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Online Supplement to Aman, Penniman and Rookard, Administrative Law and Process (4th edition)

List of Cases

Summer 2023 Online Supplement to Chapter 1 Relating Individuals to Government

Note: This is a new chapter supplement to Aman, Penniman & Rookard, Administrative Law and Process (4th ed.).

§ 1.02 Rules or Orders?

Insert after note 1-9 on page 12.

For a recent example of litigation over this dichotomy, which highlights the critical task of precisely identifying the government action being challenged, consider the Eleventh Circuit's en banc decision in *Jones v. Governor of Fla.*, 975 F.3d 1016 (11th Cir. 2020). That case involved a dispute over Florida's constitutional reenfranchising felons who completed "all terms of sentence including parole or probation." Fla. Const. art. VI, § 4(a). Specifically, in 2018, the Florida legislature enacted a statute defining "all terms of sentence" to include the "[f]ull payment" of restitution, fines, and fees, without regard to one's ability to pay. Fla. Stat. § 98.0751(2)(a). It remained a crime to vote without satisfying these reenfranchisement requirements.

Prospective voters brought suit, challenging the statute. Were the prospective voters challenging their disenfranchisement (for requiring completion of their payment obligations), the process for regaining their franchise, or both? To Chief Judge William Prior and the majority, the lawsuit spoke only to the former:

> The constitutional provision [depriving all felons of the right to vote] is a law of general applicability that plainly qualifies as legislative action. And even if we accept the argument that [the constitutional amendment and reenfranchisement statute] deprive felons of the right to vote by conditioning reenfranchisement on the completion of all terms of sentence, those laws also qualify as legislative acts. The legislative and constitutional-amendment processes gave the felons all the process they were due before Florida deprived them of the right to vote and conditioned the restoration of that right on completion of their sentences.

Jones, 975 F.3d at 1048–49. To the four judges in dissent, the lawsuit represented something much broader:

> The Plaintiffs do not say [that the statute] or the Florida constitutional provision . . . were enacted without due process of law. This alone makes the majority's reliance on *Bi-Metallic* misguided. The majority also focuses exclusively on the removal of people from voter rolls [in its due process analysis]. However, I view the scope of the due process interest here to be much broader. People are deprived of a protected due process interest when they cannot register to vote because they lack reliable information about their outstanding [criminal payment] balances. People are likewise deprived of a protected due process interest when they don't vote for fear of criminal prosecution while they wait for the Division of Elections to review their voter registrations—a process that apparently takes years to complete. Meanwhile, elections will come and go. Because the Division's determinations are necessarily individualized and fact-specific, Florida's voter reenfranchisement scheme is one for which "persons [are] . . . exceptionally affected, in each case upon individual grounds" and entitled to due process.

Id. at 1061 n.1 (Martin, J., dissenting) (quoting *Bi-Metallic*, 239 U.S. at 446) (alterations in internal quotation original; citation omitted);

Administrative law, then, involves a series of decisions about framing. So far, this chapter has introduced two big-picture questions that must be answered in every case—identifying the action being challenged and categorizing it as a rule, order, or something else. Often these will be straightforward questions; sometimes, like in the Eleventh Circuit's split decision, they will be contentious. In all cases, the answers will lead to more specific issues of framing that we take up in the remainder of this chapter and this book.

Summer 2023 Online Supplement to Chapter 2
The Availability and Timing of Judicial Review

Note: This is a new chapter supplement to Aman, Penniman & Rookard, Administrative Law and Process (4th ed.).

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§ 2.05 Due Process Methodology

Insert the following section heading before Note 2-36 on page 92.

A. Reputational Interests and "Stigma-Plus" Claims

Insert after note 2-36 on page 92.

Note 2-36A. The "active shoplifter" flyer from *Paul v. Davis* is available at https://biotech.law.lsu.edu/cases/adlaw/Paul-v-Davis-Flier.pdf. Mr. Davis (the plaintiff-respondent in *Paul v. Davis*) is pictured on page 3. What do you make of Davis's argument that his inclusion in this flyer violated a due process interest? Why do you think Rehnquist held that this was a matter for state tort law?

Insert the following materials after Note 2-39 on page 100.[1]

Note 2-39A. Contrast the result and discussion in *Fritz* with *Doe v. Purdue University*, 928 F.3d 652 (7th Cir. 2019), authored by then-Circuit Judge (and current Supreme Court Justice) Amy Coney Barrett. *Doe* involved the sufficiency of the complaint of a Purdue University student who complained of being suspended for sexual misconduct. John Doe's property interest claim foundered because "a college education . . . is not 'property'

[1] The following materials are adapted from Aman, Rookard & Mayton, Administrative Law 170–73 (West Academic Publishing, 4th ed. 2023)

in the usual sense of the word" (though this is the subject of a circuit split).[2] In contrast, (citing *Goss v. Lopez*, *infra* § 2.09) "[h]igh school students (and, for that matter, elementary school students) have a property interest in their public education because state law entitles them to receive one." Doe failed to "point to any specific contractual promise that Purdue allegedly broke" or otherwise "identify a state-granted property right to pursue higher education."

But Doe's liberty interest claim stood on stronger footing, because he also complained that the action led to a deprivation of "his freedom to pursue naval service, his occupation of choice," after Purdue told the Navy of the misconduct finding and the Navy kicked Doe out of the Navy ROTC program. Judge Barrett explained: "To succeed on this theory, John [Doe] must satisfy the 'stigma plus' test, which requires him to show that the state inflicted reputational damage accompanied by an alteration in legal status that deprived him of a right he previously held."

The court concluded that Doe sufficiently alleged such a claim. First, Purdue decision to tell the Navy about the misconduct finding against Doe "stigmatized" Doe. Second, Purdue's alleged actions went beyond mere stigma. Unlike the case of "state-spread rumors or an investigation that was ultimately dropped," Purdue's misconduct finding "changed John's status: he went from a full-time student in good standing to one suspended for an academic year." The additional damage allegedly done to John's career was the result of "this official determination of guilt, not the preceding charges or any accompanying rumors, that allegedly deprived John of occupational liberty. It caused his expulsion from the Navy ROTC program (with the accompanying loss of scholarship) and foreclosed the possibility of his re-enrollment in it."

Note 2-39B. Judge Barrett's property interest analysis should sound familiar, as the Seventh Circuit analyzed Indiana law to determine that Doe lacked a property interest in his education. The liberty interests at issue in cases like *Doe v. Purdue*, *Beley v. City of Chicago*, and *Fritz v. Evers*, are, as Judge Barrett explained, flavors of "Stigma-plus" claims. Stigma-plus cases build on *Roth*'s and *Paul*'s conclusions that a plaintiff may have a viable due process liberty interest if stigma is accompanied by some additional threatened injury.

Another burgeoning area of significant stigma-plus litigation involves a pair of terrorist watchlists contained within the Terrorist Screening Database (TSDB): the "Selectee List" and the No Fly List. The Fifth Circuit concisely described the significance of these watchlists:

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[2] Judge Barrett explained: "The First, Sixth, and Tenth Circuits have recognized a generalized property interest in higher education. The Fifth and Eighth Circuits have assumed without deciding that such a property interest exists. The Second, Third, Fourth, Ninth, and Eleventh Circuits join us in making a state-specific inquiry to determine whether a property interest exists." *Id.* at 659 n.2; *see, e.g.*, R. George Wright, *Due Process on Campus: Where Do Procedural Rights Come from, and What Do They Require?*, 22 NEV. L.J. 281 (2021) (describing the state of the law and observing that "there is nothing approaching a consensus on the source of any possible procedural due process rights to which public university students may be entitled").

> Inclusion on either comes with consequences. The No Fly List is exactly what it sounds like: a list of individuals that the TSA prohibits from flying. In contrast, someone on the Selectee List may still fly. The TSA, however, will subject the individual to "enhanced screening" before boarding. According to the Government, enhanced screening differs from standard screening in two ways. First, it takes more time for the passenger. The TSA will search the passenger's person multiple times and in multiple ways instead of using a single search. Second, the screening itself is more intrusive. TSA will search the passenger's property for trace amounts of explosives, physically search luggage, power electronics on and off, and examine the passenger's footwear.
>
> Still, merely undergoing enhanced screening does not mean that the TSA has placed a passenger on the Selectee List. According to the Government, any passenger with an "SSSS" printed on his boarding pass must undergo enhanced screening. And those passengers might have an SSSS printed on their boarding passes due to inclusion on the Selectee List, "random selection," or "reasons unrelated to any status." . . . . The Government neither confirms nor denies who is included on either list since that would reveal information of "considerable value" to terrorists.[3]

Because inclusion on the TSDB is secret (though one may infer that they are on the No Fly List when they are not permitted to fly), allegations of inclusion on the Selectee List are usually based on excessive "enhanced security screenings" on multiple flights. Several courts of appeals have recently addressed liberty interest due process claims by individuals who believed they were listed on the Selectee List. In *Ghedi v. Mayorkas*, 16 F.4th 456 (5th Cir. 2021), the Fifth Circuit made quick work of the plaintiff's claim, noting that the plaintiff was required to "plausibly allege both 'stigma' and 'an infringement of some other interest [i.e., the "plus"].'" He plausibly alleged neither; the plaintiff's "status on the Selectee List is a Government secret," and "Secrets are not stigmas." Additionally, the court observed that the plaintiff "has no right to hassle-free travel."

In *Elhady v. Kable*, 993 F.3d 208, 217 (4th Cir. 2021), the Fourth Circuit reached a similar conclusion on similar facts, rejecting the plaintiff's more detailed allegations regarding both public dissemination and additional infringement. First, the plaintiff alleged that the government made the TSDB available to certain private entities, such as those involved with national security. But the court held that dissemination is a matter of degree: under circuit precedent, "plaintiffs must plead more than the simple act of making derogatory information available; they must prove that information is likely to be inspected by prospective employers." Despite completing discovery, the plaintiffs failed to make this showing and did "not point to specific instances where private employers looked at this evidence or made employment decisions based upon it."

In *Abdi v. Wray*, 942 F.3d 1019 (10th Cir. 2019), the plaintiff alleged a list of possible stigmatizing consequences from his inclusion on the Selectee List, including,

[3] Ghedi v. Mayorkas, 16 F.4th 456, 460 (5th Cir. 2021).

"potentially," restrictions on accessing the financial system and bank accounts, sponsoring the permanent residency of relatives, entering other countries, purchasing a gun, obtaining hazardous material licenses, working for an airline, or obtaining an FAA license. But, again, the plaintiff failed to state a claim. His litany of complaints "suffer[ed] from two infirmities": First, the plaintiff "failed to specifically allege that he has actually been prevented from participating in any of the above activities. His allegations are entirely speculative." Second, as in the other cases, the plaintiff failed to allege that the government distributed the watchlist. The court held that the plaintiff failed to meet a further requirement: the plaintiff also needed to allege that the "government mandates that the private and public entities in receipt of the list refuse to offer service or employment to the listed individuals." The plaintiff alleged "that the government disseminates the watchlist 'with the purpose and hope' that the entities and individuals that receive it 'will impose consequences on those individuals.' But a 'purpose and hope' is not a mandate.'"

In contrast to this trio of Selectee List cases, the plaintiff-appellant in *Fikre v. FBI*, 35 F.4th 762 (9th Cir. 2022), a recent Ninth Circuit case, alleged that he was listed in both the broader TSDB and, more specifically, the No Fly List. While the was ongoing pended, the government removed the plaintiff from the No Fly List and committed that it wouldn't put him back on the List "based on 'currently available information.'" The Ninth Circuit reversed the district court's finding that the plaintiff's stigma-plus claim was moot.[4] Declining to opine in the first instance on the merits of the plaintiff's claimed liberty interest, the Ninth Circuit suggested that, "[c]onsidering [the plaintiff's] placement on the No Fly List and his alleged presence in the broader [TSDB] together, both the reputational injuries and the 'plus' factors . . . may be more numerous and more substantial than the district court believed."

These cases illustrate the high bar for stigma-plus claims, especially in this context. In the Fifth Circuit case of *Ghedi v. Mayorkas*, for example, the plaintiff described how it took him an hour simply to check in, another hour for TSA inspections, and, for international travel, three hours or more of questioning or detention plus the confiscation of his laptop and phone for up to three weeks. In a world where multi-hour travel delays often provoke viral social media posts, these far exceed what an average U.S. citizen might call an inconvenience. Despite these consequences, these courts unanimously concluded that, on its own, inclusion on the secret Selectee terrorist watchlist does not trigger a reputational due process interest.

Insert the following section heading after § 2.09 on page 162 Note 2-36 on page 92.

[4] In similar circumstances, the Fourth Circuit came to the opposite conclusion on the mootness issue. Long v. Pekoske, 38 F.4th 417, 424–25 (4th Cir. 2022).

§ 2.10 Due Process in an Emergency

Adapted from

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Mathews v. Eldridge, we've seen, is a pragmatic framework. It does not require the government to "do the impossible" and provide "pre-deprivation" protections against an agent gone rogue. Nor does it require schools to give dangerous or unruly students a hearing before removing them from the classroom. Under *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 552–53 (1985), the government may, under appropriate circumstances, act promptly with process to follow, such as where a government employee is suspended upon facing a serious criminal charge.[5] In those cases, the initial criminal processes stand in the place of agency pre-deprivation process to provide at least some basis to conclude that the initial deprivation is warranted. In *United States v. James Daniel Good Real Property*, 510 U.S. 43, 62 (1993), the Court held that the government may not seize real property without prior hearing except under "exigent circumstances." Exigent circumstances must be demonstrated by showing that less restrictive measures, such as a *lis pendens*, restraining order, or bond, "would not suffice to protect the Government's interests in preventing the sale, destruction, or continued unlawful use of the real property."

Apart from these situation-specific holdings, the Supreme Court has recognized more generally that "summary administrative action may be justified in emergency situations," such as where "swift action is necessary to protect the public health and safety." *Hodel v. Vir. Surface Min. & Reclamation Ass'n*, 452 U.S. 264, 300–01 (1981). At issue in *Hodel* was the Secretary of the Interior's authority under the Surface Mining Control and Reclamation Act to order immediate stoppages in a surface mining operation whenever it violates the law and "creates an immediate danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources." In a terse, implicit weighing of the factors at issue (though the Court did not cite *Mathews*), the Court held that post-deprivation procedures satisfied the Due Process Clause in light of the "paramount governmental interest" at stake.

The courts of appeals have relied on *Hodel* to uphold summary actions to demolish a damaged building[6] and to seize animals that may be in imminent danger, may carry harmful pathogens, or may threaten public safety.[7] *Simpson v. Brown County*, *supra* Note 2-49, suggested too that *Hodel* would support the summary suspension of a septic repairer if the county could produce evidence showing that the suspension was tied to the repairer's qualifications.[8]

Government efforts to ameliorate public health emergencies often impinge upon liberty and property rights, not to mention day-to-day life. This has been felt acutely throughout the COVID-19 pandemic, which wrought myriad suits challenging, on a variety of constitutional and statutory grounds, measures such as business closures, travel quarantine requirements,

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[5] Gilbert v. Homar, 520 U.S. 924 (1997) (holding that felony arrest and formal charges served as adequate pre-suspension process under *Loudermill*, assuming that plaintiffs' suspension without pay triggered due process interest); Nnebe v. Daus, 931 F.3d 66, 85, 88 (2d Cir. 2019) (citing *Gilbert* for the proposition that taxi drivers' licenses may be immediately suspended upon being charged with certain crimes but concluding that post-suspension hearing needed to "encompass[] some level of conduct-specific findings based upon the facts underlying the complaint and the driver's history and characteristics"); Nagel v. City of Jamestown, 952 F.3d 923, 934 (8th Cir. 2020) (addressing scope of *Loudermill* rights and collecting authorities).

[6] S. Commons Condo. Ass'n v. Charlie Arment Trucking, Inc., 775 F.3d 82, 86–87 (1st Cir. 2014).

[7] Recchia v. City of Los Angeles Dep't of Animal Servs., 889 F.3d 553, 562 (9th Cir. 2018).

[8] Simpson v. Brown Cnty., 860 F.3d 1001, 1009 (7th Cir. 2017).

vaccination requirements for student, and employees, masking requirements, and church closures and attendance limitations.[9] Some of these cases raised interesting substantive due process issues. But district courts, seemingly uniformly, rejected many efforts to pigeonhole these suits into procedural due process. One reason is that, under *Hodel*. district courts were accommodating of the governments' emergency rationales. But another, more pressing reason (and one overlooked by several district courts[10]) is that the vast majority of these cases challenged restrictions taking the form of generally applicable rules that, unlike orders, are not subject to due process requirements.[11] We introduced this topic in Chapter 1, § 1.02. The complaints, in other words, weren't that an individual faced the prospect of receiving insufficient process before being punished for violating (for example) a business closure or travel quarantine rule, but rather that the rules themselves were unfair or unconstitutional. That's a matter of substantive due process[12] or other substantive constitutional right, not procedural due process. As conventionally understood, *Hodel* comes into play only when adjudicating a particular deprivation.

That said, COVID-19 has yielded a few important procedural due process cases addressing the appropriate safeguards for particular deprivations. In one case, the Pennsylvania Supreme Court cited *Hodel* to uphold the adequacy of the post-deprivation process provided to businesses to challenge their categorization as "life-sustaining" versus "non-life-sustaining," which in turn decided which businesses could remain open during the height of the pandemic.[13] In another case, Chrysafis v. Marks, 141 S. Ct. 2482 (2021), the U.S. Supreme Court enjoined enforcement of part of New York's COVID eviction moratorium which allowed a tenant to conclusively establish financial hardship (and forestall eviction) by filing a self-certification. The Court held that "[t]his scheme violates the Court's longstanding teaching that ordinarily 'no man can be a judge in his own case' consistent with the Due Process Clause." (The dissent took umbrage at the characterization of the statute as depriving property rather than merely "delaying the exercise" of "the right to challenge a tenant's hardship claim" since the self-certification provision was due to expire three weeks later.)[14]

Finally, quite apart from the constitutionality of the COVID protections themselves, scholars, advocates, and judges have raised concerns about the impact of COVID-related

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[9] *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 211 L. Ed. 2d 448 (2022) (employee vaccination requirement likely outside scope of OSHA's authority); Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 208 L. Ed. 2d 206 (2020) (church occupancy restrictions likely violated Free Exercise Clause); Klaassen v. Trustees of Indiana Univ., 7 F.4th 592 (7th Cir. 2021) (rejecting substantive due process challenge to student vaccinations); Hernandez v. Grisham, 508 F. Supp. 3d 893, 979–80 (D.N.M. 2020) (collecting numerous cases rejecting procedural due process to various COVID-19 policies, including limitations on gatherings, mask requirements, and business closures); Page v. Cuomo, 478 F. Supp. 3d 355, 371 (N.D.N.Y. 2020) (rejecting procedural due process challenge to travel quarantine).

[10] Though some decisions flagged the rules–orders issue, many others skipped right to *Hodel*. *Compare, e.g.*, Carmichael v. Ige, 470 F. Supp. 3d 1133, 1148–49 (D. Haw. 2020) (applying *Hodel* and also holding that quarantine for travelers did not impact due process because it "affect[s] the entire state"), *and* Hernandez v. Grisham, 508 F. Supp. 3d 893, 980 (D.N.M. 2020) (applying *Hodel* and describing directive closing schools in high COVID areas as "quasi-legislative in nature" and thus not triggering individual due process protections), *with* Page v. Cuomo, 478 F. Supp. 3d 355, 371 (N.D.N.Y. 2020) (resolving due process challenge to travel quarantine under *Hodel*), *and* Savage v. Mills, 478 F. Supp. 3d 16, 29 (D. Me. 2020) (same with respect to non-essential business closures and travel quarantine).

[11] Toni M. Massaro *et. al.*, *Pandemics and the Constitution*, 2022 U. ILL. L. REV. 229, 244 (2022) (describing this principle through the example of a two-week before a travelling student may attend class at a public university; the quarantine requirement itself is "a generally applicable, prospective rule" not subject to process before its implementation, but "[i]f the university later determined that the student violated the quarantine rule, then that decision would be an individualized determination potentially subject to due process").

[12] *See, e.g.*, Jennifer L. Piatt, *A Balancing Act: Public Health, COVID-19, and the Economic Due Process "Right to Work"*, NEB. L. REV. BULLETIN (June 16, 2021), https://lawreview.unl.edu/balancing-act-public-health-covid-19-and-economic-due-process-%E2%80%9Cright-work%E2%80%9D.

[13] Friends of Danny DeVito v. Wolf, 227 A.3d 872 (Pa.), *cert. denied*, 141 S. Ct. 239, 208 L. Ed. 2d 17 (2020).

[14] *Id.* at 2483 (Breyer, J., dissenting).

alterations to judicial procedures[15] and delays.[16] For example, the indigent and elderly may lack the ability to participate in virtual judicial proceedings. Should future waves of this or a future pandemic result in renewed restrictions, alteration, and delays in judicial proceedings, these issues may evolve from being the primary concerns of court administrators and commentators into full-fledged due process issues requiring evaluation under *Mathews v. Eldridge*.

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Notes & Questions

Note S2-1. Suppose a state enacted a valid statue requiring all restaurants to wash their produce for 30 seconds to protect against a new disease ("X"). Transmission by insufficiently washed restaurant produce is the primary (though not only) way X is transmitted. The statute tasks the state health agency to enforce the statute and gives it power to conduct all necessary procedures and issue all necessary orders to do so, including shutting down restaurants that violate the statute, consistent with public health and the Due Process Clause. Suppose further that the agency primarily monitors compliance with the vaccination rule by asking hospitalized consumers what restaurants they had eaten at in the previous 24 hours.

As part of this monitoring the agency notices a spike in consumers who took ill with X after eating at Small's Restaurant. It wants to order Small's to shut down immediately. Suppose you represent the agency. What questions would you have for the agency's medical health professionals? What evidence would you hope to gather to defend against a challenge that the agency should have provided Small's a chance to contest the closure order before shutting it down? Assuming you advise the agency that it can shut Small's down immediately, what would you advise that the agency do thereafter?

Conversely, if you represented Small's, what questions would you have for your client? What questions would you want to ask of the agency officials or of your own experts? What evidence would you hope to marshal on your client's behalf?

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[15] *See, e.g.*, Alicia L. Bannon & Douglas Keith, *Remote Court: Principles for Virtual Proceedings During the Covid-19 Pandemic and Beyond*, 115 NW. U. L. REV. 1875 (2021); Leslie Birnbaum, *Due Process and Administrative Hearings in the Time of Covid-19: Help, I Need Somebody!*, 41 J. NAT'L ASS'N ADMIN. L. JUDICIARY 140 (2021); Madison C. DeRegis, Comment, *"Can You Hear Me Now?": The Implications of Virtual Proceedings on Criminal Defendants' Constitutional Rights*, 81 MD. L. REV. ONLINE 71 (2022). One scholar raises similar concerns with virtual school discipline, invoking *Goss v. Lopez*. Peggy Nicholson, *When Virtual Discipline Becomes Virtual Suspension: Protecting the Due Process Rights of Virtual Learners*, 50 J.L. & EDUC. 133 (2021).

[16] *See, e.g.*, A Casey C. DeReus, *Ashes to Ashes—The Coronavirus, Ebola, and the Erosion of Liberty and Property Interests in the Fight Against Communicable Diseases*, 81 LA. L. REV. 887, 920 (2021) (arguing that Louisiana's "court-by-court" evaluation of what should be prioritized as "emergency matters" during the pandemic risked deprioritizing cases involving "disease-related deprivation[s] of liberty"); *see also, e.g.*, Tarika Daftary-Kapur *et. al.*, *Covid-19 Exacerbates Existing System Factors That Disadvantage Defendants: Findings from A National Survey of Defense Attorneys*, 45 LAW & HUM. BEHAV. 81 (2021).

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§ 3.06 The Administrative Structure of Formal Adjudication

Insert after Note 3-38:

Note 3-38(a): ***North Carolina State Board of Dental Examiners v. FTC***

The Supreme Court has acknowledged the potential for structural bias in the antitrust context, citing the ability of agencies to sanction anticompetitive behavior. In *North Carolina State Board of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015), the Court considered whether an agency board, comprised of a majority of active market participants, was entitled to state-action immunity from the Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (2015). The North Carolina State Board of Dental Examiners argued that the Board fit the exception carved out in *Parker v. Brown* for "anticompetitive conduct by the States when acting in their sovereign capacity." 317 U.S. 341 (1943). In *Parker*, the Court reasoned that Congress did not intend to infringe upon the ability of states to make policy decisions under its police power. In *Board of Dental Examiners*, however, the Court limited *Parker* and held that agency boards that are "controlled by market participants" are not automatically entitled to state-action immunity. Instead, these boards must show that "the actions in question are an exercise of the State's sovereign power" to benefit from the immunity.

The North Carolina State Board of Dental Examiners was responsible for creating, administering, and enforcing a licensing system for dentists. As required by

statute, the eight-member Board included six practicing dentists, elected by other dentists in the state; one practicing dental hygienist, elected by other hygienists; and one "consumer," appointed by the governor. Each member served three-year terms with a maximum of two consecutive terms, and the Act did not establish a mechanism for any public official to remove a board member.

In the 1990s, dentists began providing teeth-whitening services. By 2003, nondentists provided the same services at lower prices. Dentists complained to the Board about the competition from nondentists, citing their lower prices. In 2006, the Board issued cease-and-desist letters warning nondentists that teeth whitening constituted the "practice of dentistry" and thus required a license. As a result, nondentists stopped offering teeth whitening services.

In 2010, the Federal Trade Commission filed an administrative complaint alleging that the Board's "concerted action to exclude nondentists from the market for teeth whitening services in North Carolina constituted an anticompetitive and unfair method of competition." *Id.* at 1109. In response, the Board asserted state-action immunity under *Parker*. The Administrative Law Judge decided that the Board could not assert the immunity without active supervision from the state, which it could not show. On the merits, the ALJ "determined that the Board had unreasonably restrained trade in violation of antitrust law." The FTC sustained the ALJ and was affirmed by the Fourth Circuit.

The Supreme Court affirmed, reasoning that "while the Sherman Act confers immunity on the States' own anticompetitive policies out of respect for federalism, it does not always confer immunity where, as here, a State delegates control over a market to a nonsovereign actor." The Court noted that while *Parker* immunity protected the states' right to make policy choices that involved anticompetitve behavior, the rationale did not extend to cases where a state delegates its decision making power to a nonsovereign board and abdicates its supervisory responsibilities. Nor could the determination of whether an agency requires supervision to turn "on the formal designation given by States to regulators." Rather, the determination requires as "an assessment of the structural risk of market participants' confusing their own interests with the State's policy goals."

The Court rejected the argument that its holding would "discourage dedicated citizens from serving on state agencies that regulate their own occupation." While this was not a case that presented the question whether agency officials were immune from damages liability, the Court noted that such immunity could be available and that, in any event, the states could provide for defense and indemnification in the event of litigation. Even simpler, the Court suggested, the states could comply with the requirement of active supervision for agencies controlled by active market participants.

In dissent, Justice Alito, joined by Justices Scalia and Thomas, argued that the majority ignored the history of the Sherman Act, disrespected state sovereignty, and created an unworkable standard to determine when an actor is "nonsovereign."

Note 3-44 (supplement). Further details on these negotiations reveal that in the wake of tweets from President Trump branding as "fake" the news that the federal government was dropping its quest to include a question about citizenship on the 2020 census, U.S. District Judge George Hazel called for a telephone conference call in the proceedings in Maryland on Wednesday, July 3. During the call, Department of Justice lawyer Joshua Gardner told Hazel that the president's tweet was the "first I had heard of the president's position on the issue," but Gardner "confirmed that the Census Bureau is continuing with the process of printing the questionnaire without a citizenship questionnaire, and that process has not stopped."

However, Jody Hunt, the assistant attorney general for the civil division, then told Hazel that attorneys "at the Department of Justice have been instructed to examine whether there is a path forward, consistent with the Supreme Court's decision, that would allow us to include the citizenship question on the census. We think there may be a legally available path under the Supreme Court's decision." If so, Hunt continued, "our current plan would be to file a motion in the Supreme Court to request instructions on remand to govern further proceedings in order to simplify and expedite the remaining litigation and provide clarity to the process going forward."

Hazel instructed the parties in the Maryland case to submit, by 2 pm on Friday, either a stipulation that the government will not make any further efforts to include a citizenship question on the census or a scheduling order for how the parties would proceed on the plaintiffs' claim that an intent to discriminate against minorities was behind the government's decision to include the citizenship question.

Meanwhile, DOJ lawyers made similar statements in a letter to the federal district judge presiding over New York v. Department of Commerce, the challenge to the citizenship question in which the Supreme Court issued its ruling last week. They explained that the Department of Justice and the Department of Commerce "have now been asked to reevaluate all available options following the Supreme Court's decision and whether the Supreme Court's decision would allow for a new decision to include the citizenship question on the 2020 Decennial Census." If the Department of Commerce "adopts a new rationale for including the citizenship question on the" census, they continued, the government will "immediately notify" the district court. Ultimately, the administration dropped this change.

§ 3.07 The Administrative Law Judge as an Unbiased Decision Maker (updated)

Replace the excerpt and text on page 212 with the following updated and corrected text.

ALFRED C. AMAN, JR., LANDYN WM. ROOKARD AND WILLIAM T. MAYTON,
ADMINISTRATIVE LAW, 4th Edition, §9.5.2
(West Academic Publishing, 4th ed. 2023)

The Administrative Procedure Act created the position of Administrative Law Judge (ALJ). Prior to this Act, hearing examiners, as they were then called, usually were "subordinate employees chosen by the agencies, and the power of the agencies to control and influence such personnel made questionable the contention of any agency that its proceedings assured fundamental fairness."[1] They were perceived as "mere tools of the agency concerned,"[2] substantially undermining the objectivity of the administrative process.

The APA sought to allay these fears by vesting ALJs with an independence from their respective agencies.[3] Tenure[4] and compensation[5] decisions were removed from agency control and vested largely in the Civil Service Commission, now the Office of Personnel Management. In addition, ALJs were exempted from performance ratings required for other civil service employees.[6] They could be removed by the agency that employed them, but only for cause and after a hearing before the Merit Systems Protection Board. The Trump administration altered the independence of ALJs as originally conceived. Following the Supreme Court's decision in *Lucia v. SEC*,[7] holding that ALJs in the SEC were "Officers of the United States," the Trump Administration issued Executive Order 13843.

> Pursuant to my authority under section 3302(1) of title 5, United States Code, I find that conditions of good administration make necessary an exception to the competitive hiring rules and examinations for the position of ALJ. These conditions include the need to provide agency heads with additional flexibility to assess prospective appointees without the limitations imposed by competitive examination and competitive service selection procedures. Placing the position of ALJ in the excepted service will mitigate concerns about undue limitations on the selection of ALJs, reduce the likelihood of successful Appointments Clause challenges, and forestall litigation in which such concerns have been or might be raised. This action will also give agencies greater ability and discretion to assess critical qualities in ALJ candidates, such as work ethic, judgment, and ability to meet the particular needs of the agency. These are all qualities individuals should have before wielding the significant authority conferred on ALJs, and each agency should be able to assess them without proceeding through complicated and elaborate examination processes or rating procedures that do not necessarily reflect the agency's particular needs. This change will also promote confidence in, and the durability of, agency adjudications.[8]

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[1] Jeffrey Lubbers, *Federal Administrative Law Judges: A Focus on Our Invisible Judiciary*, 33 ADMIN. L. REV. 109 (1981). *See also* Nash v. Califano, 613 F.2d 10, 14 (2d Cir. 1980) (hearing examiners had "limited independence from the agencies they served"); *Administrative Procedure Act-Legislative History*, S. Doc. No. 248, 79th Cong., 2d Sess. (1946); Thomas, *The Selection of Federal Hearing Examiners: Pressure Groups and the Administrative Process*, 59 YALE L.J. 431 (1950).

[2] Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128, 131, 73 S. Ct. 570, 572, 97 L. Ed. 872 (1953).

[3] Lubbers, *supra* note 315, at 111.

[4] 5 U.S.C. § 5362 (1976).

[5] *Id*.

[6] 5 U.S.C. § 4301 (1976).

[7] 138 S. Ct. 2044 (2018); *see* text and note 334 *infra*. *See also* Chapter 14, § 14.3.2 for discussion of this case in the context of the executive branch's appointment and removal powers.

[8] Exec. Order No. 13843, § 1, 83 Fed. Reg. 32755 (Jul. 10, 2018).

These changes were controversial; critics saw the order as a politicization of the administrative judiciary and there were concerns about efficiency and impartiality.[9] The Trump Administration's Order recognized the need for increased agency control and flexibility, but arguably at the expense of the independence of ALJ's. The Biden Administration issued its own orders repealing some of the hiring processes of the Trump administration, but many of the hiring changes remain in place, including the lone qualification for appointment is that the ALJ must be authorized to practice law.

Summarizing the concerns and prospects for amelioration of these new practices, the Federal Bar Association encouraged "national leaders" to take steps to address the "legitimate concerns over the prospect of abuse in the exercise of agency hiring authority" raised by "the lone requirement [in the Order] that an ALJ need only be authorized to practice law."[10] This concern may stems from the fact that agency heads are political appointees and may feel pressured by the executive administration to put like-minded individuals into judicial-type positions. This can undermine the integrity of the appointment process. Though some agencies, have made headway in creating new and effective standards,[11] no comprehensive guideline has yet been created. Congress has tried but so far has failed to pass legislation opposing implementation of this order on the grounds that it compromised the independence of ALJs.[12]

***

In the case that follows, the issue before the court was whether the ALJ's previous position as an "attorney advisor" was an "investigative or prosecutorial function" under § 556(e). Is it fair to say that individual bias resulting from the combination of functions is more closely controlled by the APA than the Due Process Clause of the Constitution?

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[9] For example, *see* William Funk, *Trump's Politicization of the Administrative Judiciary,* AMERICAN CONSTITUTION SOCIETY—EXPERT FORUM, July 19, 2018, https://www.acslaw.org/expertforum/trumps-politicization-of-the-administrative-judiciary/. The Administrative Conference of the United States responded with recommendations supporting the independence of ALJs such as competitive searches, broad pools, and transparency regarding qualifications Administrative Conference of the United States. Recommendation 2019–2: Agency Recruitment and Selection of Administrative Law Judges, https://www.acus.gov/recommendation/agency-recruitment-and-selection-administrative-law-judges. *See also* Jeremy Graboyes, *Decisional Independence of Administrative Adjudicators: Perspectives from ACUS,* YALE J. ON REG. (Feb. 25, 2022), https://www.yalejreg.com/nc/symposium-decisional-independence-10/.

[10] Federal Bar Association, *Statement on Executive Order 13843 Regarding the Hiring of Federal Administrative Law Judges* (Aug. 10, 2018), https://www.fedbar.org/government-relations/fba-statements-letters-and-testimony/fba-statement-on-executive-order-13843-august-2018/.

[11] *See* PAUL VERKUIL, BUREAUCRACY AND PRESIDENTIAL ADMINISTRATION: EXPERTISE AND ACCOUNTABILITY IN CONSTITUTIONAL GOVERNMENT ("The Department of Labor, one of the most politically contested agencies, has created criteria that in some respects even exceed those previously required by OPM (*e.g.*, requiring 10, not 7, years of relevant litigation experience) and placed the screening panel under the aegis of the DOL Chief ALJ, a non-political figure.")

[12] U.S. House of Representatives—117th Congress. Administrative Law Judges Competitive Service Restoration Act—HR 4448 (2021–2022). As of this writing, HR 4448 remains with the House Committee on Oversight and Reform.

Summer 2023 Online Supplement to Chapter 4 Agency Rulemaking

Note: This is an **updated** chapter supplement to Aman, Penniman & Rookard, Administrative Law and Process (4th ed.).

Table of Contents

Bold denotes new/substantially changed materials

§ 4.03 Formal and Informal Rules and Rulemaking Processes

A. Overview

Insert the following introductory materials to the end of § 4.03[A] on Page 300.

Adapted from
Alfred C. Aman, Jr., Landyn Wm. Rookard & William T. Mayton
Administrative Law 108–09
West Academic Publishing (4th ed. 2023)

The Pre-Notice Part of Rulemaking: Setting the Agenda

An oft-overlooked first step of the administrative process is the agency's responsibility to identify its regulatory priorities and set its agenda.[1] These priorities reflect a range of considerations, from pure politics to practical concerns such as "internal management considerations as to budget and personnel; evaluations of [the agency's] own competence; [and]

[1] *See* Michael Sant'Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U.L. REV. 793, 798 (2021) ("[A]gencies make many of their most important decisions in rulemaking well before the publication of a Notice of Proposed Rulemaking (NPRM). Long before agencies publish their proposals, they set their regulatory agendas and decide which issues or problems they will and will not address."); *cf., e.g.*, Office of Information & Regulatory Affairs, Office of Management & Budget, *Current Unified Agenda of Regulatory and Deregulatory Actions*, Reginfo.gov (last updated Spring 2022), https://www.reginfo.gov/public/do/eAgendaMain (setting forth the current regulatory agenda for executive agencies; we discuss OIRA's and OMB's influence on agency policymaking in § 14.1).

weighing of competing policies within a broad statutory framework."[2] Control of the presidency often determines the political affiliation of the agency head who sets the agenda, whether as a sole leader or as part of a multimember commission, and that leader will invariably face pressure —if not an obligation—to align their rulemaking activities with the administration's priorities.[3] Congress, too, can influence an agency's rulemaking agenda, for example, by allocating (or refusing to allocate) funding[4] or by directly mandating the initiation or completion of a rulemaking proceeding.[5] But ordinarily, proposals for rulemaking are formulated by the agencies themselves.

In all events, agencies lack the resources to address every problem. Allocating those limited resources is, in many respects, determinative of the policies that agencies will ultimately pursue. Thus, the most critical aspect of agency policymaking happens with only minimal public input and even less public oversight. Agencies often embed contractors within their structure, and they can play an important role in the "pre-rule stage" (and beyond) by, for example, "help[ing] with crafting regulatory strategies, planning timelines, conducting research, convening stakeholders, and developing models that inform the agency's thinking ahead of writing a proposed rule."[6] Informal conversations with agency staff and leaders and behind-the-scenes lobbying from interest groups can greatly influence the course of future rulemakings "by, at a minimum, framing the debate and scope of action available during the notice and comment period."[7]

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[2] Natural Resources Defense Council, Inc. v. SEC, 606 F.2d 1031, 1053 (D.C. Cir. 1979).

[3] This is true even for independent, multi-commissioner agencies, such as the FCC. "[N]ew empirical research on commissions with partisan balance requirements shows that commissioners have become more partisan since the 1990s, which might mean that they will be less likely than earlier 'partisans' to moderate their views. . . . [I]n a partisan political environment, we might expect commissioners to move to the fringes in order to curry favor with co-partisans in Congress and the Executive Branch who could support their ambitions for future positions in government." Ganesh Sitaraman & Ariel Dobkin, *The Choice Between Single Director Agencies and Multimember Commissions*, 71 ADMIN. L. REV. 719, 750 (2019).

[4] *See infra* § 15.2.

[5] Sometimes the two (failing to provide funding while simultaneously requiring agency action) go hand-in-hand. *See, e.g.*, *Establishing the Digital Opportunity Data Collection*, Second Report & Order & Third Further Notice of Proposed Rulemaking, 35 FCC Rcd. 7460, 2020 WL 4187348, at *5 (2020) (explaining that the FCC lacked the funding to implement the improved broadband maps for allocating government subsidies but would "take steps to complete the rulemaking required within the statutory deadline and in anticipation of receiving necessary funding in the future so that we can begin developing these granular, precise broadband service availability maps as quickly as possible"). In addition to a lack of funding, NHTSA has often faced inconsistent mandates to act swiftly without "relax[ing] of supplement[ing] in any way the statutory commands of 'reasonableness,' 'practicability,' and 'objectivity' that inhabited the original act and had proven so troublesome earlier on judicial review." Jerry L. Mashaw & David L. Harfst, *From Command and Control to Agency Deference: The Transformation of Auto Safety Regulation*, 34 YALE J. ON REG. 167, 204 (2017).

[6] Bridget C.E. Dooling & Rachel Augustine Potter, Regulatory Body Shops 8 (Aug. 11, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4186402 (describing contractors' roles throughout the rulemaking process and arguing that the use of "embedded . . . regulatory body shops" can "compromise the agency's capacity to act as an independent decision maker").

[7] Susan Webb Yackee, *The Politics of* Ex Parte *Lobbying: Pre-Proposal Agenda Building and Blocking During Agency Rulemaking*, 22 J. PUB. ADMIN. RES. & THEORY 373, 378 (2011) ("By lobbying early in the regulatory policymaking process, groups introduce the facts agencies consider, define policy problems, and develop the detailed stipulations in proposed government rules."); William C. Hudson, *When Influence Encroaches: Statutory Advice in the Administrative State*, 26 WM. & MARY BILL RTS. J. 657, 683–84 & nn.135–36 (2018) ("Having the opportunity to develop an administrator's view of an issue well before the administrator has actually taken steps in his or her official capacity to address the issue may be more impactful than intervening when the issues have matured into actual deliberations; the advantages that accrue to early influencers is a recognized feature of both administrative law practice and cognitive psychology.").

Agencies have some mechanisms available to formally solicit outside input prior to the proposed rule stage.[8] For example, agencies could separately seek comment on potential rulemaking priorities.[9] For perhaps obvious reasons, such as a lack of resources or, indeed, a lack of a desire to consider those comments, agencies rarely do this. More frequently, agencies issue broader notices of inquiry to generate input on subjects of anticipated rulemakings.

B. Informal Rulemaking Processes—Notice and Comment

S4-1 – Insert after Note 4-17, page 306.

Consider *Center for Science in the Public Interest v. Perdue*, 438 F. Supp. 3d 546 (D. Md. 2020), where a district court dealt with a challenge to "a final rule promulgated by Defendant United States Department of Agriculture ('USDA') governing nutrition standards for school breakfast and lunch programs." The court held that the Final Rule's elimination of school meal nutrition requirements (a sodium requirement and a "one-hundred percent whole grain-rich requirement") was "not a logical outgrowth of the Interim Final Rule."

> With respect to sodium, the Interim Final Rule acknowledged "the importance of reducing the sodium content of school meals" because over ninety percent of school-age children exceeded the Dietary Guidelines' upper intake limit for dietary sodium between 2009 and 2012. At the same time, it recognized that "a more gradual process" was necessary to meet this goal. The purpose of the Interim Final Rule was therefore to provide "more time" for children to adjust to school meals with less sodium content and for schools and manufacturers to make appropriate menu and product changes, thus suggesting that the Dietary Guidelines' upper intake limit, long-embodied in the Final Sodium Target, would remain in effect, but would simply be delayed. Indeed, the Interim Final Rule spoke exclusively in terms of delaying compliance requirements, not abandoning the compliance requirements altogether, and at no point did the Interim Final Rule discuss eliminating the Final Sodium Target or even solicit comments about the effect of continued sodium "flexibilities" on the Final Sodium Target. Rather, it "specifically" sought comment only on "the impact [of extending the Sodium Target 1 compliance dates] on Sodium Target 2." "This specificity, together with total silence concerning any suggestion of eliminating [the Final Sodium Target], strongly indicated that [the Final Sodium Target] was not at issue." See *Chocolate Mfrs. Ass'n*, 755 F.2d at 1107 (finding that a final rule eliminating flavored milk from a permissible diet was not a logical outgrowth of a proposed rule that specifically discussed the dangers of high sugar content in foods such as cereals and juices, but not flavored milk, which had long been considered part of a permissible diet).
>
> Although an agency is certainly permitted to change a rule in response to comments, USDA's changes are not "in character with the original scheme" of the Interim Final Rule, because there is a fundamental difference between delaying compliance standards— which indicates that school meals will still eventually meet those

[8] Sant'Ambrogio & Staszewski, *supra* note 6, at 801 (discussing research that "unearthed numerous efforts by federal agencies to engage the public with their agenda setting," including petitions for rulemaking, advisory committees, "focus groups, requests for information, listening sessions and other public hearings, hotlines or suggestion boxes, public complaints, various forms of web-based outreach, negotiated rulemaking, and advance notices of proposed rulemaking," but lamenting that such measures were "relatively unstructured, unsystematic, and ad hoc").

[9] Statutes may mandate additional "pre-notice" steps, such as the Magnuson-Moss Warranty Act, 15 U.S.C. § 57a(b)(2), which requires the Federal Trade Commission to publish an "advance notice of proposed rulemaking" prior to publishing a notice of proposed rulemaking under its authority to define specific "unfair or deceptive acts or practices" proscribed by the FTC Act.

> standards—and eliminating those standards altogether. Thus, the Final Rule's elimination of the Final Sodium Target is not a logical outgrowth of the Interim Final Rule's focus on delaying compliance requirements.
>
> The Final Rule's elimination of the one-hundred percent whole grain-rich requirement is similarly not a logical outgrowth of the Interim Final Rule. With respect to whole grains, the Interim Final Rule specifically "retain[ed] the whole grain-rich regulatory requirement" of one hundred percent whole grains, while also extending the availability of an exemption, upon request, to "SFAs that demonstrate hardship in providing specific products that meet the whole grain-rich criteria and as long as at least 50 percent of the grains served are whole grain-rich." The express purpose of extending the exemption's availability was, as with sodium, to provide "additional time" for students, schools, and the industry to adjust.
>
> Congress' regular appropriations riders offering the hardship exemption, in conjunction with the Interim Final Rule's "very detailed" discussion of that exemption and its "total silence concerning" eliminating, or even changing, the underlying one-hundred percent whole-grain rich requirement, "could have led interested persons only to conclude that a change in [the underlying whole-grain rich requirement] would not be considered." See *Chocolate Mfrs.*, 755 F.2d at 1107.The Final Rule therefore "materially alter[ed]" and "substantially depart[ed] from the terms or substance" of the Interim Final Rule by transforming what was a limited, case-by-case exemption into the new rule across the board. *See id.* at 1105. Thus, the Final Rule's elimination of the one hundred percent whole grain-rich requirement is not a logical outgrowth of the Interim Final Rule.

G. Exceptions to Section 553 Rulemaking Procedures

2. Interpretive Rules

Insert after Note 4-57, page 365.[10]

Note 4-57A. *Hoctor* remains influential. For example, the Sixth Circuit turned to *Hoctor* for guidance in addressing a "Commentary" provision of the U.S. Sentencing Guidelines (very roughly analogous to interpretive rules under the APA) defining the word "loss" in the context of stolen gift cards to mean a minimum "loss" value of $500 per card. *United States v. Riccardi*, 989 F.3d 476, 487 (6th Cir. 2021). A greater loss amount generally translates to a higher "offense level" score and longer recommended sentence. Thus, a defendant found responsible for the theft of gift cards could face a longer sentence than if they had stolen cash worth the same amount. *See generally* U.S.S.G. 2B1.1. The Sixth Circuit held that the "bright-line" gift card calculation was not an "'interpretation' of general nonnumeric language," and thus needed to be part of a guideline rather than set forth in the Commentary.

The rough analogies between the unique provisions of the Sentencing Reform Act of 1984 (*see* 18 U.S.C. § 3553(b)(1); 28 U.S.C. § 995) and the APA's categories of legislative rules and interpretive rules are part of a deep circuit split. That split has touched on a variety of administrative law issues, including matters of organic statute interpretation and administrative deference. *See generally* United States v. Moses, 23 F.4th 347, 347–58 (4th Cir. 2022)

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[10] The following materials are adapted from Aman, Rookard & Mayton, Administrative Law 90 n.36 (West Academic Publishing, 4th ed. 2023)

(describing the broad contours of the circuit split and explaining the nuances that set guidelines commentary apart from APA interpretive rules).

3. Interim Rules

Insert after Note 4-60, page 370.

In *Little Sisters of the Poor*, excerpted next, the Court held that the Departments of Health and Human Services, Labor, and the Treasury had authority under the Affordable Care Act to promulgate rules exempting employers with religious or moral objections from providing contraceptive coverage to their employees. Justice Thomas wrote for the majority of the Court and, with regard to the procedural issues raised, addressed the nature of interim rules. As you read this excerpt below, ask yourself what the differences are between the procedural requirements for promulgating final interim rules and final rules in § 553 informal rulemaking processes. When did the substance of the interim rule go into effect? Did the good cause provisions of the interim rule exception come into play here? Why not?

Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania

Nos. 19-431 & 19-454, 591 U. S. ____ (July 8, 2020)

III

Because we hold that the Departments had authority to promulgate the exemptions, we must next decide whether the 2018 final rules are procedurally invalid. Respondents present two arguments on this score. Neither is persuasive.

A

Unless a statutory exception applies, the APA requires agencies to publish a notice of proposed rulemaking in the Federal Register before promulgating a rule that has legal force. See 5 U. S. C. §553(b). Respondents point to the fact that the 2018 final rules were preceded by a document entitled "Interim Final Rules with Request for Comments," not a document entitled "General Notice of Proposed Rulemaking." They claim that since this was insufficient to satisfy §553(b)'s requirement, the final rules were procedurally invalid. Respondents are incorrect. Formal labels aside, the rules contained all of the elements of a notice of proposed rulemaking as required by the APA.

The APA requires that the notice of proposed rulemaking contain "reference to the legal authority under which the rule is proposed" and "either the terms or substance of the proposed rule or a description of the subjects and issues involved." §§553(b)(2)–(3). The request for comments in the 2017 IFRs readily satisfies these requirements. That request detailed the Departments' view that they had legal authority under the ACA to promulgate both exemptions, 82 Fed. Reg. 47794, 47844, as well as authority under RFRA to promulgate the religious

exemption, id., at 47800–47806. And respondents do not—and cannot—argue that the IFRs failed to air the relevant issues with sufficient detail for respondents to understand the Departments' position. See *supra*, at 10–11. Thus, the APA notice requirements were satisfied.

Even assuming that the APA requires an agency to publish a document entitled "notice of proposed rulemaking" when the agency moves from an IFR to a final rule, there was no "prejudicial error" here. §706. We have previously noted that the rule of prejudicial error is treated as an "administrative law . . . harmless error rule," National Assn. of Home Builders v. Defenders of Wildlife, 551 U. S. 644, 659–660 (2007) (internal quotation marks omitted). Here, the Departments issued an IFR that explained its position in fulsome detail and "provide[d] the public with an opportunity to comment on whether [the] regulations . . . should be made permanent or subject to modification." 82 Fed. Reg. 47815; see also id., at 47852, 47855. Respondents thus do not come close to demonstrating that they experienced any harm from the title of the document, let alone that they have satisfied this harmless error rule. "The object [of notice and comment], in short, is one of fair notice," Long Island Care at Home, Ltd. v. Coke, 551 U. S. 158, 174 (2007), and respondents certainly had such notice here. Because the IFR complied with the APA's requirements, this claim fails.

B

Next, respondents contend that the 2018 final rules are procedurally invalid because "nothing in the record signal[s]" that the Departments "maintained an open mind throughout the [post-promulgation] process." Brief for Respondents 27. As evidence for this claim, respondents point to the fact that the final rules made only minor alterations to the IFRs, leaving their substance unchanged. The Third Circuit applied this "open-mindedness" test, concluding that because the final rules were "virtually identical" to the IFRs, the Departments lacked the requisite "flexible and open-minded attitude" when they promulgated the final rules. 930 F. 3d, at 569 (internal quotation marks omitted).

We decline to evaluate the final rules under the openmindedness test. We have repeatedly stated that the text of the APA provides the "'maximum procedural requirements'" that an agency must follow in order to promulgate a rule. Perez, 575 U. S., at 100 (quoting Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U. S. 519, 524 (1978)). Because the APA "sets forth the full extent of judicial authority to review executive agency action for procedural correctness," FCC v. Fox Television Stations, Inc., 556 U. S. 502, 513 (2009), we have repeatedly rejected courts' attempts to impose "judge-made procedur[es]" in addition to the APA's mandates, Perez, 575 U. S., at 102; see also Pension Benefit Guaranty Corporation v. LTV Corp., 496 U. S. 633, 654–655 (1990); Vermont Yankee, 435 U. S., at 549. And like the procedures that we have held invalid, the open-mindedness test violates the "general proposition that courts are not free to impose upon agencies specific procedural requirements that have no basis in the APA." LTV Corp., 496 U. S., at 654. Rather than adopting this test, we focus our inquiry on whether the Departments satisfied the APA's objective criteria, just as we have in previous cases. We conclude that they did.

Section 553(b) obligated the Departments to provide adequate notice before promulgating a rule that has legal force. As explained supra, at 22–23, the IFRs provided sufficient notice. Aside from these notice requirements, the APA mandates that agencies "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments," §553(c); states that the final rules must include "a concise general statement of their basis and purpose," ibid.; and requires that final rules must be published 30 days before they become effective, §553(d).

The Departments complied with each of these statutory procedures. They "request[ed] and encourag[ed] public comments on all matters addressed" in the rules—i.e., the basis for the Departments' legal authority, the rationales for the exemptions, and the detailed discussion of the exemptions' scope. 82 Fed. Reg. 47813, 47854. They also gave interested parties 60 days to submit comments. Id., at 47792, 47838. The final rules included a concise statement of their basis and purpose, explaining that the rules were "necessary to protect sincerely held" moral and religious objections and summarizing the legal analysis supporting the exemptions. 83 Fed. Reg. 57592; see also *id.*, at 57537– 57538. Lastly, the final rules were published on November 15, 2018, but did not become effective until January 14, 2019—more than 30 days after being published. Id., at 57536, 57592. In sum, the rules fully complied with "'the maximum procedural requirements [that] Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures.'" Perez, 575 U. S., at 102 (quoting Vermont Yankee, 435 U. S., at 524). Accordingly, respondents' second procedural challenge also fails.

* * *

In a footnote, the Court added: "Because we conclude that the IFRs' request for comment satisfies the APA's rulemaking requirements, we need not reach respondents' additional argument that the Departments lacked good cause to promulgate the 2017 IFRs."

* * *

Excerpt from
Alfred C. Aman, Jr., Landyn Wm. Rookard & William T. Mayton
Administrative Law 108–09
West Academic Publishing (4th ed. 2023)

As its name suggests, an interim rule is a gap-filling measure, one that (often) takes immediate effect but is accompanied by a notice of proposed rulemaking to solicit comments on and craft a permanent solution. Theoretically, at least, an agency could issue an interim rule after an abbreviated notice and comment period, with the subsequent period designed to allow for more fulsome input and review. Despite their prevalence,[11] the APA nowhere refers to them. Rather, when issued without notice and comment, the agency must justify them with one of the

[11] *See* Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 712–15 (1999).

enumerated good cause bases set forth in § 553(b)(B).[12] Occasionally, courts of appeals have treated the decision to solicit post-effective comment as a factor weighing in favor of good cause for issuing the interim rule without notice and comment,[13] though, if given any serious weight, this position could permit agencies to "issue interim rules of limited effect for any plausible reason, irrespective of the degree of urgency," and thereby insulate their good cause determinations from scrutiny.[14]

The Administrative Conference of the United States and commentators have proposed amending the APA to require a post-effective comment period for all rules invoking the impracticable and public interest prongs of the good cause exception, in essence codifying an interim rule procedure.[15] Though agencies may follow this practice on a voluntary basis, this recommendation has much to commend to it. An emergency, for example, may well provide good cause for taking immediate action without notice and comment. But that same emergency would have no impact on the agency's ability to subsequently seek public input on whether the interim rule should be finalized as adopted, finetuned or amended, or ultimately withdrawn.

4. Other APA Rulemaking Exceptions

Insert before first complete paragraph on page 371.

In *Capital Area Immigrants' Rights Coalition v. Trump*, the District Court addressed and rejected the Department of Justice and Department of Homeland Security's reliance on the good cause and military and foreign affairs exception to notice-and-comment rulemaking. Plaintiffs challenged "an interim final rule that significantly changes the United States' asylum procedures. The rule categorically disqualifies aliens arriving at the southern border from receiving asylum unless they have already unsuccessfully sought similar protection in another country on their way here. Plaintiffs allege that the rule is unlawful for several reasons, including that . . . it was issued without notice-and-comment procedures required under the Administrative Procedure Act (APA)." The District Court agreed, as excerpted below:

Capital Area Immigrants' Rights Coalition v. Trump

471 F. Supp. 3d 25 (D.D.C. June 30, 2020)

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[12] *See, e.g.*, N. Carolina Growers' Ass'n, Inc. v. United Farm Workers, 702 F.3d 755, 770 (4th Cir. 2012) (collecting cases).

[13] *See, e.g.*, United States v. Johnson, 632 F.3d 912, 932 (5th Cir. 2011) (suggesting "that the final rulemaking process with full APA comment . . . cannot be ignored" in determining that the Attorney General's failure to seek comment on the SORNA Interim Rule was harmless); James Kim, Comment, *For A Good Cause: Reforming the Good Cause Exception to Notice and Comment Rulemaking Under the Administrative Procedure Act*, 18 GEO. MASON L. REV. 1045, 1076 & n.232 (2011) (citing, for example, Mid-Tex Elec. Coop. v. Fed. Energy Regulatory Comm'n, 822 F.2d 1123, 1131–34 (D.C. Cir. 1987); Petry v. Block, 737 F.2d 1193, 1203 (D.C. Cir. 1984); Republic Steel Corp. v. Costle, 621 F.2d 797, 804 (6th Cir. 1980)).

[14] Mack Trucks, Inc. v. EPA, 682 F.3d 87, 94 (D.C. Cir. 2012) (internal quotation omitted); *see, e.g.*, United States v. Ross, 848 F.3d 1129, 1133 (D.C. Cir. 2017) ("[P]rocedurally sound adoption of a rule after the conduct affected can have no legitimate effect on that conduct."); United States v. Utesch, 596 F.3d 302, 312 (6th Cir. 2010) ("The fact that the Attorney General eventually made SORNA retroactive through legitimate means cannot sustain prosecution of an individual based on conduct committed long before the final guidelines' enactment . . . .").

[15] *See, e.g.*, Asimow, *supra* note 153, at 733–36 (citing ACUS Recommendation 95-4, Procedures for Noncontroversial and Expedited Rulemaking, 60 Fed. Reg. 43,110 (1995)); Kim, *supra* note 155 at 1076.

The APA generally requires substantive rules to be promulgated through notice-and-comment rulemaking. See 5 U.S.C. § 553. These procedures are not a mere formality. They "are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *Int'l Union, United Mine Workers v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005). And they "attempt[] to provide a 'surrogate political process' that takes some of the sting out of the inherently undemocratic and unaccountable rulemaking process." *Regents of the Univ. of California,* No. 18-587, 2020 WL 3271746, at *27 (Thomas, J., dissenting) (citation omitted)).

Because the Rule was promulgated without these procedures, the question for the Court is whether one of the APA's exceptions to the usual requirements applies. Defendants assert that two do. First, under the "good cause" exception, an agency need not provide notice and an opportunity to comment "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B).

Second, under the "foreign affairs function" exception, the normal notice-and-comment requirements do not apply "to the extent that there is involved . . . a military or foreign affairs function of the United States." *Id.* § 553(a)(1).

Despite their potentially broad sweep, the D.C. Circuit has instructed that these exceptions must be "narrowly construed" and "reluctantly countenanced." New Jersey, 626 F.2d at 1045. The Circuit has also emphasized that the broader a rule's reach, "the greater the necessity for public comment." American Fed'n of Gov't Emps. v. Block, 655 F.2d 1153, 1156 (D.C. Cir. 1981). With these baseline principles in mind, the Court considers whether either the good cause or foreign affairs function exception applies here. Neither does.

1. The Good Cause Exception

The APA permits an agency to dispense with notice-and-comment procedures when it finds that doing so would be "impracticable, unnecessary, or contrary to the public interest," an exception said to require "good cause." 5 U.S.C. § 553(b)(B). Here, Defendants assert that providing notice and comment would have been both impracticable and contrary to the public interest. 84 Fed. Reg. at 33,841.

Even on top of the principles described above, the D.C. Circuit has set a high bar for satisfying good cause. As it recently explained, review of an "agency's legal conclusion of good cause is de novo." Sorenson Commc'ns Inc. v. FCC, 755 F.3d 702, 706 (D.C. Cir. 2014). In other words, a court may not simply defer to an agency's judgment about whether good cause exists. Rather, the Circuit instructs, a court must "examine closely" an agency's stated rationale and the

circumstances surrounding the agency's decision. Council of S. Mountains, Inc. v. Donovan, 653 F.2d 573, 580 (D.C. Cir. 1981). The good cause inquiry is both "meticulous" and "demanding." Sorenson, 755 F.3d at 706 (citation omitted).

The Circuit has found notice-and-comment procedures sufficiently impracticable only in unusual cases, such as when "air travel security agencies would be unable to address threats posing 'a possible imminent hazard to aircraft, persons, and property within the United States,'" or when "a rule was of 'life-saving importance' to mine workers in the event of a mine explosion." Mack Trucks, Inc. v. EPA, 682 F.3d 87, 93 (D.C. Cir. 2012) (citation omitted). And it has instructed that the public interest ground "is met only in the rare circumstance when ordinary procedures—generally presumed to serve the public interest—would in fact harm that interest." *Id.* at 95. The good cause exception is therefore "appropriately invoked when the timing and disclosure requirements of the usual procedures would defeat the purpose of the proposal—if, for example, 'announcement of a proposed rule would enable the sort of financial manipulation the rule sought to prevent.'" *Id.* (citation omitted).

Defendants argue that notice-and-comment rulemaking would have been impracticable and contrary to the public interest because that process would have led to a surge of asylum seekers at the southern border of the United States. 84 Fed. Reg. at 33,841. The Departments asserted upon the Rule's promulgation that if it were published for notice and comment before becoming effective, smugglers might communicate its impending effects to potential asylum seekers, thus creating a "risk of a surge in migrants hoping to enter the country" beforehand. *Id.* They also asserted that pre-promulgation "notice and comment, or a delay in the effective date, would be destabilizing and would jeopardize the lives and welfare of aliens who could surge to the border to enter the United States before the rule took effect." *Id.* According to the Departments, their "experience has been that when public announcements are made regarding changes in our immigration laws and procedures, there are dramatic increases in the numbers of aliens who enter or attempt to enter the United States along the southern border." *Id.*

Common sense dictates that the announcement of a proposed rule may, at least to some extent and in some circumstances, encourage those affected by it to act before it is finalized. But this rationale cannot satisfy the D.C. Circuit's standard in this case unless it is adequately supported by evidence in the administrative record suggesting that this dynamic might have led to the consequences predicted by the Departments—consequences so dire as to warrant dispensing with notice and comment procedures. See Sorenson, 755 F.3d at 707. After carefully examining the record, the Court finds that it does not contain sufficient evidence to justify invocation of the good cause exception.

The evidence that Defendants rely on begins—and for the most part ends—with a single newspaper article in the Washington Post from October 2018; indeed, it is the only specific evidence the Departments cited when promulgating the Rule. That article includes several passages suggesting that: (1) after the United States abruptly stopped separating families who

applied for asylum together in the spring of 2018, smugglers encouraged asylum seekers to bring their children and to speed up their efforts to reach the border; (2) those same smugglers may coach asylum seekers about what to tell interviewing officers so they can meet the credible fear standard; and (3) many months after the United States stopped separating families, a greater proportion of asylum applicants had brought children or other family members with them to the border.

Under Circuit precedent, this newspaper article alone does not provide good cause to bypass notice-and-comment rulemaking procedures for the reasons cited by Defendants. Even assuming that the Rule was likely to have had a similar effect as the regulatory change described in the article, the article contains no evidence that that change caused a surge of asylum seekers at the border—let alone one on a scale and at a speed that would have jeopardized their lives or otherwise have defeated the purpose of the Rule if notice-and-comment rulemaking had proceeded. In fact, the article lacks any data suggesting that the number of asylum seekers increased at all during this time—only that more asylum seekers brought children with them. Clearly, the article suggests that smugglers are not oblivious to major changes in United States' immigration policy, and that they pass on the information they learn to some who may use it to game the asylum process. None of that is surprising. But at bottom, the article does little if anything to support Defendants' prediction that undertaking notice-and-comment rulemaking would have led to a dramatic, immediate surge of asylum applicants at the border that would have had the impact they suggest. And other articles from the administrative record that Defendants cite either do not support, or even undermine, their prediction of such a surge.

Defendants offer no other data or information that persuasively supports their prediction of a surge. They point the Court to several charts that they argue support their invocation of good cause. One shows the number of enforcement actions undertaken by Customs and Border Protection at the southwest border from October 2016 through May 2019, broken down by the alien's country of origin. But the Court can glean little from that chart, other than that these enforcement actions decreased somewhat during the first six months of that period, increased gradually over the next few years, and then increased more sharply early in 2019. Defendants also point to a chart that depicts "Southwest Border Encounters of non-Mexican Aliens" each month from October 2012 to March 2019 and also contains some agency observations of that data. See AR at 208–20. But again, all this chart shows is that as of March 2019, more and more non-Mexican aliens were encountered at the southern border and that the agency projected the number to continue to rise for unspecified reasons. Interestingly, though, the agency's observations reflect that even the relatively high number of encounters reported in March 2019 was not unprecedented; a higher number had been reported a decade earlier..

As far as providing a basis for predicting a surge of asylum seekers prompted by the publishing of the Rule for notice and comment, these numbers would be meaningful if Defendants explained that peaks or troughs in the data corresponded with regulatory or policy changes in the United States. But Defendants have not done so, and the Court cannot find any such analysis in

the record. At bottom, as Plaintiffs point out, Defendants—"despite studying migration patterns closely"—have "failed to document any immediate surge that has ever occurred during a temporary pause in an announced policy." That failure is striking. . . .

Finally, Defendants also cite the Supreme Court's decision in *Holder v. Humanitarian Law Project,* 561 U.S. 1, 34–35 (2010), to support their argument that "courts are ill-equipped to second-guess the Executive Branch's prospective judgment." In Holder, the Court denied a constitutional challenge to a criminal statute prohibiting the provision of material support to a foreign terrorist organization. In so doing, Defendants point out, the Court noted that the "Government, when seeking to prevent imminent harms in the context of international affairs and national security, is not required to conclusively link all the pieces in the puzzle before we grant weight to its empirical conclusions."

There are many circumstances in which the law appropriately commands, as in Holder, that courts defer to the Executive Branch's national security judgments. But even putting aside the many other differences between that case and this one, the record in that case consisted of far more than a newspaper article. There, the basis for the judgments of both Congress and the Executive about the material support statute—the latter's set forth in an affidavit of a State Department official—were thoroughly explained to the Court. Those judgments were informed by extensive experience with how terrorist groups fund their activities, and the specific designated terrorist organizations at issue, which the Executive asserted had killed thousands. *Id.* at 29–30. Here, by contrast, the Departments rely on a single newspaper article that does not even directly address the key predictive judgment in question: the likelihood of a surge in asylum seekers so great and so rapid as to threaten human life or defeat the purpose of the Rule if notice- and-comment procedures were followed.

It bears emphasizing that in holding that the good cause exception does not apply, the Court does not suggest in any way that the Executive's broader security concerns that prompted promulgation of the Rule were unfounded. The question for the Court is simply whether, on the record before it, the prediction of a surge offered by the Departments provided good cause to dispense with notice-and-comment procedures before the Rule took effect. For the reasons explained above, the Court holds that it did not.

2. The Foreign Affairs Function Exception

The second exception Defendants invoke is the foreign affairs function exception. As noted above, notice-and-comment requirements do not apply "to the extent there is involved . . . a military or foreign affairs function of the United States." 5 U.S.C. § 553(a)(1). Unlike the good cause exception, there is little case law in this Circuit, or elsewhere, to guide the Court's application of this exception. Perhaps as a result, it presents a closer call. Still, the Court finds that Defendants' arguments in favor of the exception come up short. . . .

The Court starts, as it must, with the text of the statute: notice-and-comment procedures are unnecessary "to the extent there is involved . . . a military or foreign affairs function of the United States." 5 U.S.C. § 553(a)(1). The first part of that phrase, "to the extent there is involved," applies to several other categories of rulemakings as well, including those involving public benefits, 5 U.S.C. § 553(a)(2), and the D.C. Circuit has interpreted the phrase in that context. Specifically, in *Humana of South Carolina, Inc. v. Califano*, the Circuit instructed—consistent with the duty to "narrowly construe" and "reluctantly countenance" such exceptions, New Jersey, 626 F.2d at 1045—that "to the extent that any one of the enumerated categories is clearly and directly involved in the regulatory effort at issue, the Act's procedural compulsions are suspended." 590 F.2d 1070, 1082 (D.C. Cir. 1978) (citations and quotations omitted) (emphasis added). As a result, a rule falls within the foreign affairs function exception only if it "clearly and directly" involves "a foreign affairs function of the United States."

The APA does not define the key terms in the second part of that phrase—"foreign affairs" or "function"—and so the Court turns to dictionaries in use at the time of the APA's enactment. The definition of "foreign affairs" is reasonably straightforward: it refers to the conduct of international relations between sovereign states. The meaning of "function," on the other hand, is less so. The 1945 version of Webster's New International Dictionary defines it as "[t]he natural and proper action of anything; special activity," "[t]he natural or characteristic action of any power or faculty," or "[t]he course of action which peculiarly pertains to any public officer in church or state; the activity appropriate to any business or profession; official duty." "Function" thus appears to narrow the exception further; to be covered, a rule must involve activities or actions that are especially characteristic of foreign affairs. Applying these definitions, then, a "foreign affairs function" encompasses activities or actions characteristic to the conduct of international relations. And to sum up, 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. . . .

Thus, the foreign affairs function exception plainly covers heartland cases in which a rule itself directly involves the conduct of foreign affairs. For example, the exception covers scenarios in which a rule implements an international agreement between the United States and another sovereign state. Indeed, that is the only circumstance to which the D.C. Circuit has applied it. Specifically, in *International Brotherhood of Teamsters v. Pena*, 17 F.3d 1478 (D.C. Cir. 1994), the Circuit held that the foreign affairs function exception applied to a Federal Highway Administration rule implementing a Memorandum of Understanding (MOU) between the United States and Mexico about the countries' reciprocal recognition of each other's commercial drivers' licenses. The court noted that "the rule does no more" than carry out the United States' "obligations to a foreign nation." The rule in that case merely "added a sentence to [a] footnote" in a regulation specifying that the Administrator had determined that Mexican commercial drivers' licenses met the United States' standards. The exception also certainly covers rules that regulate foreign diplomats in the United States. For example, in *City of New York v. Permanent Mission of India to United Nations*, the Second Circuit held that the exception covered an action

by the State Department "exempt[ing] from real property taxes" any "property owned by foreign governments and used to house the staff of permanent missions to the United Nations or the Organization of American States or of consular posts." 618 F.3d at 175. As the court observed, "the action taken by the State Department to regulate the treatment of foreign missions implicates matters of diplomacy *directly*."

That Congress would categorically exclude rules like these from notice-and-comment procedures is unsurprising. These procedures enhance the rulemaking process by exposing proposed regulations to feedback from a broad set of interested parties. But comments are unlikely to impact a rule to which the United States has already effectively committed itself through international agreement. Similarly, in the diplomatic context, agency action may be grounded in international reciprocity.

Here, however, the foreign affairs function exception does not excuse the Departments from failing to engage in notice-and-comment rulemaking before promulgating the Rule. The Rule overhauls the procedure through which the United States decides whether aliens who arrive at our southern border are eligible for asylum here, no matter the country from which they originally fled. These changes to our asylum criteria do not "clearly and directly" involve activities or actions characteristic of the conduct of international relations. They do not, for example, themselves involve the mechanisms through which the United States conducts relations with foreign states. Nor were they the product of any agreement between the United States and another country, regardless of any ongoing negotiations. To be sure, Defendants say they intended that the Rule would have downstream effects in other countries, and perhaps on those negotiations. Obviously, they expected that the Rule would cause more aliens to apply for protection in other countries before arriving in the United States and seeking asylum here. But these indirect effects do not clear the high bar necessary to dispense with notice-and-comment rulemaking under the foreign affairs function exception.

It may seem a quibble that the exception distinguishes between rules that "clearly and directly" involve activities characteristic of the conduct of international relations and those that have indirect international effects. And of course, the Court is bound to apply both Circuit precedent and the statutory text as it is, "even if it thinks some other approach might accord with good policy." *Loving v. IRS*, 742 F.3d 1013, 1022 (D.C. Cir. 2014). But it is worth pointing out that the Circuit's holding in Califano and Congress's use of the word "function"— instead of, say, "effects" or "implications"—prevent the foreign affairs function exception from swallowing the proverbial rule. There are many rulemakings that an agency might plausibly argue have downstream effects in other countries or on international negotiations in which the United States is perpetually engaged. Courts have, for example, warned that in the immigration context, the "dangers of an expansive reading of the foreign affairs exception . . . are manifest." But this is true in other areas of the law as well. One agency might reach for a too-sweeping interpretation of the foreign affairs function exception to argue that a rule involving climate change that affects other countries is subject to the exception.

Another might contend that a rule regarding domestic production of some good or commodity that impacts ongoing trade negotiations is covered. Thus, as Plaintiffs point out, courts of appeals have generally rejected the idea that the exception applies merely because a rule "implicate[s] foreign affairs" or "touche[s] on national sovereignty." In the end, the narrowness of this exception does not mean that these agencies cannot take these hypothetical actions; it simply means that they are not excused from engaging in notice-and- comment rulemaking when they do. . . .

Defendants also argue that the Court should defer to the Departments' conclusion that the foreign affairs function exception applies. But they do not point to any case law suggesting that agencies are entitled to deference in interpreting the scope of the exception. That is hardly surprising. As this Circuit has explained, "an agency has no interpretive authority over the APA." And Defendants again point to cases like *Holder*, 561 U.S. at 35. The Court reiterates that there are many circumstances in which courts appropriately defer to the national security judgments of the Executive. But determining the scope of an APA exception is not one of them. As noted above, if engaging in notice-and- comment rulemaking before implementing the rule would have harmed ongoing international negotiations, Defendants could have argued that these effects gave them good cause to forgo these procedures. And they could have provided an adequate factual record to support those predictive judgments to which the Court could defer. But they did not do so.

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For all the above reasons, the Court finds that the Rule is not exempt from the APA's notice-and-comment procedures. Because the Departments unlawfully dispensed with those requirements, they issued the Rule "without observance of procedure required by law," 5 U.S.C. § 706. . . .

I. Policymaking By Delays And Rescissions

Delete the materials appearing in § 4.03[I], pp. 374–76. The principal case addressed in that section, *Pennsylvania v. Trump*, was reversed *sub nom. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, excerpted *supra*. The District Court's decision in *California v. EPA* likewise took a U-turn after the EPA promulgated a new regulation. *See* California *ex re.* Becerra v. EPA, 978 F.3d 708 (9th Cir. 2020).

For an edited version of the Supreme Court's decision dealing with the attempt by the Department of Homeland Security to rescind the Deferred Action for Childhood Arrivals (DACA) and accompanying discussion questions, **see Online Supplement to Chapter 7.**

Summer 2023 Online Supplement to Chapter 5 Legislative Control of Agency Discretion

Note: This is an **updated** chapter supplement to Aman, Penniman & Rookard, Administrative Law and Process (4th ed.).

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Bold denotes new/substantially changed materials

§ 5.08E supp. The Freedom of Information Act

ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW

§ 17.1 (West Academic Publishing, 3d ed. 2014)

In the late 1960's and throughout the 1970's, Congress passed a number of Acts aimed at increasing the openness with which agencies carried out their regulatory responsibilities. The most important of these was the Freedom of Information Act (FOIA), passed in 1966. It, and its subsequent amendments, establish a liberal disclosure policy regarding public access to information obtained, generated and held by the government. "Any person" is entitled to request and receive identifiable records held by an agency, unless the records in question fall within one of the Act's nine exemptions. …

The … assumption underlying…[such] legislation is that open government leads to better government. Open government is in accord with our basic principles of democracy and the need for citizens to know how their government, in fact, functions. This enables the citizenry to make proper evaluations of the wisdom of governmental uses of power. It also, however, is in accord with a healthy sense of distrust of governmental power as well and the need to control agency discretion to ensure that the law is administered properly. In this sense, open government and the publicity that goes along with it provides not only valuable information but a means of effectively constraining government and thus protecting citizens from any potential abuses of governmental power that may exist….

* * *

Below, you will find an overview of FOIA and examine some typical cases that arise under that Act. As you consider these cases, reflect upon the basic purposes of this statute and the extent to which those purposes can be achieved.

A. The Freedom of Information Act - Overview

Congress passed the Freedom of Information Act (FOIA) in 1966[1] "to establish a general philosophy of full agency disclosure." Under FOIA, "any person" has the right to request and receive copies of much of the records and information generated or maintained by Federal agencies. Although the Act exempts certain types of information from mandatory release to the public, disclosure is the norm. A requester's motives or her relation to the information she seeks

[1] Codified as amended at 5 U.S.C. § 552 (1982).

to acquire are irrelevant; the government has the burden of proving that information it withholds is exempt from disclosure. An agency's refusal to disclose requested information is subject to *de novo* judicial review.

The Act was first amended in 1974 in the aftermath of the Watergate hearings. The 1974 amendments provided FOIA with more teeth and greater reach. The Act increasingly has come to symbolize an implicit tenet of democracy: the public's right to know.[2] But at the same time, questions persist with regard to its scope, its costs compared to its benefits, and its susceptibility to abuse. Critics contend that in practice, FOIA "has turned out to be a far cry from just John Q. Public finding out about how his Government works."[3] Moreover, computers have triggered a transformation of information services and, more importantly, they have redefined what now qualifies as "information."

The Act continued to evolve with further amendments in 1976 and 1986 in response to ambiguities that arose with regard to some of its nine exemptions (3 and 7, respectively).[4] In 1996 more fundamental issues were involved, specifically, the ability of agencies to effectively adapt to the computer age. On October 2, 1996, President Clinton signed onto law the Electronic Freedom of Information Act Amendments of 1996, (EFOIA), P.L. 104-231….

The open environment that began taking hold changed dramatically after September 11, 2001. There was an information clamp down of sorts, especially at certain agencies. Various web sites were removed, including some at the Departments of Energy and Transportation as well as the Nuclear Regulatory Commission and the EPA. In 2003, President Bush issued Executive Order 13,292. This order allowed more information to be classified, at much longer time intervals than the previous Executive Order, removing the time limit for initial document classification and the clause requiring declassification of historical information over twenty-five years old. [In 2007, Congress passed the Openness Promotes Effectiveness in Our National Government Act (the OPEN Government Act of 2007, strengthening Se3ction 552 of the FOIA with amendments to various of FOIA processes.] In turn, President Obama issued Executive Order 13,526 on December 29, 2009, revoking and replacing the previously mentioned orders. This Order created the National Declassification Center, which has the task of classifying and declassifying government information, set new declassification goals for historical records, and implemented new technologies to expedite declassification of documents. Moreover, as President

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[2] *See* P. Wald, *The Freedom of Information Act. A Short Case Study in the Perils and Paybacks of Legislating Democratic Values.* 33 EMORY L.J. 649, 652 (Citing President Johnson: "This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits"). *See* S. Rep. No. 813, 89th cong., 1st sess. 3 (1965) ("[I]t is only when one further considers the hundreds of departments, branches and agencies which are not directly responsible to the people that one begins to understand the great importance of having an information policy of full disclosure").

[3] 1981 Senate Hearings on FOIA (97th Cong., 1st Sess., July–Dec. 1981) (Statement of then Professor, now Justice, Scalia).

[4] *See* Paul M. Schoenhard, *Disclosure of Government Information Online: A New Approach from an Existing Framework*, 15 HARV. J.L. & TECH 497, 502 (2002).

Obama outlined in a memorandum on January 21, 2009, all agencies should adopt a presumption in favor of disclosure with regard to all decisions involving FOIA to serve the concept of open government. Following the publication of this memorandum, Attorney General Eric Holder issued a memorandum requiring a "presumption of openness" and explicitly rescinding a prior memorandum published by former Attorney General John Ashcroft in 2001.

[In 2016, Congress passed the FOIA Improvement Act of 2016, to address FOIA's backlog issues.]

ALFRED C. AMAN, JR., LANDYN WM. ROOKARD AND WILLIAM T. MAYTON ADMINISTRATIVE LAW § 16.3 (West Academic Publishing, 4th ed. 2023)

FOIA is divided into twelve subsections.[5] Subsection (a)(1) requires automatic publication in the Federal Register of matters such as descriptions of agency organization, functions, procedures, substantive rules and statements of general policy. Subsection (a)(2) requires agencies to "make available for public inspection and copying," materials such as final opinions rendered in the adjudication of cases, policy statements and interpretations not published in the Federal Register, administrative staff manuals or instructions "unless the materials are promptly published and copies offered for sale", and copies of records released in response to FOIA requests that the agency determines have been, or will likely be, the subject of additional requests, as well as an index of these previously released records. The 1996 Amendments direct these records to be made available by computer telecommunications or other electronic form if the agency does not have the means to put the information online. To protect personal privacy, an agency may delete identifying details from these materials, but must indicate the extent of any deletion. Agencies must also compile and publish indices of these materials in order to facilitate public access.

Subsections (a)(1) and (a)(2) guarantee constructive notice to the public of agencies' regulations and operations, along with the procedures necessary to initiate agency action or responses.[6] An agency's failure to satisfy the notification requirements of either subsection can invalidate related agency action.[7] An agency's failure to respond to a FOIA request within the statutory time frame satisfies the exhaustion of administrative remedies requirement necessary for the requester to seek *de novo* judicial review.[8] Failure to follow an agency's previously published procedures for making FOIA requests, however, may prevent the requester from obtaining judicial relief.[9]

Subsection (a)(3) is the heart of the Act. Except with respect to records made available pursuant to Subsections (a)(1) and (a)(2), "each agency," upon receipt of a request for records "which reasonably describes such records" and is made in accordance with the agency's published procedures, must make

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[5] 5 U.S.C. § 552.

[6] *See, e.g.*, Schwaner v. Department of Air Force, 698 F.Supp. 4 (D.D.C.1988), *rev'd on other grounds*, 898 F.2d 793 (D.C.Cir.1990); *see also* Welch v. United States, 750 F.2d 1101, 1111 (1st Cir.1985) (purposes of subsections (a)(1) and (a)(2) are to provide public notice and guidance).

[7] *See, e.g.*, Vigil v. Andrus, 667 F.2d 931, 938 (10th Cir. 1982); Anderson v. Butz, 550 F.2d 459, 462 (9th Cir. 1977). *But see* United States v. Hall, 742 F.2d 1153, 1155 (9th Cir.1984) (no invalidation if complaining party had actual and timely notice of unpublished agency policy); Zaharakis v. Heckler, 744 F.2d 711, 714 (9th Cir. 1984) (no invalidation if complainant unable to show she was adversely affected by the lack of publication).

[8] 5 U.S.C. § 552(a)(6)(C). *But cf.* Open America v. Watergate Special Prosecution Force, 547 F.2d 605, 615–16 (D.C. Cir. 1976) (absent exceptional urgency on part of requester, agency deemed to be complying with FOIA, notwithstanding passage of the statutory deadline, if it is exercising "due diligence" while processing requests in the order in which they are received); Spannaus v. U.S. Department of Justice, 824 F.2d 52, 58 (D.C.Cir.1987) (statute of limitations started to run when the agency failed to comply with the FOIA request within ten working days, and not when all administrative appeals were completed).

[9] *See, e.g.*, Brumley v. U.S. Dep't of Labor, 767 F.2d 444, 445 (8th Cir.1985) (plaintiff's disclosure suit dismissed for failure to exhaust administrative remedies where agency's delayed response resulted in part from plaintiff's failure to make his request in accordance with published routing procedures).

the requested records promptly available "to any person in any form or format requested by the person if the record is readily reproducible by the agency in that form or format." Moreover, an agency must make "reasonable efforts to search for the record in electronic format."

Subsection (a)(4) limits the fees that agencies can charge for a request.[10] It also authorizes *de novo* judicial review of an agency's decision to withhold requested records,[11] and prescribes fairly stringent deadlines by which agencies must respond to requests. In the event that a court finds that records have been withheld improperly, there are conditional provisions for plaintiffs' recovery of attorney fees[12] and disciplinary action against responsible agency personnel.[13] Sections (a)(7)(A) and (a)(7)(B) require each agency to establish a system to assign and provide to the requestor an individualized tracking number for each request received that will take longer than ten days to process and to establish a telephone line or Internet service that provides information about the status of a request to the requestor,[14] including the date of original receipt and estimated completion.[15]

Subsection (b) defines nine types of information that are exempt from disclosure under the Act. The last sentence of Subsection (b) mandates the release of reasonably segregable portions of any requested record "after deletion of the portions which are exempt." This provision was added as part of the 1974 Amendments and it prevents agencies from classifying entire categories of records as exempt.[16] At the same time, it imposes a significant burden on the agencies, which must often pull from the field personnel most familiar with the subject matter to review and redact large volumes of documents so as to avoid

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[10] Fees are limited to "reasonable standard charges . . . for recovery of only the [agency's] direct costs of . . . search for duplication," but documents must be furnished "without any charge or at a charge reduced below the fee established . . . if disclosure of the information is in the public interest." 5 U.S.C. § 552(a)(4)(A). Depending on the scope of the search, search and copying costs can be substantial, and often vary from agency to agency. *See, e.g.*, 28 C.F.R. § 16.11 (1999). The agency's discretionary determination of whether a request qualifies for a fee waiver—i.e., is "in the public interest"—may thus dictate the viability of a request. *See, e.g.*, Ely v. U.S. Postal Service, 753 F.2d 163, 165 (D.C.Cir.1985), *cert. denied* 471 U.S. 1106, 105 S. Ct. 2338, 85 L. Ed. 2d 854 (1985) (requester's indigency alone insufficient to warrant waiver of fees).

[11] The general rule under FOIA is that administrative remedies must be exhausted prior to judicial review. *See, e.g.*, Tuchinsky v. Selective Service System, 418 F.2d 155, 158 (7th Cir. 1969); Weisberg v. U.S. Department of Justice, 745 F.2d 1476, 1497 (D.C. Cir. 1984), *affirmed in part and remanded*, 848 F.2d 1265 (D.C. Cir. 1988); however, the Act gives requesters the right to seek immediate judicial review, even where the requester has not filed an administrative appeal, when the agency does not respond to a *properly made* request within the statutory time limits (twenty business days, absent "unusual circumstances") set forth in Section 552(a)(6). Practically speaking, this constructive exhaustion provision has been diluted by the D.C. Circuit's holding in *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605, 615–16 (D.C. Cir. 1976) (notwithstanding its failure to respond by statutory deadline, agency deemed to be complying with FOIA if exercising "due diligence" under the circumstances).

[12] Courts are authorized to award "attorney fees and other litigation costs reasonably incurred" to a FOIA complainant who has "substantially prevailed." Whether a plaintiff has "substantially prevailed" is a question of fact that involves both causation and equities. *See, e.g.*, *Weisberg*,745 F.2d at 1494–1500.

[13] Where a court orders disclosure of improperly withheld records *and* assesses attorneys' fees and costs against the government *and* issues a written finding that agency personnel may have acted arbitrarily and capriciously, the Special Counsel of the Merit System Protection Board must initiate an investigation and take appropriate action. 5 U.S.C. § 552(a)(4). However, no court to date has issued the written finding that is a prerequisite for such sanctions. *See, e.g.*, Perry v. Block, 684 F.2d 121, 122 (D.C. Cir. 1982) (despite a "regrettable [2-year] saga of carelessness and delay," court refused to issue a sanction, in part because the records sought were not technically disclosed pursuant to court order); U.S. Gov't Accountability Off., Freedom of Information Act: Federal Court Decisions Have Not Required the Office of Special Counsel to Initiate Disciplinary Actions for the Improper Withholding of Records (Mar. 13, 2018), https://www.gao.gov/assets/gao-18-235r.pdf ("[S]ince fiscal year 2008, no court orders have been issued that have required OSC to initiate a proceeding to determine whether disciplinary action should be taken against agency FOIA personnel.").

[14] 5 U.S.C. § 552(a)(7)(A)–(B).

[15] *Id.*

[16] *See* Irons v. Gottschalk, 548 F.2d 992 (D.C. Cir. 1976) (existence of some exempt information does not justify nondisclosure of the entire record).

disclosure of legitimately exempt information.[17] The ease with which computers can redact information makes it impossible to tell how much information has, in fact, been redacted. The 1996 Amendments, therefore, require agencies to identify the location of deletions and show the amount of deleted material at the place on the record where the deletion was made.[18] In addition, with the OPEN Government Act, agencies are required to indicate the exemption under which the deletion was made unless the indication would harm an interest protected by that exemption.[19]

Subsection (c) allows an agency to exempt information related to a pending criminal investigation, information that identifies informants, and FBI records that pertain to foreign intelligence and international terrorism.[20] Subsection (d) states that FOIA does not authorize agencies to withhold information from Congress.[21] Subsection (e) requires annual reports to Congress from each agency regarding its FOIA operations, and an annual report from the Attorney General regarding FOIA litigation and the Department of Justice's efforts (through the Office of Information and Privacy) to encourage agency compliance with FOIA.[22] The 1996 Amendments, which completely restructured existing provisions in subsection (e),[23] require that the Attorney General's report and all agency FOIA reports be made available online. Also, the reports are required to be more useful to the public by, for example, answering such basic questions as how to make a FOIA request.[24]

Subsection (f) defines the term "agency" so as to subject nearly all executive branch entities to FOIA.[25] FOIA's mandate does not, however, extend to records maintained by Congress, by the courts (including judicial agencies, such as the U.S. Sentencing Commission), or by state governments.[26] Nor does FOIA apply to entities that "are neither chartered by the Federal Government nor controlled by it."[27] The proliferation in recent years of quasi-governmental advisory boards, investigative commissions, and

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[17] In regard to certain types of requested information—such as that pertaining to intelligence-gathering operations or matters of national security—this painstaking process of review can result in the release of heavily redacted documents of little or no practical value to anyone. Such concerns prompted Congress to exempt CIA operational files from FOIA's "release of segregable portions" requirement. *See* Central Intelligence Information Act, Pub. L. No. 98–477, 98 Stat. 2209 (1984).

[18] 5 U.S.C. § 552(a)(6)(F).

[19] 5 U.S.C. § 552(b)(9).

[20] 5 U.S.C. § 552(c).

[21] FOIA's exemptions cannot be used to justify withholding from Congress as a body or from one of its committees; individual members of Congress, however, have only the right of access guaranteed to "any person" under subsection (a)(3). *See* H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11–12 (1966).

[22] 5 U.S.C. § 552(e)(1).

[23] 5 U.S.C. § 552(e)(2)–(3).

[24] 5 U.S.C. § 552(g).

[25] *See* 5 U.S.C. § 551(1).

[26] *See, e.g.*, Goland v. CIA, 607 F.2d 339, 348 (D.C.Cir.1978), *vacated in part and reh'g denied* 607 F.2d 367 (D.C.Cir.1978), *cert. denied*, 445 U.S. 927, 100 S. Ct. 1312, 63 L. Ed. 2d 759 (1980) (Congress); Warth v. Department of Justice, 595 F.2d 521, 523 (9th Cir.1979) (courts); Davidson v. State of Georgia, 622 F.2d 895, 897 (5th Cir.1980) (state government).

[27] H.R.Rep. No. 1380, 93d Cong., 2d Sess. 15 (1974).

corporate entities serving particular public interests has resulted in a spate of FOIA cases concerning this threshold issue.[28]

For example, units of the Executive Office and other bodies whose sole function is to advise and assist the President are not considered "agencies" subject to FOIA, while entities whose functions are not so limited must respond to FOIA requests.[29] In determining whether an entity is an agency for the purpose of FOIA, courts usually assess a variety of considerations, typically including the origin of the entity, the manner in which its members were appointed, whether the body has rulemaking authority, whether its employees are deemed federal employees, and the amount of government supervision of day-to-day operations.[30]

The 1996 Amendments also make explicit under Subsection (f) that a "record" for the purposes of FOIA includes electronically stored information. The policy is broad and does not discriminate against different types of storage media. The form in which an agency's data are stored, therefore, cannot improve agency attempts to evade disclosure.[31] The 1996 Amendments also added Subsection (g), which requires agencies to make available a guide for requesting records from the agency. It was anticipated that such guides would be made available by electronic means.[32]

The OPEN Government Act of 2007 added several subsections to the 1996 Amendments. Subsection (h)(1) establishes an Office of Government Information Services within the National Archives and Records Administration.[33] This Office reviews policies of administrative agencies, ensures agency compliance, recommends policy changes to improve administration of FOIA[34] and offers mediation services and advisory opinions.[35] Subsection (i) creates a Government Accountability Office that audits and reports on administrative agency implementation of FOIA.[36]

Subsection (j) requires each agency to designate a chief FOIA officer,[37] whose authority Subsection (k) outlines, including: 1) agency-wide responsibility for efficient and appropriate compliance with the FOIA; 2) monitoring agency implementation of FOIA and informing agency leadership, the chief legal officer, and the Attorney General of agency performance; 3) recommending improvements to agency practices, policies, personnel, and funding as may be necessary for the implementation of FOIA; 4) reviewing and reporting to the Attorney General on agency-wide FOIA implementation; 5) facilitating

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[28] *See, e.g.*, Rushforth v. Council of Economic Advisers, 762 F.2d 1038, 1043 (D.C. Cir. 1985) (President's Council of Economic Advisers not a federal "agency" for purposes of FOIA); Forsham v. Harris, 445 U.S. 169, 179–80, 100 S. Ct. 977, 983–84, 63 L. Ed. 2d 293 (1980) (private grantee of federal agency not subject to FOIA); Ehm v. National Railroad Passenger Corp., 732 F.2d 1250, 1252–55 (5th Cir. 1984)(Amtrak not a federal agency for purposes of Privacy Act; subject to FOIA only because of express statutory reference); *see also*, Sweetland v. Walters, 60 F.3d 852, 855 (D.C.Cir.1995) (President's Executive Residence is not a federal agency for the purpose of FOIA); Dong v. Smithsonian Inst., 125 F.3d 877, 883 (D.C. Cir. 1997) (Smithsonian Institution is not a federal agency for the purpose of the Privacy Act); Armstrong v. Executive Office of the President, 90 F.3d 553, 555–56 (D.C. Cir. 1996) (National Security Council not an agency within the meaning of FOIA). The *Irwin* memorial line of cases includes *Dong v. Smithsonian.*

[29] *See Rushforth, supra* note 143, 762 F.2d at 1043; Sweetland v. Walters, *supra* note 143, 60 F.3d 852 at 855.

[30] *See, e.g.*, Ehm v. National Railroad Passenger Corporation, 732 F.2d 1250, 1255 (5th Cir.1984), *cert. denied*, 469 U.S. 982, 105 S. Ct. 387, 83 L. Ed. 2d 322 (1984).

[31] This portion of the Act effectively overrules *SDC Dev. Corp. v. Mathews*, 542 F.2d 1116 (9th Cir. 1976) (finding that an agency-created database was library material exempt from FOIA requests under the Records Disposal Act's library material exclusion provision).

[32] H.R. Rep. No. 104–795, 104th Cong., 2d Sess., 30 (1996). See note 158, *infra.*

[33] 5 U.S.C. § 552(h)(1).

[34] *Id.*

[35] *Id.*

[36] 5 U.S.C. § 552(i).

[37] 5 U.S.C. § 552(j).

public understanding of FOIA exemptions through publications of concise exemption descriptions and exemption-eligible categories of agency records in both the agency's handbook issued under Subsection (g) and the agency's annual FOIA report; and 6) designating one or more FOIA Public Liaisons.[38]

Subsection (*l*) sets forth the duties of the FOIA Public Liaisons, who report to the agency chief FOIA officer and act as the supervisory official to whom a requester may raise additional concerns about the service received from the FOIA Requester Center.[39] FOIA Public Liaisons assist in reducing delays, increasing transparency and understanding the status of requests, and assisting in the resolution of disputes.[40]

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Even with a presumption of openness, two basic questions, as we will see below, must be confronted in all FOIA cases: what is an agency? and what is an agency record? The following cases address these fundamental questions.

B. Defining Agency and Agency Records

Forsham v. Harris

445 U.S. 169 (1980)

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The Freedom of Information Act, 5 U.S.C. § 552, empowers federal courts to order an "agency" to produce "agency records improperly withheld" from an individual requesting access. § 552(a)(4)(B). We hold here that written data generated, owned, and possessed by a privately controlled organization receiving federal study grants are not "agency records" within the meaning of the Act when copies of those data have not been obtained by a federal agency subject to the FOIA. Federal participation in the generation of the data by means of a grant from the Department of Health, Education, and Welfare (HEW) does not make the private organization a federal "agency" within the terms of the Act. Nor does this federal funding in combination with a federal right of access render the data "agency records" of HEW, which is a federal "agency" under the terms of the Act.

I

In 1959, a group of private physicians and scientists specializing in the treatment of diabetes formed the University Group Diabetes Program (UGDP). The UGDP conducted a long-term study of the effectiveness of five diabetes treatment regimens. Two of these treatment regimens involved diet control in combination with the administration of either tolbutamide, or phenformin hydrochloride, both "oral hypoglycemic" drugs. The UGDP's participating physicians were located at 12 clinics nationwide and the study was coordinated at the Coordinating Center of the University of Maryland.

The study generated more than 55 million records documenting the treatment of over 1,000 diabetic patients who were monitored for a 5-to 8-year period. In 1970, the UGDP presented the initial results of its study indicating that the treatment of adult-onset diabetics with tolbutamide increased the risk of death from cardiovascular disease over that present when diabetes was treated by the other methods studied. The UGDP later expanded these findings to report a similarly increased incident of heart disease when patients were treated with phenformin hydrochloride. These findings have in turn generated substantial professional debate.

The Committee on the Care of the Diabetic (CCD), a national association of physicians involved in the treatment of diabetes mellitus patients, have been among those critical of the UGDP study. CCD

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38 5 U.S.C. § 552(k).

39 *Id.*

40 *Id.*

requested the UGDP to grant it access to the raw data in order to facilitate its review of the UGDP findings, but UGDP has declined to comply with that request. CCD therefore sought to obtain the information under the Freedom of Information Act. The essential facts are not in dispute, and we hereafter set forth those relevant to our decision.

The UGDP study has been solely funded by federal grants in the neighborhood of $15 million between 1961 and 1978. These grants were awarded UGDP by the National Institute of Arthritis, Metabolism, and Digestive Diseases (NIAMDD), a federal agency, pursuant to the Public Health Service Act, 42 U.S.C. § 241(c). NIAMDD has not only awarded the federal grants to UGDP, but has exercised a certain amount of supervision over the funded activity. Federal regulations governing supervision of grantees allow for the review of periodic reports submitted by the grantee and on-site visits, and require agency approval of major program or budgetary changes. It is undisputed, however, both that the day-to-day administration of grant-supported activities is in the hands of a grantee, and that NIAMDD's supervision of UGDP conformed to these regulations.

The grantee has also retained control of its records: the patient records and raw data generated by UGDP have at all times remained in the possession of that entity, and neither the NIAMDD grants nor related regulations shift ownership of such data to the Federal Government.

Although no employees of the NIAMDD have reviewed the UGDP records, the Institute did contract in 1972 with another private grantee, the Biometric Society, for an assessment of the validity of the UGDP study. The Biometric Society was given direct access to the UGDP raw data by the terms of its contract with NIAMDD. The contract with the Biometric Society, however, did not require the Society to seek access to the UGDP raw data, nor did it require that any data actually reviewed be transmitted to the NIAMDD. While the Society did review some UGDP data, it did not submit any raw data reviewed by it to the NIAMDD. The Society issued a report to the Institute in 1974 concluding that the UGDP results were "mixed" but "moderately strong."

An additional connection between the Federal Government and the UGDP study has occurred through the activities of the Food and Drug Administration. After the FDA was apprised of the UGDP results, the agency issued a statement recommending that physicians use tolbutamide in the treatment of diabetes only in limited circumstances. After the UGDP reported finding a similarly higher incidence of cardiovascular disease with the administration of phenformin, the FDA proposed changes in the labeling of these oral hypoglycemic drugs to warn patients of cardiovascular hazards. The FDA deferred further action on this labeling proposal, however, until the Biometric Society completed its review of the UGDP study.

After the Biometric study was issued, FDA renewed its proposal to require a label warning that oral hypoglycemics should be used only in cases of adult onset, stable diabetes that could not be treated adequately by a combination of diet and insulin. The FDA clearly relied on the UGDP study in renewing this position. …

Although this labeling proposal has not yet become final, other FDA regulatory action has been taken. On July 25, 1977, the Secretary of HEW suspended the New Drug Application for phenformin, one of the oral hypoglycemic medications studied by the UGDP. The decision was premised in part on the findings of the UGDP study. …

Petitioners had long since initiated a series of FOIA requests seeking access to the UGDP raw data. On August 7, 1975, HEW denied their request for the UGDP data on the grounds that no branch of HEW had ever reviewed or seen the raw data; that the FDA's proposed relabeling action relied on the UGDP published reports and not on an analysis of the underlying data; that the data were the property of the UGDP, a private group; and that the agencies were not required to acquire and produce those data under the FOIA. The following month petitioners filed this FOIA suit in the United States District Court for the District of Columbia to require HEW to make available all of the raw data compiled by UGDP. The District Court granted summary judgment in favor of respondents, holding that HEW properly denied the request on the ground that the patient data did not constitute "agency records" under the FOIA.

The Court of Appeals affirmed on the same rationale. … The court found that although NIAMDD

is a federal agency, its grantees are not federal agencies. … Although HEW has a right of access to the documents, the court reasoned that this right did not render the documents "agency records" since the FOIA only applies to records which have been "created or obtained … in the course of doing its work." …

II

As we hold in the companion case of *Kissinger v. Reporters Committee for Freedom of the Press,* 445 U.S. 136, it must be established that an "agency" has "improperly withheld agency records" for an individual to obtain access to documents through an FOIA action. We hold here that HEW need not produce the requested data because they are *not* "agency records" within the meaning of the FOIA. In so holding, we reject three separate but related claims of petitioners: (1) the data they seek are "agency records" because they were at least "records" of UGDP, and UGDP in turn received its funds from a federal agency and was subject to some supervision by the agency in its use of those funds; (2) the data they seek are "agency records" because HEW, concededly a federal agency, had sufficient authority under its grant agreement to have obtained the data had it chosen to do so; and (3) the data are "agency records" because they formed the basis for the published reports of UGDP, which in turn were relied upon by the FDA in the actions described above.

Congress undoubtedly sought to expand public rights of access to Government information when it enacted the Freedom of Information Act, but that expansion was a finite one. Congress limited access to "agency records," 5 U.S.C. § 552(a)(4)(B), but did not provide any definition of "agency records" in that Act. The use of the word "agency" as a modifier demonstrates that Congress contemplated some relationship between an "agency" and the "record" requested under the FOIA. With due regard for the policies and language of the FOIA, we conclude that data generated by a privately controlled organization which has received grant funds from an agency (hereafter a grantee), but which data has not at any time been obtained by the agency, are not "agency records" accessible under the FOIA.

A

We first examine petitioners' claim that the data were at least records of UGDP, and that the federal funding and supervision of UGDP alone provides the close connection necessary to render *its* records "agency records" as that term is used in the Freedom of Information Act. Congress did not define "agency record" under the FOIA, but it did define "agency." The definition of "agency" reveals a great deal about congressional intent as to the availability of records from private grantees under the FOIA, and thus, a great deal about the relevance of federal funding and supervision to the definitional scope of "agency records." Congress excluded private grantees from FOIA disclosure obligations by excluding them from the definition of "agency," an action consistent with its prevalent practice of preserving grantee autonomy. It has, for example, disclaimed any federal property rights in grantee records by virtue of its funding. We cannot agree with petitioners in light of these circumstances that the very federal funding and supervision which Congress found insufficient to make the grantee an *agency* subject to the FOIA nevertheless makes its *records* accessible under the same Act.

Under 5 U.S.C. § 552(e) an "agency" is defined as:

> "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government … , or any independent regulatory agency."

The legislative history indicates unequivocally that private organizations receiving federal financial assistance grants are not within the definition of "agency." In their Report, the conferees stated that they did "not intend to include corporations which receive appropriated funds but are neither chartered by the Federal Government nor controlled by it, such as the Corporation for Public Broadcasting." H. Conf. Rep. No. 93-1380, pp. 14–15 (1974), reprinted in Freedom of Information Act and Amendments of 1974 Source Book 231–232 (Jt. Comm. Print 1975). Through operation of this exclusion, Congress chose not to confer any direct public rights of access to such federally funded project information.

Congress could have provided that the records generated by a federally funded grantee were federal property even though the grantee has not been adopted as a federal entity. But Congress has not done so, reflecting the same regard for the autonomy of the grantee's records as for the grantee itself. Congress expressly requires an agency to use "procurement contracts" when the "principal purpose of the instrument is the acquisition … of property or services for the direct benefit or use of the Federal Government … ." Federal Grant and Cooperative Agreement Act of 1977, § 4, 92 Stat. 4, 41 U.S.C. § 503 (1976 ed., Supp. II). In contrast, "grant agreements" must be used when money is given to a recipient "in order to accomplish a public purpose of support or stimulation authorized by Federal statute, rather than acquisition … of property or services. …" § 5, 41 U.S.C. § 504 (1976 ed., Supp. II). As in this case, where a grant was used, there is no dispute that the documents created are the property of the recipient and not the Federal Government. *See* 45 CFR § 74.133 (1979). The HEW regulations do retain a right to acquire the documents. Those regulations, however, clearly demonstrate that unless and until that right is exercised the records are only the "records of grantees." …

The fact that Congress has chosen not to make a federal grantee an "agency" or to vest ownership of the records in the Government does not resolve with mathematical precision the question of whether the granting agency's funding and supervisory activities nevertheless make the grantee's records "agency records." Records of a nonagency certainly could become records of an agency as well. But if Congress found that federal funding and supervision did not justify direct access to the grantee's records as it clearly did, we fail to see why we should nevertheless conclude that those identical activities were intended to permit indirect access through an expansive definition of "agency records." Such a conclusion would not implement the intent of Congress; it would defeat it.

These considerations do not finally conclude the inquiry, for conceivably other facts might indicate that the documents could be "agency records" even though generated by a private grantee. The definition of "agency" and congressional policy towards grantee records indicate, however, that Congress did not intend that grant supervision short of Government control serve as a sufficient basis to make the private records "agency records" under the Act, and reveal a congressional determination to keep federal grantees free from the direct obligations imposed by the FOIA. … .

B

Petitioners seek to prevail on their second and third theories, even though their first be rejected, by invoking a broad definition of "agency records," so as to include all documents created by a private grantee to which the Government has access, and which the Government has used. We do not believe that this broad definition of "agency records," a term undefined in the FOIA, is supported by either the language of that Act or its legislative history. We instead agree with the opinions of the courts below that Congress contemplated that an agency must first either create or obtain a record as a prerequisite to its becoming an "agency record" within the meaning of the FOIA. …

We think the foregoing reasons dispose of all petitioners' arguments. We therefore conclude that the data petitioners seek are not "agency records" within the meaning of the FOIA. UGDP is not a "federal agency" as that term is defined in the FOIA, and the data petitioners seek have not been created or obtained by a federal agency. Having failed to establish this threshold requirement, petitioners' FOIA claim must fail, and the judgment of the Court of Appeals is accordingly

AFFIRMED.

JUSTICES BRENNAN and MARSHALL dissented.

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U.S. Department of Justice v. Tax Analysts

492 U.S. 136 (1989)

JUSTICE MARSHALL delivered the opinion of the Court.

The question presented is whether the Freedom of Information Act (FOIA or Act), 5 U.S.C. § 552 (1982 ed. and Supp. V), requires the United States Department of Justice (Department) to make available

copies of district court decisions that it receives in the course of litigating tax cases on behalf of the Federal Government. We hold that it does.

I

The Department's Tax Division represents the Federal Government in nearly all civil tax cases in the district courts, the courts of appeals, and the Claims Court. Because it represents a party in litigation, the Tax Division receives copies of all opinions and orders issued by these courts in such cases. Copies of these decisions are made for the Tax Division's staff attorneys. The original documents are sent to the official files kept by the Department.…

Respondent Tax Analysts publishes a weekly magazine, Tax Notes, which reports on legislative, judicial, and regulatory developments in the field of federal taxation to a readership largely composed of tax attorneys, accountants, and economists. As one of its regular features, Tax Notes provides summaries of recent federal-court decisions on tax issues. To supplement the magazine, Tax Analysts provides full texts of these decisions in microfiche form. Tax Analysts also publishes Tax Notes Today, a daily electronic data base that includes summaries and full texts of recent federal-court tax decisions.

In late July 1979, Tax Analysts filed a FOIA request in which it asked the Department to make available all district court tax opinions and final orders received by the Tax Division earlier that month. The Department denied the request on the ground that these decisions were not Tax Division records. …

II

In enacting the FOIA 23 years ago, Congress sought " 'to open agency action to the light of public scrutiny.' " Congress did so by requiring agencies to adhere to " 'a general philosophy of full agency disclosure.' " Congress believed that this philosophy, put into practice, would help "ensure an informed citizenry, vital to the functioning of a democracy."

The FOIA confers jurisdiction on the district courts "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld." § 552(a)(4)(B). Under this provision, "federal jurisdiction is dependent on a showing that an agency has (1) 'improperly' (2) 'withheld' (3) 'agency records.' " Unless each of these criteria is met, a district court lacks jurisdiction to devise remedies to force an agency to comply with the FOIA's disclosure requirements.

In this case, all three jurisdictional terms are at issue. Although these terms are defined neither in the Act nor in its legislative history, we do not write on a clean slate. Nine Terms ago we decided three cases that explicated the meanings of these partially overlapping terms. *Kissinger v. Reporters Committee for Freedom of Press,* 445 U.S. 136 (1980); *Forsham v. Harris,* 445 U.S. 169 (1980); *GTE Sylvania, Inc. v. Consumers Union of United States, Inc.,* 445 U.S. 375 (1980). These decisions form the basis of our analysis of Tax Analysts' requests.

A

We consider first whether the district court decisions at issue are "agency records," a term elaborated upon both in *Kissinger* and in *Forsham. Kissinger* involved three separate FOIA requests for written summaries of telephone conversations in which Henry Kissinger had participated when he served as Assistant to the President for National Security Affairs from 1969 to 1975, and as Secretary of State from 1973 to 1977. Only one of these requests — for summaries of specific conversations that Kissinger had had during his tenure as National Security Adviser — raised the "agency records" issue. At the time of this request, these summaries were stored in Kissinger's office at the State Department in his personal files. We first concluded that the summaries were not "agency records" at the time they were made because the FOIA does not include the Office of the President in its definition of "agency." 445 U.S. at 156. We further held that these documents did not acquire the status of "agency records" when they were removed from the White House and transported to Kissinger's office at the State Department, a FOIA-covered agency:

"We simply decline to hold that the physical location of the notes of telephone

> conversations renders them 'agency records.' The papers were not in the control of the State Department at any time. They were not generated in the State Department. They never entered the State Department's files, and they were not used by the Department for any purpose. If mere physical location of papers and materials could confer status as an 'agency record' Kissinger's personal books, speeches, and all other memorabilia stored in his office would have been agency records subject to disclosure under the FOIA."

Forsham, in turn, involved a request for raw data that formed the basis of a study conducted by a private medical research organization. Although the study had been funded through federal agency grants, the data never passed into the hands of the agencies that provided the funding, but instead was produced and possessed at all times by the private organization. We recognized that "[r]ecords of a nonagency certainly could become records of an agency as well," 445 U.S. at 181, but the fact that the study was financially supported by a FOIA-covered agency did not transform the source material into "agency records." Nor did the agencies' right of access to the materials under federal regulations change this result. As we explained, "the FOIA applies to records which have been *in fact* obtained, and not to records which merely *could have been obtained.*" (emphasis in original; footnote omitted).

Two requirements emerge from *Kissinger* and *Forsham,* each of which must be satisfied for requested materials to qualify as "agency records." First, an agency must "either create or obtain" the requested materials "as a prerequisite to its becoming an 'agency record' within the meaning of the FOIA." In performing their official duties, agencies routinely avail themselves of studies, trade journal reports, and other materials produced outside the agencies both by private and governmental organizations. To restrict the term "agency records" to materials generated internally would frustrate Congress' desire to put within public reach the information available to an agency in its decision-making processes. As we noted in *Forsham,* "The legislative history of the FOIA abounds with … references to records *acquired* by an agency." (emphasis added).

Second, the agency must be in control of the requested materials at the time the FOIA request is made. By control we mean that the materials have come into the agency's possession in the legitimate conduct of its official duties. This requirement accords with *Kissinger's* teaching that the term "agency records" is not so broad as to include personal materials in an employee's possession, even though the materials may be physically located at the agency. This requirement is suggested by *Forsham* as well, where we looked to the definition of agency records in the Records Disposal Act. Under that definition, agency records include "all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government *under Federal law or in connection with the transaction of public business ... . "* (emphasis added)[41]. …

Applying these requirements here, we conclude that the requested district court decisions constitute "agency records." First, it is undisputed that the Department has obtained these documents from the district courts. This is not a case like *Forsham,* where the materials never in fact had been received by the agency. The Department contends that a district court is not an "agency" under the FOIA, but this truism is beside the point. The relevant issue is whether an agency covered by the FOIA has "create[d] or obtaine[d] the materials sought, *Forsham,* 445 U.S., at 182, not whether the organization from which the documents originated is itself covered by the FOIA.

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[41] In *GTE Sylvania, Inc. v. Consumers Union of United States, Inc.,* 445 U.S. 375, 385 (1980), we noted that Congress intended the FOIA to prevent agencies from refusing to disclose, among other things, agency telephone directories and the names of agency employees. We are confident, however, that requests for documents of this type will be relatively infrequent. Common sense suggests that a person seeking such documents or materials housed in an agency library typically will find it easier to repair to the Library of Congress, or to the nearest public library, rather than to invoke the FOIA's disclosure mechanisms. To the extent such requests are made, the fact that the FOIA allows agencies to recoup the costs of processing requests from the requester may discourage recourse to the FOIA where materials are readily available elsewhere.

Second, the Department clearly controls the district court decisions that Tax Analysts seeks. Each of Tax Analysts' FOIA requests referred to district court decisions in the agency's possession at the time the requests were made. … Furthermore, the court decisions at issue are obviously not personal papers of agency employees. …

For the reasons stated, the Department improperly withheld agency records when it refused Tax Analysts' requests for copies of the district court tax decisions in its files. Accordingly, the judgment of the Court of Appeals is

AFFIRMED.

JUSTICE WHITE concurs in the judgment.

JUSTICE BLACKMUN, dissenting.

The Court in this case has examined once again the Freedom of Information Act (FOIA), 5 U.S.C. § 552. It now determines that under the Act the Department of Justice on request must make available copies of federal district court orders and opinions it receives in the course of its litigation of tax cases on behalf of the Federal Government. The majority holds that these qualify as agency records, within the meaning of § 552(a)(4)(B), and that they were improperly withheld by the Department when respondent asked for their production. The Court's analysis, I suppose, could be regarded as a fairly routine one.

I do not join the Court's opinion, however, because it seems to me that the language of the statute is not that clear or conclusive on the issue and, more important, because the result the Court reaches cannot be one that was within the intent of Congress when the FOIA was enacted.

Respondent Tax Analysts, although apparently a nonprofit organization for federal income tax purposes, is in business and in that sense is a commercial enterprise. It sells summaries of these opinions and supplies full texts to major electronic data bases. The result of its now-successful effort in this litigation is to impose the cost of obtaining the court orders and opinions upon the Government and thus upon taxpayers generally. There is no question that this material is available elsewhere. But it is quicker and more convenient, and less "frustrat[ing]," *see ante,* at 2845, for respondent to have the Department do the work and search its files and produce the items than it is to apply to the respective court clerks.

This, I feel, is almost a gross misuse of the FOIA. What respondent demands, and what the Court permits, adds nothing whatsoever to public knowledge of Government operations. That, I had thought, and the majority acknowledges, was the real purpose of the FOIA and the spirit in which the statute has been interpreted thus far. I also sense, I believe not unwarrantedly, a distinct lack of enthusiasm on the part of the majority for the result it reaches in this case.

If, as I surmise, the Court's decision today is outside the intent of Congress in enacting the statute, Congress perhaps will rectify the decision forthwith and will give everyone concerned needed guidelines for the administration and interpretation of this somewhat opaque statute.

NOTES AND QUESTIONS

5supp-1. How does the Court in *Forsham* define agency? Why is the definition so important to the function of this Act? What is the significance of the fact that the documents sought were created by an agency exempt from FOIA? Are departments within the Executive Office of the President that assist the president with administrative functions, but do not have administrative authority, exempt? The D.C. Circuit has held that many of these departments are exempt. *See, Citizens for Responsibility and Ethics in Washington v. Office of Admin.*, 566 F.3d 219 (D.C. Cir. 2009).

5supp-2. In 1998 Congress passed the Data Access Act (DAA), [Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, 112 Stat. 2681-495 (1998)],

commonly referred to as the Shelby Amendment. The Shelby Amendment requires, in part, "that the Director of OMB [Office of Management and Budget] amend … the OMB Circular A-110 to require Federal awarding agencies to ensure that all data produced under an award will be made available to the public through the procedures established under the Freedom of Information Act." In October, 1999, OMB implemented the required changes to Circular A-110. The amended circular provides, in part:

> … [I]n response to a Freedom of Information Act (FOIA) request for research data relating to published research findings produced under an award that were used by the Federal Government in developing a regulation, the Federal awarding agency shall request, and the recipient shall provide, within a reasonable time, the research data so that they can be made available to the public through the procedures established under the FOIA.[42]

Does this adequately implement the intent of Congress expressed in the DAA?

The question of what constitutes "an action that has the force and effect of law" is one that will likely generate some conflict in the coming years. The OMB interpretive material states that a rule … or an administrative order … falls within the meaning of the key phrase. In contrast, agency guidance documents fall outside of the agency actions that trigger publication under the OMB requirements.…[43] How would *Forsham* have been decided under your reading of the DAA? How does it come out in light of OMB's guidelines?

5supp-3. To what extent has information placed on agency websites obviated the need to file FOIA requests to obtain information? *See* Martin E. Halstuk, *Speed Bumps on the Information Superhighway: A Study on Federal Agency Compliance with the Electronic Freedom of Information Act of 1996,* 5 COMM. L. & POL'Y 423 (2000). *See also* Paul M. Schoenhard, Note *Disclosure of Government Information Online: A New Approach from an Existing Framework,* 15 HARV. J. LAW & TEC. 497 (2002).

5supp-4. What if an agency file is created by one agency and then given to a private entity? Is it still an agency record? Must the private entity give it up? How does *Tax Analyst* define agency file? What if this information is then used to gain a competitive advantage? For instance, what if the requested documents provide information about future government plans that are going to affect the securities markets? Would acting on such information violate federal securities laws? *See* Donna Nagy & Richard Painter, *Plugging Leaks and Lowering Levees in the Federal Government: Practical Solutions for Securities Trading Based on Political Intelligence*, 2014 U. ILL. L. REV (forthcoming Spring 2014). For a discussion of how unauthorized government leaks fit into this picture *see* David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information*, 127 HARV. L. REV. 512 (2013).

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[42] Fed. Reg. 54926, vol. 64, No. 195.

[43] Robert L. Fischman & Vicky J. Meretsky, *Endangered Species Information: Access and Control*, 41 WASHBURN L. J. 90, 102–03 (2001). Copyright © 2001 Washburn Law Journal. All rights reserved.

5supp-5. In *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 169 (1980), the Court dealt with the related issue of whether agency records obtained or created by an agency subject to FOIA records obtained or created by an agency subject to FOIA and then transferred to a nonagency remain accessible under FOIA. The Court noted that for FOIA to apply, it must be shown that the agency remained in "possession or control" of the records. In *Kissinger,* the Court concluded that certain records created by the Secretary of State and subsequently transferred to a nonagency were no longer in that agency's control and thus, not subject to FOIA.

5supp-6. What if the agency simply says that it cannot find the records being asked for? How thoroughly must the agency search? Courts have held that the agency's search process, not the outcome of the search, is the deciding factor. Whether or not the search is adequate turns on whether the search process is reasonable. *See*, *Trentadue v. F.B.I.*, 572 F.3d 794 (10th Cir. 2009).

C. FOIA Exemptions

Adapted from Aman, Rookard and Mayton, Administrative Law § 16.4

FOIA … designates nine exemptions from the Act's disclosure requirements.[44] For an exemption to apply to requested agency material, the agency must reasonably foresee that disclosure would be harmful to the agency interest protected by the exemption.[45] In addition, under President Obama's earlier-mentioned 2009 Memoranda, all agencies "should adopt a presumption in favor of disclosure" with regard to "all decisions involving FOIA."**[46]** As a result, per Attorney General Eric Holder's own 2009 Memorandum, the mere fact that an agency can legally, technically demonstrate that records are within the scope of a FOIA exception is insufficient cause to withhold those records.[47] The DOJ will only defend a FOIA denial if the agency foresees the disclosure would harm an interest protected by the exemption or disclosure is prohibited by law.**[48]**

Exemption (b)(1): National Security Information

FOIA does not apply to matters that are "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order."[49]

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[44] According to K.C. Davis, FOIA as interpreted by the courts is far superior to the Act as written. He also notes that the right at common law to inspect and copy public records is generally overlooked. *See* 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 34–36 (2d ed. Supp. 1982).

[45] *Id.*

[46] WENDY R. GINSBURG, CONG. RESEARCH SERV., R40766, FREEDOM OF INFORMATION ACT (FOIA): ISSUES FOR THE 111TH CONGRESS, 12 (2009).

[47] *Id.*

[48] *Id.*

[49] 5 U.S.C. § 552(b)(1); *see also* ACLU v. DOJ, 640 F. App'x 9, 10 (D.C. 2016) (confirming Exemption 1 applies to classified information under national security executive order).

Congress amended the national security exemption in 1974, … overruling *EPA v. Mink*,[50] … and authorizing judicial *in camera* review of classified documents. The 1974 FOIA amendments sought to minimize automatic deference to the Executive.

The current judicial approach to Exemption 1, as outlined in *King v. U.S. Department of Justice* (presented *infra*),[51] allows the agency significant discretion to determine what Exemption 1 does and does not cover. As in all FOIA cases of contested exemptions, the district court must review *de novo* any claim advanced[52] and the agency must bear the burden of justifying its decision to withhold the information.[53] Congress intended the courts to accord substantial weight to an agency's affidavit concerning the details of the classification of the disputed record.

Exemption (b)(2): Internal Rules and Practices

FOIA's disclosure mandate does not apply to matters "related solely to the internal personnel rules and practices of an agency."[54] …

[T]hree elements that must be satisfied in order for information to fit within Exemption 2: 1) the information must be related to "personnel" rules and practices; 2) the information must relate "solely" to those personnel rules and practices;[55] and 3) the information must be "internal."[56] …

There is no doubt that the primary criterion for determining the exemption's scope is … the requirement that the information be related to "personnel."[57] To the extent the material requested also relates solely to the internal personnel rules and practices of an agency, which means there is no genuine and significant public interest in its disclosure, the material is eligible for protection.[58]

Exemption (b)(3): Exemption by Statute

Under FOIA, an agency may refuse to release information if the information is

> specifically exempted from disclosure by statute (other than § 552b of this title) [The Privacy Act], provided that such statute (A) requires that the matters be withheld from the public in such

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[50] 410 U.S. 73, 93 S. Ct. 827, 35 L. Ed. 2d 119 (1973), *superseded by statute as stated in* Halpern v. FBI, 181 F.3d 279 (2d Cir.1999).

[51] 830 F.2d 210 (D.C.Cir.1987) (Exemption 1 categorization by FBI of files kept on civil rights lawyer who died in 1952 remanded to district court for further examination).

[52] 5 U.S.C. § 552(a)(4)(B).

[53] *Id.*

[54] 5 U.S.C. § 552(b)(2).

[55] *See, e.g.,* Rojas v. FAA, 941 F.3d 394, 402 (9th Cir. 2019) (ensuring Exemption 2 protection for screening test used in the selection of employees). Specifically, Exemption 2 protects records *about* personnel rather than records created *for* personnel. *See*, Nat'l Sec. Counselors v. CIA, 960 F. Supp. 2d 101, 172 (D.D.C. 2013) (finding internal training documents are not protected under Exemption 2 not because they "are not human resources documents" but because they "concern an agency's internal rules and practices for its personnel to follow. . .").

[56] *Milner*, 131 S. Ct. at 1264–65. *See Milner v. U.S. Dep't of the Navy* (*infra*)

[57] *Id.*

[58] *Id.* For additional discussion regarding *Milner*, see Sullivan, *supra* note 12, at 74–76 ("As *Milner* shows, the government regularly invokes exemptions other than Exemption 1 to withhold records on national security grounds. In many cases, the government cannot invoke Exemption 1 because the records are not classified.").

> a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.[59]

Courts employ a two-step approach in reviewing Exemption 3 claims. First, the court determines whether the statute is a withholding statute by the standards set forth in Exemption (b)(3).[60] Secondly, the court then ascertains whether the information withheld falls within the boundaries of the nondisclosure statute.[61] The (b)(3) Exemption does not provide a list of specific Federal statutes that would override FOIA's disclosure mandate. Rather, Congress chose to provide a generic exemption standard so that courts could decide what these statutory conflicts were on a case-by-case basis.

> Exemption 3 is applicable only to Federal statutes…

Exemption (b)(4): Trade Secrets

Also exempt from disclosure under FOIA are "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential."[62]

There is no clear definition of "trade secrets." Although the term arguably encompasses virtually any information that provides anyone a competitive advantage, the D.C. Circuit has defined the phrase more narrowly, as "a secret, commercially valuable plan, formula, process or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort."[63] The same court also required that there be a "direct relationship" between the trade secret and the productive process.[64] As we have seen, the Trade Secrets Act[65] is not a

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[59] 5 U.S.C. § 552(b)(3). .

[60] CIA v. Sims, 471 U.S. 159, 167, 105 S. Ct. 1881, 1887, 85 L. Ed. 2d 173, 182 (1985), *distinguished by* Wolk L. Firm v. United States of Am. Nat'l Transportation Safety Bd., 392 F. Supp. 3d 514 (E.D. Pa. 2019) (while the issue of deference remains unclear, even if the Court does not give deference to the agency's interpretation, the Court finds that cell phone video falls within the material covered by the asserted Exemption 3 statute, 49 U.S.C. § 1114(c)(1)); *see also* Reporters Committee for Freedom of the Press v. U.S. Department of Justice, 816 F.2d 730, 735 (D.C.Cir.1987), *remanded* 831 F.2d 1124 (1987), *rev'd*, 489 U.S. 749, 109 S. Ct. 1468, 103 L. Ed. 2d 774 (1989); Essential Info, Inc. v. USIA, 134 F.3d 1165, 1168 (D.C.Cir.1998) (holding that a statute that prohibits "dissemination" and "distribution" of information qualifies as a "nondisclosure" statute).

[61] Irons & Sears v. Dann, 606 F.2d 1215, 1219 (D.C.Cir.1979), *cert. denied sub nom*. Irons & Sears v. Commissioner of Patents & Trademarks, 444 U.S. 1075, 100 S. Ct. 1021, 62 L. Ed. 2d 757 (1980). *See also* City of Chicago v. U.S. Department of Treasury, 384 F.3d 429 (7th Cir.2004) (holding that there is no irreconcilable conflict between the prohibition of the use of federal funds to process FOIA requests in § 644 of the Consolidated Appropriations Resolution of 2003 and granting the City access to the databases; rather, City should use a court-appointed special master paid for by the City to produce the files).

[62] 5 U.S.C. § 552(b)(4).

[63] Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1288 (D.C.Cir.1983). *See also* Anderson v. Department of HHS, 907 F.2d 936, 944 (10th Cir.1990) ("We agree with the D.C. Circuit's narrow definition because we believe that it is more consistent with the policies behind the FOIA than the broad Restatement definition. Of the arguments put forth by that court in support of its construction, we find most compelling the observation the adoption of the Restatement definition of 'trade secrets' would render superfluous the 'commercial or financial information' prong of Exemption 4 because there would be no category of information falling within the latter but outside the former. Like the D.C. Circuit, we are reluctant to construe the FOIA in such a manner.").

[64] *Id. See also* United Technologies Corp. v. U.S. Department of Defense, 601 F.3d 557 (D.C. Cir.2010) (holding that documents, even when redacted, that appear to reveal details about proprietary manufacturing and quality control systems and could be used by competitors to improve their own manufacturing and quality control systems constitute an affirmative use of proprietary information and are not allowed under FOIA).

[65] 18 U.S.C. § 1905.

valid Exemption (b)(3) withholding statute.[66] The D.C. Circuit, however, has held that Exemption 4 and the Trade Secrets Act are coextensive.[67]

The majority of Exemption 4 cases focus on whether the information sought falls within the second category of the exemption. To do so, the information must be commercial or financial *and* obtained from a person *and* be privileged[68] or confidential.[69]

Exemption (b)(5): Intra and Inter Agency Memoranda

The fifth exemption of FOIA permits an agency to withhold "inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency."[70]

Exemption 5 is generally construed to "exempt those documents, and only those documents, normally privileged in the civil discovery context."[71] Its three main components are the deliberative process privilege (executive privilege), the attorney work-product privilege, and the attorney-client privilege.[72] Under Exemption 5, the threshold issue is whether a record is the type covered by the statutory language "inter-agency or intra-agency memorandums."[73] The courts have construed the scope of Exemption 5 broadly to include documents created outside of an agency.[74]

Exemption (b)(6): Privacy Protection

FOIA also authorizes agencies to withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[75] In

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[66] *See* CNA Financial Corp. v. Donovan, 830 F.2d 1132, 1137–43 (D.C.Cir.1987), *cert. denied sub nom*. CNA Financial Corp. v. McLaughlin, 485 U.S. 977, 108 S. Ct. 1270, 99 L. Ed. 2d 481 (1988).

[67] *Id.* at 1144. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 317–19 and n. 49, 99 S. Ct. 1705, 1725–26 and n. 49, 60 L. Ed. 2d 208 (1979).

[68] *See* Washington Post Co. v. U.S. Department of HHS, 795 F.2d 205, 208 (D.C.Cir.1986), *appeal after remand* 865 F.2d 320 (1989) (J. Scalia) (agency waived its right to raise "privilege" defense on remand by not doing so at the outset of the case).

[69] *See, e.g.*, Gulf & Western Industries, Inc. v. United States, 615 F.2d 527, 529 (D.C.Cir.1979); Consumers Union v. VA, 301 F.Supp. 796, 802 (S.D.N.Y.1969), *appeal dismissed as moot* 436 F.2d 1363 (2d Cir.1971).

[70] 5 U.S.C. § 552(b)(5).

[71] *Sears, Roebuck & Co.*, *supra* note 201, 421 U.S. at 149, 95 S. Ct. at 1516, 44 L. Ed. 2d 29 (1975); *see also* FTC v. Grolier, Inc., 462 U.S. 19, 26, 103 S. Ct. 2209, 2214, 76 L. Ed. 2d 387 (1983) ("The test under Exemption 5 is whether the documents would be 'routinely' or 'normally' dismissed upon a showing of relevance.").

[72] The U.S. Supreme Court also extended Exemption 5 to include confidential factual statements made to air crash investigators (United States v. Weber Aircraft, Corp., 465 U.S. 792, 798, 104 S. Ct. 1488, 1492, 79 L. Ed. 2d 814 (1984); Machin v. Zuckert, 316 F.2d 336 (D.C.Cir.1963)) and confidential commercial information protected by FED.R.CIV.P. 26c(7) (Federal Open Market Committee v. Merrill, 443 U.S. 340, 360, 99 S. Ct. 2800, 2812, 61 L. Ed. 2d 587 (1979)). *But see* Burka v. Department of HHS, 87 F.3d 508, 517 (D.C.Cir.1996) (ruling that agency must show that discovery material is protected for reasons similar to FOIA material before court will deem the information privileged).

[73] *See* United States Dep't of Justice v. Julian, 486 U.S. 1, 11 n. 9, 108 S. Ct. 1606, 100 L. Ed. 2d 1 (1988) (Scalia, J., dissenting) (stating that "the most natural meaning of the phrase 'intra-agency memorandum' is a memorandum that is addressed both to and from employees of a single agency-as opposed to an 'inter-agency memorandum,' which would be a memorandum between employees of two different agencies").

[74] *See, e.g.*, General Electric Co. v. EPA, 18 F.Supp.2d 138, 142 (D.Mass.1998) (exempting state agency data sent to a federal agency at the request of the federal agency).

[75] 5 U.S.C. § 552(b)(6). For reform proposals, *see* Chapter 13, § 13.3 *supra*.

Department of the Air Force v. Rose,[76] the U.S. Supreme Court declared "the primary concern of Congress in drafting Exemption 6 was to provide for the confidentiality of personal matters."[77] Consequently, judicial review of Exemption 6 claims focuses not on the physical nature of the information, but rather on the information itself and the impact it will have on the privacy of the individual.[78] …

Typical privacy interests falling easily under Exemption 6 include marital status, religious affiliation, medical information, welfare payments, legitimacy of children, reputation and the like.

Exemption (b)(7): Law Enforcement Purposes

FOIA also gives the various agencies the right to withhold:

> records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a state, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source (E) would disclose techniques and procedures for law enforcement investigations or prosecutions or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual.[79]

Exemption (b)(8): Records of Financial Institutions

FOIA permits agencies to withhold information "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions."[80] There are two main purposes of Exemption 8: (1) to protect the

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[76] 425 U.S. 352, 96 S. Ct. 1592, 48 L. Ed. 2d 11 (1976).

[77] *Id.* at 376 n. 14, 96 S. Ct. at 1606 n. 14. *But see* Norwood v. FAA, 993 F.2d 570, 575 (6th Cir.1993) (holding that only items such as names and social security numbers, which "by themselves" would identify an individual, could be withheld) *modified*, No. 92–5820 (6th Cir. July 9, 1993) (stating that there might be occasions in which an agency could justifiably withhold information other than "those items which 'by themselves' would identify the individuals," but that the FAA "made no such particularized effort, relying generally on the claim that 'fragments of information' might be able to be pieced together into an identifiable set of circumstances").

[78] *See* New York Times Co. v. NASA, 852 F.2d 602 (D.C.Cir.1988) (voice recording of shuttle launch containing nonpersonal information previously released to media held not exempt under (b)(6)); *see also* Wine Hobby USA, Inc. v. IRS, 502 F.2d 133 (3d Cir.1974); Rural Housing Alliance v. U.S. Department of Agriculture, 498 F.2d 73 (D.C.Cir.1974); Howard Johnson Co. v. NLRB, 618 F.2d 1 (6th Cir.1980).

[79] 5 U.S.C. § 552(b)(7).

[80] 5 U.S.C. § 552(b)(8) (1994 & Supp. IV 1998). Courts have declined to restrict the scope of Exemption 8. *See* FOIA GUIDE, *supra* note 445, at 448. *See also* Public Citizen v. Farm Credit Admin., 938 F.2d 290, 293–94 (D.C.Cir.1991) (construing the term "financial institutions" broadly and holding that it is not limited to "depository" institutions); Gregory v. FDIC, 631 F.2d 896, 898 (D.C.Cir.1980) (finding that that Exemption 8 provides "absolute protection regardless of the circumstances underlying the regulatory agency's receipt or preparation of examination, operating or condition reports"); Feshbach v. SEC, 5 F.Supp.2d 774, 781 (N.D.Cal.1997) (holding that the term "financial institutions" includes "brokers and dealers of securities or commodities as well as self-regulatory organizations, such as the [National Association of Securities Dealers])"; Berliner, Zisser, Walter & Gallegos v. SEC, 962 F.Supp. 1348, 1352 (D.Colo.1997) (ruling that an "investment advisor company" is a "financial institution" under Exemption 8).

security and stability of banks by withholding frank evaluations and (2) to promote employee-examiner cooperation.[81] The courts tend to interpret Exemption 8 expansively;[82] in general entire documents relating to banks' conditions are exempt, with little need to show cause.[83]

Exemption (b)(9): Records of Oil Exploration

Finally, FOIA specifically exempts from disclosure "geological and geophysical information and data, including maps, concerning wells."[84] Although few agencies have invoked Exemption 9 and few courts have interpreted it,[85] one court has held that the exemption only applies to "well information of a technical or scientific nature."[86]

Exclusions

Three special protection provisions under Subsection (c), referred to as record "exclusions," authorize federal law enforcement agencies to treat certain sensitive records "as not subject to the requirements of [the FOIA]."[87] An agency that applies one of the three record exclusions will simply inform the FOIA requester that no records responsive to his FOIA request exist.[88] The (c)(1) Exclusion authorizes federal law enforcement agencies to hide the existence of records of ongoing investigations or proceedings.[89] The (c)(2) Exclusion guards against identifying confidential informants in criminal proceedings.[90] The (c)(3) Exclusion guards certain FBI foreign intelligence, counterintelligence, and antiterrorism records.[91]

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[81] *See, e.g.,* Pub. Investors Arbitration Bar Ass'n v. SEC, 930 F. Supp. 2d 55, 64 (D.D.C. 2013) (stating Exemption 8 is primarily to "ensure the security of financial institutions" and secondarily to "safeguard the relationship between the banks and their supervising agencies"), aff'd, 771 F.3d 1(D.C.Cir. 2014).

[82] *See Gregory*, 631 F.2d at 898; *Berliner*, 962 F.Supp. at 1353 (describing Exemption 8 "dual purposes" as "protecting the integrity of financial institutions and facilitating cooperation between [agencies] and the entities regulated by [them]"). *But see* McKinley v. FDIC, 268 F. Supp. 3d 234, 246 (D.D.C. 2017) (holding Exemption 8 "is not so broad as to permit the agency to refuse to identify which of the many grounds within Exemption 8 purportedly applies to each document that the agency seeks to withhold").

[83] FOIA GUIDE, *supra* note 445, at 450.

[84] 5 U.S.C. § 552(b)(9) (1994 & Supp. IV 1998).

[85] United States Dep't of Justice, Freedom of Information Act Guide & Privacy Act Overview 454 (2000). *See, e.g.*, Superior Oil Co. v. Federal Energy Regulatory Comm'n, 563 F.2d 191, 203–04 & n. 20 (5th Cir.1977) (non-FOIA case); Pennzoil Co. v. Federal Power Comm'n, 534 F.2d 627, 629–30 & n. 2 (5th Cir.1976) (non-FOIA case); National Broad. Co. v. SBA, 836 F.Supp. 121, 124 n. 2 (S.D.N.Y.1993) (mentioning Exemption 9). *See generally* Ecee, Inc. v. Federal Energy Regulatory Comm'n, 645 F.2d 339, 348–49 (5th Cir.1981) (holding that requirement that producers of natural gas submit confidential geological information was valid) (non-FOIA case); Nat. Res. Def. Council, Inc. v. U.S. Dep't of Interior, 397 F. Supp. 3d 430 (S.D.N.Y. 2019) (denying Exemption 9 when the information at issue was outside the scope); Story of Stuff Project v. U.S. Forest Service, 366 F. Supp. 3d 66, 81 (D.D.C. 2019) (interpreting the term "wells" to include borehole maps and related information and holding that the Government was correct when it withheld information claiming Exemption 9).

[86] Black Hills Alliance v. United States Forest Serv., 603 F.Supp. 117, 122 (D.S.D.1984) (withholding technical information about proposed uranium exploration drill holes).

[87] 5 U.S.C. § 552(c)(1)–(3) (1994 & Supp. IV 1998).

[88] FOIA GUIDE, *supra* note 445, at 455.

[89] *Id.* at 456.

[90] *Id.* at 458.

[91] *Id.* at 461. *See also* Exec. Order No. 12,958, 3 C.F.R. 333 (1996), *reprinted in* 50 U.S.C. § 435 note (Supp. II 1996) (classifying certain records for national security purposes).

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King v. U.S. Dept. of Justice

830 F.2d 210 (D.C. Cir. 1987)

Before ROBINSON and STARR, CIRCUIT JUDGES, and WRIGHT, SENIOR CIRCUIT JUDGE.

SPOTTSWOOD W. ROBINSON, III, CIRCUIT JUDGE:

In this Freedom of Information Act (FOIA) case, appellant, Cynthia King, seeks production by the Federal Bureau of Investigation (FBI) of documents relating to her deceased mother-in-law, Carol King, a civil rights attorney and activist about whose career appellant is writing a book. The FBI has released many of the documents — most, however, in redacted form. The agency contends that its decision to withhold portions of the requested information is authorized by Exemptions 1 and 7 of the Act, which respectively except from FOIA's disclosure mandate, documents classified for national security reasons and certain other material gathered during investigations for law-enforcement purposes. Appellant challenges the applicability of either exemption in the circumstances presented here.

The District Court denied motions by appellant for summary judgment or in the alternative to compel discovery, rejected appellant's request for in-camera inspection, and granted the FBI's motion for summary judgment. This appeal ensued.

I

The records whose disclosure is here at issue are part of an FBI surveillance file on Carol King compiled during the 1940's and 1950's. She was a prominent civil rights attorney who devoted her practice to defending minorities, aliens, radicals and union members both famous and obscure; and a substantial portion of her practice consisted in representation of aliens facing deportation during the McCarthy era. The nature of Carol King's law practice and her political associations aroused [the] suspicions of the FBI. In 1941, the FBI opened a surveillance file on her, and subjected her to continuous investigation until her death in 1952. The FBI represents that its investigation was devoted exclusively to determining whether Carol King was guilty of political sedition. While the eleven-year investigation amassed a file 1,665 pages in length, no charge was ever made.

Appellant is a writer by profession who intends to publish a biography on her mother-in-law and longtime friend, Carol King. As yet, no significant history of the latter's career has been published. In the course of her research, appellant attempted to obtain information pertaining to Carol King by means of a FOIA request. The FBI eventually responded by releasing to appellant redacted portions of its King investigative file. Ultimately provided were 1,500 pages of the 1,665-page file, and, from most of the 1,500 pages supplied, names and, frequently, substantial passages were deleted.

Contesting the sufficiency of the FBI's response to her FOIA request, appellant filed suit in the District Court, and moved for a *Vaughn* index[92] detailing the grounds for the FBI's exemption claims. Production of the *Vaughn* index was ordered. Thereafter, the FBI submitted the joint declaration of Special Agents Richard C. Stayer and Walter Scheuplein, Jr.,[93] and the declaration of John H. Walker of

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[92] *See Vaughn v. Rosen,* 340, 484 F.2d 820 (1973), *cert. denied,* 415 U.S. 977 (1974). [A *Vaughn* index is an itemized index which correlates each withheld document with a specific FOIA exemption and the relevant part of the agency's statement refusing disclosure.]

[93] … The declaration consists of two parts: the first, by Special Agent Stayer, sets forth the grounds for the FBI's Exemption 1 position and the second, by Special Agent Scheuplein, addresses the FBI's remaining withholding claims, including those under Exemption 7.

the Immigration and Naturalization Service, attesting to the reasons for excising portions of the King file; it then moved for summary judgment. Appellant in turn moved for summary judgment, or in the alternative to compel a response to outstanding discovery requests.

The District Court granted the FBI's motion for summary judgment. It sustained the Exemption 1 contentions, relying on the Staver-Scheuplein declaration, which it found to set forth with "reasonable specificity of detail rather than mere conclusory statements" an adequate description of the portions of the King file withheld, as well as the national security considerations advanced in support of the FBI's refusal to disclose. Similarly, the District Court deemed the declaration a sufficient foundation for the FBI's claims under Exemptions 7(C) and 7(D) that information withheld was gathered pursuant to an investigation for law-enforcement purposes and that its release would constitute an unwarranted invasion of personal privacy or compromise assurances of source confidentiality.

Appellant urges us to hold that the District Court erred in crediting the FBI's Exemption 1 and 7 arguments, contending that they shield information in contravention of FOIA's broad disclosure mandate. Specifically, appellant asserts that the Staver-Scheuplein declaration presents only a vague and conclusory description of the material excised pursuant to Exemption 1, wholly inadequate for purposes of ascertaining whether the documents in question have in fact been properly classified, or what harm might result from their production. "How," appellant queries, "can release of … records of this nature and at this late date possibly damage the national security?" Appellant further contends that the Staver-Scheuplein declaration does not make the threshold showing required for resort to Exemption 7: that the documents in question were compiled for *bona fide* law-enforcement purposes pursuant to an investigation whose relation to the agency's law-enforcement duties is based on information sufficient to support at least a " 'colorable claim' of its rationality." And, whether or not a law-enforcement purpose originally animated the investigation, appellant insists no considerations of privacy or confidentiality warrant continued withholding of its fruits. While we reject appellant's challenge to the disposition of the Exemption 7 claims in this case, we believe valid objections to the FBI's showing on the Exemption 1 claims have been raised, and remand in order that the District Court secure a fuller elaboration of the FBI's basis for asserting them.

II

Exemption 1 of the Freedom of Information Act protects from disclosure information that is "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and [is] in fact properly classified pursuant to such Executive order." An agency may invoke this exemption only if it complies with classification procedures established by the relevant executive order and withholds only such material as conforms to the order's substantive criteria for classification. Appellant challenges, on substantive and not procedural grounds, the propriety of the classification decisions underlying the FBI's Exemption 1 claims.

A.

Both appellant and the FBI believe that the directive pertinent to disposition of the Exemption 1 issues in this case is Executive Order 12065, which was in effect when the FBI's classification determinations were made. This order provided that information could be classified only if it concerned:

(a) military plans, weapons, or operations;

(b) foreign government information;

(c) intelligence activities, sources or methods;

(d) foreign relations or foreign activities of the United States;

(e) scientific, technological, or economic matters relating to the national security;

(f) United States Government Programs for safeguarding nuclear materials or facilities; or

(g) other categories of information which are related to national security and which require protection

against unauthorized disclosure as determined by the President, by a person designated by the President pursuant to Section 1-201, or by an agency head.

Executive Order 12065 further specified that information concerning any of the enumerated matters was eligible for classification as "confidential," the lowest security designation, only if its "unauthorized disclosure … reasonably could be expected to cause at least identifiable damage to the national security." It also established a presumption against classification: "If there is reasonable doubt … whether the information should be classified at all … the information should not be classified."

Subsequent to the decision to classify the documents involved in this case, and after commencement of this litigation, President Reagan promulgated Executive Order 12356. This order retains all categories of classifiable information enumerated in Executive Order 12065, but diverges from that order in several other significant respects. The new executive order eliminates the prior order's presumption against classification and modifies the standard for classifying information. While the earlier order prohibited an agency from classifying information unless it could be shown that "unauthorized disclosure reasonably could be expected to cause at least identifiable damage to the national security," the new order seemingly commands classification of all material within certain enumerated categories of sensitive information whose "unauthorized disclosure, either by itself or in the context of other information, reasonably could be expected to cause damage to the national security." While the old executive order in some instances required declassification decisions to be made by weighing the need to protect information against the public interest in disclosure, the new executive order eliminates this balancing provision from the declassification calculus. Absent as well from the new order are certain procedures contained in Executive Order 12065 designed to ensure systematic declassification review of older material.

The parties have conformed their arguments regarding the propriety of the classification decisions in dispute to the terms of Executive Order 12065, under which those decisions were made, notwithstanding the fact that Executive Order 12065 is now superseded by Executive Order 12356. Their position finds support in our holding in *Lesar v. United States Department of Justice,* 636 F.2d 472 (D.C. Cir. 1980), that "[o]n review, the court should … assess the documents according to the terms of the Executive Order under which the agency made its ultimate classification determination." …

Lesar [directs] a reviewing court to assess the propriety of a classification decision purportedly supporting an Exemption 1 claim in terms of the executive order in force at the time the agency's ultimate classification decision is actually made. …

B

Turning to the general principles affecting this appeal, we begin with a reminder that, as in all FOIA cases, the district courts are to review *de novo* all exemption claims advanced, and that the agency bears the burden of justifying its decision to withhold requested information. The agency may meet this burden by filing affidavits describing the material withheld and the manner in which it falls within the exemption claimed; and the court owes substantial weight to detailed agency explanations in the national security context. However, a district court may award summary judgment to an agency invoking Exemption 1 only if (1) the agency affidavits describe the documents withheld and the justifications for nondisclosure in enough detail and with sufficient specificity to demonstrate that material withheld is logically within the domain of the exemption claimed, and (2) the affidavits are neither controverted by contrary record evidence nor impugned by bad faith on the part of the agency. On appeal, the court is to determine, from inspection of the agency affidavits submitted, whether the agency's explanation was full and specific enough to afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding. …

The significance of agency affidavits in a FOIA case cannot be underestimated. As, ordinarily, the agency alone possesses knowledge of the precise content of documents withheld, the FOIA requester and the court both must rely upon its representations for an understanding of the material sought to be protected. As we observed in *Vaughn v. Rosen,* "[t]his lack of knowledge by the party seeing [sic] disclosure seriously distorts the traditional adversary nature of our legal system's form of dispute

resolution," with the result that "[a]n appellate court, like the trial court, is completely without the controverting illumination that would ordinarily accompany a lower court's factual determination." Even should the court undertake *in camera* inspection of the material — an unwieldy process where hundreds or thousands of pages are in dispute — "[t]he scope of the inquiry will not have been focused by the adverse parties. …"

Affidavits submitted by a governmental agency in justification for its exemption claims must therefore strive to correct, however, imperfectly, the asymmetrical distribution of knowledge that characterizes FOIA litigation. The detailed public index which in *Vaughn* we required of withholding agencies is intended to do just that: "to permit adequate adversary testing of the agency's claimed right to an exemption," and enable "the District Court to make a rational decision whether the withheld material must be produced without actually viewing the documents themselves, as well as to produce a record that will render the District Court's decision capable of meaningful review on appeal." Thus, when an agency seeks to withhold information, it must provide "a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply." Specificity is the defining requirement of the *Vaughn* index and affidavit; affidavits cannot support summary judgment if they are "conclusory, merely reciting statutory standards, or if they are too vague or sweeping." To accept an inadequately supported exemption claim "would constitute an abandonment of the trial court's obligation under the FOIA to conduct a *de novo* review."

C

The District Court examined the affidavits submitted by the FBI in the instant case, and concluded that they substantiated its reliance on Exemption 1. On appeal, then, we are to determine as a threshold matter whether the affidavits in fact provided the District Court with "an adequate basis to decide" the Exemption 1 issues: to ascertain whether the material withheld is within the categories of classifiable information enumerated in Executive Order 12065 and, further, whether its unauthorized disclosure reasonably could be expected to cause the requisite amount of damage to the national security. We turn to the *Vaughn* index and the accompanying declaration prepared by Special FBI Agent, Richard C. Stayer.

Stayer advised the District Court that "[t]o provide a more workable *'Vaughn* index' format and thus reduce the burden of analyzing Exemption One claims" he was departing from the practice of preparing typed pages separately describing each withheld document, and was submitting instead copies of the documents released pursuant to appellant's FOIA demand with each deletion annotated by means of a four-character code referring in turn to an accompanying code-catalogue. The copy of the redacted documents and the explanatory code-catalogue together comprise the FBI's *Vaughn* filing.

In brief, the system works as follows. For every instance in which information was withheld, the documents released have been marked with the four character code. The first two characters of the code identify the FOIA exemption assertedly authorizing the withholding — for example, (b)(1); the third character identifies the category in Executive Order 12065 under which the material has been classified — such as Section 1-301(c) (intelligence activities, sources or methods); and the fourth character refers to a statement in the code-catalogue that is offered as a description of the material withheld, intended to demonstrate that it lies within one or more of the classification categories of Executive Order 12065, and to point to the likely harm to the national security attending its release. In sum, the District Court was presented with an intensively redacted and annotated 1500-page reproduction of the requested file, as well as numerous inserts, similarly annotated, representing the remaining 165 pages of the file withheld.

Stayer opines that this new method of presentation represents "a vast improvement over previous formats" and that "the required specificity has been enhanced." We regret to differ. The system Stayer has adopted imposes a significant burden upon the reviewing court without commensurate benefit. Stayer system of annotation neither adequately describes redacted material nor explains, with sufficient specificity to enable meaningful review, how its disclosure would likely impair national security. …

The *Vaughn* index here submitted is, in a word, inadequate — wholly lacking in that specificity of

description we have repeatedly warned is necessary to ensure meaningful review of an agency's claim to withhold information subject to a FOIA request. A withholding agency must describe *each* document or portion thereof withheld, and for *each* withholding it must discuss the consequences of disclosing the sought-after information. This requirement, if indeed not explicit in *Vaughn,* is unmistakably implicit in the principles supporting our decision in that case, as our subsequent decisions have made very clear. When, in *Vaughn,* we first insisted that agencies tender an index and affidavits as a precondition to review of exemptions claims, we emphasized the necessity of identifying which exemption was relied upon for each item withheld. In *Mead Data Central v. United States Department of the Air Force,* we elaborated on *Vaughn's* requirements, explaining that the withholding agency must supply "a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply." As we subsequently reiterated in *Dellums v. Powell, Vaughn's* call for specificity imposes on the agency the burden of demonstrating applicability of the exemptions invoked *as to each document or segment withheld.*

D

We conclude that the *Vaughn* index tendered in this case provides an insufficient basis for the *de novo* review that FOIA mandates for Exemption 1 claims. This requires a remand of the case to the District Court for further proceedings. Then, the court may employ any of several measures to acquire enough information to conduct the review requisite.

The District Court may, in its discretion, order production of the excised material or some sample thereof for *in camera* inspection. An opportunity for "first-hand inspection [enables the court to] determine whether the weakness of the affidavits is a result of poor draftsmanship or a flimsy exemption claim," but "the district court's inspection prerogative is not a substitute for the government's burden of proof, and should not be resorted to lightly." Moreover, should the task of *in camera* examination appear too burdensome, the court may allow appellant to engage in further discovery, or order the FBI to supplement its *Vaughn* filings. If so ordered, the FBI must provide on an item specific basis the maximum amount of information consistent with protection of the interests of national security and the exigencies of forecasting events in this domain.

Whether the District Court proceeds by ordering supplemental affidavits or by *in camera* inspection of documents or samplings, it must ensure that it has an adequate foundation for review of the FBI's withholding claims before giving the agency's expert opinion on national security matters the substantial weight to which it is entitled. At a minimum, the court must secure more information with respect to excisions involving whole documents or substantial parts thereof, where no contextual information is available to supplement and particularize the FBI's code descriptions. Having garnered this additional information on material withheld, the court should then scrutinize afresh the FBI's assessment of the consequences of disclosure, allowing appropriate latitude for opinion but ensuring that the enumeration of alternate consequences presently characterizing the agency's submission reflects predictive uncertainty rather than mere categorical response.

In reviewing the FBI's predictions on disclosure, the court should devote particular attention to the age of the file in this case. It was compiled between 1941 and 1952; all documents it contains are now at least 35 years old. Executive Order 12065 directs declassification "as early as national security considerations permit," and identifies "the occurrence of a declassification event" or "loss of the information's sensitivity with the passage of time" as circumstances sufficient to warrant dissolution of a prior classification determination. … [The Court then discussed Exemption 7, upholding the District Court's decision in this regard.]

Glen Scott Milner v. Department of the Navy

131 S. Ct. 1259 (2011)

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, THOMAS, GINSBURG, ALITO, and SOTOMAYOR, J.J., joined. ALITO, J., filed a concurring opinion. BREYER, J., filed a dissenting opinion.

JUSTICE KAGAN delivered the opinion of the Court.

The Freedom of Information Act (FOIA), 5 U.S.C. § 552, requires federal agencies to make Government records available to the public, subject to nine exemptions for specific categories of material. This case concerns the scope of Exemption 2, which protects from disclosure material that is "related solely to the internal personnel rules and practices of an agency." § 552(b)(2). Respondent Department of the Navy (Navy or Government) invoked Exemption 2 to deny a FOIA request for data and maps used to help store explosives at a naval base in Washington State. We hold that Exemption 2 does not stretch so far.

I

Congress enacted FOIA to overhaul the public disclosure section of the Administrative Procedure Act (APA), 5 U.S.C. § 1002 (1964 ed.). That section of the APA "was plagued with vague phrases" and gradually became more "a withholding statute than a disclosure statute." *EPA v. Mink*, 410 U.S.73, 79 (1973). Congress intended FOIA to "permit access to official information long shielded unnecessarily from public view." *Id*. at 80. FOIA thus mandates that an agency disclose records on request, unless they fall within one of nine exemptions. These exemptions are "explicitly made exclusive," *id*., at 79, and must be "narrowly construed," *FBI v. Abramson*, 456 U.S. 615, 630 (1982).

At issue here is Exemption 2, which shields from compelled disclosure documents "related solely to the internal personnel rules and practices of an agency." § 552(b)(2). Congress enacted Exemption 2 to replace the APA's exemption for "any matter relating solely to the internal management of an agency," 5 U.S.C. § 1002 (1964 ed.). Believing that the "sweep" of the phrase "internal management" had led to excessive withholding, Congress drafted Exemption 2 "to have a narrower reach." *Department of Air Force v. Rose*, 425 U.S. 352, 362–363 (1976).

We considered the extent of that reach in *Department of Air Force v. Rose*. There, we rejected the Government's invocation of Exemption 2 to withhold case summaries of honor and ethics hearings at the United States Air Force Academy. The exemption, we suggested, primarily targets material concerning employee relations or human resources: "use of parking facilities or regulations of lunch hours, statements of policy as to sick leave, and the like." *Id*., at 363. … But we stated a possible caveat to our interpretation of Exemption 2: That understanding of the provision's coverage governed, we wrote, "at least where the situation is not one where disclosure may risk circumvention of agency regulation." *Id*., at 369.

In *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (1981), the D. C. Circuit converted this caveat into a new definition of Exemption 2's scope. *Crooker* approved the use of Exemption 2 to shield a manual designed to train Government agents in law enforcement surveillance techniques. The D. C. Circuit noted that it previously had understood Exemption 2 to "refe[r] only to 'pay, pensions, vacations, hours of work, lunch hours, parking, etc.' *Id*. at 1056. … But the court now thought Exemption 2 should also cover any "predominantly internal" materials, whose disclosure would "significantly ris[k] circumvention of agency regulations or statutes," *id*., at 1074. This construction of Exemption 2, the court reasoned, flowed from FOIA's "overall design," its legislative history, "and even common sense," because Congress could not have meant to "enac[t] a statute whose provisions undermined … the effectiveness of law enforcement agencies." *Ibid*.

In the ensuing years, three Courts of Appeals adopted the D. C. Circuit's interpretation of Exemption 2. *See* 575 F.3d 959, 965 (CA9 2009) (case below); *Massey v. FBI*, 3 F.3d 620, 622 (CA2 1993); *Kaganove v. EPA*, 856 F.2d 884, 889 (CA7 1988). And that interpretation spawned a new

terminology: Courts applying the *Crooker* approach now refer to the "Low 2" exemption when discussing materials concerning human resources and employee relations, and to the "High 2" exemption when assessing records whose disclosure would risk circumvention of the law. Congress, as well, took notice of the D. C. Circuit's decision, borrowing language from *Crooker* to amend Exemption 7(E) when next enacting revisions to FOIA. The amended version of Exemption 7(E) shields certain "records or information compiled for law enforcement purposes" if their disclosure "could reasonably be expected to risk circumvention of the law." § 552(b)(7)(E); *see* Freedom of Information Reform Act of 1986, § 1802(a).

II

The FOIA request at issue here arises from the Navy's operations at Naval Magazine Indian Island, a base in Puget Sound, Washington. The Navy keeps weapons, ammunition, and explosives on the island. To aid in the storage and transport of these munitions, the Navy uses data known as Explosive Safety Quantity Distance (ESQD) information. ESQD information prescribes "minimum separation distances" for explosives and helps the Navy design and construct storage facilities to prevent chain reactions in case of detonation. The ESQD calculations are often incorporated into specialized maps depicting the effects of hypothetical explosions.

In 2003 and 2004, petitioner Glen Milner, a Puget Sound resident, submitted FOIA requests for all ESQD information relating to Indian Island. The Navy refused to release the data, stating that disclosure would threaten the security of the base and surrounding community. In support of its decision to withhold the records, the Navy invoked Exemption 2.

The District Court granted summary judgment to the Navy, and the Court of Appeals affirmed, relying on the High 2 interpretation developed in *Crooker*. The Court of Appeals explained that the ESQD information "is predominantly used for the internal purpose of instructing agency personnel on how to do their jobs." And disclosure of the material, the court determined, "would risk circumvention of the law" by "point[ing] out the best targets for those bent on wreaking havoc" — for example, "[a] terrorist who wished to hit the most damaging target." *Id.* at 971. The ESQD information, the court concluded, therefore qualified for a High 2 exemption.

We granted certiorari in light of the Circuit split respecting Exemption 2's meaning, and we now reverse.

III

Our consideration of Exemption 2's scope starts with its text. Judicial decisions since FOIA's enactment have analyzed and reanalyzed the meaning of the exemption. But comparatively little attention has focused on the provision's 12 simple words: "related solely to the internal personnel rules and practices of an agency."

The key word in that dozen — the one that most clearly marks the provision's boundaries — is "personnel." When used as an adjective, as it is here to modify "rules and practices," that term refers to human resources matters. "Personnel," in this common parlance, means "the selection, placement, and training of employees and … the formulation of policies, procedures, and relations with [or involving] employees or their representatives." Webster's Third New International Dictionary 1687 (1966) (hereinafter Webster's). So, for example, a "personnel department" is "the department of a business firm that deals with problems affecting the employees of the firm and that usually interviews applicants for jobs." Random House Dictionary 1075 (1966) (hereinafter Random House). "Personnel management" is similarly "the phase of management concerned with the engagement and effective utilization of manpower to obtain optimum efficiency of human resources." Webster's 1687. And a "personnel agency" is "an agency for placing employable persons in jobs; employment agency." Random House 1075.

FOIA itself provides an additional example in Exemption 6. *See Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears"). That exemption … protects from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

§ 552(b)(6). Here too, the statute uses the term "personnel" as a modifier meaning "human resources." As we recognized in *Rose*, "the common and congressional meaning of … 'personnel file' " is the file "showing, for example, where [an employee] was born, the names of his parents, where he has lived from time to time, his … school records, results of examinations, [and] evaluations of his work performance." 425 U.S. at 377. It is the file typically maintained in the human resources office — otherwise known (to recall an example offered above) as the "personnel department."

Exemption 2 uses "personnel" in the exact same way. An agency's "personnel rules and practices" are its rules and practices dealing with employee relations or human resources. … But all the rules and practices referenced in Exemption 2 share a critical feature: They concern the conditions of employment in federal agencies — such matters as hiring and firing, work rules and discipline, compensation and benefits. Courts in practice have had little difficulty identifying the records that qualify for with-holding under this reading: They are what now commonly fall within the Low 2 exemption. Our construction of the statutory language simply makes clear that Low 2 is all of 2 (and that High 2 is not 2 at all).

The statute's purpose reinforces this understanding of the exemption. We have often noted "the Act's goal of broad disclosure" and insisted that the exemptions be "given a narrow compass." *Department of Justice v. Tax Analysts*, 492 U.S. 136 (1989). This practice of "constru[ing] FOIA exemptions narrowly," *Department of Justice v. Landano*, 508 U.S. 165, 181 (1993), stands on especially firm footing with respect to Exemption 2. As described earlier, Congress worded that provision to hem in the prior APA exemption for "any matter relating solely to the internal management of an agency," which agencies had used to prevent access to masses of documents. *See Rose*, 425 U.S. at 362. We would ill-serve Congress's purpose by construing Exemption 2 to reauthorize the expansive withholding that Congress wanted to halt. Our reading instead gives the exemption the "narrower reach" Congress intended, through the simple device of confining the provision's meaning to its words.

The Government resists giving "personnel" its plain meaning on the ground that Congress, when drafting Exemption 2, considered but chose not to enact language exempting "internal employment rules and practices." This drafting history, the Navy maintains, proves that Congress did not wish "to limit the Exemption to employment-related matters," even if the adjective "personnel" conveys that meaning in other contexts. But we think the Navy's evidence insufficient: The scant history concerning this word change as easily supports the inference that Congress merely swapped one synonym for another. Those of us who make use of legislative history believe that clear evidence of congressional intent may illuminate ambiguous text. We will not take the opposite tack of allowing ambiguous legislative history to muddy clear statutory language.

Exemption 2, as we have construed it, does not reach the ESQD information at issue here. These data and maps calculate and visually portray the magnitude of hypothetical detonations. By no stretch of imagination do they relate to "personnel rules and practices," as that term is most naturally understood. They concern the physical rules governing explosives, not the workplace rules governing sailors; they address the handling of dangerous materials, not the treatment of employees. The Navy therefore may not use Exemption 2, interpreted in accord with its plain meaning to cover human resources matters, to prevent disclosure of the requested maps and data.

IV

[The Court rejected two alternative readings of exemption 2 offered by the government, as inconsistent with the language of the statute].…

The dissent offers one last reason to embrace High 2, and indeed stakes most of its wager on this argument. *Crooker*, the dissent asserts, "has been consistently relied upon and followed for 30 years" by other lower courts. But this claim, too, trips at the starting gate. It would be immaterial even if true, because we have no warrant to ignore clear statutory language on the ground that other courts have done so. And in any event, it is not true. Prior to *Crooker*, three Circuits adopted the reading of Exemption 2 we think right, and they have not changed their minds. Since *Crooker*, three other Circuits have accepted the High 2 reading. One Circuit has reserved judgment on the High 2-Low 2 debate. *See Audubon Society v.*

Forest Serv., 104 F.3d 1201, 1203–1204 (CA10 1997). And the rest have not considered the matter. (No one should think *Crooker* has been extensively discussed or debated in the Courts of Appeals. In the past three decades, *Crooker's* analysis of Exemption 2 has been cited a sum total of five times in federal appellate decisions outside the D. C. Circuit — on average, once every six years.) The result is a 4 to 3 split among the Circuits. We will not flout all usual rules of statutory interpretation to take the side of the bare majority.

B

Presumably because *Crooker* so departs from Exemption 2's language, the Government also offers another construction, which it says we might adopt "on a clean slate," "based on the plain text … alone." On this reading, the exemption "encompasses records concerning an agency's internal rules and practices for its personnel to follow in the discharge of their governmental functions." According to the Government, this interpretation makes sense because "the phrase 'personnel rules and practices of an agency' is logically understood to mean an agency's rules and practices for its personnel."

But the purported logic in the Government's definition eludes us. We would not say, in ordinary parlance, that a "personnel file" is any file an employee uses, or that a "personnel department" is any department in which an employee serves. No more would we say that a "personnel rule or practice" is any rule or practice that assists an employee in doing her job. The use of the term "personnel" in each of these phrases connotes not that the file or department or practice/rule is for personnel, but rather that the file or department or practice/rule is about personnel — *i.e.*, that it relates to employee relations or human resources. This case well illustrates the point. The records requested, as earlier noted, are explosives data and maps showing the distances that potential blasts travel. This information no doubt assists Navy personnel in storing munitions. But that is not to say that the data and maps relate to "personnel rules and practices." No one staring at these charts of explosions and using ordinary language would describe them in this manner. …

Interpreted in this way, Exemption 2 — call it "Super 2" now — would extend, rather than narrow, the APA's former exemption for records relating to the "internal management of an agency." 5 U.S.C. § 1002 (1964 ed.). We doubt that even the "internal management" provision, which Congress thought allowed too much withholding, would have protected all information that guides employees in the discharge of their duties, including the explosives data and maps in this case. And perhaps needless to say, this reading of Exemption 2 violates the rule favoring narrow construction of FOIA exemptions. Super 2 in fact has no basis in the text, context, or purpose of FOIA, and we accordingly reject it.

V

Although we cannot interpret Exemption 2 as the Government proposes, we recognize the strength of the Navy's interest in protecting the ESQD data and maps and other similar information. The Government has informed us that "[p]ublicly disclosing the [ESQD] information would significantly risk undermining the Navy's ability to safely and securely store military ordnance," and we have no reason to doubt that representation. The Ninth Circuit similarly cautioned that disclosure of this information could be used to "wrea[k] havoc" and "make catastrophe more likely." Concerns of this kind — a sense that certain sensitive information should be exempt from disclosure — in part led the *Crooker* court to formulate the High 2 standard. And we acknowledge that our decision today upsets three decades of agency practice relying on *Crooker*, and therefore may force considerable adjustments.

We also note, however, that the Government has other tools at hand to shield national security information and other sensitive materials. Most notably, Exemption 1 of FOIA prevents access to classified documents. § 552(b)(1); *see* 575 F.3d, at 980 (W. Fletcher, J., dissenting) (Exemption 1 is "specifically designed to allow government agencies to withhold information that might jeopardize our national security"). The Government generally may classify material even after receiving a FOIA request, *see* Exec. Order No. 13526, § 1.7(d), 75 Fed. Reg. 711 (2009); an agency therefore may wait until that time to decide whether the dangers of disclosure outweigh the costs of classification. Exemption 3 also may mitigate the Government's security concerns. That provision applies to records that any other statute exempts from disclosure, § 552(b)(3), thus offering Congress an established, streamlined method to

authorize the withholding of specific records that FOIA would not otherwise protect. And Exemption 7, as already noted, protects "information compiled for law enforcement purposes" that meets one of six criteria, including if its release "could reasonably be expected to endanger the life or physical safety of any individual." § 552(b)(7)(F). The Navy argued below that the ESQD data and maps fall within Exemption 7(F), and that claim remains open for the Ninth Circuit to address on remand.

If these or other exemptions do not cover records whose release would threaten the Nation's vital interests, the Government may of course seek relief from Congress. *See* Tr. of Oral Arg. 48. All we hold today is that Congress has not enacted the FOIA exemption the Government desires. We leave to Congress, as is appropriate, the question whether it should do so.

VI

Exemption 2, consistent with the plain meaning of the term "personnel rules and practices," encompasses only records relating to issues of employee relations and human resources. The explosives maps and data requested here do not qualify for withholding under that exemption. We therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE ALITO, concurring.

I agree with the Court that the text of Exemption 2 of the Freedom of Information Act of 1966 cannot support the "High 2" interpretation that courts have adopted and applied over the years. As the Court explains, however, the Government may avail itself of numerous other exemptions, exemptions that may have been overshadowed in recent years by the broad reach of High 2. I write separately to underscore the alternative argument that the Navy raised below, which rested on Exemption 7(F) and which will remain open on remand. …

Documents compiled for multiple purposes are not necessarily deprived of Exemption 7's protection. The text of Exemption 7 does not require that the information be compiled solely for law enforcement purposes. Cf. § 552(b)(2) ("related solely to the internal personnel rules and practices of an agency"). Therefore, it may be enough that law enforcement purposes are a significant reason for the compilation.

In this case, the Navy has a fair argument that the Explosive Safety Quantity Distance (ESQD) information falls within Exemption 7(F). The ESQD information, the Navy argues, is used "for the purpose of identifying and addressing security issues" and for the "protection of people and property on the base, as well as in [the] nearby community, from the damage, loss, death, or injury that could occur from an accident or breach of security." If, indeed, the ESQD information was compiled as part of an effort to prevent crimes of terrorism and to maintain security, there is a reasonable argument that the information has been "compiled for law enforcement purposes." § 552(b)(7). Assuming that this threshold requirement is satisfied, the ESQD information may fall comfortably within Exemption 7(F).

JUSTICE BREYER, dissenting.

JUSTICE STEVENS has explained that, once "a statute has been construed, either by this Court *or by a consistent course of decision by other federal judges* and agencies," it can acquire a clear meaning that this Court should hesitate to change. *See Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 268 (1987) (opinion concurring in part and dissenting in part) (emphasis added). *See also* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921). I would apply that principal to this case and accept the 30-year-old decision by the D.C. Circuit in *Crooker* as properly stating the law. …

The majority acknowledges that "our decision today upsets three decades of agency practice relying on *Crooker*, and therefore may force considerable adjustments." But how are these adjustments to be made? Should the Government rely upon other exemptions to provide the protection it believes necessary? As JUSTICE ALITO notes, Exemption 7 applies where the documents consist of "records or information compiled for law enforcement purposes" and release would, *e.g.*, "disclose techniques and procedures for law enforcement investigations," or "could reasonably be expected to endanger the life or

physical safety of any individual." 5 U.S.C. § 552(b)(7). But what about information that is *not* compiled for law enforcement purposes, such as building plans, computer passwords, credit card numbers, or safe deposit combinations? The Government, which has much experience litigating FOIA cases, warns us that Exemption 7 "targets only a subset of the important agency functions that may be circumvented." Today's decision only confirms this point, as the Court's insistence on narrow construction might persuade judges to avoid reading Exemption 7 broadly enough to provide *Crooker*-type protection.

The majority suggests that the Government can classify documents that should remain private. See 5 U.S.C. § 552(b)(1) (permitting withholding of material "properly classified" as authorized to be "kept secret in the interest of national defense or foreign policy"). But classification is at best a partial solution. It takes time. It is subject to its own rules. As the Government points out, it would hinder the sharing of information about Government buildings with "first responders," such as local fire and police departments. And both Congress and the President believe the Nation currently faces a problem of too much, not too little, classified material. *See* Reducing Over-Classification Act, 124 Stat. 2648; Exec. Order No. 13526, §§ 1.3(d), 2.1(d), 5.4(d)(10), 3 CFR 298, 299–300, 304, 321 (2009 Comp.). Indeed, Congress recently found:

> "The 9/11 Commission and others have observed that the over-classification of information interferes with accurate, actionable, and timely information sharing, increases the cost of information security, and needlessly limits stakeholder and public access to information.
>
> "Over-classification of information causes considerable confusion regarding what information may be shared with whom, and negatively affects the dissemination of information within the Federal Government and with State, local, and tribal entities, and with the private sector." Reducing Over-Classification Act, §§ 2(2), (3), 124 Stat. 2648.

These legislative findings suggest that it is "over-classification," not *Crooker*, that poses the more serious threat to the FOIA's public information objectives.

That leaves congressional action. As the Court points out, Congress remains free to correct whatever problems it finds in today's narrowing of Exemption 2. But legislative action takes time; Congress has much to do; and other matters, when compared with a FOIA revision, may warrant higher legislative priority. In my view, it is for the courts, through appropriate interpretation, to turn Congress' public information objectives into workable agency practice, and to adhere to such interpretations once they are settled.

That is why: Where the courts have already interpreted Exemption 2, where that interpretation has been consistently relied upon and followed for 30 years, where Congress has taken note of that interpretation in amending other parts of the statute, where that interpretation is reasonable, where it has proved practically helpful and achieved commonsense results, where it is consistent with the FOIA's overall statutory goals, where a new and different interpretation raises serious problems of its own, and where that new interpretation would require Congress to act just to preserve a decades-long status quo, I would let sleeping legal dogs lie.

For these reasons, with respect, I dissent.

Center for National Security Studies v. Dept of Justice

331 F.3d 918 (D.C. Cir. 2003)

Before: SENTELLE, HENDERSON and TATEL, CIRCUIT JUDGES.

Opinion for the Court filed by CIRCUIT JUDGE SENTELLE

Dissenting opinion filed by CIRCUIT JUDGE TATEL.

SENTELLE, CIRCUIT JUDGE:

Various "public interest" groups (plaintiffs) brought this Freedom of Information Act (FOIA)

action against the Department of Justice (DOJ or government) seeking release of information concerning persons detained in the wake of the September 11 terrorist attacks, including: their names, their attorneys, dates of arrest and release, locations of arrest and detention, and reasons for detention. The government objected to release, and asserted numerous exceptions to FOIA requirements in order to justify withholding the information. The parties filed cross-motions for summary judgment. The district court ordered release of the names of the detainees and their attorneys, but held that the government could withhold all other detention information pursuant to FOIA Exemption 7(A), which exempts "records or information compiled for law enforcement purposes … to the extent that the production" of them "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A) (2000). Attorneys filed cross-appeals. Upon *de novo* review, we agree with the district court that the detention information is properly covered by Exemption 7(A); but we further hold that Exemption 7(A) justifies withholding the names of the detainees and their attorneys. … We therefore affirm in part, reverse in part, and remand the case to the district court for the entry of a judgment of dismissal.

I. Background

A. The Investigation

Consistent with the mutual decision of the parties to seek resolution to this controversy on summary judgment, the facts are not in serious dispute. In response to the terrorist attacks of September 11, 2001, President George W. Bush ordered a worldwide investigation into those attacks and into "threats, conspiracies, and attempts to perpetrate terrorist acts against United States citizens and interests." The Department of Justice, defendant in this action, has been conducting the investigation in conjunction with other federal, state and local agencies. The investigation continues today.

In the course of the post-September 11 investigation, the government interviewed over one thousand individuals about whom concern had arisen. The concerns related to some of these individuals were resolved by the interviews, and no further action was taken with respect to them. Other interviews resulted in the interviewees being detained. As relevant here, these detainees fall into three general categories.

The first category of detainees consists of individuals who were questioned in the course of the investigation and detained by the INS for violation of the immigration laws (INS detainees). INS detainees were initially questioned because there were "indications that they might have connections with, or possess information pertaining to, terrorist activity against the United States including particularly the September 11 attacks and/or the individuals or organizations who perpetrated them." Based on the initial questioning, each INS detainee was determined to have violated immigration law; some of the INS detainees were also determined to "have links to other facets of the investigation." Over 700 individuals were detained on INS charges. As of June 13, 2002, only seventy-four remained in custody. Many have been deported. INS detainees have had access to counsel, and the INS has provided detainees with lists of attorneys willing to represent them, as required by 8 U.S.C. § 1229(b)(2) (2000). INS detainees have had access to the courts to file *habeas corpus* petitions. They have also been free to disclose their names to the public.

The second category of detainees consists of individuals held on federal criminal charges (criminal detainees). The government asserts that none of these detainees can be eliminated as a source of probative information until after the investigation is completed. According to the most recent information released by the Department of Justice, 134 individuals have been detained on federal criminal charges in the post-September 11 investigation; 99 of these have been found guilty either through pleas or trials. While many of the crimes bear no direct connection to terrorism, several criminal detainees have been charged with terrorism-related crimes, and many others have been charged with visa or passport forgery, perjury, identification fraud, and illegal possession of weapons. Zacarias Moussaoui, presently on trial for participating in the September 11 attacks, is among those who were detained on criminal charges.

The third category consists of persons detained after a judge issued a material witness warrant to secure their testimony before a grand jury, pursuant to the material witness statute, 18 U.S.C. § 3144 (2000) (material witness detainees). Each material witness detainee was believed to have information material to

the events of September 11. The district courts before which these material witnesses have appeared have issued sealing orders that prohibit the government from releasing any information about the proceedings. The government has not revealed how many individuals were detained on material witness warrants. At least two individuals initially held as material witnesses are now being held for alleged terrorist activity.

The criminal detainees and material witness detainees are free to retain counsel and have been provided court-appointed counsel if they cannot afford representation, as required by the Sixth Amendment to the Constitution. In sum, each of the detainees has had access to counsel, access to the courts, and freedom to contact the press or the public at large.

B. The Litigation

On October 29, 2001, plaintiffs submitted a FOIA request to the Department of Justice seeking the following information about each detainee: 1) name and citizenship status; 2) location of arrest and place of detention; 3) date of detention/arrest, date any charges were filed, and the date of release; 4) nature of charges or basis for detention, and the disposition of such charges or basis; 5) names and addresses of lawyers representing any detainees; 6) identities of any courts which have been requested to enter orders sealing any proceedings in connection with any detainees, copies of any such orders, and the legal authorities relied upon by the government in seeking the sealing orders; 7) all policy directives or guidance issued to officials about making public statements or disclosures about these individuals or about the sealing of judicial or immigration proceedings. To support its FOIA request, plaintiffs cited press reports about mistreatment of the detainees, which plaintiffs claimed raised serious questions about "deprivations of fundamental due process, including imprisonment without probable cause, interference with the right to counsel, and threats of serious bodily injury."

In response to plaintiffs' FOIA request, the government released some information, but withheld much of the information requested. As to INS detainees, the government withheld the detainees' names, locations of arrest and detention, the dates of release, and the names of lawyers. As to criminal detainees, the government withheld the dates and locations of arrest and detention, the dates of release, and the citizenship status of each detainee. The government withheld all requested information with respect to material witnesses. Although the government has refused to disclose a comprehensive list of detainees' names and other detention information sought by plaintiffs, the government has from time to time publicly revealed names and information of the type sought by plaintiffs regarding a few individual detainees, particularly those found to have some connection to terrorism.

On December 5, 2001, plaintiffs filed this action in district court seeking to compel release of the withheld information pursuant to the Freedom of Information Act, 5 U.S.C. § 552. Plaintiffs also argued that the First Amendment, as interpreted in *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (1980) and its progeny, and the common law doctrine of access to public records require the government to disclose the names and detention information of the detainees.

The parties filed cross-motions for summary judgment. In its motion, the government contended that FOIA Exemptions 7(A), 7(C), and 7(F), 5 U.S.C. § 552(b)(7)(A), (C) & (F), allow the government to withhold the requested documents as to all three categories of detainees. These exemptions permit withholding information "compiled for law enforcement purposes" whenever disclosure:

> (A) could reasonably be expected to interfere with enforcement proceedings, … (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, … or (F) could reasonably be expected to endanger the life or physical safety of any individual.

5 U.S.C. § 552(b)(7)(A), (C), (F). As to the material witness detainees, the government also invoked Exemption 3, 5 U.S.C. § 552(b)(3), which exempts from FOIA requirements matters that are "specifically exempted from disclosure by [other statutes] … ," contending that Federal Rule of Criminal Procedure 6(e), which limits the disclosure of grand jury matters, bars the release of information concerning material witnesses. …

As to Exemption 7(A), the declarations state that release of the requested information could hamper the ongoing investigation by leading to the identification of detainees by terrorist groups,

resulting in terrorists either intimidating or cutting off communication with the detainees; by revealing the progress and direction of the ongoing investigation, thus allowing terrorists to impede or evade the investigation; and by enabling terrorists to create false or misleading evidence. As to Exemption 7(C), the declarations assert that the detainees have a substantial privacy interest in their names and detention information because release of this information would associate detainees with the September 11 attacks, thus injuring detainees' reputations and possibly endangering detainees' personal safety. Finally, as to Exemption 7(F), the government's declarations contend that release of the information could endanger the public safety by making terrorist attacks more likely and could endanger the safety of individual detainees by making them more vulnerable to attack from terrorist organizations. For these same reasons, the counterterrorism officials state that the names of the detainees' lawyers should also be withheld.

C. The Judgment

On August 2, 2002, the district court rendered its decision, ruling in part for the plaintiffs and in part for the government. Briefly put, the court ordered the government to disclose the names of the detainees and detainees' lawyers, but held that the government was entitled to withhold all other detention information under Exemptions 7(A) and 7(F).

Addressing the names of the detainees, the court held that disclosure could not reasonably be expected to interfere with ongoing enforcement proceedings, and thus the names were not exempt under 7(A). The court rejected the government's argument that disclosure of detainees' names would deter them from cooperating with the government because terrorist groups likely already know which of their cell members have been detained. Moreover, the court reasoned that the government's voluntary disclosure of the names of several detainees undermined the force of its argument about the harms resulting from disclosure. The court further held that "the government has not met its burden of establishing a 'rational link' between the harms alleged and disclosure" because its declarations provided no evidence that the detainees actually have any connection to, or knowledge of, terrorist activity.

The court next rejected the government's 7(A) argument that disclosure of names would allow terrorist groups to map the course of, and thus impede, its investigation. The government had advanced a "mosaic" argument, contending that the court should consider the aggregate release of the names under 7(A) rather than the release of each in isolation, on the reasoning that the release of the names *in toto* could assist terrorists in piecing together the course, direction and focus of the investigation. The district court rejected this argument, holding, *inter alia,* as a matter of law that FOIA Exemption 7(A) requires an individualized assessment of disclosure, and that the government's mosaic theory could not justify a blanket exclusion of information under Exemption 7(A). In the district court's view, the mosaic theory is only cognizable under Exemption 1, which protects information authorized by Executive Order to be kept secret in the interest of national defense or foreign policy. The court further rejected the government's final 7(A) argument, concluding that there was insufficient evidence that disclosure would enable terrorist groups to create false and misleading evidence.

Turning to Exemptions 7(C) and 7(F), the court rejected the government's claims, holding that the admittedly substantial privacy and safety interests of the detainees do not outweigh the vital public interest in ensuring that the government is not abusing its power. The court noted that plaintiffs have raised "grave concerns" about the mistreatment of detainees and have provided evidence of alleged mistreatment in the form of media reports, and firsthand accounts given to Congress and human rights groups. While rejecting the government's attempt to withhold detainees' names, the court ruled that it would permit detainees to opt out of disclosure by submitting a signed declaration within fifteen days. The court did not address the government's argument that disclosure could harm public safety.

Having rejected the government's Exemption 7 claims, the court further held that Exemption 3 does not bar the release of the names of material witnesses. Specifically, the court held that Exemption 3 does not apply, reasoning Federal Rule of Criminal Procedure 6(e) does not bar the disclosure of the identities of persons detained as material witnesses, but only bars "disclosure of a matter occurring before a grand jury." Fed.R.Crim.P. 6(e)(6). The government's evidence did not establish that any of the detainees were actual grand jury witnesses or were scheduled to testify before a grand jury. Further, the government's disclosure of the identities of twenty-six material witness detainees undercut its argument

that disclosure is barred by statute. As to the government's contention that court sealing orders prevent the government from releasing the names of material witnesses, the court ordered the government to submit such orders for *in camera* review or to submit a "supplemental affidavit explaining the nature and legal basis for these sealing orders."

For reasons not unlike its rejection of the government's attempt to withhold the names of detainees, the court also held that the government must reveal the names of the detainees' lawyers. The court determined that the names of the attorneys were not covered by Exemptions 7(A), 7(C), or 7(F) for the same reason it had rejected the government's attempt to withhold the names of detainees; because attorneys have no expectation of anonymity; and because any concerns about physical danger were purely speculative.

Turning to the other information sought by plaintiffs — the dates and locations of arrest, detention, and release — the court granted summary judgment for the government on its claim that such detention information was covered under 7(A) and 7(F). The court credited the counterterrorism officials' judgment that the detention information "would be particularly valuable to anyone attempting to discern patterns in the Government's investigation and strategy," and that disclosure would make detention facilities "vulnerable to retaliatory attacks." Finally, the court rejected plaintiffs' claim that the First Amendment and common law entitle them to the dates and locations of arrest, detention, and release.

The court ordered the government to release the names of detainees and their lawyers in fifteen days, subject to the right of detainees to opt out of disclosure. On August 15, 2002, the district court stayed its order pending appeal. …

II. The FOIA Claims

We review *de novo* the district court's grant of summary judgment, and therefore consider anew each of the claims and defenses advanced before the district court. We turn first to the government's claims of exemption from disclosure under FOIA of the names of the detainees and their lawyers.

A. Names of Detainees

"Public access to government documents" is the "fundamental principle" that animates FOIA. "Congress recognized, however, that public disclosure is not always in the public interest." Accordingly, FOIA represents a balance struck by Congress between the public's right to know and the government's legitimate interest in keeping certain information confidential. To that end, FOIA mandates disclosure of government records unless the requested information falls within one of nine enumerated exemptions, *see* 5 U.S.C. § 552(b). While these exemptions are to be "narrowly construed," courts must not fail to give them "a meaningful reach and application," The government bears the burden of proving that the withheld information falls within the exemptions it invokes. 5 U.S.C. § 552(a)(4)(b).

The government invokes four exemptions — 7(A), 7(C), 7(F), and 3 — to shield the names of detainees from disclosure. Upon review, we hold that Exemption 7(A) was properly invoked to withhold the names of the detainees and their lawyers. Finding the names protected under 7(A), we need not address the other exemptions invoked by the government and reserve judgment on whether they too would support withholding the names.

Exemption 7(A) allows an agency to withhold "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information … could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). In enacting this exemption, "Congress recognized that law enforcement agencies had legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations." Exemption 7(A) does not require a presently pending "enforcement proceeding." Rather, as the district court correctly noted, it is sufficient that the government's ongoing September 11 terrorism investigation is likely to lead to such proceedings.

The threshold question here is whether the names of detainees were "compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7). Because the DOJ is an agency "specializ[ing] in law enforcement," its claim of a law enforcement purpose is entitled to deference. To establish a law

enforcement purpose, DOJ's declarations must establish (1) "a rational nexus between the investigation and one of the agency's law enforcement duties;" and (2) "a connection between an individual or incident and a possible security risk or violation of federal law." The government's proffer easily meets this standard. The terrorism investigation is one of DOJ's chief "law enforcement duties" at this time, and the investigation concerns a heinous violation of federal law as well as a breach of this nation's security. Moreover, the names of the detainees and their connection to the investigation came to the government's attention as a result of that law enforcement investigation.

Nonetheless, plaintiffs contend that detainees' names fall outside Exemption 7 because the names are contained in arrest warrants, INS charging documents, and jail records. Since these documents have traditionally been public, plaintiffs contend, Exemption 7 should not be construed to allow withholding of the names. We disagree. Plaintiffs are seeking a comprehensive listing of individuals detained during the post-September 11 investigation. The names have been compiled for the "law enforcement purpose" of successfully prosecuting the terrorism investigation. As compiled, they constitute a comprehensive diagram of the law enforcement investigation after September 11. Clearly this is information compiled for law enforcement purposes.

Next, plaintiffs urge that Exemption 7(A) does not apply because disclosure is not "reasonably likely to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). We disagree. Under Exemption 7(A), the government has the burden of demonstrating a reasonable likelihood of interference with the terrorism investigation. The government's declarations, viewed in light of the appropriate deference to the executive on issues of national security, satisfy this burden.

It is well-established that a court may rely on government affidavits to support the withholding of documents under FOIA exemptions, and that we review the government's justifications therein *de novo,* 5 U.S.C. § 552(a)(4)(B). It is equally well-established that the judiciary owes some measure of deference to the executive in cases implicating national security, a uniquely executive purview. *See, e.g., Zadvydas v. Davis,* 533 U.S. 678, 696 (2001) (noting that "terrorism or other special circumstances" might warrant "heightened deference to the judgments of the political branches"); *Dep't of the Navy v. Egan,* 484 U.S. 518, 530 (1988) ("courts traditionally have been reluctant to intrude upon the authority of the executive in military and national security affairs"). Indeed, both the Supreme Court and this Court have expressly recognized the propriety of deference to the executive in the context of FOIA claims which implicate national security.

In *CIA v. Sims,* 471 U.S. 159 (1985), the Supreme Court examined the CIA's claims that the names and institutional affiliations of certain researchers in a government-sponsored behavior modification program were exempt from disclosure under FOIA Exemption 3, 5 U.S.C. § 552(b)(3). The agency claimed that the information was protected from disclosure by a statute charging the CIA to prevent unauthorized disclosure of "intelligence sources and methods," 50 U.S.C. § 403(d)(3). In accepting the CIA Director's judgment that disclosure would reveal intelligence sources and methods, the Court explained that "the decisions of the Director, who must of course be familiar with 'the whole picture,' as judges are not, are worthy of great deference given the magnitude of the national security interests and potential risks at stake." *Sims,* 471 U.S. at 179. The Court further held that "it is the responsibility of the Director of Central Intelligence, not that of the judiciary, to weigh the variety of subtle and complex factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process."

The same is true of the Justice Department officials in charge of the present investigation. We have consistently reiterated the principle of deference to the executive in the FOIA context when national security concerns are implicated. …

Given this weight of authority counseling deference in national security matters, we owe deference to the government's judgments contained in its affidavits. Just as we have deferred to the executive when it invokes FOIA Exemptions 1 and 3, we owe the same deference under Exemption 7(A) in appropriate cases, such as this one. …

The need for deference in this case is just as strong as in earlier cases. America faces an enemy just as real as its former Cold War foes, with capabilities beyond the capacity of the judiciary to explore.

Exemption 7(A) explicitly requires a predictive judgment of the harm that will result from disclosure of information, permitting withholding when it "could reasonably be expected" that the harm will result. 5 U.S.C. § 552(b)(7)(A). It is abundantly clear that the government's top counterterrorism officials are well-suited to make this predictive judgment. Conversely, the judiciary is in an extremely poor position to second-guess the executive's judgment in this area of national security. We therefore reject any attempt to artificially limit the long-recognized deference to the executive on national security issues. Judicial deference depends on the substance of the danger posed by disclosure — that is, harm to the national security — not the FOIA exemption invoked.

In light of the deference mandated by the separation of powers and Supreme Court precedent, we hold that the government's expectation that disclosure of the detainees' names would enable al Qaeda or other terrorist groups to map the course of the investigation and thus develop the means to impede it is reasonable. A complete list of names informing terrorists of every suspect detained by the government at any point during the September 11 investigation would give terrorist organizations a composite picture of the government investigation, and since these organizations would generally know the activities and locations of its members on or about September 11, disclosure would inform terrorists of both the substantive and geographic focus of the investigation. Moreover, disclosure would inform terrorists which of their members were compromised by the investigation, and which were not. This information could allow terrorists to better evade the ongoing investigation and more easily formulate or revise counter-efforts. In short, the "records could reveal much about the focus and scope of the [agency's] investigation, and are thus precisely the sort of information exemption 7(A) allows an agency to keep secret."

As the district court noted, courts have relied on similar mosaic arguments in the context of national security. In *Sims*, for example, the Supreme Court cautioned that "bits and pieces" of data " 'may aid in piecing together bits of other information even when the individual piece is not of obvious importance in itself.' " Thus, "[w]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context." (quotations omitted). Such a danger is present here. While the name of any individual detainee may appear innocuous or trivial, it could be of great use to al Qaeda in plotting future terrorist attacks or intimidating witnesses in the present investigation. Importantly, plaintiffs here do not request "bits and pieces" of information, but rather seek the names of every single individual detained in the course of the government's terrorism investigation. It is more than reasonable to expect that disclosing the name of every individual detained in the post-September 11 terrorism investigation would interfere with that investigation.

Similarly, the government's judgment that disclosure would deter or hinder cooperation by detainees is reasonable. The government reasonably predicts that if terrorists learn one of their members has been detained, they would attempt to deter any further cooperation by that member through intimidation, physical coercion, or by cutting off all contact with the detainee. A terrorist organization may even seek to hunt down detainees (or their families) who are not members of the organization, but who the terrorists know may have valuable information about the organization.

On numerous occasions, both the Supreme Court and this Court have found government declarations expressing the likelihood of witness intimidation and evidence tampering sufficient to justify withholding of witnesses' names under Exemption 7(A). …

For several reasons, plaintiffs contend that we should reject the government's predictive judgments of the harms that would result from disclosure. First, they argue that terrorist organizations likely already know which of their members have been detained. We have no way of assessing that likelihood. Moreover, even if terrorist organizations know about some of their members who were detained, a complete list of detainees could still have great value in confirming the status of their members. For example, an organization may be unaware of a member who was detained briefly and then released, but remains subject to continuing government surveillance. After disclosure, this detainee could be irreparably compromised as a source of information.

More importantly, some detainees may not be members of terrorist organizations, but may nonetheless have been detained on INS or material witness warrants as having information about

terrorists. Terrorist organizations are less likely to be aware of such individuals' status as detainees. Such detainees could be acquaintances of the September 11 terrorists, or members of the same community groups or mosques. These detainees, fearing retribution or stigma, would be less likely to cooperate with the investigation if their names are disclosed. Moreover, tracking down the background and location of these detainees could give terrorists insights into the investigation they would otherwise be unlikely to have. After disclosure, terrorist organizations could attempt to intimidate these detainees or their families, or feed the detainees false or misleading information. It is important to remember that many of these detainees have been released at this time and are thus especially vulnerable to intimidation or coercion. While the detainees have been free to disclose their names to the press or public, it is telling that so few have come forward, perhaps for fear of this very intimidation.

We further note the impact disclosure could have on the government's investigation going forward. A potential witness or informant may be much less likely to come forward and cooperate with the investigation if he believes his name will be made public.

Plaintiffs next argue that the government's predictive judgment is undermined by the government's disclosure of some of the detainees' names. The Supreme Court confronted a similar argument in *Sims*, in which respondents contended that "because the Agency has already revealed the names of many of the institutions at which [behavior modification] research was performed, the Agency is somehow estopped from withholding the names of others." In rejecting the argument, the Court stated that "[t]his suggestion overlooks the political realities of intelligence operations in which, among other things, our Government may choose to release information deliberately to 'send a message' to allies or adversaries." We likewise reject the plaintiffs' version of this discredited argument. The disclosure of a few pieces of information in no way lessens the government's argument that complete disclosure would provide a composite picture of its investigation and have negative effects on the investigation. Furthermore … strategic disclosures can be important weapons in the government's arsenal during a law enforcement investigation. The court should not second-guess the executive's judgment in this area. "It is the responsibility of the [executive] not that of the judiciary" to determine when to disclose information that may compromise intelligence sources and methods.

Contrary to plaintiffs' claims, the government's submissions easily establish an adequate connection between both the material witness and the INS detainees and terrorism to warrant full application of the deference principle. First, all material witness detainees have been held on warrants issued by a federal judge pursuant to 18 U.S.C. § 3144. Under this statute, a federal judge may issue a material witness warrant based on an affidavit stating that the witness has information relevant to an ongoing criminal investigation. Consequently, material witness detainees have been found by a federal judge to have relevant knowledge about the terrorism investigation. It is therefore reasonable to assume that disclosure of their names could impede the government's use of these potentially valuable witnesses. As to the INS detainees, the government states that they were

> originally questioned because there were indications that they might have connections with, or possess information pertaining to, terrorist activity against the United States including particularly the September 11 attacks and/or the individuals and organizations who perpetrated them. For example, they may have been questioned because they were identified as having interacted with the hijackers, or were believed to have information relating to other aspects of the investigation.

Reynolds Decl. P 10. "Other INS detainees may have been questioned because of their association with an organization believed to be involved in providing material support to terrorist organizations." Moreover, "[i]n the course of questioning them, law enforcement agents determined, often from the subjects themselves, that they were in violation of federal immigration laws, and, in some instances also determined that they had links to other facets of the investigation." Furthermore, the Watson Declaration speaks of the INS detainees being subject to "public hearings involving evidence about terrorist links," and states that "concerns remain" about links to terrorism. The clear import of the declarations is that many of the detainees have links to terrorism. This comes as no surprise given that the detainees were apprehended during the course of a terrorism investigation, and given that several

detainees have been charged with federal terrorism crimes or held as enemy combatants. Accordingly, we conclude that the evidence presented in the declarations is sufficient to show a rational link between disclosure and the harms alleged.…

B. Identity of Counsel

We next address whether the government properly withheld the names of the attorneys for INS and material witness detainees under Exemptions 7(A), 7(C), and 7(F). As with the identities of the detainees, we hold that their attorneys' names are also protected from disclosure by Exemption 7(A).

The government contends that a list of attorneys for the detainees would facilitate the easy compilation of a list of all detainees, and all of the dangers flowing therefrom. It is more than reasonable to assume that plaintiffs and amici press organizations would attempt to contact detainees' attorneys and compile a list of all detainees. As discussed above, if such a list fell into the hands of al Qaeda, the consequences could be disastrous. Having accepted the government's predictive judgments about the dangers of disclosing a comprehensive list of detainees, we also defer to its prediction that disclosure of attorneys' names involves the same danger.

C. Other Detention Information

Having held that the government properly withheld the names of the detainees pursuant to Exemption 7(A), we easily affirm the portion of the district court's ruling that allowed withholding, under Exemption 7(A), of the more comprehensive detention information sought by plaintiffs.

As outlined above, plaintiffs sought the dates and locations of arrest, detention, and release for each of the detainees. Even more than disclosure of the identities of detainees, the information requested here would provide a complete roadmap of the government's investigation. Knowing when and where each individual was arrested would provide a chronological and geographical picture of the government investigation. Terrorists could learn from this information not only where the government focused its investigation but how that investigation progressed step by step. Armed with that knowledge, they could then reach such conclusions as, for example, which cells had been compromised, and which individuals had been cooperative with the United States. They might well be able to derive conclusions as to how more adequately secure their clandestine operations in future terrorist undertakings. Similarly, knowing where each individual is presently held could facilitate communication between terrorist organizations and detainees and the attendant intimidation of witnesses and fabrication of evidence. As explained in detail above, these impediments to an ongoing law enforcement investigation are precisely what Exemption 7(A) was enacted to preclude. Accordingly, we affirm the district court and hold that the government properly withheld information about the dates and locations of arrest, detention, and release for each detainee.

III. Alternative Grounds

[The majority rejected plaintiff's alternative grounds for disclosure based on the First Amendment and a common law right of access to government information.]

IV. Conclusion

For the reasons set forth above, we conclude that the government was entitled to withhold under FOIA Exemption 7(A) the names of INS detainees and those detained as material witnesses in the course of the post-September 11 terrorism investigation; the dates and locations of arrest, detention, and release of all detainees, including those charged with federal crimes; and the names of counsel for detainees. Finally, neither the First Amendment nor federal common law requires the government to disclose the information sought by plaintiffs.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

TATEL, CIRCUIT JUDGE, dissenting:

….

I.

I begin with some preliminary observations about the principles that govern this case. First, no one can doubt that uniquely compelling governmental interests are at stake: the government's need to respond to the September 11 attacks — unquestionably the worst ever acts of terrorism on American soil — and its ability to defend the nation against future acts of terrorism. But although this court overlooks it, there is another compelling interest at stake in this case: the public's interest in knowing whether the government, in responding to the attacks, is violating the constitutional rights of the hundreds of persons whom it has detained in connection with its terrorism investigation — by, as the plaintiffs allege, detaining them mainly because of their religion or ethnicity, holding them in custody for extended periods without charge, or preventing them from seeking or communicating with legal counsel. The government claims that the detainees have access to counsel and freedom to contact whomever they wish, but the public has a fundamental interest in being able to examine the veracity of such claims. Just as the government has a compelling interest in ensuring citizens' safety, so do citizens have a compelling interest in ensuring that their government does not, in discharging its duties, abuse one of its most awesome powers, the power to arrest and jail.

Second, while the governmental interests in this case may be uniquely compelling, the legal principles that govern its resolution are not at all unique. The court's opinion emphasizes the national-security implications of the September 11 investigation, but as the government conceded at oral argument, this case is not just about September 11. The law that governs this case is the same law that applies whenever the government's need for confidentiality in a law enforcement investigation runs up against the public's right to know "what [its] government is up to." In all such situations, FOIA fully accommodates the government's concerns about the harms that might arise from the release of information pertaining to its investigations. To be sure, the statute strongly favors openness, since Congress recognized that an informed citizenry is "vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." But Congress also recognized that "legitimate governmental and private interests could be harmed by release of certain types of information." It therefore "provided … specific exemptions under which disclosure could be refused," including the four exemptions relevant to this case. … But " 'these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.' " Accordingly, courts must "narrowly construe" the exemptions, and "the burden is on the agency to sustain its action." The government may in some situations withhold entire categories of records from disclosure, as it seeks to do here by withholding names and other information pertaining to all terrorism-investigation detainees. In order to sustain its burden, however, the government must demonstrate that "the range of circumstances included in the category 'characteristically support[s] an inference' that the statutory requirements for exemption are satisfied."

The third principle relates to the level of deference we owe the government. Invoking the "heightened deference to the judgments of the political branches with respect to matters of national security," the government refuses to identify the specific categories of information that would actually interfere with its investigation, but rather asks us simply to trust its judgment. This court obeys, declaring that "the judiciary is in an extremely poor position to second-guess the executive's judgment in this area of national security." But requiring agencies to make the detailed showing FOIA requires is not second guessing their judgment about matters within their expertise. And in any event, this court is also in an extremely poor position to second-guess the legislature's judgment that the judiciary must play a meaningful role in reviewing FOIA exemption requests. Neither FOIA itself nor this circuit's interpretation of the statute authorizes the court to invoke the phrase "national security" to relieve the government of its burden of justifying its refusal to release information under FOIA.

NOTES AND QUESTIONS

5supp-8. Why should there be a national security exemption to FOIA? How would you draft the exemption, if you believe there should be one? What do you think of the interpretation of this exemption, as expressed by Executive Order 12,065?

5supp-9. What is the purpose of exemption 7? When does that purpose cease to exist?

5supp-10. How does the majority's interpretive approach to FOIA in *Milner* differ from that of Justice Breyer? Does the textualist approach taken here narrow the scope of the exemption 2? Were the old formulations of High 2 and Low 2 based on legislative history rather than statutory language? Is that why they no longer are controlling?

5supp-11. What remains of Exemption 2 after this opinion? Based on the text of this exemption what three elements must be satisfied for that Exemption to apply? For a discussion of this case and the role that FOIA plays in national security cases generally, see Barry Sullivan, *FOIA and the First Amendment: Representative Democracy and the People's Elusive "Right to Know*," 72 MD L. REV. 1, 84 (2012) ("the promise of FOIA remains unfulfilled particularly when national security considerations can be interposed as plausible objections to disclosure, no matter how transient, ephemeral, or remote the danger to national security may be").

5supp-12. What impact did 9/11 have on the court's reasoning in *Center for National Security Studies?*

5supp-13. Is the majority's categorical all or nothing approach to Exemption 7(A) justified? Were there any parts of the plaintiff's request that could have been provided?

5supp-14. How much deference does the majority give to executive determinations of national security? How much deference should it give? On what basis, does the dissent differ in its approach to these issues?

5supp-15. In the aftermath of the September 11, 2001, attack on the World Trade Center, the federal government significantly restricted the information it makes available to the public — lest the government provide information that facilitates another terrorist attack. *See generally* Bradley Pack, Note, *FOIA Frustration: Access to Government Records Under the Bush Administration,* 46 ARIZ. L. REV. 815 (2004); Kristen E. Uhl, Note, *The Freedom of Information Act Post-9/11: Balancing the Public's Right to Know, Critical Infrastructure Protection, and Homeland Security,* 53 AM. U. L. REV. 261 (2003).

The Department of Justice then announced that it would defend in court an agency's decision to withhold information so long as the denial has a "sound legal basis or [release of the information] present [s] an unwarranted risk of adverse impact on the ability of other agencies to protect other important records." Memorandum from John Ashcroft, Attorney General, to Heads of All Federal Departments and Agencies re: The Freedom of Information Act (Oct. 12, 2001), available at http://www.justice.gov/archive/oip/foiapost/2001foiapost19.htm. This represented a change from the policy under the Clinton administration, which had "adopted the policy that the Justice Department would only defend an assertion of a FOIA exemption by agencies 'in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption.' " William A. Wilcox, Jr., *Access to Environmental Information in the United States and the United Kingdom,* 23 LOY. L.A. INT'L & COMP. L. REV. 121, 215 (2001).

5supp-16. The Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, created a new FOIA exemption, the critical infrastructure information exemption, 6 U.S.C. § 133 (2005). It

provides as follows:

§ 133. Protection of voluntarily shared critical infrastructure information

a) Protection

(1)

In general. Notwithstanding any other provision of law, critical infrastructure information (including the identity of the submitting person or entity) that is voluntarily submitted to a covered Federal agency for use by that agency regarding the security of critical infrastructure and protected systems, analysis, warning, interdependency study, recovery, reconstitution, or other informational purpose, when accompanied by an express statement specified in paragraph (2)

(A)

shall be exempt from disclosure under section 552 of Title 5 (commonly referred to as the Freedom of Information Act) … .

(2)

Express statement. For purposes of paragraph (1), the term "express statement", with respect to information or records, means—

(A)

in the case of written information or records, a written marking on the information or records substantially similar to the following: "This information is voluntarily submitted to the Federal Government in expectation of protection from disclosure as provided by the provisions of the Critical Infrastructure Information Act of 2002."; or

(B)

in the case of oral information, a similar written statement submitted within a reasonable period following the oral communication.…

*

Note that the exemption covers "information" rather than "records," and also note that the exemption does not apply to information that an entity is required to submit to the federal government, 6 C.F.R. § 29.3 (2005).

D. Reverse FOIA Suits

FOIA is replete with the word "shall," underscoring its heralded goal of *mandatory* information disclosure. But in regard to its exemptions (Section 552(b)), the Act is silent as to whether an agency "may" or "shall" refuse to disclose such exempt information.[94] A "reverse" FOIA action is one in which the submitter of information—usually a corporation or other business entity—seeks to enjoin an agency from releasing that information in response to a third-

[94] CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1133 n. 1 (D.C.Cir.1987). *See also* Bartholdi Cable Co. v. FCC, 114 F.3d 274, 279 (D.C.Cir.1997); Cortez III Serv. Corp. v. NASA, 921 F.Supp. 8, 11 (D.D.C.1996) (holding that in reverse FOIA actions "courts have jurisdiction to hear complaints brought by parties claiming that an agency decision to release information adversely affects them").

party FOIA request. In *Chrysler Corporation v. Brown*,[95] the U.S. Supreme Court held that those who submit information could bring suit to prevent its release.[96]

***

Given that citizens can seek to obtain information from the Government, can those who submitted that information prevent its disclosure? What are the rights of submitters of information under FOIA? Consider the following case.

Chrysler Corp. v. Brown

441 U.S. 281 (1979)

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The expanding range of federal regulatory activity and growth in the Government sector of the economy have increased federal agencies' demands for information about the activities of private individuals and corporations. These developments have paralleled a related concern about secrecy in Government and abuse of power. The Freedom of Information Act (hereinafter FOIA) was a response to this concern, but it has also had a largely unforeseen tendency to exacerbate the uneasiness of those who comply with governmental demands for information. For under the FOIA third parties have been able to obtain Government files containing information submitted by corporations and individuals who thought that the information would be held in confidence.

This case belongs to a class that has been popularly denominated "reverse-FOIA" suits. The Chrysler Corp. (hereinafter Chrysler) seeks to enjoin agency disclosure on the grounds that it is inconsistent with the FOIA and 18 U.S.C. § 1905, a criminal statute with origins in the 19th century that proscribes disclosure of certain classes of business and personal information. We agree with the Court of Appeals for the Third Circuit that the FOIA is purely a disclosure statute and affords Chrysler no private right of action to enjoin agency disclosure. But we cannot agree with that court's conclusion that this disclosure is "authorized by law" within the meaning of § 1905. Therefore, we vacate the Court of Appeals' judgment and remand so that it can consider whether the documents at issue in this case fall within the terms of § 1905. …

In contending that the FOIA bars disclosure of the requested equal employment opportunity information, Chrysler relies on the Act's nine exemptions and argues that they require an agency to withhold exempted material. In this case it relies specifically on Exemption 4:

> "(b) [FOIA] does not apply to matters that are—
>
> … (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential. …"

Chrysler contends that the nine exemptions in general, and Exemption 4 in particular, reflect a sensitivity to the privacy interests of private individuals and nongovernmental entities. That contention may be conceded without inexorably requiring the conclusion that the exemptions impose affirmative duties on an agency to withhold information sought. In fact, that conclusion is not supported by the

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[95] 441 U.S. 281, 99 S. Ct. 1705, 60 L. Ed. 2d 208 (1979), *on remand*, 611 F.2d 439 (3d Cir.1979). For agency regulations dealing with this issue, *see* 28 C.F.R. § 16.7 (1980).

[96] The Court noted:

> The expanding range of federal regulatory activity and growth in the Government sector of the economy have increased federal agencies' demands for information about the activities of private individuals and corporations. These developments have paralleled a related concern about secrecy in Government and abuse of power. The [FOIA] was a response to this concern, but it has also had a largely unforeseen tendency to exacerbate the uneasiness of those who comply with governmental demands for information. For under the FOIA third parties have been able to obtain Government files containing information submitted by corporations and individuals who thought the information would be held in confidence. . . .

441 U.S. at 285, 99 S. Ct. at 1709.

language, logic, or history of the Act.

The organization of the Act is straightforward. Subsection (a), 5 U.S.C. § 552(a), places a general obligation on the agency to make information available to the public and sets out specific modes of disclosure for certain classes of information. Subsection (b), which lists the exemptions, simply states that the specified material is not subject to the disclosure obligations set out in subsection (a). By its terms, subsection (b) demarcates the agency's obligation to disclose; it does not foreclose disclosure.

That the FOIA is exclusively a disclosure statute is, perhaps, demonstrated most convincingly by examining its provision for judicial relief. Subsection (a)(4)(B) gives federal district courts "jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B). That provision does not give the authority to bar disclosure, and thus fortifies our belief that Chrysler, and courts which have shared its view, have incorrectly interpreted the exemption provisions of the FOIA. The Act is an attempt to meet the demand for open government while preserving workable confidentiality in governmental decision-making. Congress appreciated that, with the expanding sphere of governmental regulation and enterprise, much of the information within Government files has been submitted by private entities seeking Government contracts or responding to unconditional reporting obligations imposed by law. There was sentiment that Government agencies should have the latitude, in certain circumstances, to afford the confidentiality desired by these submitters. But the congressional concern was with the agency's need or preference for confidentiality; the FOIA by itself protects the submitters' interest in confidentiality only to the extent that this interest is endorsed by the agency collecting the information.

Enlarged access to governmental information undoubtedly cuts against the privacy concerns of nongovernmental entities, and as a matter of policy some balancing and accommodation may well be desirable. We simply hold here that Congress did not design the FOIA exemptions to be mandatory bars to disclosure.[97]

III

Chrysler contends, however, that even if its suit for injunctive relief cannot be based on the FOIA, such an action can be premised on the Trade Secrets Act, 18 U.S.C. § 1905. The Act provides:

> "Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment."

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[97] It is informative in this regard to compare the FOIA with the Privacy Act of 1974, 5 U.S.C. § 552a. In the latter Act, Congress explicitly requires agencies to withhold records about an individual from most third parties unless the subject gives his permission. Even more telling is 49 U.S.C. § 1357, a section which authorizes the Administrator of the FAA to take anti-hijacking measures, including research and development of protection devices. "Notwithstanding [the FOIA], the Administrator shall prescribe such regulations as he may deem necessary to prohibit disclosure of any information obtained or developed in the conduct of research and development activities under this subsection if, in the opinion of the Administrator, the disclosure of such information— . …

> "(B) would reveal trade secrets or privileged or confidential commercial or financial information obtained from any person. …" § 1357(d)(2)(B).

There are necessarily two parts to Chrysler's argument: that § 1905 is applicable to the type of disclosure threatened in this case, and that it affords Chrysler a private right of action to obtain injunctive relief.

A

The Court of Appeals held that § 1905 was not applicable to the agency disclosure at issue here because such disclosure was "authorized by law" within the meaning of the Act. The court found the source of that authorization to be the OFCCP regulations that DLA relied on in deciding to disclose information on the Hamtramck and Newark plants. Chrysler contends here that these agency regulations are not "law" within the meaning of § 1905.

It has been established in a variety of contexts that properly promulgated, substantive agency regulations have the "force and effect of law." This doctrine is so well established that agency regulations implementing federal statutes have been held to pre-empt state law under the Supremacy Clause. It would therefore take a clear showing of contrary legislative intent before the phrase "authorized by law" in § 1905 could be held to have a narrower ambit than the traditional understanding.

The origins of the Trade Secrets Act can be traced to Rev. Stat. § 3167, an Act which barred unauthorized disclosure of specified business information by Government revenue officers. There is very little legislative history concerning the original bill, which was passed in 1864. It was re-enacted numerous times, with some modification, and remained part of the revenue laws until 1948. Congressional statements made at the time of these reenactments indicate that Congress was primarily concerned with unauthorized disclosure of business information by feckless or corrupt revenue agents, for in the early days of the Bureau of Internal Revenue, it was the field agents who had substantial contact with confidential financial information.

In 1948, Rev. Stat. § 3167 was consolidated with two other statutes — involving the Tariff Commission and the Department of Commerce — to form the Trade Secrets Act. The statute governing the Tariff Commission was very similar to Rev. Stat. § 3167, and it explicitly bound members of the Commission as well as Commission employees. The Commerce Department statute embodied some differences in form. It was a mandate addressed to the Bureau of Foreign and Domestic Commerce and to its Director, but there was no reference to Bureau employees and it contained no criminal sanctions. Unlike the other statutes, it also had no exception for disclosures "authorized by law." In its effort to "consolidat[e]" the three statutes, Congress enacted § 1905 and essentially borrowed the form of Rev. Stat. § 3167 and the Tariff Commission statute. We find nothing in the legislative history of § 1905 and its predecessors which lends support to Chrysler's contention that Congress intended the phrase "authorized by law," as used in § 1905, to have a special, limited meaning.

Nor do we find anything in the legislative history to support the respondents' suggestion that § 1905 does not address formal agency action — *i.e.*, that it is essentially an "antileak" statute that does not bind the heads of governmental departments or agencies. That would require an expansive and unprecedented holding that any agency action directed or approved by an agency head is "authorized by law," regardless of the statutory authority for that action. …

In order for a regulation to have the "force and effect of law," it must have certain substantive characteristics and be the product of certain procedural requisites. The central distinction among agency regulations found in the APA is that between "substantive rules" on the one hand and "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" on the other. A "substantive rule" is not defined in the APA, and other authoritative sources essentially offer definitions by negative inference. But in *Morton v. Ruiz,* 415 U.S. 199 (1974), we noted a characteristic inherent in the concept of a "substantive rule." We described a substantive rule — or a "legislative-type rule," as one "affecting individual rights and obligations." This characteristic is an important touchstone for distinguishing those rules that may be "binding" or have the "force of law."

That an agency regulation is "substantive," however, does not by itself give it the "force and effect of law." The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such

power by the Congress and subject to limitations which that body imposes. As this Court noted in *Batterton v. Francis,* 432 U.S. 416, 425 n.9:

> "Legislative, or substantive, regulations are 'issued by an agency pursuant to statutory authority and … implement the statute, as, for example, the proxy rules issued by the Securities and Exchange Commission. … Such rules have the force and effect of law."

Likewise the promulgation of these regulations must conform with any procedural requirements imposed by Congress. For agency discretion is limited not only by substantive, statutory grants of authority, but also by the procedural requirements which "assure fairness and mature consideration of rules of general application." The pertinent procedural limitations in this case are those found in the APA.

The regulations relied on by the respondents in this case as providing "authoriz[ation] by law" within the meaning of § 1905 certainly affect individual rights and obligations; they govern the public's right to information in records obtained under Executive Order 11246 and the confidentiality rights of those who submit information to OFCCP and its compliance agencies. It is a much closer question, however, whether they are the product of a congressional grant of legislative authority.…

We think that it is clear that when it enacted these statutes, Congress was not concerned with public disclosure of trade secrets or confidential business information, and, unless we were to hold that any federal statute that implies some authority to collect information must grant legislative authority to disclose that information to the public, it is simply not possible to find in these statutes a delegation of the disclosure authority asserted by the respondents here. … [The court went on to discuss certain procedural issues under the APA.]

B

We reject, however, Chrysler's contention that the Trade Secrets Act affords a private right of action to enjoin disclosure in violation of the statute. In *Cort v. Ash,* 422 U.S. 66 (1975), we noted that this Court has rarely implied a private right of action under a criminal statute, and where it has done so "there was at least a statutory basis for inferring that a civil cause of action of some sort lay in favor of someone." Nothing in § 1905 prompts such an inference. Nor are other pertinent circumstances outlined in *Cort* present here. As our review of the legislative history of § 1905 — or lack of same — might suggest, there is no indication of legislative intent to create a private right of action. Most importantly, a private right of action under § 1905 is not "necessary to make effective the congressional purpose," for we find that review of DLA's decision to disclose Chrysler's employment data is available under the APA.

IV

While Chrysler may not avail itself of any violations of the provisions of § 1905 in a separate cause of action, any such violations may have a dispositive effect on the outcome of judicial review of agency action pursuant to § 10 of the APA. Section 10(a) of the APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action … , is entitled to judicial review thereof." Two exceptions to this general rule of reviewability are set out in § 10. Review is not available where "statutes preclude judicial review" or where "agency action is committed to agency discretion by law." 5 U.S.C. §§ 701(a)(1), (2). In *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 410 (1971), the Court held that the latter exception applies "where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' " … Were we simply confronted with the authorization in 5 U.S.C. § 301 to prescribe regulations regarding "the custody, use, and preservation of [agency] records, papers, and property," it would be difficult to derive any standards limiting agency conduct which might constitute "law to apply." But our discussion in Part III demonstrates that § 1905 and any "authoriz[ation] by law" contemplated by that section place substantive limits on agency action. Therefore, we conclude that DLA's decision to disclose the Chrysler reports is reviewable agency action and Chrysler is a person "adversely affected or aggrieved" within the meaning of § 10(a).

Both Chrysler and the respondents agree that there is APA review of DLA's decision. They disagree on the proper scope of review. Chrysler argues that there should be *de novo* review, while the

respondents contend that such review is only available in extraordinary cases and this is not such a case.

The pertinent provisions of § 10(e) of the APA, 5 U.S.C. § 706, provide that a reviewing court shall

> "(2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; …
>
> "(F) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court."

For the reasons previously stated, we believe any disclosure that violates § 1905 is "not in accordance with law" within the meaning of 5 U.S.C. § 706(2)(A). *De novo* review by the District Court is ordinarily not necessary to decide whether a contemplated disclosure runs afoul of § 1905. The District Court in this case concluded that disclosure of some of Chrysler's documents was barred by § 1905, but the Court of Appeals did not reach the issue. We shall therefore vacate the Court of Appeals' judgment and remand for further proceedings consistent with this opinion in order that the Court of Appeals may consider whether the contemplated disclosures would violate the prohibition of § 1905.[98] Since the decision regarding this substantive issue — the scope of § 1905 — will necessarily have some effect on the proper form of judicial review pursuant to § 706(2), we think it unnecessary, and therefore unwise, at the present stage of this case for us to express any additional views on that issue.

Vacated and remanded.

[MR. JUSTICE MARSHALL, concurred and raised the issue of the validity of the executive orders involved in this case.]

NOTES AND QUESTIONS

5supp-17. A decision by an agency to release information covered by one of the exemptions to FOIA is subject to judicial review. A court could find that the agency's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Did the Court resolve the relationship of Exemption 4 to the Trade Secrets Act in this case? The D.C. Circuit subsequently ruled that Exemption 4 and the Trade Secrets Act are coextensive, thereby making Exemption 4's bar against disclosure mandatory. *See CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1144 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 977 (1988).

5supp-18. Exemption 4 protects against the disclosure of "trade secrets and commercial or financial information." 5 U.S.C. § 552(b)(4). Courts have held that if a reverse-FOIA plaintiff has shown that competitive harm will result from the disclosure, the agency must provide more than an "unelaborated contrary conclusion" to survive a reverse-FOIA challenge. *See, United Technologies Corp. v. U.S. Dept. of Defense*, 601 F.3d 557, 563 (D.C. Cir. 2010). Competitive harm does not include the disclosure of information that would harm the reputation of the

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[98] Since the Court of Appeals assumed for purposes of argument that the material in question was within an exemption to the FOIA, that court found it unnecessary expressly to decide that issue and it is open on remand. We, of course, do not here attempt to determine the relative ambits of Exemption 4 and § 1905, or to determine whether § 1905 is an exempting statute within the terms of the amended Exemption 3, 5 U.S.C. § 552(b)(3). Although there is a theoretical possibility that material might be outside Exemption 4 yet within the substantive provisions of § 1905, and that therefore the FOIA might provide the necessary "authorization by law" for purposes of § 1905, that possibility is at most of limited practical significance in view of the similarity of language between Exemption 4 and the substantive provisions of § 1905.

plaintiff. However, it does include the traditional trade secrets protected by Exemption 4. What about the disclosure of quality control audit reports of companies fulfilling government contracts? In *United Technologies Corp*. the court held that the reports were protected to the extent that they "reveal[ed] details about … [the plaintiff's] proprietary manufacturing and quality control processes." *Id*. at 565. How does this affect the ability of interested parties to use FOIA to examine whether appropriate oversight of government contracts was being conducted?

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§ 5.12 The Return of Crowell v. Benson

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§ 6.11 (Lexis-Nexis, 3d ed. 2014)

Consider the following case. Why was Justice Brennan so concerned about the role of bankruptcy judges? Do bankruptcy judges threaten to undermine the integrity of the federal courts? What was Congress trying to do when it created these judgeships? Was it improperly interfering with federal court jurisdiction?

Northern Pipeline Construction Co. v. Marathon Pipe Line Co.

458 U.S. 50 (1982)

[This case involved the constitutionality of the Bankruptcy Act of 1978. Bankruptcy judges were Article I judges authorized to conduct trials of state contract and tort cases brought by the estates of bankrupt persons against third parties, even if diversity of citizenship existed. A plurality of the Court, in an opinion by Justice Brennan clearly found these powers far too extensive for an Article I Court. In the excerpted opinion below, Justice Brennan, writing for Justices Marshall, Blackmun, and Stevens, attempted to restate or, perhaps redefine, the kinds of cases in which Article I courts could replace Article III courts.]

… It is undisputed that the bankruptcy judges whose offices were created by the Bankruptcy Act of 1978 do not enjoy the protections constitutionally afforded to Art. III judges. The bankruptcy judges do not serve for life subject to their continued "good Behaviour." Rather, they are appointed for 14-year terms, and can be removed by the judicial council of the circuit in which they serve on grounds of "incompetency, misconduct, neglect of duty, or physical or mental disability." Second, the salaries of the bankruptcy judges are not immune from diminution by Congress. … In short, there is no doubt that the bankruptcy judges created by the Act are not Art. III judges. That Congress chose to vest such broad jurisdiction in non-Art. III bankruptcy courts, after giving substantial consideration to the constitutionality of the Act, is of course reason to respect the congressional conclusion. … But at the same time,

> "[d]eciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution." *Baker v. Carr,* 369 U.S. 186, 211 (1962).

With these principles in mind, we turn to the question presented for decision: whether the Bankruptcy Act of 1978 violates the command of Art. III that the judicial power of the United States must be vested in courts whose judges enjoy the protections and safeguards specified in that Article.

Appellants suggest two grounds for upholding the Act's conferral of broad adjudicative powers upon judges unprotected by Art. III. First, it is urged that "pursuant to its enumerated Article I powers, Congress may establish legislative courts that have jurisdiction to decide cases to which the Article III

judicial power of the United States extends." Brief for United States 9. Referring to our precedents upholding the validity of "legislative courts," appellants suggest that "the plenary grants of power in Article I permit Congress to establish non-Article III tribunals in specialized areas having particularized needs and warranting distinctive treatment," such as the area of bankruptcy law. … Second, appellants contend that even if the Constitution does require that this bankruptcy-related action be adjudicated in an Art. III court, the Act in fact satisfies that requirement. "Bankruptcy jurisdiction was vested in the district court" of the judicial district in which the bankruptcy court is located, "and the exercise of that jurisdiction by the adjunct bankruptcy court was made subject to appeal as of right to an Article III court." … Analogizing the role of the bankruptcy court to that of a special master, appellants urge us to conclude that this "adjunct" system established by Congress satisfies the requirements of Art. III. We consider these arguments in turn.

III

Congress did not constitute the bankruptcy courts as legislative courts. Appellants contend, however, that the bankruptcy courts could have been so constituted, and that as a result the "adjunct" system in fact chosen by Congress does not impermissibly encroach upon the judicial power. In advancing this argument, appellants rely upon cases in which we have identified certain matters that "congress may or may not bring within the cognizance of [Art. III courts], as it may deem proper." *Murray's Lessee v. Hoboken Land & Improvement* Co., 18 How. 272, 284 (1856). But when properly understood, these precedents represent no broad departure from the constitutional command that the judicial power of the United States must be vested in Art. III courts. Rather, they reduce to three narrow situations not subject to that command, each recognizing a circumstance in which the grant of power to the Legislative and Executive Branches was historically and constitutionally so exceptional that the congressional assertion of a power to create legislative courts was consistent with, rather than threatening to, the constitutional mandate of separation of powers. These precedents simply acknowledge that the literal command of Art. III, assigning the judicial power of the United States to courts insulated from Legislative or Executive interference, must be interpreted in light of the historical context in which the Constitution was written, and of the structural imperatives of the Constitution as a whole. … [The Court then discussed and distinguished precedents dealing with non-Article III territorial Courts, and cases involving courts martial].

Finally, appellants rely on a third group of cases, in which this Court has upheld the constitutionality of legislative courts and administrative agencies created by Congress to adjudicate cases involving "public rights."[99] The "public rights" doctrine was first set forth in *Murray's Lessee v. Hoboken Land & Improvement Co.,* 18 How. 272 (1856):

> [W]e do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, *involving public rights,* which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." *Id.,* at 284 (emphasis added).

This doctrine may be explained in part by reference to the traditional principle of sovereign immunity, which recognizes that the Government may attach conditions to its consent to be sued. … But the public-rights doctrine also draws upon the principle of separation of powers, and a historical understanding that certain prerogatives were reserved to the political Branches of Government. The doctrine extends only to matters arising "between the Government and persons subject to its authority in

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[99] Congress' power to create legislative courts to adjudicate public rights carries with it the lesser power to create administrative agencies for the same purpose, and to provide for review of those agency decisions in Art. III courts. *See, e.g., Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n,* 430 U.S. 442, 450 (1977).

connection with the performance of the constitutional functions of the executive or legislative departments," *Crowell v. Benson,* 285 U.S. 22, 50 (1932), and only to matters that historically could have been determined exclusively by those departments. … The understanding of these cases is that the Framers expected that Congress would be free to commit such matters completely to nonjudicial executive determination, and that as a result there can be no constitutional objection to Congress' employing the less drastic expedient of committing their determination to a legislative court or an administrative agency. *Crowell v. Benson, supra,* at 50.

The public-rights doctrine is grounded in a historically recognized distinction between matters that could be conclusively determined by the Executive and Legislative Branches and matters that are "inherently … judicial." *Ex parte Bakelite Corp., supra,* at 458. … For example, the Court in *Murray's Lessee* looked to the law of England and the States at the time the Constitution was adopted, in order to determine whether the issue presented was customarily cognizable in the courts. … Concluding that the matter had not traditionally been one for judicial determination, the Court perceived no bar to Congress' establishment of summary procedures, outside of Art. III courts, to collect a debt due to the Government from one of its customs agents. On the same premise, the court in *Ex parte Bakelite Corp., supra,* held that the Court of Customs Appeals had been properly constituted by Congress as a legislative court. …

The distinction between public rights and private rights has not been definitively explained in our precedents.[100] Nor is it necessary to do so in the present cases, for it suffices to observe that a matter of public rights must at a minimum arise "between the government and others." … In contrast, "the liability of one individual to another under the law as defined," *Crowell v. Benson, supra,* at 51, is a matter of private rights. Our precedents clearly establish that only controversies in the former category may be removed from Art. III courts and delegated to legislative courts or administrative agencies for their determination. *See Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n,* 430 U.S. 442, 450, n.7 (1977); *Crowell v. Benson, supra,* at 50–51. … Private-rights disputes, on the other hand, lie at the core of the historically recognized judicial power.

In sum, this Court has identified three situations in which Art. III does not bar the creation of legislative courts. In each of these situations, the Court has recognized certain exceptional powers bestowed upon Congress by the Constitution or by historical consensus. Only in the face of such an exceptional grant of power has the Court declined to hold the authority of Congress subject to the general prescriptions of Art. III.

We discern no such exceptional grant of power applicable in the cases before us. The courts created by the Bankruptcy Act of 1978 do not lie exclusively outside the States of the Federal Union, like those in the District of Columbia and the Territories. Nor do the bankruptcy courts bear any resemblance to courts-martial, which are founded upon the Constitution's grant of plenary authority over the Nation's military forces to the Legislative and Executive Branches. Finally, the substantive legal rights at issue in the present action cannot be deemed "public rights." Appellants argue that a discharge in bankruptcy is indeed a "public right," similar to such congressionally created benefits as "radio station licenses, pilot licenses, or certificates for common carriers" granted by administrative agencies. … But the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case. The former may well be a "public right," but the latter obviously is not. Appellant Northern's right to recover contract damages to augment its estate is "one of private right, that is, of the liability of one individual to another under the law as defined." *Crowell v. Benson,* 285 U.S., at 51. …

IV

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[100] *Crowell v. Benson,* 285 U.S. 22 (1932), attempted to catalog some of the matters that fall within the public-rights doctrine:"Familiar illustrations of administrative agencies created for the determination of such matters are found in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions and payments to veterans." *Id.,* at 51 (footnote omitted).

Appellants advance a second argument for upholding the constitutionality of the Act: that "viewed within the entire judicial framework set up by Congress," the bankruptcy court is merely an "adjunct" to the district court, and that the delegation of certain adjudicative functions to the bankruptcy court is accordingly consistent with the principle that the judicial power of the United States must be vested in Art. III courts. …

We hold that the Bankruptcy Act of 1978 carries the possibility of … an unwarranted encroachment. Many of the rights subject to adjudication by the Act's bankruptcy courts, … are not of Congress' creation. Indeed, the cases before us, which center upon appellant Northern's claim for damages for breach of contract and misrepresentation, involve a right created by state law, a right independent of and antecedent to the reorganization petition that conferred jurisdiction upon the Bankruptcy Court. Accordingly, Congress' authority to control the manner in which that right is adjudicated, through assignment of historically judicial functions to a non-Art. III "adjunct," plainly must be deemed at a minimum. Yet it is equally plain that Congress has vested the "adjunct" bankruptcy judges with powers over Northern's state-created right that far exceed the powers that it has vested in administrative agencies that adjudicate only rights of Congress' own creation.

Unlike the administrative scheme that we reviewed in *Crowell,* the Act vests all "essential attributes" of the judicial power of the United States in the "adjunct" bankruptcy court. First, the agency in *Crowell* made only specialized, narrowly confined factual determinations regarding a particularized area of law. In contrast, the subject-matter jurisdiction of the bankruptcy courts encompasses not only traditional matters of bankruptcy, but also "all civil proceedings arising under title 11 or arising in or related to cases under title 11." … Second, while the agency in *Crowell* engaged in statutorily channeled factfinding functions, the bankruptcy courts exercise "all of the jurisdiction" conferred by the Act on the district courts, § 1471(c). Third, the agency in *Crowell* possessed only a limited power to issue compensation orders pursuant to specialized procedures, and its orders could be enforced only by order of the district court. By contrast, the bankruptcy courts exercise all ordinary powers of district courts, including the power to preside over jury trials, … the power to issue declaratory judgments, § 2201, the power to issue writs of habeas corpus, § 2256, and the power to issue any order, process, or judgment appropriate for the enforcement of the provisions of Title 11, 11 U.S.C. § 105(a) (1976 ed., Supp. IV). Fourth, while orders issued by the agency in *Crowell* were to be set aside if "not supported by the evidence," the judgments of the bankruptcy courts are apparently subject to review only under the more deferential "clearly erroneous" standard. … Finally, the agency in *Crowell* was required by law to seek enforcement of its compensation orders in the district court. In contrast, the bankruptcy courts issue final judgments, which are binding and enforceable even in the absence of an appeal. …

We conclude that 28 U.S.C. § 1471 (1976 ed., Supp. IV), as added by § 241(a) of the Bankruptcy Act of 1978, has impermissibly removed most, if not all, of "the essential attributes of the judicial power" from the Art. III district court, and has vested those attributes in a non-Art. III adjunct. Such a grant of jurisdiction cannot be sustained as an exercise of Congress' power to create adjuncts to Art. III courts. …

JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR joins, concurring in the judgment.

Were I to agree with the plurality that the question presented by these cases is "whether the assignment by Congress to bankruptcy judges of the jurisdiction granted in 28 U.S.C. § 1471 (1976 ed., Supp. IV) by § 241(a) of the Bankruptcy Act of 1978 violates Art. III of the Constitution," *ante,* at 52, I would with considerable reluctance embark on the duty of deciding this broad question. But appellee Marathon Pipe Line Co. has not been subjected to the full range of authority granted bankruptcy courts by § 1471. It was named as a defendant in a suit brought by appellant Northern Pipeline Construction Co. in a United States Bankruptcy Court. The suit sought damages for, *inter alia,* breaches of contract and warranty. Marathon moved to dismiss the action on the grounds that the Bankruptcy Act of 1978, which authorized the suit, violated Art. III of the Constitution insofar as it established bankruptcy judges whose tenure and salary protection do not conform to the requirements of Art. III.

With the cases in this posture, Marathon has simply been named defendant in a lawsuit about a contract, a lawsuit initiated by appellant Northern after having previously filed a petition for reorganization under the Bankruptcy Act. Marathon may object to proceeding further with this lawsuit on

the grounds that if it is to be resolved by an agency of the United States, it may be resolved only by an agency which exercises "[the] judicial power of the United States" described by Art. III of the Constitution. But resolution of any objections it may make on this ground to the exercise of a different authority conferred on bankruptcy courts by the 1978 Act … should await the exercise of such authority. …

The cases dealing with the authority of Congress to create courts other than by use of its power under Art. III do not admit of easy synthesis. In the interval of nearly 150 years between *American Insurance Co. v. Canter,* 7 L. Ed. 242, 1 Pet. 511 (1828), and *Palmore v. United States,* 411 U.S. 389 (1973), the Court addressed the question infrequently. I need not decide whether these cases in fact support a general proposition and three tidy exceptions, as the plurality believes, or whether instead they are but landmarks on a judicial "darkling plain" where ignorant armies have clashed by night, as JUSTICE WHITE apparently believes them to be. None of the cases has gone so far as to sanction the type of adjudication to which Marathon will be subjected against its will under the provisions of the 1978 Act. To whatever extent different powers granted under that Act might be sustained under the "public rights" doctrine of *Murray's Lessee v. Hoboken Land & Improvement* Co., 18 How. 272 (1856), and succeeding cases, I am satisfied that the adjudication of Northern's lawsuit cannot be so sustained. …

CHIEF JUSTICE BURGER, dissenting [opinion omitted].

JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE POWELL join, dissenting.

Article III, § 1, of the Constitution is straightforward and uncomplicated on its face:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Any reader could easily take this provision to mean that although Congress was free to establish such lower courts as it saw fit, any court that it did establish would be an "inferior" court exercising "judicial Power of the United States" and so must be manned by judges possessing both life tenure and a guaranteed minimal income. This would be an eminently sensible reading and one that, as the plurality shows, is well founded in both the documentary sources and the political doctrine of separation of powers that stands behind much of our constitutional structure. …

If this simple reading were correct and we were free to disregard 150 years of history, these would be easy cases and the plurality opinion could end with its observation that "[i]t is undisputed that the bankruptcy judges whose offices were created by the Bankruptcy Act of 1978 do not enjoy the protections constitutionally afforded to Art. III judges." … The fact that the plurality must go on to deal with what has been characterized as one of the most confusing and controversial areas of constitutional law itself indicates the gross oversimplification implicit in the plurality's claim that "our Constitution unambiguously enunciates a fundamental principle — that the 'judicial Power of the United States' must be reposed in an independent Judiciary [and] provides clear institutional protections for that independence." … While this is fine rhetoric, analytically it serves only to put a distracting and superficial gloss on a difficult question.

That question is what limits Art. III places on Congress' ability to create adjudicative institutions designed to carry out federal policy established pursuant to the substantive authority given Congress elsewhere in the Constitution. Whether fortunate or unfortunate, at this point in the history of constitutional law that question can no longer be answered by looking only to the constitutional text. This Court's cases construing that text must also be considered. In its attempt to pigeonhole these cases, the plurality does violence to their meaning and creates an artificial structure that itself lacks coherence. …

[After analyzing the majority's opinion and reading the cases differently, the dissent, quoting from *Palmore v. United States,* 411 U.S. 389 (1973), sets forth the following approach to these issues:]

[T]he requirements of Art. III, which are applicable where laws of national applicability

> and affairs of national concern are at stake, must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment." 411 U.S., at 407–408.

I do not suggest that the Court should simply look to the strength of the legislative interest and ask itself if that interest is more compelling than the values furthered by Art. III. The inquiry should, rather, focus equally on those Art. III values and ask whether and to what extent the legislative scheme accommodates them or, conversely, substantially undermines them. The burden on Art. III values should then be measured against the values Congress hopes to serve through the use of Art. I courts.

To be more concrete: *Crowell, supra,* suggests that the presence of appellate review by an Art. III court will go a long way toward insuring a proper separation of powers. Appellate review of the decisions of legislative courts, like appellate review of state-court decisions, provides a firm check on the ability of the political institutions of government to ignore or transgress constitutional limits on their own authority. Obviously, therefore, a scheme of Art. I courts that provides for appellate review by Art. III courts should be substantially less controversial than a legislative attempt entirely to avoid judicial review in a constitutional court.

Similarly, as long as the proposed Art. I courts are designed to deal with issues likely to be of little interest to the political branches, there is less reason to fear that such courts represent a dangerous accumulation of power in one of the political branches of government. Chief Justice Vinson suggested as much when he stated that the Court should guard against any congressional attempt "to transfer jurisdiction … for the purpose of emasculating" constitutional courts. *National Insurance Co. v. Tidewater Co.,* 337 U.S., at 644.

V

….

Finally, I have no doubt that the ends that Congress sought to accomplish by creating a system of non-Art. III bankruptcy courts were at least as compelling as the ends found to be satisfactory in *Palmore v. United States,* 411 U.S. 389 (1973), or the ends that have traditionally justified the creation of legislative courts. The stresses placed upon the old bankruptcy system by the tremendous increase in bankruptcy cases were well documented and were clearly a matter to which Congress could respond. I do not believe it is possible to challenge Congress' further determination that it was necessary to create a specialized court to deal with bankruptcy matters. This was the nearly uniform conclusion of all those that testified before Congress on the question of reform of the bankruptcy system, as well as the conclusion of the Commission on Bankruptcy Laws established by Congress in 1970 to explore possible improvements in the system.

The real question is not whether Congress was justified in establishing a specialized bankruptcy court, but rather whether it was justified in failing to create a specialized, Art. III bankruptcy court. My own view is that the very fact of extreme specialization may be enough, and certainly has been enough in the past, to justify the creation of a legislative court. Congress may legitimately consider the effect on the federal judiciary of the addition of several hundred specialized judges: We are, on the whole, a body of generalists. The addition of several hundred specialists may substantially change, whether for good or bad, the character of the federal bench. Moreover, Congress may have desired to maintain some flexibility in its possible future responses to the general problem of bankruptcy. There is no question that the existence of several hundred bankruptcy judges with life tenure would have severely limited Congress' future options. Furthermore, the number of bankruptcies may fluctuate, producing a substantially reduced need for bankruptcy judges. Congress may have thought that, in that event, a bankruptcy specialist should not as a general matter serve as a judge in the countless nonspecialized cases that come before the federal district courts. It would then face the prospect of large numbers of idle federal judges. Finally, Congress may have believed that the change from bankruptcy referees to Art. I judges was far less dramatic, and so less disruptive of the existing bankruptcy and constitutional court systems, than would be a change to Art. III judges.

For all of these reasons, I would defer to the congressional judgment. Accordingly, I dissent.

NOTES AND QUESTIONS

5supp-17. One of the important aspects of this plurality opinion is that it resurrected parts of *Crowell v. Benson* long thought to be irrelevant, or at least not likely to be controlling in future cases. Indeed, during the 50 years "from *Crowell* to *Northern Pipeline,* the Supreme Court allowed Congress increasing flexibility in circumventing Article III's tenure requirements. With only a few minor exceptions, the Court decided cases and wrote its opinions in a way that did little to indicate a willingness to resist the more alarming possibilities raised by *Crowell's* broad statements." Young, *Public Rights and the Federal Judicial Power: From* Murray's Lessee *Through* Crowell *to* Schor, 35 BUFF. L. REV. 765, 841 (1986). The plurality opinion certainly serves notice that there are Article III limitations on the delegation of judicial power to Article I courts. What are the limitations articulated in this case? The plurality opinion stated only three instances in which Congress could use courts other than Article III courts to resolve disputes: (1) disputes involving territorial courts; (2) cases involving courts martial; and (3) public rights cases.

5supp-18. Focusing on the plurality's reasoning, particularly with regard to the public rights exception to Article III, what constitutes a public right? The plurality seems not at all clear as to what it means by public rights cases: "The distinction between public rights and private rights has not been definitively explained by our precedents. . . ." But the Court is clear that if a case does not fall into one of these three exceptions, the adjudication must be by an Article III court. Is the concurring opinion in accord with the plurality's rather tidy arrangement of cases into three categories, including a public rights category?

5supp-19. If a case does not fall into any of the plurality's three categories, is it constitutionally possible to create an Article I court? Are any further exceptions possible? Or does the plurality suggest this is it as far as exceptions are concerned?

5supp-20. What is the difference between an Article I court and adjudicatory bodies that are merely adjuncts to Article III courts? Was the administrative court in *Crowell* merely an adjunct? What are the elements of an adjunct adjudicator?

5supp-21. What are the Article III limits on congressional establishment of so-called adjunct courts? Put another way, when does an Article I adjudicatory body cease being an adjunct and become a court? If the body deals with public rights, can the adjunct be more powerful than if it deals only with private rights? How important is judicial review by an Article III court of the decisions made by Article I adjuncts? Is judicial review alone important? Is the standard of review used by the Court also significant? *See generally,* Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision,* 1983 DUKE L.J. 197.

5supp-22. *Compare* the dissent's approach to the constitutional issues in this case with that of the plurality. Is Justice White's approach consistent with the way he approached the constitutional issues in *Atlas Roofing?* Does he believe that there really has been a major shift in the balance of power among the branches of government in this case?

5supp-23. *Northern Pipeline* raised a number of issues, not the least of which was the constitutionality of agency adjudication that, at least practically speaking, was long thought to have been settled. The bright lines the plurality tried to draw between public rights cases and private rights cases suggested an approach to the separation of powers issues implicit in these cases that was formalistic and had great potential for future litigation that could profoundly affect the ability of some administrative agencies to exist, much less act. As we shall see later in the course, a strict or formalistic constitutional approach to separation of powers issues was not limited only to Article III and the judiciary. This approach also was evident in the way the Court decided the constitutionality of legislative vetoes in *INS v. Chadha, supra* at § 6.03 and the constitutional limits of the appointment and removal powers of the President. *See Bowsher v. Synar,* discussed *infra* at Chapter 7, § 7.04, Note 7-22. At this point in the course, it is, therefore, not only important to analyze the results the Court reached in *Northern Pipeline,* but also the constitutional approach that the Court employed. There are various approaches or methodologies to separation-of-powers issues that will, as you shall see, provide an analytical framework for understanding and critiquing the Court's decisions in related areas of constitutional and administrative law. What approaches can you discern in *Northern Pipeline?*

5supp-24. The approach to separation-of-powers issues adopted by the plurality in *Northern Pipeline* was significantly modified in the subsequent case of *Thomas v. Union Carbide Agricultural Products* Co., 473 U.S. 568 (1985), set forth in full, *supra*, § 4.05 [C] Though the decision in *Thomas* was unanimous, the majority was composed of the dissenters in *Northern Pipeline,* plus the two concurring Justices, Rehnquist and O'Connor. The Justices that made up the plurality in *Northern Pipeline* filed their own concurring opinions, Justice Brennan writing for Justices Marshall and Blackmun, and Justice Stevens concurring on his own.

The case was a complicated one, involving the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). The Act requires that pesticides be registered with the Environmental Protection Agency (EPA) before they are sold. Before the EPA will allow registration, however, the manufacturer must make available certain data concerning the product's health, safety, and environmental effects. This data often is of value to competitors and has trade secret status until it is made public.

FIFRA, thus, does not allow a second manufacturer to register a pesticide if it has used the data submitted by another unless there has been an offer to compensate the original registrant. Even if there has been such an offer, it might not have been accepted. The Act thus provides for binding arbitration of this dispute. If the parties cannot agree on an arbitrator, one will be appointed, whose decision is final "except for fraud, misrepresentation or other misconduct by one of the parties to the arbitration or the arbitrator. …" 7 U.S.C. § 136a(c)(1)(D)(ii) (1982).

In *Thomas,* the first submitter of the data would not accept a subsequent user's offer nor the outcome of the arbitration. It challenged the entire arbitration scheme as being violative of Article III. Specifically, Union Carbide argued that FIFRA, in effect, substituted a new federal right for a state-created property right and then required adjudication of this new right by a non-Article III judge (or arbitrator) whose decision could only be reviewed for "fraud,

misrepresentation or other misconduct. …"

Justice O'Connor described the issue as whether "Article III of the Constitution prohibits Congress from selecting binding arbitration with only limited judicial review as the mechanism for resolving disputes among participants in FIFRA's pesticide registration scheme." The Court concluded it does not. Of particular significance for our purposes is the approach the Court took to the Article III questions presented. It largely eschewed the bright line the plurality in *Northern Pipeline* drew between public and private rights. Yet, Justice O'Connor did define the right involved in *Thomas,* as a public one: "the right created by FIFRA is not [a] purely 'private' right, but bears many of the characteristics of a 'public' right. Use of a registrant's data … serves a public purpose." 473 U.S. at 589. This definition of a public right was so broad as to undercut considerably the approach in *Northern.* Of even greater significance, however, was the more functional, flexible approach to separation-of-powers questions the majority took in this case. This approach is very much the one that the majority adopted in *Commodity Futures Trading Commission v. Schor,* 478 U.S. 833 (1986), the case we shall now examine in full. We shall also examine the Supreme Court's latest pronouncements on these issues in *Stern v Marshall*. Can you reconcile these cases?

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Can claimants waive their rights to Article III courts? As the next case suggests, whatever claims petitioners may have had to their Article III guaranties, they seem to have waived them by choosing the agency forum and reparations process. The majority was intent on renouncing "doctrinaire reliance on formal categories."

Commodity Futures Trading Commission v. Schor

478 U.S. 833 (1986)

JUSTICE O'CONNOR delivered the opinion of the Court.

The question presented is whether the Commodity Exchange Act (CEA or Act), 7 U.S.C. § 1 *et seq.,* empowers the Commodity Futures Trading Commission (CFTC or Commission) to entertain state law counterclaims in reparation proceedings and, if so, whether that grant of authority violates Article III of the Constitution.

I

The CEA broadly prohibits fraudulent and manipulative conduct in connection with commodity futures transactions. In 1974, Congress "overhaul[ed]" the Act in order to institute a more "comprehensive regulatory structure to oversee the volatile and esoteric futures trading complex." Congress also determined that the broad regulatory powers of the CEA were most appropriately vested in an agency which would be relatively immune from the "political winds that sweep Washington." It therefore created an independent agency, the CFTC, and entrusted to it sweeping authority to implement the CEA.

Among the duties assigned to the CFTC was the administration of a reparations procedure through which disgruntled customers of professional commodity brokers could seek redress for the brokers' violations of the Act or CFTC regulations. Thus, § 14 of the CEA, 7 U.S.C.A. § 18 (Supp. 1986), provides that any person injured by such violations may apply to the Commission for an order directing the offender to pay reparations to the complainant and may enforce that order in federal district court. Congress intended this administrative procedure to be an "inexpensive and expeditious" alternative to existing fora available to aggrieved customers, namely, the courts and arbitration. S. Rep. No. 95-850, p.

11 (1978). …

In conformance with the congressional goal of promoting efficient dispute resolution, the CFTC promulgated a regulation in 1976 which allows it to adjudicate counterclaims "aris[ing] out of the transaction or occurrence or series of transactions or occurrences set forth in the complaint." … This permissive counterclaim rule leaves the respondent in a reparations proceeding free to seek relief against the reparations complainant in other fora.

The instant dispute arose in February 1980, when respondents Schor and Mortgage Services of America invoked the CFTC's reparations jurisdiction by filing complaints against petitioner ContiCommodity Services, Inc. (Conti), a commodity futures broker, and Richard L. Sandor, a Conti employee. Schor had an account with Conti which contained a debit balance because Schor's net futures trading losses and expenses, such as commissions, exceeded the funds deposited in the account. Schor alleged that this debit balance was the result of Conti's numerous violations of the CEA. …

Before receiving notice that Schor had commenced the reparations proceeding, Conti had filed a diversity action in Federal District Court to recover the debit balance. … Schor counterclaimed in this action, reiterating his charges that the debit balance was due to Conti's violations of the CEA. Schor also moved on two separate occasions to dismiss or stay the district court action, arguing that the continuation of the federal action would be a waste of judicial resources and an undue burden on the litigants in view of the fact that "[t]he reparations proceedings … will fully … resolve and adjudicate all the rights of the parties to this action with respect to the transactions which are the subject matter of this action." …

After discovery, briefing and a hearing, the Administrative Law Judge (ALJ) in Schor's reparations proceeding ruled in Conti's favor on both Schor's claims and Conti's counterclaims. After this ruling, Schor for the first time challenged the CFTC's statutory authority to adjudicate Conti's counterclaim. The ALJ rejected Schor's challenge, stating himself "bound by agency regulations and published agency policies." The Commission declined to review the decision and allowed it to become final, at which point Schor filed a petition for review with the Court of Appeals for the District of Columbia Circuit. Prior to oral argument, the Court of Appeals, *sua sponte,* raised the question of whether CFTC could constitutionally adjudicate Conti's counterclaims in light of *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,* 458 U.S. 50 (1982) … in which this Court held that "Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review." *Thomas v. Union Carbide Agricultural Products Co.,* 473 U.S. 568, 584.

After briefing and argument, the Court of Appeals upheld the CFTC's decision on Schor's claim in most respects, but ordered the dismissal of Conti's counterclaims on the ground that "the CFTC lacks authority (subject matter competence) to adjudicate" common law counterclaims. 239 U.S. App. D.C., at 161, 740 F.2d, at 1264. In support of this latter ruling, the Court of Appeals reasoned that the CFTC's exercise of jurisdiction over Conti's common law counterclaim gave rise to "[s]erious constitutional problems" under *Northern Pipeline.* ... The Court of Appeals therefore concluded that, under well-established principles of statutory construction, the relevant inquiry was whether the CEA was " 'fairly susceptible' of [an alternative] construction," such that Article III objections, and thus unnecessary constitutional adjudication, could be avoided. …

… This Court granted the CFTC's petition for certiorari, vacated the court of appeals' judgment, and remanded the case for further consideration in light of *Thomas, supra,* at 582–593, 473 U.S. 568 (1985). We had there ruled that the arbitration scheme established under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), … does not contravene Article III and, more generally, held that "Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." 473 U.S., at 593.

On remand, the Court of Appeals reinstated its prior judgment. It reaffirmed its earlier view that *Northern Pipeline* drew into serious question the Commission's authority to decide debit-balance counterclaims in reparations proceedings; concluded that nothing in *Thomas* altered that view; and again

held that, in light of the constitutional problems posed by the CFTC's adjudication of common law counterclaims, the CEA should be construed to authorize the CFTC to adjudicate only counterclaims arising from violations of the Act or CFTC regulations. …

We again granted certiorari, 474 U.S. 1018 (1985), and now reverse.

II

[The Court concluded that it was "squarely faced with the question of whether the CFTC's assumption of jurisdiction over common law counterclaims violates Article III of the Constitution."]

III

Article III, § 1 directs that the "judicial Power of the United States shall be vested in one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish," and provides that these federal courts shall be staffed by judges who hold office during good behavior, and whose compensation shall not be diminished during tenure in office. Schor claims that these provisions prohibit Congress from authorizing the initial adjudication of common law counterclaims by the CFTC, an administrative agency whose adjudicatory officers do not enjoy the tenure and salary protections embodied in Article III.

Although our precedents in this area do not admit of easy synthesis, they do establish that the resolution of claims such as Schor's cannot turn on conclusory reference to the language of Article III. *See, e.g., Thomas,* 473 U.S., at 583. Rather, the constitutionality of a given congressional delegation of adjudicative functions to a non-Article III body must be assessed by reference to the purposes underlying the requirements of Article III. *See, e.g., id.,* at 590, *Northern Pipeline,* 458 U.S., at 64. This inquiry, in turn, is guided by the principle that "practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III." *Thomas, supra,* at 587. *See also Crowell v. Benson,* 285 U.S., at 53.

A

Article III, § 1 serves both to protect "the role of the independent judiciary within the constitutional scheme of tripartite government," *Thomas, supra,* at 583, and to safeguard litigants' "right to have claims decided before judges who are free from potential domination by other branches of government." *United States v. Will,* 449 U.S. 200, 218 (1980). … Although our cases have provided us with little occasion to discuss the nature or significance of this latter safeguard, our prior discussions of Article III, § l's guarantee of an independent and impartial adjudication by the federal judiciary of matters within the judicial power of the United States intimated that this guarantee serves to protect primarily personal, rather than structural, interests. …

Our precedents also demonstrate, however, that Article III does not confer on litigants an absolute right to the plenary consideration of every nature of claim by an Article III court. … Moreover, as a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried. …

In the instant case, Schor indisputably waived any right he may have possessed to the full trial of Conti's counterclaim before an Article III court. Schor expressly demanded that Conti proceed on its counterclaim in the reparations proceeding rather than before the District Court, and was content to have the entire dispute settled in the forum he had selected until the ALJ ruled against him on all counts; it was only after the ALJ rendered a decision to which he objected that Schor raised any challenge to the CFTC's consideration of Conti's counterclaim.

Even were there no evidence of an express waiver here, Schor's election to forgo his right to proceed in state or federal court on his claim and his decision to seek relief instead in a CFTC reparations proceeding constituted an effective waiver. Three years before Schor instituted his reparations action, a private right of action under the CEA was explicitly recognized in the circuit in which Schor and Conti filed suit in District Court. … Moreover, at the time Schor decided to seek relief before the CFTC rather than in the federal courts, the CFTC's regulations made clear that it was empowered to adjudicate all

counterclaims "aris[ing] out of the same transaction or occurrence or series of transactions or occurrences set forth in the complaint." … Thus, Schor had the option of having the common law counterclaim against him adjudicated in a federal Article III court, but, with full knowledge that the CFTC would exercise jurisdiction over that claim, chose to avail himself of the quicker and less expensive procedure Congress had provided him. In such circumstances, it is clear that Schor effectively agreed to an adjudication by the CFTC of the entire controversy by seeking relief in this alternative forum. …

B

As noted above, our precedents establish that Article III, § 1 not only preserves to litigants their interest in an impartial and independent federal adjudication of claims within the judicial power of the United States, but also serves as "an inseparable element of the constitutional system of checks and balances." *Northern Pipeline, supra* at 53. … Article III, § 1 safeguards the role of the Judicial Branch in our tripartite system by barring congressional attempts "to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating" constitutional courts, … and thereby preventing "the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo,* 424 U.S. 1, 122 (1976) *(per curiam).* To the extent that this structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject matter jurisdiction beyond the limitations imposed by Article III, § 2. … When these Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect.

In determining the extent to which a given congressional decision to authorize the adjudication of Article III business in a non-Article III tribunal impermissibly threatens the institutional integrity of the Judicial Branch, the Court has declined to adopt formalistic and unbending rules. *Thomas,* 473 U.S., at 587. Although such rules might lend a greater degree of coherence to this area of the law, they might also unduly constrict Congress' ability to take needed and innovative action pursuant to its Article I powers. Thus, in reviewing Article III challenges, we have weighed a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary. … Among the factors upon which we have focused are the extent to which the "essential attributes of judicial power" are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III. …

An examination of the relative allocation of powers between the CFTC and Article III courts in light of the considerations given prominence in our precedents demonstrates that the congressional scheme does not impermissibly intrude on the province of the judiciary. The CFTC's adjudicatory powers depart from the traditional agency model in just one respect: the CFTC's jurisdiction over common law counterclaims. While wholesale importation of concepts of pendent or ancillary jurisdiction into the agency context may create greater constitutional difficulties, we decline to endorse an absolute prohibition on such jurisdiction out of fear of where some hypothetical "slippery slope" may deposit us. Indeed, the CFTC's exercise of this type of jurisdiction is not without precedent. Thus, in *RFC v. Bankers Trust* Co., 318 U.S. 163, 168–171 (1943), we saw no constitutional difficulty in the initial adjudication of a state law claim by a federal agency, subject to judicial review, when that claim was ancillary to a federal law dispute. Similarly, in *Katchen v. Landy,* 382 U.S. 323 (1966), this Court upheld a bankruptcy referee's power to hear and decide state law counterclaims against a creditor who filed a claim in bankruptcy when those counterclaims arose out of the same transaction. We reasoned that, as a practical matter, requiring the trustee to commence a plenary action to recover on its counterclaim would be a "meaningless gesture." …

In the instant case, we are likewise persuaded that there is little practical reason to find that this single deviation from the agency model is fatal to the congressional scheme. Aside from its authorization of counterclaim jurisdiction, the CEA leaves far more of the "essential attributes of judicial power" to Article III courts than did that portion of the Bankruptcy Act found unconstitutional in *Northern Pipeline.* The CEA scheme in fact hews closely to the agency model approved by the Court in *Crowell v. Benson,*

285 U.S. 22 (1932).

The CFTC, like the agency in *Crowell,* deals only with a "particularized area of law," *Northern Pipeline…* whereas the jurisdiction of the bankruptcy courts found unconstitutional in *Northern Pipeline* extended to broadly "all civil proceedings arising under title 11 or arising in or *related to* cases under title 11." 28 U.S.C. § 1471(b) (quoted in *Northern Pipeline,* 458 U.S., at 85) (emphasis added). CFTC orders, like those of the agency in *Crowell,* but unlike those of the bankruptcy courts under the 1978 Act, are enforceable only by order of the District Court. … CFTC orders are also reviewed under the same "weight of the evidence" standard sustained in *Crowell,* rather than the more deferential standard found lacking in *Northern Pipeline.* ... The legal rulings of the CFTC, like the legal determinations of the agency in *Crowell,* are subject to *de novo* review. Finally, the CFTC, unlike the bankruptcy courts under the 1978 Act, does not exercise "all ordinary powers of district courts," and thus may not, for instance, preside over jury trials or issue writs of habeas corpus. …

Of course, the nature of the claim has significance in our Article III analysis quite apart from the method prescribed for its adjudication. The counterclaim asserted in this case is a "private" right for which state law provides the rule of decision. It is therefore a claim of the kind assumed to be at the "core" of matters normally reserved to Article III courts. … Yet this conclusion does not end our inquiry; just as this Court has rejected any attempt to make determinative for Article III purposes the distinction between public rights and private rights, *Thomas, supra,* at 585–586, there is no reason inherent in separation of powers principles to accord the state law character of a claim talismanic power in Article III inquiries. …

We have explained that "the public rights doctrine reflects simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that 'could be conclusively determined by the Executive and Legislative Branches,' the danger of encroaching on the judicial powers" is less than when private rights, which are normally within the purview of the judiciary, are relegated as an initial matter to administrative adjudication. *Thomas, supra,* 473 U.S., at 589 (quoting *Northern Pipeline, supra,* at 68). Similarly, the state law character of a claim is significant for purposes of determining the effect that an initial adjudication of those claims by a nonArticle III tribunal will have on the separation of powers for the simple reason that private, common law rights were historically the types of matters subject to resolution by Article III courts. … The risk that Congress may improperly have encroached on the federal judiciary is obviously magnified when Congress "withdraw[s] from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty" and which therefore has traditionally been tried in Article III courts, and allocates the decision of those matters to a non-Article III forum of its own creation. *Murray's Lessee v. The Hoboken Land and Improvement Co.,* 18 How. 272, 284 (1856). Accordingly, where private, common law rights are at stake, our examination of the congressional attempt to control the manner in which those rights are adjudicated has been searching. … In this litigation, however, "[l]ooking beyond form to the substance of what" Congress has done, we are persuaded that the congressional authorization of limited CFTC jurisdiction over a narrow class of common law claims as an incident to the CFTC's primary, and unchallenged, adjudicative function does not create a substantial threat to the separation of powers. …

It is clear that Congress has not attempted to "withdraw from judicial cognizance" the determination of Conti's right to the sum represented by the debit balance in Schor's account. Congress gave the CFTC the authority to adjudicate such matters, but the decision to invoke this forum is left entirely to the parties and the power of the federal judiciary to take jurisdiction of these matters is unaffected. In such circumstances, separation of powers concerns are diminished, for it seems self-evident that just as Congress may encourage parties to settle a dispute out of court or resort to arbitration without impermissible incursions on the separation of powers, Congress may make available a quasi-judicial mechanism through which willing parties may, at their option, elect to resolve their differences. This is not to say, of course, that if Congress created a phalanx of non-Article III tribunals equipped to handle the entire business of the Article III courts without any Article III supervision or control and without evidence of valid and specific legislative necessities, the fact that the parties had the election to proceed in their forum of choice would necessarily save the scheme from constitutional attack. … But this case obviously bears no resemblance to such a scenario, given the degree of judicial control saved to the federal courts,

… as well as the congressional purpose behind the jurisdictional delegation, the demonstrated need for the delegation, and the limited nature of the delegation.

When Congress authorized the CFTC to adjudicate counterclaims, its primary focus was on making effective a specific and limited federal regulatory scheme, not on allocating jurisdiction among federal tribunals. Congress intended to create an inexpensive and expeditious alternative forum through which customers could enforce the provisions of the CEA against professional brokers. Its decision to endow the CFTC with jurisdiction over such reparations claims is readily understandable given the perception that the CFTC was relatively immune from political pressures, … and the obvious expertise that the Commission possesses in applying the CEA and its own regulations. This reparations scheme itself is of unquestioned constitutional validity. … It was only to ensure the effectiveness of this scheme that Congress authorized the CFTC to assert jurisdiction over common law counterclaims. Indeed, as was explained above, absent the CFTC's exercise of that authority, the purposes of the reparations procedure would have been confounded.

It also bears emphasis that the CFTC's assertion of counterclaim jurisdiction is limited to that which is necessary to make the reparations procedure workable. *See* 7 U.S.C. § 12a(5). The CFTC adjudication of common law counterclaims is incidental to, and completely dependent upon, adjudication of reparations claims created by federal law, and in actual fact is limited to claims arising out of the same transaction or occurrence as the reparations claim.

In such circumstances, the magnitude of any intrusion on the Judicial Branch can only be termed *de minimis*. Conversely, were we to hold that the Legislative Branch may not permit such limited cognizance of common law counterclaims at the election of the parties, it is clear that we would "defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task." *Crowell v. Benson, supra* at 46. *See also Thomas, supra* at 583–584. We do not think Article III compels this degree of prophylaxis.

Nor does our decision in *Bowsher v. Synar,* [this case was decided on the same day. It is set forth in Chapter 7, § 7.04, *infra*] … require a contrary result. Unlike *Bowsher,* this case raises no question of the aggrandizement of congressional power at the expense of a coordinate branch. Instead, the separation of powers question presented in this case is whether Congress impermissibly undermined, without appreciable expansion of its own power, the role of the Judicial Branch. In any case, we have, consistent with *Bowsher,* looked to a number of factors in evaluating the extent to which the congressional scheme endangers separation of powers principles under the circumstances presented, but have found no genuine threat to those principles to be present in this case.

In so doing, we have also been faithful to our Article III precedents, which counsel that bright line rules cannot effectively be employed to yield broad principles applicable in all Article III inquiries. … Rather, due regard must be given in each case to the unique aspects of the congressional plan at issue and its practical consequences in light of the larger concerns that underlie Article III. We conclude that the limited jurisdiction that the CFTC asserts over state law claims as a necessary incident to the adjudication of federal claims willingly submitted by the parties for initial agency adjudication does not contravene separation of powers principles or Article III. …

The judgment of the Court of Appeals for the District of Columbia Circuit is reversed and the case remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Article III, § 1, of the Constitution provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." It further specifies that the federal judicial power must be exercised by judges who "shall hold their Offices during good Behavior, and [who] shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office."

On its face, Article III, § 1, seems to prohibit the vesting of any judicial functions in either the Legislative or the Executive Branches. The Court has, however, recognized three narrow exceptions to the otherwise absolute mandate of Article III: territorial courts, … courts martial, and courts that adjudicate certain disputes concerning public rights. … Unlike the Court, I would limit the judicial authority of non-Article III federal tribunals to these few, long-established exceptions and would countenance no further erosion of Article III's mandate. …

NOTES AND QUESTIONS

5supp-25. The Court notes that the personal right of the commodity broker's customer in *Schor* to an Article III court had been waived. How would this case have been decided if there had been no such waiver?

5supp-26. Northern Pipeline took a more formalistic approach to the separation-of-powers issues. It sought to categorize certain kinds of cases as being within or without Article III ambit. Schor is more purpose-oriented: "The constitutionality of a given delegation of adjudicative functions to a non-Article III body must be assessed by reference to the purposes underlying the requirements of Article III." Thus, the Court points to factors such as (1) "the extent to which the 'essential attributes of judicial power' are reserved to Article III courts;" (2) "the origin and importance of the rights to be adjudicated;" and (3) "The concerns that drove Congress to depart from the requirements of Article III."

5supp-27. Could you reach the same result in *Schor* by using the analysis and rhetoric of the plurality opinion in *Northern Pipeline*? Is the Commission in *Schor* not an adjunct of an Article III court? Does the majority in *Schor* use this approach? Schor does not mention adjunct courts, but presumably it could have reached the same result if it had.

5supp-28. What factors does the majority in *Schor* wish to consider so as to determine whether there has been an infringement on the powers of Article III courts? Does it use a balancing approach?

5supp-29. What goes into the balance? The Schor court balances Congress' need to solve practical problems with the requirement that, in so doing, it not go so far as to undermine the central role of an independent judiciary. In addition, it takes seriously into account the breadth or narrowness of the agency's subject matter jurisdiction, finding the CEA's to be quite narrow. How does this square with Justice White's dissent in *Northern Pipeline?*

5supp-30. Does the balancing approach the Court applies in *Schor* sufficiently protect Article III courts? Consider the following summary in Young, *Public Rights and Federal Judicial Power: From* Murray's Lessee *Through* Crowell *to* Schor, 35 BUFF. L. REV. at 863–65 (1986):

> As the history of the public-rights exception … up to the time of *Crowell,* should make clear, the public rights category has not been a stable one…. Even early in this century, on occasion, private rights of action against private parties were conferred legislatively, largely for public purposes. Conversely, some suits by the government were old common-law actions in public-law garb. [A]ny attempted public/private distinction, particularly a nominal one focusing on the nature of the parties to an adjudication, seems to provide no useful foundation for an exception to article III's requirements.
>
> The Court has finally come to some recognition of these facts in *Thomas* and in

> *Schor*. The focus now is off arbitrary distinctions between the public and the private and between article I courts and adjuncts. The focus is now properly on balancing the need for non-article III adjudication against the threat it poses to a variety of private interests and rights, and to the tenured judiciary. The Court currently emphasizes the interplay of (1) the source, importance, and sensitivity of the rights to be adjudicated, (2) the practical need for non-article III adjudication, (3) the portion of the judicial power spectrum preempted by non-article III institutions, and (4) the degree of review available in the article III courts….
>
> Without abandoning 200 years of case law, the Court's current approach seems the best alternative for preserving a meaningful article III.

Do you agree? Is the balancing approach the Court now uses so open-ended they can do whatever they wish? *See Morrison v. Olson, infra,* SCALIA, J., dissenting.

5supp-31. Do you have any theories concerning why these issues would return to the fore over 50 years after *Crowell* was decided? Did the Court handle them any better this time around?

5supp-32. Consider the following argument about the relationship between Article I "tribunals" and Article III courts:

> Although the Constitution speaks of "courts" both in Article III and elsewhere, it contains but a single reference to "tribunals," one appearing in the Inferior Tribunals Clause of Article I. Most observers have treated the words as synonyms, assuming that when Congress exercises the power to create inferior tribunals under Article I, the tribunals in question must meet the requirements of Article III and employ judges with salary and tenure protections. Distinguishing Article III courts from Article I tribunals, however, creates new possibilities. In particular, Article III can then be read to vest the judicial power in inferior federal "courts" but not in some inferior "tribunals" created under Article I. This interpretation suggests that Congress enjoys a degree of flexibility in creating Article I tribunals. On such a reading, the Inferior Tribunals Clause may empower Congress to create inferior "tribunals" with judges who lack Article III protections. While these tribunals must remain inferior to the Supreme Court and the judicial department, Article I does not require that they employ life-tenured judges and Article III does not formally invest these tribunals with the judicial power of the United States.
>
> Such an "inferior tribunals" approach has a number of virtues. First, it suggests a textual solution to the nettlesome problem of incorporating Article I tribunals into the framework of Article III courts. This approach explains how the Court can insist on a strict adherence to the Article III requirement of life-tenured judges for lower federal courts, all of which exercise the judicial power of the United States, yet still recognize that the strict requirements of Article III do not apply to certain tribunals that Congress creates pursuant to Article I. Complementing this textual predicate for Congress's power to create tribunals, the Article I requirement of "inferiority" offers an important justification for the widely accepted notion that the legality of such tribunals depends in part on the availability of judicial review in Article III courts.…
>
> Finally, the inferior tribunals thesis provides an account of the scope and limits of congressional power to create tribunals outside of Article III. In contrast to the consensus in the literature, which portrays their creation as an act of simple expediency, institutional history reveals that Congress often created Article I tribunals as forums to hear disputes that, for one reason or another, were thought to lie beyond the judicial power of the United States. Article III permits federal courts to exercise power only in circumstances in which the judicial department is to have the last word, free from revision at the hands of the political departments. Such a requirement of judicial finality was thought to

> preclude Article III courts from hearing "public rights" claims for money against the federal government, at least when Congress retained legislative discretion over payment, and proceedings in the nature of courts-martial, which were subject to review that occurred inside the executive branch. Similarly, Article III courts exercising the limited judicial power of the United States were not thought appropriate to hear disputes over the local common law of contract, property, and probate that filled the dockets of the territorial courts.
>
> The perceived inability of the Article III judiciary to hear disputes in the first instance did not mean that Congress could place the work of Article I tribunals entirely beyond the reach of the constitutional courts. To the contrary, Article III courts frequently oversaw the work of Article I tribunals. Article III courts policed the jurisdictional boundaries of courts-martial, either by considering petitions for writs of habeas corpus by those claiming to have been wrongly detained for trial before such tribunals, or by hearing common law suits for trespass against those who convened such tribunals unlawfully. …
>
> This portrait of Article I tribunals as acting outside of the judicial power while remaining subject to the oversight and control of Article III courts finds a reflection in modern cases and helps to solve a number of problems in the literature. Perhaps most importantly, it makes clear that the recognition of exceptions to Article III does not imply that Congress can create tribunals and place them entirely beyond the supervisory authority of the federal courts. It thus avoids the problem — sometimes implicit in discussions of exceptionalism — that Congress might frustrate the judiciary's role entirely through reliance upon one or more exceptions. The most pressing modern variant of this argument arises from President George W. Bush's decision to create military tribunals for the adjudication of criminal claims against individuals designated as enemy combatants. Although the government has argued for an exceedingly restricted judicial role in overseeing the operation of such tribunals, the inferior tribunals account rejects this contention. At least when such tribunals operate within the jurisdiction of the United States, they must remain inferior to the Supreme Court and subject to judicial review as to certain claims of federal right.

James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States,* 118 HARV. L. REV. 643, 650–53 (2004).*

Stern v. Marshall

131 S. Ct. 2594 (2011)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

… This is the second time we have had occasion to weigh in on this long running dispute between Vickie Lynn Marshall and E. Pierce Marshall over the fortune of J. Howard Marshall II, a man believed to have been one of the richest people in Texas. The Marshalls' litigation has worked its way through state and federal courts in Louisiana, Texas, and California, and two of those courts — a Texas state probate court and the Bankruptcy Court for the Central District of California — have reached contrary decisions on its merits. The Court of Appeals below held that the Texas state decision controlled, after concluding that the Bankruptcy Court lacked the authority to enter final judgment on a counterclaim that Vickie brought against Pierce in her bankruptcy proceeding. To determine whether the Court of Appeals was correct in that regard, we must resolve two issues: (1) whether the Bankruptcy Court had the statutory

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authority under 28 U.S.C. § 157(b) to issue a final judgment on Vickie's counterclaim; and (2) if so, whether conferring that authority on the Bankruptcy Court is constitutional.

Although the history of this litigation is complicated, its resolution ultimately turns on very basic principles. Article III, § 1, of the Constitution commands that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." That Article further provides that the judges of those courts shall hold their offices during good behavior, without diminution of salary. Those requirements of Article III were not honored here. The Bankruptcy Court in this case exercised the judicial power of the United States by entering final judgment on a common law tort claim, even though the judges of such courts enjoy neither tenure during good behavior nor salary protection. We conclude that, although the Bankruptcy Court had the statutory authority to enter judgment on Vickie's counterclaim, it lacked the constitutional authority to do so. …

I

… Known to the public as Anna Nicole Smith, Vickie was J. Howard's third wife and married him about a year before his death. Although J. Howard bestowed on Vickie many monetary and other gifts during their courtship and marriage, he did not include her in his will. Before J. Howard passed away, Vickie filed suit in Texas state probate court, asserting that Pierce — J. Howard's younger son — fraudulently induced J. Howard to sign a living trust that did not include her, even though J. Howard meant to give her half his property. Pierce denied any fraudulent activity and defended the validity of J. Howard's trust and, eventually, his will.

After J. Howard's death, Vickie filed a petition for bankruptcy in the Central District of California. Pierce filed a complaint in that bankruptcy proceeding, contending that Vickie had defamed him by inducing her lawyers to tell members of the press that he had engaged in fraud to gain control of his father's assets. The complaint sought a declaration that Pierce's defamation claim was not dischargeable in the bankruptcy proceedings. Pierce subsequently filed a proof of claim for the defamation action, meaning that he sought to recover damages for it from Vickie's bankruptcy estate. Vickie responded to Pierce's initial complaint by asserting truth as a defense to the alleged defamation and by filing a counterclaim for tortious interference with the gift she expected from J. Howard. …

On November 5, 1999, the Bankruptcy Court issued an order granting Vickie summary judgment on Pierce's claim for defamation. On September 27, 2000, after a bench trial, the Bankruptcy Court issued a judgment on Vickie's counterclaim in her favor. The court later awarded Vickie over $400 million in compensatory damages and $25 million in punitive damages.

In post-trial proceedings, Pierce argued that the Bankruptcy Court lacked jurisdiction over Vickie's counterclaim. In particular, Pierce renewed a claim he had made earlier in the litigation, asserting that the Bankruptcy Court's authority over the counterclaim was limited because Vickie's counterclaim was not a "core proceeding" under 28 U.S.C. §157(b)(2)(C). As explained below, bankruptcy courts may hear and enter final judgments in "core proceedings" in a bankruptcy case. In non-core proceedings, the bankruptcy courts instead submit proposed findings of fact and conclusions of law to the district court, for that court's review and issuance of final judgment. The Bankruptcy Court in this case concluded that Vickie's counterclaim was "a core proceeding" under §157(b)(2)(C), and the court therefore had the "power to enter judgment" on the counterclaim under § 157(b)(1). …

II

[The Supreme Court held that Vickie's counterclaim was "a core proceeding under the plain text of § 157(b)(2)(C)" and that bankruptcy courts have statutory power to enter final judgments on all core proceedings and not merely, as Pierce argued (by this time, both Pierce and Vickie had passed away), on a limited set of core proceedings.]

III

Although we conclude that §157(b)(2)(C) permits the Bankruptcy Court to enter final judgment on Vickie's counterclaim, Article III of the Constitution does not.

A

Article III, §1, of the Constitution mandates that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The same section provides that the judges of those constitutional courts "shall hold their Offices during good Behaviour" and "receive for their Services a Compensation [that] shall not be diminished" during their tenure. …

Article III protects liberty not only through its role in implementing the separation of powers, but also by specifying the defining characteristics of Article III judges. The colonists had been subjected to judicial abuses at the hand of the Crown, and the Framers knew the main reasons why: because the King of Great Britain "made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." The Declaration of Independence P11. The Framers undertook in Article III to protect citizens subject to the judicial power of the new Federal Government from a repeat of those abuses. By appointing judges to serve without term limits, and restricting the ability of the other branches to remove judges or diminish their salaries, the Framers sought to ensure that each judicial decision would be rendered, not with an eye toward currying favor with Congress or the Executive, but rather with the "[c]lear heads … and honest hearts" deemed "essential to good judges." 1 WORKS OF JAMES WILSON 363 (J. Andrews ed. 1896).

Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decision making if the other branches of the Federal Government could confer the Government's "judicial Power" on entities outside Article III. That is why we have long recognized that, in general, Congress may not "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." *Murray's Lessee v. Hoboken Land & Improvement Co*., 18 How. 272, 284 (1856). When a suit is made of "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789," *Northern Pipeline*, 458 U.S., at 90 (REHNQUIST, J., concurring in judgment), and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts. The Constitution assigns that job — resolution of "the mundane as well as the glamorous, matters of common law and statute as well as constitutional law, issues of fact as well as issues of law" — to the Judiciary.

B

This is not the first time we have faced an Article III challenge to a bankruptcy court's resolution of a debtor's suit. In *Northern Pipeline*, we considered whether bankruptcy judges serving under the Bankruptcy Act of 1978 — appointed by the President and confirmed by the Senate, but lacking the tenure and salary guarantees of Article III — could "constitutionally be vested with jurisdiction to decide [a] state-law contract claim" against an entity that was not otherwise part of the bankruptcy proceedings. The Court concluded that assignment of such state law claims for resolution by those judges "violates Art. III of the Constitution." (plurality opinion); (REHNQUIST, J., concurring in judgment).

The plurality in *Northern Pipeline* recognized that there was a category of cases involving "public rights" that Congress could constitutionally assign to "legislative" courts for resolution. That opinion concluded that this "public rights" exception extended "only to matters arising between" individuals and the Government "in connection with the performance of the constitutional functions of the executive or legislative departments … that historically could have been determined exclusively by those" branches. A full majority of the Court, while not agreeing on the scope of the exception, concluded that the doctrine did not encompass adjudication of the state law claim at issue in that case. (REHNQUIST, J., concurring in judgment) ("None of the [previous cases addressing Article III power] has gone so far as to sanction the type of adjudication to which Marathon will be subjected … . To whatever extent different powers granted under [the 1978] Act might be sustained under the 'public rights' doctrine of *Murray's Lessee* … and succeeding cases, I am satisfied that the adjudication of Northern's lawsuit cannot be so sustained").

A full majority of Justices in *Northern Pipeline* also rejected the debtor's argument that the bankruptcy court's exercise of jurisdiction was constitutional because the bankruptcy judge was acting merely as an adjunct of the district court or court of appeals.

After our decision in *Northern Pipeline*, Congress revised the statutes governing bankruptcy jurisdiction and bankruptcy judges. In the 1984 Act, Congress provided that the judges of the new

bankruptcy courts would be appointed by the courts of appeals for the circuits in which their districts are located. And, as we have explained, Congress permitted the newly constituted bankruptcy courts to enter final judgments only in "core" proceedings.

With respect to such "core" matters, however, the bankruptcy courts under the 1984 Act exercise the same powers they wielded under the Bankruptcy Act of 1978. As in *Northern Pipeline*, the new courts in core proceedings "issue final judgments, which are binding and enforceable even in the absence of an appeal." And, as in *Northern Pipeline*, the district courts review the judgments of the bankruptcy courts in core proceedings only under the usual limited appellate standards. That requires marked deference to, among other things, the bankruptcy judges' findings of fact.

C

Vickie and the dissent argue that the Bankruptcy Court's entry of final judgment on her state common law counterclaim was constitutional, despite the similarities between the bankruptcy courts under the 1978 Act and those exercising core jurisdiction under the 1984 Act. We disagree. It is clear that the Bankruptcy Court in this case exercised the "judicial Power of the United States" in purporting to resolve and enter final judgment on a state common law claim, just as the court did in *Northern Pipeline*. No "public right" exception excuses the failure to comply with Article III in doing so, any more than in *Northern Pipeline*. … Here Vickie's claim is a state law action independent of the federal bankruptcy law and not necessarily resolvable by a ruling on the creditor's proof of claim in bankruptcy. Northern Pipeline and our subsequent decision in *Granfinanciera*, 492 U.S. 33, rejected the application of the "public rights" exception in such cases. …

1

Vickie's counterclaim cannot be deemed a matter of "public right" that can be decided outside the Judicial Branch. As explained above, in *Northern Pipeline* we rejected the argument that the public rights doctrine permitted a bankruptcy court to adjudicate a state law suit brought by a debtor against a company that had not filed a claim against the estate. Although our discussion of the public rights exception since that time has not been entirely consistent, and the exception has been the subject of some debate, this case does not fall within any of the various formulations of the concept that appear in this Court's opinions.

We first recognized the category of public rights in *Murray's Lessee v. Hoboken Land & Improvement Co*., 18 How. 272 (1856). That case involved the Treasury Department's sale of property belonging to a customs collector who had failed to transfer payments to the Federal Government that he had collected on its behalf. The plaintiff, who claimed title to the same land through a different transfer, objected that the Treasury Department's calculation of the deficiency and sale of the property was void, because it was a judicial act that could not be assigned to the Executive under Article III.

"To avoid misconstruction upon so grave a subject," the Court laid out the principles guiding its analysis. It confirmed that Congress cannot "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." The Court also recognized that "[a]t the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper."

As an example of such matters, the Court referred to "[e]quitable claims to land by the inhabitants of ceded territories" and cited cases in which land issues were conclusively resolved by Executive Branch officials. In those cases "it depends upon the will of congress whether a remedy in the courts shall be allowed at all," so Congress could limit the extent to which a judicial forum was available. *Murray's Lessee*, 18 How. at 284. … The point of Murray's Lessee was simply that Congress may set the terms of adjudicating a suit when the suit could not otherwise proceed at all.

Subsequent decisions from this Court contrasted cases within the reach of the public rights exception — those arising "between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments" — and those that were instead matters "of private right, that is, of the liability of one individual to another under

the law as defined." *Crowell v. Benson*, 285 U.S. 22, 50, 51 (1932).[101] …

Shortly after *Northern Pipeline*, the Court rejected the limitation of the public rights exception to actions involving the Government as a party. The Court has continued, however, to limit the exception to cases in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert government agency is deemed essential to a limited regulatory objective within the agency's authority. In other words, it is still the case that what makes a right "public" rather than private is that the right is integrally related to particular federal government action.

Our decision in *Thomas v. Union Carbide Agricultural Products Co*., for example, involved a data-sharing arrangement between companies under a federal statute providing that disputes about compensation between the companies would be decided by binding arbitration. 473 U.S. 568, 571–575 (1985). This Court held that the scheme did not violate Article III, explaining that "[a]ny right to compensation … results from [the statute] and does not depend on or replace a right to such compensation under state law." *Id*., at 584.

Commodity Futures Trading Commission v. Schor concerned a statutory scheme that created a procedure for customers injured by a broker's violation of the federal commodities law to seek reparations from the broker before the Commodity Futures Trading Commission (CFTC). A customer filed such a claim to recover a debit balance in his account, while the broker filed a lawsuit in Federal District Court to recover the same amount as lawfully due from the customer. The broker later submitted its claim to the CFTC, but after that agency ruled against the customer, the customer argued that agency jurisdiction over the broker's counterclaim violated Article III. This Court disagreed, but only after observing that (1) the claim and the counterclaim concerned a "single dispute" — the same account balance; (2) the CFTC's assertion of authority involved only "a narrow class of common law claims" in a " 'particularized area of law' "; (3) the area of law in question was governed by "a specific and limited federal regulatory scheme" as to which the agency had "obvious expertise"; (4) the parties had freely elected to resolve their differences before the CFTC; and (5) CFTC orders were "enforceable only by order of the district court." Most significantly, given that the customer's reparations claim before the agency and the broker's counterclaim were competing claims to the same amount, the Court repeatedly emphasized that it was "necessary" to allow the agency to exercise jurisdiction over the broker's claim, or else "the reparations procedure would have been confounded."

The most recent case in which we considered application of the public rights exception — and the only case in which we have considered that doctrine in the bankruptcy context since *Northern Pipeline* — is *Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33 (1989). In *Granfinanciera*, we rejected a bankruptcy trustee's argument that a fraudulent conveyance action filed on behalf of a bankruptcy estate against a noncreditor in a bankruptcy proceeding fell within the "public rights" exception. We explained that, "[i]f a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court." We reasoned that fraudulent conveyance suits were "quintessentially suits at common law that more nearly resemble state law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res." As a consequence, we concluded that fraudulent conveyance actions were "more accurately characterized as a private rather than a public right as we have used those terms in our Article III decisions." *Id*., at 55.

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[101] Although the Court in *Crowell* went on to decide that the facts of the private dispute before it could be determined by a non-Article III tribunal in the first instance, subject to judicial review, the Court did so only after observing that the administrative adjudicator had only limited authority to make specialized, narrowly confined factual determinations regarding a particularized area of law and to issue orders that could be enforced only by action of the District Court. In other words, the agency in *Crowell* functioned as a true "adjunct" of the District Court. That is not the case here.… *Crowell* may well have additional significance in the context of expert administrative agencies that oversee particular substantive federal regimes, but we have no occasion to and do not address those issues today.…

Vickie's counterclaim — like the fraudulent conveyance claim at issue in *Granfinanciera* — does not fall within any of the varied formulations of the public rights exception in this Court's cases. … The claim is instead one under state common law between two private parties. … Congress has nothing to do with it.

In addition, Vickie's claimed right to relief does not flow from a federal statutory scheme, as in *Thomas*, 473 U.S., at 584–585, or *Atlas Roofing*, 430 U.S., at 458. …

Furthermore, the asserted authority to decide Vickie's claim is not limited to a "particularized area of the law," as in *Crowell*, *Thomas*, and *Schor*. We deal here not with an agency but with a court, with substantive jurisdiction reaching any area of the *corpus juris*. This is not a situation in which Congress devised an "expert and inexpensive method for dealing with a class of questions of fact which are particularly suited to examination and determination by an administrative agency specially assigned to that task." *Crowell*, 285 U.S., at 46; *see Schor*.…

We recognize that there may be instances in which the distinction between public and private rights — at least as framed by some of our recent cases — fails to provide concrete guidance as to whether, for example, a particular agency can adjudicate legal issues under a substantive regulatory scheme. Given the extent to which this case is so markedly distinct from the agency cases discussing the public rights exception in the context of such a regime, however, we do not in this opinion express any view on how the doctrine might apply in that different context.…

Article III of the Constitution provides that the judicial power of the United States may be vested only in courts whose judges enjoy the protections set forth in that Article. We conclude today that Congress, in one isolated respect, exceeded that limitation in the Bankruptcy Act of1984. The Bankruptcy Court below lacked the constitutional authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim. Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE SCALIA, concurring.

I agree with the Court's interpretation of our Article III precedents, and I accordingly join its opinion. I adhere to my view, however, that — our contrary precedents notwithstanding — "a matter of public rights … must at a minimum arise between the government and others," *Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33, 65 (1989) (SCALIA, J., concurring in part and concurring in judgment) (internal quotation marks omitted).

The sheer surfeit of factors that the Court was required to consider in this case should arouse the suspicion that something is seriously amiss with our jurisprudence in this area. I count at least seven different reasons given in the Court's opinion for concluding that an Article III judge was required to adjudicate this lawsuit: that it was one "under state common law" which was "not a matter that can be pursued only by grace of the other branches," *ante*, at 27; that it was "not 'completely dependent upon' adjudication of a claim created by federal law," that "Pierce did not truly consent to resolution of Vickie's claim in the bankruptcy court proceedings," that "the asserted authority to decide Vickie's claim is not limited to a 'particularized area of the law,' " that "there was never any reason to believe that the process of adjudicating Pierce's proof of claim would necessarily resolve Vickie's counterclaim," that the trustee was not "asserting a right of recovery created by federal bankruptcy law," and that the Bankruptcy Judge "ha[d] the power to enter 'appropriate orders and judgments' — including final judgments — subject to review only if a party chooses to appeal."

Apart from their sheer numerosity, the more fundamental flaw in the many tests suggested by our jurisprudence is that they have nothing to do with the text or tradition of Article III. For example, Article III gives no indication that state-law claims have preferential entitlement to an Article III judge; nor does it make pertinent the extent to which the area of the law is "particularized." The multi-factors relied upon today seem to have entered our jurisprudence almost randomly.

Leaving aside certain adjudications by federal administrative agencies, which are governed (for

better or worse) by our landmark decision in *Crowell v. Benson*, 285 U.S. 22 (1932), in my view an Article III judge is required in all federal adjudications, unless there is a firmly established historical practice to the contrary. For that reason — and not because of some intuitive balancing of benefits and harms — I agree that Article III judges are not required in the context of territorial courts, courts-martial, or true "public rights" cases. But Vickie points to no historical practice that authorizes a non-Article III judge to adjudicate a counterclaim of the sort at issue here.

JUSTICE BREYER, with whom JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN, join dissenting.

….

I

My disagreement with the majority's conclusion stems in part from my disagreement about the way in which it interprets, or at least emphasizes, certain precedents. In my view, the majority overstates the current relevance of statements this Court made in an 1856 case, *Murray's Lessee v. Hoboken Land & Improvement Co*., and it overstates the importance of an analysis that did not command a Court majority in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co*., and that was subsequently disavowed. At the same time, I fear the Court understates the importance of a watershed opinion widely thought to demonstrate the constitutional basis for the current authority of administrative agencies to adjudicate private disputes, namely, *Crowell v. Benson*, 285 U.S. 22 (1932). And it fails to follow the analysis that this Court more recently has held applicable to the evaluation of claims of a kind before us here, namely, claims that a congressional delegation of adjudicatory authority violates separation-of-powers principles derived from Article III. *See Thomas v. Union Carbide Agricultural Products Co*., 473 U.S. 568 (1985); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986). … I believe we should put less weight than does the majority upon the statement in *Murray's Lessee* and the analysis followed by the *Northern Pipeline* plurality and instead should apply the approach this Court has applied in *Crowell*, *Thomas*, and *Schor*.

[JUSTICE BREYER'S extensive analysis of these cases is omitted.]

II

A

This case law, as applied in *Thomas* and *Schor*, requires us to determine pragmatically whether a congressional delegation of adjudicatory authority to a non-Article III judge violates the separation-of-powers principles inherent in Article III. That is to say, we must determine through an examination of certain relevant factors whether that delegation constitutes a significant encroachment by the Legislative or Executive Branches of Government upon the realm of authority that Article III reserves for exercise by the Judicial Branch of Government. Those factors include (1) the nature of the claim to be adjudicated; (2) the nature of the non-Article III tribunal; (3) the extent to which Article III courts exercise control over the proceeding; (4) the presence or absence of the parties' consent; and (5) the nature and importance of the legislative purpose served by the grant of adjudicatory authority to a tribunal with judges who lack Article III's tenure and compensation protections. The presence of "private rights" does not automatically determine the outcome of the question but requires a more "searching" examination of the relevant factors. *Schor*, ….

Insofar as the majority would apply more formal standards, it simply disregards recent, controlling precedent. *Thomas*, *supra*, at 587 ("[P]ractical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III"); *Schor*, *supra*, at 851 ("[T]he Court has declined to adopt formalistic and unbending rules" for deciding Article III cases).

B

Applying *Schor's* approach here, I conclude that the delegation of adjudicatory authority before us is constitutional. A grant of authority to a bankruptcy court to adjudicate compulsory counterclaims does not violate any constitutional separation-of-powers principle related to Article III. …

Fifth, the nature and importance of the legislative purpose served by the grant of adjudicatory

authority to bankruptcy tribunals argues strongly in favor of constitutionality. Congress' delegation of adjudicatory powers over counterclaims asserted against bankruptcy claimants constitutes an important means of securing a constitutionally authorized end. Article I, §8, of the Constitution explicitly grants Congress the "Power To … establish … uniform Laws on the subject of Bankruptcies throughout the United States." …

Consequently a bankruptcy court's determination of such matters has more than "some bearing on a bankruptcy case." It plays a critical role in Congress' constitutionally based effort to create an efficient, effective federal bankruptcy system. At the least, that is what Congress concluded. We owe deference to that determination, which shows the absence of any legislative or executive motive, intent, purpose, or desire to encroach upon areas that Article III reserves to judges to whom it grants tenure and compensation protections.

Considering these factors together, I conclude that, as in *Schor*, "the magnitude of any intrusion on the Judicial Branch can only be termed *de minimis*." I would similarly find the statute before us constitutional.

III

The majority predicts that as a "practical matter" today's decision "does not change all that much." But I doubt that is so. … Thus, under the majority's holding, the federal district judge, not the bankruptcy judge, would have to hear and resolve the counterclaim.

Why is that a problem? Because these types of disputes arise in bankruptcy court with some frequency. Because the volume of bankruptcy cases is staggering, involving almost 1.6 million filings last year, compared to a federal district court docket of around 280,000 civil cases and 78,000 criminal cases. Administrative Office of the United States Courts, J. Duff, Judicial Business of the United States Courts: Annual Report of the Director 14 (2010). Because unlike the "related" non-core state law claims that bankruptcy courts must abstain from hearing, *see ante*, at 36, compulsory counterclaims involve the same factual disputes as the claims that may be finally adjudicated by the bankruptcy courts. Because under these circumstances, a constitutionally required game of jurisdictional ping-pong between courts would lead to inefficiency, increased cost, delay, and needless additional suffering among those faced with bankruptcy.

For these reasons, with respect, I dissent.

NOTES AND QUESTIONS

5supp-33. How does the court apply the factor analysis it developed in *Northern Pipeline* in this case? Is it fair to say that of all the factors it considered, the state-law origin of the claim for tortious interference was by far the most important? Why did this mean the case could not fall within the public rights exception? Did Congress waive sovereign immunity?

5supp-34. Was Vickie's counterclaim a "core proceeding" under the statute? Why did that make the statute unconstitutional? Why were bankruptcy judges unable to decide such a claim? Why is it so important, as far as the majority is concerned, that state law claims such as these remain in federal court? What is the relationship of common law claims to liberty? What are the limits of this approach?

5supp-35. Why did Justice Scalia concur specially? What were his views as to public rights cases and how did they differ from those of the majority? Did Justice Breyer in dissent agree with the majority's statutory analysis? Why did he disagree with its constitutional analysis? What does he fear will happen in the future? How will this case affect adjudications by administrative agencies in the future? Does the Court say? How do you reconcile this case with *Crowell?*

Schor? Thomas?

5supp-36. Limiting *Stern – Arkison & Sharif*

The Supreme Court has subsequently limited *Stern* in two recent decisions. In *Executive Benefits Insurance Agency v. Arkison*, the Court held that bankruptcy judges could issue reports and recommendations on *Stern* issues to be reviewed de novo by the district court. 134 S. Ct. 2165 (2014). In *Wellness International Network, Ltd. v. Sharif*, the Court held that parties could consent to bankruptcy court adjudication of *Stern* claims. 135 S. Ct. 1932 (2015).

Executive Benefits Insurance Agency v. Arkison

In *Arkison*, a bankruptcy trustee filed a motion for summary judgment against the Executive Benefits Insurance Agency (EBIA), which had filed a voluntary Chapter 7 bankruptcy petition. 134 S. Ct. 2165 (2014). The bankruptcy granted summary judgment for the trustee on all claims, including a fraudulent conveyance claim under Washington law. The district court conducted de novo review, affirming the bankruptcy court and entering judgment for the trustee. On appeal, EBIA contended that "Article III did not permit Congress to vest authority in a bankruptcy court to finally decide the trustee's fraudulent conveyance claims." *Id.* at 1269.

Justice Thomas, for a unanimous Court, held that the statutory report-and-recommendation procedure applicable to "non-core" proceedings under 28 U.S.C. § 157(c) is also applicable to *Stern* claims. The Court's analysis centered on the "severability provision" of the Bankruptcy Amendments and Federal Judgeship Act of 1984:

> [The Court first quoted the provision:] "If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of this Act, or the application of that provision to persons or circumstances other than those as to which it is held invalid, is not affected thereby." 98 Stat. 344, note following 28 U.S.C. § 151.
>
> The plain text of this severability provision closes the so-called "gap" created by Stern claims. When a court identifies a claim as a Stern claim, it has necessarily "held invalid" the "application" of § 157(b) [the "core proceedings" statute]. In that circumstance, the statute instructs that "the remainder of th[e] Act . . . is not affected thereby." That remainder includes § 157(c), which governs non-core proceedings. With the "core" category no longer available for the *Stern* claim at issue, we look to § 157(c)(1) to determine whether the claim may be adjudicated as a non-core claim—specifically, whether it . . . is "otherwise related to a case under title 11." If the claim satisfies the criteria of § 157(c)(1), the bankruptcy court simply treats the claims as non-core: The bankruptcy court should hear the proceeding and submit proposed findings of fact and conclusions of law to the district court for *de novo* review and entry of judgment.
>
> The conclusion that the remainder of the statute may continue to apply to *Stern* claims accords with our general approach to severability. We ordinarily give effect to the valid portion of a partially unconstitutional statute so long as it remains fully operative as a law and so long as it is not evident from the statutory text and context that Congress would have preferred no statute at all. Neither of those concerns applies here.

Id. at 2173. The Court next held that the fraudulent conveyance claim at issue came within the scope of § 157(c)(1) as a claim "related to a case under title 11" because, "[a]t bottom, a fraudulent conveyance claim asserts that property that should have been part of the bankruptcy estate and therefore available for distribution to creditors pursuant to Title 11 was improperly removed." *Id.* at 2174.

Finally, while the bankruptcy court did not properly follow the procedures of submitting a report and recommendation because it actually ruled on the summary judgment motion, "the District Court's *de novo* review and entry of its own valid final judgment cured any error." *Id.* at 2175. Because of this holding, the Court declined to address other issues raised by the parties, including "whether Article III

permits a bankruptcy court, with the consent of the parties, to enter final judgment on a *Stern* claim. We reserve that question for another day." *Id.* at 2170 n.4.

Wellness International Network, Ltd. v. Sharif

This question was not reserved for long, however, as the Court considered the ability of parties' consent to bankruptcy court jurisdiction over *Stern* claims in *Sharif*, less than one year later. 135 S. Ct. 1932 (2015).

Sharif arose out of a bankruptcy court's default judgment against Sharif in an adversary proceeding, imposed as a sanction for repeated violation of the court's discovery order. The default judgment included a declaration, requested by a creditor, that the assets held by a trust Sharif administered were "in fact property of Sharif's bankruptcy estate." *Id.* at 1941. While the creditor alleged that Sharif failed to timely challenge the bankruptcy court's order as violating *Stern*, the Seventh Circuit concluded that, in any event, separation-of-powers concerns precluded forfeiture. The Seventh Circuit held that the declaration that trust assets were Sharif's property constituted a *Stern* claim, over which the bankruptcy court lacked constitutional authority.

Citing *Schor*, *supra* § 6.11, Justice Sotomayor, writing for the Court, concluded that "litigants may validly consent to adjudication by bankruptcy courts." First, the Court observed that "the entitlement to an Article III adjudicator is a personal right and thus ordinarily subject to waiver." *Id.* at 1942. As examples, the Court cited the ability of litigants to waive the right to have an Article III judge preside at trial and the ability of criminal defendants to waive the right to have an Article III judge supervise voir dire.

Second, the Court concluded that "allowing bankruptcy courts to decide *Stern* claims by consent" would not "impermissibly threaten the institutional integrity of the Judicial Branch." *Id.* at 1944. Bankruptcy courts "hear matters solely on a district court's reference, which the district court may withdraw *sua sponte*," and their powers are "limited to a narrow class of common law claims as an incident to [their] . . . unchallenged, adjudicative function," the Court said. *Id.* at 1945. There was no "danger" that Congress was attempting "to aggrandize itself or humble the Judiciary." *Id.*

Finally, the Court concluded that consent must be knowing and voluntary but need not be express under both the Constitution and the statute. The statute "states only that a bankruptcy court must obtain 'the consent'—consent *simpliciter*—'of all parties to the proceeding' before hearing and determining a non-core claim." *Id.* at 1947. The Court noted that a requirement of express consent would conflict with the Court's holding to the contrary in the context of magistrate judges. Thus, "the key inquiry is whether the litigant or counsel was made aware of the need for consent to refuse it, and still voluntarily appeared to try the case." *Id.* at 1948.

The Court reversed and remanded the proceeding to the Seventh Circuit "to decide on remand whether Sharif's actions evinced the requisite knowing and voluntary consent, and also whether . . . Sharif forfeited his Stern argument below." *Id.* at 1949.

In dissent, Chief Justice Roberts, joined by Justice Scalia and, in part, Justice Thomas, accused the majority of "yield[ing] . . . to functionalism." *Id.* at 1950 (Roberts, C.J., dissenting). The dissent disparaged *Schor*'s conclusion that Article III merely implicates waivable, personal rights, and warned that

> the Court's acceptance of an Article III violation is not likely to go unnoticed. The next time Congress takes judicial power from Article III courts, the encroachment may not be so modest—and we will no longer hold the high ground of principle. The majority's acquiescence in the erosion of our constitutional power sets a precedent that I fear we will regret.

Id. The majority rejoined: "To hear the principal dissent tell it, the world will end not in fire, or ice, but in a bankruptcy court." *Id.* at 1947 (majority opinion). The majority then quoted Justice Brennan's dissent from *Schor* to affirm that the Court would not tolerate a "phalanx of non-Article III tribunals equipped to handle the entire business of the Article III courts." *Id.* The majority remarked: "Adjudication based on

litigant consent has been a consistent feature of the federal court system since its inception. Reaffirming that unremarkable fact, we are confident, poses no great threat to anyone's birthrights, constitutional or otherwise." *Id.*

* * *

On April 14, 2023, in a case that addressed only the appropriate mechanism for judicial review rather than the merits of the agency's action, Justice Thomas filed a solo concurrence to become the latest voice advocating for a reexamination of agencies' adjudicative authority under Article III. Consider his views below:

Axon Enterprise, Inc. v. Federal Trade Commission

143 S. Ct. 890 (2023)

[The majority opinion, which concluded that two parties could pursue their constitutional challenges against the FTC and SEC under the U.S. District Court's federal-question jurisdiction rather than under the relevant special statutory review provisions, is omitted, as is Justice Gorsuch's opinion concurring in the judgment.]

Justice THOMAS, concurring.

I join the Court's opinion in full because it correctly applies precedent to determine that Axon Enterprise's and Michelle Cochran's structural constitutional claims need not be channeled through the administrative review schemes at issue. I write separately, however, because I have grave doubts about the constitutional propriety of Congress vesting administrative agencies with primary authority to adjudicate core private rights with only deferential judicial review on the back end.

I

A

The Court correctly notes that precedent allows Congress to replace Article III district courts with "an alternative scheme of review," as it did in the provisions of the Securities Exchange Act and the Federal Trade Commission Act at issue here. *S*ee 15 U.S.C. §§ 45(c) and 78y(a). Under such schemes, administrative agencies may impose orders and penalties on private parties; adjudicate them before agency administrative law judges (ALJs); and only then be subjected to deferential review by an Article III court. As the Court puts it, "[t]he agency effectively fills in for the district court, with the court of appeals providing judicial review." That Article III review is sharply limited. For example, under the administrative review schemes at issue here, the reviewing court must treat agency findings of fact as "conclusive" so long as they are "supported by substantial evidence," § 78y(a)(4); see § 45(c) ("if supported by evidence"), a highly deferential standard of review. The reviewing court also cannot take its own evidence—it can only remand the case to the agency for further proceedings.

This mixed system—primary adjudication by an executive agency subject to only limited Article III review—is unlike the system that prevailed for the first century of our Nation's existence. During that period, judicial review was "all-or-nothing"; "either a court had authority to review administrative action or not, and if it did, it decided the whole case." T. Merrill, Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law, 111 Colum. L. Rev. 939, 944, 952 (2011). This all-or-nothing model rested on a conceptual distinction between core private rights, on the one hand, and mere public rights and governmental privileges, on the other. "Disposition of private rights to life, liberty, and property" was understood to "fal[l] within the core of the judicial power, whereas disposition of public rights [was] not." *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 711 (2015) (THOMAS, J.,

dissenting). Thus, "[t]he measure of judicial involvement was private right. In particular, the extent to which the judiciary reviewed actions and legal determinations of the executive depended on private right." J. Harrison, Jurisdiction, Congressional Power, and Constitutional Remedies, 86 Geo. L. J. 2513, 2516 (1998). Even today, the distinction "between 'public rights' and 'private rights' " continues to inform this Court's understanding of "Article III judicial power." *Oil States Energy Services, LLC* v. *Greene's Energy Group, LLC*, 584 U. S. ——, ——, 138 S. Ct. 1365, 1373 (2018).

As I have explained, when private rights are at stake, full Article III adjudication is likely required. Private rights encompass "the three 'absolute' rights," life, liberty, and property, "so called because they 'appertain and belong to particular men merely as individuals,' not 'to them as members of society or standing in various relations to each other'—that is, not dependent upon the will of the government." *Wellness Int'l Network*, 575 U.S. at 713–714, 135 S.Ct. 1932 (dissenting opinion) (quoting 1 W. Blackstone, Commentaries on the Laws of England 119 (1765)). Such rights could be adjudicated and divested only by Article III courts.

A different regime prevailed for public rights and privileges. Unlike "the *private* unalienable rights of each individual," *Lansing v. Smith*, 4 Wend. 9, 21 (N. Y. 1829), public rights "belon[g] to the people at large," and governmental privileges are "created purely for reasons of public policy and ha[ve] no counterpart in the Lockean state of nature." *Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 344, n. 2, 135 S.Ct. 831 (2015) (THOMAS, J., dissenting). It was understood at the founding that such governmental privileges (some of which we today call Government benefits and entitlements) "could be taken away without judicial process." *Sessions* v. *Dimaya*, 584 U. S. ——, ——, 138 S.Ct. 1204, 1246 (2018) (THOMAS, J., dissenting). Thus, "the legislative and executive branches may dispose of public rights [and privileges] at will—including through non-Article III adjudications." *Wellness Int'l Network*, 575 U.S. at 713, 135 S.Ct. 1932 (THOMAS, J., dissenting).

B

The requirement of plenary Article III adjudication of private rights began to change in the early 20th century. As notions of administrative efficiency came into vogue, courts were viewed less as guardians of core private rights and more as impediments to expert administrative adjudication. After his election in 1904, President Theodore Roosevelt, who "shared the progressive faith in administrative expertise," sought to "rei[n] in judicial review" of administrative action. This progressive sentiment led to the Hepburn Act, which was designed to curb judicial review of Interstate Commerce Commission (ICC) rate orders. Prior to the Hepburn Act, the ICC was required to file a bill of equity in court to obtain judicial enforcement of its rate orders. But, the Hepburn Act provided that the ICC's "orders were to be self-executing thirty days after they became final, unless 'suspended or set aside by a court of competent jurisdiction' "—almost inverting the traditional system. While the Act was silent on the standard of review, this Court understood "the implied threat that if [it] did not back off from its aggressive review practices, more drastic action would be in the offing."

Accordingly, the Court began to develop what is now known as the "appellate review model." While maintaining that the courts must decide "all relevant questions of constitutional power or right" and other questions of law, the Court held that an ICC order "supported by evidence" must be "accepted as final." Following the Court's lead, Congress codified the appellate review model in the two statutes at issue here. . . .

In the 1930s, this Court upheld the constitutionality of the appellate review model against arguments that it violated the separation of powers and Seventh Amendment. First, in *Crowell v. Benson*, 285 U.S. 22 (1932), the Court examined the Longshoremen's and Harbor Workers' Compensation Act, which authorized administrative agencies to adjudicate workers' compensation claims against private parties. The Court acknowledged that the case was "one of private right," but held that Congress had the authority to place primary factfinding authority in an administrative agency. It reasoned that such a

scheme did not violate Article III because "Congress has considerable power to structure [judicial] proceedings and to regulate the mechanisms that courts use to ascertain facts."

Next, in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the Court examined the National Labor Relations Act's judicial review provisions, which required an Article III court to accept the National Labor Relations Board's factual findings so long as they were "supported by evidence" in the administrative record. The Court held that this arrangement did not violate the Seventh Amendment, which provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." The Court reasoned that, "because claims seeking statutory remedies for violations of the Act were 'statutory proceedings' that were 'unknown to the common law,' they were not 'suits at common law' within the meaning of the Seventh Amendment." These cases solidified administrative agencies' authority "to act as factfinding adjuncts to the federal judiciary on a broad array of statutory claims, including claims for monetary relief."

II

As I have previously explained, "[b]ecause federal administrative agencies are part of the Executive Branch, it is not clear that they have power to adjudicate claims involving core private rights." *B&B Hardware, Inc. v. Hargis Industries, Inc.*, 575 U.S. 138, 171 (2015) (dissenting opinion). The "appellate review model" of agency adjudication thus raises serious constitutional concerns. It may violate the separation of powers by placing adjudicatory authority over core private rights—a judicial rather than executive power—within the authority of Article II agencies. It may ***910** violate Article III by compelling the Judiciary to defer to administrative agencies regarding matters within the core of the Judicial Vesting Clause. And, it may violate due process by empowering entities that are not courts of competent jurisdiction to deprive citizens of core private rights. **Finally, the appellate review model may run afoul of the Seventh Amendment by allowing an administrative agency to adjudicate what may be core private rights without a jury.** See *Tull v. United States*, 481 U.S. 412, 417 (1987) (explaining that the Seventh Amendment ensures the right to a jury trial for all adjudications "analogous to 'Suits at common law' ").

It is no answer that an Article III court may eventually review the agency order and its factual findings under a deferential standard of review. In fact, there seems to be no basis for treating factfinding differently from deciding questions of law. Both are at the core of judicial power, as Article III itself acknowledges. See § 2, cl. 2 (providing that this Court's appellate jurisdiction is "both as to Law and Fact"); see also *Stern v. Marshall*, 564 U.S. 462, 484 (2011). For much of the Nation's history, it was understood that Article III precluded "the political branches" from exercising "power over the determination of individualized adjudicative facts when core private rights were at stake." It is obvious that Article III "would not be satisfied if Congress provided for judicial review but ordered the courts to affirm the agency no matter what." G. Lawson, The Rise and Rise of the Administrative State, 107 Harv. L. Rev. 1231, 1247 (1994). And, "[t]here is no reason to think that it is any different if Congress instead simply orders courts to put a thumb (or perhaps two forearms) on the agency's side of the scale." *Id.*, at 1247–1248. Such a regime "allows a mere party to supplant a jury as the court's fact finder," and it "effectively vest[s] the judicial power either in the agency or in Congress." It thus appears likely that, "when agency adjudicators stray outside the proper limits of executive adjudication such as by depriving individuals of vested property rights, they must not serve even as fact-finders subject to judicial deference."

In sum, whether any form of administrative adjudication is constitutionally permissible likely turns on the nature of the right in question. If private rights are at stake, the Constitution likely requires plenary Article III adjudication. Conversely, if privileges or public rights are at stake, Congress likely can foreclose judicial review at will.

III

The rights at issue in these cases appear to be core private rights that must be adjudicated by Article III courts. For one, Axon and Cochran face the threat of significant monetary fines. Indeed, in the first round of proceedings, the SEC imposed a $22,500 civil penalty on Cochran. And, the FTC seeks to require Axon to transfer intellectual property to another entity. These types of penalties and orders implicate the core private right to property. Naturally, merely labeling the deprivation of a core private right a "civil penalty" cannot allow Congress and agencies to circumvent constitutional requirements. Cf. *Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33, 61 (1989) ("Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity"). By permitting administrative agencies to adjudicate what may be core private rights, the administrative review schemes here raise serious constitutional issues. . . .

NOTES AND QUESTIONS

5supp-37. What is the "agency review model" and what are Justice Thomas's concerns with that model? What claims does Justice Thomas think may properly be assigned to an agency? What claims does Justice Thomas believe should be heard by Article III courts? How would you characterize Justice Thomas's view of separation of powers in this concurrence – does the term "formalism" come to mind?

Could Congress assign adjudication of Social Security Disability claims to the Social Security Administration? Why or why not?

Could Congress assign adjudication of securities fraud enforcement actions to the SEC? Why or why not? We'll return to this point in the next section.

5supp-38. What **legal bases** does Justice Thomas identify for his view that the appellate review model violates the Constitution in the first paragraph of Part II of his opinion? He focuses on Article III in his concurrence (and you can review *Crowell v. Benson* and its progeny above to trace that line of reasoning), but he also cites several others. Your editors have added bold text to one of those bases—the Seventh Amendment. Take a look at the next section.

§ 5.13 The Seventh Amendment and Agency Adjudications

Adapted from
Alfred C. Aman, Jr., Landyn Wm. Rookard & William T. Mayton
Administrative Law 141–45
West Academic Publishing (4th ed. 2023)

The Seventh Amendment, like Article III, provides a facially simple directive: "In Suits at common law, . . . the right of trial by jury shall be preserved . . . ."[102] Until very recently, it has played (at most) a peripheral role in constraining the authority of agency adjudicators. This is because, "when Congress properly assigns a matter to adjudication in a non-Article III tribunal, 'the Seventh Amendment poses no

[102] U.S. CONST. amend. VII.

independent bar to the adjudication of that action by a nonjury factfinder.'"[103] In short, a finding that an agency adjudication does not violate Article III yields the same conclusion under the Seventh Amendment.[104] Because of this feature, cases addressing whether the Seventh Amendment applies to a particular statutory action brought in federal court address a separate question—whether an action and its remedy are analogous to those from legal actions at common law rather than equitable in nature.[105] This is a very important issue that requires, for example, a jury determination as to liability in actions in federal court seeking civil penalties under the Clean Water Act, but not as to the amount of the penalty.[106] It likewise requires a jury to decide claims in federal court seeking backpay for breach of the duty of fair representation under the National Labor Relations Act[107] and seeking damages under the Fair Housing Act.[108] But our focus in the remainder of the chapter is the "quite distinct inquiry" into when the Seventh Amendment jury requirement constrains Congress's authority to assign a matter to a federal agency.[109]

Seventh Amendment and Public Rights

Atlas Roofing Co. v. Occupational Safety & Health Review Commission,[110] a leading Supreme Court case on agency adjudications and the Seventh Amendment,[111] was decided after *Crowell* but before its

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[103] Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1379 (2018) (quoting Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 53–54 (1989)); *see, e.g.*, William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1564, 1570–71 (2020) (explaining that *Oil States* "flatly rejected the relevance of the Seventh Amendment such that "[t]he Article III analysis should be conducted first, on its own. And then . . . if the non-Article III adjudication is permissible, the Seventh Amendment should be ignored").

[104] *Cf., e.g.*, *Granfinanciera*, 492 U.S. at 54 ("In addition to our Seventh Amendment precedents, we therefore rely on our decisions exploring the restrictions Article III places on Congress' choice of adjudicative bodies to resolve disputes over statutory rights to determine whether petitioners are entitled to a jury trial.").

[105] *See, e.g.*, Tull v. United States, 481 U.S. 412, 417 (1987) ("The Court has construed [the Seventh Amendment] to require a jury trial on the merits in those actions that are analogous to 'Suits at common law.'"); Curtis v. Loether, 415 U.S. 189, 195 (1974) ("A damages action under [42 U.S.C. § 3612] sounds basically in tort—the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant's wrongful breach."); Shields v. Thomas, 59 U.S. (18 How.) 253, 262 (1855) ("[The Seventh Amendment], correctly interpreted, cannot be made to embrace the established, exclusive jurisdiction of courts of equity, nor that which they have exercised as concurrent with courts of law; but should be understood as limited to rights and remedies peculiarly legal in their nature, and such as it was proper to assert in courts of law, and by the appropriate modes and proceedings of courts of law.").

[106] *Tull*, 481 U.S. at 427 ("Since Congress itself may fix the civil penalties, it may delegate that determination to trial judges.").

[107] Chauffeurs, Teamsters & Helpers, Loc. No. 391 v. Terry, 494 U.S. 558, 571 (1990) (observing that the requested relief was not restitutionary and contrasting the statutory context for backpay under the NLRA with backpay under Title VII of the Civil Rights Act).

[108] Curtis v. Loether, 415 U.S. 189, 195 (1974) ("A damages action under the statute sounds basically in tort—the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant's wrongful breach.").

[109] *Granfinanciera*, 492 U.S. at 42, n. 4.

[110] 430 U.S. 442 (1977).

[111] *See, e.g.*, Robert R. Gasaway & Ashley C. Parrish, *Administrative Law in Flux: An Opportunity for Constitutional Reassessment*, 24 GEO. MASON L. REV. 361, 388 (2017) (describing *Atlas Roofing* as "the key precedent" regarding "broad transfers of adjudicatory authority from the judiciary to executive agencies and non-Article III courts" and critiquing the decision for "failing to distinguish administrative law's core [*i.e.*, "proceedings involving private citizens solely in their capacity as subjects of governmental action"] from its outlying areas"); *cf., e.g.*, Evan D. Bernick, *Is Judicial Deference to Agency Fact-Finding Unlawful?*, 16 GEO. J.L. & PUB. POL'Y 27, 39 (2018) (describing *Atlas Roofing* as one of "the most striking expansions of the category of public rights").

subsequent treatment in cases like *Northern Pipeline* and *Schor*. Like *Crowell*, the Court framed the issue in familiar terms of public and private rights. The Court asked whether the Seventh Amendment permitted Congress, via the Occupational Safety and Health Act (OSH Act), to "create[] a new statutory duty to avoid maintaining unsafe or unhealthy working conditions" and a new, concomitant "cause of action in the Government for civil penalties enforceable in an administrative agency where there is no jury trial."[112] Under the OSH Act, enforcement actions began with a citation issued by inspectors from the Department of Labor., which If the inspectors discovered a violation, they issued a citation, directed the employer to correct the issue, and proposed a civil penalty of up to $10,000. Employers could challenge the citation and obtain an evidentiary hearing before an ALJ from the OSH Review Commission, with a further right to an administrative appeal before the full Commission. If still unsatisfied, an employer could seek review before a court of appeals, though the Commission's factual finding were subject only to review for substantial evidence.

The Court upheld this arrangement under the Seventh Amendment. The Court initially explained that the Seventh Amendment's jury requirement was, by its own terms, applicable only to "Suits at common law," a class of cases that (at the time the Amendment was adopted in 1791) were heard "in courts of law in which jury trial was customary as distinguished from courts of equity or admiralty in which jury trial was not."[113] An enforcement action under the OSH Act was not, as the employers maintained, "classically a suit at common law," but instead was a suit by the Government "in its sovereign capacity to enforce public rights created by statutes . . . ."[114] The Court thus held that "when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be 'preserved' in 'suits at common law.'"[115] But the Court spoke more generally of Congress's expansive power to assign adjudications to administrative agencies, adding a dose of pragmatism:

> Congress is not required by the Seventh Amendment to choke the already crowded federal courts with new types of litigation or prevented from committing some new types of litigation to administrative agencies with special competence in the relevant field. This is the case even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned instead to a federal court of law instead of an administrative agency.[116]

To the contrary, "the Seventh Amendment was never intended to establish the jury as the exclusive mechanism for factfinding in civil cases."[117] And it did not erect "an impenetrable barrier to administrative factfinding under otherwise valid federal regulatory statute."[118] With regard to the OSH Act, "Congress found the common-law and other existing remedies for work injuries resulting from unsafe working conditions to be inadequate . . . ."[119] Congress was entitled to craft a new action and

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[112] 430 U.S. at 444–45.

[113] *Id.* at 449.

[114] *Id.* at 449–50.

[115] *Id.* 455.

[116] *Id.*

[117] *Id.* at 460.

[118] *Id.*

[119] *Id.* at 461.

remedy, "unknown to the common law," and "place[] [its] enforcement in a tribunal supplying speedy and expert resolutions of the issues involved."[120]

In *Granfinanciera v. Nordberg*, a case finding a Seventh Amendment right to a jury trial in a fraudulent transfer action brought by a bankruptcy trustee, the Court echoed the "general teaching" of *Atlas Roofing*.[121] In particular, the Court emphasized that "Congress may devise novel causes of action involving public rights," even "causes of action that are closely *analogous* to common-law claims[,] and place them beyond the ambit of the Seventh Amendment by assigning their resolution" to an administrative agency."[122] But Congress could not simply "strip parties contesting matters of private right of their constitutional right to a trial by jury" "by assigning to administrative agencies . . . all causes of action not grounded in state law, whether they originate in a newly fashioned regulatory scheme or possess a long line of common-law forebears."[123] The Court thus explained that, "whether the Seventh Amendment permits Congress to assign its adjudication to a tribunal that does not employ juries as factfinders requires the same answer as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal," effectively importing cases such as *Northern Pipeline* (and subsequent cases such as *Oil States*) to guide the public rights analysis. The Court concluded: "If a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court."[124]

Possible Sign of a Strengthened Seventh Amendment?

As we've suggested, the modern Seventh Amendment analysis in the administrative law context requires first conducting the Article III analysis from § 7.1 "on its own. And then . . . if the non-Article III adjudication is permissible," the Seventh Amendment is not implicated.[125] This approach is not without its critics, who argue that the Seventh Amendment constrains Congress's authority to assign matters to agencies separate from (and in addition to) Article III.[126]

The Fifth Circuit's May 2022 decision in *Jarkesy v. SEC*, concluding that (among other constitutional deficiencies) the SEC could not internally adjudicate securities fraud enforcement actions

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[120] *Id.*

[121] Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 51 (1989).

[122] *Id.* at 51–52.

[123] *Id.*

[124] *Id.* at 54–55.

[125] Baude, *supra* note 9, at 1571.

[126] *See, e.g.*, Ellen E. Sward, Legislative Courts, Article III, and the Seventh Amendment, 77 N.C. L. Rev. 1037, 1099 (1999) (criticizing the Court for "apply[ing] the same test to the Seventh Amendment issues as to the Article III issues" and arguing that "the strongest evidence of the analytical distinction [between the two provisions] is that Congress has less power to abrogate the Seventh Amendment than to establish non-Article III courts");
Martin H. Redish & Daniel J. La Fave, *Seventh Amendment Right to Jury Trial in Non- Article III Proceedings: A Study in Dysfunctional Constitutional Theory*, 4 WM. & MARY BILL RTS. J. 407, 421 (1995) (criticizing *Atlas Roofing*'s reliance on the public rights doctrine as "puzzling" and explaining that "Nothing in the history of common law practice in any way distinguished between law and equity on the basis of the 'public' or 'private' nature of the right being adjudicated").

without running afoul of the Seventh Amendment, reflects many of these criticisms.[127] To the Fifth Circuit, all securities fraud actions—even when brought as enforcement actions by the SEC—implicate only private rights. They "are not new actions unknown to the common law" nor are "uniquely suited for agency adjudication."[128] And though the court accepted the premise that "the securities statutes are designed to protect the public at large," it rejected the conclusion that this "convert[ed] the SEC's action into one focused on public rights."[129] Rather, the fraud claims were "quintessentially about the redress of private harms" to "particular investors" and were "analogous to traditional fraud claims at common law in a way that the 'new' claims and remedies in *Atlas Roofing* were not."[130] So, the court summarized, "(1) this type of action was commonplace at common law, (2) jury trial rights are consistent and compatible with the statutory scheme, and (3) such actions are commonly considered by federal courts with or without the federal government's involvement."[131] The petitioners were therefore entitled to a jury trial and could not be found liable in an SEC adjudication.

As the dissent rejoined, the majority's analysis represents a significant departure from the ordinary understanding of how the Seventh Amendment operates with respect to government enforcement actions and agency adjudications. The "enforcement action satisfies *Atlas Roofing*'s [and *Crowell*'s and *Oil States*'] definition of a 'public right.'[132]" It was brought to further the "broad congressional purpose" of protecting investors, "'"vindicating public rights[,] and furthering public interests'" and arose "'between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.'"[133] As such, under the teachings of *Granfinanciera* and *Oil States*, "the fact that the securities statutes at issue resemble (but are not identical to) common-law fraud does not change th[e] result."

* * *

On June 30, 2023, the Supreme Court granted certiorari to review three issues addressed in the Fifth Circuit's decision in *Jarkesy*, No. 22-859:

1. Whether statutory provisions that empower the Securities and Exchange Commission (SEC) to initiate and adjudicate administrative enforcement proceedings seeking civil penalties violate the Seventh Amendment.

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[127] Jarkesy v. SEC, 34 F.4th 446, 451 (5th Cir. 2022), *cert. granted*, No. 22-859 (June 30, 2023). *Contra* Imperato v. SEC, 693 F. App'x 870, 876 (11th Cir. 2017) (unpublished opinion) (summarily rejecting Seventh Amendment argument on the ground that, under *Atlas Roofing*, "the Seventh Amendment does not require a jury trial in administrative proceedings designed to adjudicate statutory 'public rights'").

[128] *Jarkesy*, 34 F.4th at 455.

[129] *Id.* at 456.

[130] *Id.* at 458.

[131] *Id.* at 459.

[132] *Id.* at 468–69 (Davis, J., dissenting).

[133] *Id.* at 469 (first quoting SEC v. Diversified Corporate Consulting Grp., 378 F.3d 1219, 1224 (11th Cir. 2004), then quoting Crowell v. Benson, 285 U.S. 22, 50, 52 S. Ct. 285, 285, 76 L. Ed. 598 (1932)).

2. Whether statutory provisions that authorize the SEC to choose to enforce the securities laws through an agency adjudication instead of filing a district court action violate the nondelegation doctrine. [*See* § 5.06.]

3. Whether Congress violated Article II by granting for-cause removal protection to administrative law judges in agencies whose heads enjoy for-cause removal protection. [*See* § 6.04.]

How the Supreme Court decides to resolve these issues may reshape agency adjudications or administrative law more generally.

Online Supplement to Chapter 6
Executive Control of Agency Discretion

Table of Contents

§ 6.04 The Power To Remove

Supplement to note 6-10 on page 542:

Jarkesy v. SEC (U.S. Supreme Court, No. 22-991, 2022), currently pending at the Supreme Court on appeal from the Fifth Circuit, involves (among other questions) removal issues relating to ALJs. The Fifth Circuit held that *Lucia* does not decide the question presented in *Jarkesy*, in that the Constitution does not preclude for-cause protection for ALJs:

> The Supreme Court decided in *Lucia* that SEC ALJs are "inferior officers" under the Appointments Clause because they have substantial authority within SEC enforcement actions. Lucia v. SEC, 138 S. Ct. 2044, 2053 (2018). And in *Free Enterprise Fund* it explained that the President must have adequate control over officers and how they carry out their functions. 561 U.S. at 492, 496. If principal officers cannot intervene in their inferior officers' actions except in rare cases, the President lacks the control necessary to ensure that the laws are faithfully executed. So, if SEC ALJs are "inferior officers" of an executive agency, as the Supreme Court in *Lucia* indicated was the case at least for the purposes of the Appointments Clause, they are sufficiently important to executing the laws that the Constitution requires that the President be able to exercise authority over their functions. Specifically, SEC ALJs exercise considerable power over administrative case records by controlling the presentation and admission of evidence; they may punish contemptuous conduct; and often their decisions are final and binding. Lucia, 138 S. Ct. at 2053–54. But 5 U.S.C. § 7521(a) provides that SEC ALJs may be removed by the Commission "only for good cause established and determined by the Merit Systems Protection Board (MSPB) on the record after opportunity for hearing before the Board." (Parenthetical not in original.) And the SEC Commissioners may only be removed by the President for

good cause. (*SEC v. Jarkesy*, U.S. Court of Appeals for the Fifth Circuit, No. 20-61007, 2022, at 27-28).

Insert after note 6-38 on page 590:

Notes 6-35 to 6-38 discuss the lower courts' approaches to the constitutionality of a single head of an independent commission protected from executive removal except for cause. In the following case, the Supreme Court holds such commissions to be unconstitutional.

Seila Law LLC v. Consumer Financial Protection Bureau

No. 19-7, 591 U.S. ____ (June 29, 2020)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court with respect to Parts I, II, and III.

In the wake of the 2008 financial crisis, Congress established the Consumer Financial Protection Bureau (CFPB), an independent regulatory agency tasked with ensuring that consumer debt products are safe and transparent. In organizing the CFPB, Congress deviated from the structure of nearly every other independent administrative agency in our history. Instead of placing the agency under the leadership of a board with multiple members, Congress provided that the CFPB would be led by a single Director, who serves for a longer term than the President and cannot be removed by the President except for inefficiency, neglect, or malfeasance. The CFPB Director has no boss, peers, or voters to report to. Yet the Director wields vast rulemaking, enforcement, and adjudicatory authority over a significant portion of the U. S. economy. The question before us is whether this arrangement violates the Constitution's separation of powers.

Under our Constitution, the "executive Power"—all of it—is "vested in a President," who must "take Care that the Laws be faithfully executed." Art. II, § 1, cl. 1; *id.*, § 3. Because no single person could fulfill that responsibility alone, the Framers expected that the President would rely on subordinate officers for assistance. Ten years ago, in *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477 (2010), we reiterated that, "as a general matter," the Constitution gives the President "the authority to remove those who assist him in carrying out his duties.: "Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else." *Id.*, at 514.

The President's power to remove—and thus supervise—those who wield executive power on his behalf follows from the text of Article II, was settled by the First Congress, and was confirmed in the landmark decision *Myers v. United States*, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160 (1926). Our precedents have recognized only two exceptions to the President's unrestricted removal power. In *Humphrey's Executor* v. *United States*, 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611 (1935), we held that Congress could create expert agencies led by a *group* of principal officers removable by the President only for good cause. And in *United States v. Perkins*, 116 U.S. 483 (1886), and *Morrison v. Olson*, 487 U.S. 654 (1988), we held that Congress could provide tenure protections to certain *inferior* officers with narrowly defined duties.

We are now asked to extend these precedents to a new configuration: an independent agency that wields significant executive power and is run by a single individual who cannot be removed by the President unless certain statutory criteria are met. We decline to take that step. While we need not and do not revisit our prior decisions allowing certain limitations on the President's removal power, there are compelling reasons not to extend those precedents to the novel context of an independent agency led by a single Director. Such an agency lacks a

foundation in historical practice and clashes with constitutional structure by concentrating power in a unilateral actor insulated from Presidential control.

We therefore hold that the structure of the CFPB violates the separation of powers. We go on to hold that the CFPB Director's removal protection is severable from the other statutory provisions bearing on the CFPB's authority. The agency may therefore continue to operate, but its Director, in light of our decision, must be removable by the President at will.

I

A

In the summer of 2007, then-Professor Elizabeth Warren called for the creation of a new, independent federal agency focused on regulating consumer financial products. Warren, Unsafe at Any Rate, Democracy (Summer 2007). Professor Warren believed the financial products marketed to ordinary American households—credit cards, student loans, mortgages, and the like—had grown increasingly unsafe due to a "regulatory jumble" that paid too much attention to banks and too little to consumers. To remedy the lack of "coherent, consumer-oriented" financial regulation, she proposed "concentrat[ing] the review of financial products in a single location"—an independent agency modeled after the multimember Consumer Product Safety Commission.

That proposal soon met its moment. Within months of Professor Warren's writing, the subprime mortgage market collapsed, precipitating a financial crisis that wiped out over $10 trillion in American household wealth and cost millions of Americans their jobs, their retirements, and their homes. In the aftermath, the Obama administration embraced Professor Warren's recommendation. Through the Treasury Department, the administration encouraged Congress to establish an agency with a mandate to ensure that "consumer protection regulations" in the financial sector "are written fairly and enforced vigorously." Dept. of Treasury, Financial Regulatory Reform: A New Foundation 55 (2009). Like Professor Warren, the administration envisioned a traditional independent agency, run by a multimember board with a "diverse set of viewpoints and experiences."

In 2010, Congress acted on these proposals and created the Consumer Financial Protection Bureau (CFPB) as an independent financial regulator within the Federal Reserve System. Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), 124 Stat. 1376. Congress tasked the CFPB with "implement[ing]" and "enforc[ing]" a large body of financial consumer protection laws to "ensur[e] that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive." 12 U.S.C. § 5511(a). Congress transferred the administration of 18 existing federal statutes to the CFPB, including the Fair Credit Reporting Act, the Fair Debt Collection Practices Act, and the Truth in Lending Act. See §§ 5512(a), 5481(12), (14). In addition, Congress enacted a new prohibition on "any unfair, deceptive, or abusive act or practice" by certain participants in the consumer-finance sector. § 5536(a)(1)(B). Congress authorized the CFPB to implement that broad standard (and the 18 pre-existing statutes placed under the agency's purview) through binding regulations. §§ 5531(a)–(b), 5581(a)(1)(A), (b).

Congress also vested the CFPB with potent enforcement powers. The agency has the authority to conduct investigations, issue subpoenas and civil investigative demands, initiate administrative adjudications, and prosecute civil actions in federal court. §§ 5562, 5564(a), (f). To remedy violations of federal consumer financial law, the CFPB may seek restitution, disgorgement, and injunctive relief, as well as civil penalties of up to $1,000,000 (inflation adjusted) for each day that a violation occurs. §§ 5565(a), (c)(2); 12 CFR § 1083.1(a). Since its inception, the CFPB has obtained over $11 billion in relief for over 25 million consumers, including a $1 billion penalty against a single bank in 2018

The CFPB's rulemaking and enforcement powers are coupled with extensive adjudicatory authority. The agency may conduct administrative proceedings to "ensure or enforce compliance with" the statutes and regulations it administers. 12 U.S.C. § 5563(a). When the CFPB acts as an adjudicator, it has "jurisdiction to grant any appropriate legal or equitable relief." § 5565(a)(1). The "hearing officer" who presides over the proceedings may issue subpoenas, order depositions, and resolve any motions filed by the parties. 12 CFR § 1081.104(b). At the close of the proceedings, the hearing officer issues a "recommended decision," and the CFPB Director considers that recommendation and "issue[s] a final decision and order." §§ 1081.400(d), 1081.402(b); see also § 1081.405.

Congress's design for the CFPB differed from the proposals of Professor Warren and the Obama administration in one critical respect. Rather than create a traditional independent agency headed by a multimember board or commission, Congress elected to place the CFPB under the leadership of a single Director. 12 U.S.C. § 5491(b)(1). The CFPB Director is appointed by the President with the advice and consent of the Senate. § 5491(b)(2). The Director serves for a term of five years, during which the President may remove the Director from office only for "inefficiency, neglect of duty, or malfeasance in office." §§ 5491(c)(1), (3).

Unlike most other agencies, the CFPB does not rely on the annual appropriations process for funding. Instead, the CFPB receives funding directly from the Federal Reserve, which is itself funded outside the appropriations process through bank assessments. Each year, the CFPB requests an amount that the Director deems "reasonably necessary to carry out" the agency's duties, and the Federal Reserve grants that request so long as it does not exceed 12% of the total operating expenses of the Federal Reserve (inflation adjusted). §§ 5497(a)(1), (2)(A)(iii), 2(B). In recent years, the CFPB's annual budget has exceeded half a billion dollars.

B

Seila Law LLC is a California-based law firm that provides debt-related legal services to clients. In 2017, the CFPB issued a civil investigative demand to Seila Law to determine whether the firm had "engag[ed] in unlawful acts or practices in the advertising, marketing, or sale of debt relief services." The demand (essentially a subpoena) directed Seila Law to produce information and documents related to its business practices.

Seila Law asked the CFPB to set aside the demand, objecting that the agency's leadership by a single Director removable only for cause violated the separation of powers. The CFPB declined to address that claim and directed Seila Law to comply with the demand.

When Seila Law refused, the CFPB filed a petition to enforce the demand in the District Court. See § 5562(e)(1) (creating cause of action for that purpose). . . .

We granted certiorari to address the constitutionality of the CFPB's structure. We also requested argument on an additional question: whether, if the CFPB's structure violates the separation of powers, the CFPB Director's removal protection can be severed from the rest of the Dodd-Frank Act.

Because the Government agrees with petitioner on the merits of the constitutional question, we appointed Paul Clement to defend the judgment below as *amicus curiae*. He has ably discharged his responsibilities.

II

We first consider three threshold arguments raised by the appointed *amicus* for why we

may not or should not reach the merits. Each is unavailing. [The Court first rejected amicus' standing argument, which asserted that the CFPB's "demand" was not traceable to the appointment issue "because two of the three Directors who have in turn played a role in enforcing the demand were (or now consider themselves to be) removable by the President at will." The Court held that petitioner's injury "is traceable to the decision below and would be fully redressed if we were to reverse the judgment of the Court of Appeals and remand with instructions to deny the Government's petition to enforce the demand," explaining that "a litigant challenging governmental action as void on the basis of the separation of powers is not required to prove that the Government's course of conduct would have been different in a 'counterfactual world' in which the Government had acted with constitutional authority."

Second, the Court rejected amicus' argument that a removal restriction could only be challenged in "a contested removal," citing decisions where private parties had challenged officials' authority on removal grounds and explaining that "when such a provision violates the separation of powers it inflicts a 'here-and-now' injury on affected third parties that can be remedied by a court."

Third, the Court held that the United States' alignment with petitioner posed no barrier to considering the issue with assistance of amicus.]

III

We hold that the CFPB's leadership by a single individual removable only for inefficiency, neglect, or malfeasance violates the separation of powers.

A

Article II provides that "[t]he executive Power shall be vested in a President," who must "take Care that the Laws be faithfully executed." Art. II, § 1, cl. 1; *id.*, § 3. The entire "executive Power" belongs to the President alone. But because it would be "impossib[le]" for "one man" to "perform all the great business of the State," the Constitution assumes that lesser executive officers will "assist the supreme Magistrate in discharging the duties of his trust." 30 Writings of George Washington 334 (J. Fitzpatrick ed. 1939).

These lesser officers must remain accountable to the President, whose authority they wield. As Madison explained, "[I]f any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws." 1 Annals of Cong. 463 (1789). That power, in turn, generally includes the ability to remove executive officials, for it is "only the authority that can remove" such officials that they "must fear and, in the performance of [their] functions, obey." *Bowsher*, 478 U.S., at 726.

The President's removal power has long been confirmed by history and precedent. It "was discussed extensively in Congress when the first executive departments were created" in 1789. *Free Enterprise Fund*, 561 U.S., at 492. "The view that 'prevailed, as most consonant to the text of the Constitution' and 'to the requisite responsibility and harmony in the Executive Department,' was that the executive power included a power to oversee executive officers through removal." *Ibid.* (quoting Letter from James Madison to Thomas Jefferson (June 30, 1789), 16 Documentary History of the First Federal Congress 893 (2004)). The First Congress's recognition of the President's removal power in 1789 "provides contemporaneous and weighty evidence of the Constitution's meaning," *Bowsher*, 478 U.S., at 723, and has long been the "settled and well understood construction of the Constitution," *Ex parte Hennen*, 13 Pet. 230, 259 (1839).

The Court recognized the President's prerogative to remove executive officials in *Myers*

v. United States, 272 U.S. 52. Chief Justice Taft, writing for the Court, conducted an exhaustive examination of the First Congress's determination in 1789, the views of the Framers and their contemporaries, historical practice, and our precedents up until that point. He concluded that Article II "grants to the President" the "general administrative control of those executing the laws, including the power of appointment *and removal* of executive officers." Just as the President's "selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible." "[T]o hold otherwise," the Court reasoned, "would make it impossible for the President ... to take care that the laws be faithfully executed."

We recently reiterated the President's general removal power in *Free Enterprise Fund*. "Since 1789," we recapped, "the Constitution has been understood to empower the President to keep these officers accountable—by removing them from office, if necessary." Although we had previously sustained congressional limits on that power in certain circumstances, we declined to extend those limits to "a new situation not yet encountered by the Court"—an official insulated by *two* layers of for-cause removal protection. In the face of that novel impediment to the President's oversight of the Executive Branch, we adhered to the general rule that the President possesses "the authority to remove those who assist him in carrying out his duties."

Free Enterprise Fund left in place two exceptions to the President's unrestricted removal power. First, in *Humphrey's Executor*, decided less than a decade after *Myers*, the Court upheld a statute that protected the Commissioners of the FTC from removal except for "inefficiency, neglect of duty, or malfeasance in office." In reaching that conclusion, the Court stressed that Congress's ability to impose such removal restrictions "will depend upon the character of the office."

Because the Court limited its holding "to officers of the kind here under consideration," the contours of the *Humphrey's Executor* exception depend upon the characteristics of the agency before the Court. Rightly or wrongly, the Court viewed the FTC (as it existed in 1935) as exercising "no part of the executive power." Instead, it was "an administrative body" that performed "specified duties as a legislative or as a judicial aid." *Ibid.* It acted "as a legislative agency" in "making investigations and reports" to Congress and "as an agency of the judiciary" in making recommendations to courts as a master in chancery. To the extent that [the FTC] exercise[d] any executive *function*[,] as distinguished from executive *power* in the constitutional sense," it did so only in the discharge of its "quasi-legislative or quasi-judicial powers."[1]

The Court identified several organizational features that helped explain its characterization of the FTC as non-executive. Composed of five members—no more than three from the same political party—the Board was designed to be "non-partisan" and to "act with entire impartiality." The FTC's duties were "neither political nor executive," but instead called for "the trained judgment of a body of experts" "informed by experience." And the Commissioners' staggered, seven-year terms enabled the agency to accumulate technical expertise and avoid a "complete change" in leadership "at any one time."

In short, *Humphrey's Executor* permitted Congress to give for-cause removal protections to a multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions and was said not to exercise any executive power. Consistent with that understanding, the Court later applied "[t]he philosophy of *Humphrey's Executor*" to uphold for-

[1] The Court's conclusion that the FTC did not exercise executive power has not withstood the test of time. As we observed in *Morrison* v. *Olson*, 487 U. S. 654 (1988), "[I]t is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive,' at least to some degree."

cause removal protections for the members of the War Claims Commission—a three-member "adjudicatory body" tasked with resolving claims for compensation arising from World War II.

While recognizing an exception for multimember bodies with "quasi-judicial" or "quasi-legislative" functions, *Humphrey's Executor* reaffirmed the core holding of *Myers* that the President has "unrestrictable power ... to remove purely executive officers." The Court acknowledged that between purely executive officers on the one hand, and officers that closely resembled the FTC Commissioners on the other, there existed "a field of doubt" that the Court left "for future consideration."

We have recognized a second exception for *inferior* officers in two cases . . . . Backing away from the reliance in *Humphrey's Executor* on the concepts of "quasi-legislative" and "quasi-judicial" power, we viewed the ultimate question as whether a removal restriction is of "such a nature that [it] impede[s] the President's ability to perform his constitutional duty." Although the independent counsel was a single person and performed "law enforcement functions that typically have been undertaken by officials within the Executive Branch," we concluded that the removal protections did not unduly interfere with the functioning of the Executive Branch because "the independent counsel [was] an inferior officer under the Appointments Clause, with limited jurisdiction and tenure and lacking policymaking or significant administrative authority."

These two exceptions—one for multimember expert agencies that do not wield substantial executive power, and one for inferior officers with limited duties and no policymaking or administrative authority—"represent what up to now have been the outermost constitutional limits of permissible congressional restrictions on the President's removal power." *PHH*, 881 F.3d at 196 (Kavanaugh, J., dissenting).

B

Neither *Humphrey's Executor* nor *Morrison* resolves whether the CFPB Director's insulation from removal is constitutional. Start with *Humphrey's Executor*. Unlike the New Deal-era FTC upheld there, the CFPB is led by a single Director who cannot be described as a "body of experts" and cannot be considered "non-partisan" in the same sense as a group of officials drawn from both sides of the aisle. Moreover, while the staggered terms of the FTC Commissioners prevented complete turnovers in agency leadership and guaranteed that there would always be some Commissioners who had accrued significant expertise, the CFPB's single-Director structure and five-year term guarantee abrupt shifts in agency leadership and with it the loss of accumulated expertise.

In addition, the CFPB Director is hardly a mere legislative or judicial aid. Instead of making reports and recommendations to Congress, as the 1935 FTC did, the Director possesses the authority to promulgate binding rules fleshing out 19 federal statutes, including a broad prohibition on unfair and deceptive practices in a major segment of the U. S. economy. And instead of submitting recommended dispositions to an Article III court, the Director may unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications. Finally, the Director's enforcement authority includes the power to seek daunting monetary penalties against private parties on behalf of the United States in federal court—a

quintessentially executive power not considered in *Humphrey's Executor*.[2]

The logic of *Morrison* also does not apply. Everyone agrees the CFPB Director is not an inferior officer, and her duties are far from limited. Unlike the independent counsel, who lacked policymaking or administrative authority, the Director has the sole responsibility to administer 19 separate consumer-protection statutes that cover everything from credit cards and car payments to mortgages and student loans. It is true that the independent counsel in *Morrison*was empowered to initiate criminal investigations and prosecutions, and in that respect wielded core executive power. But that power, while significant, was trained inward to high-ranking Governmental actors identified by others, and was confined to a specified matter in which the Department of Justice had a potential conflict of interest. By contrast, the CFPB Director has the authority to bring the coercive power of the state to bear on millions of private citizens and businesses, imposing even billion-dollar penalties through administrative adjudications and civil actions.

In light of these differences, the constitutionality of the CFPB Director's insulation from removal cannot be settled by *Humphrey's Executor* or *Morrison* alone.

C

The question instead is whether to extend those precedents to the "new situation" before us, namely an independent agency led by a single Director and vested with significant executive power. *Free Enterprise Fund*, 561 U.S., at 483. We decline to do so. Such an agency has no basis in history and no place in our constitutional structure.

1

"Perhaps the most telling indication of [a] severe constitutional problem" with an executive entity "is [a] lack of historical precedent" to support it. *Id.,* at 505 . An agency with a structure like that of the CFPB is almost wholly unprecedented.

After years of litigating the agency's constitutionality, the Courts of Appeals, parties, and *amici* have identified "only a handful of isolated" incidents in which Congress has provided good-cause tenure to principal officers who wield power alone rather than as members of a board or commission. "[T]hese few scattered examples"—four to be exact—shed little light. *NLRB v. Noel Canning*, 573 U.S. 513, 538 (2014).

First, the CFPB's defenders point to the Comptroller of the Currency, who enjoyed removal protection for *one year* during the Civil War. That example has rightly been dismissed as an aberration. It was "adopted without discussion" during the heat of the Civil War and abandoned before it could be "tested by executive or judicial inquiry." (At the time, the Comptroller may also have been an inferior officer, given that he labored "under the general direction of the Secretary of the Treasury.")[5]

Second, the supporters of the CFPB point to the Office of the Special Counsel (OSC), which has been headed by a single officer since 1978. But this first enduring single-leader office,

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[2] The dissent would have us ignore the reasoning of *Humphrey's Executor* and instead apply the decision only as part of a reimagined *Humphrey's*-through-*Morrison* framework. But we take the decision on its own terms, not through gloss added by a later Court in dicta. The dissent also criticizes us for suggesting that the 1935 FTC may have had lesser responsibilities than the present FTC. Perhaps the FTC possessed broader rulemaking, enforcement, and adjudicatory powers than the *Humphrey's* Court appreciated. Perhaps not. Either way, what matters is the set of powers the Court considered as the basis for its decision, not any latent powers that the agency may have had not alluded to by the Court

created nearly 200 years after the Constitution was ratified, drew a contemporaneous constitutional objection from the Office of Legal Counsel under President Carter and a subsequent veto on constitutional grounds by President Reagan. In any event, the OSC exercises only limited jurisdiction to enforce certain rules governing Federal Government employers and employees. It does not bind private parties at all or wield regulatory authority comparable to the CFPB.

Third, the CFPB's defenders note that the Social Security Administration (SSA) has been run by a single Administrator since 1994. That example, too, is comparatively recent and controversial. President Clinton questioned the constitutionality of the SSA's new single-Director structure upon signing it into law. In addition, unlike the CFPB, the SSA lacks the authority to bring enforcement actions against private parties. Its role is largely limited to adjudicating claims for Social Security benefits.

The only remaining example is the Federal Housing Finance Agency (FHFA), created in 2008 to assume responsibility for Fannie Mae and Freddie Mac. That agency is essentially a companion of the CFPB, established in response to the same financial crisis. It regulates primarily Government-sponsored enterprises, not purely private actors. And its single-Director structure is a source of ongoing controversy. Indeed, it was recently held unconstitutional by the Fifth Circuit, sitting en banc.

With the exception of the one-year blip for the Comptroller of the Currency, these isolated examples are modern and contested. And they do not involve regulatory or enforcement authority remotely comparable to that exercised by the CFPB. The CFPB's single-Director structure is an innovation with no foothold in history or tradition.

2

In addition to being a historical anomaly, the CFPB's single-Director configuration is incompatible with our constitutional structure. Aside from the sole exception of the Presidency, that structure scrupulously avoids concentrating power in the hands of any single individual.

"The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty." Their solution to governmental power and its perils was simple: divide it. To prevent the "gradual concentration" of power in the same hands, they enabled "[a]mbition . . . to counteract ambition" at every turn. The Federalist No. 51, p. 349 (J. Cooke ed. 1961) (J. Madison). At the highest level, they "split the atom of sovereignty" itself into one Federal Government and the States. They then divided the "powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial."

They did not stop there. Most prominently, the Framers bifurcated the federal legislative power into two Chambers: the House of Representatives and the Senate, each composed of multiple Members and Senators. Art. I, §§ 2, 3.

The Executive Branch is a stark departure from all this division. The Framers viewed the legislative power as a special threat to individual liberty, so they divided that power to ensure that "differences of opinion" and the "jarrings of parties" would "promote deliberation and circumspection" and "check excesses in the majority." See The Federalist No. 70, at 475 (A. Hamilton). By contrast, the Framers thought it necessary to secure the authority of the Executive so that he could carry out his unique responsibilities. As Madison put it, while "the weight of the legislative authority requires that it should be ... divided, the weakness of the executive may require, on the other hand, that it should be fortified."

The Framers deemed an energetic executive essential to "the protection of the community

against foreign attacks," "the steady administration of the laws," "the protection of property," and "the security of liberty." Accordingly, they chose not to bog the Executive down with the "habitual feebleness and dilatoriness" that comes with a "diversity of views and opinions." Instead, they gave the Executive the "[d]ecision, activity, secrecy, and dispatch" that "characterise the proceedings of one man."

To justify and check *that* authority—unique in our constitutional structure—the Framers made the President the most democratic and politically accountable official in Government. Only the President (along with the Vice President) is elected by the entire Nation. And the President's political accountability is enhanced by the solitary nature of the Executive Branch, which provides "a single object for the jealousy and watchfulness of the people." he President "cannot delegate ultimate responsibility or the active obligation to supervise that goes with it," because Article II "makes a single President responsible for the actions of the Executive Branch." *Free Enterprise Fund*, 561 U.S., at 496–497.

The resulting constitutional strategy is straightforward: divide power everywhere except for the Presidency, and render the President directly accountable to the people through regular elections. In that scheme, individual executive officials will still wield significant authority, but that authority remains subject to the ongoing supervision and control of the elected President. Through the President's oversight, "the chain of dependence [is] preserved," so that "the lowest officers, the middle grade, and the highest" all "depend, as they ought, on the President, and the President on the community." 1 Annals of Cong. 499 (J. Madison).

The CFPB's single-Director structure contravenes this carefully calibrated system by vesting significant governmental power in the hands of a single individual accountable to no one. The Director is neither elected by the people nor meaningfully controlled (through the threat of removal) by someone who is. The Director does not even depend on Congress for annual appropriations. See The Federalist No. 58, at 394 (J. Madison) (describing the "power over the purse" as the "most compleat and effectual weapon" in representing the interests of the people). Yet the Director may *unilaterally*, without meaningful supervision, issue final regulations, oversee adjudications, set enforcement priorities, initiate prosecutions, and determine what penalties to impose on private parties. With no colleagues to persuade, and no boss or electorate looking over her shoulder, the Director may dictate and enforce policy for a vital segment of the economy affecting millions of Americans.

The CFPB Director's insulation from removal by an accountable President is enough to render the agency's structure unconstitutional. But several other features of the CFPB combine to make the Director's removal protection even more problematic. In addition to lacking the most direct method of presidential control—removal at will—the agency's unique structure also forecloses certain indirect methods of Presidential control.

Because the CFPB is headed by a single Director with a five-year term, some Presidents may not have any opportunity to shape its leadership and thereby influence its activities. A President elected in 2020 would likely not appoint a CFPB Director until 2023, and a President elected in 2028 may *never* appoint one. That means an unlucky President might get elected on a consumer-protection platform and enter office only to find herself saddled with a holdover Director from a competing political party who is dead set *against* that agenda. To make matters worse, the agency's single-Director structure means the President will not have the opportunity to appoint any other leaders—such as a chair or fellow members of a Commission or Board—who can serve as a check on the Director's authority and help bring the agency in line with the President's preferred policies.

The CFPB's receipt of funds outside the appropriations process further aggravates the agency's threat to Presidential control. The President normally has the opportunity to recommend

or veto spending bills that affect the operation of administrative agencies. See Art. I, § 7, cl. 2; Art. II, § 3. And, for the past century, the President has annually submitted a proposed budget to Congress for approval. Presidents frequently use these budgetary tools "to influence the policies of independent agencies." But no similar opportunity exists for the President to influence the CFPB Director. Instead, the Director receives over $500 million per year to fund the agency's chosen priorities. And the Director receives that money from the Federal Reserve, which is itself funded outside of the annual appropriations process. This financial freedom makes it even more likely that the agency will "slip from the Executive's control, and thus from that of the people." *Free Enterprise Fund*, 561 U.S., at 499.[3]

3

Amicus raises three principal arguments in the agency's defense. At the outset, *amicus* questions the textual basis for the removal power and highlights statements from Madison, Hamilton, and Chief Justice Marshall expressing "heterodox" views on the subject. But those concerns are misplaced. It is true that "there is no 'removal clause' in the Constitution," but neither is there a "separation of powers clause" or a "federalism clause." These foundational doctrines are instead evident from the Constitution's vesting of certain powers in certain bodies. As we have explained many times before, the President's removal power stems from Article II's vesting of the "executive Power" in the President. . . .

Next, *amicus* offers a grand theory of our removal precedents that, if accepted, could leave room for an agency like the CFPB—and many other innovative intrusions on Article II. According to *amicus, Humphrey's Executor* and *Morrison* establish a general rule that Congress may impose "modest" restrictions on the President's removal power, with only two limited exceptions. Congress may not reserve a role *for itself* in individual removal decisions (as it attempted to do in *Myers* and *Bowsher*). And it may not eliminate the President's removal power altogether (as it effectively did in *Free EnterpriseFund*). Outside those two situations, *amicus* argues, Congress is generally free to constrain the President's removal power.

But text, first principles, the First Congress's decision in 1789, *Myers*, and *Free Enterprise Fund* all establish that the President's removal power is the rule, not the exception. While we do not revisit *Humphrey's Executor* or any other precedent today, we decline to elevate it into a freestanding invitation for Congress to impose additional restrictions on the President's removal authority.

Finally, *amicus* contends that if we identify a constitutional problem with the CFPB's structure, we should avoid it by broadly construing the statutory grounds for removing the CFPB Director from office. The Dodd-Frank Act provides that the Director may be removed for "inefficiency, neglect of duty, or malfeasance in office." In *amicus*' view, that language could be interpreted to reserve substantial discretion to the President.

We are not persuaded. For one, *Humphrey's Executor* implicitly rejected an interpretation that would leave the President free to remove an officer based on disagreements about agency

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[3] *Amicus* and the dissent try to diminish the CFPB's insulation from Presidential control by observing that the CFPB's final rules can be set aside by a super majority of the Financial Stability and Oversight Council (FSOC). But the FSOC's veto power is statutorily reserved for extreme situations, when two-thirds of the Council concludes that a CFPB regulation would "put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk." 12 U.S.C. §§ 5513(a), (c)(3). That narrow escape hatch has no impact on the CFPB's enforcement or adjudicatory authority and has never been used in the ten years since the agency's creation. It certainly does not render the CFPB's independent, single-Director structure constitutional.

policy. In addition, while both *amicus* and the House of Representatives invite us to adopt whatever construction would cure the constitutional problem, they have not advanced any workable standard derived from the statutory language. *Amicus* suggests that the proper standard might permit removals based on *general* policy disagreements, but not *specific* ones; the House suggests that the permissible bases for removal might vary depending on the context and the Presidential power involved. They do not attempt to root either of those standards in the statutory text. Further, although nearly identical language governs the removal of some two-dozen multimember independent agencies, *amicus* suggests that the standard should vary from agency to agency, morphing as necessary to avoid constitutional doubt. We decline to embrace such an uncertain and elastic approach to the text.

Amicus and the House also fail to engage with the Dodd-Frank Act as a whole, which makes plain that the CFPB is an "independent bureau." . . . The Constitution might of course compel the agency to be dependent on the President notwithstanding Congress's contrary intent, but that result cannot fairly be inferred from the statute Congress enacted. . . .

As we explained in *Free Enterprise Fund*, "One can have a government that functions without being ruled by functionaries, and a government that benefits from expertise without being ruled by experts." While "[n]o one doubts Congress's power to create a vast and varied federal bureaucracy," the expansion of that bureaucracy into new territories the Framers could scarcely have imagined only sharpens our duty to ensure that the Executive Branch is overseen by a President accountable to the people.

IV

Having concluded that the CFPB's leadership by a single independent Director violates the separation of powers, we now turn to the appropriate remedy. We directed the parties to brief and argue whether the Director's removal protection was severable from the other provisions of the Dodd-Frank Act that establish the CFPB. If so, then the CFPB may continue to exist and operate notwithstanding Congress's unconstitutional attempt to insulate the agency's Director from removal by the President. There is a live controversy between the parties on that question, and resolving it is a necessary step in determining petitioner's entitlement to its requested relief. . . .

The only constitutional defect we have identified in the CFPB's structure is the Director's insulation from removal. If the Director were removable at will by the President, the constitutional violation would disappear. We must therefore decide whether the removal provision can be severed from the other statutory provisions relating to the CFPB's powers and responsibilities.

In *Free Enterprise Fund*, we found a set of unconstitutional removal provisions severable even in the absence of an express severability clause because the surviving provisions were capable of "functioning independently" and "nothing in the statute's text or historical context [made] it evident that Congress, faced with the limitations imposed by the Constitution, would have preferred no Board at all to a Board whose members are removable at will." 561 U.S., at 509.

So too here. The provisions of the Dodd-Frank Act bearing on the CFPB's structure and duties remain fully operative without the offending tenure restriction. Those provisions are capable of functioning independently, and there is nothing in the text or history of the Dodd-Frank Act that demonstrates Congress would have preferred *no* CFPB to a CFPB supervised by the President. Quite the opposite. Unlike the Sarbanes-Oxley Act at issue in *Free Enterprise Fund*, the Dodd-Frank Act contains an express severability clause. There is no need to wonder what Congress would have wanted if "any provision of this Act" is "held to be unconstitutional"

because it has told us: "the remainder of this Act" should "not be affected." 12 U. S. C. § 5302.

Petitioner urges us to disregard this plain language for three reasons. None is persuasive. First, petitioner dismisses the clause as non-probative "boilerplate" because it applies "to the entire, 848-page Dodd-Frank Act" and "appears almost 600 pages before the removal provision at issue." In petitioner's view, that means we cannot be certain that Congress really meant to apply the clause to each of the Act's provisions. But boilerplate is boilerplate for a reason—because it offers tried-and-true language to ensure a precise and predictable result. . . . Congress was not required to laboriously insert duplicative severability clauses, provision by provision, to accomplish its stated objective.

Second, petitioner points to an additional severability clause in the Act that applies only to one of the Act's subtitles. See 15 U.S.C. § 8232. In petitioner's view, that clause would be superfluous if Congress meant the general severability clause to apply across the Act. . . . In this instance, the redundant language appears to reflect the fact that the subtitle to which it refers originated as a standalone bill that was later incorporated into Dodd-Frank. . .

Finally, petitioner argues more broadly that Congress would not have wanted to give the President unbridled control over the CFPB's vast authority. . . .

. . . Congress preferred an independent CFPB to a dependent one; but they shed little light on the critical question whether Congress would have preferred a dependent CFPB to *no agency at all.* That is the only question we have the authority to decide, and the answer seems clear. . . .

Because we find the Director's removal protection severable from the other provisions of Dodd-Frank that establish the CFPB, we remand for the Court of Appeals to consider whether the civil investigative demand was validly ratified.

* * *

A decade ago, we declined to extend Congress's authority to limit the President's removal power to a new situation, never before confronted by the Court. We do the same today. In our constitutional system, the executive power belongs to the President, and that power generally includes the ability to supervise and remove the agents who wield executive power in his stead. While we have previously upheld limits on the President's removal authority in certain contexts, we decline to do so when it comes to principal officers who, acting alone, wield significant executive power. The Constitution requires that such officials remain dependent on the President, who in turn is accountable to the people. . . .

Justice THOMAS, with whom Justice GORSUCH joins, concurring in part and dissenting in part.

The Court's decision today takes a restrained approach on the merits by limiting *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), rather than overruling it. At the same time, the Court takes an aggressive approach on severability by severing a provision when it is not necessary to do so. I would do the opposite.

Because the Court takes a step in the right direction by limiting *Humphrey's Executor* to "multimember expert agencies that *do not wield substantial executive power*," I join Parts I, II, and III of its opinion. I respectfully dissent from the Court's severability analysis, however, because I do not believe that we should address severability in this case.

I

The decision in *Humphrey's Executor* poses a direct threat to our constitutional structure and, as a result, the liberty of the American people. The Court concludes that it is not strictly necessary for us to overrule that decision. But with today's decision, the Court has repudiated almost every aspect of *Humphrey's Executor*. In a future case, I would repudiate what is left of this erroneous precedent. [The remainder of Justice Thomas's opinion, advocating for the overruling of *Humphrey's* and a rejection of the plurality's severability holding (in part IV of the Chief Justice's opinion), is omitted.]

Justice KAGAN, with whom Justice GINSBURG, Justice BREYER, and Justice SOTOMAYOR join, concurring in the judgment with respect to severability and dissenting in part.

Throughout the Nation's history, this Court has left most decisions about how to structure the Executive Branch to Congress and the President, acting through legislation they both agree to. In particular, the Court has commonly allowed those two branches to create zones of administrative independence by limiting the President's power to remove agency heads. The Federal Reserve Board. The Federal Trade Commission (FTC). The National Labor Relations Board. Statute after statute establishing such entities instructs the President that he may not discharge their directors except for cause—most often phrased as inefficiency, neglect of duty, or malfeasance in office. Those statutes, whose language the Court has repeatedly approved, provide the model for the removal restriction before us today. If precedent were any guide, that provision would have survived its encounter with this Court—and so would the intended independence of the Consumer Financial Protection Bureau (CFPB).

Our Constitution and history demand that result. The text of the Constitution allows these common for-cause removal limits. Nothing in it speaks of removal. And it grants Congress authority to organize all the institutions of American governance, provided only that those arrangements allow the President to perform his own constitutionally assigned duties. Still more, the Framers' choice to give the political branches wide discretion over administrative offices has played out through American history in ways that have settled the constitutional meaning. From the first, Congress debated and enacted measures to create spheres of administration—especially of financial affairs—detached from direct presidential control. As the years passed, and governance became ever more complicated, Congress continued to adopt and adapt such measures—confident it had latitude to do so under a Constitution meant to "endure for ages to come." *McCulloch v. Maryland*, 4 Wheat. 316, 415 (1819) (approving the Second Bank of the United States). Not every innovation in governance—not every experiment in administrative independence—has proved successful. And debates about the prudence of limiting the President's control over regulatory agencies, including through his removal power, have never abated. But the Constitution—both as originally drafted and as practiced—mostly leaves disagreements about administrative structure to Congress and the President, who have the knowledge and experience needed to address them. Within broad bounds, it keeps the courts—who do not—out of the picture.

The Court today fails to respect its proper role. It recognizes that this Court has approved limits on the President's removal power over heads of agencies much like the CFPB. Agencies possessing similar powers, agencies charged with similar missions, agencies created for similar reasons. The majority's explanation is that the heads of those agencies fall within an "exception"—one for multimember bodies and another for inferior officers—to a "general rule" of unrestricted presidential removal power. And the majority says the CFPB Director does not. That account, though, is wrong in every respect. The majority's general rule does not exist. Its exceptions, likewise, are made up for the occasion—gerrymandered so the CFPB falls outside them. And the distinction doing most of the majority's work—between multimember bodies and single directors—does not respond to the constitutional values at stake. If a removal provision

violates the separation of powers, it is because the measure so deprives the President of control over an official as to impede his own constitutional functions. But with or without a for-cause removal provision, the President has at least as much control over an individual as over a commission—and possibly more. That means the constitutional concern is, if anything, ameliorated when the agency has a single head. Unwittingly, the majority shows why courts should stay their hand in these matters. "Compared to Congress and the President, the Judiciary possesses an inferior understanding of the realities of administration" and the way "political power[] operates." *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 523 (2010) (BREYER, J., dissenting).

In second-guessing the political branches, the majority second-guesses as well the wisdom of the Framers and the judgment of history. It writes in rules to the Constitution that the drafters knew well enough not to put there. It repudiates the lessons of American experience, from the 18th century to the present day. And it commits the Nation to a static version of governance, incapable of responding to new conditions and challenges. Congress and the President established the CFPB to address financial practices that had brought on a devastating recession, and could do so again. Today's decision wipes out a feature of that agency its creators thought fundamental to its mission—a measure of independence from political pressure. I respectfully dissent.

I

The text of the Constitution, the history of the country, the precedents of this Court, and the need for sound and adaptable governance—all stand against the majority's opinion. They point not to the majority's "general rule" of "unrestricted removal power" with two grudgingly applied "exceptions." Rather, they bestow discretion on the legislature to structure administrative institutions as the times demand, so long as the President retains the ability to carry out his constitutional duties. And most relevant here, they give Congress wide leeway to limit the President's removal power in the interest of enhancing independence from politics in regulatory bodies like the CFPB.

A

What does the Constitution say about the separation of powers—and particularly about the President's removal authority? (Spoiler alert: about the latter, nothing at all.)

The majority offers the civics class version of separation of powers—call it the Schoolhouse Rock definition of the phrase. See Schoolhouse Rock! Three Ring Government (Mar. 13, 1979), http://www.youtube.com/watch?v=pKSGyiT-o3***o*** ("Ring one, Executive. Two is Legislative, that's Congress. Ring three, Judiciary"). The Constitution's first three articles, the majority recounts, "split the atom of sovereignty" among Congress, the President, and the courts. And by that mechanism, the Framers provided a "simple" fix "to governmental power and its perils."

There is nothing wrong with that as a beginning (except the adjective "simple"). It is of course true that the Framers lodged three different kinds of power in three different entities. And that they did so for a crucial purpose—because, as James Madison wrote, "there can be no liberty where the legislative and executive powers are united in the same person[ ] or body" or where "the power of judging [is] not separated from the legislative and executive powers." The Federalist No. 47, p. 325 (J. Cooke ed. 1961) (quoting Baron de Montesquieu).

The problem lies in treating the beginning as an ending too—in failing to recognize that the separation of powers is, by design, neither rigid nor complete. Blackstone, whose work influenced the Framers on this subject as on others, observed that "every branch" of government "supports and is supported, regulates and is regulated, by the rest." So as James Madison stated,

the creation of distinct branches "did not mean that these departments ought to have no partial agency in, or no controul over the acts of each other." The Federalist No. 47, at 325. To the contrary, Madison explained, the drafters of the Constitution—like those of then-existing state constitutions—opted against keeping the branches of government "absolutely separate and distinct." Or as Justice Story reiterated a half-century later: "[W]hen we speak of a separation of the three great departments of government," it is "not meant to affirm, that they must be kept wholly and entirely separate." . . .

One way the Constitution reflects that vision is by giving Congress broad authority to establish and organize the Executive Branch. Article II presumes the existence of "Officer[s]" in "executive Departments." § 2, cl. 1. But it does not, as you might think from reading the majority opinion, give the President authority to decide what kinds of officers—in what departments, with what responsibilities—the Executive Branch requires. Instead, Article I's Necessary and Proper Clause puts those decisions in the legislature's hands. Congress has the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution" not just its own enumerated powers but also "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." § 8, cl. 18. Similarly, the Appointments Clause reflects Congress's central role in structuring the Executive Branch. Yes, the President can appoint principal officers, but only as the legislature "shall ... establish[ ] by Law" (and of course subject to the Senate's advice and consent). Art. II, § 2, cl. 2. And Congress has plenary power to decide not only what inferior officers will exist but also who (the President or a head of department) will appoint them. So as Madison told the first Congress, the legislature gets to "create[ ] the office, define[ ] the powers, [and] limit[] its duration." The President, as to the construction of his own branch of government, can only try to work his will through the legislative process.[3]

The majority relies for its contrary vision on Article II's Vesting Clause, but the provision can't carry all that weight. Or as Chief Justice Rehnquist wrote of a similar claim in *Morrison v. Olson*, 487 U.S. 654 (1988), "extrapolat[ing]" an unrestricted removal power from such "general constitutional language"—which says only that "[t]he executive Power shall be vested in a President"—is "more than the text will bear." For now, note two points about practice before the Constitution's drafting. First, in that era, Parliament often restricted the King's power to remove royal officers—and the President, needless to say, wasn't supposed to be a king. Second, many States at the time allowed limits on gubernatorial removal power even though their constitutions had similar vesting clauses. Historical understandings thus belie the majority's "general rule."

Nor can the Take Care Clause come to the majority's rescue. That Clause cannot properly serve as a "placeholder for broad judicial judgments" about presidential control. To begin with, the provision—"he shall take Care that the Laws be faithfully executed"—speaks of duty, not power. Art. II, § 3. . . . And yet more important, the text of the Take Care Clause requires only enough authority to make sure "the laws [are] faithfully executed"—meaning with fidelity to the law itself, not to every presidential policy preference. . . . A for-cause standard gives him "ample authority to assure that [an official] is competently performing [his] statutory responsibilities in a manner that comports with the [relevant legislation's] provisions." *Ibid.*

Finally, recall the Constitution's telltale silence: Nowhere does the text say anything about the President's power to remove subordinate officials at will. The majority professes unconcern. After all, it says, "neither is there a 'separation of powers clause' or a 'federalism clause.'" But those concepts are carved into the Constitution's text—the former in its first three articles separating powers, the latter in its enumeration of federal powers and its reservation of all else to the States. And anyway, at-will removal is hardly such a "foundational doctrine[]": You won't find it on a civics class syllabus. That's because removal is a *tool*—one means among many, even if sometimes an important one, for a President to control executive officialsTo find that authority hidden in the Constitution as a "general rule" is to discover what is nowhere there.

B

History no better serves the majority's cause. [Justice Kagan proceeds to rebut the majority's historical analysis.]

II

As the majority explains, the CFPB emerged out of disaster. The collapse of the subprime mortgage market "precipitat[ed] a financial crisis that wiped out over $10 trillion in American household wealth and cost millions of Americans their jobs, their retirements, and their homes." In that moment of economic ruin, the President proposed and Congress enacted legislation to address the causes of the collapse and prevent a recurrence. . . .

No one had a doubt that the new agency should be independent. As explained already, Congress has historically given—with this Court's permission—a measure of independence to financial regulators like the Federal Reserve Board and the FTC. And agencies of that kind had administered most of the legislation whose enforcement the new statute transferred to the CFPB. The law thus included an ordinary for-cause provision—once again, that the President could fire the CFPB's Director only for "inefficiency, neglect of duty, or malfeasance in office." § 5491(c)(3). That standard would allow the President to discharge the Director for a failure to "faithfully execute[ ]" the law, as well as for basic incompetence. U. S. Const., Art. II, § 3. But it would not permit removal for policy differences.

The question here, which by now you're well equipped to answer, is whether including that for-cause standard in the statute creating the CFPB violates the Constitution.

A

Applying our longstanding precedent, the answer is clear: It does not. This Court, as the majority acknowledges, has sustained the constitutionality of the FTC and similar independent agencies. The for-cause protections for the heads of those agencies, the Court has found, do not impede the President's ability to perform his own constitutional duties, and so do not breach the separation of powers. There is nothing different here. The CFPB wields the same kind of power as the FTC and similar agencies. And all of their heads receive the same kind of removal protection. No less than those other entities—by now part of the fabric of government—the CFPB is thus a permissible exercise of Congress's power under the Necessary and Proper Clause to structure administration.

First, the CFPB's powers are nothing unusual in the universe of independent agencies. The CFPB, as the majority notes, can issue regulations, conduct its own adjudications, and bring civil enforcement actions in court—all backed by the threat of penalties. But then again, so too can (among others) the FTC and SEC, two agencies whose regulatory missions parallel the CFPB's. Just for a comparison, the CFPB now has 19 enforcement actions pending, while the SEC brought 862 such actions last year alone. And although the majority bemoans that the CFPB can "bring the coercive power of the state to bear on millions of private citizens," that scary-sounding description applies to most independent agencies. Forget that the more relevant factoid for those many citizens might be that the CFPB has recovered over $11 billion for banking consumers. The key point here is that the CFPB got the mass of its regulatory authority from other independent agencies that had brought the same "coercive power to bear." See 12 U. S. C. § 5581 (transferring power from, among others, the Federal Reserve, FTC, and FDIC). Congress, to be sure, gave the CFPB new authority over "unfair, deceptive, or abusive act[s] or practice[s]" in transactions involving a "consumer financial product or service." But again, the FTC has power to go after "unfair or deceptive acts or practices in or affecting commerce"—a portfolio spanning

a far wider swath of the economy. And if influence on economic life is the measure, consider the Federal Reserve, whose every act has global consequence. The CFPB, gauged by that comparison, is a piker.

Second, the removal protection given the CFPB's Director is standard fare. The removal power rests with the President alone; Congress has no role to play, as it did in the laws struck down in *Myers* and *Bowsher*. he statute provides only one layer of protection, unlike the law in *Free Enterprise Fund*. See *supra,* at ——— – ———. And the clincher, which you have heard before: The for-cause standard used for the CFPB is identical to the one the Court upheld in *Humphrey's*. Both enable the President to fire an agency head for "inefficiency, neglect of duty, or malfeasance in office." A removal provision of that kind applied to a financial agency head, this Court has held, does not "unduly trammel[ ] on executive authority," even though it prevents the President from dismissing the official for a discretionary policy judgment. Once again: The removal power has not been "completely stripped from the President," providing him with no means to "ensure the 'faithful execution' of the laws." Rather, this Court has explained, the for-cause standard gives the President "ample authority to assure that [the official] is competently performing his or her statutory responsibilities in a manner that comports with" all legal obligations. In other words—and contra today's majority—the President's removal power, though not absolute, gives him the "meaningful[] control[]" of the Director that the Constitution requires.

The analysis is as simple as simple can be. The CFPB Director exercises the same powers, and receives the same removal protections, as the heads of other, constitutionally permissible independent agencies. How could it be that this opinion is a dissent?

B

The majority focuses on one (it says sufficient) reason: The CFPB Director is singular, not plural. "Instead of placing the agency under the leadership of a board with multiple members," the majority protests, "Congress provided that the CFPB would be led by a single Director." And a solo CFPB Director does not fit within either of the majority's supposed exceptions. He is not an inferior officer, so (the majority says) *Morrison* does not apply; and he is not a multimember board, so (the majority says) neither does *Humphrey's*. Further, the majority argues, "[a]n agency with a [unitary] structure like that of the CFPB" is "novel"—or, if not quite that, "almost wholly unprecedented." Finally, the CFPB's organizational form violates the "constitutional structure" because it vests power in a "single individual" who is "insulated from Presidential control."

I'm tempted at this point just to say: No. All I've explained about constitutional text, history, and precedent invalidates the majority's thesis. But I'll set out here some more targeted points, taking step by step the majority's reasoning.

First, as I'm afraid you've heard before, the majority's "exceptions" (like its general rule) are made up. To begin with, our precedents reject the very idea of such exceptions. "The analysis contained in our removal cases," *Morrison* stated, shuns any attempt "to define rigid categories" of officials who may (or may not) have job protection. Still more, the contours of the majority's exceptions don't connect to our decisions' reasoning. The analysis in *Morrison*, as I've shown, extended far beyond inferior officers. And of course that analysis had to apply to *individual* officers: The independent counsel was very much a person, not a committee. So the idea that *Morrison* is in a separate box from this case doesn't hold up. Similarly, *Humphrey's* and later precedents give no support to the majority's view that the number of people at the apex of an agency matters to the constitutional issue. Those opinions mention the "groupness" of the agency head only in their background sections. The majority picks out that until-now-irrelevant fact to distinguish the CFPB, and constructs around it an until-now-unheard-of exception. So if the majority really wants to see something "novel," it need only look to its opinion.

By contrast, the CFPB's single-director structure has a fair bit of precedent behind it. The Comptroller of the Currency. The Office of the Special Counsel (OSC). The Social Security Administration (SSA). The Federal Housing Finance Agency (FHFA). Maybe four prior agencies is in the eye of the beholder, but it's hardly nothing. I've already explained why the earliest of those agencies—the Civil-War-era Comptroller—is not the blip the majority describes. The office is one in a long line, starting with the founding-era Comptroller of the Treasury (also one person), of financial regulators designed to do their jobs with some independence. As for the other three, the majority objects: too powerless and too contested. I think not. On power, the SSA runs the Nation's largest government program—among other things, deciding all claims brought by its 64 million beneficiaries; the FHFA plays a crucial role in overseeing the mortgage market, on which millions of Americans annually rely; and the OSC prosecutes misconduct in the two-million-person federal workforce. All different from the CFPB, no doubt; but the majority can't think those matters beneath a President's notice. (Consider: Would the President lose more votes from a malfunctioning SSA or CFPB?) And controversial? Well, yes, they are. Almost *all* independent agencies are controversial, no matter how many directors they have. Or at least controversial among Presidents and their lawyers. That's because whatever might be said in their favor, those agencies divest the President of some removal power. If signing statements and veto threats made independent agencies unconstitutional, quite a few wouldn't pass muster. Maybe that's what the majority really wants (I wouldn't know)—but it can't pretend the disputes surrounding these agencies had anything to do with whether their heads are singular or plural.

Still more important, novelty is not the test of constitutionality when it comes to structuring agencies. Congress regulates in that sphere under the Necessary and Proper Clause, not (as the majority seems to think) a Rinse and Repeat Clause. The Framers understood that new times would often require new measures, and exigencies often demand innovation. . . . In deciding what *this* moment demanded, Congress had no obligation to make a carbon copy of a design from a bygone era.

And Congress's choice to put a single director, rather than a multimember commission, at the CFPB's head violates no principle of separation of powers. The purported constitutional problem here is that an official has "slip[ped] from the Executive's control" and "supervision"—that he has become unaccountable to the President. So to make sense on the majority's own terms, the distinction between singular and plural agency heads must rest on a theory about why the former more easily "slip" from the President's grasp. But the majority has nothing to offer. In fact, the opposite is more likely to be true: To the extent that such matters are measurable, individuals are easier than groups to supervise.

To begin with, trying to generalize about these matters is something of a fool's errand. Presidential control, as noted earlier, can operate through many means—removal to be sure, but also appointments, oversight devices (*e.g.,* centralized review of rulemaking or litigating

positions), budgetary processes, personal outreach, and more.[4] The effectiveness of each of those control mechanisms, when present, can then depend on a multitude of agency-specific practices, norms, rules, and organizational features. In that complex stew, the difference between a singular and plural agency head will often make not a whit of difference. Or to make the point more concrete, a multimember commission may be harder to control than an individual director for a host of reasons unrelated to its plural character. That may be so when the two are subject to the same removal standard, or even when the individual director has greater formal job protection. Indeed, the very category of multimember commissions breaks apart under inspection, spoiling the majority's essential dichotomy. Some of those commissions have chairs appointed by the President; others do not. Some of those chairs are quite powerful; others are not. Partisan balance requirements, term length, voting rules, and more—all vary widely, in ways that make a significant difference to the ease of presidential control. Why, then, would anyone distinguish along a simple commission/single-director axis when deciding whether the Constitution requires at-will removal?

But if the demand is for generalization, then the majority's distinction cuts the opposite way: More powerful control mechanisms are needed (if anything) for commissions. . . . It is hard to know why Congress did not take the same tack when creating the CFPB. But its choice brought the agency only closer to the President—more exposed to his view, more subject to his sway. In short, the majority gets the matter backward: Where presidential control is the object, better to have one [director] than many.

Because it has no answer on that score, the majority slides to a different question: Assuming presidential control of any independent agency is vanishingly slim, is a single-head or a multi-head agency more capable of exercising power, and so of endangering liberty? The majority says a single head is the greater threat because he may wield power "*unilaterally*" and "[w]ith no colleagues to persuade." So the CFPB falls victim to what the majority sees as a constitutional anti-power-concentration principle (with an exception for the President).

If you've never heard of a statute being struck down on that ground, you're not alone. It is bad enough to "extrapolat[e]" from the "general constitutional language" of Article II's Vesting Clause an unrestricted removal power constraining Congress's ability to legislate under the Necessary and Proper Clause. It is still worse to extrapolate from the Constitution's general structure (division of powers) and implicit values (liberty) a limit on Congress's express power to create administrative bodies. And more: to extrapolate from such sources a distinction as prosaic as that between the SEC and the CFPB—*i.e.,* between a multi-headed and single-headed agency. . . . In deciding for itself what is "proper," the Court goes beyond its own proper bounds.

And in doing so, the majority again reveals its lack of interest in how agencies work. First, the premise of the majority's argument—that the CFPB head is a mini-dictator, not subject to meaningful presidential control—is wrong. As this Court has seen in the past, independent

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[4] To use one important example, Congress provided for executive oversight of all the CFPB's rulemaking. The Financial Stability Oversight Council can veto by a two-thirds vote any CFPB regulation it deems a threat to the "safety and soundness" of the financial system. 12 U.S.C. §5513(a). The FSOC is chaired by the Treasury Secretary, and most of its members are under the direct supervision of the President. See §5321. So the majority is wrong in saying that the CFPB's Director can "*unilaterally*" issue final regulations. Indeed, the President has more control over rulemaking at the CFPB than at any similar independent agency. And the majority is similarly wrong to think that because the FSOC has not yet issued a formal veto, its review authority makes no practical difference. Regulatory review, whether by the Office of Management and Budget or the FSOC, usually relies more on the threat of vetoes than on their execution. OMB casts a long shadow over rulemaking in the Executive Branch, but rarely uses its veto pen.

agencies are not fully independent. A for-cause removal provision, as noted earlier, leaves "ample" control over agency heads in the hands of the President. He can discharge them for failing to perform their duties competently or in accordance with law, and so ensure that the laws are "faithfully executed." And he can use the many other tools attached to the Office of the Presidency—including in the CFPB's case, rulemaking review—to exert influence over discretionary policy calls. Second, the majority has nothing but intuition to back up its essentially functionalist claim that the CFPB would be less capable of exercising power if it had more than one Director (even supposing that were a suitable issue for a court to address). Maybe the CFPB would be. Or maybe not. Although a multimember format tends to frustrate the President's control over an agency, it may not lessen the agency's own ability to act with decision and dispatch. (Consider, for a recent example, the Federal Reserve Board.) That effect presumably would depend on the agency's internal organization, voting rules, and similar matters. At the least: If the Court is going to invalidate statutes based on empirical assertions like this one, it should offer some empirical support. It should not pretend that its assessment that the CFPB wields more power more dangerously than the SEC comes from someplace in the Constitution. But today the majority fails to accord even that minimal respect to Congress.

III

. . . The majority tells Congress that it may "pursu[e] alternative responses" to the identified constitutional defect—"for example, converting the CFPB into a multimember agency." But there was no need to send Congress back to the drawing board. The Constitution does not distinguish between single-director and multimember independent agencies. It instructs Congress, not this Court, to decide on agency design. Because this Court ignores that sensible—indeed, that obvious—division of tasks, I respectfully dissent.

Notes and Questions

S6-1. How would you compare Justice Roberts' view of Congress with Justice Kagan's view in dissent? How would you compare their views of the Executive?

S6-2. Why do you think that both President Obama and Elizabeth Warren assumed this would be a multimember commission? Why might Congress decide on a single director?

S6-3. By whose conception of the Take Care Clause are you more convinced? What does it mean for laws to "be faithfully executed?"

S6-4. Do you think Justice Thomas is correct that there is very little left of *Humphrey's* and that it should be overruled? Does Chief Justice Roberts' treatment of *Humphrey's* suggest that it has any remaining vitality?

S6-5. Does *Seila Law* foreclose all single-director, for-cause arrangements? What potential agencies or areas of regulation could tolerate such a system? Would it be worth the risk?

S6-6. What difference is there between single-director versus multi-member for-clause protection and why does that difference matter to the Constitution?

S6-7. Compare footnote 3 (as renumbered from the above excerpt) of the majority's opinion with footnote 4 from the dissent. Why are such alternative methods of control insufficient to save the removal defect? Should such alternative paths for direct executive control suffice?

Summer 2023 Online Supplement to Chapter 7
Judicial Control of Agency Discretion

Note: This is a new chapter supplement to Aman, Penniman & Rookard, Administrative Law and Process (4th ed.).

Table of Contents

(Editorial note: Footnotes are numbered consecutively within this online chapter supplement.)

§ 7.01 Introduction (supplement to paragraph 2)

A recent example of the way statutory language figures in the Court's analysis of agency discretion can be found in *Sackett v. EPA*. In *Sackett*, the EPA had ordered the plaintiffs to restore wetlands that formed part of their property. The Court's ruling for the plaintiffs relied in part on the majority's reading of the meaning of the word "waters" in the text of the Clean Water Act of 1974 (CWA).

Michael Sackett, et ux., Petitioners *v.* Environmental Protection Agency, et al.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit
[598 U.S. ____ (2023), No. 21-454, May 25, 2023]

Justice Alito delivered the opinion of the Court.

This case concerns a nagging question about the outer reaches of the Clean Water Act (CWA), the principal federal law regulating water pollution in the United States.[1] By all accounts, the Act has been a great success. Before its enactment in 1972, many of the Nation's rivers, lakes, and streams were severely polluted, and existing federal legislation had proved to be inadequate. Today, many formerly fetid bodies of water are safe for the use and enjoyment of the people of this country.

There is, however, an unfortunate footnote to this success story: the outer boundaries of the Act's geographical reach have been unc§ertain from the start. The Act applies to "the waters of the United States," but what does that phrase mean? Does the term encompass any backyard that is soggy enough for some minimum period of time? Does it reach "mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, [or] playa lakes?"[2] How about ditches, swimming pools, and puddles?

For more than a half century, the agencies responsible for enforcing the Act have wrestled with the problem and adopted varying interpretations. On three prior occasions, this Court has tried to clarify the meaning of "the waters of the United States." But the problem persists. When we last addressed the question 17 years ago, we were unable to agree on an opinion of the Court.[3] Today, we return to the problem and attempt to identify with greater clarity what the Act means by "the waters of the United States." …

III

… [W]e now consider the extent of the CWA's geographical reach.

A

We start, as we always do, with the text of the CWA. *Bartenwerfer* v. *Buckley*, 598 U.S. 69, 74 (2023). As noted, the Act applies to "navigable waters," which had a well-established meaning at the time of the CWA's enactment. But the CWA complicates matters by proceeding to define "navigable waters" as "the waters of the United States," §1362(7), which was decidedly not a well-known term of art. This frustrating drafting choice has led to decades of litigation, but we must try to make sense of the terms Congress chose to adopt. And for the reasons explained below, we conclude that

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[1] 86 Stat. 816, as amended, 33 U.S.C. §1251 *et seq.*

[2] 40 CFR §230.3(s)(3) (2008).

[3] See *Rapanos* v. *United States*, 547 U.S. 715 (2006). Neither party contends that any opinion in *Rapanos* controls. We agree. See *Nichols* v. *United States*, 511 U.S. 738, 745–746 (1994).

the *Rapanos* plurality was correct: the CWA's use of "waters" encompasses "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.' " 547 U. S., at 739 (quoting Webster's New International Dictionary 2882 (2d ed. 1954) (Webster's Second); original alterations omitted).

This reading follows from the CWA's deliberate use of the plural term "waters." See 547 U. S., at 732–733. That term typically refers to bodies of water like those listed above. See, *e.g.*, Webster's Second 2882; Black's Law Dictionary 1426 (5th ed. 1979) ("especially in the plural, [water] may designate a body of water, such as a river, a lake, or an ocean, or an aggregate of such bodies of water, as in the phrases 'foreign waters,' '*waters of the United States*,' and the like" (emphasis added)); Random House Dictionary of the English Language 2146 (2d ed. 1987) (Random House Dictionary) (defining "waters" as "a. flowing water, or water moving in waves: The river's mighty waters. b. the sea or seas bordering a particular country or continent or located in a particular part of the world" (emphasis deleted)). This meaning is hard to reconcile with classifying " ' "lands," wet or otherwise, as "waters." ' " *Rapanos*, 547 U. S., at 740 (plurality opinion) (quoting *Riverside Bayview*, 474 U. S., at 132).

This reading also helps to align the meaning of "the waters of the United States" with the term it is defining: "navigable waters." See *Bond* v. *United States*, 572 U.S. 844, 861 (2014) ("In settling on a fair reading of a statute, it is not unusual to consider the ordinary meaning of a defined term, particularly when there is dissonance between that ordinary meaning and the reach of the definition"). Although we have acknowledged that the CWA extends to more than traditional navigable waters, we have refused to read "navigable" out of the statute, holding that it at least shows that Congress was focused on "its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *SWANCC*, 531 U. S., at 172; see also *Appalachian Electric*, 311 U. S., at 406–407; *The Daniel Ball*, 10 Wall., at 563. At a minimum, then, the use of "navigable" signals that the definition principally refers to bodies of navigable water like rivers, lakes, and oceans. See *Rapanos*, 547 U. S., at 734 (plurality opinion).

More broadly, this reading accords with how Congress has employed the term "waters" elsewhere in the CWA and in other laws. The CWA repeatedly uses "waters" in contexts that confirm the term refers to bodies of open water. See 33 U. S. C. §1267(i)(2)(D) ("the waters of the Chesapeake Bay"); §1268(a)(3)(I) ("the open waters of each of the Great Lakes"); §1324(d)(4)(B)(ii) ("lakes and other surface waters"); §1330(g)(4)(C)(vii) ("estuarine waters"); §1343(c)(1) ("the waters of the territorial seas, the contiguous zone, and the oceans"); §§1346(a)(1), 1375a(a) ("coastal recreation waters"); §1370 (state "boundary waters"). The use of "waters" elsewhere in the U. S. Code likewise correlates to rivers, lakes, and oceans.[4]

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[4] See, *e.g.*, 16 U. S. C. §745 ("the waters of the seacoast . . . the waters of the lakes"); §4701(a)(7) ("waters of the Chesapeake Bay"); 33 U. S. C. §4 ("the waters of the Mississippi River and its tributaries"); 43 U. S. C. §390h–8(a) ("the waters of Lake Cheraw, Colorado . . . the waters of the Arkansas River"); 46 U. S. C. §70051 (allowing the Coast Guard to take control of particular vessels during an emergency in order to "prevent damage or injury to any harbor or waters of the United States").

Statutory history points in the same direction. The CWA's predecessor statute covered "interstate or navigable waters" and defined "interstate waters" as "all *rivers*, *lakes*, *and other waters* that flow across or form a part of State boundaries." 33 U. S. C. §§1160(a), 1173(e) (1970 ed.) (emphasis added); see also Rivers and Harbors Act of 1899, 30Stat. 1151 (codified, as amended, at 33 U. S. C. §403) (prohibiting unauthorized obstructions "to the navigable capacity of any of the waters of the United States").

This Court has understood the CWA's use of "waters" in the same way. Even as *Riverside Bayview* grappled with whether adjacent wetlands could fall within the CWA's coverage, it acknowledged that wetlands are not included in "traditional notions of 'waters.' " 474 U. S., at 133. It explained that the term conventionally refers to "hydrographic features" like "rivers" and "streams." *Id.*, at 131. *SWANCC* went even further, repeatedly describing the "waters" covered by the Act as "open water" and suggesting that "the waters of the United States" principally refers to traditional navigable waters. 531 U. S., at 168–169, 172. That our CWA decisions operated under this assumption is unsurprising. Ever since *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824), this Court has used "waters of the United States" to refer to similar bodies of water, almost always in relation to ships. *Id.*, at 218 (discussing a vessel's "conduct in the waters of the United States").[5]

The EPA argues that "waters" is "naturally read to encompass wetlands" because the "presence of water is 'universally regarded as the most basic feature of wetlands.' " Brief for Respondents 19. But that reading proves too much. Consider puddles, which are also defined by the ordinary presence of water even though few would describe them as "waters." This argument is also tough to square with *SWANCC*, which held that the Act does not cover isolated ponds, see 531 U. S., at 171, or *Riverside Bayview*, which would have had no need to focus so extensively on the adjacency of wetlands to covered waters if the EPA's reading were correct, see 474 U. S., at 131–135, and n. 8. Finally, it is also instructive that the CWA expressly "protect[s] the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and "to plan the development and use . . . of land and water resources." §1251(b). It is hard to see how the States' role in regulating water resources would remain "primary" if the EPA had jurisdiction over anything defined by the presence of water. See *County of Maui* v. *Hawaii Wildlife Fund*, 590 U. S. ___, ___ (2020) (slip op., at 7); *Rapanos*, 547 U. S., at 737 (plurality opinion) …

In sum, we hold that the CWA extends to only those wetlands that are "as a practical matter indistinguishable from waters of the United States." *Rapanos*, 547 U. S.,

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[5] See, *e.g.*, *United States* v. *Alvarez-Machain*, 504 U.S. 655, 661, n. 7 (1992) (discussing a treaty "to allow British passenger ships to carry liquor while in the waters of the United States"); *Kent* v. *Dulles*, 357 U.S. 116, 123 (1958) (discussing a prohibition on boarding "vessels of the enemy on waters of the United States"); *New Jersey* v. *New York City*, 290 U.S. 237, 240 (1933) (enjoining employees of New York City from dumping garbage "into the ocean, or waters of the United States, off the coast of New Jersey"); *Cunard S. S. Co.* v. *Mellon*, 262 U.S. 100, 127 (1923) (holding that the National Prohibition Act did not apply to "merchant ships when outside the waters of the United States"); *Keck* v. *United States*, 172 U.S. 434, 444–445 (1899) (holding that concealing imported goods on vessels "at the time of entering the waters of the United States," without more, did not constitute smuggling).

at 755 (plurality opinion) (emphasis deleted). This requires the party asserting jurisdiction over adjacent wetlands to establish "first, that the adjacent [body of water constitutes] . . . 'water[s] of the United States,' (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Id.*, at 742.

IV

The EPA resists this reading of §1362(7) and instead asks us to defer to its understanding of the CWA's jurisdictional reach, as set out in its most recent rule defining "the waters of the United States." See 88 Fed. Reg. 3004. This rule, as noted, provides that "adjacent wetlands are covered by the Act if they 'possess a "significant nexus" to' traditional navigable waters." Brief for Respondents 32 (quoting *Rapanos*, 547 U. S., at 759 (opinion of Kennedy, J.)); see 88 Fed. Reg. 3143. And according to the EPA, wetlands are "adjacent" when they are "neighboring" to covered waters, even if they are separated from those waters by dry land. Brief for Respondents 20; 88 Fed. Reg. 3144.

A

For reasons already explained, this interpretation is inconsistent with the text and structure of the CWA. Beyond that, it clashes with "background principles of construction" that apply to the interpretation of the relevant statutory provisions. *Bond*, 572 U. S., at 857. Under those presumptions, the EPA must provide clear evidence that it is authorized to regulate in the manner it proposes.

1

First, this Court "require[s] Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property." *United States Forest Service* v. *Cowpasture River Preservation Assn.*, 590 U. S. ___, ___–___ (2020) (slip op., at 15–16); see also *Bond*, 572 U. S., at 858. Regulation of land and water use lies at the core of traditional state authority. See, *e.g.*, *SWANCC*, 531 U. S., at 174 (citing *Hess* v. *Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 44 (1994)); *Tarrant Regional Water Dist.* v. *Herrmann*, 569 U.S. 614, 631 (2013). An overly broad interpretation of the CWA's reach would impinge on this authority. The area covered by wetlands alone is vast —greater than the combined surface area of California and Texas. And the scope of the EPA's conception of "the waters of the United States" is truly staggering when this vast territory is supplemented by all the additional area, some of which is generally dry, over which the Agency asserts jurisdiction. Particularly given the CWA's express policy to "preserve" the States' "primary" authority over land and water use, §1251(b), this Court has required a clear statement from Congress when determining the scope of "the waters of the United States." *SWANCC*, 531 U. S., at 174; accord, *Rapanos*, 547 U. S., at 738 (plurality opinion).

The EPA, however, offers only a passing attempt to square its interpretation with the text of §1362(7), and its "significant nexus" theory is particularly implausible. It suggests that the meaning of "the waters of the United States" is so "broad and

unqualified" that, if viewed in isolation, it would extend to all water in the United States. Brief for Respondents 32. The EPA thus turns to the "significant nexus" test in order to reduce the clash between its understanding of "the waters of the United States" and the term defined by that phrase, *i.e.*, "navigable waters." As discussed, however, the meaning of "waters" is more limited than the EPA believes. See *supra*, at 14. And, in any event, the CWA never mentions the "significant nexus" test, so the EPA has no statutory basis to impose it. See *Rapanos*, 547 U. S., at 755–756 (plurality opinion).

2

Second, the EPA's interpretation gives rise to serious vagueness concerns in light of the CWA's criminal penalties. Due process requires Congress to define penal statutes " 'with sufficient definiteness that ordinary people can understand what conduct is prohibited' " and " 'in a manner that does not encourage arbitrary and discriminatory enforcement.' " *McDonnell* v. *United States*, 579 U.S. 550, 576 (2016) (quoting *Skilling* v. *United States*, 561 U.S. 358, 402–403 (2010)). Yet the meaning of "waters of the United States" under the EPA's interpretation remains "hopelessly indeterminate." *Sackett*, 566 U. S., at 133 (Alito, J., concurring); accord, *Hawkes Co*., 578 U. S., at 602 (opinion of Kennedy, J.).

The EPA contends that the only thing preventing it from interpreting "waters of the United States" to "conceivably cover literally every body of water in the country" is the significant-nexus test. Tr. of Oral Arg. 70–71; accord, Brief for Respondents 32. But the boundary between a "significant" and an insignificant nexus is far from clear. And to add to the uncertainty, the test introduces another vague concept—"similarly situated" waters—and then assesses the aggregate effect of that group based on a variety of open-ended factors that evolve as scientific understandings change. This freewheeling inquiry provides little notice to landowners of their obligations under the CWA. Facing severe criminal sanctions for even negligent violations, property owners are "left 'to feel their way on a case-by-case basis.' " *Sackett*, 566 U. S., at 124 (quoting *Rapanos*, 547 U. S., at 758 (Roberts, C. J., concurring)). Where a penal statute could sweep so broadly as to render criminal a host of what might otherwise be considered ordinary activities, we have been wary about going beyond what "Congress certainly intended the statute to cover." *Skilling*, 561 U. S., at 404.

Under these two background principles, the judicial task when interpreting "the waters of the United States" is to ascertain whether clear congressional authorization exists for the EPA's claimed power. The EPA's interpretation falls far short of that standard…

VI

In sum, we hold that the CWA extends to only those "wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right," so that they are "indistinguishable" from those waters. *Rapanos*, 547 U. S., at 742, 755 (plurality opinion) (emphasis deleted); see *supra*, at 22. This holding compels reversal here. The wetlands on the Sacketts' property are distinguishable from any possibly covered waters.

* * *

We reverse the judgment of the United States Court of Appeals for the Ninth Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

§ 7.03 Judicial Review of Findings of Fact – The Substantial Evidence Standard

Note 7-15 discusses Biestek v. Berryhill, 139 S. Ct. 1148 (2019). Below is an edited version of the full case with additional questions.

Biestek *v.* Berryhill

139 S. Ct. 1148 (2019)

JUSTICE KAGAN delivered the opinion of the Court.

…This case arises from the SSA's reliance on an expert's testimony about the availability of certain jobs in the economy. The expert largely based her opinion on private market-survey data. The question presented is whether her refusal to provide that data upon the applicant's request categorically precludes her testimony from counting as "substantial evidence. We hold it does not….

[The majority went on to elaborate]:

To rule on Biestek's application, the ALJ had to determine whether the former construction laborer could successfully transition to less physically demanding work. That required exploring two issues. The ALJ needed to identify the types of jobs Biestek could perform notwithstanding his disabilities. … And the ALJ needed to ascertain whether those kinds of jobs "exist[ed] in significant numbers in the national economy." For guidance on such questions, ALJs often seek the views of "vocational experts." … Those experts are professionals under contract with SSA to provide impartial testimony in agency proceedings. …They must have "expertise" and "current knowledge" of "[w]orking conditions and physical demands of various" jobs; "[k]nowledge of the existence and numbers of [those jobs] in the national economy"; and "[i]nvolvement in or knowledge of placing adult workers[] with disabilities[] into jobs." ... Many vocational experts simultaneously work in the private sector locating employment for persons with disabilities…. When offering testimony, the experts may invoke not only publicly

available sources but also "information obtained directly from employers" and data otherwise developed from their own "experience in job placement or career counseling….

At Biestek's hearing, the ALJ asked a vocational expert named Erin O'Callaghan to identify a sampling of "sedentary" jobs that a person with Biestek's disabilities, education, and job history could perform. …In response to the ALJ's query, O'Callaghan listed sedentary jobs "such as a bench assembler [or] sorter" that did not require many skills. …And she further testified that 240,000 bench assembler jobs and 120,000 sorter jobs existed in the national economy. …On cross-examination, Biestek's attorney asked O'Callaghan "where [she was] getting those [numbers] from." O'Callaghan replied that they came from the Bureau of Labor Statistics and her "own individual labor market surveys." The lawyer then requested that O'Callaghan turn over the private surveys so he could review them. O'Callaghan responded that she wished to keep the surveys confidential because they were "part of [her] client files." The lawyer suggested that O'Callaghan could "take the clients' names out." But at that point the ALJ interjected that he "would not require" O'Callaghan to produce the files in any form. Biestek's counsel asked no further questions about the basis for O'Callaghan's assembler and sorter numbers.

After the hearing concluded, the ALJ issued a decision granting Biestek's application in part and denying it in part. According to the ALJ, Biestek was entitled to benefits beginning in May 2013, when his advancing age (he turned fifty that month) adversely affected his ability to find employment. But before that time, the ALJ held, Biestek's disabilities should not have prevented a "successful adjustment to other work." The ALJ based that conclusion on O'Callaghan's testimony about the availability in the economy of "sedentary unskilled occupations such as bench assembler [or] sorter."
Biestek sought review in federal court of the ALJ's denial of benefits for the period between October 2009 and May 2013. On judicial review, an ALJ's factual findings—such as the determination that Biestek could have found sedentary work—"shall be conclusive" if supported by "substantial evidence." Biestek contended that O'Callaghan's testimony could not possibly constitute such evidence because she had declined, upon request, to produce her supporting data. But the District Court rejected that argument. And the Court of Appeals for the Sixth Circuit affirmed. See *Biestek* v. *Commissioner of Social Security*, 880 F. 3d 778 (2018). That court recognized that the Seventh Circuit had adopted the categorical rule Biestek proposed, precluding a vocational expert's testimony from qualifying as substantial if the expert had declined an applicant's request to provide supporting data. See *id.*, at 790 (citing *McKinnie* v. *Barnhart*, 368 F. 3d 907, 910–911 (2004)). But that rule, the Sixth Circuit observed in joining the ranks of unconvinced courts, "ha[d] not been a popular export." 880 F. 3d, at 790. And no more is it so today. The phrase "substantial evidence" is a "term of art" used throughout administrative law to describe how courts are to review agency factfinding. *T-Mobile South*, *LLC* v. *Roswell*, 574 U. S. ___, ___ (2015) (slip op., at 7). Under the substantial-evidence standard, a court looks to an existing administrative

record and asks whether it contains "sufficien[t] evidence" to support the agency's factual determinations. *Consolidated Edison Co.* v. *NLRB*, 305 U. S. 197, 229 (1938) (emphasis deleted). And whatever the meaning of "substantial" in other contexts, the threshold for such evidentiary sufficiency is not high. Substantial evidence, this Court has said, is "more than a mere scintilla." *Ibid.*; see, *e.g.*, *Perales*, 402 U. S., at 401 (internal quotation marks omitted). It means—and means only—"such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison*, 305 U. S., at 229. See *Dickinson* v. *Zurko*, 527 U. S. 150, 153 (1999) (comparing the substantial-evidence standard to the deferential clearly-erroneous standard). Today, Biestek argues that the testimony of a vocational expert who (like O'Callaghan) refuses a request for supporting data about job availability can never clear the substantial-evidence bar….. As that formulation makes clear, Biestek's proposed rule is categorical, rendering expert testimony insufficient to sustain an ALJ's factfinding whenever such a refusal has occurred. But Biestek hastens to add two caveats. The first is to clarify what the rule is not, the second to stress where its limits lie. …

[After discussing Biestek's arguments in detail, the majority concluded:]

Where Biestek goes wrong, at bottom, is in pressing for a categorical rule, applying to every case in which a vocational expert refuses a request for underlying data. Sometimes an expert's withholding of such data, when combined with other aspects of the record, will prevent her testimony from qualifying as substantial evidence. That would be so, for example, if the expert has no good reason to keep the data private and her testimony lacks other markers of reliability. But sometimes the reservation of data will have no such effect. Even though the applicant might wish for the data, the expert's testimony still will clear (even handily so) the more-than-a-mere-scintilla threshold. The inquiry, as is usually true in determining the substantiality of evidence, is case-by-case. See, *e.g.*, *Perales*, 402 U. S., at 399, 410 (rejecting a categorical rule pertaining to the substantiality of medical reports in a disability hearing). It takes into account all features of the vocational expert's testimony, as well as the rest of the administrative record. And in so doing, it defers to the presiding ALJ, who has seen the hearing up close.

That much is sufficient to decide this case. Biestek petitioned us only to adopt the categorical rule we have now rejected. He did not ask us to decide whether, in the absence of that rule, substantial evidence supported the ALJ in denying him benefits. Accordingly, we affirm the Court of Appeals' judgment.

It is so ordered.

JUSTICE SOTOMAYOR, dissenting.

The Court focuses on the propriety of a categorical rule that precludes private data that a vocational expert refuses to provide upon request from qualifying as " 'substantial evidence.' " I agree with JUSTICE GORSUCH that the question presented by this case encompasses an inquiry not just into the propriety of a categorical rule in such circumstances but also into whether the substantial evidence standard was met in the narrower circumstances of Michael Biestek's case. … For the reasons that JUSTICE

GORSUCH sets out, the vocational expert's conclusory testimony in this case, offered without even a hint of support, did not constitute substantial evidence….

JUSTICE GORSUCH, with whom JUSTICE GINSBURG joins, dissenting.

Walk for a moment in Michael Biestek's shoes. As part of your application for disability benefits, you've proven that you suffer from serious health problems and can't return to your old construction job. Like many cases, yours turns on whether a significant number of other jobs remain that someone of your age, education, and experience, and with your physical limitations, could perform. When it comes to that question, the Social Security Administration bears the burden of proof. To meet its burden in your case, the agency chooses to rest on the testimony of a vocational expert the agency hired as an independent contractor. The expert asserts there are 120,000 "sorter" and 240,000 "bench assembler" jobs nationwide that you could perform even with your disabilities.

Where did these numbers come from? The expert says she relied on data from the Bureau of Labor Statistics and her own private surveys. But it turns out the Bureau can't be the source; its numbers aren't that specific. The source—if there is a source—must be the expert's private surveys. So you ask to see them. The expert refuses—she says they're part of confidential client files. You reply by pointing out that any confidential client information can be redacted. But rather than ordering the data produced, the hearing examiner, herself a Social Security Administration employee, jumps in to say that won't be necessary. Even without the data, the examiner states in her decision on your disability claim, the expert's say-so warrants "great weight" and is more than enough evidence to deny your application. Case closed.

Would you say this decision was based on "substantial evidence"? Count me with Judge Easterbrook and the Seventh Circuit in thinking that an agency expert's bottom line conclusion, supported only by a claim of readily available evidence that she refuses to produce on request, fails to satisfy the government's statutory burden of producing substantial evidence of available other work. See *Donahue* v. *Barnhart*, 279 F. 3d 441, 446 (CA7 2002); *McKinnie* v. *Barnhart*, 368 F. 3d 907, 910–911 (CA7 2004) (*per curiam*).…

Start with the legal standard. The Social Security Act of 1935 requires the agency to support its conclusions about the number of available jobs with "substantial evidence." 42 U. S. C. §405(g). Congress borrowed that standard from civil litigation practice, where reviewing courts may overturn a jury verdict when the record lacks "substantial evidence"—that is, evidence sufficient to permit a reasonable jury to reach the verdict it did. Much the same standard governs summary judgment and directed verdict practice today. …Next, consider what we know about this standard. Witness testimony that's clearly wrong as a matter of fact cannot be substantial evidence. …Falsified evidence isn't substantial evidence. …Speculation isn't substantial evidence. …And, maybe most

pointedly for our purposes, courts have held that a party or expert who supplies only conclusory assertions fails this standard too.…

If clearly mistaken evidence, fake evidence, speculative evidence, and conclusory evidence aren't substantial evidence, the evidence here shouldn't be either. The case hinges on an expert who (a) claims to possess evidence on the dispositive legal question that can be found nowhere else in the record, but (b) offers only a conclusion about its contents, and (c) refuses to supply the evidence when requested without showing that it can't readily be made available. What reasonable factfinder would rely on evidence like that? It seems just the sort of conclusory evidence courts have long held insufficient to meet the substantial evidence standard. And thanks to its conclusory nature, for all anyone can tell it may have come out of a hat—and, thus, may wind up being clearly mistaken, fake, or speculative evidence too. Unsurprisingly given all this, the government fails to cite even a single authority blessing the sort of evidence here as substantial evidence, despite the standard's long history and widespread use….

What leads the Court to a different conclusion? It says that it views Mr. Biestek's petition as raising only the "categorical" question whether an expert's failure to produce underlying data always and in "every case" precludes her testimony from qualifying as substantial evidence. And once the question is ratcheted up to that level of abstraction, of course it is easy enough to shoot it down: just point to a series of hypothetical cases where the record contains *additional* justification for the expert's failure to produce or *additional* evidence to support her opinion. In such counterfactual cases, the failure to produce either would not be enough to give rise to an adverse inference under traditional legal principles or could be held harmless as a matter of law.…

But as I understand Mr. Biestek's submission, it does not require an all-or-nothing approach that would cover "every case." As the Court acknowledges, Mr. Biestek has focused us "on the Seventh Circuit's categorical rule." ... And that "rule" targets the narrower "category" of circumstances we have here—where an expert "'give[s] a bottom line,'" fails to provide evidence "underlying that bottom line" when challenged, and fails to show the evidence is unavailable. … What to do about *that* category falls well within the question presented: "[w]hether a vocational expert's testimony can constitute substantial evidence of 'other work' . . . when the expert fails upon the applicant's request to provide the underlying data on which that testimony is premised." The answer to that question may be "always," "never," or—as the Court itself seems to acknowledge —"[s]ometimes." And if the answer is "sometimes," the critical question becomes "in what circumstances"?

I suppose we could stop short and leave everyone guessing. But another option is to follow the Seventh Circuit's lead, resolve the smaller yet still significant "category" of cases like the one before us, and in that way begin to offer lower courts meaningful guidance in this important area. While I would not hesitate to take this course and make plain that cases like Mr. Biestek's fail the substantial evidence standard, I understand the Court today to choose the first option and leave these matters for another day. There is

good news and bad news in this. If my understanding of the Court's opinion is correct, the good news is that the Court remains open to the possibility that in real world cases like Mr. Biestek's, lower courts may—and even should—find the substantial evidence test unmet. The bad news is that we must wait to find out, leaving many people and courts in limbo in the meantime. Cases with facts like Mr. Biestek's appear to be all too common….

The principle that the government must support its allegations with substantial evidence, not conclusions and secret evidence, guards against arbitrary executive decisionmaking. …Without it, people like Mr. Biestek are left to the mercy of a bureaucrat's caprice. Over 100 years ago, in *ICC* v. *Louisville & Nashville R. Co.*, 227 U. S. 88 (1913), the government sought to justify an agency order binding private parties without producing the information on which the agency had relied. The government argued that its findings should be "presumed to have been supported." In essence, the government sought the right to "act upon any sort of secret evidence." Gellhorn, Official Notice in Administrative Adjudication, 20 Texas L. Rev. 131, 145 (1941). This Court did not approve of that practice then, and I would not have hesitated to make clear that we do not approve of it today.

I respectfully dissent.

Notes and Questions

7-15 (a). If the Court takes a very deferential view of what constitutes substantial evidence, does this not increase the discretion of the administrative agency involved? If the Court takes a less deferential view, does this shift power in the direction of the Court? Is power a factor in this case? Is it for the dissenters? Does the plight of Mr. Biestek matter more than the relative power shifts between courts and agencies here?

7-15 (b).What's wrong with the use of a categorical rule in such cases? Is it fair to say that the science behind health risks and smoking was not well known at the outset? If a witness in a different kind of proceeding testified that there may be health concerns based on research not yet available, should that evidence be discounted as less than substantial? What about evidence in the early days of climate change research? If experts testified that societal risks were substantial but had no hard data as yet existed, is that too to be considered as failing the substantial evidence test? Is the expert's opinion enough? On the other hand, if reports that suggested climate change was a hoax were relied upon but the data upon which they were based was not revealed, could that testimony constitute substantial evidence?

7-15 (c).What standard does the majority and the Gorsuch dissent use to determine what is and what is not substantial evidence in this case? Is the standard more like the standard used in a jury case—that is, when a directed verdict is sought?

* * *

§ 7.04 Questions of Law

Supplement to note 7-36:

In 2023, the Supreme Court invoked its decision in *MCI* in the context of the Secretary of Education's implementation of the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act). The Secretary's plan would have offered debt relief to student loan borrowers in the context of the COVID-19 pandemic. In *Biden v. Nebraska*, the Court ruled that the text of the HEROES Act would allow modest revisions by the Secretary, but that the Secretary's student loan forgiveness program amounted to a major revision of the statute for which he did not have the authority.

Joseph R. Biden, President of The United States, et al., Petitioners *v.* Nebraska, et al.

On Writ of Certiorari Before Judgment to the United States Court Of Appeals for the Eighth Circuit

[600 U.S. ____ (2023), No. 22-506, June 30, 2023]

Chief Justice Roberts delivered the opinion of the Court.

[The Court reviews the history of the HEROES Act and its various applications.]

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III

The Secretary [of Education] asserts that the HEROES Act grants him the authority to cancel $430 billion of student loan principal. It does not. We hold today that the Act allows the Secretary to "waive or modify" existing statutory or regulatory provisions applicable to financial assistance programs under the Education Act, not to rewrite that statute from the ground up.

A

The HEROES Act authorizes the Secretary to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the [Education Act] as the Secretary deems necessary in connection with a war or other military operation or national emergency." 20 U. S. C. §1098bb(a)(1). That power has limits. To begin with, statutory permission to "modify" does not authorize "basic and fundamental changes in the scheme" designed by Congress. *MCI Telecommunications*

Corp. v. *American Telephone & Telegraph Co.*, 512 U.S. 218, 225 (1994). Instead, that term carries "a connotation of increment or limitation," and must be read to mean "to change moderately or in minor fashion." *Ibid.* That is how the word is ordinarily used. See, *e.g.*, Webster's Third New International Dictionary 1952 (2002) (defining "modify" as "to make more temperate and less extreme," "to limit or restrict the meaning of," or "to make minor changes in the form or structure of [or] alter without transforming"). The legal definition is no different. Black's Law Dictionary 1203 (11th ed. 2019) (giving the first definition of "modify" as "[t]o make somewhat different; to make small changes to," and the second as "[t]o make more moderate or less sweeping"). The authority to "modify" statutes and regulations allows the Secretary to make modest adjustments and additions to existing provisions, not transform them.

The Secretary's previous invocations of the HEROES Act illustrate this point. Prior to the COVID–19 pandemic, "modifications" issued under the Act implemented only minor changes, most of which were procedural. Examples include reducing the number of tax forms borrowers are required to file, extending time periods in which borrowers must take certain actions, and allowing oral rather than written authorizations. See 68 Fed. Reg. 69314–69316.

Here, the Secretary purported to "modif[y] the provisions of " two statutory sections and three related regulations governing student loans. 87 Fed. Reg. 61514. The affected statutory provisions granted the Secretary the power to "discharge [a] borrower's liability," or pay the remaining principal on a loan, under certain narrowly prescribed circumstances. 20 U. S. C. §§1087, 1087dd(g)(1). Those circumstances were limited to a borrower's death, disability, or bankruptcy; a school's false certification of a borrower or failure to refund loan proceeds as required by law; and a borrower's inability to complete an educational program due to closure of the school. See §§1087(a)–(d), 1087dd(g). The corresponding regulatory provisions detailed rules and procedures for such discharges. They also defined the terms of the Government's public service loan forgiveness program and provided for discharges when schools commit malfeasance. See 34 CFR §§682.402, 685.212; 34 CFR pt. 674, subpt. D.

The Secretary's new "modifications" of these provisions were not "moderate" or "minor." Instead, they created a novel and fundamentally different loan forgiveness program. The new program vests authority in the Department of Education to discharge up to $10,000 for every borrower with income below $125,000 and up to $20,000 for every such borrower who has received a Pell Grant. 87 Fed. Reg. 61514. No prior limitation on loan forgiveness is left standing. Instead, every borrower within the specified income cap automatically qualifies for debt cancellation, no matter their circumstances. The Department of Education estimates that the program will cover 98.5% of all borrowers. See Dept. of Ed., White House Fact Sheet: The Biden Administration's Plan for Student Debt Relief Could Benefit Tens of Millions of Borrowers in All Fifty States (Sept. 20, 2022). From a few narrowly delineated situations specified by Congress, the Secretary has expanded forgiveness to nearly every borrower in the country.

The Secretary's plan has "modified" the cited provisions only in the same sense that "the French Revolution 'modified' the status of the French nobility"—it has

abolished them and supplanted them with a new regime entirely. *MCI*, 512 U. S., at 228. Congress opted to make debt forgiveness available only in a few particular exigent circumstances; the power to modify does not permit the Secretary to "convert that approach into its opposite" by creating a new program affecting 43 million Americans and $430 billion in federal debt. *Descamps* v. *United States*, 570 U.S. 254, 274 (2013). Labeling the Secretary's plan a mere "modification" does not lessen its effect, which is in essence to allow the Secretary unfettered discretion to cancel student loans. It is "highly unlikely that Congress" authorized such a sweeping loan cancellation program "through such a subtle device as permission to 'modify.' " *MCI*, 512 U. S., at 231.

The Secretary responds that the Act authorizes him to "waive" legal provisions as well as modify them—and that this additional term "grant[s] broader authority" than would "modify" alone. But the Secretary's invocation of the waiver power here does not remotely resemble how it has been used on prior occasions. Previously, waiver under the HEROES Act was straightforward: the Secretary identified a particular legal requirement and waived it, making compliance no longer necessary. For instance, on one occasion the Secretary waived the requirement that a student provide a written request for a leave of absence. See 77 Fed. Reg. 59314. On another, he waived the regulatory provisions requiring schools and guaranty agencies to attempt collection of defaulted loans for the time period in which students were affected individuals. See 68 Fed. Reg. 69316.

Here, the Secretary does not identify any provision that he is actually waiving.[6] No specific provision of the Education Act establishes an obligation on the part of student borrowers to pay back the Government. So as the Government concedes, "waiver"—as used in the HEROES Act—cannot refer to "waiv[ing] loan balances" or "waiving the obligation to repay" on the part of a borrower. Tr. of Oral Arg. 9, 64. Contrast 20 U. S. C. §1091b(b)(2)(D) (allowing the Secretary to "waive the amounts that students are required to return" in specified circumstances of overpayment by the Government). Because the Secretary cannot waive a particular provision or provisions to achieve the desired result, he is forced to take a more circuitous approach, one that avoids any need to show compliance with the statutory limitation on his authority. He simply "waiv[es] the elements of the discharge and cancellation provisions that are inapplicable in this [debt cancellation] program that would limit eligibility to other contexts." Tr. of Oral Arg. 64–65.

Yet even that expansive conception of waiver cannot justify the Secretary's plan, which does far more than relax existing legal requirements. The plan specifies particular sums to be forgiven and income-based eligibility requirements. The addition of these new and substantially different provisions cannot be said to be a "waiver" of the old in any meaningful sense. Recognizing this, the Secretary acknowledges that waiver alone is not enough; after waiving whatever "inapplicable" law would bar his debt cancellation plan, he says, he then "modif[ied] the provisions to bring [them] in line with this program." *Id.*,

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[6] While the Secretary's notice published in the Federal Register refers to "waivers and modifications" generally, see 87 Fed. Reg. 61512–61514, and while two sentences use the somewhat ambiguous phrase "[t]his waiver," *id.*, at 61514, the notice identifies no specific legal provision as having been "waived" by the Secretary.

at 65. So in the end, the Secretary's plan relies on modifications all the way down. And as we have explained, the word "modify" simply cannot bear that load.

The Secretary and the dissent go on to argue that the power to "waive or modify" is greater than the sum of its parts. Because waiver allows the Secretary "to eliminate legal obligations in their entirety," the argument runs, the combination of "waive or modify" allows him "to reduce them to any extent short of waiver"—even if the power to "modify" ordinarily does not stretch that far. Reply Brief 16–17 (internal quotation marks omitted). But the Secretary's program cannot be justified by such sleight of hand. The Secretary has not truly waived or modified the provisions in the Education Act authorizing specific and limited forgiveness of student loans. Those provisions remain safely intact in the U. S. Code, where they continue to operate in full force. What the Secretary has actually done is draft a new section of the Education Act from scratch by "waiving" provisions root and branch and then filling the empty space with radically new text.

Lastly, the Secretary points to a procedural provision in the HEROES Act. The Act directs the Secretary to publish a notice in the Federal Register "includ[ing] *the terms and conditions to be applied in lieu of* such statutory and regulatory provisions" as the Secretary has waived or modified. 20 U. S. C. §1098bb(b)(2) (emphasis added). In the Secretary's view, that language authorizes "both deleting and then adding back in, waiving and then putting his own requirements in"—a sort of "red penciling" of the existing law. Tr. of Oral Arg. 65; see also Reply Brief 17.

Section 1098bb(b)(2) is, however, "a wafer-thin reed on which to rest such sweeping power." *Alabama Assn. of Realtors* v. *Department of Health and Human Servs.*, 594 U. S. ___, ___ (2021) (*per curiam*) (slip op., at 7). The provision is no more than it appears to be: a humdrum reporting requirement. Rather than implicitly granting the Secretary authority to draft new substantive statutory provisions at will, it simply imposes the obligation to report any waivers and modifications he has made. Section 1098bb(b)(2) suggests that "waivers and modifications" includes additions. The dissent accordingly reads the statute as authorizing any degree of change or any new addition, "from modest to substantial"—and nothing in the dissent's analysis suggests stopping at "substantial." *Post*, at 20. Because the Secretary "does not have to leave gaping holes" when he waives provisions, the argument runs, it follows that *any* replacement terms the Secretary uses to fill those holes must be lawful. *Ibid.* But the Secretary's ability to add new terms "in lieu of " the old is limited to his authority to "modify" existing law.

As with any other modification issued under the Act, no new term or condition reported pursuant to §1098bb(b)(2) may distort the fundamental nature of the provision it alters.[7]

The Secretary's comprehensive debt cancellation plan cannot fairly be called a waiver—it not only nullifies existing provisions but augments and expands them

[7]The dissent asserts that our decision today will control any challenge to the Secretary's temporary suspensions of loan repayments and interest accrual. *Post*, at 21–22. We decide only the case before us. A challenge to the suspensions may involve different considerations with respect to both standing and the merits.

dramatically. It cannot be mere modification, because it constitutes "effectively the introduction of a whole new regime." *MCI*, 512 U. S., at 234. And it cannot be some combination of the two, because when the Secretary seeks to *add* to existing law, the fact that he has "waived" certain provisions does not give him a free pass to avoid the limits inherent in the power to "modify." However broad the meaning of "waive or modify," that language cannot authorize the kind of exhaustive rewriting of the statute that has taken place here.[8]

B

In a final bid to elide the statutory text, the Secretary appeals to congressional purpose. "The whole point of " the HEROES Act, the Government contends, "is to ensure that in the face of a national emergency that is causing financial harm to borrowers, the Secretary can do something." Tr. of Oral Arg. 55. And that "something" was left deliberately vague because Congress intended "to grant substantial discretion to the Secretary to respond to unforeseen emergencies." Reply Brief 22, n. 3. So the unprecedented nature of the Secretary's debt cancellation plan only "reflects the pandemic's unparalleled scope." Brief for Petitioners 52 (Brief for United States).

The dissent agrees. "Emergencies, after all, are emergencies," it reasons, and "more serious measures" must be expected "in response to more serious problems." *Post*, at 25, 28. The dissent's interpretation of the HEROES Act would grant unlimited power to the Secretary, not only to modify or waive certain provisions but to "fill the holes that action creates with new terms"—no matter how drastic those terms might be—and to "alter [provisions] to the extent [he] think[s] appropriate," up to and including "the most substantial kind of change" imaginable. *Post,* at 16, 19–20. That is inconsistent with the statutory language and past practice under the statute.

The question here is not whether something should be done; it is who has the authority to do it. Our recent decision in *West Virginia* v. *EPA* involved similar concerns over the exercise of administrative power. 597 U. S. ___ (2022). That case involved the EPA's claim that the Clean Air Act authorized it to impose a nationwide cap on carbon dioxide emissions. Given "the 'history and the breadth of the authority that [the agency] ha[d] asserted,' and the 'economic and political significance' of that assertion," we found that there was " 'reason to hesitate before concluding that Congress' meant to confer such authority." *Id.*, at ___ (slip op., at 17) (quoting *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–160 (2000); first alteration in original).

So too here, where the Secretary of Education claims the authority, on his own, to release 43 million borrowers from their obligations to repay $430 billion in student loans. The Secretary has never previously claimed powers of this magnitude under the

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[8] The States further contend that the Secretary's program violates the requirement in the HEROES Act that any waivers or modifications be "necessary to ensure that . . . affected individuals are not placed in a worse position financially in relation to" federal financial assistance. 20 U. S. C. §1098bb(a)(2)(A); see Brief for Respondents 39–44. While our decision does not rest upon that reasoning, we note that the Secretary faces a daunting task in showing that cancellation of debt principal is "necessary to ensure" that borrowers are not placed in "worse position[s] financially in relation to" their loans, especially given the Government's prior determination that pausing interest accrual and loan repayments would achieve that end.

HEROES Act. As we have already noted, past waivers and modifications issued under the Act have been extremely modest and narrow in scope. The Act has been used only once before to waive or modify a provision related to debt cancellation: In 2003, the Secretary waived the requirement that borrowers seeking loan forgiveness under the Education Act's public service discharge provisions "perform uninterrupted, otherwise qualifying service for a specified length of time (for example, one year) or for consecutive periods of time, such as 5 consecutive years." 68 Fed. Reg. 69317. That waiver simply eased the requirement that service be uninterrupted to qualify for the public service loan forgiveness program. In sum, "[n]o regulation premised on" the HEROES Act "has even begun to approach the size or scope" of the Secretary's program. *Alabama Assn.*, 594 U. S., at ___ (slip op., at 7).[9]

Under the Government's reading of the HEROES Act, the Secretary would enjoy virtually unlimited power to rewrite the Education Act. This would "effec[t] a 'fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation' into an entirely different kind," *West Virginia*, 597 U. S., at ___ (slip op., at 24) (quoting *MCI*, 512 U. S., at 231)—one in which the Secretary may unilaterally define every aspect of federal student financial aid, provided he determines that recipients have "suffered direct economic hardship as a direct result of a . . . national emergency." 20 U. S. C. §1098ee(2)(D).

The " 'economic and political significance' " of the Secretary's action is staggering by any measure. *West Virginia*, 597 U. S., at ___ (slip op., at 17) (quoting *Brown & Williamson*, 529 U. S., at 160). Practically every student borrower benefits, regardless of circumstances. A budget model issued by the Wharton School of the University of Pennsylvania estimates that the program will cost taxpayers "between $469 billion and $519 billion," depending on the total number of borrowers ultimately covered. App. 108. That is ten times the "economic impact" that we found significant in concluding that an eviction moratorium implemented by the Centers for Disease Control and Prevention triggered analysis under the major questions doctrine. *Alabama Assn.*, 594 U. S., at ___ (slip op., at 6). It amounts to nearly one-third of the Government's $1.7 trillion in annual discretionary spending. Congressional Budget Office, The Federal Budget in Fiscal Year 2022. There is no serious dispute that the Secretary claims the authority to exercise control over "a significant portion of the American

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[9] The Secretary also cites a prior invocation of the HEROES Act waiving the requirement that borrowers must repay prior overpayments of certain grant funds. See Brief for United States 41; 68 Fed. Reg. 69314. But Congress had already limited borrower liability in such cases to exclude overpayments in amounts up to "50 percent of the total grant assistance received by the student" for the period at issue, so the Secretary's waiver had only a modest effect. 20 U. S. C. §1091b(b)(2)(C)(i)(II). And that waiver simply held the Government responsible for its *own* errors when it had mistakenly disbursed undeserved grant funds.

economy." *Utility Air Regulatory Group* v. *EPA*, 573 U.S. 302, 324 (2014) (quoting *Brown & Williamson*, 529 U. S., at 159).

The dissent is correct that this is a case about one branch of government arrogating to itself power belonging to another. But it is the Executive seizing the power of the Legislature. The Secretary's assertion of administrative authority has "conveniently enabled [him] to enact a program" that Congress has chosen not to enact itself. *West Virginia*, 597 U. S., at ___ (slip op., at 27). Congress is not unaware of the challenges facing student borrowers. "More than 80 student loan forgiveness bills and other student loan legislation" were considered by Congress during its 116th session alone. M. Kantrowitz, Year in Review: Student Loan Forgiveness Legislation, Forbes, Dec. 24, 2020.[10] And the discussion is not confined to the halls of Congress. Student loan cancellation "raises questions that are personal and emotionally charged, hitting fundamental issues about the structure of the economy." J. Stein, Biden Student Debt Plan Fuels Broader Debate Over Forgiving Borrowers, Washington Post, Aug. 31, 2022.

The sharp debates generated by the Secretary's extraordinary program stand in stark contrast to the unanimity with which Congress passed the HEROES Act. The dissent asks us to "[i]magine asking the enacting Congress: Can the Secretary use his powers to give borrowers more relief when an emergency has inflicted greater harm?" *Post*, at 27–28. The dissent "can't believe" the answer would be no. *Post*, at 28. But imagine instead asking the enacting Congress a more pertinent question: "Can the Secretary use his powers to abolish $430 billion in student loans, completely canceling loan balances for 20 million borrowers, as a pandemic winds down to its end?" We can't believe the answer would be yes. Congress did not unanimously pass the HEROES Act with such power in mind. "A decision of such magnitude and consequence" on a matter of " 'earnest and profound debate across the country' " must "res[t] with Congress itself, or an agency acting pursuant to a clear delegation from that representative body." *West Virginia*, 597 U. S., at ___, ___ (slip op., at 28, 31) (quoting *Gonzales* v. *Oregon*, 546 U.S. 243, 267–268 (2006)). As then-Speaker of the House Nancy Pelosi explained:

> "People think that the President of the United States has the power for debt forgiveness. He does not. He can postpone. He can delay. But he does not have that power. That has to be an act of Congress." Press Conference, Office of the Speaker of the House (July 28, 2021).

Aside from reiterating its interpretation of the statute, the dissent offers little to rebut our conclusion that "indicators from our previous major questions cases are present" here. *Post*, at 15 (Barrett, J., concurring). The dissent insists that "[s]tudent loans are in the Secretary's wheelhouse." *Post*, at 26 (opinion of Kagan, J.). But in light of the sweeping and unprecedented impact of the Secretary's loan forgiveness program, it

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[10] Resolutions were also introduced in 2020 and 2021 "[c]alling on the President . . . to take executive action to broadly cancel Federal student loan debt." See S. Res. 711, 116th Cong., 2d Sess. (2020); S. Res. 46, 117th Cong., 1st Sess. (2021). Those resolutions failed to reach a vote.

would seem more accurate to describe the program as being in the "wheelhouse" of the House and Senate Committees on Appropriations. Rather than dispute the extent of that impact, the dissent chooses to mount a frontal assault on what it styles "the Court's made-up major questions doctrine." *Post*, at 29–30. But its attempt to relitigate *West Virginia* is misplaced. As we explained in that case, while the major questions "label" may be relatively recent, it refers to "an identifiable body of law that has developed over a series of significant cases" spanning decades. *West Virginia*, 597 U. S., at ___ (slip op., at 20). At any rate, "the issue now is not whether [*West Virginia*] is correct. The question is whether that case is distinguishable from this one. And it is not." *Collins* v. *Yellen*, 594 U. S. ___, ___ (2021) (Kagan, J., concurring in part and concurring in judgment) (slip op., at 2).

The Secretary, for his part, acknowledges that *West Virginia* is the law. Brief for United States 47–48. But he objects that its principles apply only in cases concerning "agency action[s] involv[ing] the power to regulate, not the provision of government benefits." Reply Brief 21. In the Government's view, "there are fewer reasons to be concerned" in cases involving benefits, which do not impose "profound burdens" on individual rights or cause "regulatory effects that might prompt a note of caution in other contexts involving exercises of emergency powers." Tr. of Oral Arg. 61.

This Court has never drawn the line the Secretary suggests—and for good reason. Among Congress's most important authorities is its control of the purse. U. S. Const., Art. I, §9, cl. 7; see also *Office of Personnel Management* v. *Richmond*, 496 U.S. 414, 427 (1990) (the Appropriations Clause is "a most useful and salutary check upon profusion and extravagance" (internal quotation marks omitted)). It would be odd to think that separation of powers concerns evaporate simply because the Government is providing monetary benefits rather than imposing obligations. As we observed in *West Virginia*, experience shows that major questions cases "have arisen from all corners of the administrative state," and administrative action resulting in the conferral of benefits is no exception to that rule. 597 U. S., at ___ (slip op., at 17). In *King* v. *Burwell*, 576 U.S. 473 (2015), we declined to defer to the Internal Revenue Service's interpretation of a healthcare statute, explaining that the provision at issue affected "billions of dollars of spending each year and . . . the price of health insurance for millions of people." *Id.*, at 485. Because the interpretation of the provision was "a question of deep 'economic and political significance' that is central to [the] statutory scheme," we said, we would not assume that Congress entrusted that task to an agency without a clear statement to that effect. *Ibid.* (quoting *Utility Air*, 573 U. S., at 324). That the statute at issue involved government benefits made no difference in *King*, and it makes no difference here.

All this leads us to conclude that "[t]he basic and consequential tradeoffs" inherent in a mass debt cancellation program "are ones that Congress would likely have intended for itself." *West Virginia*, 597 U. S., at ___ (slip op., at 26). In such circumstances, we have required the Secretary to "point to 'clear congressional authorization' " to justify the challenged program. *Id.*, at ___, ___ (slip op., at 19, 28) (quoting *Utility Air*, 573 U. S., at 324). And as we have already shown, the HEROES Act provides no authorization for the Secretary's plan even when examined using the ordinary

tools of statutory interpretation—let alone "clear congressional authorization" for such a program.[11][9]

* * *

It has become a disturbing feature of some recent opinions to criticize the decisions with which they disagree as going beyond the proper role of the judiciary. Today, we have concluded that an instrumentality created by Missouri, governed by Missouri, and answerable to Missouri is indeed part of Missouri; that the words "waive or modify" do not mean "completely rewrite"; and that our precedent—old and new—requires that Congress speak clearly before a Department Secretary can unilaterally alter large sections of the American economy. We have employed the traditional tools of judicial decisionmaking in doing so. Reasonable minds may disagree with our analysis—in fact, at least three do. See *post*, p. ___ (Kagan, J., dissenting). We do not mistake this plainly heartfelt disagreement for disparagement. It is important that the public not be misled either. Any such misperception would be harmful to this institution and our country.

The judgment of the District Court for the Eastern District of Missouri is reversed, and the case is remanded for further proceedings consistent with this opinion. The Government's application to vacate the Eighth Circuit's injunction is denied as moot.

It is so ordered.

Justice Kagan, with whom Justice Sotomayor and Justice Jackson join, dissenting.

In every respect, the Court today exceeds its proper, limited role in our Nation's governance.

Some 20 years ago, Congress enacted legislation, called the HEROES Act, authorizing the Secretary of Education to provide relief to student-loan borrowers when a national emergency struck. The Secretary's authority was bounded: He could do only what was "necessary" to alleviate the emergency's impact on affected borrowers' ability to repay their student loans. 20 U. S. C. §1098bb(a)(2). But within that bounded area, Congress gave discretion to the Secretary. He could "waive or modify any statutory or

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[11] The dissent complains that our application of the major questions doctrine is a "tell" revealing that " 'normal' statutory interpretation cannot sustain [our] decision." *Post*, at 23, 30. Not so. As we have explained, the statutory text alone precludes the Secretary's program. Today's opinion simply reflects this Court's familiar practice of providing multiple grounds to support its conclusions. See, *e.g.*, *Kucana* v. *Holder*, 558 U.S. 233, 243–252 (2010) (interpreting the text of a federal immigration statute in the first instance, then citing the "presumption favoring judicial review of administrative action" as an additional sufficient basis for the Court's decision). The fact that multiple grounds support a result is usually regarded as a strength, not a weakness.

regulatory provision" applying to federal student-loan programs, including provisions relating to loan repayment and forgiveness. And in so doing, he could replace the old provisions with new "terms and conditions." §§1098bb(a)(1), (b)(2). The Secretary, that is, could give the relief that was needed, in the form he deemed most appropriate, to counteract the effects of a national emergency on borrowers' capacity to repay. That may have been a good idea, or it may have been a bad idea. Either way, it was what Congress said.

When COVID hit, two Secretaries serving two different Presidents decided to use their HEROES Act authority. The first suspended loan repayments and interest accrual for all federally held student loans. The second continued that policy for a time, and then replaced it with the loan forgiveness plan at issue here, granting most low- and middle-income borrowers up to $10,000 in debt relief. Both relied on the HEROES Act language cited above. In establishing the loan forgiveness plan, the current Secretary scratched the pre-existing conditions for loan discharge, and specified different conditions, opening loan forgiveness to more borrowers. So he "waive[d]" and "modif[ied]" statutory and regulatory provisions and applied other "terms and conditions" in their stead. That may have been a good idea, or it may have been a bad idea. Either way, the Secretary did only what Congress had told him he could.

The Court's first overreach in this case is deciding it at all. Under Article III of the Constitution, a plaintiff must have standing to challenge a government action. And that requires a personal stake—an injury in fact. We do not allow plaintiffs to bring suit just because they oppose a policy. Neither do we allow plaintiffs to rely on injuries suffered by others. Those rules may sound technical, but they enforce "fundamental limits on federal judicial power." *Allen* v. *Wright*, 468 U.S. 737, 750 (1984). They keep courts acting like courts. Or stated the other way around, they prevent courts from acting like this Court does today. The plaintiffs in this case are six States that have no personal stake in the Secretary's loan forgiveness plan. They are classic ideological plaintiffs: They think the plan a very bad idea, but they are no worse off because the Secretary differs. In giving those States a forum—in adjudicating their complaint—the Court forgets its proper role. The Court acts as though it is an arbiter of political and policy disputes, rather than of cases and controversies.

And the Court's role confusion persists when it takes up the merits. For years, this Court has insisted that the way to keep judges' policy views and preferences out of judicial decisionmaking is to hew to a statute's text. The HEROES Act's text settles the legality of the Secretary's loan forgiveness plan. The statute provides the Secretary with broad authority to give emergency relief to student-loan borrowers, including by altering usual discharge rules. What the Secretary did fits comfortably within that delegation. But the Court forbids him to proceed. As in other recent cases, the rules of the game change when Congress enacts broad delegations allowing agencies to take substantial regulatory measures. See, *e.g.*, *West Virginia* v. *EPA*, 597 U. S. ___ (2022). Then, as in this case, the Court reads statutes unnaturally, seeking to cabin their evident scope. And the Court applies heightened-specificity requirements, thwarting Congress's efforts to ensure adequate responses to unforeseen events. The result here is that the Court substitutes

itself for Congress and the Executive Branch in making national policy about student-loan forgiveness. Congress authorized the forgiveness plan (among many other actions); the Secretary put it in place; and the President would have been accountable for its success or failure. But this Court today decides that some 40 million Americans will not receive the benefits the plan provides, because (so says the Court) that assistance is too "significan[t]." *Ante*, at 20–21. With all respect, I dissent…

III

From the first page to the last, today's opinion departs from the demands of judicial restraint. At the behest of a party that has suffered no injury, the majority decides a contested public policy issue properly belonging to the politically accountable branches and the people they represent. In saying so, and saying so strongly, I do not at all "disparage[ ]" those who disagree. *Ante*, at 26. The majority is right to make that point, as well as to say that "[r]easonable minds" are found on both sides of this case. *Ante*, at 25. And there is surely nothing personal in the dispute here. But Justices throughout history have raised the alarm when the Court has overreached—when it has "exceed[ed] its proper, limited role in our Nation's governance." *Supra*, at 1. It would have been "disturbing," and indeed damaging, if they had not. *Ante*, at 25. The same is true in our own day.

The majority's opinion begins by distorting standing doctrine to create a case fit for judicial resolution. But there is no such case here, by any ordinary measure. The Secretary's plan has not injured the plaintiff-States, however much they oppose it. And in that respect, Missouri is no different from any of the others. Missouri does not suffer any harm from a revenue loss to MOHELA, because the two entities are legally and financially independent. And MOHELA has chosen not to sue—which of course it could have. So no proper party is before the Court. A court acting like a court would have said as much and stopped.

The opinion ends by applying the Court's made-up major-questions doctrine to jettison the Secretary's loan forgiveness plan. Small wonder the majority invokes the doctrine. The majority's "normal" statutory interpretation cannot sustain its decision. The statute, read as written, gives the Secretary broad authority to relieve a national emergency's effect on borrowers' ability to repay their student loans. The Secretary did no more than use that lawfully delegated authority. So the majority applies a rule specially crafted to kill significant regulatory action, by requiring Congress to delegate not just clearly but also micro- specifically. The question, the majority maintains, is "who has the authority" to decide whether such a significant action should go forward. *Ante*, at 19; see *supra*, at 23. The right answer is the political branches: Congress in broadly authorizing loan relief, the Secretary and the President in using that authority to implement the forgiveness plan. The majority instead says that it is theirs to decide.

So in a case not a case, the majority overrides the combined judgment of the Legislative and Executive Branches, with the consequence of eliminating loan forgiveness for 43 million Americans. I respectfully dissent from that decision.

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In *West Virginia v. EPA* (597 U.S. ____ (2022)), the Court spelled out the Major Questions Doctrine for the first time:

West Virginia v. Environmental Protection Agency

597 U.S. ____ (2022), Nos. 20–1530, 20–1531, 20–1778 and 20–1780, June 30, 2022

WEST VIRGINIA, et al., PETITIONERS
20–1530*v.*
ENVIRONMENTAL PROTECTION AGENCY, et al.
THE NORTH AMERICAN COAL CORPORATION, PETITIONER
20–1531*v.*
ENVIRONMENTAL PROTECTION AGENCY, et al.
WESTMORELAND MINING HOLDINGS LLC, PETITIONER
20–1778*v.*
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NORTH DAKOTA, PETITIONER
20–1780*v.*
ENVIRONMENTAL PROTECTION AGENCY, et al.
on writs of certiorari to the united states court of appeals for the district of columbia circuit
[June 30, 2022]
Chief Justice Roberts delivered the opinion of the Court.

The Clean Air Act authorizes the Environmental Protection Agency to regulate power plants by setting a "standard of performance" for their emission of certain pollutants into the air. 84Stat. 1683, 42 U. S. C. §7411(a)(1). That standard may be different for new and existing plants, but in each case it must reflect the "best system of emission reduction" that the Agency has determined to be "adequately demonstrated" for the particular category. §§7411(a)(1), (b)(1), (d).

For existing plants, the States then implement that requirement by issuing rules restricting emissions from sources within their borders.

Since passage of the Act 50 years ago, EPA has exercised this authority by setting performance standards based on measures that would reduce pollution by causing plants to operate more cleanly. In 2015, however, EPA issued a new rule concluding that the "best system of emission reduction" for existing coal-fired power plants included a requirement that such facilities reduce their own production of electricity, or subsidize increased generation by natural gas, wind, or solar sources.

The question before us is whether this broader conception of EPA's authority is within the power granted to it by the Clean Air Act.

I

A

[Discusses the Clean Air Act's regulatory programs.]

B

…[In] October 2015, … EPA promulgated two rules addressing carbon dioxide pollution from power plants—one for new plants under Section 111(b), the other for existing plants under Section 111(d). Both were premised on the Agency's earlier finding that carbon dioxide is an "air pollutant" that "may reasonably be anticipated to endanger public health or welfare" by causing climate change. 80 Fed. Reg. 64530. Carbon dioxide is not subject to a NAAQS and has not been listed as a toxic pollutant.

The first rule announced by EPA established federal carbon emissions limits for new power plants of two varieties: fossil-fuel-fired electric steam generating units (mostly coal fired) and natural-gas-fired stationary combustion turbines. *Id.*, at 64512. Following the statutory process set out above, the Agency determined the BSER for the two categories of sources. For steam generating units, for instance, EPA determined that the BSER was a combination of high-efficiency production processes and carbon capture technology. See 80 Fed. Reg. 64512. EPA then set the emissions limit based on the amount of carbon dioxide that a plant would emit with these technologies in place. *Id.*, at 64513.

The second rule was triggered by the first: Because EPA was now regulating carbon dioxide from *new* coal and gas plants, Section 111(d) required EPA to also address carbon emissions from *existing* coal and gas plants. See §7411(d)(1). It did so through what it called the Clean Power Plan rule.

In that rule, EPA established "final emission guidelines for states to follow in developing plans" to regulate existing power plants within their borders. *Id.*, at 64662. To arrive at the guideline limits, EPA did the same thing it does when imposing federal regulations on new sources: It identified the BSER.

The BSER that the Agency selected for existing coal-fired power plants, however, was quite different from the BSER it had chosen for new sources. The BSER for existing plants included three types of measures, which the Agency called "building blocks." *Id.*, at 64667. The first building block was "heat rate improvements" at coal-fired plants—essentially practices such plants could undertake to burn coal more efficiently. *Id.*, at 64727. But such improvements, EPA stated, would "lead to only small emission reductions," because coal-fired power plants were already operating near optimum efficiency. *Ibid.* On the Agency's view, "much larger emission reductions [were] needed from [coal-fired plants] to address climate change." *Ibid.*

So the Agency included two additional building blocks in its BSER, both of which involve what it called "generation shifting from higher-emitting to lower-emitting" producers of electricity. *Id.*, at 64728. Building block two was a shift in electricity production from existing coal-fired power plants to natural-gas-fired plants. *Ibid.* Because natural gas plants produce "typically less than half as much" carbon dioxide per unit of

electricity created as coal-fired plants, the Agency explained, "this generation shift [would] reduce[] CO2 emissions." *Ibid.* Building block three worked the same way, except that the shift was from both coal- and gas-fired plants to "new low- or zero-carbon generating capacity," mainly wind and solar. *Id.*, at 64729, 64748. "Most of the CO2 controls" in the rule came from the application of building blocks two and three. *Id.*, at 64728.

The Agency identified three ways in which a regulated plant operator could implement a shift in generation to cleaner sources. *Id.*, at 64731. First, an operator could simply reduce the regulated plant's own production of electricity. Second, it could build a new natural gas plant, wind farm, or solar installation, or invest in someone else's existing facility and then increase generation there. *Ibid.* Finally, operators could purchase emission allowances or credits as part of a cap-and-trade regime. *Id.*, at 64731–64732. Under such a scheme, sources that achieve a reduction in their emissions can sell a credit representing the value of that reduction to others, who are able to count it toward their own applicable emissions caps.

EPA explained that taking any of these steps would implement a sector-wide shift in electricity production from coal to natural gas and renewables. *Id.*, at 64731. Given the integrated nature of the power grid, "adding electricity to the grid from one generator will result in the instantaneous reduction in generation from other generators," and "reductions in generation from one generator lead to the instantaneous increase in generation" by others. *Id.*, at 64769. So coal plants, whether by reducing their own production, subsidizing an increase in production by cleaner sources, or both, would cause a shift toward wind, solar, and natural gas.

Having decided that the "best system of emission reduction . . . adequately demonstrated" was one that would reduce carbon pollution mostly by moving production to cleaner sources, EPA then set about determining "the degree of emission limitation achievable through the application" of that system. 42 U. S. C. §7411(a)(1). The Agency recognized that—given the nature of generation shifting—it could choose from "a wide range of potential stringencies for the BSER." 80 Fed. Reg. 64730. Put differently, in translating the BSER into an operational emissions limit, EPA could choose whether to require anything from a little generation shifting to a great deal. The Agency settled on what it regarded as a "reasonable" amount of shift, which it based on modeling of how much more electricity both natural gas and renewable sources could supply without causing undue cost increases or reducing the overall power supply. *Id.*, at 64797–64811. Based on these changes, EPA projected that by 2030, it would be feasible to have coal provide 27% of national electricity generation, down from 38% in 2014. *Id.*, at 64665, 64694; see Dept. of Energy, U. S. Energy Information Admin., Monthly Energy Review (May 2015), Electricity Net Generation: Electric Power Sector, p. 106 (Table 7.2b).

From these significant projected reductions in generation, EPA developed a series of complex equations to "determine the emission performance rates" that States would be required to implement. 80 Fed. Reg. 64815. The calculations resulted in numerical emissions ceilings so strict that no existing coal plant would have been able to achieve them without engaging in one of the three means of shifting generation described above.

Indeed, the emissions limit the Clean Power Plan established for existing power plants was actually *stricter* than the cap imposed by the simultaneously published standards for *new* plants. Compare *id.*, at 64742, with *id.*, at 64513.

The point, after all, was to compel the transfer of power generating capacity from existing sources to wind and solar. The White House stated that the Clean Power Plan would "drive a[n] . . . aggressive transformation in the domestic energy industry." White House Fact Sheet, App. in *American Lung Assn*. v. *EPA*, No. 19–1140 etc. (CADC), p. 2076. EPA's own modeling concluded that the rule would entail billions of dollars in compliance costs (to be paid in the form of higher energy prices), require the retirement of dozens of coal-fired plants, and eliminate tens of thousands of jobs across various sectors. EPA, Regulatory Impact Analysis for the Clean Power Plan Final Rule 3–22, 3–30, 3–33, 6–24, 6–25 (2015). The Energy Information Administration reached similar conclusions, projecting that the rule would cause retail electricity prices to remain persistently 10% higher in many States, and would reduce GDP by at least a trillion 2009 dollars by 2040. Dept. of Energy, Analysis of the Impacts of the Clean Power Plan 21, 63–64 (May 2015).

C

These projections were never tested, because the Clean Power Plan never went into effect. The same day that EPA promulgated the rule, dozens of parties (including 27 States) petitioned for review in the D. C. Circuit. After that court declined to enter a stay of the rule, the challengers sought the same relief from this Court. We granted a stay, preventing the rule from taking effect. *West Virginia* v. *EPA*, 577 U.S. 1126 (2016). The Court of Appeals later heard argument on the merits en banc. But before it could issue a decision, there was a change in Presidential administrations. The new administration requested that the litigation be held in abeyance so that EPA could reconsider the Clean Power Plan. The D. C. Circuit obliged, and later dismissed the petitions for review as moot.

EPA eventually repealed the rule in 2019, concluding that the Clean Power Plan had been "in excess of its statutory authority" under Section 111(d). 84 Fed. Reg. 32523 (2019). Specifically, the Agency concluded that generation shifting should not have been considered as part of the BSER. The Agency interpreted Section 111 as "limit[ing] the BSER to those systems that can be put into operation *at* a building, structure, facility, or installation," such as "add-on controls" and "inherently lower-emitting processes/practices/designs." *Id.*, at 32524. It then explained that the Clean Power Plan, rather than setting the standard "based on the application of equipment and practices at the level of an individual facility," had instead based it on "a shift in the energy generation mix at the grid level," *id.*, at 32523—not the sort of measure that has "a potential for application to an individual source." *Id.*, at 32524.

The Agency determined that "the interpretative question raised" by the Clean Power Plan—"*i.e.*, whether a 'system of emission reduction' can consist of generation-shifting measures"—fell under the "major question doctrine." *Id.*, at 32529. Under that doctrine, EPA explained, courts "expect Congress to speak clearly if it wishes to assign to

an agency decisions of vast economic and political significance." *Ibid.* (quoting *Utility Air Regulatory Group* v. *EPA*, 573 U.S. 302, 324 (2014) (internal quotation marks omitted)). The Agency concluded that the Clean Power Plan was such a decision, for a number of reasons. Its "generation-shifting scheme was projected to have billions of dollars of impact." 84 Fed. Reg. 32529. "[N]o section 111 rule of the scores issued ha[d] ever been based on generation shifting." *Ibid.* And that novel reading of the statute would empower EPA "to order the wholesale restructuring of any industrial sector" based only on its discretionary assessment of "such factors as 'cost' and 'feasibility.' " *Ibid.*

EPA argued that under the major questions doctrine, a clear statement was necessary to conclude that Congress intended to delegate authority "of this breadth to regulate a fundamental sector of the economy." *Ibid.* It found none. "Indeed," it concluded, given the text and structure of the statute, "Congress has directly spoken to this precise question and precluded" the use of measures such as generation shifting. *Ibid.*

In the same rulemaking, the Agency replaced the Clean Power Plan by promulgating a different Section 111(d) regulation, known as the Affordable Clean Energy (ACE) Rule. *Id.*, at 32532. Based on its view of what measures may permissibly make up the BSER, EPA determined that the best system would be akin to building block one of the Clean Power Plan: a combination of equipment upgrades and operating practices that would improve facilities' heat rates. *Id.*, at 32522, 32537. The ACE Rule determined that the application of its BSER measures would result in only small reductions in carbon dioxide emissions. *Id.*, at 32561.

D

A number of States and private parties immediately filed petitions for review in the D. C. Circuit, challenging EPA's repeal of the Clean Power Plan and its enactment of the replacement ACE Rule. Other States and private entities—including petitioners here West Virginia, North Dakota, Westmoreland Mining Holdings LLC, and The North American Coal Corporation (NACC)—intervened to defend both actions.

The Court of Appeals consolidated all 12 petitions for review into one case. It then held that EPA's "repeal of the Clean Power Plan rested critically on a mistaken reading of the Clean Air Act"—namely, that generation shifting cannot be a "system of emission reduction" under Section 111. 985 F. 3d, at 995. To the contrary, the court concluded, the statute could reasonably be read to encompass generation shifting. As part of that analysis, the Court of Appeals concluded that the major questions doctrine did not apply, and thus rejected the need for a clear statement of congressional intent to delegate such power to EPA. *Id.*, at 959–968. Having found that EPA misunderstood the scope of its authority under the Clean Air Act, the Court vacated the Agency's repeal of the Clean Power Plan and remanded to the Agency for further consideration. *Id.*, at 995. It also vacated and remanded the replacement rule, the ACE Rule, for the same reason. *Ibid.*

The court's decision, handed down on January 19, 2021, was quickly followed by another change in Presidential administrations. One month later, EPA moved the Court of Appeals to partially stay the issuance of its mandate as it pertained to the Clean Power Plan. The Agency did so to ensure that the Clean Power Plan would not immediately go back into effect. Respondents' Motion for a Partial Stay of Issuance of the Mandate

in *American Lung Assn*. v. *EPA*, No. 19–1140 etc. (CADC), p. 4. EPA believed that such a result would not make sense while it was in the process of considering whether to promulgate a new Section 111(d) rule. *Ibid*. No party opposed the motion, and the court accordingly stayed its vacatur of the Agency's repeal of the Clean Power Plan.

Westmoreland, NACC, and the States defending the repeal of the Clean Power Plan all filed petitions for certiorari. We granted the petitions and consolidated the cases. 595 U. S. ___ (2021).

II

We first consider the Government's contention that no petitioner has Article III standing to seek our review.

Although most disputes over standing concern whether a plaintiff has satisfied the requirement when filing suit, "Article III demands that an actual controversy persist throughout all stages of litigation." *Hollingsworth* v. *Perry*, 570 U.S. 693, 705 (2013) (internal quotation marks omitted). The requirement of standing "must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 64 (1997). In considering a litigant's standing to appeal, the question is whether it has experienced an injury "fairly traceable to the *judgment below*." *Food Marketing Institute* v. *Argus Leader Media*, 588 U. S. ___, ___ (2019) (slip op., at 4) (emphasis added; internal quotation marks omitted). If so, and a "favorable ruling" from the appellate court "would redress [that] injury," then the appellant has a cognizable Article III stake. *Ibid.*

Here, it is apparent that at least one group of petitioners—the state petitioners—are injured by the Court of Appeals' judgment. That judgment vacated "the ACE rule *and* its embedded repeal of the Clean Power Plan," 985 F. 3d, at 995 (emphasis added), and accordingly purports to bring the Clean Power Plan back into legal effect. Thus, to the extent the Clean Power Plan harms the States, the D. C. Circuit's judgment inflicts the same injury. And there can be "little question" that the rule does injure the States, since they are "the object of " its requirement that they more stringently regulate power plant emissions within their borders. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561–562 (1992).

The Government counters that "agency and judicial actions" subsequent to the court's entry of judgment have "eliminated any . . . possibility" of injury. Brief for Federal Respondents 16. First, after the decision, EPA informed the Court of Appeals that it does not intend to enforce the Clean Power Plan because it has decided to promulgate a new Section 111(d) rule. Second, on EPA's request, the lower court stayed the part of its judgment that vacated the repeal, pending that new rulemaking. "These circumstances," says the Government, "have *mooted* the prior dispute as to the CPP Repeal Rule's legality." *Id.*, at 17 (emphasis added).

That Freudian slip, however, reveals the basic flaw in the Government's argument: It is the doctrine of *mootness*, not standing, that addresses whether "an intervening circumstance [has] deprive[d] the plaintiff of a personal stake in the outcome

of the lawsuit." *Genesis HealthCare Corp.* v. *Symczyk*, 569 U.S. 66, 72 (2013) (internal quotation marks omitted); see also *Friends of the Earth*, *Inc.* v. *Laidlaw Environmental Services (TOC)*, *Inc.*, 528 U.S. 167, 189–192 (2000). The distinction matters because the Government, not petitioners, bears the burden to establish that a once-live case has become moot. *Id.*, at 189; *Adarand Constructors*, *Inc.* v. *Slater*, 528 U.S. 216, 222 (2000) (*per curiam*).

That burden is "heavy" where, as here, "[t]he only conceivable basis for a finding of mootness in th[e] case is [the respondent's] voluntary conduct." *Friends of the Earth*, 528 U. S., at 189. Although the Government briefly argues that the lower court's stay of its mandate extinguished the controversy, it cites no authority for that proposition, and it does not make sense: Lower courts frequently stay their mandates when notified that the losing party intends to seek our certiorari review. So the Government's mootness argument boils down to its representation that EPA has no intention of enforcing the Clean Power Plan prior to promulgating a new Section 111(d) rule.

But "voluntary cessation does not moot a case" unless it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U.S. 701, 719 (2007). Here the Government "nowhere suggests that if this litigation is resolved in its favor it will not" reimpose emissions limits predicated on generation shifting; indeed, it "vigorously defends" the legality of such an approach. *Ibid.* We do not dismiss a case as moot in such circumstances. See *City of Mesquite* v. *Aladdin's Castle*, *Inc.*, 455 U.S. 283, 288–289 (1982). The case thus remains justiciable, and we may turn to the merits.

III

A

In devising emissions limits for power plants, EPA first "determines" the "best system of emission reduction" that—taking into account cost, health, and other factors—it finds "has been adequately demonstrated." 42 U. S. C. §7411(a)(1). The Agency then quantifies "the degree of emission limitation achievable" if that best system were applied to the covered source. *Ibid.*; see also 80 Fed. Reg. 64719. The BSER, therefore, "is the central determination that the EPA must make in formulating [its emission] guidelines" under Section 111. *Id.*, at 64723. The issue here is whether restructuring the Nation's overall mix of electricity generation, to transition from 38% coal to 27% coal by 2030, can be the "best system of emission reduction" within the meaning of Section 111.

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis* v. *Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989). Where the statute at issue is one that confers authority upon an administrative agency, that inquiry must be "shaped, at least in some measure, by the nature of the question presented"—whether Congress in fact meant to confer the power the agency has asserted. *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). In the ordinary case, that context has no great effect on the appropriate analysis. Nonetheless, our precedent teaches that there are "extraordinary cases" that call for a different

approach—cases in which the "history and the breadth of the authority that [the agency] has asserted," and the "economic and political significance" of that assertion, provide a "reason to hesitate before concluding that Congress" meant to confer such authority. *Id.*, at 159–160.

Such cases have arisen from all corners of the administrative state. In *Brown & Williamson*, for instance, the Food and Drug Administration claimed that its authority over "drugs" and "devices" included the power to regulate, and even ban, tobacco products. *Id.*, at 126–127. We rejected that "expansive construction of the statute," concluding that "Congress could not have intended to delegate" such a sweeping and consequential authority "in so cryptic a fashion." *Id.*, at 160. In *Alabama Assn. of Realtors* v. *Department of Health and Human Servs.*, 594 U. S. ___, ___ (2021) (*per curiam*) (slip op., at 3), we concluded that the Centers for Disease Control and Prevention could not, under its authority to adopt measures "necessary to prevent the . . . spread of " disease, institute a nationwide eviction moratorium in response to the COVID–19 pandemic. We found the statute's language a "wafer-thin reed" on which to rest such a measure, given "the sheer scope of the CDC's claimed authority," its "unprecedented" nature, and the fact that Congress had failed to extend the moratorium after previously having done so. *Id.*, at ___–___ (slip op., at 6–8).

Our decision in *Utility Air* addressed another question regarding EPA's authority —namely, whether EPA could construe the term "air pollutant," in a specific provision of the Clean Air Act, to cover greenhouse gases. 573 U. S., at 310. Despite its textual plausibility, we noted that the Agency's interpretation would have given it permitting authority over millions of small sources, such as hotels and office buildings, that had never before been subject to such requirements. *Id.*, at 310, 324. We declined to uphold EPA's claim of "unheralded" regulatory power over "a significant portion of the American economy." *Id.*, at 324. In *Gonzales* v. *Oregon*, 546 U.S. 243 (2006), we confronted the Attorney General's assertion that he could rescind the license of any physician who prescribed a controlled substance for assisted suicide, even in a State where such action was legal. The Attorney General argued that this came within his statutory power to revoke licenses where he found them "inconsistent with the public interest," 21 U. S. C. §823(f). We considered the "idea that Congress gave [him] such broad and unusual authority through an implicit delegation . . . not sustainable." 546 U. S., at 267. Similar considerations informed our recent decision invalidating the Occupational Safety and Health Administration's mandate that "84 million Americans . . . either obtain a COVID–19 vaccine or undergo weekly medical testing at their own expense." *National Federation of Independent Business* v. *Occupational Safety and Health Administration*, 595 U. S. ___, ___ (2022) (*per curiam*) (slip op., at 5). We found it "telling that OSHA, in its half century of existence," had never relied on its authority to regulate occupational hazards to impose such a remarkable measure. *Id.*, at ___ (slip op., at 8).

All of these regulatory assertions had a colorable textual basis. And yet, in each case, given the various circumstances, "common sense as to the manner in which Congress [would have been] likely to delegate" such power to the agency at issue, *Brown*

& Williamson, 529 U. S., at 133, made it very unlikely that Congress had actually done so. Extraordinary grants of regulatory authority are rarely accomplished through "modest words," "vague terms," or "subtle device[s]." *Whitman*, 531 U. S., at 468. Nor does Congress typically use oblique or elliptical language to empower an agency to make a "radical or fundamental change" to a statutory scheme. *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U.S. 218, 229 (1994). Agencies have only those powers given to them by Congress, and "enabling legislation" is generally not an "open book to which the agency [may] add pages and change the plot line." E. Gellhorn & P. Verkuil, Controlling *Chevron*- Based Delegations, 20 Cardozo L. Rev. 989, 1011 (1999). We presume that "Congress intends to make major policy decisions itself, not leave those decisions to agencies." *United States Telecom Assn.* v. *FCC*, 855 F.3d 381, 419 (CADC 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us "reluctant to read into ambiguous statutory text" the delegation claimed to be lurking there. *Utility Air*, 573 U. S., at 324. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to "clear congressional authorization" for the power it claims. *Ibid.*

The dissent criticizes us for "announc[ing] the arrival" of this major questions doctrine, and argues that each of the decisions just cited simply followed our "ordinary method" of "normal statutory interpretation," *post,* at 13, 15 (opinion of Kagan, J.). But in what the dissent calls the "key case" in this area, *Brown & Williamson*, *post,* at 15, the Court could not have been clearer: "In extraordinary cases . . . there may be reason to hesitate" before accepting a reading of a statute that would, under more "ordinary" circumstances, be upheld. 529 U. S., at 159. Or, as we put it more recently, we "typically greet" assertions of "extravagant statutory power over the national economy" with "skepticism." *Utility Air*, 573 U. S., at 324. The dissent attempts to fit the analysis in these cases within routine statutory interpretation, but the bottom line—a requirement of "clear congressional authorization," *ibid.*—confirms that the approach under the major questions doctrine is distinct.

As for the major questions doctrine "label[ ]," *post,* at 13, it took hold because it refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted. Scholars and jurists have recognized the common threads between those decisions. So have we. See *Utility Air*, 573 U. S., at 324 (citing *Brown & Williamson* and *MCI*); *King* v. *Burwell*, 576 U.S. 473, 486 (2015) (citing *Utility Air*, *Brown & Williamson*, and *Gonzales*).

B

Under our precedents, this is a major questions case. In arguing that Section 111(d) empowers it to substantially restructure the American energy market, EPA "claim[ed] to discover in a long-extant statute an unheralded power" representing a "transformative expansion in [its] regulatory authority." *Utility Air*, 573 U. S., at 324. It located that newfound power in the vague language of an "ancillary provision[ ]" of the

Act, *Whitman*, 531 U. S., at 468, one that was designed to function as a gap filler and had rarely been used in the preceding decades. And the Agency's discovery allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself. *Brown & Williamson*, 529 U. S., at 159–160; *Gonzales*, 546 U. S., at 267–268; *Alabama Assn.*, 594 U. S., at ___, ___ (slip op., at 2, 8). Given these circumstances, there is every reason to "hesitate before concluding that Congress" meant to confer on EPA the authority it claims under Section 111(d). *Brown & Williamson*, 529 U. S., at 159–160.

Prior to 2015, EPA had always set emissions limits under Section 111 based on the application of measures that would reduce pollution by causing the regulated source to operate more cleanly. See, *e.g.*, 41 Fed. Reg. 48706 (requiring "degree of control achievable through the application of fiber mist eliminators"); see also *supra*, at 6. It had never devised a cap by looking to a "system" that would reduce pollution simply by "shifting" polluting activity "from dirtier to cleaner sources." 80 Fed. Reg. 64726; see *id.*, at 64738 ("[O]ur traditional interpretation . . . has allowed regulated entities to produce as much of a particular good as they desire provided that they do so through an appropriately clean (or low-emitting) process."). And as Justice Frankfurter has noted, "just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred." *FTC* v. *Bunte Brothers*, *Inc.*, 312 U.S. 349, 352 (1941).

The Government quibbles with this description of the history of Section 111(d), pointing to one rule that it says relied upon a cap-and-trade mechanism to reduce emissions. See 70 Fed. Reg. 28616 (2005) (Mercury Rule). The legality of that choice was controversial at the time and was never addressed by a court. See *New Jersey* v. *EPA*, 517 F.3d 574 (CADC 2008) (vacating on other grounds). Even assuming the Rule was valid, though, it still does not help the Government. In that regulation, EPA set the actual "emission cap"—*i.e.*, the limit on emissions that sources would be required to meet —"based on the level of [mercury] emissions reductions that w[ould] be achievable by" the use of "technologies [that could be] installed and operational on a nationwide basis" in the relevant timeframe—namely, wet scrubbers. 70 Fed. Reg. 28620–28621. In other words, EPA set the cap based on the application of particular controls, and regulated sources could have complied by installing them. By contrast, and by design, there is no control a coal plant operator can deploy to attain the emissions limits established by the Clean Power Plan. See *supra*, at 10. The Mercury Rule, therefore, is no precedent for the Clean Power Plan. To the contrary, it was one more entry in an unbroken list of prior Section 111 rules that devised the enforceable emissions limit by determining the best control mechanisms available for the source.[12]

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[12] The dissent cites other ostensible precedents, see *post*, at 25–26, but they are also inapposite. A few allowed cap-and-trade or similar averaging measures as compliance mechanisms, like the Mercury Rule. See, *e.g.*, 60 Fed. Reg. 65402 (1995). The others were not Section 111 rules.

This consistent understanding of "system[s] of emission reduction" tracked the seemingly universal view, as stated by EPA in its inaugural Section 111(d) rulemaking, that "Congress intended a technology-based approach" to regulation in that Section. 40 Fed. Reg. 53343 (1975); see *id.*, at 53341 ("degree of control to be reflected in EPA's emission guidelines" will be based on "application of best adequately demonstrated control technology").[13] A technology-based standard, recall, is one that focuses on improving the emissions performance of individual sources. EPA "commonly referred to" the "level of control" required as a "best demonstrated technology (BDT)" standard, 73 Fed. Reg. 34073, and consistently applied it as such. *E.g.*, 61 Fed. Reg. 9907 (declaring "BDT" to be "a well-designed and well-operated gas collection system and . . . a control device capable of reducing [harmful gases] in the collected gas by 98 weight-percent.").

Indeed, EPA nodded to this history in the Clean Power Plan itself, describing the sort of "systems of emission reduction" it had always before selected—"efficiency improvements, fuel-switching," and "add-on controls"—as "more traditional air pollution control measures." 80 Fed. Reg. 64784. The Agency noted that it had "considered" such measures as potential systems of emission reduction for carbon dioxide, *ibid.*, including a measure it ultimately adopted as a "component" of the BSER, namely, heat rate improvements. *Id.*, at 64727.

But, the Agency explained, in order to "control[ ] CO2 from affected [plants] at levels . . . necessary to mitigate the dangers presented by climate change," it could not base the emissions limit on "measures that improve efficiency at the power plants." *Id.*, at 64728. "The quantity of emissions reductions resulting from the application of these measures" would have been "too small." *Id.*, at 64727. Instead, to attain the necessary "critical CO2 reductions," EPA adopted what it called a "broader, forward-thinking approach to the design" of Section 111 regulations. *Id.*, at 64703. Rather than focus on improving the performance of individual sources, it would "improve the *overall power system* by lowering the carbon intensity of power generation." *Ibid.* (emphasis added). And it would do that by forcing a shift throughout the power grid from one type of energy source to another. In the words of the then-EPA Administrator, the rule was "not about pollution control" so much as it was "an investment opportunity" for States, especially "investments in renewables and clean energy." Oversight Hearing on EPA's

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[13] See McGarity 165 (EPA promulgates "technology-based new source performance standards that require the implementation of the 'best available demonstrated' technology"); P. McCubbin, The Risk in Technology-Based Standards, 16 Duke Env. L. & Pol'y Forum 1, 46, n. 180 (2003) (Section 111 standards "are another set of technology-based standards"); W. Wagner, The Triumph of Technology-Based Standards, 2000 U. Ill. L. Rev 83, 84, n. 4 ("Technology-based standards made their initial appearance" in "Section 111 of the Clean Air Act," which "requires the EPA to set technology-based emission limitations"). The dissent points to a 1977 amendment to Section 111 as evidence that the 1970 Congress did not intend for EPA to establish this sort of source-specific standard. *Post*, at 10–11. But it is clear that the 1977 amendment was merely intended to prohibit power plants from adopting one specific kind of at-the-source measure—a switch from burning high-sulfur coal to low-sulfur coal—and was not intended or understood to change the basic, source-focused regulatory approach. See *Wisconsin Elec. Power Co.* v. *Reilly*, 893 F.2d 901, 919 (CA8 1990) (explaining the history); B. Ackerman & W. Hassler, Clean Coal/Dirty Air (1981) (same).

Proposed Carbon Pollution Standards for Existing Power Plants before the Senate Committee on Environment and Public Works, 113th Cong., 2d Sess., p. 33 (2014).

This view of EPA's authority was not only unprecedented; it also effected a "fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation" into an entirely different kind. *MCI*, 512 U. S., at 231. Under the Agency's prior view of Section 111, its role was limited to ensuring the efficient pollution performance of each individual regulated source. Under that paradigm, if a source was already operating at that level, there was nothing more for EPA to do. Under its newly "discover[ed]" authority, *Utility Air*, 573 U. S., at 324, however, EPA can demand much greater reductions in emissions based on a very different kind of policy judgment: that it would be "best" if coal made up a much smaller share of national electricity generation. And on this view of EPA's authority, it could go further, perhaps forcing coal plants to "shift" away virtually all of their generation—*i.e.*, to cease making power altogether.[14]

The Government attempts to downplay the magnitude of this "unprecedented power over American industry." *Industrial Union Dept.*, *AFL–CIO* v. *American Petroleum Institute*, 448 U.S. 607, 645 (1980) (plurality opinion). The amount of generation shifting ordered, it argues, must be "adequately demonstrated" and "best" in light of the statutory factors of "cost," "nonair quality health and environmental impact," and "energy requirements." 42 U. S. C. §7411(a)(1). EPA therefore must limit the magnitude of generation shift it demands to a level that will not be "exorbitantly costly" or "threaten the reliability of the grid." Brief for Federal Respondents 42.

But this argument does not so much *limit* the breadth of the Government's claimed authority as *reveal* it. On EPA's view of Section 111(d), Congress implicitly tasked it, and it alone, with balancing the many vital considerations of national policy implicated in deciding how Americans will get their energy. EPA decides, for instance, how much of a switch from coal to natural gas is practically feasible by 2020, 2025, and 2030 before the grid collapses, and how high energy prices can go as a result before they become unreasonably "exorbitant."

There is little reason to think Congress assigned such decisions to the Agency. For one thing, as EPA itself admitted when requesting special funding, "Understand[ing] and project[ing] system-wide . . . trends in areas such as electricity transmission, distribution, and storage" requires "technical and policy expertise *not* traditionally needed in EPA regulatory development." EPA, Fiscal Year 2016: Justification of Appropriation Estimates for the Committee on Appropriations 213 (2015) (emphasis added). "When [an] agency has no comparative expertise" in making certain policy judgments, we have said, "Congress presumably would not" task it with doing so. *Kisor* v. *Wilkie*, 588 U. S. ___, ___ (2019) (slip op., at 17); see also *Gonzales*, 546 U. S., at 266–267.

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[14] The dissent suggests that EPA could bring about the same result by, for example, simply requiring coal plants to become natural gas plants, and that this would fit within the prior regulatory approach of efficiency-improving, at-the-source measures. *Post*, at 24. Of course, EPA has never ordered anything remotely like that, and we doubt it could. Section 111(d) empowers EPA to guide States in "establish[ing] standards of performance" for "existing source[s]," §7411(d)(1), not to direct existing sources to effectively cease to exist.

We also find it "highly unlikely that Congress would leave" to "agency discretion" the decision of how much coal- based generation there should be over the coming decades. *MCI*, 512 U. S., at 231; see also *Brown & Williamson*, 529 U. S., at 160 ("We are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."). The basic and consequential tradeoffs involved in such a choice are ones that Congress would likely have intended for itself. See W. Eskridge, Interpreting Law: A Primer on How To Read Statutes and the Constitution 288 (2016) ("Even if Congress has delegated an agency general rulemaking or adjudicatory power, judges presume that Congress does not delegate its authority to settle or amend major social and economic policy decisions."). Congress certainly has not conferred a like authority upon EPA anywhere else in the Clean Air Act. The last place one would expect to find it is in the previously little-used backwater of Section 111(d).

The dissent contends that there is nothing surprising about EPA dictating the optimal mix of energy sources nationwide, since that sort of mandate will reduce air pollution from power plants, which is EPA's bread and butter. *Post*, at 20–22. But that does not follow. Forbidding evictions may slow the spread of disease, but the CDC's ordering such a measure certainly "raise[s] an eyebrow." *Post*, at 18. We would not expect the Department of Homeland Security to make trade or foreign policy even though doing so could decrease illegal immigration. And no one would consider generation shifting a "tool" in OSHA's "toolbox," *post*, at 21, even though reducing generation at coal plants would reduce workplace illness and injury from coal dust.

The dissent also cites our decision in *American Elec. Power Co.* v. *Connecticut*, 564 U.S. 410 (2011). *Post*, at 20. The question there, however, was whether Congress wanted district court judges to decide, under unwritten federal nuisance law, "whether and how to regulate carbon- dioxide emissions from powerplants." 564 U. S., at 426. We answered no, given the existence of Section 111(d). But we said nothing about the ways in which Congress intended EPA to exercise its power under that provision. And it is doubtful we had in mind that it would claim the authority to require a large shift from coal to natural gas, wind, and solar. After all, EPA had never regulated in that manner, despite having issued many prior rules governing power plants under Section 111. See, *e.g.*, 71 Fed. Reg. 9866 (2006); 70 Fed. Reg. 28616; 44 Fed. Reg. 33580; 36 Fed. Reg. 24875 (1973).[15]

Finally, we cannot ignore that the regulatory writ EPA newly uncovered conveniently enabled it to enact a program that, long after the dangers posed by

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[15] According to the dissent, "EPA is always controlling the mix of energy sources" under Section 111 because all of the Agency's rules impose some costs on regulated plants, and therefore (all else equal) cause those plants to lose some share of the electricity market. *Post,* at 22. But there is an obvious difference between (1) issuing a rule that may end up causing an incidental loss of coal's market share, and (2) simply announcing what the market share of coal, natural gas, wind, and solar must be, and then requiring plants to reduce operations or subsidize their competitors to get there. No one has ever thought that the Clean Power Plan was just business as usual. See *American Lung Assn.* v. *EPA*, 985 F.3d 914, 1000 (CADC 2021) (Walker, J., dissenting) ("Leaders of the environmental movement considered the rule 'groundbreaking,' called its announcement 'historic,' and labeled it a 'critically important catalyst.' " (footnotes omitted)).

greenhouse gas emissions "had become well known, Congress considered and rejected" multiple times. *Brown & Williamson*, 529 U. S., at 144; see also *Alabama Assn.*, 594 U. S., at ___ (slip op., at 2); *Bunte Brothers*, 312 U. S., at 352 (lack of authority not previously exercised "reinforced by [agency's] unsuccessful attempt . . . to secure from Congress an express grant of [the challenged] authority"). At bottom, the Clean Power Plan essentially adopted a cap-and-trade scheme, or set of state cap-and-trade schemes, for carbon. See 80 Fed. Reg. 64734 ("Emissions trading is . . . an integral part of our BSER analysis."). Congress, however, has consistently rejected proposals to amend the Clean Air Act to create such a program. See, *e.g.*, American Clean Energy and Security Act of 2009, H. R. 2454, 111th Cong., 1st Sess.; Clean Energy Jobs and American Power Act, S. 1733, 111th Cong., 1st Sess. (2009). It has also declined to enact similar measures, such as a carbon tax. See, *e.g.*, Climate Protection Act of 2013, S. 332, 113th Cong., 1st Sess.; Save our Climate Act of 2011, H. R. 3242, 112th Cong., 1st Sess. "The importance of the issue," along with the fact that the same basic scheme EPA adopted "has been the subject of an earnest and profound debate across the country, . . . makes the oblique form of the claimed delegation all the more suspect." *Gonzales*, 546 U. S., at 267–268 (internal quotation marks omitted).

C

Given these circumstances, our precedent counsels skepticism toward EPA's claim that Section 111 empowers it to devise carbon emissions caps based on a generation shifting approach. To overcome that skepticism, the Government must—under the major questions doctrine—point to "clear congressional authorization" to regulate in that manner. *Utility Air*, 573 U. S., at 324.

All the Government can offer, however, is the Agency's authority to establish emissions caps at a level reflecting "the application of the best system of emission reduction . . . adequately demonstrated." 42 U. S. C. §7411(a)(1). As a matter of "definitional possibilities," *FCC* v. *AT&T Inc.*, 562 U.S. 397, 407 (2011), generation shifting can be described as a "system"—"an aggregation or assemblage of objects united by some form of regular interaction," Brief for Federal Respondents 31—capable of reducing emissions. But of course almost anything could constitute such a "system"; shorn of all context, the word is an empty vessel. Such a vague statutory grant is not close to the sort of clear authorization required by our precedents.

The Government, echoed by the other respondents, looks to other provisions of the Clean Air Act for support. It points out that the Act elsewhere uses the word "system" or "similar words" to describe cap-and-trade schemes or other sector-wide mechanisms for reducing pollution. *Ibid*. The Acid Rain program set out in Title IV of the Act establishes a cap-and-trade scheme for reducing sulfur dioxide emissions, which the statute refers to as an "emission allocation and transfer *system*." §7651(b) (emphasis added). And Section 110 of the NAAQS program specifies that "marketable permits" and "auctions of emissions rights" qualify as "control measures, means, or techniques" that States may adopt in their state implementation plans in order "to meet the applicable requirements of " a NAAQS. §7410(a)(2)(A). If the word "system" or similar words like

"technique" or "means" can encompass cap-and-trade, the Government maintains, why not in Section 111?

But just because a cap-and-trade "system" can be used to reduce emissions does not mean that it is the kind of "system of emission reduction" referred to in Section 111. Indeed, the Government's examples demonstrate why it is not.

First, unlike Section 111, the Acid Rain and NAAQS programs contemplate trading systems as a means of *complying* with an *already established emissions limit*, set either directly by Congress (as with Acid Rain, see 42 U. S. C. §7651c) or by reference to the safe concentration of the pollutant in the ambient air (as with the NAAQS). In Section 111, by contrast, it is EPA's job to come up with the cap itself: the "numerical limit on emissions" that States must apply to each source. 80 Fed. Reg. 64768. We doubt that Congress directed the Agency to set an emissions cap at the level "which reflects the degree of emission limitation achievable through the application of [a cap-and-trade] system," §7411(a)(1), for that degree is indeterminate. It is one thing for Congress to authorize regulated sources to use trading to comply with a preset cap, or a cap that must be based on some scientific, objective criterion, such as the NAAQS. It is quite another to simply authorize EPA to set the cap itself wherever the Agency sees fit.

Second, Congress added the above authorizations for the use of emissions trading programs in 1990, simultaneous with amending Section 111 to its present form. At the time, cap-and-trade was a novel and highly touted concept. The Acid Rain program was "the nation's first-ever emissions trading program." L. Heinzerling & R. Steinzor, A Perfect Storm: Mercury and the Bush Administration, 34 Env. L. Rep. 10297, 10309 (2004). And Congress went out of its way to amend the NAAQS statute to make absolutely clear that the "measures, means, [and] techniques" States could use to meet the NAAQS included cap-and-trade. §7410(a)(2)(A). Yet "not a peep was heard from Congress about the possibility that a trading regime could be installed under §111." *Id.*, at 10309.

Finally, the Government notes that other parts of the Clean Air Act, past and present, have "explicitly limited the permissible components of a particular 'system' " of emission reduction in some regard. Brief for Federal Respondents 32. For instance, a separate section of the statute empowers EPA to require the "degree of reduction achievable through the *retrofit* application of the best system of *continuous* emission reduction." §7651f(b)(2) (emphasis added). The comparatively unadorned use of the phrase "best system of emission reduction" in Section 111, the Government urges, "suggest[s] a conscious congressional" choice *not* to limit the measures that may constitute the BSER to those applicable at or to an individual source. *Id.*, at 32.

These arguments, however, concern an interpretive question that is not at issue. We have no occasion to decide whether the statutory phrase "system of emission reduction" refers *exclusively* to measures that improve the pollution performance of individual sources, such that all other actions are ineligible to qualify as the BSER. To be sure, it is pertinent to our analysis that EPA has acted consistent with such a limitation for the first four decades of the statute's existence. But the only interpretive question before us, and the only one we answer, is more narrow: whether the "best system of emission reduction"

identified by EPA in the Clean Power Plan was within the authority granted to the Agency in Section 111(d) of the Clean Air Act. For the reasons given, the answer is no.[16]

* * *

Capping carbon dioxide emissions at a level that will force a nationwide transition away from the use of coal to generate electricity may be a sensible "solution to the crisis of the day." *New York* v. *United States*, 505 U.S. 144, 187 (1992). But it is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme in Section 111(d). A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body. The judgment of the Court of Appeals for the District of Columbia Circuit is reversed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

§ 7.05 The *Chevron* Revolution

Supplement to notes 7-37 through 40:

Sackett v. EPA and *West Virginia v. EPA* rely in part on *Utility Air*, presented here.

Utility Air Regulatory Group, Petitioner
v.
Environmental Protection Agency, et al., Respondent

No. 12–1146 | Argued Feb. 24, 2014 | Decided June 23, 2014
134 S. Ct. 2427

JUSTICE SCALIA announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II.

Acting pursuant to the Clean Air Act . . . the Environmental Protection Agency recently set standards for emissions of "greenhouse gases" (substances it believes contribute to "global climate change") from new motor vehicles. We must decide whether it was permissible for EPA to determine that its motor-vehicle greenhouse-gas regulations

[16] We find it odd that the dissent accuses us of champing at the bit to "constrain EPA's efforts to address climate change," *post*, at 4, yet also chides us for "mak[ing] no effort" to opine—in what would be plain dicta—on "how far [our] opinion constrain[s] EPA," *post*, at 12.

automatically triggered permitting requirements under the Act for stationary sources that emit greenhouse gases.

I. Background

A. Stationary-Source Permitting

The Clean Air Act regulates pollution-generating emissions from both stationary sources, such as factories and powerplants, and moving sources, such as cars, trucks, and aircraft. This litigation concerns permitting obligations imposed on stationary sources under Titles I and V of the Act.

Title I charges EPA with formulating national ambient air quality standards (NAAQS) for air pollutants. . . . States have primary responsibility for implementing the NAAQS by developing "State implementation plans." . . . A State must designate every area within its borders as "attainment," "nonattainment," or "unclassifiable" with respect to each NAAQS . . . and the State's implementation plan must include permitting programs for stationary sources that vary according to the classification of the area where the source is or is proposed to be located. . . .

Stationary sources in areas designated attainment or unclassifiable are subject to the Act's provisions relating to "Prevention of Significant Deterioration" (PSD). . . . Since the inception of the PSD program, every area of the country has been designated attainment or unclassifiable for at least one NAAQS pollutant; thus, on EPA's view, all stationary sources are potentially subject to PSD review.

[In areas where the PSD program applies, it is unlawful to construct a major emitting facility—a stationary source that may emit 250 tons per year of any pollutant or 100 tons per year for certain types of sources—without first obtaining a permit. Permit applicants must not violate air-quality standards and must implement "best available control technology" (BACT) for each pollutant subject to regulation.]

In addition to the PSD permitting requirements for construction and modification, Title V of the Act makes it unlawful to operate any "major source," wherever located, without a comprehensive operating permit. . . . Title V defines a "major source" by reference to the Act-wide definition of "major stationary source," which in turn means any stationary source with the potential to emit 100 tons per year of "any air pollutant." . . .

B. EPA's Greenhouse-Gas Regulations

In 2007, the Court held that Title II of the Act "authorize[d] EPA to regulate greenhouse gas emissions from new motor vehicles" if the Agency "form[ed] a

'judgment' that such emissions contribute to climate change." *Massachusetts v. EPA*, 549 U.S. 497. In response to that decision, EPA embarked on a course of regulation resulting in "the single largest expansion in the scope of the [Act] in its history."

[In a notice of proposed rulemaking, EPA expressed its view that once greenhouse gases are regulated under any portion of the Clean Air Act, the PSD and Title V permitting requirements would extend to all stationary sources with the potential to emit greenhouse gases in excess of the 250/100-ton thresholds, sweeping many new sources under these programs. In spite of its concern, EPA proceeded to issue a "Tailpipe Rule" for motor vehicle emissions.]

EPA then announced steps it was taking to "tailor" the PSD program and Title V to greenhouse gases. . . . Those steps were necessary, it said, because the PSD program and Title V were designed to regulate "a relatively small number of large industrial sources," and requiring permits for all sources with greenhouse-gas emissions above the statutory thresholds would radically expand those programs, making them both unadministrable and "unrecognizable to the Congress that designed" them. . . . EPA adopted a "phase-in approach" that it said would "appl[y] PSD and title V at threshold levels that are as close to the statutory levels as possible, and do so as quickly as possible, at least to a certain point." . . .

[The phase-in approach consisted of three steps. During the first six months (step one), no source would become newly subject to the PSD/Title V requirements solely on the basis of greenhouse gas emissions, though sources already required to obtain permits based on conventional pollutants would need to comply with BACT for greenhouse gases if they emitted 75,000 tons per year. Then, for a one-year period (step two), sources with the potential to emit 100,000 tons of greenhouse gases per year would be subject to PSD/ Title V. After that one-year period (step three), the agency hinted that it might reduce permitting thresholds to 50,000 tons with appropriate exemptions.]

C. Decision Below

Numerous parties, including several States, filed petitions for review in the D.C. Circuit under 42 U.S.C. § 7607(b), challenging EPA's greenhouse-gas-related actions. The Court of Appeals dismissed some of the petitions for lack of jurisdiction and denied the remainder. . . . First, it upheld the Endangerment Finding and Tailpipe Rule. . . . Next, it held that EPA's interpretation of the PSD permitting requirement as applying to "any regulated air pollutant," including greenhouse gases, was "compelled by the statute." . . . The court also found it "crystal clear that PSD permittees must install BACT for greenhouse gases." . . . Because it deemed petitioners' arguments about the PSD program insufficiently applicable to Title V, it held they had "forfeited any challenges to EPA's greenhouse gas-inclusive interpretation of Title V." . . . Finally, it held that

petitioners were without Article III standing to challenge EPA's efforts to limit the reach of the PSD program and Title V through the Triggering and Tailoring Rules. . . .

We granted six petitions for certiorari but agreed to decide only one question: "Whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases."

II. Analysis

. . .

A. The PSD and Title V Triggers.

We first decide whether EPA permissibly interpreted the statute to provide that a source may be required to obtain a PSD or Title V permit on the sole basis of its potential greenhouse-gas emissions.

1.

EPA thought its conclusion that a source's greenhouse-gas emissions may necessitate a PSD or Title V permit followed from the Act's unambiguous language. The Court of Appeals agreed and held that the statute "compelled" EPA's interpretation. . . . We disagree. The statute compelled EPA's greenhouse-gas-inclusive interpretation with respect to neither the PSD program nor Title V.

The Court of Appeals reasoned by way of a flawed syllogism: Under *Massachusetts*, the general, Act-wide definition of "air pollutant" includes greenhouse gases; the Act requires permits for major emitters of "any air pollutant;" therefore, the Act requires permits for major emitters of greenhouse gases. The conclusion follows from the premises only if the air pollutants referred to in the permit-requiring provisions (the minor premise) are the same air pollutants encompassed by the Act-wide definition as interpreted in *Massachusetts* (the major premise). Yet no one—least of all EPA—endorses that proposition, and it is obviously untenable.

The Act-wide definition says that an air pollutant is "any air pollution agent or combination of such agents, including any physical, chemical, biological, [or] radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air." In *Massachusetts*, the Court held that the Act-wide definition includes greenhouse gases because it is all-encompassing; it "embraces all airborne compounds of whatever stripe." . . . But where the term "air pollutant" appears in the Act's operative provisions, EPA has routinely given it a narrower, context-appropriate meaning.

That is certainly true of the provisions that require PSD and Title V permitting for

major emitters of "any air pollutant." Since 1978, EPA's regulations have interpreted "air pollutant" in the PSD permitting trigger as limited to regulated air pollutants . . . a class much narrower than *Massachusetts*' "all airborne compounds of whatever stripe" . . . . and since 1993 EPA has informally taken the same position with regard to the Title V permitting trigger, a position the Agency ultimately incorporated into some of the regulations at issue here. . . . Those interpretations were appropriate: It is plain as day that the Act does not envision an elaborate, burdensome permitting process for major emitters of steam, oxygen, or other harmless airborne substances. It takes some cheek for EPA to insist that it cannot possibly give "air pollutant" a reasonable, context-appropriate meaning in the PSD and Title V contexts when it has been doing precisely that for decades.

. . .

Massachusetts does not strip EPA of authority to exclude greenhouse gases from the class of regulable air pollutants under . . . parts of the Act where their inclusion would be inconsistent with the statutory scheme. . . . *Massachusetts* does not foreclose the Agency's use of statutory context to infer that certain of the Act's provisions use "air pollutant" to denote not every conceivable airborne substance, but only those that may sensibly be encompassed within the particular regulatory program. . . .

[JUSTICE SCALIA chided Congress's "profligate use of 'air pollutant' where what is meant is obviously narrower than the Act-wide definition," but he pointed out EPA and the courts must do their best to read the words of the statute with a view to their place in the overall statutory scheme.]

In sum, there is no insuperable textual barrier to EPA's interpreting "any air pollutant" in the permitting triggers of PSD and Title V to encompass only pollutants emitted in quantities that enable them to be sensibly regulated at the statutory thresholds, and to exclude those atypical pollutants that, like greenhouse gases, are emitted in such vast quantities that their inclusion would radically transform those programs and render them unworkable as written.

2.

Having determined that EPA was mistaken in thinking the Act compelled a greenhouse-gas-inclusive interpretation of the PSD and Title V triggers, we next consider the Agency's alternative position that its interpretation was justified as an exercise of its "discretion" to adopt "a reasonable construction of the statute." . . . We conclude that EPA's interpretation is not permissible.

[Even under the deferential *Chevron* framework, agencies must operate within the bounds of reasonable interpretation, accounting for the specific context in which language is used and the structure and design of the statute as a whole.]

EPA itself has repeatedly acknowledged that applying the PSD and Title V permitting requirements to greenhouse gases would be inconsistent with—in fact, would overthrow—the Act's structure and design. . . .

Like EPA, we think it beyond reasonable debate that requiring permits for sources based solely on their emission of greenhouse gases at the 100– and 250–tons–per–year levels set forth in the statute would be "incompatible" with "the substance of Congress' regulatory scheme."

. . .

The fact that EPA's greenhouse-gas-inclusive interpretation of the PSD and Title V triggers would place plainly excessive demands on limited governmental resources is alone a good reason for rejecting it; but that is not the only reason. EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization. . . . The power to require permits for the construction and modification of tens of thousands, and the operation of millions, of small sources nationwide falls comfortably within the class of authorizations that we have been reluctant to read into ambiguous statutory text. Moreover, in EPA's assertion of that authority, we confront a singular situation: an agency laying claim to extravagant statutory power over the national economy while at the same time strenuously asserting that the authority claimed would render the statute "unrecognizable to the Congress that designed" it. . . . Since, as we hold above, the statute does not compel EPA's interpretation, it would be patently unreasonable—not to say outrageous—for EPA to insist on seizing expansive power that it admits the statute is not designed to grant.

3.

EPA thought that despite the foregoing problems, it could make its interpretation reasonable by adjusting the levels at which a source's greenhouse-gas emissions would oblige it to undergo PSD and Title V permitting. Although the Act, in no uncertain terms, requires permits for sources with the potential to emit more than 100 or 250 tons per year of a relevant pollutant, EPA in its Tailoring Rule wrote a new threshold of 100,000 tons per year for greenhouse gases. Since the Court of Appeals thought the statute unambiguously made greenhouse gases capable of triggering PSD and Title V, it held that petitioners lacked Article III standing to challenge the Tailoring Rule because that rule did not injure petitioners but merely relaxed the pre-existing statutory requirements. Because we, however, hold that EPA's greenhouse-gas-inclusive interpretation of the triggers was not compelled, and because EPA has essentially admitted that its interpretation would be unreasonable without "tailoring," we consider the validity of the Tailoring Rule.

We conclude that EPA's rewriting of the statutory thresholds was impermissible and therefore could not validate the Agency's interpretation of the triggering provisions. An agency has no power to "tailor" legislation to bureaucratic policy goals by rewriting unambiguous statutory terms. Agencies exercise discretion only in the interstices created by statutory silence or ambiguity; they must always "give effect to the unambiguously expressed intent of Congress." . . . It is hard to imagine a statutory term less ambiguous than the precise numerical thresholds at which the Act requires PSD and Title V permitting. When EPA replaced those numbers with others of its own choosing, it went well beyond the "bounds of its statutory authority."

. . .

Were we to recognize the authority claimed by EPA in the Tailoring Rule, we would deal a severe blow to the Constitution's separation of powers. Under our system of government, Congress makes laws and the President, acting at times through agencies like EPA, "faithfully execute[s]" them. . . . The power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration. But it does not include a power to revise clear statutory terms that turn out not to work in practice. . . .

In the Tailoring Rule, EPA asserts newfound authority to regulate millions of small sources—including retail stores, offices, apartment buildings, shopping centers, schools, and churches—and to decide, on an ongoing basis and without regard for the thresholds prescribed by Congress, how many of those sources to regulate. We are not willing to stand on the dock and wave goodbye as EPA embarks on this multiyear voyage of discovery. We reaffirm the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate. EPA therefore lacked authority to "tailor" the Act's unambiguous numerical thresholds to accommodate its greenhouse-gas-inclusive interpretation of the permitting triggers. Instead, the need to rewrite clear provisions of the statute should have alerted EPA that it had taken a wrong interpretive turn. Agencies are not free to "adopt . . . unreasonable interpretations of statutory provisions and then edit other statutory provisions to mitigate the unreasonableness." . . . Because the Tailoring Rule cannot save EPA's interpretation of the triggers, that interpretation was impermissible under *Chevron*.

[Although the court invalidated EPA's Tailoring Rule, it agreed with the agency that sources which already required permits on the basis of conventional pollutants could be required to comply with BACT for greenhouse gas emissions. The text of the BACT provision in the Clean Air Act is more specific than the ambiguous text of the PSD and Title V permitting triggers: it provides that BACT is required for *each* pollutant subject to Clean Air Act regulation. Moreover, the wider statutory context does not call for a narrower construction. And, as JUSTICE SCALIA pointed out, even if the text were

ambiguous, EPA's extension of BACT to greenhouse gases emitted by sources already subject to permitting regulation "is not so disastrously unworkable . . . as to convince [the Court] that EPA's interpretation is unreasonable."]

To sum up: We hold that EPA exceeded its statutory authority when it interpreted the Clean Air Act to require PSD and Title V permitting for stationary sources based on their greenhouse-gas emissions. Specifically, the Agency may not treat greenhouse gases as a pollutant for purposes of defining a "major emitting facility" (or a "modification" thereof) in the PSD context or a "major source" in the Title V context. To the extent its regulations purport to do so, they are invalid. EPA may, however, continue to treat greenhouse gases as a "pollutant subject to regulation under this chapter" for purposes of requiring BACT for [sources already subject to permitting regulation]. The judgment of the Court of Appeals is affirmed in part and reversed in part.

§ 7.07 When *Chevron* Does Not Apply

Supplement to note 52:

Kisor v. Wilkie

139 S. Ct. 2400 (2019)

Justice KAGAN announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–B, III–B, and IV, and an opinion with respect to Parts II–A and III–A, in which Justice GINSBURG, Justice BREYER, and Justice SOTOMAYOR join.

This Court has often deferred to agencies' reasonable readings of genuinely ambiguous regulations. We call that practice *Auer* deference, or sometimes *Seminole Rock* deference, after two cases in which we employed it. The only question presented here is whether we should overrule those decisions, discarding the deference they give to agencies. We answer that question no. *Auer* deference retains an important role in construing agency regulations. But even as we uphold it, we reinforce its limits. *Auer* deference is sometimes appropriate and sometimes not. Whether to apply it depends on a range of considerations that we have noted now and again, but compile and further develop today. The deference doctrine we describe is potent in its place, but cabined in its scope. On remand, the Court of Appeals should decide whether it applies to the agency interpretation at issue.

I

[The Court summarized the facts of the case, admitting that, "[t]ruth be told, nothing recounted in this Part has much bearing on the rest of our decision."]

II

Before addressing that question directly, we spend some time describing what *Auer* deference is, and is not, for. You might view this Part as "just background" because we have made many of its points in prior decisions. But even if so, it is background that matters. . . .

A

Begin with a familiar problem in administrative law: For various reasons, regulations may be genuinely ambiguous. They may not directly or clearly address every issue; when applied to some fact patterns, they may prove susceptible to more than one reasonable reading. Sometimes, this sort of ambiguity arises from careless drafting—the use of a dangling modifier, an awkward word, an opaque construction. But often, ambiguity reflects the well-known limits of expression or knowledge. The subject matter of a rule "may be so specialized and varying in nature as to be impossible"—or at any rate, impracticable—to capture in its every detail. *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). Or a "problem[ ] may arise" that the agency, when drafting the rule, "could not [have] reasonably foresee[n]." *Id.,* at 202. Whichever the case, the result is to create real uncertainties about a regulation's meaning.

Consider these examples:

- In a rule issued to implement the Americans with Disabilities Act (ADA), the Department of Justice requires theaters and stadiums to provide people with disabilities "lines of sight comparable to those for members of the general public." 28 C.F.R. pt. 36, App. A, p. 563 (1996). Must the Washington Wizards construct wheelchair seating to offer lines of sight over spectators when they rise to their feet? Or is it enough that the facility offers comparable views so long as everyone remains seated? See *Paralyzed Veterans of Am. v. D. C. Arena L. P.*, 117 F.3d 579, 581–582 (CADC 1997).

- The Transportation Security Administration (TSA) requires that liquids, gels, and aerosols in carry-on baggage be packed in containers smaller than 3.4 ounces and carried in a clear plastic bag. Does a traveler have to pack his jar of truffle pâté in that way? See *Laba v. Copeland*, 2016 WL 5958241, *1 (WDNC, Oct. 13, 2016).

- The Mine Safety and Health Administration issues a rule requiring employers to report occupational diseases within two weeks after they are "diagnosed." 30 C.F.R. § 50.20(a) (1993). Do chest X-ray results that "scor[e]" above some level of opacity count as a "diagnosis"? What level, exactly? See *American Min. Congress v. Mine Safety and Health Admin.*, 995 F.2d 1106, 1107–1108 (CADC 1993).

- An FDA regulation gives pharmaceutical companies exclusive rights to drug products if they contain "no active moiety that has been approved by FDA in any other" new drug application. 21 C.F.R. § 314.108(a) (2010). Has a company created a new "active moiety" by joining a previously approved moiety to lysine through a non-ester covalent bond? See *Actavis Elizabeth LLC v. FDA*, 625 F.3d 760, 762–763 (CADC 2010).

- Or take the facts of *Auer* itself. An agency must decide whether police captains are eligible for overtime under the Fair Labor Standards Act. According to the agency's regulations, employees cannot receive overtime if they are paid on a "salary basis." 29 C.F.R. § 541.118(a) (1996). And in deciding whether an employee is salaried, one question is whether his pay is "subject to reduction" based on performance. *Ibid.* A police department's manual informs its officers that their pay might be docked if they commit a disciplinary infraction. Does that fact alone make them "subject to" pay deductions? Or must the department have a practice of docking officer pay, so that the possibility of that happening is more than theoretical? 519 U.S. at 459–462.

In each case, interpreting the regulation involves a choice between (or among) more than one reasonable reading. To apply the rule to some unanticipated or unresolved situation, the court must make a judgment call. How should it do so?

In answering that question, we have often thought that a court should defer to the agency's construction of its own regulation. . . . . And *Seminole Rock* itself was not built on sand. Deference to administrative agencies traces back to the late nineteenth century, and perhaps beyond. See *United States v. Eaton*, 169 U.S. 331, 343 (1898) ("The interpretation given to the regulations by the department charged with their execution ... is entitled to the greatest weight").

We have explained *Auer* deference (as we now call it) as rooted in a presumption about congressional intent—a presumption that Congress would generally want the agency to play the primary role in resolving regulatory ambiguities. Congress, we have pointed out, routinely delegates to agencies the power to implement statutes by issuing rules. In doing so, Congress knows (how could it not?) that regulations will sometimes contain ambiguities. But Congress almost never explicitly assigns responsibility to deal with that problem, either to agencies or to courts. Hence the need to presume, one way or the other, what Congress would want. And as between those two choices, agencies have gotten the nod. We have adopted the presumption—though it is always rebuttable—that "the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." Or otherwise said, we have thought that when granting rulemaking power to agencies, Congress usually intends to give them, too, considerable latitude to interpret the ambiguous rules they issue.

In part, that is because the agency that promulgated a rule is in the "better position [to] reconstruct" its original meaning. Consider that if you don't know what some text (say, a memo or an e-mail) means, you would probably want to ask the person who wrote it. And for the same reasons, we have thought, Congress would too (though the person is here a collective actor). The agency that "wrote the regulation" will often have direct insight into what that rule was intended to mean. . . .

In still greater measure, the presumption that Congress intended *Auer* deference stems from the awareness that resolving genuine regulatory ambiguities often "entail[s] the exercise of judgment grounded in policy concerns." Return to our TSA example. In most of their applications, terms like "liquids" and "gels" are clear enough. (Traveler checklist: Pretzels OK; water not.) But resolving the uncertain issues—the truffle pâtés or olive tapenades of the world—requires getting in the weeds of the rule's policy: Why does TSA ban liquids and gels in the first instance? What makes them dangerous? Can a potential hijacker use pâté jars in the same way as soda cans? Or take the less specialized-seeming ADA example. It is easy enough to know what "comparable lines of sight" means in a movie theater—but more complicated when, as in sports arenas, spectators sometimes stand up. How costly is it to insist that the stadium owner take that sporadic behavior into account, and is the viewing value received worth the added expense? That cost-benefit calculation, too, sounds more in policy than in law. Or finally, take the more technical "moiety" example. Or maybe, don't. If you are a judge, you probably have no idea of what the FDA's rule means, or whether its policy is implicated when a previously approved moiety is connected to lysine through a non-ester covalent bond.

And Congress, we have thought, knows just that: It is attuned to the comparative advantages of agencies over courts in making such policy judgments. Agencies (unlike courts) have "unique expertise," often of a scientific or technical nature, relevant to applying a regulation "to complex or changing circumstances." . . .

Finally, the presumption we use reflects the well-known benefits of uniformity in interpreting genuinely ambiguous rules. . . . Consider *Auer* itself. See *supra,* at 2411 - 2412. There, four Circuits held that police captains were "subject to" pay deductions for disciplinary infractions if a police manual said they were, even if the department had never docked anyone. Two other Circuits held that captains were "subject to" pay deductions only if the department's actual practice made that punishment a realistic possibility. Had the agency issued an interpretation before all those rulings (rather than, as actually happened, in a brief in this Court), a deference rule would have averted most of that conflict and uncertainty. . . .

B

But all that said, *Auer* deference is not the answer to every question of interpreting an agency's rules. Far from it. As we explain in this section, the possibility of deference can arise only if a regulation is genuinely ambiguous. And when we use that

term, we mean it—genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation. Still more, not all reasonable agency constructions of those truly ambiguous rules are entitled to deference. . . . [W]hen the reasons for [deference] do not apply, or countervailing reasons outweigh them, courts should not give deference to an agency's reading, except to the extent it has the "power to persuade." *Christopher*, 567 U.S. at 159 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944)). . . . . And although the limits of *Auer* deference are not susceptible to any rigid test, we have noted various circumstances in which such deference is "unwarranted." In particular, that will be so when a court concludes that an interpretation does not reflect an agency's authoritative, expertise-based, "fair[, or] considered judgment."

. . . [I]n a vacuum, our most classic formulation of the test—whether an agency's construction is "plainly erroneous or inconsistent with the regulation," *Seminole Rock*, 325 U.S. at 414—may suggest a caricature of the doctrine, in which deference is "reflexive." . . . So before we turn to Kisor's specific grievances, we think it worth reinforcing some of the limits inherent in the *Auer* doctrine.

First and foremost, a court should not afford *Auer* deference unless the regulation is genuinely ambiguous. If uncertainty does not exist, there is no plausible reason for deference. The regulation then just means what it means—and the court must give it effect, as the court would any law. Otherwise said, the core theory of *Auer* deference is that sometimes the law runs out, and policy-laden choice is what is left over. But if the law gives an answer—if there is only one reasonable construction of a regulation—then a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense. Deference in that circumstance would "permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Auer* does not, and indeed could not, go that far.

And before concluding that a rule is genuinely ambiguous, a court must exhaust all the "traditional tools" of construction. *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, n. 9 (1984) (adopting the same approach for ambiguous statutes). For again, only when that legal toolkit is empty and the interpretive question still has no single right answer can a judge conclude that it is "more [one] of policy than of law." That means a court cannot wave the ambiguity flag just because it found the regulation impenetrable on first read. . . . To make that effort, a court must "carefully consider[ ]" the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on. . . .

If genuine ambiguity remains, moreover, the agency's reading must still be "reasonable." In other words, it must come within the zone of ambiguity the court has identified after employing all its interpretive tools. . . . Some courts have thought (perhaps because of *Seminole Rock*'s "plainly erroneous" formulation) that at this stage of the analysis, agency constructions of rules receive greater deference than agency

constructions of statutes. . . . But that is not so. Under *Auer*, as under *Chevron*, the agency's reading must fall "within the bounds of reasonable interpretation." And let there be no mistake: That is a requirement an agency can fail.

Still, we are not done—for not every reasonable agency reading of a genuinely ambiguous rule should receive *Auer* deference. We have recognized in applying *Auer* that a court must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight. . . .

To begin with, the regulatory interpretation must be one actually made by the agency. In other words, it must be the agency's "authoritative" or "official position," rather than any more ad hoc statement not reflecting the agency's views. . . . Of course, the requirement of "authoritative" action must recognize a reality of bureaucratic life: Not everything the agency does comes from, or is even in the name of, the Secretary or his chief advisers. So, for example, we have deferred to "official staff memoranda" that were "published in the Federal Register," even though never approved by the agency head. But there are limits. The interpretation must at the least emanate from those actors, using those vehicles, understood to make authoritative policy in the relevant context. . . .

Next, the agency's interpretation must in some way implicate its substantive expertise. Administrative knowledge and experience largely "account [for] the presumption that Congress delegates interpretive lawmaking power to the agency." . . . Once again, though, there are limits. Some interpretive issues may fall more naturally into a judge's bailiwick. Take one requiring the elucidation of a simple common-law property term, or one concerning the award of an attorney's fee. When the agency has no comparative expertise in resolving a regulatory ambiguity, Congress presumably would not grant it that authority.

Finally, an agency's reading of a rule must reflect "fair and considered judgment" to receive *Auer* deference. That means, we have stated, that a court should decline to defer to a merely "convenient litigating position" or "*post hoc* rationalizatio[n] advanced" to "defend past agency action against attack." And a court may not defer to a new interpretation, whether or not introduced in litigation, that creates "unfair surprise" to regulated parties. That disruption of expectations may occur when an agency substitutes one view of a rule for another. We have therefore only rarely given *Auer* deference to an agency construction "conflict[ing] with a prior" one. Or the upending of reliance may happen without such an explicit interpretive change. This Court, for example, recently refused to defer to an interpretation that would have imposed retroactive liability on parties for longstanding conduct that the agency had never before addressed. . . .

* * *

The upshot of all this goes something as follows. When it applies, *Auer* deference gives an agency significant leeway to say what its own rules mean. In so doing, the

doctrine enables the agency to fill out the regulatory scheme Congress has placed under its supervision. But that phrase "when it applies" is important—because it often doesn't. As described above, this Court has cabined *Auer*'s scope in varied and critical ways—and in exactly that measure, has maintained a strong judicial role in interpreting rules. What emerges is a deference doctrine not quite so tame as some might hope, but not nearly so menacing as they might fear.

[The Chief Justice's opinion concurring in part and Justice Gorsuch's and Justice Kavanaugh's opinions concurring in the judgment are omitted.]

Notes and Questions

A. The classic formulation of *Auer* deference (prior to *Kisor*) was that courts would defer to an agency's interpretation (i.e. an interpretive rule or similar) of its own regulation unless that interpretation is plainly erroneous or inconsistent with the regulation. Further, as the main text suggests, *Auer* was once thought of as the strongest form of deference – even stronger than *Chevron*. *Kisor* put the kibosh on that view, even as it reaffirmed (and restricted) *Auer*. Note that much of the analysis commanded only a plurality – Roberts, C.J., concurred in omitted sections dealing with stare decisis, and the opinions concurring in the judgment (see note 7-53 of the principal casebook) all wanted to do away entirely with Auer.

B. Part II.A of the opinion begins with some excellent examples of where interpretive rules would be welcome, even under the *Kisor* regime (assuming the agency ticks all of the new boxes). Why does the plurality think it worthwhile to keep *Auer* around, despite the restrictions?

C. So what are those boxes that must be ticked? When is *Auer* deference to an agency's interpretation of its own regulations appropriate? What is the rationale for *Auer*? What is the rationale for retaining *Auer*?

Supplement to § 7.07, note 7-63:

See Baltimore Gas & Electric Co. v. NRDC (462 U.S.87 (1983)) – a pre-*Chevron* case that articulates the Court's approach to agency discretion in the context of major questions. Compare the Court's position on major questions in this case with their position in *West Virginia v. EPA*.

Baltimore Gas & Electric Co. v. NRDC

462 U.S. 87 (1983)

JUSTICE O'CONNOR delivered the opinion of the Court.

… We are acutely aware that the extent to which this Nation should rely on nuclear power as a source of energy is an important and sensitive issue. Much of the debate focuses on whether development of nuclear generation facilities should proceed in the face of uncertainties about their long-term effects on the environment. Resolution of these fundamental policy questions lies, however, with Congress and the agencies to which Congress has delegated authority, as well as with state legislatures and, ultimately, the populace as a whole. Congress has assigned the courts only the limited, albeit important, task of reviewing agency action to determine whether the agency conformed with controlling statutes. As we emphasized in our earlier encounter with these very proceedings, "[a]dministrative decisions should be set aside in this context, as in every other, only for substantial procedural or substantive reasons as mandated by statute … , not simply because the court is unhappy with the result reached." *Vermont Yankee,* 435 U.S. at 558. …

The controlling statute at issue here is the NEPA. NEPA has twin aims. First, it "places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action." Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decision-making process. Congress in enacting NEPA, however, did not require agencies to elevate environmental concerns over other appropriate considerations. Rather, it required only that the agency take a "hard look" at the environmental consequences before taking major action. The role of the courts is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious. *See generally Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 415–417 (1971)…

7supp-66. Reasoned or adequate decision-making remains alive and well in the lower courts. *See, e.g., Bluewater Network v. EPA,* 370 F.3d 1 (D.C. Cir. 2004); *El Rio Santa Cruz Neighborhood Health Center, Inc. v. U.S. Department of Health and Human Services,* 396 F.3d 1265 (D.C. Cir. 2005); *Prometheus Radio Project v. FCC,* 373 F.3d 372 (3d Cir. 2004).

7supp-67. In *Michigan v. EPA*, 135 S. Ct. 2699 (2015) a sharply divided Supreme Court considered whether and how the EPA was required to consider cost in finding that regulating pollutant emissions was "appropriate and necessary" under the Clean Air Act.. The National Emissions Standards for Hazardous Air Pollutants Program, established by the act, requires the EPA to regulate stationary sources of air pollutants that meet a threshold emission level. Power plants, however, are excluded from that program. Rather, the EPA was directed to "perform a study of the hazards to public health reasonably anticipated to occur as a result of emissions by [power plants]" and, if the EPA found regulation "appropriate and necessary," the EPA was required to regulate the power plants. *Id.* at 2705 (quoting 42 U.S.C. § 7412(n)(1)(A)). As a result of the study,

> The Agency found regulation "appropriate" because (1) power plants' emissions . . . posed risks to human health and the environment and (2) controls were available to reduce these emissions. It found regulation "necessary" because the imposition of the Act's other requirements did not eliminate these risks. EPA concluded that "costs should not be considered" when deciding whether power plants should be regulated . . . .

Id. The EPA issued a regulatory impact analysis along with its regulation, estimating that the regulation would cost power plants 9.6 billion dollars per year. *Id.* at 2706.

The five-member majority, led by Justice Scalia, characterized the inquiry in this way:

> "We must decide whether it was reasonable for EPA to refuse to consider cost when making this finding [that regulation was appropriate and necessary]." *Id.* at 2704. The Court acknowledged the deference due to "an agency's reasonable resolution of an ambiguity in a statute" under *Chevron*, *infra*, but iterated that "agencies must operate within the bounds of reasonable interpretation." *Id.* at 2707.

The Court determined that "appropriate and necessary" was a capacious term that certainly included cost:*Id.* at 2708. The EPA argued that the statute did not require consideration of cost because, while other parts of the Clean Air Act expressly mention cost considerations, the provision at issue did not. The Court was not persuaded:

> It is unreasonable to infer that, by expressly making cost relevant to other decisions, the Act implicitly makes cost irrelevant to the appropriateness of regulating power plants. . . . Other parts of the Clean Air Act also expressly mention environmental effects, while [the power plant provision] does not. Yet that did not stop EPA from deeming environmental effects relevant to the appropriateness of regulating power plants.*Id.* at 2709.

Justice Kagan and her colleagues in dissent agreed with the majority on the law: "I agree with the majority—let there be no doubt about this—that EPA's power plant regulation would be unreasonable if '[t]he Agency gave cost no thought at all.'" *Id.* at 2714 (Kagan, J., dissenting). However, the dissent characterized the EPA's actions very differently. While Justice Scalia considered it fatal to not expressly consider cost at step one of the process (in deciding whether to regulate), to the dissent, it was a reasonable, preliminary decision. As Justice Kagan noted,

> EPA could not have accurately assessed costs at the time of its 'appropriate and necessary' finding. Under the statutory scheme, that finding comes before—years before—the Agency designs emissions standards. And until EPA knows what standards it will establish, it cannot know what costs they will impose.

Id. at 2723. Justice Kagan also considered the numerous ways in which the regulatory scheme actually included cost, including by creating "floor standards" that "intrinsically account[] for costs" by using existing power plants as a benchmark, and by categorizing power plants with "different standards for plants with different cost structures." *Id.* at 2718. The categorization process ensured that more polluting types of power plants (for example, coal) would not have to match the standards of cleaner types of power plants (for example, natural gas).

The dissent rejected the majority's factual conclusion that court was not considered because "a court may not strike down agency action without considering the reasons the agency gave. And that is what the majority does. . . . It denies that 'EPA said . . . that cost-benefit analysis would be deferred until later.' But EPA said exactly that . . . ." *Id.* at 2725 (Kagan, J., dissenting).

§ 7.07 Note 7-71(a). In *Lindeen v. Securities and Exchange Commission*, two states petitioned for review of a final rule of the Securities and Exchange Commission (SEC) known as Regulation A-Plus, preempting all state registration and qualification requirements for a new class of securities offerings freed from federal-registration requirements so long as issuers complied with certain investor safeguards. 825 F.3d 646 (D.C. Cir. 2016).

The petitioners argued that, because the SEC declined to adopt a qualified-purchaser definition limited to investors with sufficient wealth, revenue or financial sophistication to protect their interests without state protection, Regulation A-Plus failed both parts of *Chevron*. They also argued that the rule should be vacated as arbitrary and capricious because the Commission failed to explain adequately how it protects investors.

In the petitioners' view, the SEC's qualified-purchaser definition, which does not restrict Tier-2 sales to wealthy and/or sophisticated investors, contravened the plain meaning of the Securities Act. The court, however, found that the Securities Act did not unambiguously foreclose the SEC's qualified-purchaser definition. Here, the Act did not define qualified purchaser at all but instead explicitly authorized the SEC to define it. Thus, the petitioners' invocation of legislative history and long-standing securities law practice were insufficient to overturn the SEC's definition at step one of *Chevron.* At step two, the court said, where "there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," we give the regulation "controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." The petitioners insist that the SEC's qualified-purchaser definition "is actually 'manifestly contrary to the statute' "because it imposes no restrictions based on investor wealth, income or sophistication. However, the court noted that Congress explicitly granted the SEC discretion to determine how best to protect the public and investors, and the SEC, in exercising its discretion, concluded that Tier-2 investors were sufficiently protected by Tier-2's purchase cap and reporting requirements. The court found that the SEC had "cogently explain[ed] why it ha[d] exercised its discretion in a given manner" and its "explanation [was] . . . sufficient to enable us to conclude that [its action] was the product of reasoned decisionmaking."

§ 7.07 Note 7-72(a):

NRDC v. NHTSA

2018 U.S. App. LEXIS 17881 (2d Cir. 2018)

The Energy Policy and Conservation Act (EPCA) was enacted to avoid another severe energy crisis by encouraging the creation of programs, among other things, designed to improve the energy efficiency of motor vehicles and other consumer products. 42 U.S.C.S. § 6201(5). The EPCA statutory scheme includes civil penalties for manufacturers that violate CAFE standards established by law. 49 U.S.C.S. § 32912(b). In 2016, the NHTSA published an interim final rule raising the penalty from $5.50 per tenth of a mile-per-gallon in excess of the standard to $14.00 pursuant to the formula required by the Improvement Act. 28 U.S.C.S. § 2461. When industry representatives took exception, the NHTSA issued a compromise final rule, effective January 27, 2017, that delayed implementation of the new penalty until the model year 2019 to give manufacturers time to adjust.

Under the new administration, the NHTSA published final rules delaying the effective date of the civil penalties final rule on four occasions between January 30 and June 27, 2017. On July 12, the NHTSA issued a final rule indefinitely suspending the effective date of the civil

penalties rule. Environmental petitioners sought review on July 7, 2017, followed by State petitioners the next day.

NHTSA announced the Suspension Rule without first having undertaking notice and comment, opting instead to invoke the APA's "good cause" exception. *Id*. at 34. The good cause exception applies where the agency has reason to believe notice and comment would be impracticable, unnecessary, or contrary to the public interest. 5 U.S.C.S. § 553(b)(B). According to the court:

> 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. [*Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012)] (collecting cases). The exception may also be invoked when notice and comment are "unnecessary." This 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 to and to the public." *Id*. at 94 []. And, finally, an agency may invoke the good cause exception if notice and comment would be "contrary to the public interest." Of course, since notice and comment are regarded as beneficial to the public interest, for the exception to apply, the use of notice and comment must actually harm the public interest. *Id*. at 94-5.

Unable to find that the good cause exception applied, the court concluded that the NHTSA exceeded its statutory authority and failed to observe the procedure required by APA § 706(2). The court granted review, vacated the suspension of the civil penalties rule.

§ 7.07 Note 7-72(b):

For an example of a court ordering an agency to abide by its own regulations, *see*, Press Release, American Immigration Council, Judge Rules USCIS Must Adjudicate Employment Authorization for Asylum Seekers Within 30-Days (Aug. 2, 2018), https://americanimmigrationcouncil.org/news/judge-rules-uscis-must-adjudicate-employment-authorization-asylum-seekers-within-30-days.

The INA requires the Attorney General to provide employment authorization to asylees. 8 U.S.C.S. § 1158(c)(1)(B). Applicants for asylum are not entitled to employment authorization, but the Attorney General may provide it to eligible applicants by regulation. § 1158(d)(2). Current regulations allow eligible applicants to request employment authorization 150 days after submitting their asylum application, or if their case has been recommended for approval, when they receive notice of that recommendation. 8 C.F.R. § 208.7(a)(1). If the asylum application has not been denied before a decision on the employment authorization application has been reached, USCIS must grant or deny employment authorization within 30 days of receiving the request.

Where USCIS regularly delayed the adjudication of work authorization applications beyond the 30 day deadline, a Federal district judge granted the plaintiff's motion for summary judgment and enjoined the defendant, U.S. Citizenship and

Immigration Services, from ignoring the adjudication guidelines established in 8 C.F.R. § 208.7(a)(1). *Rosario v. USCIS*, No. C15-0813JLR (W.D. Wash. July 26, 2018).

§ 7.07 Note 7-72(c):

Damus V. Nielsen

No. 18-578 (JEB), 2018 U.S. Dist. LEXIS 109843 (D.D.C. 2018)

Plaintiffs made up a class of asylum-seekers that had received a credible fear determination but were denied the opportunity for parole and remained in detention pending a further consideration of their asylum application. They alleged that since 2009, the detention of similarly situated asylum-seekers was governed by the principles and procedures set forth in ICE's "Parole Directive," but with respect to certain ICE Field Offices, the established procedures were ignored in favor of a policy of systematic detention. They supported their claim with evidence of near universal parole denials, where in the past, nearly 90 percent of the asylum-seekers who had passed a credible fear interview were released. Plaintiffs claimed that by ignoring the directive, the defendants had violated the APA, the INA, and the Fifth Amendment Due Process Clause. Defendants filed a motion to dismiss on multiple grounds. Plaintiffs requested a preliminary injunction.

Plaintiffs based their APA claim on the *Accardi* doctrine, which arose from a 1954 Supreme Court case, *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, in which the Court vacated a deportation order issued without procedures conforming to the relevant regulations. *Damus v. Nielsen*, 2018 U.S. Dist. LEXIS 109843, at *38. Citing a number of cases from the D.C. Circuit and two immigration-specific Second Circuit decisions, the court suggested that *Accardi* required federal agencies to follow their own rules, including burdensome procedural rules that may limit discretionary actions, and that judicial review would be available where rules are ignored to the detriment of the party protected by the rule, even if the rule is a product of internal guidance and not formal regulation. *Id*. at *39-40. The court concluded that an *Accardi* claim could give rise to a cause of action under APA § 706(2)(A).

Defendants argued that the ICE Directive was not implicated by *Accardi* doctrine because it was not binding on DHS, relying in part, on language in the Directive disclaiming the conferral of any substantive right. The court disagreed. Because "the policies and procedures contained within the Directive establish a set of minimum protections for those seeking asylum, including an opportunity to submit documentation, the availability of an individualized parole interview, and an explanation of the reasons for a parole denial," *id*. at *43, the Directive fell "squarely within the ambit of those agency actions to which the doctrine may attach," *id*. With respect to the disclaimer, the court pointed to the government's statement at oral argument that the Directive was binding but explained that even without such concession, disclaimer language could not bar application of the *Accardi* doctrine from procedures intended to benefit individuals. *Id*. at *44-6.

Concluding that the *Accardi* doctrine could apply to the Directive, the court next considered the merits of plaintiffs' claim. Plaintiffs' supplied evidence that the five ICE Field Offices at issue were denying 92 to 100 percent of the parole applications they received. *Id*. at *47. This, they noted, was a marked departure from a few years prior when parole applications were granted in 90 percent of cases. *Id*. at *48. Plaintiffs' also submitted declarations from asylum-seekers and immigration attorneys demonstrating that similarly situated applicants routinely granted parole in the past were being denied in the present. *Id*. at *52. Defendants offered no statistics of their own and offered no explanation for how implementation of the same Directive could produce such conflicting results. *Id*. at *50-1. Defendants' own declarations did

little to refute the substantial evidence that the Directive was not followed and, in some cases, tended to support plaintiffs' position. *Id*. at 52-3 (noting that a denial based on recent entry cuts contrary to the concept of individualized determinations). The court found plaintiffs had demonstrated a likelihood of success on the merits of their *Accardi* claim that defendants were no longer abiding by their own procedures.

* * *

Did the plaintiffs overcome the presumption of regularity? What is the court's irregularity threshold, and what are the consequences of crossing it?

§ 7.07 Supplement to Note 7-73:

Agency Rule Reconsideration

"The Trump administration says people would drive more and be exposed to increased risk if their cars get better gas mileage, an argument intended to justify freezing Obama-era toughening of fuel standards." The Associated Press, *US Says Driving Would Be Riskier if Fuel Standards Tougher*, N. Y. TIMES (July 31, 2018), https://www.nytimes.com/aponline/2018/07/31/us/politics/ap-us-trump-mileage-standards.html.

The draft proposal obtained by the Associated Press was a late iteration of the Trump administration's effort to unmake emissions-related regulations. On April 1, then-EPA Administrator, Scott Pruitt, announced "the completion of the Midterm Evaluation (MTE) process for the greenhouse gas (GHG) emissions standards for cars and light trucks for model years 2022-2025, and his final determination that, in light of recent data, the current standards are not appropriate and should be revised." News Release, Office of the Administrator, EPA Administrator Pruitt: GHG Emissions Standards for Cars and Light Trucks Should Be Revised (April 2, 2018) (available at https://www.epa.gov/newsreleases/epa-administrator-pruitt-ghg-emissions-standards-cars-and-light-trucks-should-be). The announcement also unveiled the start of a "joint process with the National Highway Traffic Safety Administration (NHTSA) to develop a notice and comment rulemaking to set more appropriate GHG emissions standards and Corporate Average Fuel Economy (CAFE) standards." *Id*.

Following the announcement, the EPA published a notice explaining its intention reevaluate GHG emissions. Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022-2025 Light-Duty Vehicles, 83 Fed. Reg. 16077-87 (Apr. 13, 2018). In response, several parties filed suit. *See*, Environmental Law at Harvard, Corporate Average Fuel Economy Standards / Greenhouse Gas Standard*s*, Regulatory Rollback Tracker, http://environment.law.harvard.edu/2017/09/corporate-average-fuel-economy-standards/ (last visited Aug. 1, 2018).

Also following the announcement, the NHTSA published a proposed rule reconsidering the civil penalty for manufacturers failing to meet corporate average fuel economy (CAFE) standards. Civil Penalties, 83 FR 13904 (proposed Apr. 2, 2018). This coincided with a particularly fraught, separate rulemaking intended to delay the implementation of the previous administration's final rule regarding civil penalties.

Summer 2023 Online Supplement to Chapter 8
The Availability and Timing of Judicial Review

Note: This is a new chapter supplement to Aman, Penniman & Rookard, Administrative Law and Process (4th ed.).

Table of Contents

§ 8.03 Who Has Standing to Seek Judicial Review?

A. Constitutional Requirements

Insert after note 8-38 on page 849.[1] Summary of *TransUnion LLC v. Ramirez*.

In *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021) (5–4 decision), Justice Kavanaugh took the *Spokeo* mantle and effectively slammed the door shut on the viability of purely statutory injuries. The Court also imposed a new, completed injury requirement for pursuing damages, rebuking *Spokeo*'s suggestion that a "real" or "material risk" of harm could suffice. A class of over 8,000 litigants sued TransUnion alleging that it created misleading credit reports–specifically, wrongly flagging individuals as being on the Office of Foreign Assets Control's list of potential terrorists. Nearly 2,000 of those individuals established standing because their credit reports were provided to third-party businesses, which resulted in reputational harm, among other things. But the balance, over 6,000 class members, lacked standing because their credit files were not provided to others.

Justice Kavanaugh explained that, while "*Spokeo* does not require an exact duplicate" between the alleged intangible harm and the "traditional" cause of action recognized in American courts, *Spokeo* was "not an open-ended invitation for federal courts to loosen Article III based on contemporary, evolving beliefs about what kinds of suits should be heard in federal courts." Congress's historic ability to create new procedural rights, the violation of which formerly satisfied the injury required to establish standing, was downgraded to a recognition "that Congress's views may be instructive" in identifying concrete injuries. But Congress could not "us[e] its lawmaking power to transform something that is not remotely harmful into something that is."

The Court thus held that there was "an important" (and, likely, a dispositive) "difference" between "(i) a plaintiff 's statutory cause of action to sue a defendant over

[1] The following summation is adapted from Aman, Rookard & Mayton, Administrative Law 337–40 (4th ed. 2023).

the defendant's violation of federal law, and (ii) a plaintiff 's suffering concrete harm because of the defendant's violation of federal law." Practically speaking, this meant that a Maine citizen could sue a nearby factory for violating a federal environmental law and polluting her property, but "a second plaintiff in Hawaii" could not establish standing based on the same facts. "The violation did not personally harm the plaintiff in Hawaii." This is the case even if Congress, by statute, would allow either plaintiff to bring suit to vindicate the broader public interest in eliminating pollution. Kavanaugh thus took *Lujan*'s separation-of-powers rationale (which, recall, dealt with a lawsuit against a federal agency) a step further. He explained that Congress could not deputize private plaintiffs, who "are not accountable to the people and are not charged with pursuing the public interest in enforcing a defendant's general compliance with regulatory law," without "infring[ing] on the Executive Branch's Article II authority."

Applying these principles, the Court held that the class members whose incorrect credit reports (flagging them as potential terrorists) were actually disseminated had "suffered a harm with a 'close relationship' to the harm associated with the tort of defamation." But the others did not suffer any such harm, just "as if someone wrote a defamatory letter and then stored it in her desk drawer." Walking back *Spokeo*'s reasoning, the Court rejected these plaintiffs' suggestion that they had suffered an injury for which damages were available because TransUnion's mistake subjected them to an increased risk of harm. Though that sort of injury could support a request for injunctive relief, only harm that "materializes" can "constitute a basis" for damages. Kavanaugh reasoned by analogy to a situation where "a woman drives home from work a quarter mile ahead of a reckless driver who is dangerously swerving across lanes" yet arrives home safely, which is "cause for celebration, not a lawsuit."

In dissent, Justice Thomas (joined by Justices Breyer, Sotomayor, and Kagan) argued that the effect of *Spokeo* and *TransUnion* has been to "constitutionally preclude[]" Congress "from creating legal rights enforceable in federal courts if those rights deviate too far from their common-law roots." Now, "courts alone have the power to sift and weigh harms to decide whether they merit the Federal Judiciary's attention. In the name of protecting the separation of powers, this Court has relieved the legislature of its power to create and define rights."

Instead, Justice Thomas argued that a reasonable line could have been drawn based on *Lujan*, distinguishing between suits against the government to vindicate "public rights," which "require more than just a legal violation," and suits that "create[] a private right and a cause of action," which "*does* give[] plaintiffs an adequate interest in vindicating their public rights in federal court." Justice Thomas also echoed longstanding academic criticism of the majority's historical analysis, challenging the very requirement of concreteness; "[a]fter all, it was not until 1970—180 years after the ratification of Article III—that this Court even introduced the "injury in fact" (as opposed to injury in law) concept of standing." He closed with a parting shot at the majority's reasoning:

> Ultimately, the majority seems to pose to the reader a single rhetorical question: Who could possibly think that a person is harmed when he requests and is sent an incomplete credit report, or is sent a suspicious notice informing him that he may be a designated drug trafficker or terrorist, or is not sent anything informing him of how to remove this inaccurate red flag? The answer is, of course, legion: Congress, the President, the jury, the District Court, the Ninth Circuit, and four Members of this Court.

By constitutionalizing a narrow definition of "injury," Congress's judgment carries less weight.

The *TransUnion* majority left open one avenue to the group of plaintiffs whose erroneous credit reports were not disclosed, suggesting in a footnote that "exposure to the risk of future harm" could "cause[] a separate concrete harm," such as where a "plaintiff's knowledge that he or she is exposed to a risk of future physical, monetary, or reputational harm" causes "its own current emotional or psychological harm." But the Court declined to take a "position on whether or how such an emotional or psychological harm could suffice for Article III purposes—for example, by analogy to the tort of intentional infliction of emotional distress."

That issue is the subject of an "entrenched" circuit split.[2] A majority of a Seventh Circuit panel tersely held, in response to a claim that a plaintiff "experienced emotional distress" about possibly being sued after receiving a communication about collecting a stale debt, that "worry, like confusion, is insufficient to confer standing in [the FDCPA] context."[3] This prompted Judge Hamilton to exhaustively canvas circuit and national precedent on emotional harm and to implore his colleagues to "give due respect to Congress's judgment about making harms actionable" and to acknowledge the "many areas of common law that recognize such intangible but real harms [such as stress, fear, anxiety, confusion, and embarrassment] and offer protection against them."[4] Judge Hamilton nonetheless suggested that it may be the Supreme Court's responsibility to "provide a correction."

Insert after note 8-42 on page 855.[5] Summary of *California v. Texas.*

By now, you should be able to identify the discrete requirements to establish standing under the Supreme Court's Article III jurisprudence: (1) injury in fact that is both (a) concrete and particularized and (b) actual or imminent; (2) redressability; and (3) traceability. These latter two requirements are distinct requirements; as the D.C. Circuit once observed, "[C]ausation [traceability] does not inevitably imply redressability, because a new status quo may be held in place by other forces besides the government action at issue."[6] But often both are absent.

California v. Texas, 141 S. Ct. 2104 (2021), involved tenuous traceability and redressability theories, raised by a variety of individuals and states seeking a declaration that the Affordable Care Act's minimal essential coverage provision[7] was unconstitutional. But their real goal was to obtain a declaration that the minimal coverage provision was inseverable from the rest of the Act and an injunction against enforcement against the rest of the Act. The individuals claimed that they were injured by the insurance payments that they had made previously and by those that they would have to make in the future to meet the minimum coverage requirements. The problem, however, was that Congress had already amended the Act to remove the penalty for noncompliance. "Because of this, there is no possible Government action that is causally connected to the plaintiffs' injury—the costs of purchasing health insurance." Thus, the

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[2] Pierre v. Midland Credit Mgmt., Inc., 29 F.4th 934, 950–55 (7th Cir. 2022) (Hamilton, J., dissenting) (discussing state of the circuit split).

[3] *Id.* at 939 (majority opinion).

[4] *Id.* at 953 (Hamilton, J., dissenting).

[5] The following summation is adapted from Aman, Rookard & Mayton, Administrative Law 347 (West Academic Publishing, 4th ed. 2023).

[6] Competitive Enter. Inst. v. FCC, 970 F.3d 372, 381 (D.C. Cir. 2020).

[7] 26 U.S.C. § 5000A(a).

plaintiffs could not show traceability. Nor was their pocketbook injury redressable by the injunctive and declaratory relief sought: "What is that relief [that will redress the individual plaintiffs' injuries]? The plaintiffs did not obtain damages [in the trial court]. Nor . . . did the plaintiffs obtain an injunction in respect to the provision they attack as unconstitutional. But, more than that: How could they have sought any such injunction? The provision is unenforceable. There is no one, and nothing, to enjoin." In short, the individual plaintiffs lacked standing to use the minimum coverage provision, which Congress had already effectively nullified by eliminating the penalty provision, to topple the rest of the Act.

The states likewise lacked standing. They first theorized that minimum coverage requirements would cause their residents to enroll in state-subsidized insurance programs in greater numbers. But this theory rested on the "decision of an independent third party (here an individual's decision to enroll in, say, Medicaid)," and the states failed to demonstrate, with competent evidence, "that an unenforceable mandate will cause their residents to enroll in valuable benefits programs that they would otherwise forgo." Their second theory was that the minimum coverage provision "causes them to incur additional costs directly," such as "the costs of providing beneficiaries of state health plans with information about their health insurance coverage, as well as the cost of furnishing the IRS with that related information." Here, too, the states had a dispositive traceability problem because "other provisions of Act, not the minimum essential coverage provision, impose these other requirements."

We now turn to special issues that may arise when states assert standing to challenge the federal government's policies.

B. Do States Have Standing?

Insert the following principal case after note 8-48 on page 866.

The uncertain contours of *Massachusetts v. EPA* contributed to confusion in the circuit courts over whether states had standing to challenge the Biden Administration's immigration enforcement priorities.[8] But, in the following case, the majority resolves the issue by dealing with *Massachusetts* in a footnote—though the case features prominently in the concurring and dissenting opinions.

United States v. Texas

599 U.S. ____, 143 S. Ct. 1964 (2023)

Justice KAVANAUGH delivered the opinion of the Court.

In 2021, after President Biden took office, the Department of Homeland Security issued new Guidelines for immigration enforcement. The Guidelines prioritize the arrest and removal from the United States of noncitizens who are suspected terrorists or dangerous criminals, or who have unlawfully entered the country only recently, for example. Texas and Louisiana sued the Department of Homeland Security. According to those States, the Department's new Guidelines violate federal statutes that purportedly require the Department to arrest *more* criminal noncitizens pending their removal.

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[8] *Compare* Texas v. United States, 40 F.4th 205, 216 & n.4 (5th Cir. 2022) (citing *Massachusetts* favorably but rev'd in the case below), *with* Arizona v. Biden, 40 F.4th 375, 385–86 (6th Cir. 2022) (concluding that *Massachusetts* did not give state standing).

The States essentially want the Federal Judiciary to order the Executive Branch to alter its arrest policy so as to make more arrests. But this Court has long held "that a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution." *Linda R. S. v. Richard D.*, 410 U. S. 614, 619 (1973). Consistent with that fundamental Article III principle, we conclude that the States lack Article III standing to bring this suit.

I

In 2021, Secretary of Homeland Security Mayorkas promulgated new "Guidelines for the Enforcement of Civil Immigration Law." The Guidelines prioritize the arrest and removal from the United States of noncitizens who are suspected terrorists or dangerous criminals, or who have unlawfully entered the country only recently, for example.

Texas and Louisiana sued the Department of Homeland Security, as well as other federal officials and agencies. According to those States, the Guidelines contravene two federal statutes that purportedly require the Department to arrest more criminal noncitizens pending their removal. First, the States contend that for certain noncitizens, such as those who are removable due to a state criminal conviction, § 1226(c) of Title 8 says that the Department "shall" arrest those noncitizens and take them into custody when they are released from state prison. Second, § 1231(a)(2), as the States see it, provides that the Department "shall" arrest and detain certain noncitizens for 90 days after entry of a final order of removal.

In the States' view, the Department's failure to comply with those statutory mandates imposes costs on the States. The States assert, for example, that they must continue to incarcerate or supply social services such as healthcare and education to noncitizens who should be (but are not being) arrested by the Federal Government. [The Court's recitation of the procedural history is omitted.]

II

Article III of the Constitution confines the federal judicial power to "Cases" and "Controversies." Under Article III, a case or controversy can exist only if a plaintiff has standing to sue—a bedrock constitutional requirement that this Court has applied to all manner of important disputes. See, *e.g., TransUnion LLC* v. *Ramirez*, 594 U. S. ——, ——, 141 S.Ct. 2190, 2203 (2021); *California* v. *Texas*, 593 U. S. ——, ——, 141 S.Ct. 2104, 2113 (2021).

As this Court's precedents amply demonstrate, Article III standing is "not merely a troublesome hurdle to be overcome if possible so as to reach the 'merits' of a lawsuit which a party desires to have adjudicated; it is a part of the basic charter promulgated by the Framers of the Constitution at Philadelphia in 1787." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 476 (1982). The principle of Article III standing is "built on a single basic idea—the idea of separation of powers." *Allen*, 468 U. S., at 752. Standing doctrine helps safeguard the Judiciary's proper—and properly limited—role in our constitutional system. By ensuring that a plaintiff has standing to sue, federal courts "prevent the judicial process from being used to usurp the powers of the political branches." *Clapper*, 568 U. S., at 408.

A

. . . The threshold question is whether the States have standing under Article III to maintain this suit. The answer is no.

To establish standing, a plaintiff must show an injury in fact caused by the defendant and redressable by a court order. See *Lujan*, 504 U. S., at 560–561. The District Court found that the States would incur additional costs because the Federal Government is not arresting more noncitizens. Monetary costs are of course an injury. But this Court has "also stressed that the

alleged injury must be legally and judicially cognizable." *Raines*, 521 U. S., at 819. That "requires, among other things," that the "dispute is traditionally thought to be capable of resolution through the judicial process"—in other words, that the asserted injury is traditionally redressable in federal court. In adhering to that core principle, the Court has examined "history and tradition," among other things, as "a meaningful guide to the types of cases that Article III empowers federal courts to consider."

The States have not cited any precedent, history, or tradition of courts ordering the Executive Branch to change its arrest or prosecution policies so that the Executive Branch makes more arrests or initiates more prosecutions. On the contrary, this Court has previously ruled that a plaintiff lacks standing to bring such a suit.

The leading precedent is *Linda R. S. v. Richard D.*, 410 U. S. 614 (1973). The plaintiff in that case contested a State's policy of declining to prosecute certain child-support violations. This Court decided that the plaintiff lacked standing to challenge the State's policy, reasoning that in "American jurisprudence at least," a party "lacks a judicially cognizable interest in the prosecution . . . of another." The Court concluded that "a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution."

The Court's Article III holding in *Linda R. S.* applies to challenges to the Executive Branch's exercise of enforcement discretion over whether to arrest or prosecute. See *id.,* at 617, 619, 93 S.Ct. 1146; *Castle Rock v. Gonzales*, 545 U.S. 748, 760–761, 767, n.13 (2005); cf. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984) (citing *Linda R. S.* principle in immigration context and stating that the petitioners there had "no judicially cognizable interest in procuring enforcement of the immigration laws" by the Executive Branch). And importantly, that Article III standing principle remains the law today; the States have pointed to no case or historical practice holding otherwise. A "telling indication of the severe constitutional problem" with the States' assertion of standing to bring this lawsuit "is the lack of historical precedent" supporting it. *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010) (internal quotation marks omitted).

In short, this Court's precedents and longstanding historical practice establish that the States' suit here is not the kind redressable by a federal court.

B

Several good reasons explain why, as *Linda R. S.* held, federal courts have not traditionally entertained lawsuits of this kind.

To begin with, when the Executive Branch elects *not* to arrest or prosecute, it does not exercise coercive power over an individual's liberty or property, and thus does not infringe upon interests that courts often are called upon to protect. See *Lujan*, 504 U. S., at 561–562. And for standing purposes, the absence of coercive power over the plaintiff makes a difference: When "a plaintiff 's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed" to establish standing. *Id.* at 562.[9]

Moreover, lawsuits alleging that the Executive Branch has made an insufficient number of arrests or brought an insufficient number of prosecutions run up against the Executive's Article II authority to enforce federal law. Article II of the Constitution assigns the "executive Power" to

[9] By contrast, when "the plaintiff is himself an object of the action (or forgone action) at issue," "there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it."

the President and provides that the President "shall take Care that the Laws be faithfully executed." U. S. Const., Art. II, § 1, cl. 1; § 3. Under Article II, the Executive Branch possesses authority to decide "how to prioritize and how aggressively to pursue legal actions against defendants who violate the law." *TransUnion LLC*, 594 U. S., at ——, 141 S.Ct. at 2207. The Executive Branch—not the Judiciary—makes arrests and prosecutes offenses on behalf of the United States.

That principle of enforcement discretion over arrests and prosecutions extends to the immigration context, where the Court has stressed that the Executive's enforcement discretion implicates not only "normal domestic law enforcement priorities" but also "foreign-policy objectives." *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 490–491 (1999). In line with those principles, this Court has declared that the Executive Branch also retains discretion over whether to remove a noncitizen from the United States. *Arizona v. United States*, 567 U.S. 387, 396 (2012) ("Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all").

In addition to the Article II problems raised by judicial review of the Executive Branch's arrest and prosecution policies, courts generally lack meaningful standards for assessing the propriety of enforcement choices in this area. After all, the Executive Branch must prioritize its enforcement efforts. That is because the Executive Branch (i) invariably lacks the resources to arrest and prosecute every violator of every law and (ii) must constantly react and adjust to the ever-shifting public-safety and public-welfare needs of the American people.

This case illustrates the point. As the District Court found, the Executive Branch does not possess the resources necessary to arrest or remove all of the noncitizens covered by § 1226(c) and § 1231(a)(2). That reality is not an anomaly—it is a constant. For the last 27 years since § 1226(c) and § 1231(a)(2) were enacted in their current form, all five Presidential administrations have determined that resource constraints necessitated prioritization in making immigration arrests.

In light of inevitable resource constraints and regularly changing public-safety and public-welfare needs, the Executive Branch must balance many factors when devising arrest and prosecution policies. That complicated balancing process in turn leaves courts without meaningful standards for assessing those policies. Cf. *Heckler v. Chaney*, 470 U.S. 821, 830–832 (1985); *Lincoln v. Vigil*, 508 U.S. 182, 190–192 (1993). Therefore, in both Article III cases and Administrative Procedure Act cases, this Court has consistently recognized that federal courts are generally not the proper forum for resolving claims that the Executive Branch should make more arrests or bring more prosecutions. See *Linda R. S.*, 410 U. S., at 619; cf. *Heckler*, 470 U. S., at 831 (recognizing the "general unsuitability for judicial review of agency decisions to refuse enforcement"); *ICC v. Locomotive Engineers*, 482 U.S. 270, 283 (1987) ("it is entirely clear that the refusal to prosecute cannot be the subject of judicial review").[10]

All of those considerations help explain why federal courts have not traditionally entertained lawsuits of this kind. By concluding that Texas and Louisiana lack standing here, we abide by and reinforce the proper role of the Federal Judiciary under Article III. The States' novel standing argument, if accepted, would entail expansive judicial direction of the Department's arrest policies. If the Court green-lighted this suit, we could anticipate complaints in future years about

[10] Also, the plaintiffs here are States, and federal courts must remain mindful of bedrock Article III constraints in cases brought by States against an executive agency or officer. To be sure, States sometimes have standing to sue the United States or an executive agency or officer. But in our system of dual federal and state sovereignty, federal policies frequently generate indirect effects on state revenues or state spending. And when a State asserts, for example, that a federal law has produced only those kinds of indirect effects, the State's claim for standing can become more attenuated.

alleged Executive Branch under-enforcement of any similarly worded laws—whether they be drug laws, gun laws, obstruction of justice laws, or the like. We decline to start the Federal Judiciary down that uncharted path. Our constitutional system of separation of powers "contemplates a more restricted role for Article III courts."

C

In holding that Texas and Louisiana lack standing, we do not suggest that federal courts may never entertain cases involving the Executive Branch's alleged failure to make more arrests or bring more prosecutions.

First, the Court has adjudicated selective-prosecution claims under the Equal Protection Clause. In those cases, however, a party typically seeks to prevent his or her own prosecution, not to mandate additional prosecutions against other possible defendants.

Second, as the Solicitor General points out, the standing analysis might differ when Congress elevates *de facto* injuries to the status of legally cognizable injuries redressable by a federal court. For example, Congress might (i) specifically authorize suits against the Executive Branch by a defined set of plaintiffs who have suffered concrete harms from executive under-enforcement and (ii) specifically authorize the Judiciary to enter appropriate orders requiring additional arrests or prosecutions by the Executive Branch.

Here, however, the relevant statutes do not supply such specific authorization. The statutes, even under the States' own reading, simply say that the Department "shall" arrest certain noncitizens. Given the "deep-rooted nature of law-enforcement discretion," a purported statutory arrest mandate, without more, does not entitle any particular plaintiff to enforce that mandate in federal court. *Castle Rock*, 545 U. S., at 761, 764–765, 767, n. 13; cf. *Heckler*, 470 U.S., at 835. For an arrest mandate to be enforceable in federal court, we would need at least a "stronger indication" from Congress that judicial review of enforcement discretion is appropriate—for example, specific authorization for particular plaintiffs to sue and for federal courts to order more arrests or prosecutions by the Executive. *Castle Rock*, 545 U. S., at 761, 125 S.Ct. 2796. We do not take a position on whether such a statute would suffice for Article III purposes; our only point is that no such statute is present in this case.

Third, the standing calculus might change if the Executive Branch wholly abandoned its statutory responsibilities to make arrests or bring prosecutions. Under the Administrative Procedure Act, a plaintiff arguably could obtain review of agency non-enforcement if an agency "has consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities." *Heckler*, 470 U. S., at 833, n.4; cf. 5 U.S.C. § 706(1). So too, an extreme case of non-enforcement arguably could exceed the bounds of enforcement discretion and support Article III standing. But the States have not advanced a *Heckler*-style "abdication" argument in this case or argued that the Executive has entirely ceased enforcing the relevant statutes. Therefore, we do not analyze the standing ramifications of such a hypothetical scenario.

Fourth, a challenge to an Executive Branch policy that involves both the Executive Branch's arrest or prosecution priorities *and* the Executive Branch's provision of legal benefits or legal status could lead to a different standing analysis. That is because the challenged policy might implicate more than simply the Executive's traditional enforcement discretion. Cf. *Department of Homeland Security* v. *Regents of Univ. of Cal.*, 591 U. S. ——, —— – ——, 140 S.Ct. 1891, 1906–07 (2020) (benefits such as work authorization and Medicare eligibility accompanied by non-enforcement meant that the policy was "more than simply a non-enforcement policy"); *Texas v. United States*, 809 F.3d 134, 154 (CA5 2015) (*Linda R. S.* "concerned only nonprosecution," which is distinct from "both nonprosecution and the conferral of benefits"), aff'd by an equally

divided Court, 579 U.S. 547 (2016). Again, we need not resolve the Article III consequences of such a policy.

Fifth, policies governing the continued detention of noncitizens who have already been arrested arguably might raise a different standing question than arrest or prosecution policies. Cf. *Biden* v. *Texas*, 597 U. S. ——, 142 S.Ct. 2528 (2022). But this case does not concern a detention policy, so we do not address the issue here.

D

The discrete standing question raised by this case rarely arises because federal statutes that purport to *require* the Executive Branch to make arrests or bring prosecutions are rare—not surprisingly, given the Executive's Article II authority to enforce federal law and the deeply rooted history of enforcement discretion in American law. Indeed, the States cite no similarly worded federal laws. This case therefore involves both a highly unusual provision of federal law and a highly unusual lawsuit.

To be clear, our Article III decision today should in no way be read to suggest or imply that the Executive possesses some freestanding or general constitutional authority to disregard statutes requiring or prohibiting executive action. Moreover, the Federal Judiciary of course routinely and appropriately decides justiciable cases involving statutory requirements or prohibitions on the Executive.

This case is categorically different, however, because it implicates only one discrete aspect of the executive power—namely, the Executive Branch's traditional discretion over whether to take enforcement actions against violators of federal law. And this case raises only the narrow Article III standing question of whether the Federal Judiciary may in effect order the Executive Branch to take enforcement actions against violators of federal law—here, by making more arrests. Under this Court's Article III precedents and the historical practice, the answer is no.[11]

It bears emphasis that the question of whether the federal courts have jurisdiction under Article III is distinct from the question of whether the Executive Branch is complying with the relevant statutes . . . . We hold only that the federal courts are not the proper forum to resolve this dispute.

. . . [O]ther forums remain open for examining the Executive Branch's arrest policies. For example, Congress possesses an array of tools to analyze and influence those policies—oversight, appropriations, the legislative process, and Senate confirmations, to name a few. And through elections, American voters can both influence Executive Branch policies and hold elected officials to account for enforcement decisions. In any event, those are political checks for the political process. We do not opine on whether any such actions are appropriate in this instance.

The Court's standing decision today is narrow and simply maintains the longstanding jurisprudential status quo. The Court's decision does not alter the balance of powers between Congress and the Executive, or change the Federal Judiciary's traditional role in separation of powers cases.

* * *

[11] As part of their argument for standing, the States also point to *Massachusetts v. EPA*, 549 U. S. 497 (2007). Putting aside any disagreements that some may have with *Massachusetts* v. *EPA*, that decision does not control this case. The issue there involved a challenge to the denial of a statutorily authorized petition for rulemaking, not a challenge to an exercise of the Executive's enforcement discretion.

. . . [B]ecause the States lack Article III standing, the District Court did not have jurisdiction. We reverse the judgment of the District Court.

It is so ordered.

Justice GORSUCH, with whom Justice THOMAS and Justice BARRETT join, concurring in the judgment.

The Court holds that Texas and Louisiana lack Article III standing to challenge the Department of Homeland Security's Guidelines for the Enforcement of Civil Immigration Law. I agree. But respectfully, I diagnose the jurisdictional defect differently. The problem here is redressability.

I

Article III vests federal courts with the power to decide "Cases" and "Controversies." Standing doctrine honors the limitations inherent in this assignment by ensuring judges attend to actual harms rather than abstract grievances. "If individuals and groups could invoke the authority of a federal court to forbid what they dislike for no more reason than they dislike it, we would risk exceeding the judiciary's limited constitutional mandate and infringing on powers committed to other branches of government." *American Legion* v. *American Humanist Assn*., 588 U. S. ——, ——, 139 S.Ct. 2067, 2099 (2019) (GORSUCH, J., concurring in judgment).

To establish standing to sue in federal court, a plaintiff must show that it has suffered a concrete and particularized injury, one that is both traceable to the defendant and redressable by a court order. If a plaintiff fails at any step, the court cannot reach the merits of the dispute. This is true whether the plaintiff is a private person or a State. After all, standing doctrine derives from Article III, and nothing in that provision suggests a State may have standing when a similarly situated private party does not. See *Massachusetts v. EPA*, 549 U. S. 497, 536–538, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007) (ROBERTS, C. J., dissenting).

The Court holds that Texas and Louisiana lack standing to challenge the Guidelines because "a party lacks a judicially cognizable interest in the prosecution . . . of another." To be sure, the district court found that the Guidelines have led to an increase in the number of aliens with criminal convictions and final orders of removal who are released into the States. The district court also found that, thanks to this development, the States have spent, and continue to spend, more money on law enforcement, incarceration, and social services. Still, the Court insists, "[s]everal good reasons explain why" these harms are insufficient to afford the States standing to challenge the Guidelines..

I confess to having questions about each of the reasons the Court offers. Start with its observation that the States have not pointed to any "historical practice" of courts ordering the Executive Branch to change its arrest or prosecution policies. The Court is right, of course, that "history and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider." But, again, the district court found that the Guidelines impose "significant costs" on the States. The Court today does not set aside this finding as clearly erroneous. Nor does anyone dispute that even one dollar's worth of harm is traditionally enough to "qualify as concrete injur[y] under Article III." Indeed, this Court has allowed other States to challenge other Executive Branch policies that indirectly caused them monetary harms. So why are these States now forbidden from doing the same?

Next, the Court contends that, "when the Executive Branch elects *not* to arrest or prosecute, it does not exercise coercive power over an individual's liberty or property." Here again, in principle, I agree. But if an exercise of coercive power matters so much to the Article III standing inquiry, how to explain decisions like *Massachusetts* v. *EPA*? There the Court held that

Massachusetts had standing to challenge the federal government's decision not to regulate greenhouse gas emissions from new motor vehicles. See 549 U. S., at 516–526. And what could be less coercive than a decision not to regulate? In *Massachusetts* v. *EPA*, the Court chose to overlook this difficulty in part because it thought the State's claim of standing deserved "special solicitude." *Id.,* at 520. I have doubts about that move. Before *Massachusetts* v. *EPA*, the notion that States enjoy relaxed standing rules "ha[d] no basis in our jurisprudence." *Id.*, at 536, 127 S.Ct. 1438 (ROBERTS, C. J., dissenting). Nor has "special solicitude" played a meaningful role in this Court's decisions in the years since. Even so, it's hard not to wonder why the Court says nothing about "special solicitude" in this case. And it's hard not to think, too, that lower courts should just leave that idea on the shelf in future ones.

Finally, the Court points to the fact that Article II vests in the President considerable enforcement discretion. So much so that "courts generally lack meaningful standards for assessing the propriety of [the Executive Branch's] enforcement choices.". But almost as soon as the Court announces this general rule, it adds a caveat, stressing that "[t]his case concerns only arrest and prosecution policies." It's a curious qualification. Article II does not have an Arrest and Prosecution Clause. It endows the President with the "executive Power," § 1, cl. 1, and charges him with "tak[ing] Care" that federal laws are "faithfully executed," § 3. These provisions give the President a measure of discretion over the enforcement of *all* federal laws, not just those that can lead to arrest and prosecution. So if the Court means what it says about Article II, can it mean what it says about the narrowness of its holding? There's another curious qualification in the Court's opinion too. "[T]he standing calculus might change," we are told, "if the Executive Branch wholly abandoned its statutory responsibilities to make arrests or bring prosecutions." But the Court declines to say more than that because "the States have not advanced" such an argument. *Ibid.* Is that true, though? . . .

II

As I see it, the jurisdictional problem the States face in this case isn't the lack of a "judicially cognizable" interest or injury. The States proved that the Guidelines increase the number of aliens with criminal convictions and final orders of removal released into the States. They also proved that, as a result, they spend more money on everything from law enforcement to healthcare. The problem the States face concerns something else altogether—a lack of redressability.

To establish redressability, a plaintiff must show from the outset of its suit that its injuries are capable of being remedied " 'by a favorable decision.' " Ordinarily, to remedy harms like those the States demonstrated in this suit, they would seek an injunction. The injunction would direct federal officials to detain aliens consistent with what the States say the immigration laws demand. But even assuming an injunction like that would redress the States' injuries, that form of relief is not available to them [under the relevant statute, 8 U.S.C. § 1252(f)(1), which provides "that 'no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of' certain immigration laws, including the very laws the States seek to have enforced in this case."] . . .

The district court thought it could sidestep § 1252(f)(1). Instead of issuing an injunction, it purported to "vacate" the Guidelines pursuant to § 706(2) of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2). Vacatur, as the district court understood it, is a distinct form of relief that operates directly on agency action, depriving it of legal force or effect. And vacatur, the district court reasoned, does not offend § 1252(f)(1), because it does not entail an order directing any federal official to do anything. The States embrace this line of argument before us.

It's a clever workaround, but it doesn't succeed. . . . [A] vacatur order still does nothing to redress the States' injuries. The Guidelines merely advise federal officials about how to exercise their prosecutorial discretion when it comes to deciding which aliens to prioritize for arrest and removal. A judicial decree rendering the Guidelines a nullity does nothing to change the fact that

federal officials possess the same underlying prosecutorial discretion. Nor does such a decree require federal officials to change how they exercise that discretion in the Guidelines' absence. It's a point even the States have acknowledged.

. . .

III

Beyond these redressability problems may lie still another. Recall the essential premise on which the district court proceeded—that the APA empowers courts to vacate agency action. The federal government vigorously disputes this premise, arguing that the law does not contemplate this form of relief. The reasons the government offers are plenty and serious enough to warrant careful consideration. [Justice Gorsuch argued that § 706(2), which allows courts to "set aside" agency action, allows courts only to "disregard" rather than "vacate" an agency's action. He situated this critique within his larger disapproval of universal injunctions and addressed various counterarguments.]

. . .

*

In our system of government, federal courts play an important but limited role by resolving cases and controversies. Standing doctrine honors this limitation at the front end of every lawsuit. It preserves a forum for plaintiffs seeking relief for concrete and personal harms while filtering out those with generalized grievances that belong to a legislature to address. Traditional remedial rules do similar work at the back end of a case. They ensure successful plaintiffs obtain meaningful relief. But they also restrain courts from altering rights and obligations more broadly in ways that would interfere with the power reserved to the people's elected representatives. In this case, standing and remedies intersect. The States lack standing because federal courts do not have authority to redress their injuries. Section 1252(f)(1) denies the States any coercive relief. A vacatur order under § 706(2) supplies them no effectual relief. And such an order itself may not even be legally permissible. . . . The Constitution affords federal courts considerable power, but it does not establish "government by lawsuit." R. Jackson, The Struggle for Judicial Supremacy 286–287 (1941).

Justice BARRETT, with whom Justice GORSUCH joins, concurring in the judgment.

I agree with the Court that the States lack standing to challenge the Federal Government's Guidelines for the enforcement of immigration law. But I reach that conclusion for a different reason: The States failed to show that the District Court could order effective relief. Justice GORSUCH ably explains why that is so. And because redressability is an essential element of Article III standing, the District Court did not have jurisdiction.

The Court charts a different path. In its view, this case can be resolved based on what it calls the "fundamental Article III principle" that " 'a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution.' " In other words, the Court says, the States have not asserted a " 'judicially cognizable interest' " in this case. Respectfully, I would not take this route.

I

To begin with, I am skeptical that *Linda R. S.* suffices to resolve this dispute. First, the Court reads that decision too broadly. Consider the facts. The "mother of an illegitimate child" sued in federal court, "apparently seek[ing] an injunction running against the district attorney forbidding him from declining prosecution" of the child's father for failure to pay child support. 410 U. S., at 614–616. She objected, on equal protection grounds, to the State's view that "fathers of illegitimate children" were not within the ambit of the relevant child-neglect statute.

We agreed that the plaintiff "suffered an injury stemming from the failure of her child's father to contribute support payments." But if the plaintiff "were granted the requested relief, it would result only in the jailing of the child's father." Needless to say, the prospect that prosecution would lead to child-support payments could, "at best, be termed only speculative." For this reason, we held that the plaintiff lacked standing. Only then, after resolving the standing question on redressability grounds, did we add that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." In short, we denied standing in *Linda R. S.* because it was speculative that the plaintiff 's requested relief would redress her asserted injury, not because she failed to allege one.

Viewed properly, *Linda R. S.* simply represents a specific application of the general principle that "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish" given the causation and redressability issues that may arise. *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 562d(1992). That is true for the States here. I see little reason to seize on the case's bonus discussion of whether "a private citizen" has a "judicially cognizable interest in the prosecution or nonprosecution of another" to establish a broad rule of Article III standing.

Second, even granting the broad principle the Court takes from *Linda R. S.*, I doubt that it applies with full force in this case. Unlike the plaintiff in *Linda R. S.*, the States do not seek the prosecution of any particular individual—or even any particular class of individuals. . . .

The upshot is that the States do not dispute that the Government can prosecute whomever it wants. They seek, instead, the temporary detention of certain noncitizens during elective removal proceedings of uncertain duration. And the States' desire to remove the Guidelines' influence on the Government's admittedly broad discretion to enforce immigration law meaningfully differs from the *Linda R. S.* plaintiff 's desire to channel prosecutorial discretion toward a particular target. . . .

II

In addition to its reliance on *Linda R. S.*, the Court offers several reasons why "federal courts have not traditionally entertained lawsuits of this kind." I am skeptical that these reasons are rooted in Article III standing doctrine.

Take, for example, the Court's discussion of *Castle Rock v. Gonzales*, 545 U. S. 748 (2005). There, we reasoned that given "[t]he deep-rooted nature of law-enforcement discretion," a "true mandate of police action would require some stronger indication" from the legislature than, for example, the bare use of the word " 'shall' " in a statutory directive. The Court today concludes that "no such statute is present in this case." But *Castle Rock* is not a case about Article III standing. It addressed "whether an individual who has obtained a state-law restraining order has a constitutionally protected property interest" under the Fourteenth Amendment "in having the police enforce the restraining order when they have probable cause to believe it has been violated." 545 U. S., at 750–751. I see no reason to opine on *Castle Rock*'s application here, especially given that the parties (correctly) treat *Castle Rock* as relevant to the *merits* of their statutory claims rather than to the States' *standing* to bring them.

The Court also invokes "the Executive's Article II authority to enforce federal law." I question whether the President's duty to "take Care that the Laws be faithfully executed," Art. II, § 3, is relevant to the standing analysis. While it is possible that Article II imposes justiciability limits on federal courts, it is not clear to me why any such limit should be expressed through Article III's definition of a cognizable injury. Moreover, the Court works the same magic on the Take Care Clause that it does on *Castle Rock*: It takes an issue that entered the case on the merits and transforms it into one about standing.

The Court leans, too, on principles set forth in *Heckler v. Chaney*, 470 U.S. 821 (1985). But, again, *Heckler* was not about standing. It addressed a different question: "the extent to which a decision of an administrative agency to exercise its 'discretion' not to undertake certain enforcement actions is subject to judicial review under the Administrative Procedure Act." 470 U. S., at 823; see also 5 U.S.C. § 701(a)(2) (the APA's judicial-review provisions do not apply "to the extent" that "agency action is committed to agency discretion by law"). *Heckler* held that "an agency's decision not to take enforcement action should be presumed immune from judicial review under" the APA. But such a decision "is only presumptively unreviewable; the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." Whatever *Heckler*'s relevance to cases like this one, it does not establish a principle of Article III standing. And elevating it to the status of a constitutional rule would transform it from a case about statutory provisions (that Congress is free to amend) to one about a constitutional principle (that lies beyond Congress's domain). Although the Court notes that *Heckler* involved the APA, its conflation of *Heckler* with standing doctrine is likely to cause confusion.

* * *

. . . In my view, this case should be resolved on the familiar ground that it must be " 'likely,' as opposed to merely 'speculative,' " that any injury "will be 'redressed by a favorable decision.' " I respectfully concur only in the judgment.

Justice ALITO, dissenting.

The Court holds Texas lacks standing to challenge a federal policy that inflicts substantial harm on the State and its residents by releasing illegal aliens with criminal convictions for serious crimes. In order to reach this conclusion, the Court brushes aside a major precedent that directly controls the standing question, refuses to apply our established test for standing, disregards factual findings made by the District Court after a trial, and holds that the only limit on the power of a President to disobey a law like the important provision at issue is Congress's power to employ the weapons of inter-branch warfare—withholding funds, impeachment and removal, etc. . . .

This Court has long applied a three-part test to determine whether a plaintiff has standing to sue. Under that test, a plaintiff must plead and ultimately prove that it has been subjected to or imminently faces an injury that is: (1) "concrete and particularized," (2) "fairly traceable to the challenged action," and (3) "likely" to be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 560–561 (1992) (internal quotation marks and alterations omitted). Under that familiar test, Texas clearly has standing to bring this suit.

Nevertheless, the United States (the defendant in this case) has urged us to put this framework aside and adopt a striking new rule. At argument, the Solicitor General was asked whether it is the position of the United States that the Constitution does not allow any party to challenge a President's decision not to enforce laws he does not like. . . .

[A]ccording to the United States, even if a party clearly meets our three-part test for Article III standing, the Constitution bars that party from challenging a President's decision not to enforce the law. Congress may wield what the Solicitor General described as "political . . . tools"—which presumably means such things as withholding funds, refusing to confirm Presidential nominees, and impeachment and removal—but otherwise Congress and the American people must simply wait until the President's term in office expires.

The Court—at least for now—does not fully embrace this radical theory and instead holds only that, with some small and equivocal limitations . . . , no party may challenge the Executive's

"arrest and prosecution policies." But the Court provides no principled explanation for drawing the line at this point, and that raises the concern that the Court's only reason for framing its rule as it does is that no more is needed to dispose of *this* case. . . .

II

Before I address the Court's inexplicable break from our ordinary standing analysis, I will first explain why Texas easily met its burden to show a concrete, particularized injury that is traceable to the Final Memorandum and redressable by the courts.

A

Injury in fact. The District Court's factual findings, which must be accepted unless clearly erroneous, quantified the cost of criminal supervision of aliens who should have been held in DHS custody and also identified other burdens that Texas had borne and would continue to bear going forward. These findings sufficed to establish a concrete injury that was specific to Texas.

Traceability. The District Court found that each category of cost would increase "*because of* the Final Memorandum," rather than decisions that DHS personnel would make irrespective of the directions that memorandum contains.

The majority does not hold—and in my judgment, could not plausibly hold—that these findings are clearly erroneous. Instead, it observes only that a "State's claim for standing can become more attenuated" when based on the "indirect effects" of federal policies "on state revenues or state spending." But while it is certainly true that indirect injuries may be harder to prove, an indirect financial injury that *is* proved at trial supports standing. And that is what happened here. . . .

In any event, many of the costs in this case are not indirect. When the Federal Government refuses or fails to comply with §§ 1226(a) and (c) as to criminal aliens, the *direct* result in many cases is that the State must continue its supervision [of detained individuals]. . . .

Redressability. A court order that forecloses reliance on the memorandum would likely redress the States' injuries. If, as the District Court found, DHS personnel rescind detainers "because of" the Final Memorandum, then vacating that memorandum would likely lead to those detainers' remaining in place.

B

While the majority does not contest redressability, Justice GORSUCH's concurrence does, citing two reasons. [Justice Alito proceeded to contest Justice Gorsuch's statutory analysis.] . . .

To be clear, I would be less troubled than I am today if Justice GORSUCH's concurrence had commanded a majority. At least then, Congress would be free to amend § 1252(f). But the majority reaches out and redefines our understanding of the *constitutional* limits on otherwise-available lawsuits. It is to this misunderstanding that I now turn.

III

The majority adopts the remarkable rule that injuries from an executive decision not to arrest or prosecute, even in a civil case, are generally not "cognizable." Its reasoning has three failings. First, it fails to engage with contrary precedent that is squarely on point. Second, it lacks support in the cases on which it relies. Third, the exceptions (or possible exceptions) that it notes do nothing to allay concern about the majority's break from our established test for Article III standing. I address each of these problems in turn.

A

Prior to today's decision, it was established law that plaintiffs who suffer a traditional injury resulting from an agency "decision not to proceed" with an enforcement action have Article III standing. The obvious parallel to the case before us is *Massachusetts v. EPA*, 549 U.S. 497 (2007), which has been called "the most important environmental law case ever decided by the Court." In that prior case, Massachusetts challenged the Environmental Protection Agency's failure to use its civil enforcement powers to regulate greenhouse gas emissions that allegedly injured the Commonwealth. Massachusetts argued that it was harmed because the accumulation of greenhouse gases would lead to higher temperatures; higher temperatures would cause the oceans to rise; and rising sea levels would cause the Commonwealth to lose some of its dry land. The Court noted that Massachusetts had a "quasi-sovereign interes[t]" in avoiding the loss of territory and that our federalist system had stripped the Commonwealth of "certain sovereign prerogatives" that it could have otherwise employed to defend its interests. Proclaiming that Massachusetts' standing claim was entitled to "special solicitude," the Court held that the Commonwealth had standing.

The reasoning in that case applies with at least equal force in the case at hand. In *Massachusetts* v. *EPA*, the Court suggested that allowing Massachusetts to protect its sovereign interests through litigation compensated for its inability to protect those interests by the means that would have been available had it not entered the Union. In the present case, Texas's entry into the Union stripped it of the power that it undoubtedly enjoyed as a sovereign nation to police its borders and regulate the entry of aliens. The Constitution and federal immigration laws have taken away most of that power, but the statutory provisions at issue in this case afford the State at least *some* protection—in particular by preventing the State and its residents from bearing the costs, financial and non-financial, inflicted by the release of certain dangerous criminal aliens. Our law on standing should not deprive the State of even that modest protection. We should not treat Texas less favorably than Massachusetts. And even if we do not view Texas's standing argument with any "special solicitude," we should at least refrain from treating it with special hostility by failing to apply our standard test for Article III standing.

Despite the clear parallel with this case and the States' heavy reliance on *Massachusetts* throughout their briefing, the majority can only spare a passing footnote for that important precedent. It first declines to say *Massachusetts* was correctly decided and references the "disagreements that some may have" with that decision. But it then concludes that *Massachusetts* "does not control" since the decision itself refers to " 'key differences between a denial of a petition for rulemaking and an agency's decision not to initiate an enforcement action,' " with the latter " 'not *ordinarily* subject to judicial review.' "

The problem with this argument is that the portion of *Massachusetts* to which the footnote refers deals not with its key Article III holding, but with the scope of review that is "ordinarily" available under the statutory scheme. Importantly, *Massachusetts* frames its statement about declining enforcement as restating the rule of *Heckler v. Chaney*. And as the Court acknowledges when it invokes *Heckler* directly, that decision is not about standing; it is about the interpretation of the statutory exception to APA review for actions "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). And even in that context, *Heckler* expressly contemplates that any "presumption" of discretion to withhold enforcement can be rebutted by an express statutory limitation of discretion—which is exactly what we have here.

So rather than answering questions about this case, the majority's footnote on *Massachusetts* raises more questions about *Massachusetts* itself—most importantly, has this monumental decision been quietly interred? . . . [The remainder of Part III is omitted.]

IV

The Court declares that its decision upholds "[o]ur constitutional system of separation of powers," but as I said at the outset, the decision actually damages that system by improperly inflating the power of the Executive and cutting back the power of Congress and the authority of the Judiciary. And it renders States already laboring under the effects of massive illegal immigration even more helpless.

Our Constitution gives the President important powers, and the precise extent of some of them has long been the subject of contention, but it has been widely accepted that "the President's power reaches 'its lowest ebb' when he contravenes the express will of Congress, 'for what is at stake is the equilibrium established by our constitutional system.' " *Zivotofsky v. Kerry*, 576 U. S. 1, 61 (2015) (ROBERTS, C. J., dissenting) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 637–638 (1952) (Jackson, J., concurring)).

That is the situation here. To put the point simply, Congress enacted a law that requires the apprehension and detention of certain illegal aliens whose release, it thought, would endanger public safety. The Secretary of DHS does not agree with that categorical requirement. He prefers a more flexible policy. And the Court's answer today is that the Executive's policy choice prevails unless Congress, by withholding funds, refusing to confirm Presidential nominees, threatening impeachment and removal, etc., can win a test of strength. Relegating Congress to these disruptive measures radically alters the balance of power between Congress and the Executive, as well as the allocation of authority between the Congress that enacts a law and a later Congress that must go to war with the Executive if it wants that law to be enforced. [The remainder of Justice Alito's dissent is omitted.]

Notes and Questions

S8-1. The opinions in *United States v. Texas* cover a lot of ground and show the extremely blurry lines between jurisdiction and merits. They address a case addressing due process property interests (*Castle Rock v. Gonzales*, notes 2-30 and 2-31), APA cases applying the "committed to agency discretion by law" provision (§8.02), the Take Care Clause, and the gamut of standing decisions, underscoring the interrelatedness of the materials we cover throughout administrative law.

What is the general standing principle the majority establishes (or, in their view, applies from *Linda R.S.*) in this case? How does that principle fit in with the tripartite standing framework set forth in *Lujan*?

S8-2. What problem do the concurring and dissenting opinions have with the majority's approach? Where do Gorsuch's, Barrett's, and Alito's opinions diverge? How would you describe the separation of powers approaches of the various opinions in this case?

S8-3. On June 30, 2023, the Supreme Court decided a pair of cases challenging the Secretary of Education's decision to cancel approximately $430 billion of federal student loans under the HEROES Act.

The first, *Dep't of Educ. v. Brown*, 600 U.S. ____, 143 S. Ct. 2343 (2023), involved suits by individual borrowers who did not quality for maximum relief under the Secretary's relief scheme. They alleged that the Secretary failed to comply with notice and comment

and negotiated rulemaking. For a unanimous court, Justice Alito concluded that the borrowers lacked standing:

> [W]e now understand respondents' claim and theory of standing as follows. First, because the HEROES Act does not substantively authorize the [debt cancellation plan], the Department was obligated to follow the typical negotiated-rulemaking and notice-and-comment requirements. Second, if the Department had observed those procedures, respondents might have used those opportunities to convince the Department (1) that proceeding under the HEROES Act is unlawful or otherwise undesirable, and (2) that it should adopt a different loan-forgiveness plan under the [Higher Education Act] HEA instead, one that is more generous to them than the HEROES Act plan that they allege is unlawful.
>
> Describing respondents' claim illustrates how unusual it is. They claim they are injured because the Government has not adopted a lawful benefits program under which they would qualify for assistance. But the same could be said of anyone who might benefit from a benefits program that the Government has not chosen to adopt. It is difficult to see how such an injury could be particular (since all people suffer it) or concrete (since an as-yet-uncreated benefits plan is necessarily " 'abstract' " and not " 'real' ").
>
> Nonetheless, we think the deficiencies of respondents' claim are clearest with respect to traceability. They cannot show that their purported injury of not receiving loan relief under the HEA is fairly traceable to the Department's (allegedly unlawful) decision to grant loan relief under the HEROES Act.
>
> . . .
>
> A decision by this Court that the Plan is lawful would have no effect on the Department's ability to forgive respondents' loans under the HEA. Thus, the Plan poses no legal obstacle to the Department's choosing to find other ways to remedy the harm respondents experience from not having their loans forgiven.
>
> Put differently, the Department's decision to give *other* people relief under a *different* statutory scheme did not *cause* respondents not to obtain the benefits they want. The cause of their supposed injury is far more pedestrian than that: The Department has simply *chosen* not to give them the relief they want. Ordinarily, a party's recourse to induce an agency to take a desired action is to file not a lawsuit, but a "petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e). The denial of such a petition "must be justified by a statement of reasons," which in turn "can be appealed to the courts" if the litigant has standing to maintain such a suit. *Auer v. Robbins*, 519 U.S. 452, 459 (1997). Contesting a separate benefits program based on a theory that it crowds out the desired one, however, is an approach for which we have been unable to find any precedent.

The Court held by 6–3 vote in *Biden v. Nebraska*, 600 U.S. ____, 143 S. Ct. 2355 (2023), that the states' challenge to the debt cancellation plan stood on firmer footing. Chief Justice Roberts wrote that Missouri had standing by virtue of the financial impact of debt cancellation on MOHELA, a "nonprofit government corporation" that owned $1 billion of Federal Family Education Loans and serviced $150 billion of federal loans:

MOHELA receives an administrative fee for each of the five million federal accounts it services, totaling $88.9 million in revenue last year alone.

Under the Secretary's plan, roughly half of all federal borrowers would have their loans completely discharged. MOHELA could no longer service those closed accounts, costing it, by Missouri's estimate, $44 million a year in fees that it otherwise would have earned under its contract with the Department of Education. This financial harm is an injury in fact directly traceable to the Secretary's plan, as both the Government and the dissent concede.

The plan's harm to MOHELA is also a harm to Missouri. MOHELA is a "public instrumentality" of the State. Mo. Rev. Stat. § 173.360. Missouri established the Authority to perform the "essential public function" of helping Missourians access student loans needed to pay for college. *Id.* . . . Its profits help fund education in Missouri: MOHELA has provided $230 million for development projects at Missouri colleges and universities and almost $300 million in grants and scholarships for Missouri students.

. . .

By law and function, MOHELA is an instrumentality of Missouri: It was created by the State to further a public purpose, is governed by state officials and state appointees, reports to the State, and may be dissolved by the State. The Secretary's plan will cut MOHELA's revenues, impairing its efforts to aid Missouri college students. This acknowledged harm to MOHELA in the performance of its public function is necessarily a direct injury to Missouri itself.

Chapter 9. Updates to Text and Online Appendix - Problem Materials

A. Updates to Text of Chapter 9

Agency websites are periodically changed to add or subtract information or functions or just to spice them up. As a result, some internet links that appear in or are referenced by the text of Chapter 9 are out of date. Except for the updates noted below, the links and text in Chapter 9 and the Online Appendix Problem Materials remain. Appropriate updates and relevant comments are set forth below:

P. 909 - The web address for E-CFR has changed from what is shown on p. 909; it is now https://www.ecfr.gov/

P. 910 - Web addresses for FERC's rules of procedure have changed; Now the overall table of contents for FERC regulations is found at https://www.ecfr.gov/current/title-18/chapter-I
Rules of Practice and Procedure are found at https://www.ecfr.gov/current/title-18/chapter-I/subchapter-X . The table of contents for the rules or procedure are found at https://www.ecfr.gov/current/title-18/chapter-I/subchapter-X/part-385?toc=1

P. 910 - FERC has revised its website. To access the eLibrary of case materials, the path now goes through "FERC Online" which is found on the lower left side of the opening webpage (above the search function) and then to "eLibrary" on the rights side of the screen. The date ranges and docket numbers for the two illustrations on this page (CP07-79 and CP15-554) still work.

P 912 - As noted, the Natural Gas Act provides that the merits of FERC's decisions can only be reviewed by the U.S. Court of Appeals for the District of Columbia Circuit or for the circuit in which the pipeline company is headquartered.

Although it does not affect the problems in the book, Section 324 the Fiscal Responsibility Act of 2023, PUBLIC LAW 118–5—JUN. 3, 2023, adopted provisions unique to one interstate pipeline company, the Mountain Valley Pipeline, that was still under construction. These included a finding that building the pipeline is in the national interest, all permits previously issued are to be deemed ratified by Congress (notwithstanding judicial decisions invalidating some and finding violations of others), and all judicial review affecting federal permits for the MVP are to be conducted in the D.C. Circuit (shifting them from the Fourth Circuit). After the law was passed, the Fourth Circuit place a temporary injunction on construction pending its review of challenges, but the U.S. Supreme Court overruled the temporary injunction. This bit of recent history illustrates that obtaining favorable legislative action – even through a

measure as remote as a bill to lift the debt ceiling – may, on rare occasions, be an alternative to seeking favorable agency or judicial action.

With respect to FERC's Natural Gas Act certificate regulations, Relevant portions of these regulations are included in Appendix 6 of the Online Appendix – Problem Materials. For purposes of the problems, this Appendix can be used as is. Subsequent changes to this title of FERC's regulations have been limited and do not affect the problems presented.

p. 913 - Although the amendments do not affect the problems presented, it is noteworthy that the National Environmental Policy Act was amended by Section 321 of the Fiscal Responsibility Act of 2023, PUBLIC LAW 118–5—JUN. 3, 2023, legislation needed to raise the ceiling on the national debt. The NEPA amendments are designed to streamline and expedite environmental reviews of federal actions covered by NEPA. It is possible that FERC will amend its regulations implementing NEPA as a result of the 2023 legislation, but that should not affect the problems.

Excerpts of the Endangered Species Act, which are found in Appendix 7 of the **Online Appendix – Problem Materials,** were not affected by the debt ceiling legislation and can continue to be relied upon for purposes of the hypothetical problems.

P. 924 - The text of Appendix 3 is still accurate, but the link has changed to https://ferc.gov/administrative-policies . See also §385.2201 Rules governing off-the-record communications (Rule 2201).

P. 933 - As noted previously, FERC's website was modified. To access the eLibrary of case materials, the path now goes through "FERC Online" which is found on the lower left side of the opening webpage (above the search function) and then to "eLibrary" on the rights side of the screen.

P. 934 - The links regarding Regulation.gov https://www.regulations.gov have changed. At this time, the FAQ pages are the best source for practical guidance about use of the site. https://www.regulations.gov/faq and https://www.regulations.gov/faq?type=site

For additional information about federal rulemakings, see https://www.reginfo.gov/public/jsp/Utilities/faq.jsp

P. 942 - The table of contents for the American Bar Associations Model Rules of Professional Conduct can be found at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/ The rules and comments discussed in the book can be located using the table of comments. The 2023 versions of those rules and comments are comparable to those discussed in the book.

P.949-950 - The D.C. Circuit's **local rules** and **handbook** can now be found at the bottom of the webpage https://www.cadc.uscourts.gov/internet/home.nsf/Content/ under Rules & Procedures.

p.956 - The text concerning Exercise 9.14C notes that there may be a mismatch between the timing of construction following an order approving a certificate and an opportunity to seek a stay from a federal court. Although the problems' hypothetical facts assumed an opportunity to seek judicial review and a stay before a pipeline can begin construction. In 18 CFR §157.23, Authorizations to Proceed with Construction Activities, litigants are given the opportunity to go to court before a project may proceed to construction provided that they raised issues affecting construction in a timely filed request for rehearing of a final order approving a pipeline construction project.

P. 973 - Finding Examples of Agency Guidance. As with several other efforts to provide easy weblinks to relevant regulations and guidance documents, website designs, contents and operations change over time as new policies are adopted or when the agency decides that a more user-friendly website is desirable. The result may have benefits but people will often need to update their past research.

At this time, the following updated links will work best:

Securities and Exchange Commission: www.sec.gov

> https://www.sec.gov/regulation/staff-interpretations

Environmental Protection Agency: www.epa.gov

> Compliance: http://www.epa.gov/lawsregs/compliance/

Federal Energy Regulatory Commission: www.ferc.gov

> "Interpretive Order Modifying No-Action Letter Process and Reviewing Other Mechanisms for Obtaining Guidance," 123 FERC 61,157 (2008) (Docket PL08-2-000).

Department of Labor: www.dol.gov

> https://www.dol.gov/guidance
>
> https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions
>
> https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters
>
> https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/programs-and-initiatives

P. 976 - The OMB Circular A-76 handbook can be found at https://www.whitehouse.gov/wp-content/uploads/2017/11/1997-Supplemental-Handbook-to-OMB-Circular-A-76.pdf

P. 978 - Another shift in the design of a website. Go to bottom of the BOP.gov home page and, under "Resources," hit "Policy and Forms". Then, under "Policy," hit "General Administration and Management," and "1330.18 Administrative Remedy Program 01-06-2014" will appear. If that tab does not work, try this https://www.bop.gov/policy/progstat/1330_013.pdf

P. 981 - On the DHS.gov website, go to "How do I" then to "How do I: For Travelers." That will take you to a list of options, from which you should choose "File a Travel Complaint (DHS TRIP)." That will provide information about filing a complaint with more details at the tab "Traveler Redress Inquiry Program (DHS TRIP)." The last two tabs are at https://www.dhs.gov/file-a-travel-complaint-dhs-trip and https://www.dhs.gov/dhs-trip .

P. 964 - The DOJ treatise on FOIA can still be found at the website noted in the text

The Reporters Committee divides its major research tools between (a) state-by-state guide https://www.rcfp.org/open-government-guide/ and (b) a separate guide to federal policies https://foia.wiki/wiki/Main_Page Both are very helpful.

P. 966 - Exercise 9.18A – As noted above, FERC's website has changed in some respects. To find link to FOIA guidance, go to bottom of opening webpage, https://ferc.gov/ , there, under "Enforcement and Legal" you can click on "FOIA", which will send you to https://ferc.gov/foia (Or, you can just enter to https://ferc.gov/foia).

B. Updates to Online Appendix - Problem Materials

Most of the materials are unchanged. A few updates are noted here.

Appendix 2 - Excerpts from FERC's Rules of Practice and Procedure

Procedural rules relevant to the problems have not changed and you may continue to use the excerpts of the Rules and Practice and Procedure as they appear in the Online Appendix – Problem Materials.

(Two changes were made that do not affect the problems: (a) Rule 2001 was modified to change the address for hand-delivering filings, and (b) Rule 2007 was modified to clarify that FERC's offices are not deemed to be open for filings simply because some staff members may be working from home.)

Appendix 3 – Ethics Policies for FERC Employees

The web address for FERC's ethics policies for employees has changed. The policies can be found at https://ferc.gov/administrative-policies See also §385.2201 Rules governing off-the-record communications (Rule 2201).

Appendix 6 - EXCERPTS 18 CFR Part 157, Subpart F—Interstate Pipeline Blanket Certificates And Authorization Under Section 7 Of The Natural Gas Act For Certain Transactions And Abandonment

The maximum costs have risen with inflation (and will continue to do so annually) for blanket certificate automatic authorizations and prior notice applications. However, those changes do not affect the problem, since bypass proposals require a prior notice application regardless of the projected construction cost. Otherwise, these excerpts of regulations remain unchanged.