Administrative Law A CASEBOOK

ASPEN CASEBOOK SERIES

Administrative Law A CASEBOOK

Ninth Edition

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This book is dedicated

by Bernard Schwartz to Brian, who persuaded him to undertake this casebook;

by Roberto Corrada to Cándido and Vilma, his parents;

by J. Robert Brown, Jr., to Allison Herren Lee, his inspiration for all things in life;

and by Jessica West to all the lawyers (and aspiring lawyers) who fight for greater justice.

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Preface to the 9th Edition

Administrative law continues to be one of the most dynamic, interesting, and impactful areas of the law. This edition includes new cases on agency accountability, investigation, rulemaking and judicial review, particularly on the issue of deference. The book also brings a substantial reorganization of Chapter 4: Rulemaking. We have added a new author to the casebook with this edition as well. Jessica L. West, a former colleague of ours, is currently an Associate Professor at Vermont Law School who brings experience teaching undergraduates and master's degree students as well as law students. In addition to her teaching and administrative law expertise, Jessica possesses an extensive background in both criminal and civil litigation that informs our approach to the casebook, especially those chapters on investigation and administrative hearings. We greatly appreciate her enthusiasm for the subject as well as her complementary expertise in areas with which we are less familiar. We go to print rather early in the Trump presidency and have added some preliminary materials related to the new administration, but it is still too soon to determine the precise impact this administration will have on the area. Casebook supplements will update current jurisprudence in the area.

We continue to be guided by Bernard Schwartz's thinking on administrative law, as evidenced by his text and his many articles on the subject. As mentioned in a prior preface, Bernard Schwartz was dedicated to the advancement of administrative law. His text contains bits and pieces of his work in virtually every facet of administrative law, demonstrating his enormous commitment and contribution to the development of the area. While it may not have started as such, his text eventually came to be a showcase for his thinking on administrative law. We have endeavored to preserve the casebook as a legacy and testament to the force of his ideas on this subject. The following tributes to Bernard Schwartz attest to his extraordinary life in the law: Symposium, *The Life and Legacy of Bernard Schwartz*, 34 Tulsa L.J. 651-711 (1999); *In Memoriam: Bernard Schwartz*, 33 Tulsa L.J. 1041-1096 (1998); *Bernard Schwartz*, 73 N.Y.U. L. Rev. 701 (1998).

We are, of course, indebted to a number of people for their advice and assistance in producing this casebook. At Wolters Kluwer Law & Business, thanks to Dana Wilson and Anton Yakovlev for their oversight of this project.

Roberto L. Corrada
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January 2018

Administrative Law A CASEBOOK

CHAPTER 1
Administrative Agencies and Administrative Law

A. WHAT IS ADMINISTRATIVE LAW?

Gilmore v. Lujan
947 F.2d 1409 (9th Cir. 1991)

THOMAS G. NELSON, Circuit Judge. Appellant Reed Gilmore appeals a rejection of his oil and gas lease offer by the Bureau of Land Management ("BLM"). BLM refused the offer because it did not contain a personal handwritten signature and the Interior Board of Land Appeals ("IBLA") upheld that rejection. . . . This district court summarily affirmed the IBLA's decision. We affirm.

Factual and Procedural Background

This appeal arises out of a failure of our postal system. Reed Gilmore filed an oil and gas application for Parcel NV-148 in the June 1987 simultaneous filing of the BLM. His application was selected in the computerized random drawing. BLM sent its decision, dated August 26, which stated in part:

> Enclosed is the original and two copies of Form No. 3100-11, "Offer to Lease and Lease for Oil and Gas" for your execution. The applicant (or the applicant's attorney-in-fact, as provided by 43 CFR [§]3112.6-1(a) and (b) [(1986)]) must manually sign and date each copy on the reverse side of the form.
>
> All copies of the lease form must be properly executed and filed in this office within thirty (30) days from your receipt of this decision, which constitutes a compliance period. Failure to do so will result in the rejection of your offer without further notice.

The decision was sent certified mail, with a return receipt requested, from the Reno, Nevada office of the BLM. Gilmore received the decision on August 29, 1987; therefore, to comply with the deadline, he was to file the completed forms no later than Sept. 28, 1987.

Gilmore signed the copies of the lease form and sent them by certified mail from his office in Kimball, Nebraska, with a return receipt requested, to the Reno office on September 21. Gilmore states that his secretary, Debra Bohac, noticed on the morning of the deadline, Monday, Sept. 28, that they had not yet received the return receipt card from the envelope containing the signed forms. Bohac called the Reno office to inquire whether the forms had been received. She spoke with Joan Woodin, Supervisory Land Law Examiner for the Nevada State Office. While the text of the entire conversation is disputed, Woodin did inform Bohac that the forms had not yet arrived.

Bohac states that she then investigated whether Gilmore could travel to Reno that day. She allegedly found no commercial airline that could transport Gilmore to Reno by the close of the BLM's business day. Bohac called Woodin again. Her call was returned on Woodin's behalf by Bernita Dawson, a Land Law Examiner in the Reno office. Both parties to this second call agree that Bohac informed Dawson that Gilmore's office would arrange for a telecopied (i.e., "faxed") lease form to be delivered to the Reno BLM office that day, September 28. Bohac also states, "I asked Ms. Dawson if they (BLM) would consider the telecopied signed lease form for acceptance as the signed lease offer and she told me they would." However, Dawson claimed that she told Bohac that telecopying "would not do any good because it would merely be a copy and not the original and two copies as required by our Aug. 26, 1987 decision."

Gilmore sent a telecopy to Robert McCarthy, a Reno attorney, who delivered it to the BLM at 11:15 A.M., September 28. The mailed original and copies of the signed lease form were received by the Reno office the next day, September 29. On that day, BLM informed Gilmore that his offer was rejected.

Gilmore appealed the decision, and on Jan. 26, 1989, the IBLA affirmed the BLM's rejection on the grounds that the telecopied lease offer did not bear a personal, handwritten signature as required by 43 CFR §3122.6-1(a) and §3102.4 (1986). Reed Gilmore (On Reconsideration), 107 IBLA 37 (1989). The IBLA concluded that Gilmore's "failure to submit the signed lease offer and stipulations within 30 days was a violation of a substantive rule that justified per se rejection of the offer." *Id.* at 45. The IBLA also concluded that it did not need to decide the facts of the disputed phone conversations on two grounds: (1) "[p]arties dealing with the Government are chargeable with knowledge of duly promulgated regulations" and therefore Gilmore "knew that the law required his lease offer to be returned to BLM within 30 days and could not have justifiably relied on any possible misstatement by Woodin"; and (2) assuming that Dawson promised to consider the telecopied form, "the only commitment made by BLM was to consider whether the

telecopied lease offer constituted a proper lease offer," which BLM did before rejecting it. *Id.* at 45-46.

Gilmore sought judicial review and the United States District Court for the District of Nevada summarily affirmed the decision on Sept. 14, 1989. Gilmore filed a timely appeal to this court. . . .

Discussion

For what would seem a minor detail to the uninitiated, there is an abundance of administrative decisions involving the requirement of a holographic signature on lease applications. Of particular significance to this case is *W. H. Gilmore*, 41 IBLA 25 (1979) (no apparent relation to appellant here) published prior to the regulations in effect in this case. *W. H. Gilmore*, who was the second priority applicant, protested the award of the lease to the first applicant who had used a rubber-stamped signature in his filing. The Board refused Gilmore's petition because the only pertinent regulation in effect at that time, 43 CFR §3102.6-1 (1979) coupled with a prior Board decision, clearly allowed rubber-stamped signatures. . . .

As the result of *W. H. Gilmore*, the BLM promptly amended the regulations. In June 1980, the BLM added 43 CFR §3102.4 which read in part, "[a]ll applications [and] the original offers . . . shall be holographically signed in ink by the potential lessee. . . . Machine or rubber stamped signatures shall not be used."

The BLM regulation . . . gave fair notice to all applications that failure to comply should result in denial of their application. Such is the case here. The telefaxed application submitted by the appellant was not holographic, and it was created by a machine—both violations of the plain language of the regulation. It was within the discretion of the Secretary not to depart from the regulation in this case.

While in this instance, denial produces a harsh result, a telefaxed signature is a machine-produced signature. It is the exact situation the amended regulations sought to address. . . .

The decision we reach here is compelled by the narrow scope of the court's review of agency decisions. Obviously the equities favor Gilmore, as he is guilty of no omission but use of the United States mails. Eight days for delivery of mail from Nebraska to Nevada far exceeds the time it should take. Indeed, the Pony Express could have covered the distance with time to spare.

Justice Holmes observed that citizens dealing with their government must turn square corners. *Rock Island, AK, and Louisiana Railway Co. v. United States*, 254 U.S. 141, 143 (1920). Gilmore turned all but the last millimeter, but that millimeter, whose traverse is jealously guarded by the BLM, was his undoing. Relief to Gilmore in this narrow case would expose BLM to no fraud or risk of fraud, as his bona fides are beyond question. If Gilmore and those other few luckless applicants whose documents are

stored rather than delivered by the Postal Service are to get any relief, it must come at the hands of the BLM. As shown by this case, those hands are more iron than velvet. We can only suggest to BLM that the body politic would not be put at risk by the granting of relief in these narrow and rare situations.

Affirmed.

NOTES

1. What is the purpose of administrative law? Is it to prevent decisions like that in Gilmore v. Lujan? Or, if it cannot do that, is its function to provide a legal remedy to people like Gilmore?

2. What do you make of the need to turn "square corners" when dealing with the government? The approach suggests a rigid application of the bureaucratic process. Should this always be the case? For example, should judges take into account the "manifest injustice" of the result? See Thomas Jefferson University v. Shalala, 512 U.S. 504, 529 (1994) (Thomas, J., dissenting, joined by Stevens, O'Connor, and Ginsburg, JJ.) ("Although "[m]en must turn square corners when they deal with the Government," Rock Island, A. & L.R. Co. v. United States, 254 U.S. 141, 143 (1920) (Holmes, J.), the manifest injustice of the Court's result should be apparent."). Given these tensions between the approaches, what should be the general rule in the context of administrative action, "square corners" or "manifest injustice"?

3. Should the need for "square corners" also apply to the government? See Heckler v. Community Health Services of Crawford Cty., Inc., 467 U.S. 51, 61, n.13 (1984) ("It is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their government."). What exactly would this mean in practice? Can, for example, the government be required to make payments in violation of congressional appropriations where it failed to turn "square corners"?

*Warren, Administrative Law in the Political System**

16-17 (5th ed. 2011)

Broadly speaking, administrative law deals with (1) the ways in which power is transferred from legislative bodies to administrative agencies, (2) how administrative agencies use power, and (3) how the actions taken by administrative agencies are reviewed by the courts. More specifically, administrative law is concerned with the legal developments which

have so dramatically increased the power and scope of the administrative branch. The law-making (technically, quasi-legislative or rule-making) and judicial (technically, quasi-judicial or order-making) powers, which have been delegated to administrators by the legislative branch at both the national and state levels, have created an extremely powerful administrative branch, thus changing the meaning we have traditionally attributed to the separation of powers doctrine.

NOTES

1. The primary purpose of administrative law is to keep administrative powers within their legal bounds and to protect individuals against abuse of those powers. As such it may be defined as the branch of the law that controls the administrative operations of government. It sets forth the powers that may be exercised by administrative agencies, lays down the principles governing the exercise of those powers, and provides legal remedies to those aggrieved by administrative action. This definition divides administrative law into three parts:

(1) the powers vested in administrative agencies;
(2) the requirements imposed by law upon the exercise of those powers; and
(3) remedies against unlawful administrative action.

2. A major part of the administrative law course is devoted to administrative procedure. This is a natural reflection of growing concern with the procedural aspects of administrative action. This concern is a recent development. At the turn of the last century, administrative law was divided into the subjects of powers and remedies. Administrative law was thought of as "that part of the public law which fixes the organization and determines the competence of the administrative authorities, and indicates to the individual remedies for the violation of his rights." 1 Goodnow, Comparative Administrative Law 8-9 (1893). Delegation of authority and judicial review alone were stressed. More recently there has come the realization that of equal, if not greater, importance is the exercise of administrative power. With this realization has come the emphasis on procedural safeguards to ensure the proper exercise of administrative authority—an emphasis that found legislative articulation in the Federal Administrative Procedure Act (APA) of 1946, a law laying down the basic procedures that must be followed by federal agencies. (5 U.S.C. §§551-559, 701-706, 1305, 3105, 3344, 5362, 7521.) The APA is now the foundation of federal administrative law. Pertinent portions of it are contained throughout this book. For the student of administrative law, understanding the APA provisions is as important as understanding the Uniform Commercial Code provisions for students of commercial law.

3. Administrative procedure legislation has also been enacted in the states. The state laws have, in the main, been based on the Model State Administrative Procedure Act (Model Act) approved by the American Bar Association and the National Conference of Commissioners on Uniform State Laws in 1946. A Revised Model State Act was approved in 1961, and a newer Model Act in 1981. Though acceptance of the Model Act was slow at first (with only five states adopting it by 1959), the Act now serves as the basis of administrative procedure legislation in twenty-seven states and the District of Columbia. In addition, eleven states, including the District of Columbia, have enacted APAs based upon the 1981 revision and twenty others have also enacted administrative procedure legislation.

B. ADMINISTRATIVE AGENCIES

Federal Administrative Procedure Act

5 U.S.C. §551 (1946)

§551. Definitions

For the purpose of this subchapter—

(1) "Agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia.

NOTES

1. Virtually every administrative law case arises out of a controversy between a private party and an administrative agency. What is an administrative agency under the APA definition? Is the APA definition too inclusive for purposes of administrative law?

2. Are all federal governmental acts subjected to APA requirements, except those included within the four specific exceptions contained in §551(1)?

3. What about action of the President? Is the President an agency within the meaning of the APA? See Franklin v. Massachusetts, 505 U.S. 788 (1992); Meyer v. Bush, 981 F.2d 1288 (D.C. Cir. 1993).

The definition of an agency matters for purposes of the application of the Administrative Procedure Act. Is there also a constitutional dimension to the definition?

Department of Transportation v. Association of American Railroads

135 S. Ct. 1225 (2015)

JUSTICE KENNEDY delivered the opinion of the Court.

In 1970, Congress created the National Railroad Passenger Corporation, most often known as Amtrak. Later, Congress granted Amtrak and the Federal Railroad Administration (FRA) joint authority to issue "metrics and standards" that address the performance and scheduling of passenger railroad services. Alleging that the metrics and standards have substantial and adverse effects upon its members' freight services, respondent—the Association of American Railroads—filed this suit to challenge their validity. The defendants below, petitioners here, are the Department of Transportation, the FRA, and two individuals sued in their official capacity.

Respondent alleges the metrics and standards must be invalidated on the ground that Amtrak is a private entity and it was therefore unconstitutional for Congress to allow and direct it to exercise joint authority in their issuance. . . .

. . .

I

A

Amtrak is a corporation established and authorized by a detailed federal statute enacted by Congress for no less a purpose than to preserve passenger services and routes on our Nation's railroads. . . . Congress recognized that Amtrak, of necessity, must rely for most of its operations on track systems owned by the freight railroads. So, as a condition of relief from their common-carrier duties, Congress required freight railroads to allow Amtrak to use their tracks and facilities at rates agreed to by the parties—or in the event of disagreement to be set by the Interstate Commerce Commission (ICC). See 45 U.S.C. §§561, 562 (1970 ed.). The Surface Transportation Board (STB) now occupies the dispute-resolution role originally assigned to the ICC. See 49 U.S.C. §24308(a) (2012 ed.). Since 1973, Amtrak has received a statutory preference over freight transportation in using rail lines, junctions, and crossings. See §24308(c).

The metrics and standards at issue here are the result of a further and more recent enactment. Concerned by poor service, unreliability, and delays resulting from freight traffic congestion, Congress passed the Passenger Rail Investment and Improvement Act (PRIIA) in 2008. See 122

Stat. 4907. Section 207(a) of the PRIIA provides for the creation of the metrics and standards:

> "Within 180 days after the date of enactment of this Act, the Federal Railroad Administration and Amtrak shall jointly, in consultation with the Surface Transportation Board, rail carriers over whose rail lines Amtrak trains operate, States, Amtrak employees, nonprofit employee organizations representing Amtrak employees, and groups representing Amtrak passengers, as appropriate, develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations, including cost recovery, on-time performance and minutes of delay, ridership, on-board services, stations, facilities, equipment, and other services." Id., at 4916.

Section 207(d) of the PRIIA further provides:

> "If the development of the metrics and standards is not completed within the 180-day period required by subsection (a), any party involved in the development of those standards may petition the Surface Transportation Board to appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration." Id., at 4917.

The PRIIA specifies that the metrics and standards created under §207(a) are to be used for a variety of purposes. Section 207(b) requires the FRA to "publish a quarterly report on the performance and service quality of intercity passenger train operations" addressing the specific elements to be measured by the metrics and standards. Id., at 4916-4917. Section 207(c) provides that, "[t]o the extent practicable, Amtrak and its host rail carriers shall incorporate the metrics and standards developed under subsection (a) into their access and service agreements." Id., at 4917. And §222(a) obliges Amtrak, within one year after the metrics and standards are established, to "develop and implement a plan to improve on-board service pursuant to the metrics and standards for such service developed under [§207(a)]." Id., at 4932.

Under §213(a) of the PRIIA, the metrics and standards also may play a role in prompting investigations by the STB and in subsequent enforcement actions. For instance, "[i]f the on-time performance of any intercity passenger train averages less than 80 percent for any 2 consecutive calendar quarters," the STB may initiate an investigation "to determine whether and to what extent delays . . . are due to causes that could reasonably be addressed . . . by Amtrak or other intercity passenger rail operators." Id., at 4925-4926. While conducting an investigation under §213(a), the STB "has authority to review the accuracy of the train performance data and the extent to which scheduling and congestion contribute to delays" and shall "obtain information from all parties involved and identify reasonable measures and make recommendations to improve the service, quality, and on-time performance of the train." Id., at 4926. Following an investigation,

the STB may award damages if it "determines that delays or failures to achieve minimum standards . . . are attributable to a rail carrier's failure to provide preference to Amtrak over freight transportation." Ibid. The STB is further empowered to "order the host rail carrier to remit" damages "to Amtrak or to an entity for which Amtrak operates intercity passenger rail service." Ibid.

B

In March 2009, Amtrak and the FRA published a notice in the Federal Register inviting comments on a draft version of the metrics and standards. App. 75-76. The final version of the metrics and standards was issued jointly by Amtrak and the FRA in May 2010. Id., at 129-144. The metrics and standards address, among other matters, Amtrak's financial performance, its scores on consumer satisfaction surveys, and the percentage of passenger-trips to and from underserved communities.

Of most importance for this case, the metrics and standards also address Amtrak's on-time performance and train delays caused by host railroads. The standards associated with the on-time performance metrics require on-time performance by Amtrak trains at least 80% to 95% of the time for each route, depending on the route and year. Id., at 133-135. With respect to "host-responsible delays"—that is to say, delays attributed to the railroads along which Amtrak trains travel—the metrics and standards provide that "[d]elays must not be more than 900 minutes per 10,000 Train-Miles." Id., at 138. Amtrak conductors determine responsibility for particular delays. Ibid., n.23.

. . .

II

In holding that Congress may not delegate to Amtrak the joint authority to issue the metrics and standards—authority it described as "regulatory power," ibid.—the Court of Appeals concluded Amtrak is a private entity for purposes of determining its status when considering the constitutionality of its actions in the instant dispute. That court's analysis treated as controlling Congress' statutory command that Amtrak "'is not a department, agency, or instrumentality of the United States Government.'" Id., at 675 (quoting 49 U.S.C. §24301(a)(3)). The Court of Appeals also relied on Congress' pronouncement that Amtrak "'shall be operated and managed as a for-profit corporation.'" 721 F.3d, at 675 (quoting §24301(a)(2)); see also id., at 677 ("Though the federal government's involvement in Amtrak is considerable, Congress has both designated it a private corporation and instructed that it be managed so as to maximize profit. In deciding Amtrak's status for purposes of congressional delegations, these

declarations are dispositive"). Proceeding from this premise, the Court of Appeals concluded it was impermissible for Congress to "delegate regulatory authority to a private entity." Id., at 670; see also ibid. (holding Carter v. Carter Coal Co., 298 U.S. 238, 56 S. Ct. 855, 80 L. Ed. 1160 (1936), prohibits any such delegation of authority).

That premise, however, was erroneous. Congressional pronouncements, though instructive as to matters within Congress' authority to address, see, e.g., United States ex rel. Totten v. Bombardier Corp., 380 F.3d 488, 491-492 (C.A.D.C. 2004) (Roberts, J.), are not dispositive of Amtrak's status as a governmental entity for purposes of separation of powers analysis under the Constitution. And an independent inquiry into Amtrak's status under the Constitution reveals the Court of Appeals' premise was flawed.

It is appropriate to begin the analysis with Amtrak's ownership and corporate structure. The Secretary of Transportation holds all of Amtrak's preferred stock and most of its common stock. Amtrak's Board of Directors is composed of nine members, one of whom is the Secretary of Transportation. Seven other Board members are appointed by the President and confirmed by the Senate. 49 U.S.C. §24302(a)(1). These eight Board members, in turn, select Amtrak's president. §24302(a)(1)(B); §24303(a). Amtrak's Board members are subject to salary limits set by Congress, §24303(b); and the Executive Branch has concluded that all appointed Board members are removable by the President without cause, see 27 Op. Atty. Gen. 163 (2003).

Under further statutory provisions, Amtrak's Board members must possess certain qualifications. Congress has directed that the President make appointments based on an individual's prior experience in the transportation industry, §24302(a)(1)(C), and has provided that not more than five of the seven appointed Board members be from the same political party, §24302(a)(3). In selecting Amtrak's Board members, moreover, the President must consult with leaders of both parties in both Houses of Congress in order to "provide adequate and balanced representation of the major geographic regions of the United States served by Amtrak." §24302(a)(2).

In addition to controlling Amtrak's stock and Board of Directors the political branches exercise substantial, statutorily mandated supervision over Amtrak's priorities and operations. Amtrak must submit numerous annual reports to Congress and the President, detailing such information as route-specific ridership and on-time performance. §24315. The Freedom of Information Act applies to Amtrak in any year in which it receives a federal subsidy, 5 U.S.C. §552, which thus far has been every year of its existence. Pursuant to its status under the Inspector General Act of 1978 as a "'designated Federal entity,'" 5 U.S.C. App. §8G(a)(2), p. 521, Amtrak must maintain an inspector general, much like governmental agencies such as the Federal Communications Commission and the Securities and Exchange Commission. Furthermore, Congress conducts frequent oversight hearings into Amtrak's budget, routes, and prices. . . .

It is significant that, rather than advancing its own private economic interests, Amtrak is required to pursue numerous, additional goals defined by statute. To take a few examples: Amtrak must "provide efficient and effective intercity passenger rail mobility," 49 U.S.C. §24101(b); "minimize Government subsidies," §24101(d); provide reduced fares to the disabled and elderly, §24307(a); and ensure mobility in times of national disaster, §24101(c)(9).

In addition to directing Amtrak to serve these broad public objectives, Congress has mandated certain aspects of Amtrak's day-to-day operations. Amtrak must maintain a route between Louisiana and Florida. §24101(c)(6). When making improvements to the Northeast corridor, Amtrak must apply seven considerations in a specified order of priority. §24902(b). And when Amtrak purchases materials worth more than $1 million, these materials must be mined or produced in the United States, or manufactured substantially from components that are mined, produced, or manufactured in the United States, unless the Secretary of Transportation grants an exemption. §24305(f).

Finally, Amtrak is also dependent on federal financial support. In its first 43 years of operation, Amtrak has received more than $41 billion in federal subsidies. In recent years these subsidies have exceeded $1 billion annually. See Brief for Petitioners 5, and n.2, 46.

Given the combination of these unique features and its significant ties to the Government, Amtrak is not an autonomous private enterprise. Among other important considerations, its priorities, operations, and decisions are extensively supervised and substantially funded by the political branches. A majority of its Board is appointed by the President and confirmed by the Senate and is understood by the Executive to be removable by the President at will. Amtrak was created by the Government, is controlled by the Government, and operates for the Government's benefit. Thus, in its joint issuance of the metrics and standards with the FRA, Amtrak acted as a governmental entity for purposes of the Constitution's separation of powers provisions. And that exercise of governmental power must be consistent with the design and requirements of the Constitution, including those provisions relating to the separation of powers.

Respondent urges that Amtrak cannot be deemed a governmental entity in this respect. Like the Court of Appeals, it relies principally on the statutory directives that Amtrak "shall be operated and managed as a for profit corporation" and "is not a department, agency, or instrumentality of the United States Government." §§24301(a)(2)-(3). In light of that statutory language, respondent asserts, Amtrak cannot exercise the joint authority entrusted to it and the FRA by §207(a).

. . .

. . . Treating Amtrak as governmental for these purposes, moreover, is not an unbridled grant of authority to an unaccountable actor. The political branches created Amtrak, control its Board, define its mission, specify many of its day-to-day operations, have imposed substantial transparency

and accountability mechanisms, and, for all practical purposes, set and supervise its annual budget. Accordingly, the Court holds that Amtrak is a governmental entity, not a private one, for purposes of determining the constitutional issues presented in this case.

. . .

It is so ordered.

NOTES

1. Amtrak is not unique. Congress has created other entities that have regulatory responsibilities yet are excluded from the definition of "agency" of the U.S. government. See 15 U.S.C. §7211(b) ("The [Public Company Accounting Oversight] Board shall not be an agency or establishment of the United States Government, and, except as otherwise provided in this Act, shall be subject to, and have all the powers conferred upon a nonprofit corporation by, the District of Columbia Nonprofit Corporation Act."). The PCAOB has significant regulatory responsibility, as will be discussed later in this chapter. What is the reason for the creation of these types of entities? Why doesn't Congress simply create a new government agency? Justice Alito in his concurring opinion seemed concerned with stealth regulation by Congress and concomitant concerns over accountability. See 135 S. Ct. 1225 ("One way the Government can regulate without accountability is by passing off a Government operation as an independent private concern.").

2. The Court did not, for constitutional purposes, give definitive weight to the decision by Congress that Amtrak was not a department, agency, or instrumentality of the U.S. government. What factors seemed to matter most to the Court?

3. What are the consequences of this decision? What requirements apply and what requirements do not apply to Amtrak?

4. The finding that Amtrak was "a federal actor or instrumentality" and not a private entity left unanswered a raft of additional issues. On remand, for example, the Court noted that the designation of the president of Amtrak by the board of directors had been challenged under the Appointments Clause, a provision that we will address later in this chapter. To the extent the president is an officer, but not an inferior officer, appointment rests with the President and requires advice and consent of the Senate. Moreover, even assuming the president is an inferior officer, appointment by the board is possible only if the board is considered the "Head of a Department." A separate issue exists as to whether Amtrak constitutes a "Department" of the government for constitutional purposes.

5.With respect to Amtrak, what do you make of the "for profit" status of the entity? Does this raise any concerns with respect to Amtrak's regulatory responsibilities? Other "for profit" entities with regulatory responsibilities exist in our system of government. Stock exchanges are an example. They have the ability to adopt rules and regulations and to discipline companies

that violate their listing standards. The NYSE converted to a for-profit company in 2005. How might this case apply to that entity?

C. TYPES OF AGENCIES

Administrative agencies have been a part of the U.S. system of government since the very beginning. The consistency of their presence, however, masks a significant evolution in their duties and responsibilities. Congress often adopts legislation that amounts to a template and assigns to the agencies the authority to develop the specific requirements. Moreover, in an era when issues addressed by the government have become increasingly complex, the responsibilities of the administrative agencies have grown significantly.

Despite their longstanding nature, administrative agencies continue to raise unique constitutional questions. As will be developed in this chapter, there is a category of administrative agency that has been deliberately designed to be more "independent" of the President. The constitutional basis for these "independent" agencies has shifted over time and is not entirely resolved. Similarly, efforts to create new types of "independent" agencies have not been met with judicial approval, as the *PCAOB* case excerpted later in this chapter shows.

NOTES

1. Administrative agencies are as old as American government itself. The very first session of the first Congress enacted three statutes conferring important administrative powers. Two of them were antecedents of statutes now administered by the Bureau of Customs in the Treasury Department, and the third initiated the program of benefits now operated by the Veterans Administration. The latter statute provided for pensions to be paid to disabled veterans "under such regulations as the President of the United States may direct"—the first express delegation of rulemaking powers by Congress. Under the other two laws, port collectors were vested with adjudicatory authority, including licensing powers, and the power to decide the amount of duties payable.

2. The delegations made by the first Congress were repeated by later legislatures. The Interstate Commerce Commission (ICC) was created in 1887—the date usually considered the beginning of our administrative law. Well before the ICC, the courts recognized the existence of agencies vested with legislative and judicial-type powers. In 1813, the Supreme Court dealt with the question of whether legislative authority could be transferred by

Congress and, twelve years later, Chief Justice Marshall acknowledged that Congress could delegate rulemaking power. Before the ICC was given comparable authority, the federal courts upheld the establishment of agencies with the legislative power to fix rates. Other pre-ICC cases recognized the administrative exercise of "quasi-judicial functions." Even the form of independent commission was not original in the ICC. The first federal independent commission was created in 1822, and similar commissions existed in the states before the ICC was established.

3. The establishment of the ICC was, nevertheless, a quantum step forward in the development of American administrative law. With the ICC, the modern instrument of administrative regulation was first created. To enable the new commission to perform its specialized tasks, it was vested with broad powers of rulemaking and adjudication, as well as the more traditional types of executive power. Extensive authority that was later conferred made the ICC a virtual combined executive, Congress, and Supreme Court over the railroad industry. The ICC has been the archetype of the modern administrative agency. It has served as the model for a host of federal and state agencies, patterned in their essentials on the first federal regulatory commission. In countless instances, specialization to deal with particularized problems of administration has been provided in the same way it was in 1887. The result has been a proliferation of federal and state agencies endowed with the power to determine, by rule or by decision, private rights and obligations.

Warren, Administrative Law in the Political System
40-41 (5th ed. 2011)*

According to James Q. Wilson, . . . there were four periods in our history when the political climate favored the rapid growth of regulatory agencies. . . . He asserted that each wave

> was characterized by progressive or liberal Presidents in office (Cleveland, T. R. Roosevelt, Wilson, F. D. Roosevelt, Johnson); one was a period of national crisis (the 1930s); three were periods when the President enjoyed extraordinary majorities of his own party in both houses of Congress (1914-1916, 1932-1940, and 1964-1968); and only the first preceded the emergence of the national mass media of communication. These facts are important because of the special difficulty of passing any genuinely regulatory legislation. . . . Without specific political circumstances—a crisis, a scandal, extraordinary majorities, an especially vigorous President, the support of the media—the normal barriers to legislative innovation . . . may prove insuperable.

These periods are sketched in Table [1.1].** I have added to Table [1.1] a fifth stage, the "deregulation stage," which took place mostly during the Reagan and George H. W. Bush years, reflecting the sentiment that bureaucracy is "too fat and even illegitimate."

TABLE [1.1]. James Q. Wilson's Four Periods of Bureaucratic Growth

Period	*Focus*	*Key Acts Passed*
1887-90	Control monopolies and rates	Interstate Commerce Act Sherman Act
1906-15	Regulate product quality	Pure Food and Drug Act Meat Inspection Act Federal Trade Commission Act Clayton Act
1930-40	Extend regulation to cover various socioeconomic areas, especially new technologies	Food, Drug, and Cosmetic Act Public Utility Holding Company Act National Labor Relations Act Securities and Exchange Act Natural Gas Act
1960-79	Expand regulation to make America a cleaner, healthier safer, and fairer place to live and work	Economic Opportunity Act Civil Rights Acts of 1960, 1964, and 1968 National Environmental Policy Act Clean Air Act Occupational Safety and Health Act
1978-93	Deregulation movement as a reaction to bureaucratic overexpansion	Paperwork Reduction Act Air Deregulation Act Radio and TV deregulation Banking deregulation
1993-present	Deregulation, reregulation, or more regulation	Communication Decency Act of 1996 Telecommunications Act of 1996 USA Patriot Act of 2001

Regulatory Program of the United States Government

xiv, xviii, Apr. 1, 1985 through Mar. 31, 1986

Federal regulations serve a variety of functions, and generalizations concerning them can be so abstract that their implications may be difficult

** This table is based on Wilson, The Rise of the Bureaucratic State, The Public Interest 41 (1975), reprinted in F. Rourke, Bureaucratic Power in National Policy Making 125-148 (4th ed. 1986), but table categories and descriptions were created and supplemented by K. F. Warren.

to discern. Nonetheless, by sorting regulatory programs according to the functions they serve, similar programs at different agencies can be analyzed and compared and general principles can be established.

One of the most important regulatory functions is the protection of public health and safety and the environment. The Environmental Protection Agency and the Occupational Safety and Health Administration of the Department of Labor regulate to these ends. The Food and Drug Administration of the Department of Health and Human Services and various elements of the Departments of Agriculture and Transportation also issue regulations to protect public health and safety and the environment. The intended benefits of these programs include improved health and longevity and a cleaner environment. The costs often take the form of higher costs to producers and higher prices to consumers for goods and services of all types. Virtually every production activity is affected in some way by Federal health, safety, and environmental regulations.

A second function of regulation is the direct control of commerce and trade, i.e., traditional "economic" regulation. This involves regulating entry, prices, production, or other aspects of business and industry—not for safety reasons, but for economic reasons. For the most part, the United States relies on free enterprise and competition in the marketplace to determine prices and production levels, although we use some generic (not industry-specific) regulation to encourage competition. Antitrust regulation is a good example; patent and trademark regulation is another. Generally, economic regulation of specific industries is justified, however, only where unregulated competition is not appropriate. For example, the local "public utility" industries—electricity, gas, and telephone service—are natural monopolies, and they have traditionally been regulated as such by the states. Other industries, especially in interstate transportation and communications, have long been regulated at the Federal level—usually by independent regulatory commissions. . . .

Economic regulation of industry is the oldest form of Federal regulatory activity, having originated with the establishment of the Interstate Commerce Commission (ICC) in 1887. A rationale for establishing the ICC was that the existence of a natural monopoly (the railroads) warranted government intervention, a rationale which—where it applies—still finds general acceptance today. Actions to deregulate transportation over the past decade have come about not because the natural monopoly rationale has been rejected, but because it came to be recognized that economic regulation was being applied to transportation modes that never were natural monopolies, such as airlines, trucks, and intercity buses, or that had since been subjected to effective competition from other modes, as railroads have been for much of their traffic. The most recent steps in this development were the passage of the Motor Carrier Act of 1980, the Staggers Rail Act of 1980, the Administration's bill to deregulate intercity buses in 1982, and the closing of the Civil Aeronautics Board on January 1, 1985.

For a detailed analysis of the paradigmatic shift toward deregulation and its causes, see Joseph D. Kearney & Thomas W. Merrill, The Great Transformation of Regulated Industries Law, 98 Colum. L. Rev. 1323 (1998).

NOTES

1. To the administrative lawyer, there are two principal kinds of governmental organ.

a. Present-day administrative agencies are vested with authority to prescribe generally what shall or shall not be done in a given situation (just as legislatures do); to determine whether the law has been violated in particular cases and to proceed against the violators (just as prosecutors and courts do); to admit people to privileges not otherwise open to members of the public (as the Crown once could do); and even to impose fines and render what amount to money judgments. Agencies vested with these powers are usually called "regulatory agencies" because their activities impinge on private rights and regulate the manner in which those rights may be exercised. To administrative lawyers, this is the best-known type of agency; its prototype was the Interstate Commerce Commission, the first of an entirely new family of governmental bodies.
b. There is another group of agencies vested with the authority to dispense benefits for promoting social and economic welfare, such as pensions, disability and welfare grants, and government insurance. They exist at both the state and federal levels. The federal system of social welfare includes programs of old age, survivors, disability insurance, Medicare and Medicaid, aid to families with dependent children, supplementary security income, veterans' pensions and other benefits, and workers' compensation. The federal agencies that administer these programs are the Department of Health and Human Services, the Veterans Administration, and the Department of Labor.

2. Administrative lawyers have concentrated primarily on the regulatory agency—for the natural reason that it serves to restrict private rights. It is in this area, accordingly, that the law is more fully developed. An imposing edifice of formal administrative procedure has been constructed, patterned on the adversary procedure of the courtroom. When people speak of the judicialization of the administrative process, it is essentially the regulatory process to which they are referring.

3. Recent decades have, however, seen a substantial shift in the center of gravity toward the nonregulatory area. The welfare state has converted an ever-growing portion of the community into government clients. The Affordable Care Act represents perhaps the most recent example. Pub. L. No. 111-148, Mar. 23, 2010. Quantitatively, the work of the Department

of Health and Human Services typically dwarfs that of a regulatory agency like the Federal Trade Commission.

4. Nonetheless, this should not understate the role of the traditional regulatory agencies. In the aftermath of the financial crisis of 2008, Congress adopted the Dodd-Frank Wall Street Reform and Consumer Protection Act, a law that consisted of 848 pages of statutory text. Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010). By July 2013, this legislative total had been dwarfed by the actions of the relevant regulatory agencies such as the Securities and Exchange Commission, the Federal Reserve, and the Commodities Futures Trading Commission. Agencies had produced 13,789 pages of regulation (more than 15 million words). Moreover, this represented only 39 percent of the "required" rulemaking contained in the Act. See Davis Polk & Wardwell LLP, Dodd-Frank Progress Report, July 15, 2013.

D. AGENCIES AND ACCOUNTABILITY

The growth of the bureaucracy, particularly since the Great Depression, has been nothing short of explosive. Moreover, Congress has delegated to the agencies broad regulatory authority, with few areas of social and economic policy exempt from some level of agency oversight. The role played by agencies raises serious issues of accountability. Who ensures that the unelected bureaucracy engages in a proper exercise of authority?

Agency Accountability and Congress

Immigration and Naturalization Service v. Chadha
462 U.S. 919 (1983)

CHIEF JUSTICE BURGER delivered the opinion of the Court.

I

Chadha is an East Indian who was born in Kenya and holds a British passport. He was lawfully admitted to the United States in 1966 on a nonimmigrant student visa. His visa expired on June 30, 1972. On October 11, 1973, the District Director of the Immigration and Naturalization Service ordered Chadha to show cause why he should not be deported for having "remained in the United States for a longer time than permitted." App. 6. Pursuant to §242(b) of the Immigration and Nationality Act (Act), 8 U.S.C. §1252(b), a deportation hearing was held before an Immigration Judge on

January 11, 1974. Chadha conceded that he was deportable for overstaying his visa and the hearing was adjourned to enable him to file an application for suspension of deportation under §244(a)(1) of the Act, 8 U.S.C. §1254(a)(1). . . .

The June 25, 1974, order of the Immigration Judge suspending Chadha's deportation remained outstanding as a valid order for a year and a half. For reasons not disclosed by the record, Congress did not exercise the veto authority reserved to it under §244(c)(2) until the first session of the 94th Congress. This was the final session in which Congress, pursuant to §244(c)(2), could act to veto the Attorney General's determination that Chadha should not be deported. The session ended on December 19, 1975. 121 Cong. Rec. 42014, 42277 (1975). Absent congressional action, Chadha's deportation proceedings would have been canceled after this date and his status adjusted to that of a permanent resident alien. . . .

On December 12, 1975, Representative Eilberg, Chairman of the Judiciary Subcommittee on Immigration, Citizenship, and International Law, introduced a resolution opposing "the granting of permanent residence in the United States to [six] aliens," including Chadha. H. Res. 926, 94th Cong., 1st Sess.; 121 Cong Rec. 40247 (1975). . . .

The resolution was passed without debate or recorded vote. Since the House action was pursuant to §244(c)(2), the resolution was not treated as an Art. I legislative act; it was not submitted to the Senate or presented to the President for his action. . . .

. . .

III

A

We turn now to the question whether action of one House of Congress under §244(c)(2) violates strictures of the Constitution. . . .

Explicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process. Since the precise terms of those familiar provisions are critical to the resolution of these cases, we set them out verbatim. Article I provides:

> "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate *and* House of Representatives." Art. I, §1. (Emphasis added.)
>
> "Every Bill which shall have passed the House of Representatives *and* the Senate, *shall*, before it becomes a law, be presented to the President of the United States. . . ." Art. I, §7, cl. 2. (Emphasis added.)
>
> "*Every* Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of

> Adjournment) *shall be* presented to the President of the United States; and before the Same shall take Effect, *shall be* approved by him, or being disapproved by him, *shall be* repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill." Art. I, §7, cl. 3. (Emphasis added.)

These provisions of Art. I are integral parts of the constitutional design for the separation of powers. . . .

B

The Presentment Clauses

The records of the Constitutional Convention reveal that the requirement that all legislation be presented to the President before becoming law was uniformly accepted by the Framers. Presentment to the President and the Presidential veto were considered so imperative that the draftsmen took special pains to assure that these requirements could not be circumvented. During the final debate on Art. I, §7, cl. 2, James Madison expressed concern that it might easily be evaded by the simple expedient of calling a proposed law a "resolution" or "vote" rather than a "bill." 2 Farrand 301-302. As a consequence, Art. I, §7, cl. 3, *supra*, at 945-946, was added. 2 Farrand 304-305.

The decision to provide the President with a limited and qualified power to nullify proposed legislation by veto was based on the profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed. It is beyond doubt that lawmaking was a power to be shared by both Houses and the President. . . .

The President's role in the lawmaking process also reflects the Framers' careful efforts to check whatever propensity a particular Congress might have to enact oppressive, improvident, or ill-considered measures. . . .

C

Bicameralism

The bicameral requirement of Art. I, §§1, 7, was of scarcely less concern to the Framers than was the Presidential veto and indeed the two concepts are interdependent. By providing that no law could take effect without the concurrence of the prescribed majority of the Members of both Houses, the Framers reemphasized their belief, already remarked upon in connection with the Presentment Clauses, that legislation should not be enacted unless it has been carefully and fully considered by the Nation's elected officials. . . .

However familiar, it is useful to recall that apart from their fear that special interests could be favored at the expense of public needs, the Framers were also concerned, although not of one mind, over the apprehensions of the smaller states. Those states feared a commonality of interest among the larger states would work to their disadvantage; representatives of the larger states, on the other hand, were skeptical of a legislature that could pass laws favoring a minority of the people. See 1 Farrand 176-177, 484-491. It need hardly be repeated here that the Great Compromise, under which one House was viewed as representing the people and the other the states, allayed the fears of both the large and small states.

We see therefore that the Framers were acutely conscious that the bicameral requirement and the Presentment Clauses would serve essential constitutional functions. The President's participation in the legislative process was to protect the Executive Branch from Congress and to protect the whole people from improvident laws. The division of the Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings. The President's unilateral veto power, in turn, was limited by the power of two-thirds of both Houses of Congress to overrule a veto thereby precluding final arbitrary action of one person. See *id.*, at 99-104. It emerges clearly that the prescription for legislative action in Art. I, §§1, 7, represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.

IV

The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.

Although not "hermetically" sealed from one another, *Buckley v. Valeo*, 424 U.S., at 121, the powers delegated to the three Branches are functionally identifiable. When any Branch acts, it is presumptively exercising the power the Constitution has delegated to it. When the Executive acts, he presumptively acts in an executive or administrative capacity as defined in Art. II. And when, as here, one House of Congress purports to act, it is presumptively acting within its assigned sphere.

Beginning with this presumption, we must nevertheless establish that the challenged action under §244(c)(2) is of the kind to which the procedural requirements of Art. I, §7, apply. Not every action taken by either House is subject to the bicameralism and presentment requirements of Art. I. See *infra*, at 955, and nn. 20, 21. Whether actions taken by either

House are, in law and fact, an exercise of legislative power depends not on their form but upon "whether they contain matter which is properly to be regarded as legislative in its character and effect." S. Rep. No. 1335, 54th Cong., 2d Sess., 8 (1897).

Examination of the action taken here by one House pursuant to §244(c)(2) reveals that it was essentially legislative in purpose and effect. In purporting to exercise power defined in Art. I, §8, cl. 4, to "establish an uniform Rule of Naturalization," the House took action that had the purpose and effect of altering the legal rights, duties, and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the Legislative Branch. Section 244(c)(2) purports to authorize one House of Congress to require the Attorney General to deport an individual alien whose deportation otherwise would be canceled under §244. The one-House veto operated in these cases to overrule the Attorney General and mandate Chadha's deportation; absent the House action, Chadha would remain in the United States. Congress has *acted* and its action has altered Chadha's status.

The legislative character of the one-House veto in these cases is confirmed by the character of the congressional action it supplants. Neither the House of Representatives nor the Senate contends that, absent the veto provision in §244(c)(2), either of them, or both of them acting together, could effectively require the Attorney General to deport an alien once the Attorney General, in the exercise of legislatively delegated authority, had determined the alien should remain in the United States. Without the challenged provision in §244(c)(2), this could have been achieved, if at all, only by legislation requiring deportation. Similarly, a veto by one House of Congress under §244(c)(2) cannot be justified as an attempt at amending the standards set out in §244(a)(1), or as a repeal of §244 as applied to Chadha. Amendment and repeal of statutes, no less than enactment, must conform with Art. I.

The nature of the decision implemented by the one-House veto in these cases further manifests its legislative character. After long experience with the clumsy, time-consuming private bill procedure, Congress made a deliberate choice to delegate to the Executive Branch, and specifically to the Attorney General, the authority to allow deportable aliens to remain in this country in certain specified circumstances. It is not disputed that this choice to delegate authority is precisely the kind of decision that can be implemented only in accordance with the procedures set out in Art. I. Disagreement with the Attorney General's decision on Chadha's deportation—that is, Congress' decision to deport Chadha—no less than Congress' original choice to delegate to the Attorney General the authority to make that decision, involves determinations of policy that Congress can implement in only one way: bicameral passage followed by presentment to the President. Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked.

Finally, we see that when the Framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined the procedure for such action. There are four provisions in the Constitution, explicit and unambiguous, by which one House may act alone with the unreviewable force of law, not subject to the President's veto:

(a) The House of Representatives alone was given the power to initiate impeachments. Art. I, §2, cl. 5;
(b) The Senate alone was given the power to conduct trials following impeachment on charges initiated by the House and to convict following trial. Art. I, §3, cl. 6;
(c) The Senate alone was given final unreviewable power to approve or to disapprove Presidential appointments. Art. II, §2, cl. 2;
(d) The Senate alone was given unreviewable power to ratify treaties negotiated by the President. Art. II, §2, cl. 2.

Clearly, when the Draftsmen sought to confer special powers on one House, independent of the other House, or of the President, they did so in explicit, unambiguous terms. These carefully defined exceptions from presentment and bicameralism underscore the difference between the legislative functions of Congress and other unilateral but important and binding one-House acts provided for in the Constitution. These exceptions are narrow, explicit, and separately justified; none of them authorize the action challenged here. On the contrary, they provide further support for the conclusion that congressional authority is not to be implied and for the conclusion that the veto provided for in §244(c)(2) is not authorized by the constitutional design of the powers of the Legislative Branch.

Since it is clear that the action by the House under §244(c)(2) was not within any of the express constitutional exceptions authorizing one House to act alone, and equally clear that it was an exercise of legislative power, that action was subject to the standards prescribed in Art. I. The bicameral requirement, the Presentment Clauses, the President's veto, and Congress' power to override a veto were intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps. To preserve those checks, and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded. To accomplish what has been attempted by one House of Congress in this case requires action in conformity with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both Houses and presentment to the President.

The veto authorized by §244(c)(2) doubtless has been in many respects a convenient shortcut; the "sharing" with the Executive by Congress of its authority over aliens in this manner is, on its face, an appealing compromise. In purely practical terms, it is obviously easier for action to

be taken by one House without submission to the President; but it is crystal clear from the records of the Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency. The records of the Convention and debates in the States preceding ratification underscore the common desire to define and limit the exercise of the newly created federal powers affecting the states and the people. There is unmistakable expression of a determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process.

The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided, either by the Congress or by the President. With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.

V

We hold that the congressional veto provision in §244(c)(2) is severable from the Act and that it is unconstitutional. Accordingly, the judgment of the Court of Appeals is

Affirmed.

JUSTICE WHITE, dissenting.

Today the Court not only invalidates §244(c)(2) of the Immigration and Nationality Act, but also sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a "legislative veto." For this reason, the Court's decision is of surpassing importance. . . .

The prominence of the legislative veto mechanism in our contemporary political system and its importance to Congress can hardly be overstated. It has become a central means by which Congress secures the accountability of executive and independent agencies. Without the legislative veto, Congress is faced with a Hobson's choice: either to refrain from delegating the necessary authority, leaving itself with a hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape, or in the alternative, to abdicate its law-making function to the Executive Branch and independent agencies. To choose the former leaves major national problems unresolved; to opt for the latter risks

unaccountable policymaking by those not elected to fill that role. Accordingly, over the past five decades, the legislative veto has been placed in nearly 200 statutes. The device is known in every field of governmental concern: reorganization, budgets, foreign affairs, war powers, and regulation of trade, safety, energy, the environment, and the economy.

NOTES

1. The majority opinion makes the outcome seem almost obvious; yet, as Justice White notes in his dissent, there were over 200 statutes that included some type of congressional veto provision, whether unicameral or bicameral. Was Congress merely flaunting the Constitution, or is there a serious argument that these veto provisions are in fact constitutional?

2. What is the consequence of this case with respect to agency accountability? What residual role does Congress have in the oversight process? Does it ensure agency accountability?

3. Congress could have avoided the issue in *Chadha* by not delegating the waiver authority to the Attorney General in the first place. Is that a practical way of solving the problem of agency accountability? How might this case affect the amount of authority Congress is willing to delegate to agencies?

4. Note the wide sweep of the *Chadha* opinion. Under it, is any room now left for use of the legislative veto technique?

5. The White dissent asserts that the Court's decision that all "lawmaking" must be shared by Congress and the President "ignores that legislative authority is routinely delegated to the executive branch, to the independent regulatory agencies." If congressional action under the legislative veto technique is "lawmaking" that must be shared by Congress and the President, why is the same not true of the agency action that the technique attempts to control?

6. Despite *Chadha*, within three years of the decision Congress had passed bills containing 102 legislative veto provisions. Berns, Locke and the Legislative Principle, The Public Interest 147 (Summer 1990). Compare Executive Office Appropriations Act, 103 Stat. 790 (1991) (no funds from the appropriation "shall be used to implement, administer or enforce any regulation which has been disapproved pursuant to a [congressional] resolution").

7. What about the situation in the states? At the time *Chadha* was decided, at least twenty-eight states had adopted some form of legislative review of administrative rulemaking. In New Jersey, the legislature adopted a legislative veto in 1981, overriding the governor's veto. See General Assembly v. Byrne, 90 N.J. 376, 378-379, 448 A.2d 438 (1982) (striking down authority as a violation of separation of powers). The state constitution was amended, however, to provide:

> The Legislature may review any rule or regulation to determine if the rule or regulation is consistent with the intent of the Legislature as expressed in the language of the statute which the rule or regulation is intended to implement. Upon a finding that an existing or proposed rule or regulation is not consistent with legislative intent, the Legislature shall transmit this finding in the form of a concurrent resolution to the Governor and the head of the Executive Branch agency which promulgated, or plans to promulgate, the rule or regulation. The agency shall have 30 days to amend or withdraw the existing or proposed rule or regulation. If the agency does not amend or withdraw the existing or proposed rule or regulation, the Legislature may invalidate that rule or regulation, in whole or in part, or may prohibit that proposed rule or regulation, in whole or in part, from taking effect by a vote of a majority of the authorized membership of each House in favor of a concurrent resolution providing for invalidation or prohibition, as the case may be, of the rule or regulation.

N.J.S.A. Const. Art. 5, §4. What do you make of this provision? Will it significantly increase the role of the legislature in ensuring agency accountability?

How does *Chadha* affect these state uses of the legislative veto?

Congressional Review Act

In the aftermath of the Supreme Court's decision in *Chadha*, Congress sought to retain an active role in the review of agency regulations. In doing so, however, it had to stay within the confines of the Supreme Court's analysis. The result was the Congressional Review Act, codified at 5 U.S.C. §801 et seq.

United States v. Nasir

2013 U.S. Dist. LEXIS 138622 (E.D. Ky. Sept. 25, 2013)

JOSEPH M. HOOD, SENIOR DISTRICT JUDGE. This matter is before the Court on the Motion to Dismiss Indictment . . . .

Defendants argue that they cannot be held criminally liable for distribution of the synthetic cannabinoids JWH-122 and AM 2201, as analogues of the substance JWH-018 because JWH-018 was not properly scheduled as a controlled substance by the Drug Enforcement Administration (DEA). Specifically, Defendants concede that the DEA followed the proper procedures under 21 U.S.C. §811(h) for the emergency scheduling of JWH-018, but argue that the DEA's failure to comply with the Congressional Review Act (CRA) during that process meant that the rule scheduling JWH-018 did not go into effect. The Court agrees with the government that the DEA complied with the CRA when JWH-018 was scheduled. Accordingly, for the reasons fully described herein, Defendants' motion will be denied.

I. Background

a. The Congressional Review Act

The Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. §§801-808, more commonly known as the Congressional Review Act (CRA), "requires congressional review of agency regulations by directing agencies to submit the rule before it takes effect to the Comptroller General and each house of Congress." *Liesegang v. Sec'y of Veterans Affairs,* 312 F.3d 1368, 1373 (Fed. Cir. 2002). Regulations that qualify as a "major rule" are subject to additional conditions but for non-major rules, such as the one at issue, notice is all that is required.

b. The Controlled Substances Act

The Controlled Substances Act (CSA) classifies into five "schedules" those drugs and other substances that have a "potential for abuse." 21 U.S.C. §812(b)(1)-(5). Drugs in Schedule I are subject to the strictest controls, and violations involving Schedule I substances are subject to the most severe penalties because they are believed to present the most serious threat to public safety. *Touby v. United States,* 500 U.S. 160, 162, 111 S. Ct. 1752, 114 L. Ed. 2d 219 (1991). Schedule I drugs (1) have "a high potential for abuse," (2) do not have a "currently accepted medical use in treatment in the United States," and (3) lack "accepted safety for use . . . under medical supervision." 21 U.S.C. §812(b)(1).

The DEA may control a drug by adding it to one of the schedules, transferring it between schedules, or removing a drug from the schedules altogether. 21 U.S.C. §§802(5), 811(a). Typically, the DEA controls a substance with a potential for abuse by making "the findings prescribed by [21 U.S.C. §812(b)] for the schedule in which [the] drug is to be placed[.]" 21 U.S.C. §811(a)(1). Prior to initiating rulemaking, the DEA must gather "the necessary data" and request a scientific and medical evaluation and recommendation as to whether the drug should be controlled from the Secretary of the U.S. Department of Health and Human Services. 21 U.S.C. §811(b). The Secretary's recommendations are binding on the DEA with respect to scientific and medical matters. *Id.* Additionally, the DEA must also consider the eight factors listed in §811(c), and comply with the notice and hearing provisions of the Administrative Procedure Act (APA).

The Dangerous Drug Diversion Control Act of 1984, Pub. L. 98-73, 98 Stat. 1837, amended the CSA to add the temporary scheduling provision found at 21 U.S.C. §811(h) in order to make the process more responsive to the emerging "designer" drug market by providing a temporary scheduling provision, see *Touby,* 500 U.S. at 163.

To temporarily schedule a drug on an emergency basis pursuant to §811(h), the DEA must find that it is necessary to temporarily schedule a

substance in schedule I "to avoid an imminent hazard to the public safety." 21 U.S.C. §811(h)(1). Instead of the eight factors required for permanent scheduling under the standard §811(c) rulemaking procedures, §811(h)(3) only requires the DEA to consider three factors before reaching an "imminent hazard" determination, specifically: (1) the drug's "history and current pattern of abuse"; (2) "[t]he scope, duration, and significance of abuse"; and (3) "[w]hat, if any, risk there is to the public health." In addition, the DEA considers "actual abuse, diversion from legitimate channels, and clandestine importation, manufacture, or distribution." *Id.* §811(c)(4), (5), (6); *id.* §811(h)(3). "Rather than comply with the APA notice-and-hearing provisions, the Attorney General need provide only a 30-day notice of the proposed scheduling in the Federal Register." *Touby,* 500 U.S. at 163. The DEA scheduled JWH-018 under this emergency scheduling authority. *See* Notice of Intent to Temporarily Schedule, 75 Fed. Reg. 71635, [DE 235-1 (DEA Letter to HHS); DE 235-2 (HHS Letter responding to DEA)].

On March 1, 2011, the DEA published a Final Order temporarily placing five synthetic cannabinoids in Schedule I on an emergency basis for a period of one year. *See* Final Order, 76 Fed. Reg. 11075 (Mar. 1, 2011); 21 U.S.C. §811(h). In connection with this Order, the DEA invoked an exception to the procedural requirements of the Congressional Review Act (CRA) in order to avoid any delay. *See* 5 U.S.C. §808(2).

On February 29, 2012, DEA published an order extending the temporary scheduling of JWH-018 to August 29, 2012, or until the final rulemaking proceedings were complete, whichever came first. *See* Final Rule, 77 Fed. Reg. 12201 (Feb. 29, 2012). On July 9, 2012, President Barack Obama signed the Synthetic Drug Abuse Prevention Act of 2012, Pub. L. No. 112-144, into law. The Act bans several specific synthetic cannabinoids (including JWH-018) and an entire class of "cannabimimetic agents" as Schedule I substances, thereby obviating the need for the DEA to publish a Final Rule.

The indictment in this matter covers activity involving JWH-018 analogues during the time span of fall, 2011 to October, 2012, in other words, during the time period that JWH-018 was included on Schedule I through the temporary scheduling authority described above.

II. Analysis

The issue, Defendants argue, is whether "the DEA's failure to notify Congress and the Comptroller General before issuing the March 1, 2011 order adding JWH-018 to Schedule I pursuant to 21 U.S.C. §811(h) precludes prosecution of this defendant with regard to the alleged conspiracy to distribute JWH-122 and AM 2201, as analogues of JWH-018." [DE 219 at # 775.] To be clear, the defendants do not challenge the DEA's compliance with the temporary scheduling process set forth in 21 U.S.C. §811(h), only the DEA's compliance with the notifications required by the CRA.

The government contends, first, that the DEA did notify Congress and the Comptroller General prior to issuing the March 1, 2011 order as

required by the CRA, under 5 U.S.C. §801(a)(1)(A); second, that the DEA properly invoked the "good cause" exemption to compliance with the CRA under 5 U.S.C. §808(2); and, finally, that the CRA, specifically, 5 U.S.C. §805, bars judicial review of an agency's compliance with the CRA. This Court agrees that the DEA clearly provided notice to Congress and the Comptroller General as required under the CRA, thus, this Court need not reach the government's remaining arguments.

A. Compliance with CRA

Pursuant to 5 U.S.C. §801(a)(1)(A), prior to taking effect, the federal agency promulgating the rule shall provide to each House of Congress and to the Comptroller General a report with: (1) a copy of the rule; (2) a concise general statement relating to the rule, including whether it is a major rule; and (3) the proposed effective date of the rule. 5 U.S.C. §801(a)(1)(A). The CRA makes distinction based on whether a rule is a "major" rule, as defined in 5 U.S.C. §804(2), or a "non-major" rule. Major rules are subjected to additional procedures and a delay in the effective date of the rule, as proscribed in the CRA. The DEA designated the rule at issue as a "non-major" rule. In the case of a "non-major" rule, as here, the rule "shall take effect as otherwise provided by law after submission to Congress." 5 U.S.C. §801(4).

On or about November 24, 2010, the DEA published its Notice of Intent, dated November 15, 2010, to place JWH-018 on Schedule I under the temporary scheduling provisions. The Notice of Intent included a statement regarding the CRA in which the DEA noted that this was not a major rule. Subsequently, the DEA published a correction on or about January 13, 2011 in which it clarified that the certification regarding the CRA was prematurely included in the Notice of Intent and struck that paragraph from the Notice of Intent. 76 Fed. Reg. 2287.

The DEA provided its Final Order, dated February 18, 2011, scheduling JWH-018 as a Schedule I drug for publication in the March 1, 2011, Federal Register. With respect to the CRA, the DEA stated that it was invoking the exception to the CRA under 5 U.S.C. §808(2) because it was making a good faith finding that "notice and public procedure [on the final rule] are impracticable, unnecessary, or contrary to the public interest." Notwithstanding the DEA's reliance on §808(2), and despite the Defendants' assertions, the DEA still went forward with the requirements of 5 U.S.C. §801(a)(1)(A). A copy of the rule, a concise statement and the proposed effective date, as required under the CRA, were provided to the President of the Senate on February 28, 2011 [DE 235-3]. The same information under the CRA was provided to the Speaker of the House of Representatives on February 28, 2011. [DE 235-4]; 157 CONG. REC. H2212 (Mar. 31, 2011). The U.S. Government Accountability Office ("GAO") also received a copy on February 28, 2011. [DE 235-5]; also available at www.gao.gov/fedrules/165353.

As explained by defendants, "the DEA merely has to go through the perfunctory steps of presentation to Congress and the Comptroller General to place a substance on the list of controlled substances" [DE 219-1 at 9], and that is precisely what the DEA did in this instance.

This Court's research revealed that this challenge to the DEA's procedure for temporarily scheduling JWH-018 has only been made in one prior case, *United States v. Reece,* No. 6:12-cr-146 (W.D. La. 2012). The *Reece* Court determined that it was not necessary for the DEA to comply with the CRA, 5 U.S.C. §801; rather, the DEA's compliance with 21 U.S.C. §811(h) was sufficient. *United States v. Reece,* No. 6:12-cr-146, 2013 WL 3327913 *8-9 (W.D. La. July 1, 2013). The conclusion in *Reece* may be correct, however, this Court chooses to decide the issue on the most narrow ground possible. Since this Court finds that the DEA complied with the CRA, 5 U.S.C. §801, there is no need to determine whether the DEA was required to comply with the CRA or not.

. . .

C. Judicial Review of Compliance with CRA

It is beyond cavil that the DEA's temporary scheduling of JWH-018 under the CSA, pursuant to the procedure in 21 U.S.C. §811, is subject to judicial review. *Touby,* 500 U.S. at 168. However, in its Reply, the government argues that "[n]o determination, finding, action or omission under [the CRA] shall be subject to judicial review." 5 U.S.C. §805. The government does not argue, as Johnston suggests, that the scheduling of JWH-018 is not subject to review. Instead, this Court understands the United States' position to be that this Court may review the scheduling of JWH-018 by the DEA pursuant to §811 but the collateral aspect of the DEA's compliance, or lack thereof, with the CRA, i.e. the statute providing for notification to and any necessary action by Congress in reviewing the DEA's rulemaking, is not subject to judicial review under the plain language of §805.

Despite the plain language of the statute, at least two courts have concluded that judicial review is permitted to determine whether a rule has gone into effect. *Reece,* 2013 WL 3327913 at *8-9 (finding judicial review of temporary scheduling of JWH-018 proper, without significant discussion of 5 U.S.C. §805); *United States v. Southern Ind. Gas and Elec. Co.,* No. IP99-1962-C-M/S, 2002 WL 31427523 (S.D. Ind. October 24, 2002). In *Southern Indiana,* the Court found that the statute was ambiguous because it was susceptible to two meanings: (1) that "Congress did not intend for courts to have any judicial review of an agency's compliance with the CRA"; or (2) that Congress only intended to foreclose review of its own determinations, findings, actions or omissions made under the CRA after a rule is submitted. *Southern Ind.,* 2002 WL 31427523 at *5. In finding that §805 should be read in keeping with the second interpretation, the *Southern Indiana* court noted that the sponsors of the CRA had stated "the major rule

determinations made by the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget are not subject to judicial review. Nor may a court review whether Congress complied with the congressional review procedures in this chapter" but had not indicated a similar prohibition for judicial review of agency compliance with the CRA. *Id.* (quoting 142 Cong. Rec. S3686 (daily ed. Apr. 18, 1996)) (joint statement of Senate sponsors).

Nonetheless, the majority of courts considering this issue have noted, at least in passing, that the CRA precludes any judicial review. *See Montanans for Multiple Use v. Barbouletos,* 568 F.3d 225, 229 (D.C. Cir. 2009) (noting that §805 denies courts the power to void rule on the basis of agency noncompliance with the CRA); *Via Christi Reg. Med. Ctr., Inc. v. Leavitt,* 509 F.3d 1259, 1271 n. 11 (10th Cir. 2007) (same); *United States v. Ameren Missouri,* No. 4:11-cv-77-RWS, 2012 WL 2821928, *3-4 (E.D. Mo. July 12, 2012) (noting that the court lacked jurisdiction to review CRA challenge); *Forsyth Memorial Hosp. Inc. v. Sebelius,* 667 F. Supp. 2d 143, 150 (D.D.C. 2009); *United States v. Amer. Elec. Power Serv. Corp.,* 218 F. Supp. 2d 931, 949 (S.D. Ohio 2002) (same).

This Court need not weigh in on this debate in this instance, however, because it is clear from the face of the documents presented and the arguments before it that the DEA complied with the provisions of the CRA. Thus, this Court need look no further—there is no determination, finding, action or omission for this Court to review. *See* 5 U.S.C. §805.

NOTES

1. The concept of congressional review was included in the Contract for America, an agenda developed by Republicans that contributed to the party's retaking control of the House of Representatives in 1994. They were a direct response to the ruling in *Chadha* and an attempt by Congress to reassert itself in the oversight of federal agencies.

2. As the case notes, it matters whether the rule at issue is a "major" rule. In the case of a major rule, the provision cannot become effective for at least sixty days. During that time period, Congress can act to repeal the rule. To facilitate rapid action, §802 limits the amount of debate that can occur in the Senate over any resolution designed to overturn an agency rule (although there are no parallel provisions with respect to debate in the House of Representatives).

3. What do you make of the discussion of judicial review? The CRA provides in a relatively unequivocal fashion that "[n]o determination, finding, action, or omission under this chapter shall be subject to judicial review." 5 U.S.C. §805. Yet the court suggests that some form of review may be preserved. Assuming this is the case, when will courts examine compliance under the CRA? Could, for example, the categorization of a rule as not "major" be challenged? What implication would this have for administrative lawyers?