I. Overview

Administrative law is the study of governance. While Congress creates authority, the President enforces that authority, and courts confine or discipline the exercise of that authority, it is agencies that govern. That said, the starting point for many administrative law cases is an act of Congress that allows the agency to function. “It is axiomatic that administrative agencies may issue regulations only pursuant to authority delegated to them by Congress.” Am. Library Ass’n v. FCC, 406 F.3d 689, 691 (D.C. Cir. 2005).

The starting point for judicial review of and, where appropriate, deference to agency action is an assessment of the “congressional delegation of administrative authority.” Adams Fruit Co. v. Barrett, 494 U.S. 638, 649 (1990). Courts assessing agency action are obliged first to determine “whether the will of Congress has been obeyed.” Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 218 (1989) (citing Yakus v. United States, 321 U.S. 414, 426 (1944)). If you are wondering why we did not start with better known cases pertaining to delegation, fear not – they lie ahead in this text. We refer you to the above cases not because they are unique or precedent setting but because they reflect the common denominator in this field – agencies are the active “governors,” but only of the power given them by the legislature.

On a day-to-day basis, it is the agencies that have the capacity and authority to reach out and touch us all. It is the Internal Revenue Service, not Congress, that reaches into the pockets of private citizens and businesses. It is the Occupational Safety and Health Administration, not a congressional oversight committee, that assesses workplace safety. It is the Food and Drug Administration that approves and sets standards for all pharmaceuticals. It is the Nuclear Regulatory Commission that has comprehensive licensing authority for the operation of nuclear
power plants – and on and on. From the outset of the modern administrative state, this exercise of power came with acknowledged risks. Regarding the advent of modern administrative agency power, Roscoe Pound noted that “the revival of executive justice” can be seen as a “partial reversion[] to justice without law. . . .” Roscoe Pound, 2 Jurisprudence 425, cited in Michael Lassiter, Comparative Readings of Roscoe Pound’s Jurisprudence, 50 Am. J. Comp. L. 719, 745 (2002).

Unelected administrative officials can announce standards that interpret statutes and shift significantly interests and entitlements, and courts reviewing such standards may be required to defer to that agency pronouncement – or at least respect the decision of the agency – even if a court determines the standards are far from ideal. Does that strike you as “justice without law?” For some different perspectives on this, see Eric Biber & Frank B. Cross, Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction, 26 Va. Envtl. L.J. 461 (2008); Frank B. Cross, Pragmatic Pathologies of Judicial Review of Administrative Rulemaking, 78 N.C.L. Rev. 1013 (2000); Anuradha Vaitheswaran & Thomas A. Mayes, The Role of Deference in Judicial Review of Agency Action: A Comparison of Federal Law, Uniform State Acts, and the Iowa APA, 27 J. Nat’l Ass’n L. J. 402 (2007), and Rachel E. Barkow, The Ascent of the Administrative State and the Demise of Mercy, 121 Harv. L. Rev. 1332, 1334-35 (2008). Professor Barkow notes that “the rise of the administrative state has made unchecked discretion an anomaly in the law, and a phenomenon to be viewed with suspicion. The expansion of the administrative state has showcased the dangers associated with the exercise of discretion. . . . With the rise of administrative law, our legal culture has come to view unreviewable discretion to decide individual cases as the very definition of lawlessness.”

Not only are federal, state, and local agencies involved in regulating, guiding, or limiting behavior, they are also the focal point for much of the practice of law. “Administrative law, properly understood, is of paramount importance. Its enterprise bears considerable credit or blame for the very structure, operation, and even the ultimate efficacy of governance.” Christopher Edley, Jr., The Government Crisis, Legal Theory, and Political Ideology, 41 Duke L.J. 561, 562 (1991). Professor Edley notes further that “those . . . dissatisfied with the evolutionary direction of administrative law must

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**Key Concept**

Regardless of the field in which one practices, administrative agency action is likely to play a central role. This is true in criminal law, where much of the parole and post-conviction practice is administrative. It is also true in corporate law, where agency actors play a decisive role on issues such as taxes, employment, and securities regulation. Environmental law, international law, healthcare law, energy regulation, telecommunications, public interest practice, and virtually all other specializations require an understanding of the way administrative agencies function.
recognize that doctrinal change is part of a larger ideological and theoretical whole.” As noted above, this is about both the practice of law and governance. See J.B. Ruhl et al., Symposium, The Coevolution of Administrative Law with Everything Else, 28 FLA. ST. U.L. REV. 1 (2000); Nathan Block & Robin Smith Houston, Toward a Responsible System of Regulating Practice at Administrative Agencies: Administrative Agencies and the Changing Definition of the Practice of Law, 2 TEX. TECH ADMIN. L.J. 251 (2001).

From the outset, you should be aware that while the powers of government might be separated into three branches, nothing happens in isolation. For a review of the relationship between the executive, legislative, judicial branches and the agencies, see William D. Araiza, Judicial and Legislative Checks on Ex Parte OMB Influence Over Rulemaking, 54 ADMIN. L. REV. 611 (2002); Steven Croley, White House Review of Agency Rulemaking: An Empirical Investigation, 70 U. CHI. L. REV. 821 (2003); Jonathan R. Macey, Organizational Design and the Political Control of Administrative Agencies, 8 J.L. Econ. & Org. 93 (1992); Mark Seidenfeld, The Psychology of Accountability and Political Review of Agency Rules, 51 DUKL.J. 1059 (2001).

The primary focus of the vast majority of law school courses in administrative law, of necessity, is procedural. See Kristin Booth Glen, Thinking Out of the Bar Exam Box: A Proposal to “MacCrate” Entry to the Profession, 23 PACE L. REV. 343, 362 (2003) (urging – wisely we believe – that law schools require administrative law). As lawyers, we need to understand how agencies function, what rules they follow, and what power they possess in relation to subsequent judicial action. These inquiries require an assessment of how agency action is affected by constitutional constraints, how agencies maintain order in proceedings involving numerous conflicting interests, how agencies formulate rules and regulations, and how they exercise their power to search and investigate. See Robert L. Rabin, Federal Regulation in Historical Perspective, 38 STAN. L. REV. 1189 (1986) (setting out the historical context of the field), and on the role the executive plays in shaping the agency state; Elena Kagan, Presidential Administration, 114 HARV. L. REV. 2245 (2001); Martin S. Flaherty, The Most Dangerous Branch, 105 YALE L.J. 1725 (1996); Abner S. Greene, Checks and Balances in an Era of Presidential Lawmaking, 61 U. CHI. L. REV. 123 (1994); and Steven G. Calabresi, Some Normative Arguments for the Unitary Executive, 48 ARK. L. REV. 23 (1995).
This predominant focus on process comes at a price; most administrative law courses can devote only limited time to delve into the dynamics of whether and why activities and behaviors should be regulated. Study of these compelling and essential political options, bounded by public need, economic imperative, public acceptability, and market realities, is relegated to other courses. However, as you start the study of this field, we thought it useful to set out in broad strokes some of the traditional arguments underlying the choice to regulate.

Every major political campaign of the last quarter-century has focused in part on the question of deregulation, an ideology with considerable political appeal – and strident support from some quarters. “There is a dearth of arresting hypotheses to set off against the Coase Theorem, the Hand Formula, the efficiency theory of the common law, . . . the economics of property rights versus liability rules, the activity-level theory of strict liability, . . . and the myriad of other concepts, many counterintuitive, that have made economic analysis of law intellectually exciting.” Richard Posner, *The Sociology of the Sociology of Law: A View from Economics*, 2 EUR. J.L. & ECON. 265, 273 (1995).

While there is undeniable resistance to the concept of regulation, the demand for regulatory services is high. When the air we breathe and water we drink make us sick, when security is threatened, food products are contaminated, telecommunication systems fail, energy prices escalate beyond the reach of the average consumer, pharmaceutical products cause unexpected catastrophic consequences, when traffic snarls and schools fail, it is not hard to find loud and powerful voices asking why the government failed to “do something about it.” There is of course a good deal of literature with a decidedly open-market perspective – rejecting the public interest model of regulation. See, e.g., Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167, 168-69 (1990); John S. Moot, *Economic Theories of Regulation and Electricity Restructuring*, 25 ENERGY L.J. 273 (2004) (the public interest theory of regulation lacks any disciplined sense of economic imperative). However, we leave to you to decide whether “governmental failure” is an atypical response to the above mentioned health, safety, welfare, and economic problems. See Andrew P. Morriss et al., *Choosing How to Regulate*, 29 HARV. ENVTL. L. REV. 179 (2005); Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1 (1998); Reza Dibadj, *Regulatory Givings and the*
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Anticommons, 64 Ohio St. L.J. 1041 (2003); and for a fascinating perspective of one of the most “active” regulatory periods in U.S. history, see Thomas W. Merrill, Capture Theory and the Courts: 1967-1983, 72 Chi.-Kent L. Rev. 1039, 1048-50 (1997).

Often the discussion of why we regulate through the administrative state is sidetracked by discussions about who should regulate: If the Constitution mandates that Congress formulate basic public policy (and we read Article I to say just that), then why permit unelected, “unaccountable” agency actors (with arguably unbridled discretion) to govern? See Jack Beermann, Congressional Administration, 43 San Diego L. Rev. 61 (2006) (check out the second half of the article for a wonderful discussion on the capacity and propriety of congressional control over administrative action); Jonathan G. Pray, Comment, Congressional Reporting Requirements: Testing the Limits of the Oversight Power, 76 U. Col. L. Rev. 297 (2005).

Beyond the fact that Congress has neither the technical skills nor the personnel to undertake the regulatory missions set forth in the legislation it enacts, the likelihood of delay, political abuse, and conflicts of interest suggest that Congress is not the best entity to accomplish the day-to-day regulation that legislation requires. See Harold J. Krent, Turning Congress into an Agency: The Propriety of Requiring Legislative Findings, 46 Case W. Res. L. Rev. 731 (1996); David E. Engdahl, Intrinsic Limits of Congress’ Power Regarding the Judicial Branch, 1 BYU L. Rev. 75 (1999). Similarly, the President and those who work with the President have neither the skills nor the staff to engage in regulation. Accordingly, the basic tasks of regulation fall to administrative agencies, referred to occasionally as the “fourth branch” of government. See Terry M. Moe & William G. Howell, The Presidential Power of Unilateral Action, 15 J.L. Econ. & Org. 132, 155 (1999); Kevin M. Stack, The Statutory President, 90 Iowa L. Rev. 539, 551 (2005) (exploring the direct lawmaking power of presidential proclamation).

The use of this term can be traced back at least a half-century, when the Supreme Court found that agencies “have become a veritable fourth branch of the Government, which has

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deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking.” *FTC v. Ruberoid*, 343 U.S. 470, 487 (1952).

While we do not take sides on the branch issue, in this text, we refer to agencies primarily as executive, even though agencies are created by Congress, directed and organized by the President, and subject to judicial review by the courts. The executive can both appoint and remove critical actors within certain agencies, subject to constraints discussed at length in the materials that follow. See Saikrishna Prakash, *Regulating Presidential Powers*, 91 CORNELL L. REV. 215 (2005). Of equal or greater importance, the executive establishes enforcement priorities and can control the level of vigor with which an agency proceeds. A newly elected President can not govern through the Congress or the courts, but can through the agencies.

Others argue that agencies are a creature of the legislative branch. They are created by legislative action, subject to legislative oversight, funded by legislative appropriations and are capable of being “closed down” by legislative determination. While we will use the term executive agency, this book does not focus on that discussion. From our perspective your time is better spent wondering how and why we regulate rather than how we label regulatory agencies.

To guide the exploration of “why we regulate” we set out in the simplest form possible some of the classical arguments for regulation as well as some of the classical arguments against it.

### II. Traditional Arguments Favoring Agency Governance

#### a. Continuity

In order to have an effective regulatory program, there must be some level of reliability for those who must conform to various administrative mandates. Because of our electoral system, neither the President nor Congress can provide this continuity – but agencies can. Further strengthening this continuity, in *Motor Vehicle Manufacturers Association v. State Farm Mutual*, the Court made clear that the public has a right to rely on regulations as written, and while an agency may change regulations, when doing so the agency must, at a minimum, explain the basis and purpose for such revisions.
There is an obvious value in continuity for those regulated: Government becomes reliable. Regulation that provides constancy allows for long-term planning and justifies costly improvements in the production of goods and services. “Establishing independent administrative agencies . . . promotes continuity of policy from administration to administration, since independent agencies are bound to perform their statutory functions in good faith even if the statutory standards set by Congress become politically unpalatable to the current administration.” Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. Rev. 117, 170 (2006). Seen in this light, a trust or fiduciary relationship is possible between an agency and those subject to its regulation.

As will become apparent, continuity in regulatory administration – a foundational justification for the administrative state – is at odds with other notions of responsive government. At the most basic level, when a new President is elected, one would expect changes consistent with the promises made in the course of the presidential campaign; one would expect that after the election, the agencies will align with the new administration. However, political transition and regulatory transition do not happen simultaneously.

Anxious to force regulatory transition that matched a change in ideology following the defeat of President Jimmy Carter, President Ronald Reagan executed Executive Order No. 12,291

requiring cost-benefit evaluation of major regulatory proposals. Only regulations having a net benefit – and the greatest possible net benefit for the regulatory goal – would get the President’s stamp of approval. The President’s Office of Management and Budget (OMB) was given power to review . . . cost-benefit evaluations and . . . quash unsatisfactory regulations. [From Abner J. Mikva, *Deregulating Through the Back Door: The Hard Way to Fight a Revolution*, 57 U. Chi. L. Rev. 521, 529-30 (1990).]

When the federal agencies did not respond at a pace consistent with President Reagan’s expectations by the end of his first term, he signed Executive Order 12,498 directing agencies to implement only those regulations and programs that were “consistent with the goals of the agency and the Administration.” Exec. Order No. 12,498 § 1(b), 50 F.R. 1036.

Comprehending the inevitability of the struggle between continuity and the political necessity of the President

Take Note

Presumably, the point of an election is to allow the public to express its will – and if the agencies do not go along with the policies of the elected candidate (under the banner of continuity), conflict is inevitable. During the Reagan Administration, by “1986, one-third of all federal regulatory proposals reportedly were vetoed or held up by OMB, including over half of the Environmental Protection Agency (EPA) proposals in one three year period . . . .” Mikva, at 530.
to implement the policies on which they were elected is one of the best ways to understand this field. Every President faces this task, some with more success than others.

This “continuity” once prompted a frustrated President Kennedy to respond to a request for his assistance by saying, “I can do it, but I don’t know if the government can.” A Carter Administration official [commented]: “It’s like steering a supertanker. You may put the wheel over hand, but it’s not going to turn on a dime.” [From Mikva, at 530-31.]

b. Flexibility. In theory, agencies can proceed with speed and flexibility. They are not encumbered by the necessity of securing majority votes, cloture, or a presidential signature. They can and do respond to market changes, notwithstanding the criticism that agency procedures have become unduly brittle or ossified. Thomas O. McGarity, Some Thoughts on Deossifying the Rulemaking Process, 41 Duke L.J. 1385 (1992). Agencies also respond to political change, which is one of the driving forces in Chevron v. NRDC, infra Chapter 3, a case that demonstrates the importance of allowing agencies to adapt to new challenges and the limits on judicial interference with such changes.

The importance of an agency reviewing policy and making changes – the importance of flexibility – evokes a basic debate in administrative law: On whom does the responsibility for change lie? As you will see, this question is at the heart of the seminal Chevron decision where the Court held, inter alia, that the primary responsibility rests with the agency – although over the last decade, the Court has come back to this issue over and over again.

In some legislation, Congress makes clear the expanse of the agency’s discretion (range of flexibility). In other legislation, while Congress establishes basic policy, there are substantial gaps to be filled in by the agency. In the land management area for example, the range of regulatory flexibility is substantial. See 16 U.S.C. § 583j-2 (1990) (giving the Forest Service authority for “any and all acts necessary and proper” to carry out the legislative purpose); 16 U.S.C. § 3703 (1984) (giving the National Fish and Wildlife Foundation authority for “any and all acts necessary and proper”); 20 U.S.C. § 5509 (giving the National Environmental Education and Training Foundation power to perform “any and all acts necessary and proper”); 43 U.S.C. § 373 (1902) (giving the Secretary of the Interior the power to undertake “any and all acts” to implement a reclamation and irrigation program). Legislation of this type prompts a basic delegation question central to the study
of administrative law: Does this type of broad power without clear limitations constitute a congressional abdication of the responsibility to make public policy?

c. Specialization and Expertise. Every federal, state, and local agency makes use of both staff and non-staff technical experts. Whether the field is electrical power, nuclear energy, telecommunications, or finance, agencies retain a permanent staff of experts so that the agency can be both aware of developments in the field and able to respond to technical changes as they occur. That cannot be said of the President, Congress, or the courts. Commodity Futures Trading Commission v. Schor, infra Chapter 10, explores, inter alia, whether the expertise of the CFTC permits that agency to serve as an adjudicatory forum for disputes normally heard in Article III tribunals.

This rationale was a foundational premise of New Deal regulation. “During the New Deal era, a key feature of the organization of law and order was the commitment to centralized, institutional decision-making authorities relying on professional, official expertise: ‘The New Deal believed in experts. Those who rationalized its regulatory initiatives regarded expertise and specialization as the particular strengths of the administrative process.’” Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004), citing JAMES O. FREEDMAN, *CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT* 44 (1978); see also JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 23-24 (1938).

Specialization and expertise are central to the doctrine of primary jurisdiction – a rarely asserted prudential jurisdictional filter that can delay access to an Article III court when an agency has not concluded its process, has statutory responsibility, and an evident need for continuity and technical expertise. See, e.g., Nader v. Allegheny Airlines Inc., 426 U.S. 290, 304 (1976); Paula K. Knippa Note, *Primary Jurisdiction Doctrine and the Circumforaneous Litigant*, 85 TEX. L. REV. 1289 (2007).

d. Essential Values. Agencies are often required and uniquely positioned to implement unpopular and controversial legislative (or constitutional) imperatives regarding equal protection and fairness. Unencumbered by the necessity of reelection, agencies are capable of protecting non-majoritarian interests, a phenomenon that can be almost impossible in a politically-charged environment such as Congress. We believe this is an obvious virtue – market driven effects are often the result of popular balloting on goods and services. There is a place in the legal
system for certain core values to be represented and asserted regardless of the popularity of those values at a particular moment in time.

e. **Emergencies.** One of the classical arguments regarding the administrative state is that it is capable of functioning quickly and aggressively in an emergency. While there is little doubt that agencies can function more rapidly than Congress, the courts, or the President, there are glaring examples of agency ineptitude where inaction has also led to catastrophic consequences. See, e.g., David Gottlieb, *Katrina Consequences: What Has the Government Learned: Introduction and Background*, 53 Loyola L. Rev. 1113 (2006); *Select Bipartisan Comm. to Investigate the Preparation and Response to Hurricane Katrina, 109th Cong., A Failure of Initiative* (2006), available at http://a257.g.akamaitech.net/7/257/2422/15feb20061230/www.gpoaccess.gov/katrinareport/mainreport.pdf (last visited July 4, 2008).

f. **Volume.** Administrative agencies, using simplified decision-making systems, can process millions of claims on an annual basis. While there are backlogs in agencies at different times, it is inconceivable that courts could handle a similar volume of cases. This efficiency is a result of the rules governing agency functions or actions. *Richardson v. Perales*, infra Chapter 9, uses the capacity to handle a large volume of cases as one explanation for permitting the use of nothing but hearsay as the exclusive evidentiary basis for an order at the conclusion of an adjudication.

g. **Ongoing Supervision.** The vast majority of cases that proceed through Article III courts come to an end when a judgment is reached. While there may be injunctions, courts rarely engage in any form of long-term continuing supervision after a case has been decided. In contrast, agencies often devote themselves to ongoing supervision for years. *Donovan v. Dewey*, infra Chapter 11, explains that pervasive regulation is vital in certain industries and that on-going supervision of a trade or business may require certain compromises, e.g., warrantless searches.

h. **Economic Justification.** Agencies play a role in creating a “level playing field” in various markets. Agencies can address unfair business practices that could lead to distorted market power, including monopoly power, suppression of innovation, or creation of artificial barriers to market entry. As noted earlier, there are strong deregulatory sentiments in counterpoise to this justification.

i. **Public Safety.** Agencies can use regulatory force to mandate increased levels of safety and efficiency in goods and services. *North American Cold Storage v. City*
of Chicago, infra Chapter 6, establishes that protection of public safety is of such consequence that it may trump a due process claim to a hearing in advance of adverse government action. This does not deny the reality of market-force in achieving the same objectives; it simply recognizes that the marketplace may respond more slowly than public safety demands.


III. Traditional Arguments Disfavoring Agency Governance

a. Incompetence. The lack of competence is a standing criticism of virtually every local, state, and federal agency. If the assumption is that those who are most competent will work in areas where compensation is maximized, then the assumption may be correct. However, this is an area where reasonable minds most assuredly differ. There are many (including your authors) who contend that agencies are repositories of genuine competence, staffed by those motivated by factors beyond compensation. Rather than argue the point, suffice it to say that there are advocates for both points of view.

b. Favoritism. There is little question that political and economic power play a role in regulation. Regulatory agencies are vulnerable. Annual budget reviews, appointment power vested in the executive, and legislative oversight all play a role in creating pressures by
which agency decisions can be compromised.


e. Compromised Privacy. An administrative decisionmaker will function most effectively when there is optimal access to comprehensive information about all aspects of the problem. That said, the goal of securing information can be in conflict with the goal of protecting privacy. Agencies are not encumbered by the general requirement of “probable cause” when they secure information. So long as the agency has a reasonable basis for the information it seeks, the chances are the agency will get what it is after. The cost is obvious: Privacy is compromised when the government has unbridled discretion to secure information. See Wyman v. James, infra Chapter 11.
IV. Beyond the Pros and Cons: Privatization and Re-regulation

a. Perhaps because of the inherently political nature of administrative law, debate regarding the efficacy of the administrative state is relentless and difficult to pin down. For example, in his 1996 State of the Union Address, then-President William J. Clinton made the bold announcement that “[t]he era of big government is over.” Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 79, 79 (Jan. 23, 1996). Interestingly, in that same speech, President Clinton announced a substantial number of new regulatory initiatives. Moreover, since 1996, numerous “deregulated” programs have either been re-regulated or privatized.

b. Re-regulation. Re-regulation of various markets seems almost inevitable. The Spring 2008 sub-prime mortgage debacle produced regulatory initiatives that will fundamentally change the landscape of mortgage financing, with the encouragement of anti-regulatory President George W. Bush. Remarks at the America’s Small Business Summit, PUB. PAPERS OF THE PRESIDENTS (Apr. 21, 2008).


c. Privatization. Privatization is a bit more difficult to assess – and far more prevalent – than direct re-regulation. While there are roughly two million full-time federal civilian government employees, there are about six times that number working in the private sector in positions funded by the federal government. Paul R. Verkuil, Public Law Limitations on Privatization of Government Functions, 84 N.C. L. REV. 397, n.1-2 (2006). What happens when functions considered governmental in nature are contracted to the private sector? Circular A-76 issued by the Office of Management and Budget (OMB) requires governmental agencies to undertake activities that are “inherently government functions.” OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, OMB CIRCULAR A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES, 68 Fed. Reg. 32,134 (2003), available at http://www.white-
In the event a seemingly governmental function is contracted out privately, the agency involved must undertake a market study to identify the best means to achieve the statutory objective and use a competitive bidding procedure on any activities that are commercial in nature.

Assuming that the mandates of Circular A-76 are met, what due process protections apply? To avoid disappointment down the road, we’ll let you know right now that this question cannot be answered by a simplistic “under color of law” analysis. See David H. Rosenbloom & Suzanne J. Piotrowski, Reinventing Public Administration While “De-Inventing” Administrative Law: Is it Time for an “APA” for Regulating Outsourced Government Work?, 33 SYRACUSE J. INT’L L. & COM. 175 (2005).


Those anxious about public accountability and fairness when seemingly public functions are privatized have every reason to be concerned. Although privatization has generated its own theoretical cause of action, (termed a “wrongful privatization”), in Sugar v. West, 1998 U.S. Dist. LEXIS 15132 (E.D.N.C. 1998), the plaintiffs “brought a ‘wrongful privatization’ claim under the Administrative Procedure Act . . ., 5 U.S.C. § 702,” prompting the court to hold that a “contracting-out decision pursuant to OMB Circular A-76 is an internal management directive of the Executive Branch that creates no enforceable rights in third parties and provides no law to be applied.”

Assuming legislative authorization, when a decision is made to have private enti-
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Privatization of governmental functions continues to be tested regularly in the courts. See Nat’l Air Traffic Controllers Ass’n v. DOT, No. 06-3466, 2007 WL 2141941 (6th Cir. 2007), one of a number of decisions issued during a thirteen year saga exploring standing and related judicial review issues pertaining to air traffic controllers.

V. The Process of Regulation – The Introductory Cases

For most of the 19th Century, with the exception of the Post Office, patents and copyrights, limited public safety and some nearly invisible regulation of agriculture, the country functioned in a deregulated state. By the end of the 19th Century, many of the major industries were dominated by cartels or monopolies. Steel, oil, lumber and many food products were controlled by market forces unlikely to produce healthy competition much less optimal efficiency and public good. The unregulated 19th Century saw the rise of heavy industry – and the creation of deadly, nightmarish workplaces. It was apparent that some additional level of governance was required. Slowly, government agencies evolved and, by the middle of the 20th Century, the regulatory state was firmly established.

Every case that follows allows you to think through the grand substantive question of administrative law: Should this field be regulated? We invite you to consider that inquiry as a regular part of your study. Your primary mission, however, involves the process of regulation – how regulation takes place and what rights and responsibilities parties have as they encounter the administrative state.

With these concepts in mind, we come to our first case and perhaps the most basic inquiry: When can a governmental entity proceed by announcing rules or policies and when is it required, instead, to conduct a hearing prior to taking action?
[Justice Moody] The plaintiffs in error began this proceeding in a state court of Colorado to relieve lands owned by them from an assessment of a tax for the cost of paving a street upon which the lands abutted. The relief sought was granted by the trial court, but its action was reversed by the Supreme Court of the State . . . . The Supreme Court held that the tax was assessed in conformity with the constitution and laws of the State, and its decision on that question is conclusive. . . .

The tax complained of was assessed under the provisions of the charter of the city of Denver, which confers upon the city the power to make local improvements and to assess the cost upon property specially benefited. . . .

It appears from the charter that, in the execution of the power to make local improvements and assess the cost upon the property specially benefited, the main steps to be taken by the city authorities are plainly marked and separated:

1. The board of public works must transmit to the city council a resolution ordering the work to be done and [a proposed] ordinance authorizing it and creating an assessment district. This it can do only upon certain conditions, one of which is that there shall first be filed a petition asking for the improvement, signed by the owners of the majority of the frontage to be assessed.

2. The passage of that ordinance by the city council, which is given authority to determine conclusively whether the action of the board was duly taken.

3. The assessment of the cost upon the landowners after due notice and opportunity for hearing.

In the case before us the board took the first step by transmitting to the council the resolution to do the work and [a proposed] ordinance authorizing it. It is contended, however, that there was wanting an essential condition . . . , namely, . . . a petition from the owners . . . . The trial court found [however, that the city council found] “. . . that in their action and proceedings in relation to said Eighth Avenue Paving District Number One the said board of public works has fully complied with the requirements of the city charter relating thereto.” The state Supreme Court held that the determination of the city council was conclusive that a proper petition was filed. . . .
The [first] question for this court is whether the charter provision authorizing such a finding, without notice to the landowners, denies to them due process of law. We think it does not. The proceedings, from the beginning up to and including the passage of the ordinance authorizing the work did not include any assessment or necessitate any assessment, although they laid the foundation for an assessment, which might or might not subsequently be made. Clearly all this might validly be done without hearing to the landowners, provided a hearing upon the assessment itself is afforded. . . . This disposes of the first assignment of error, which is overruled. . . .

The fifth assignment . . . raises . . . the question whether the assessment was made without notice and opportunity for hearing to those affected by it, thereby denying to them due process of law. The trial court found as a fact that no opportunity for hearing was afforded, and the Supreme Court did not disturb this finding. The record discloses what was actually done, and there seems to be no dispute about it. After the improvement was completed the board of public works, in compliance with § 29 of the charter, certified to the city clerk a statement of the cost, and an apportionment of it to the lots of land to be assessed. Thereupon the city clerk, in compliance with § 30, published a notice stating, *inter alia*, that the written complaints or objections of the owners, if filed within thirty days, would be “heard and determined by the city council before the passage of any ordinance assessing the cost.”

Those interested, therefore, were informed that if they reduced their complaints and objections to writing, and filed them within thirty days, those complaints and objections would be heard, and would be heard before any assessment was made. . . . Resting upon the assurance that they would be heard, the plaintiffs in error filed within the thirty days the following paper:

To the Honorable Board of Public Works, . . . Mayor and City Council . . .

The undersigned . . . strenuously protest . . . the passage of the contemplated . . . ordinance against the property in Eighth Avenue Paving District No. 1 . . . for . . . the following reasons . . .

. . . 3d. That [the] property in [question] is not benefited by said pretended improvement . . . to the extent of the assessment; that the individual pieces of property . . . are not benefited . . . that the assessment is [arbitrary] and property assessed in an equal amount is not benefited equally . . .

Wherefore . . . the undersigned object and protest against the passage of the said proposed assessing ordinance.

. . . Instead of affording the plaintiffs in error an opportunity to be heard upon its allegations, the city council, without notice to them, met as a board of
equalization, not in a stated but in a specially called session, and, without any hearing, adopted the following resolution:

Whereas, complaints have been filed by the various persons and firms . . . against the proposed assessments on said property for the cost of said paving . . . and

Whereas, no complaint or objection has been filed or made against the apportionment . . ., but the complaints and objections filed deny wholly the right of the city to assess any district or portion of the assessable property of the city of Denver; therefore, be it

Resolved . . . that the apportionments of said assessment made by said board of public works be, and the same are . . . approved.

[W]ithout further notice or hearing, the city council enacted the ordinance of assessment whose validity is to be determined in this case . . . .

From beginning to end of the proceedings the landowners, although allowed to formulate and file complaints and objections, were not afforded an opportunity to be heard upon them. Upon these facts was there a denial by the State of the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States?

In the assessment, apportionment and collection of taxes upon property within their jurisdiction the Constitution of the United States imposes few restrictions upon the States . . . But where the legislature of a State, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that at some stage of the proceedings before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by a law fixing the time and place of the hearing. It must be remembered that the law of Colorado denies the landowner the right to object in the courts to the assessment, upon the ground that the objections are cognizable only by the board of equalization.

[W]e think that something more than [an opportunity to submit objections in writing], even in proceedings for taxation, is required by due process of law. Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here a hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need[ed], by [oral presentation of] proof, however informal. It is apparent that such a hearing was denied to the plaintiffs in error. The denial was by the city council, which, while acting as a board of equalization, represents the State. The assessment was therefore void . . . .
CHAPTER 1  An Introduction to Administrative Law

1. *Londoner* is the starting point for the study of agency adjudication and prompted governmental entities (at the local, state, and federal level) to rethink decision-making modalities. What criteria should be used to determine when decisions of local zoning boards, or by federal agencies, are legislative? Can you use the same criteria to determine if the action of an agency is adjudicatory? If a zoning decision fits the *Londoner* model and affects an individual or a defined and uniquely configured small group, do conventional notions of procedural due process, applicable in courts of general jurisdiction (which are referred to in this text as Article III courts), apply? Should they – particularly in land use cases? See Asimow & Sullivan, *Due Process in Local Land Use Decision Making: Is the Imperfect Way of Doing Business Good Enough or Should We Radically Reform It?,* 29 ZONING & PLAN. L. REP. 1 (2006).

2. Are governmental decisions to be weighed based on the interest affected – or the number of individuals and interests affected? What about a general building moratorium that has an explicitly negative affect on one parcel of property? See *75 Acres, LLC v. Miami-Dade County,* 338 F.3d 1288, 1293-94 (11th Cir. 2003):

   “[I]f government action is viewed as legislative in nature, property owners generally are not entitled to procedural due process. Or, as one set of commentators has summarized, “When the legislature passes a law which affects a general class of persons, those persons have all received procedural due process – the legislative process. The challenges to such laws must be based on their substantive compatibility with constitutional guarantees.” RONALD E. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 17.8 (3d ed. 1999).

3. Does the type of factual question in play determine the nature of a hearing? In *In re Asbestos Litigation,* 829 F.2d 1233, 1250 (3d Cir. 1987), a product liability case, the court interpreted *Londoner* to mean that “a legislative fact is not an individualized fact [and] the Constitution does not mandate that [legislative facts] be found through a process of individualized fact-finding . . . .” The Third Circuit explained that “[a]djudicative facts are simply the facts of the particular case. Legislative facts, on the other hand, are those which have relevance to legal rea-

Underlying Case Documents

The case referenced:
The Denver Charter of 1893
The Petition to pave the street
The notice to the residents including the laws passed establishing the paving district
soning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body.

If an administrative determination – in an individual case – requires application of a novel legal interpretation to specific facts (pertaining to identifiable parties), would that mandate an evidentiary hearing? In *FCC v. WJR, The Goodwill Station, Inc.*, 337 U.S. 265, 274-75 (1949), the Court made clear that there was no set rule – but that a Londoner oral/evidentiary hearing was not the default position:

Taken at its literal and explicit import, the [*lower court’s*] broad constitutional ruling [*mandating a hearing*] cannot be sustained. So taken, it would require oral argument upon every question of law, apart from the excluded interlocutory matters, arising in administrative proceedings of every sort. This would be regardless of whether the legal question were substantial or insubstantial; of the substantive nature of the asserted right or interest involved; of whether Congress had provided a procedure, relating to the particular interest, requiring oral argument or allowing it to be dispensed with; and regardless of the fact that full opportunity for judicial review may be available.

We do not stop to consider the effects of such a ruling, if accepted, upon the work of the vast and varied administrative as well as judicial tribunals of the federal system and the equally numerous and diversified interests affected by their functioning; or indeed upon the many and different types of administrative and judicial procedures which Congress has provided for dealing adjudicatively with such interests. It is enough to say that due process of law . . . has never been cast in so rigid and all-inclusive confinement.

On the contrary, due process of law has never been a term of fixed and invariable content.

Why not make a “fair hearing” a fixed rule in any case where a constitutionally cognizable interest is affected adversely by governmental action? Isn’t the promise of due process the commitment to provide an evidentiary hearing before the government takes action?

4. There is also an additional lens through which adjudicative and legislative
facts can be distinguished. Typical of this perspective is *Greenwood Manor v. Iowa Department of Public Health*, 641 N.W.2d 823 (Iowa 2002):

Generally, a person has a constitutional due process right to an evidentiary hearing in accordance with contested case procedures if the underlying proceeding involves adjudicative facts . . . . Conversely, if the agency decision rests on legislative facts, the parties are not constitutionally entitled to an evidentiary hearing . . . . Thus, whether due process demands an agency to provide affected persons in certificate of need proceedings an evidentiary hearing depends upon whether the proceedings involve adjudicative or legislative facts.

Adjudicative facts relate to the specific parties and their particular circumstances . . . . They involve individualized facts peculiar to the parties, and ordinarily answer the questions of who did what, where, when, how, why, with what motive or intent . . . . Legislative facts, on the other hand, do not pertain to the specific parties. Instead, legislative facts are generalized factual propositions, often consisting of demographical data and statistics compiled from surveys and studies, which aid the decisionmaker in determining questions of policy and discretion . . . . [Internal citations and quotations omitted. See K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.02 (1970).]

5. Assuming due process protections apply based on *Londoner*, what does that mean? Was the Court envisioning full trials that included discovery, pre-hearing motions, testimony by direct and cross examination, and decisions supported by the manifest weight of the evidence, all set forth in a written record? Alternatively, was the Court contemplating an individual hearing with only the right to appear before an agency official who then had summary power to render a decision?

The basic premise in *Londoner* should seem both familiar and part of the current conventional due process discourse. In *Corey v. Department of Land Conservation & Development*, 152 P.3d 933, 934-35 (Or. Ct. App. 2007), the complainants alleged that without permitting a fair hearing, the government affected adversely their property through both a taking of the property (in this instance a diminution in
land value) and a forced remedy (a waiver of certain regulations) instead of direct compensation. Citing Londoner, the court found:

Before a governmental entity applies pre-existing legislative or quasi-legislative standards in such a way as to deprive a person (or small group of persons) of an interest in property, the Due Process Clause of the Fourteenth Amendment requires the government to provide notice and a meaningful opportunity to be heard.

The Corey court also acknowledged that the fair hearing outcome was not necessarily mandated by the Supreme Court. Interpreting “the teaching” of American Manufacturers Mutual Insurance Co. v. Sullivan, 526 U.S. 40, 60-61 (1999), the court found “that a person obtains a protected property interest in a benefit only when the person has actually proven that he or she is fully entitled to it; only at that point must denial be accompanied by due process.” [Emphasis added.]

How can that be? If one does not have a hearing, how would they marshal evidence to show they are “fully entitled” to a hearing? This cart-before-the-horse phenomenon is troubling – and a regular part of this field. Consider the problem from the perspective of the government: Should absolutely anyone who has a complaint about something the government has allegedly done to them be entitled to a hearing? What threshold of proof is required to establish that one has a right worthy of protection? We will return to this question in Roth, infra Chapter 6.

6. The exercise of power in question in Londoner was based on the Denver Home Rule City Charter that implemented Article XX, Section 6 of the Colorado Constitution. Article XX allowed any city with two thousand or more residents to assess any “property in such city or town for municipal taxation and the levy and collection of taxes thereon for municipal purposes and special assessments for local improvements . . . .” COLO. CONST. art. XX, § 6(g).

Denver Mayor Robert Speer and other political leaders in the city saw the Charter and the Constitution as a license to secure tax revenue without the time, expense, and inconvenience of individual hearings. Speer once said:

Good Question!
Occasionally in this casebook we will urge you to personalize administrative law, using your law school as a model. This is one such moment. What type of hearing entitlements exist at your school for student misconduct cases? For faculty retention or dismissal? Do those procedures conform with general principles of due process? Later in the text, we provide a series of educational fair hearing cases – for now, you might look at the seminal article in the field, Curtis J. Berger & Vivian Berger, Academic Discipline: A Guide to Fair Process for the University Student, 99 COLUM. L. REV. 289 (1999).
Red tape and restricting laws will not make a crooked politician straight but will make a straight politician useless. Personally, I believe in the concentration of all administrative powers in the hands of one official. It fixes the responsibility for good or bad government. [From http://www.denvergov.org/aboutdenver/history_narrative_6.asp (last visited May 11, 2008).]

Speer and his colleagues saw taxation determinations as legislative acts for which individual hearings were simply unnecessary. Their perspective continues to be shared by many governmental entities. In South Gwinnett Venture v. Puit, 482 F.2d 389 (5th Cir. 1973), the court struggled with the distinction between legislative and adjudicatory actions. Citing Londoner, the Eighth Circuit held that “a legislative plan for the entire community must be distinguished from the treatment which a specific tract of land receives when its owner petitions for reclassification under that plan. . . . [Reclassification of a tract is] an exercise of legislative power in a case-by-case adjudicative setting.” [Emphasis added.]

7. While Londoner did not address the details of the hearing to be provided, it did find those affected by the proposed action of the city had a right to present their position orally. Nearly a half-century later, in F.C.C. v. WJR, The Goodwill Station (note 3 above), the Court held that the “right of oral argument as a matter of procedural due process varies from case to case in accordance with differing circumstances, as do other procedural regulations. . . .” 337 U.S. at 276. Later courts have interpreted F.C.C. v. WJR, The Goodwill Station to mean that there is “no general constitutional right to oral arguments before an administrative agency.” First Bank & Trust Co. v. Bd. of Governors of Fed. Reserve Sys., 605 F. Supp. 555 (D. Ky. 1984).

The case did establish one bedrock principle: The Constitution is in play when governmental entities make determinations that are inherently adjudicatory and affect constitutionally cognizable interests. Just what rights are in play and how they are to be protected is the basis of much of the second half of this text.

Good Question!

What circumstances demand oral presentation of information? How is fact finding enhanced by “in person” presentations as opposed to written, sworn statements? With the modern regulatory state about to emerge, Londoner raised far more questions than it answered.
**Bi-Metallic Investment Company v. State Board of Equalization of Colorado**

239 U.S. 441 (1915)

[Justice Holmes] This is a suit to enjoin . . . an order of the boards increasing the valuation of all taxable property in Denver forty per cent. The order was sustained and the suit directed to be dismissed by the Supreme Court of the State. The plaintiff is the owner of real estate in Denver and brings the case here on the ground that it was given no opportunity to be heard and that therefore its property will be taken without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States. That is the only question with which we have to deal. . . .

For the purposes of decision we assume that the constitutional question is presented in the baldest way – that neither the plaintiff nor the assessor of Denver, who presents a brief on the plaintiff's side, nor any representative of the city and county, was given an opportunity to be heard, other than such as they may have had by reason of the fact that the time of meeting of the boards is fixed by law. On this assumption it is obvious that injustice may be suffered if some property in the county already has been valued at its full worth. But if certain property has been valued at a rate different from that generally prevailing in the county the owner has had his opportunity to protest and appeal as usual in our system of taxation so that it must be assumed that the property owners in the county all stand alike. The question then is whether all individuals have a constitutional right to be heard before a matter can be decided in which all are equally concerned – here, for instance, before a superior board decides that the local taxing officers have adopted a system of undervaluation throughout a county, as notoriously often has been the case. The answer of this court in the *State Railroad Tax Cases* at least as to any further notice, was that it was hard to believe that the proposition was seriously made.

Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule. If the result in this case had been reached as it might have been by the State's doubling the rate of taxation, no one would suggest that the Fourteenth Amendment was violated unless every person affected had been allowed an opportunity to raise his voice against it before the body entrusted by the state constitution
with the power. In considering this case in this court we must assume that the
proper state machinery has been used, and the question is whether, if the state
constitution had declared that Denver had been undervalued as compared with
the rest of the State and had decreed that for the current year the valuation should
be forty per cent. higher, the objection now urged could prevail. It appears to us
that to put the question is to answer it. There must be a limit to individual argu-
ment in such matters if government is to go on. In *Londoner v. Denver* a local board
had to determine “whether, in what amount, and upon whom” a tax for paving a
street should be levied for special benefits. A relatively small number of persons
was concerned, who were exceptionally affected, in each case upon individual
grounds, and it was held that they had a right to a hearing. But that decision is
far from reaching a general determination dealing only with the principle upon
which all the assessments in a county had been laid.

**Underlying Case Documents**

The case referenced:
The letter to the County Assessor increasing the tax rate in Denver
The letter to the Clerk of the City and County of Denver informing him
of the tax increase

1. *Bi-Metallic* is the starting point for the study of rulemaking. Unlike *Londoner*,
which imposed limits on governmental action, *Bi-Metallic* expanded the range
and nature of actions a governmental entity could undertake. Even if interests of
a clearly cognizable constitutional nature were affected, such as real or personal
property, the local, state, and federal administrative agencies now had a basis to
act by legislative pronouncement without the burden of providing an individual
hearing to every person affected adversely. So long as the action contemplated was
designed to address a class or group of
similarly situated individuals, and was
otherwise legislative in character, the
action of the agency could be defended
based on the principles set forth in *Bi-
Metallic*.

2. The constraints on the ability of
executive entities to make legislative
decisions, including the specific pro-
cedural requirements to which gov-

**Key Concept**

*Bi-Metallic* involves neither the type
of agency you will typically encoun-
ter in this course nor the types of
rulemaking you will typically see.
The principle is what is important:
Large groups of similarly situated
people may well not have a right to
an individual hearing even if their
property is affected adversely.
ernmental entities must adhere and judicial review of agency judgments (reflected in rules, policy statements, interpretations, and similar issuances), are the focus of much of the rulemaking materials that follow in this text. *Bi-Metallic* establishes a decent historical platform for what was to become modern rulemaking but provides little meaningful detail regarding the process.

3. In *Harris v. County of Riverside*, 904 F.2d 497, 501-02 (9th Cir. 1990), the court found “little guidance in formalistic distinctions.” In the notes following *Londoner*, we raised the possibility that procedural entitlements might be determined based on an assessment of whether legislative or adjudicative facts were in issue. The Ninth Circuit rejected the distinction as facile:

> As the Supreme Court . . . recognized in *Bi-Metallic*, the character of the action, rather than its label, determines whether those affected by it are entitled to constitutional due process.

If the Ninth Circuit is correct and the “character of the action” is used to determine process, does that include the nature of the individual rights affected by the proposed action of the government? Does the “character of the action” include the nature of the governmental objectives and interests in play, e.g., improvements in efficiency, public safety, environmental quality, education, or transportation that underlie the government’s position? How are such interests balanced? See *Mathews*, Chapter 6.

4. One approach is to think about governmental action in its most primitive terms: Acquisition of information followed by a decision based on that information. Seen in that light, the nature of individual interests do not fit readily into the equation – and yet we know from rudimentary constitutional law that exclusion of individual interests is problematic. Nonetheless, there is a school of thought suggesting that as the challenge set forth in *Londoner* and *Bi-Metallic* involves deciding on process – choosing between some form of rulemaking or some form of adjudication – the key is analyzing the data gathering needs of the government required for a reasoned decision. This process might lead you back to the “legislative” and “adjudicative facts” distinction discussed in the notes following *Londoner* – but a better way to look at this might be to ask: What facts are to be found? If little or no fact-finding is required, if witness credibility and veracity are not in play, a legislative process (read – rulemaking) is the likely outcome.

5. Perhaps the most important and least debatable factor in *Bi-Metallic* involves numbers. How many are affected by the proposed governmental action? In *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), the Court found that efficient government would “grind to a halt” if all affected voices had to be heard before formulating policy through administrative action. This perspective relies on Justice Holmes’ assurances in *Bi-Metallic*. Justice Holmes under-
stood that if too many people need individual process, efficient decision-making would cease. He asserted that the public would be protected by the electoral process and by the fact that specific applications of generic rules could always be contested.

6. If the number affected is the key factor in making the distinction between rulemaking and adjudication, how many people are included in Justice Holmes characterization of “a relatively small number of persons”? For example, in Anaconda Co. v. Ruckelshaus, 482 F.2d 1301 (10th Cir. 1973), a rule issued for sulfur dioxide that appeared only to address the Anaconda Company — yet the court found that no adjudicatory proceeding was needed because the rule had a potential impact on many others. A similar outcome occurred in Air Line Pilots Association v. Quesada, 276 F.2d 892 (2d Cir. 1960), cert. denied, 366 U.S. 962 (1961), when the Federal Aviation Administration (FAA) issued a rule that, in effect, imposed a mandatory retirement on commercial pilots over age 60. The Association argued — unsuccessfully — that the rule was invalid since this was an individual decision and required a hearing for each pilot.

7. The number affected, in the end, seems to be part of the baseline for deciding between rulemaking and adjudication. It is clear that the cost and efficiency of agency action are relevant if the number affected is the decisive factor in determining the level of individual process. What is not clear is how those affected profoundly by action that affects a large group are protected. Does Bi-Metallic allow those who regulate to govern by ex cathedra pronouncement?

8. Bi-Metallic raises — but, like Londoner, does not resolve — the most basic questions: Who, beyond the administrative or governmental entity itself, can participate when unelected governmental officials issue regulations that have the force of law? To what notice, if any, are members of the public entitled when binding rules are promulgated by anyone other than elected representatives? If, as the Court finds, certain decision-making tasks must be relegated to non-elected officials, including members of the executive branch (the agencies), what is the proper role for courts reviewing such action?

9. Keep in mind that while courts can and do review legislation, the review of enacted statutes is generally limited to questions of constitutional propriety. Should that limitation also apply to judicial review of rules issued by agencies,
given that rulemaking is, in most instances, a legislative act? If courts were to engage in that form of review, how would that affect the notion of separation of powers?

10. The note cases that follow provide a quick look at recent cases that still fall back on the criteria and principles in *Londoner* and *Bi-Metallic*. Should zoning cases be considered legislative or adjudicative? Such cases usually involve a single landowner affected by the action of a zoning board or, in the *Coniston* case below, a single Board of Trustees. Nevertheless, communities often use legislative-type rules to achieve zoning objectives. What are the pros and cons – and propriety – of this method of decision-making? As you read the note cases below, ask yourself if the principles set forth in *Londoner* and *Bi-Metallic* are being followed.


The plaintiffs own a tract of several hundred acres of land, originally undeveloped, in the Village of Hoffman Estates, Illinois. Their complaint charges that in turning down the site plan for a 17-acre parcel in the tract, the Village Board of Trustees and its members violated the Constitution. . . .

The plaintiffs complain about the Board of Trustees’ action in going into executive session [to make its decision]. . . . These complaints might have considerable force if the zoning decision had been adjudicative in nature, but it was not. The . . . Board’s decision to approve or disapprove a site plan is a legislative rather than adjudicative decision. The difference is critical. . . . The Constitution does not require legislatures to use adjudicative-type procedures, to give reasons for their enactments, or to act “reasonably” in the sense in which courts are required to do . . . legislatures can base their actions on considerations – such as the desire of a special-interest group for redistributive legislation in its favor – that would be thought improper in judicial decision-making . . .

It is not labels that determine whether action is legislative or adjudicative. A legislature is not allowed to circumvent the due process clause by the facile expedient of announcing that the state’s courts and administrative agencies are henceforth to be deemed legislative bodies even though nothing in their powers and procedures has changed. But neither is the legislature required to judicialize zoning, and perhaps it would not be well advised to do so . . . The decision to make a judgment legislative is perforce a decision not to use judicial procedures, since they are geared to the making of more circumscribed, more “reasoned” judgments . . .
The Board of Trustees is the Village’s legislature . . . and it has reserved to itself the final decision in zoning matters. Naturally it has not sought to tie its hands with criteria for approval of site plans or with a requirement that it give reasons for its action and always act in a fishbowl. The check on its behavior is purely electoral . . . in a democratic polity this method of checking official action cannot be dismissed as inadequate per se . . .

A reason . . . why legislatures are not required to follow trial-type procedures is the across-the-board character of legislation. A statute, unlike a judicial decision, applies directly to a whole class of people, and it is this attribute that makes democratic checking feasible, though it is far from perfect. The smaller the class affected by a nominally legislative act, the weaker the democratic check; in the limit, where the class has only one member, we have the bill of attainder, which Congress and state legislatures are forbidden to enact . . . . The class here is small. This might support an argument that some type of individualized hearing was required. See Londoner v. City & County of Denver, 210 U.S. 373, 385-86 (1908). [However, the governmental entities involved as well as the Supreme Court in City of Eastlake v. Forest City Enters., Inc., 426 U.S. 668 (1976), have already decided it is acceptable] to submit a single landowner's zoning application to a referendum, [cutting] the other way.

b. Pro-Eco v. Board of Commissioners, 57 F.3d 505 (7th Cir. 1995):

Pro-Eco seeks damages against the Jay County Board of Commissioners (“the Board”) that allegedly stem from an illegal landfill moratorium ordinance . . . which the Board passed in 1989 to prevent Pro-Eco from building a landfill in Jay County . . . . Pro-Eco . . . alleges . . . that, in enacting the ordinance barring landfills . . . the Board . . . violated Pro-Eco’s constitutional right to due process . . . .

The Board is an elected body that acted legislatively in enacting the moratorium. It . . . enacted a generally applicable ordinance. Governing bodies may enact generally applicable laws, that is, they may legislate, without affording affected parties so much as notice and an opportunity to be heard. Bi-Metallic. “The fact that a statute (or statute-like regulation) applies across the board provides a substitute safeguard . . . .” It is likely, as Pro-Eco asserts, that the Board acted specifically because it saw Pro-Eco’s landfill coming, and we have noted that “more [process] may be required . . . where the legislation affects only a tiny class of people – maybe a class with only one member . . . .” The Supreme Court, however, has held that even the functional equivalent of a petition for a variance may be put to a referendum. City of Eastlake v. Forest City Enters., Inc., 426 U.S. 668 (1976). We do not believe that generally applicable prophylactic legislation provoked by the fear of one particular actor converts an elected body’s legislative act into a quasi-judicial or administrative act that would require more process. See Anaconda Co. v. Ruchelshaus, 482 F.2d 1301, 1306 (10th Cir. 1973) . . . .

[However, i]f an ordinance professed general applicability, but it were so specific in describing the prohibited acts that only one actor could ever come within its purview, the ordinance might amount to a bill of attainder and no manner of process would be sufficient. U.S. Const. art. I § 10. . . .
c. The more a decision looks genuinely legislative, the less likely the protections articulated in *Londoner* will be applicable. The next case involves the activity of a state legislature. Can you conceive of a situation where a legislature could be construed as acting in an adjudicative manner? As the note case above suggests, the constitutional prohibition against Bills of Attainder generally prevent such bodies from acting as adjudicatory entities – yet there are still some adjudicatory proceedings in our legislatures. U.S. Const. art. II, § 4.


The Complaint is an aggressive indictment of state government in Pennsylvania, containing shocking accusations that the House and Senate leadership, the Governor, and the Chief Justice of the Supreme Court of Pennsylvania acted in concert to pass, sign, and validate, ill-conceived legislation, in a manner that foreclosed public debate and independent judicial review, all in violation of Plaintiffs' rights to free speech, due process, and equal protection.

[The Amended Complaint advances 13 counts . . . including . . . a claim that the “truncated legislative process” that was allegedly employed in enacting Act 44 represented “a continuing pattern of illegal statutory enactment” that violated Plaintiffs’ rights to due process and equal protection; [and] a claim that Plaintiffs’ First Amendment right to free speech was violated because they were allegedly prevented from lobbying their elected state representatives prior to passage of Act 44 . . . .

Even were one or more Plaintiffs able to modify their claims to allege individualized harm, they must state a cognizable constitutional claim that would entitle them to relief. No Plaintiff has done so here. In reaching this conclusion, the Court again notes that the mere fact that Plaintiffs have alleged constitutional deprivation does not automatically entitle Plaintiffs to present those claims in federal court, rather, it is the specific nature of the rights asserted that determines whether Plaintiffs have stated a recognized constitutional claim . . .

Plaintiffs . . . appear to be suggesting that they were entitled to receive notice and procedural safeguards before Act 44 was even enacted. As Defendants aptly note, such a claim reflects a misunderstanding of our representative form of government. Plaintiffs are constructively noticed and present for every legislative act of government. When their representatives are misguided, unresponsive, or ineffectual, they are directly answerable to the people. Absent an actionable claim for institutional exclusions or specific and particular claims of individual harm, as in the narrow circumstances discussed above, Plaintiffs resort is to the ballot box, not the courts.
VI. Independent or Executive?

Up to this point, we have been using the term “government agency” without differentiating between the different types of entities that fall within that classification. Broadly speaking, at the federal level there are two types of agencies — independent and executive. In addition to independent and executive agencies, there are advisory committees, boards, panels, review committees, and numerous other entities that function under the Administrative Procedure Act and are subject to the Freedom of Information Act, the Sunshine Act and other requirements.

Executive agencies are those under the most direct control of the President. They are cabinet-level agencies such as the Department of Commerce, the Department of Transportation, the Department of Defense, the Justice Department, the Department of Homeland Security, the Department of Agriculture, and the Department of the Interior. These agencies share a number of characteristics. The agency head (Secretary) is appointed by and serves at the pleasure of the President. These are single-administrator agencies, as opposed to collegial bodies. The heads of these agencies serve in a special advisory role to the President and are part of the line of presidential succession, in the event that the President can no longer serve in office.

Hypothetical

Most of the 310 homeowners in the Town of Pleasanton are dog lovers and have at least one family dog. Many of these residents have enclosed large portions of their properties with tall stockade (wood panel) fences in order to allow their pets to romp securely in their yards untethered. Concerned that the proliferation of prominent stockade fencing would damage the town’s aesthetic appeal and lower property values across the board, the Pleasanton Town Council, in consultation with the town’s Board of Planning and Zoning, voted unanimously at a public legislative hearing to restrict stockade fencing to back yard areas not visible from the street, and to prohibit such fencing entirely from front and side yards abutting sidewalks. The 14 owners of homes on corner lots in the town are concerned that the new ordinance effectively prohibits them from building any panel fencing on their lots, since their properties do not have back yards but only front and side yards abutting sidewalks. Were these corner lot owners due notice and a hearing in advance of the town’s decision to restrict the stockade fencing?
Executive agencies are complex institutions that house sub-agencies. For example, the Surface Transportation Board and the Federal Aviation Administration are within the Department of Transportation and the National Park Service is within the Department of the Interior.

While the standard administrative law model applies to decision-making in these agencies – i.e., adjudicatory decisions must be based on substantial evidence, and rules must be supported by a record and not be arbitrary or capricious – as discussed throughout this text, the agencies have a distinctly executive quality. Before regulations issue, the Office of Information and Regulatory Affairs (OIRA) has the opportunity to examine regulations from all executive agencies to determine if the rules are consistent with the policies of the President and if the rules presented provide more benefits than costs.

In contrast to the executive agencies, at least structurally, are the independent agencies. These are entities such as the Nuclear Regulatory Commission, the Securities Exchange Commission, the Federal Communications Commission and the Consumer Product Safety Commission. Unlike the executive agencies, these are “collegial” decision-making bodies, meaning that decisions are made after deliberation and a vote by the commissioners. Commissioners serve for a period of years rather than at the pleasure of the President. While they are appointed initially by a President, often a Commissioner’s term of office will extend beyond a President’s term. Further, in a number of independent agencies, there is a requirement that the Commissioners are politically diverse, i.e., that the agency is not dominated by one political party.

While the President appoints Commissioners (who, like Secretaries, must be approved by the advice and consent of the Senate), the President cannot remove Commissioners except for “good cause.” These regulatory bodies are focused on specific areas of commerce and, like executive agencies, function pursuant to the Administrative Procedure Act found at 5 U.S.C. §§ 551 et. seq. Because there are a
number of Commissioners in each agency, decision-making takes on a very different quality. At the conclusion of an agency proceeding, Commissioners vote, occasionally issuing opinions similar to those issued by judges in Article III courts.

**MYERS v. UNITED STATES**

272 U.S. 52 (1926)

[Chief Justice Taft]

This case presents the question whether under the Constitution the President has the exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate.

Myers, appellant's intestate, was on July 21, 1917, appointed by the President, by and with the advice and consent of the Senate, to be a postmaster of the first class at Portland, Oregon, for a term of four years. On January 20, 1920, Myers' resignation was demanded. He refused the demand. On February 2, 1920, he was removed from office by order of the Postmaster General, acting by direction of the President. February 10th, Myers sent a petition to the President and another to the Senate Committee on Post Offices, asking to be heard, if any charges were filed. He protested to the Department against his removal, and continued to do so until the end of his term. He pursued no other occupation and drew compensation for no other service during the interval. On April 21, 1921, he brought this suit in the Court of Claims for his salary from the date of his removal, which, as claimed by supplemental petition filed after July 21, 1921, the end of his term, amounted to $8,838.71. In August, 1920, the President made a recess appointment of one Jones, who took office September 19, 1920.

The Court of Claims gave judgment against Myers, and this is an appeal from that judgment.

[Based on] Article II of the Constitution [the government argued that] the President's power of removal of executive officers appointed by him with the advice and consent of the Senate is full and complete without consent of the Senate. If this view is sound, the removal of Myers by the President without the Senate's consent was legal and the judgment of the Court of Claims against the appellant was correct and must be affirmed.

The relevant parts of Article II of the Constitution are as follows:

“Section 1. The executive Power shall be vested in a President of the United States of America...
“Section 2. The President shall . . . appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may be Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments. . . .

“Section 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other High Crimes and Misdemeanors.”

The question where the power of removal of executive officers appointed by the President by and with the advice and consent of the Senate was vested, was presented early in the first session of the First Congress. There is no express provision respecting removals in the Constitution, except as Section 4 of Article II, above quoted, provides for removal from office by impeachment. . . .

[This lack of apparent clarity regarding removal became an issue in 1789 when the House of Representatives voted on] whether it should recognize and declare the power of the President under the constitution to remove the Secretary of Foreign Affairs without the advice and consent of the Senate. . . . [T]here is not the slightest doubt, after an examination of the record, that the vote was, and was intended to be, a legislative declaration that the power to remove officers appointed by the President and the Senate vested in the President alone, and until the Johnson Impeachment trial in 1868, its meaning was not doubted even by those who questioned its soundness.

The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. . . . As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him [and] in the absence of any express limitation respecting removals, [remove] those for whom he can not continue to be responsible. . . . If such appointments and removals were not an exercise of the executive power, what were they? They certainly were not the exercise of legislative or judicial power in government as usually understood. . . .

. . . . When a nomination is made, it may be presumed that the Senate is, or may become, as well advised as to the fitness of the nominee as the President, but in the nature of things the defects in ability or intelligence or loyalty in the administration of the laws of one who has served as an officer under the President, are facts as to which the President, or his trusted subordinates, must be better informed than the Senate, and the power to remove him may, therefore, be regarded
as confined, for very sound and practical reasons, to the governmental authority which has administrative control. The power of removal is incident to the power of appointment, not to the power of advising and consenting to appointment, and when the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal.

It is reasonable to suppose also that, had it been intended to give to Congress power to regulate or control removals in the manner suggested, it would have been included among the specifically enumerated legislative powers in Article I, or in the specified limitations on the executive power in Article II. The fact that the executive power is given in general terms strengthened by specific terms where emphasis is appropriate, and limited by direct expressions where limitation is needed and that no express limit is placed on the power of removal by the executive, is a convincing indication that none was intended.

Made responsible under the Constitution for the effective enforcement of the law, the President needs as an indispensable aid to meet it the disciplinary influence upon those who act under him of a reserve power of removal. But it is contended that executive officers appointed by the President with the consent of the Senate are bound by the statutory law and are not his servants to do his will, and that his obligation to care for the faithful execution of the laws does not authorize him to treat them as such. The degree of guidance in the discharge of their duties that the President may exercise over executive officers varies with the character of their service as prescribed in the law under which they act. The highest and most important duties which his subordinates perform are those in which they act for him. In such cases they are exercising not their own but his discretion. This field is a very large one. It is sometimes described as political. Each head of a department is and must be the President’s alter ego in the matters of that department where the President is required by law to exercise authority.

In all such cases, the discretion to be exercised is that of the President in determining the national public interest and in directing the action to be taken by his executive subordinates to protect it. In this field his cabinet officers must do his will. He must place in each member of his official family, and his chief executive subordinates, implicit faith. The moment that he loses confidence in the intelligence, ability, judgment or loyalty of any one of them he must have the power to remove him without delay. To require him to file charges and submit them to the consideration of the Senate might make impossible that unity and coordination in executive administration essential to effective action.

The duties of the heads of departments and bureaus in which the discretion of the President is exercised and which we have described, are the most important
in the whole field of executive action of the Government. There is nothing in
the Constitution which permits a distinction between the removal of the head of
a department or a bureau, when he discharges a political duty of the President
or exercises his discretion, and the removal of executive officers engaged in the
discharge of their other normal duties. The imperative reasons requiring an unre-
stricted power to remove the most important of his subordinates in their most
important duties must, therefore, control the interpretation of the Constitution as
to all appointed by him. . . .

We come now to consider an argument advanced and strongly pressed on
behalf of the complainant, that this case concerns only the removal of a postmas-
ter; that a postmaster is an inferior officer; that such an office was not included
within the legislative decision of 1789, which related only to superior officers to
be appointed by the President by and with the advice and consent of the Sen-
ate. . . .

The power to remove inferior executive officers, like that to remove superior
executive officers, is an incident of the power to appoint them, and is in its nature
an executive power. The authority of Congress given by the excepting clause to
vest the appointment of such inferior officers in the heads of departments carries
with it authority incidentally to invest the heads of departments with power to
remove. It has been the practice of Congress to do so and this Court has recog-
nized that power. The Court also has recognized . . . that Congress, in commit-
ing the appointment of such inferior officers to the heads of departments, may pre-
scribe incidental regulations controlling and restricting the latter in the exercise of
the power of removal. But the Court never has held, nor reasonably could hold,
although it is argued to the contrary on behalf of the appellant, that the excepting
clause enables Congress to draw to itself, or to either branch of it, the power to
remove or the right to participate in the exercise of that power. To do this would
be to go beyond the words and implications of that clause and to infringe the
constitutional principle of the separation of governmental powers.

Assuming then the power of Congress to regulate removals as incidental to
the exercise of its constitutional power to vest appointments of inferior officers
in the heads of departments, certainly so long as Congress does not exercise that
power, the power of removal must remain where the Constitution places it, with
the President, as part of the executive power, in accordance with the legislative
decision of 1789 which we have been considering. . . .

Our conclusion . . . is that Article II grants to the President the executive
power of the Government, i.e., the general administrative control of those execut-
ing the laws, including the power of appointment and removal of executive officers -- a conclusion confirmed by his obligation to take care that the laws
be faithfully executed; that Article II excludes the exercise of legislative power by Congress to provide for appointments and removals, except only as granted therein to Congress in the matter of inferior offices; that Congress is only given power to provide for appointments and removals of inferior officers after it has vested, and on condition that it does vest, their appointment in other authority than the President with the Senate's consent; that the provisions of the second section of Article II, which blend action by the legislative branch, or by part of it, in the work of the executive, are limitations to be strictly construed and not to be extended by implication; that the President's power of removal is further established as an incident to his specifically enumerated function of appointment by and with the advice of the Senate, but that such incident does not by implication extend to removals the Senate's power of checking appointments; and finally that to hold otherwise would make it impossible for the President, in case of political or other differences with the Senate or Congress, to take care that the laws be faithfully executed. . . .

An argument _ab inveniendi_ has been made against our conclusion in favor of the executive power of removal by the President, without the consent of the Senate -- that it will open the door to a reintroduction of the spoils system. The evil of the spoils system aimed at in the civil service law and its amendments is in respect of inferior offices. It has never been attempted to extend that law beyond them. Indeed, Congress forbids its extension to appointments confirmed by the Senate, except with the consent of the Senate. . . . The independent power of removal by the President alone, under present conditions, works no practical interference with the merit system. Political appointments of inferior officers are still maintained in one important class, that of the first, second and third class postmasters, collectors of internal revenue, marshals, collectors of customs and other officers of that kind, distributed through the country. They are appointed by the President with the consent of the Senate. It is the intervention of the Senate in their appointment, and not in their removal, which prevents their classification into the merit system. If such appointments were vested in the heads of departments to which they belong, they could be entirely removed from politics, and that is what a number of Presidents have recommended. . . .

For the reasons given, we must therefore hold that the provision of the law of 1876, by which the unrestricted power of removal of first class postmasters is denied to the President, is in violation of the Constitution, and invalid. . . .

Judgment affirmed.

MR. JUSTICE HOLMES, dissenting
The arguments drawn from the executive power of the President, and from his duty to appoint officers of the United States (when Congress does not vest the appointment elsewhere), to take care that the laws be faithfully executed, and to commission all officers of the United States, seem to me spider's webs inadequate to control the dominant facts.

We have to deal with an office that owes its existence to Congress and that Congress may abolish tomorrow. Its duration and the pay attached to it while it lasts depend on Congress alone. Congress alone confers on the President the power to appoint to it and at any time may transfer the power to other hands. With such power over its own creation, I have no more trouble in believing that Congress has power to prescribe a term of life for it free from any interference than I have in accepting the undoubted power of Congress to decree its end. I have equally little trouble in accepting its power to prolong the tenure of an incumbent until Congress or the Senate shall have assented to his removal. The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power.

The separate opinion of MR. JUSTICE McREYNOLDS.

. . . .

Nothing short of language clear beyond serious disputation should be held to clothe the President with authority wholly beyond congressional control arbitrarily to dismiss every officer whom he appoints except a few judges. There are no such words in the Constitution, and the asserted inference conflicts with the heretofore accepted theory that this government is one of carefully enumerated powers under an intelligible charter. . .

If the phrase “executive power” infolds the one now claimed, many others heretofore totally unsuspected may lie there awaiting future supposed necessity; and no human intelligence can define the field of the President’s permissible activities. “A masked battery of constructive powers would complete the destruction of liberty.”

. . . . The legislature is charged with the duty of making laws for orderly administration obligatory upon all. It possesses supreme power over national affairs and may wreck as well as speed them. It holds the purse; every branch of the government functions under statutes which embody its will; it may impeach and expel all civil officers. The duty is upon it “to make all laws which shall be necessary and proper for carrying into execution” all powers of the federal government. We have no such thing as three totally distinct and independent departments; the others must look to the legislative for direction and support. ”In
republican government the legislative authority necessarily predominates.” Perhaps the chief duty of the President is to carry into effect the will of Congress through such instrumentalities as it has chosen to provide. Arguments, therefore, upon the assumption that Congress may willfully impede executive action are not important.

. . . Generally, the actual ouster of an officer is executive action; but to prescribe the conditions under which this may be done is legislative. The act of hanging a criminal is executive; but to say when and where and how he shall be hanged is clearly legislative. . .

. . . It is well to emphasize that our present concern is with the removal of an “inferior officer,” within Art. II, Sec. 2, of the Constitution, which the statute positively prohibits without consent of the Senate. This is no case of mere suspension. The demand is for salary and not for restoration to the service. We are not dealing with an ambassador, public minister, consul, judge or “superior officer.” Nor is the situation the one which arises when the statute creates an office without a specified term, authorizes appointment and says nothing of removal. In the latter event, under long-continued practice and supposed early legislative construction, it is now accepted doctrine that the President may remove at pleasure. This is entirely consistent with implied legislative assent; power to remove is commonly incident to the right to appoint when not forbidden by law. . .

MR. JUSTICE BRANDEIS, dissenting.

. . .

The contention that Congress is powerless to make consent of the Senate a condition of removal by the President from an executive office rests mainly upon the clause in § 1 of Article II which declares that “The executive Power shall be vested in a President.” The argument is that appointment and removal of officials are executive prerogatives. . . . The simple answer to the argument is this: The ability to remove a subordinate executive officer, being an essential of effective government, will, in the absence of express constitutional provision to the contrary, be deemed to have been vested in some person or body. . . But it is not a power inherent in a chief executive. The President’s power of removal from statutory civil inferior offices, like the power of appointment to them, comes immediately from Congress. . . [T]he Constitution has confessedly granted to Congress the legislative power to create offices, and to prescribe the tenure thereof; and it has not in terms denied to Congress the power to control removals. . .

It is also argued that the clauses in Article II, § 3, of the Constitution, which declare that the President “shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States” imply a grant to the
President of the alleged uncontrollable power of removal. I do not find in either cause anything which supports this claim. . . . There is no express grant to the President of incidental powers resembling those conferred upon Congress by clause 18 of Article I, § 8. A power implied on the ground that it is inherent in the executive, must, according to established principles of constitutional construction, be limited to “the least possible power adequate to the end proposed.” . . . The end to which the President’s efforts are to be directed is not the most efficient civil service conceivable, but the faithful execution of the laws consistent with the provisions therefore made by Congress. . . . Power to remove, as well as to suspend, a high political officer, might conceivably be deemed indispensable to democratic government and, hence, inherent in the President. But power to remove an inferior administrative officer appointed for a fixed term cannot conceivably be deemed an essential of government.

To imply a grant to the President of the uncontrollable power of removal from statutory inferior executive offices involves an unnecessary and indefensible limitation upon the constitutional power of Congress to fix the tenure of inferior statutory offices. . . . Checks and balances were established in order that this should be “a government of laws and not of men.” [A]n uncontrollable power of removal in the Chief Executive “is a doctrine not to be learned in American governments.” . . . The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. . . . In order to prevent arbitrary executive action, the Constitution provided in terms that presidential appointments be made with the consent of the Senate, unless Congress should otherwise provide. . . .

1. Flip the arguments in the case: Can Myers be read as a reflection of Chief Justice Taft’s unease with congressional patronage and the spoils system? Presidential power to remove administrative officials, unconditionally, eliminated a role that seemingly provided political opportunity to members of Congress. Take a quick look at the full opinion (an admittedly difficult task since it covers over 200 pages in the U.S. Reports) and you will notice that the Court addresses the political issue as if it had never surfaced before, perhaps to give room for Taft’s expansive opinion. The Chief Justice journeys through the Federalist Papers and other sources to support his conclusion that removal is clearly an executive function, a conclusion that just might be based on Taft’s prior role – as President of the United States. Taft was determined to implement the agenda of the Progressives but his inclination was to do so by executive (administrative) action, not by cajoling or relying on Congress.
Although *Myers* involved an executive officer appointed with the advice and consent of the Senate, Chief Justice Taft’s reasoning appears to support a much broader reading. In particular, his insistence that Congress may leave itself no role in the removal process strongly suggests that the President must be able to remove all officers he appointed with the advice and consent of the Senate. Given that the President must appoint all superior officers, and that Chief Justice Taft was not prepared to allow Congress to have any role in the removal of such officers, it follows that if the President cannot remove them, then no one can.


2. The removal question deserves the attention it has received over the last century. Most agree that the matter cannot be resolved unequivocally by the text of the Constitution. “The problem inherent in determining removal authority, implicating as it did the larger question of who was to control the government – Congress or the President, could not have been solved by the founding fathers; thus they left the issue to future political decisionmaking, not judicial determination.” Theodore Y. Blumoff, *Illusions of Constitutional Decisionmaking: Politics and the Tenure Powers in the Court*, 73 Iowa L. Rev. 1079, 1085 (1988). Cases before *Myers* provided little clarity. *See Parsons v. United States*, 167 U.S. 324 (1897) (removal required implied consent by the Senate); *McAllister v. United States*, 141 U.S. 174 (1891) (for quasi-judicial appointments, senatorial participation is a required component of removal). For Taft, such notions were deeply problematic. From his perspective, the executive must be free of coercive influence from the other branches of government. Only those who reflect the perspective of the President should be in positions of power – and those who do not share that perspective must be removed unless there is clear legislation to the contrary.

3. How much was actually at stake in *Myers*? Do you think the postmaster of Portland was a major player in national politics? Should it matter? If your answer is that, with all due deference to Oregonians, the officer in question was not likely to affect national policy, was this really about nothing but patronage? Alternatively, was the majority opinion driven by the realization that Congress was quite

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**For More Information**

capable of expediting or destroying White House initiatives and executive power had to be asserted? This interpretation is somewhat consistent with Holmes’ dissent which reflects basic republicanism – in the end, Congress is the dominant branch and should not be excluded from engagement in decisions that might be the result of executive fiat. However you see the case, our real concern is in appreciating the tension between Congress and the Presidency. For background reading, see, Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 Va. L. Rev. 1127 (2000); Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent?*, 15 Cardozo L. Rev. 273 (1993); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1 (1994); and Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, (1984).

4. Does Myers suggest an executive/independent agency distinction regarding removal of officials? It is an older case – but not older than the Interstate Commerce Commission (1887) and the Federal Trade Commission (1914). Independence, i.e., freedom from political meddling, was central to those independent agencies, something Chief Justice Taft knew intimately. Why, then, the somewhat overreaching assertion of executive power in Myers? During the 1970s and 1980s, the issue resurfaced in a very different way and boiled down to a question of the role of the President as a direct participant in central matters pertaining to the administrative state. See Peter P. Swire, Note, *Incorporation of Independent Agencies into the Executive Branch*, 94 Yale L.J. (1985); Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573 (1984); Bernstein, *The Presidential Role in Administrative Rulemaking: Improving Policy Directives: One Vote for Not Tying the President’s Hands*, 57 Tul. L. Rev. 818 (1982); and Cutler & Johnson, *Regulation and the Political Process*, 84 Yale L.J. 1395 (1975). The question of presidential power is, once again, central to the administrative law discourse. Removal is but one vista to understand the tension in the field. Consider the language of Executive Orders 12896 (3 C.F.R. 638 (1994)), reprinted at 5 U.S.C. § 601 (2000), and 13422 (Exec. Order No. 13,422, 72 Fed. Reg. 2763 issued Jan. 18, 2007), the dominant regulatory directives of the last two decades. Both demand allegiance to White House policy – and both raise questions of agency independence.
At most state law schools, employment contracts for faculty are the result of a negotiation between the dean (the executive) and the prospective faculty member. However, there is an essential “advice and consent” process whereby those seeking fulltime, tenure-track positions are reviewed by a faculty hiring committee and often the full faculty (the legislature). In the absence of approval through the committee and faculty, offers cannot be made by the dean. Assume a new dean takes office and wants to hire faculty who will carry forward the dean’s pedagogical and scholarly agenda. There are no open faculty lines or “slots” to be filled on the faculty – and none are expected for some years to come. Can the new dean “free up slots” by firing current faculty who write and teach in fields the new dean does not value? Putting aside academic freedom issues, solely as a matter of administration, can you imagine a scenario where a new dean would have that power? How would your answer vary in the absence of tenure? What if a school does not have formalized tenure and academic freedom is “protected” by having faculty appointments for a term of years (e.g., seven-year terminable or renewable contracts). Can a new dean remove faculty in their third or fourth year if they write and teach in fields the new dean does not value?

**HUMPHREY’S EXECUTOR v. UNITED STATES**

295 U.S. 602 (1935)

[JUSTICE SUTHERLAND]

William E. Humphrey, the decedent, on December 10, 1931, was nominated by President Hoover to succeed himself as a member of the Federal Trade Commission, and was confirmed by the United States Senate. He was duly commissioned for a term of seven years expiring September 25, 1938; and, after taking the required oath of office, entered upon his duties. On July 25, 1933, President Roosevelt addressed a letter to the commissioner asking for his resignation, on the ground “that the aims and purposes of the Administration with respect to the work of the Commission can be carried out most effectively with personnel of my own selection,” but disclaiming any reflection upon the commissioner personally or upon his services. The commissioner replied, asking time to consult his
friends. After some further correspondence upon the subject, the President on August 31, 1933, wrote the commissioner expressing the hope that the resignation would be forthcoming and saying:

“You will, I know, realize that I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission, and, frankly, I think it is best for the people of this country that I should have a full confidence.”

The commissioner declined to resign; and on October 7, 1933, the President wrote him:

“Effective as of this date you are hereby removed from the office of Commissioner of the Federal Trade Commission.”

Humphrey never acquiesced in this action, but continued thereafter to insist that he was still a member of the commission, entitled to perform its duties and receive the compensation provided by law at the rate of $10,000 per annum. . . .

The Federal Trade Commission Act creates a commission of five members to be appointed by the President by and with the advice and consent of the Senate, and § 1 provides: “. . . Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. . . .”

. . . . The statute fixes a term of office, in accordance with many precedents. The first commissioners appointed are to continue in office for terms of three, four, five, six, and seven years, respectively; and their successors are to be appointed for terms of seven years -- any commissioner being subject to removal by the President for inefficiency, neglect of duty, or malfeasance in office. The words of the act are definite and unambiguous.

The government says the phrase “continue in office” is of no legal significance and, moreover, applies only to the first commissioners. We think it has significance. It may be that literally, its application is restricted as suggested; but it, nevertheless, lends support to a view contrary to that of the government as to the meaning of the entire requirement in respect of tenure; for it is not easy to suppose that Congress intended to secure the first commissioners against removal except for the causes specified and deny like security to their successors. Putting this phrase aside, however, the fixing of a definite term subject to removal for cause, unless there be some countervailing provision or circumstance indicating the contrary, which here we are unable to find, is enough to establish the legislative intent that the term is not to be curtailed in the absence of such cause. . . .
The commission is to be non-partisan; and it must, from the very nature of its
duties, act with entire impartiality. It is charged with the enforcement of no policy
except the policy of the law. Its duties are neither political nor executive, but
predominantly quasi-judicial and quasi-legislative. Like the Interstate Commerce
Commission, its members are called upon to exercise the trained judgment of a
body of experts “appointed by law and informed by experience.”

The legislative reports in both houses of Congress clearly reflect the view that
a fixed term was necessary to the effective and fair administration of the law. . . .

[From the legislative history:] “The work of this commission will be of a most
exacting and difficult character demanding persons who have experience in the
problems to be met -- that is, a proper knowledge of both the public requirements
and the practical affairs of industry. It is manifestly desirable that the terms of the
commissioners shall be long enough to give them an opportunity to acquire the
expertness in dealing with these special questions concerning industry that comes
from experience.”

The report declares that one advantage which the commission possessed over
the Bureau of Corporations (an executive subdivision in the Department of Com-
merce which was abolished by the act) lay in the fact of its independence, and
that it was essential that the commission should not be open to the suspicion of
partisan direction. The report quotes a statement to the committee by Senator
Newlands, who reported the bill, that the tribunal should be of high character and
“independent of any department of the government…. a board or commission of
dignity, permanence, and ability, independent of executive authority, except in its
selection, and independent in character.”

The debates in both houses demonstrate that the prevailing view was that
the commission was not to be “subject to anybody in the government but… only
to the people of the United States”; free from “political domination or control”
or the “probability or possibility of such a thing”; to be “separate and apart from
any existing department of the government -- not subject to the orders of the
President.”

More to the same effect appears in the debates, which were long and thor-
ough and contain nothing to the contrary. . . .

Thus, the language of the act the legislative reports, and the general purposes
of the legislation as reflected by the debates, all combine demonstrate the Con-
gressional intent to create a body of experts who shall gain experience by length
of service -- a body which shall be independent of executive authority, except in
its selection, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government. To the accomplishment of these purposes, it is clear that Congress was of opinion that length and certainty of tenure would vitally contribute. And to hold that, nevertheless, the members of the commission continue in office at the mere will of the President, might be to thwart, in large measure, the very ends which Congress sought to realize by definitely fixing the term of office.

We conclude that the intent of the act is to limit the executive power of removal to the causes enumerated, the existence of none of which is claimed here.

To support its contention that the removal provision of § 1, as we have just construed it, is an unconstitutional interference with the executive power of the President, the government's chief reliance is *Myers v. United States*. That case has been so recently decided, and the prevailing and dissenting opinions so fully review the general subject of the power of executive removal, that further discussion would add little of value to the wealth of material there collected. Nevertheless, the narrow point actually decided was only that the President had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress. In the course of the opinion of the court, expressions occur which tend to sustain the government's contention, but these are beyond the point involved and, therefore, do not come within the rule of *stare decisis*. In so far as they are out of harmony with the views here set forth, these expressions are disapproved.

The office of a postmaster is so essentially unlike the office now involved that the decision in the *Myers* case cannot be accepted as controlling our decision here. A postmaster is an executive officer restricted to the performance of executive functions. He is charged with no duty at all related to either the legislative or judicial power. The actual decision in the *Myers* case finds support in the theory that such an officer is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is. Putting aside dicta, which may be followed if sufficiently persuasive but which are not controlling, the necessary reach of the decision goes far enough to include all purely executive officers. It goes no farther; much less does it include an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President.

The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified
duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control. In administering the provisions of the statute in respect of “unfair methods of competition” -- that is to say in filling in and administering the details embodied by that general standard -- the commission acts in part quasi-legislatively and in part quasi-judicially. In making investigations and reports thereon for the information of Congress under § 6, in aid of the legislative power, it acts as a legislative agency. Under § 7, which authorizes the commission to act as a master in chancery under rules prescribed by the court, it acts as an agency of the judiciary. To the extent that it exercises any executive function -- as distinguished from executive power in the constitutional sense -- it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government.

If Congress is without authority to prescribe causes for removal of members of the trade commission and limit executive power of removal accordingly, that power at once becomes practically all-inclusive in respect of civil officers with the exception of the judiciary provided for by the Constitution. The Solicitor General, at the bar, apparently recognizing this to be true, with commendable candor, agreed that his view in respect of the removability of members of the Federal Trade Commission necessitated a like view in respect of the Interstate Commerce Commission and the Court of Claims. We are thus confronted with the serious question whether not only the members of these quasi-legislative and quasi-judicial bodies, but the judges of the legislative Court of Claims, exercising judicial power continue in office only at the pleasure of the President.

We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named. The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will.

The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. . . .
The power of removal here claimed for the President falls within this principle, since its coercive influence threatens the independence of a commission, which is not only wholly disconnected from the executive department, but which, as already fully appears, was created by Congress as a means of carrying into operation legislative and judicial powers, and as an agency of the legislative and judicial departments.

...The result of what we now have said is this: Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause, will depend upon the character of the office; the Myers decision, affirming the power of the President alone to make the removal, is confined to purely executive officers; and as to officers of the kind here under consideration, we hold that no removal can be made during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute.

To the extent that, between the decision in the Myers case, which sustains the unrestrictable power of the President to remove purely executive officers, and our present decision that such power does not extend to an office such as that here involved, there shall remain a field of doubt, we leave such cases as may fall within it for future consideration and determination as they may arise.

1. How much of Myers remains after Humphrey’s? Do you agree with the following assessment?

Less than a decade after Myers, the Supreme Court in Humphrey’s Executor set forth a significantly narrower vision of presidential power in which the President’s Article II managerial authority does not include supervisory power over congressionally delegated administrative authority. In Myers, the Court used language to suggest that the authority delegated to the executive branch inhere to the President. The Supreme Court in Humphrey’s Executor, however, appeared to view administrative agencies as constitutionally independent from the Executive or perhaps even as arms or extensions of Congress. Agencies might be arms of Congress, according to the Court, at least in their exercise of what the Court termed the “quasi-legislative” or “quasi-judicial” administrative authority of the modern regulatory agency.


Assuming the above characterization, are independent agencies legislative? How can that be if the President retains the power of appointment, the power to set an agency agenda, and, by executive order, the power to determine what rules the agency may or may not issue?
2. Was Humphrey’s Executor driven by the necessity of complete political independence of decisionmakers, other than those in “executive” agencies?

Myers temporarily established that the President could remove executive officers even when he could not direct their decisions. . . . It was Myers’ short-lived dogma concerning presidential removal that the Court overcame in Humphrey’s Executor when it recognized that an officer subject to presidential removal without cause cannot be expected to exercise independent judgment. By the time of the decision in Wiener [the next case in this text], the notion that an officer subject to presidential removal would be completely free from presidential direction was rejected. In Wiener, Justice Frankfurter described the need for an officer to be free from removal in order to be completely independent from direction on particular decisions as “a fortiori” in its certainty.


A similar perspective is found in David M. Driesen, Toward a Duty-Based Theory of Executive Power, 78 Fordham L. Rev. 71, 119 (2009): “In Humphrey’s Executor v. United States and Wiener v. United States, the Supreme Court distinguished and to some extent repudiated Myers’s unitary dicta, in order to uphold the practice of insulating independent agencies exercising quasi-judicial and quasi-legislative powers.”

3. How much of your comparison translates into a “formalism vs. functionalism” discussion? Is Humphrey’s simply a functionalist approach to the tasks of governance? Compare:


While moving away from Myers’ institutional formalism, Humphrey’s Executor does not abandon the theory [of formalism] completely. The very idea of “quasi-legislative” power, for instance, depends on the concept of a “legislative” role. The qualifier cannot obscure reliance on underlying categories that are themselves called into question by the qualification. Humphrey’s Executor ultimately retained the supposition that governmental entities have substantive essences which depend on their role in the creation and implementation of law. To this extent, the formalist conception retains a lingering hold on the doctrine.

c. Peter P. Swire, Note, Incorporation of Independent Agencies into the Executive Branch, 94 Yale L.J. 1766, 1768 (1985): “The decision of Humphrey’s Executor was part of
a major shift to functionalism after 1935. The Supreme Court relaxed the Myers rule that all governmental actions had to fit into one of the three formal boxes of legislative, executive, or judicial action.”

4. Humphrey’s seemingly deprives the plenary power of the President to remove officials who are “out of step” with the administration. What if an official is both “out of step” and somewhat ineffective? Takes an unusually long time to make decisions? Misunderstands the holdings of important Supreme Court cases? A term of years can provide protection from undue political influence and aid in independent thinking – but can it also shield incompetence? There is a “good cause” exception that allows the President
to remove [administrative officials] in certain circumstances. . . . [T]he words good cause and inefficiency, neglect of duty, or malfeasance in office seem best read to grant the President at least something in the way of supervisory and removal power – allowing him, for example, to discharge, as inefficient or neglectful of duty, those commissioners who show lack of diligence, ignorance, incompetence, or lack of commitment to their legal duties.

Lawrence Lessig and Cass R. Sunstein, The President and The Administration, 94 Colum. L. Rev. 1, 111(1994).

Hypothetical

Assume that both houses of Congress are controlled by a party different from that of the President, and that the leadership of the House of Representatives and of the Senate have lost confidence in the Secretary of State. They arrange to pass a resolution in both the House and the Senate directing the President to remove the incumbent “in light of the irreconcilably deteriorated relationship between the Secretary and this Congress.” Is the President required to abide by such a bicameral resolution? If not, by what other means could Congress take action against the Secretary of State? Note: Skip ahead and take a sneak peek at Chadha. We, your authors, do not think Chadha resolves this problem.

5. In 2009 Professor Sunstein (co-author of the article excerpted above) was named Administrator of the Office of Information and Regulatory Affairs, the primary “voice” of regulatory policy of a presidential administration. Professor Sunstein notes in that 1994 article that “[t]he statutory words [good cause] might even allow discharge of commissioners who have frequently or on important occasions acted in ways inconsistent with the President’s wishes with respect to what is required by sound policy.” Id. Doesn’t that perspective cut at the core
values of Humphrey’s? The protection Humphrey’s anticipated is illusory if one can be fired for making a decision consistent with a statute but not consistent with the “President’s wishes.”

6. If there was much doubt about the position of the Court regarding the necessity for those in quasi-adjudicatory roles to be free from a White House pressures expressed in terms of job-security, at least at independent agencies, that doubt was resolved in Wiener v. United States.

WIENER v. UNITED STATES

357 U.S. 349 (1957)

[Justice Frankfurter]

This is a suit for back pay, based on petitioner’s alleged illegal removal as a member of the War Claims Commission. The facts are not in dispute. By the War Claims Act of 1948, Congress established that Commission with “jurisdiction to receive and adjudicate according to law,” § 3, claims for compensating internees, prisoners of war, and religious organizations, §§ 5, 6 and 7, who suffered personal injury or property damage at the hands of the enemy in connection with World War II. The Commission was to be composed of three persons, at least two of whom were to be members of the bar, to be appointed by the President, by and with the advice and consent of the Senate. The Commission was to wind up its affairs not later than three years after the expiration of the time for filing claims.

Having been duly nominated by President Truman, the petitioner was confirmed on June 2, 1950, and took office on June 8, following. On his refusal to heed a request for his resignation, he was, on December 10, 1953, removed by President Eisenhower. The following day, the President made recess appointments to the Commission, including petitioner’s post. Thereupon, petitioner brought this proceeding in the Court of Claims for recovery of his salary as a War Claims Commissioner. We brought the case here, because it presents a variant of the constitutional issue decided in Humphrey’s Executor v. United States, 295 U.S. 602 [and Myers].

[In Myers, the Court] announced that the President had inherent constitutional power of removal also of officials who have “duties of a quasi-judicial character . . . whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control.”
The assumption was short-lived that the Myers case recognized the President’s inherent constitutional power to remove officials, no matter what the relation of the executive to the discharge of their duties and no matter what restrictions Congress may have imposed regarding the nature of their tenure. . . . Within less than ten years a unanimous Court, in Humphrey’s Executor v. United States, narrowly confined the scope of the Myers decision to include only “all purely executive officers.” The Court explicitly “disapproved” the expressions in Myers supporting the President’s inherent constitutional power to remove members of quasi-judicial bodies. . . . In the present case, Congress provided for a tenure defined by the relatively short period of time during which the War Claims Commission was to operate -- that is, it was to wind up not later than three years after the expiration of the time for filing of claims. But nothing was said in the Act about removal.

. . . . . We start with one certainty. The problem of the President’s power to remove members of agencies entrusted with duties of the kind with which the War Claims Commission was charged was within the lively knowledge of Congress. . . . Humphrey’s case was a cause celebre -- and not least in the halls of Congress. And what is the essence of the decision in Humphrey’s case? It drew a sharp line of cleavage between officials who were part of the Executive establishment and were thus removable by virtue of the President’s constitutional powers, and those who are members of a body “to exercise its judgment without the leave or hindrance of any other official or any department of the government,” as to whom a power of removal exists only if Congress may fairly be said to have conferred it. This sharp differentiation derives from the difference in functions between those who are part of the Executive establishment and those whose tasks require absolute freedom from Executive interference. “For it is quite evident,” again to quote Humphrey’s Executor, “that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter’s will.”

Thus, the most reliable factor for drawing an inference regarding the President’s power of removal in our case is the nature of the function that Congress vested in the War Claims Commission. What were the duties that Congress confided to this Commission? And can the inference fairly be drawn from the failure of Congress to provide for removal that these Commissioners were to remain in office at the will of the President? For such is the assertion of power on which petitioner’s removal must rest. The ground of President Eisenhower’s removal of petitioner was precisely the same as President Roosevelt’s removal of Humphrey. Both Presidents desired to have Commissioners, one on the Federal Trade Commission, the other on the War Claims Commission, “of my own selection.” They wanted these Commissioners to be their men. The terms of removal in the two cases are identical and express the assumption that the agencies of which the two Commissioners were members were subject in the discharge of their duties to the
control of the Executive. An analysis of the Federal Trade Commission Act left
this Court in no doubt that such was not the conception of Congress in creating
the Federal Trade Commission. The terms of the War Claims Act of 1948 leave
no doubt that such was not the conception of Congress regarding the War Claims
Commission.

. . . Congress could, of course, have given jurisdiction over these claims to
the District Courts or to the Court of Claims. The fact that it chose to establish
a Commission to “adjudicate according to law” the classes of claims defined in
the statute did not alter the intrinsic judicial character of the task with which the
Commission was charged. The claims were to be “adjudicated according to law,”
that is, on the merits of each claim, supported by evidence and governing legal
considerations, by a body that was “entirely free from the control or coercive influ-
ence, direct or indirect,” Humphrey’s Executor v. United States, either the Executive
or the Congress. If, as one must take for granted, the War Claims Act precluded
the President from influencing the Commission in passing on a particular claim,
a fortiori must it be inferred that Congress did not wish to have hang over the
Commission the Damocles’ sword of removal by the President for no reason other
than that he preferred to have on that Commission men of his own choosing.

. . . Judging the matter in all the nakedness in which it is presented, namely,
the claim that the President could remove a member of an adjudicatory body like
the War Claims Commission merely because he wanted his own appointees on
such a Commission, we are compelled to conclude that no such power is given to
the President directly by the Constitution, and none is impliedly conferred upon
him by statute simply because Congress said nothing about it. The philosophy of
Humphrey’s Executor, in its explicit language as well as its implications, precludes
such a claim.

1. Wiener could not be more clear: decisionmakers in independent agencies
must be free from the “Sword of Damocles” of presidential removal. The posi-
tion seems perfectly logical and just – after all, we want our decisionmakers to
act objectively, free from political pressure or fear. And yet, what is the point of
electing a president every four years if changes in personnel are limited? With this
backdrop, consider the 2006 remarks of President Bush who explained that deci-
sions of consequence must be made by the President. Said President Bush, “I’m
the decider.” Ed Henry & Barbara Starr, Bush: “I’m the Decider” on Rumsfeld,
ATTY GEN. 624, 625 (1823) (suggesting that Department Heads were forbidden
from acting in a manner at odds with the “will of the President).
a. Do *Humphrey’s Executor* and *Wiener* frustrate the ability of a new presidential administration to pursue a path consistent with “the will of the President?” For example, can a newly elected president, on taking office, replace the heads of independent agencies? Consider the following question: can a newly elected President appoint a new Chair at the Consumer Product Safety Commission if the term of the Chair in office (recall that these appointments are for a period of years) has not expired?

b. The original Consumer Product Safety Act provided that the Chair “shall act as Chairman until the expiration of his term of office as a Commissioner.” The 1978 amendments (P.L. 95-631, 92 Stat. 3742) raised issues about the exercise of that power. In 2001, the Justice Department’s Office of the Legal Counsel issued a memo (PRESIDENT’S AUTHORITY TO REMOVE THE CHAIRMAN OF THE CONSUMER PRODUCT SAFETY COMMISSION, JULY 31, 2001 authored by John Yoo, then Deputy Assistant Attorney General) on that point proclaiming the presence of an executive power to remove the Chair and appoint a new person to that position. The memo involves, *inter alia*, *Humphrey’s Executor and Wiener*. An excerpted version of the OLC Opinion follows.

... As head of the executive branch, the President... must be able to supervise subordinate officials and to coordinate executive branch policies and positions. See generally *Myers v. United States*, 272 U.S. 52 (1926) [*supra* in this text]. The power to remove is the power to control... As reflected in the great debate over removal in the very first Congress, the Framers rejected a legislative role in removal in favor of plenary presidential power over officers appointed by the President with the advice and consent of the Senate...

To be sure, the Court has refused to invalidate all limitations on presidential authority over all executive branch officials. In *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935) [*supra* in this text] the Court upheld a for-cause removal provision over members of the Federal Trade Commission due to the Commission’s “quasi-legislative or quasi-judicial” functions. *Id.* at 628. In *Wiener v. United States*, 357 U.S. 349 (1958), [*supra* in this text] the Court inferred the existence of a for-cause limitation on removal, but again because the official in question, a member of the War Claims Commission, performed a quasi-judicial function... In light of these cases, it is clear that the Constitution generally reserves to the President alone the power to remove officials... [*T*]he statute establishing the CPSC does not include any limitation on the President's power to remove the Chairman... 

... As originally enacted in 1972, [Pub. L. No. 92-573, § 4(a), 86 Stat. 1207, 1210 (1972)] the Consumer Product Safety Act had stated that [the CPSC will have five commissioners]: “[O]ne of whom shall be designated by the President as Chairman. The Chairman, when so designated shall act as Chairman until the expiration of his term of office as Commissioner. Any member of the Commission may be removed by the President for neglect of duty or malfeasance in office but for no other cause.” (emphasis added)
In amending the statute in 1978 [Pub. L. No. 95-631, § 2(a), 92 Stat. 3742, 3742 (1978)], Congress clarified the CPSC removal provisions. . . . The statutory language was changed to: “The Chairman shall be appointed by the President, by and with the advice and consent of the Senate, from among the Members of the Commission. An individual may be appointed as a member of the Commission and as Chairman at the same time. Any member of the Commission may be removed by the President for neglect of duty or malfeasance in office but for no other cause. (emphasis added).

. . . . In its report on the 1978 Act, the Senate Commerce Committee . . . made clear that the “chairman of the agency shall serve at the pleasure of the President.” Consumer Product Safety Act Authorization Act of 1978, Sen. Rep. No. 95-889, 95th Cong., 2d Sess. at 10 (1978). . . . We conclude that the President has the authority to remove the Chairman of the CPSC for any reason. . . . (emphasis added)

c. Do you read Humphrey’s Executor and Wiener – or the CPSA language – to permit the removal of the Chair of an independent agency for “any reason?”

2. Presidential power, whether expressed through the removal of agency officials, presidential proclamation, executive orders, or “signing statements,” (Michael T. Crabb, Comment, “The Executive Branch Shall Construe”: The Canon of Constitutional Avoidance and the Presidential Signing Statement, 56 Kan. L. Rev. 711 (2008); Chad M. Eggspuehler, Note, The S-Words Mightier than the Pen: Signing Statements as Express Advocacy of Unlawful Action, 43 Gonz. L. Rev. 461 (2007/2008)) is a matter of great interest in the field. How much change is permissible after an election results in a new president? How does one balance the limits on presidential action in Wiener with the constitutional import of a national election?

3. Just how much a president can be a “decider” varies greatly based on the agency involved and also on the goals of the agency officials involved. Consider the following regarding the Food and Drug Administration:

The law permits the President to appoint a Secretary of Health and Human Services . . . . The President also has the power, subject to confirmation by the Senate, to select FDA Commissioners . . . . However, the Commissioners who have been appointed . . . . since the Bush Administration arrived in 2001 have held the office for an average tenure of about one year after confirmation. The appointees tend to pursue these jobs only in furtherance of their future careers, gaining appointment with the help of White House insiders who, in turn, seek those candidates most likely to implement the President’s policies.


4. Does Wiener permit the removal of a U.S. Attorney if the basis for that action is non-conformity with White House priorities? David C. Weiss, Note, Nothing Improper? Examining Constitutional Limits, Congressional Action, Partisan Motivation,
and Pretextual Justification in the U.S. Attorney Removals, 107 Mich. L. Rev. 317 (2008). Does non-conformity with White House priorities constitute anything close to “good cause”? In Mistretta v. United States, 488 U.S. 361 (1989) (infra in this text), the Court characterized the power to remove for good cause as a “limited power.” Echoing Humphrey’s Executor, misuse of this power could become a “coercive influence” – language repeated by the Court in Wiener (357 U.S. at 355).

Hypothetical

Frustrated by what some Members of Congress have characterized as the White House’s profligate disbursement of Federal Emergency Management Agency (FEMA) disaster relief funds, a majority of Congress is considering passing a bill that would grant the Comptroller General (the head of the U.S. Government Accountability Office) the authority to reject any FEMA expenditures. Would such a bill be constitutional?

5. The excerpted article below reflects a current view of the difference between independent and executive agencies from a comparative law perspective. The distinction has been blurred over the last quarter-century. Presidential influence over both types of agencies has been powerful. Nevertheless, as the article excerpt makes clear, the distinction is still of consequence.


I. Definition and Characteristics of Independent Regulatory Agencies (IRAs)

Similar to some European constitutions, the U.S. constitutional text has no provision dealing with independent regulatory agencies. Its “necessary and proper clause” merely confers the authority to create the government on Congress. Apart from a constitutional reference to the cabinet departments, the design of the U.S. federal government is Congress’s responsibility. Therefore, the establishment of the category of independent regulatory agencies, at the American federal level, as in European countries, results from legislation.

The definition and characteristics of American independent agencies must be articulated against the backdrop of the structure of the U.S. government. Beside the presidency, the study of the structure of the U.S. government stresses a main distinction between executive regulatory agencies and independent regulatory agencies. The distinction is based primarily on their respective location in the administrative architecture and secondarily on their distinct type of leadership.
The executive agencies are cabinet agencies directly located within one department in the Executive Branch whereas the independent agencies are placed outside such presidential realm. As multi-member agencies, the independent agencies are headed by a college of Commissioners and are otherwise referred to as “commissions”. Comparatively, the executive agencies are under the leadership of a single administrator.

The rules governing the appointment and the removal of the Commissioners guarantee their independence. Commissioners are nominated by the President and confirmed by Congress. Bipartisanship, staggered dates and fixed term of appointment, are designed to prevent a perfect political consonance between the President and a given independent agency. Removal of Commissioners is confined to a non political cause, thus making it, at least in principle, impossible for the President to censor or sanction political disagreement.

In light of the two aforementioned criteria, the independent agency is defined as a form of administrative government that is placed outside any cabinet department and under the leadership of a college of Commissioners independent of the President. Such a definition in structural and relational terms must be completed by an inquiry into the functions of the independent agency. Thus amended, the definition becomes: a form of administrative government that is responsible to regulate human activities and is placed outside any cabinet department and under the leadership of a college of Commissioners independent of the President. The significance of the functional dimension of the independent agency must be properly assessed. Historically, it was both an element of definition and, along with location and its oversight implications, a fundamental feature of distinction from the executive agency. Nowadays, it still has a definitional value but it is no more a source of differentiation from the executive agency.

Originally, the independent agency symbolized the vesting in idealized experts of regulatory powers over the economy, that challenged the common law notions of property and contractual freedom, in the name of the public interest. It contrasted with the executive agency which theoretically was confined to managerial tasks and could not venture into decision making as far-reaching and encompassing as congressional action. Accordingly, it was termed the independent regulatory agency. The regulatory mission was translated into “the model of combined-function agency” which makes the rules, investigates, prosecutes, and adjudicates. Nevertheless, de facto, this functional distinction proved not to be fully operational. First, executive agencies carry out regulatory functions also. Second, some independent agencies simultaneously devote a substantial part of their action to non regulatory functions. In other words, it has now become clear that the two institutional categories both carry out regulatory and executive missions and enjoy intermingled powers. Therefore, if as a matter of definition, the independent agency is regulatory, as a matter of differentiation it is not exclusively such.

The original value of the functional criterion as a way to differentiate the then new independent agency from its existing executive counterpart mirrored one of the current criteria of distinction among executive and regulatory agencies in Europe either at the national level or at the European Union level. The difference of historical stratification of the development of independent administrative structures in the U.S. and Europe certainly explains the discrepancy between the American and the
European conceptions. The question raised by this comparative historical perspective is whether Europe will experience another age in the study of regulation whereby the diffusion of the regulatory function across the administrative government will be fully recognized.

Although it reflects the main feature of the American administrative architecture the dual account of the American governmental structure is not quite faithful to the diversity of its forms. Mid-way between the main two categories, exist the independent executive agencies which was pioneered in the 1970s with respect to environmental protection. In other words, beside the independent regulatory agency, there is a second type of independent agency. In both cases, the independent characteristic is based on the lack of location in a cabinet department. But in this second type, the independence is reduced for two reasons. First, the independent executive agency is still part of the Executive branch despite its non incorporation into a department. Second, the independent executive agency is headed by an administrator who can be discharged at will by the President.


VII. The APA: A Brief Historical Perspective

a. The study of administrative law is, for the most part, a study of process. While the omni-presence of cost-benefit analysis and non-stop political rhetoric regarding deregulation might suggest that the burning questions for lawyers ought to involve the substance – or even the existence – of the regulatory state, most private sector, public interest, trade association, corporate, and government lawyers do not spend their time analyzing why and whether various components of the social order ought to be subjected to agency oversight, sanction, or benefit.

Take Note

The focus of lawyers in this field is on how to represent clients, interests, entities, and the government itself, and therefore on the rules and strategies that must be understood to secure a public or private client’s just and best interest. The starting point for the study of administrative process is the Administrative Procedure Act, 5 U.S.C. §§551 et. seq., referred to in this text – and throughout the profession – as the APA.
b. The importance of the APA is not a matter of debate. Some law faculty organize the course in administrative law around sections of the APA. Others use an approach that weaves in and out of the APA – but all courses in this field require a basic understanding of the APA. Judges likewise rely on this relatively simple legislation in one way or another in most administrative law cases.

The APA both provides a basic (and in some ways gossamer) structure for agency action as well as setting forth fundamental precepts regarding judicial review of agency action. In *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993), the Supreme Court summarized the basic APA entitlement to judicial review thusly: “The APA provides that ‘[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof,’ 5 U.S.C. § 702, and we have read the APA as embodying a ‘basic presumption of judicial review,’ *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967). This is ‘just’ a presumption, however . . . agency action is not subject to judicial review ‘to the extent that’ such action ‘is committed to agency discretion by law.’ [Section 701(a) provides:] ‘This chapter [relating to judicial review] applies . . . except to the extent that – (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.’ . . .”

c. There are literally thousands of cases in which courts ponder the question of the role, function, and availability of judicial review. In some areas, e.g., immigration, veteran’s rights, and public assistance, the pronounced unavailability of judicial review creates controversy and can lead to charges of agency (executive) authoritarianism. In other areas where judicial review is available, courts, again in countless cases, ponder the grand and inevitable separation of powers questions that exist when a judicial decision expresses, clarifies, or articulates for the first time important public policy. After all, Article I of the Constitution does state that Congress is the representative of the people – and presumably the source for policy.

Regardless of the issues such cases discuss, it is a safe assumption that a court is not involved in a matter pertaining to administrative law unless an agency has done something – and what agencies do is almost always affected by the APA (unless Congress has, for its own reason, decided that some other process ought to apply).
As with any area of study where a statute plays a central role, it makes sense to explore the circumstances that led to the enactment of the legislation. Fortunately, there is a great deal of history available on the APA. First, there is a comprehensive legislative history: S. Comm. on the Judiciary, S. Doc. No. 248, reprinted in The Administrative Procedure Act: Legislative History (1946). In addition, we have provided two excerpts from law review articles that provide some historical context for the APA. The first was written by Professor Walter Gellhorn, one of the scholars who played a lead role in drafting the APA. The second, by Professor George Shepherd, sets out the fascinating political environment in which the APA was formed. We have excised very substantial portions and omitted the footnotes from the articles below. This scholarship is most assuredly best understood and appreciated by careful study of the original text.


The story begins in May 1933, when the American Bar Association created a Special Committee on Administrative Law. Within four months, scarcely enough time to allow the committee's membership to do more than contemplate their own navels, the committee was reportedly convinced that the “judicial function” then lodged in administrators' hands should be transferred to an independent tribunal or, alternatively, that officials’ decisions should be completely reviewable on the facts as well as on the law by a tribunal marked by judicial independence.

The Special Committee's first formal report and proposal of legislation came in 1934. It was aimed at coping with “the evils notoriously prevalent” among administrative tribunals, which the committee thought would be achieved by creating a federal administrative court with branches and an appellate division, or, failing that, “an appropriate number of independent tribunals” unencumbered by “legislative and executive functions.”

Thus began a continuing practice of prescribing a cure-all for the shortcomings, real or imagined, of administrative agencies. That shortcomings did exist is incontrovertible, and some of them were amenable to statutory correction. The Committee seemingly preferred, however, to avoid specifics and instead to generalize in ringingly oratorical terms. The “independent” tribunal proposal was supported by shadowy references to the unwholesome combination of judicial, executive, and legislative powers and by the stated belief that “the judicial branch of the federal government is being rapidly and seriously undermined and, if the tendencies are permitted to develop unchecked, is in danger of meeting a measure of the fate of the Merovingian Kings.”

In 1938 Roscoe Pound became the Committee's chairman. The decibel count rose markedly. This was the heyday of Congressman Martin Dies and the House Committee on Un-American Activities. Consideration of administrative law moved perceptibly to the level of “the good guys against the bad guys.” Scholarly critics of past proposals were challenged not on the merits of their criticisms, but by characterizations, as in the following passage from the 1938 report:
Much of the case for administrative absolutism, a doctrine which has made great headway especially in American institutions of learning, with which therefore, the legal profession must sooner or later contend, rests upon a use of “administrative law” in a sense quite repugnant to what “law” had been supposed to be. . . Hence administrative law would be the actual course of the administrative process whatever it is. . . Those who would turn the administration of justice over to administrative absolutism regard this meaning as illusory. . . This is a Marxian idea. . .

In early 1939 President Roosevelt requested Attorney General Murphy to appoint a Committee to undertake a more particularized examination of administrative functioning. The Committee was to investigate “the need for procedural reform” and to make a “thorough and comprehensive study” of then “existing practices and procedures, with a view to detecting any existing deficiencies and pointing the way to improvements.” . . .

Then began the first intensive and extensive inquiry into the methods of the federal agencies, whose rules and regulations or whose adjudications of rights bore substantially upon persons outside the Government. . .

The Final Report of the Attorney General’s Committee on Administrative Procedure and the investigations that preceded it set the stage for the federal Administrative Procedure Act of 1946 even though most of the committee’s members had not favored so embracive a legislative approach. . .

At times the Administrative Procedure Act has been used as a pretext for intrusion into administrative processes, as happened in the realm of administrative rulemaking until the Supreme Court sought to stem the practice. . . [As] Justice Frankfurter remarked, “Congress expressed a mood” when it adopted the Administrative Procedure Act and the statutes it influenced.


I. Introduction

The landmark Administrative Procedure Act (APA) was the bill of rights for the new regulatory state. Enacted in 1946, the APA established the fundamental relationship between regulatory agencies and those whom they regulate – between government, on the one hand, and private citizens, business, and the economy, on the other hand. The balance that the APA struck between promoting individuals’ rights and maintaining agencies’ policy-making flexibility has continued in force, with only minor modifications, until the present. The APAs impact has been large. It has provided agencies with broad freedom, limited only by relatively weak procedural requirements and judicial review, to create and implement policies in the many areas that agencies touch: from aviation to the environment, from labor relations to the securities markets. The APA permitted the growth of the modern regulatory state.

The APA and its history are central to the United States’ economic and political development. In the 1930s and 1940s when the APA was debated, much in the
United States was uncertain. Many believed that communism was a real possibility, as were fascism and dictatorship. Many supporters of the New Deal favored a form of government in which expert bureaucrats would influence even the details of the economy, with little recourse for the people and businesses that felt the impacts of the bureaucrats’ commands. To New Dealers, this was efficiency. To the New Deals opponents, this was dictatorial central planning. The battle over the APA helped to resolve the conflict between bureaucratic efficiency and the rule of law, and permitted the continued growth of government regulation. The APA expressed the nation’s decision to permit extensive government, but to avoid dictatorship and central planning. The decision has shaped the nation for fifty years.

Since the time of the APA’s adoption, and even before, some commentators have suggested that the APA was universally beloved legislation. They have argued that, although various factions initially disagreed about the APA’s virtues, the factions unanimously approved the bill once they discovered its excellence. They suggest that the bill was so carefully and scientifically drafted that to know it was to admire it. . . . Likewise, even before the bill’s passage, commentators attempted to cover the bill’s contentious history with a pretty veneer. They suggested that, because all finally understood the bill, all now adored it. For example, shortly before Congress passed the APA, the president of the American Bar Association asserted: “Contrary to the impression which some people seem to have, the proposed Administrative Procedure Act is not a compromise. . . . It was a simple matter of good citizenship and good statesmanship to seek the best and fairest provisions for each subject. . . .”

This widely held perception of the APA’s history is inaccurate. The APA’s development was not primarily a search for administrative truth and efficiency. Nor was it a theoretically centered debate on appropriate roles for government and governed. Instead, the fight over the APA was a pitched political battle for the life of the New Deal. . . . Every legislator, both Roosevelt Democrats and conservatives, recognized that a central purpose of the proponents of administrative reform was to constrain liberal New Deal agencies. . . . They understood . . . that the shape of the administrative law statute that emerged would determine the shape of the policies that the New Deal administrative agencies would implement.

The APA that finally emerged in 1946 did not represent a unanimous social consensus about the proper balance between individual rights and agency powers. The APA was a hard-fought compromise that left many legislators and interest groups far from completely satisfied. Congressional support for the bill was unanimous only because many legislators recognized that, although the bill was imperfect, it was better than no bill. The APA passed only with much grumbling.

Nor was the APA an obvious triumph of truth over ignorance, as some commentators now contend. Instead [the] APA was a cease-fire armistice agreement that ended the New Deal war on terms that favored New Deal proponents. . . . Reprinted by special permission of Northwestern University School of Law, Northwestern University Law Review.


i. One of the best original sources used to understand the APA is the *Attorney General’s Manual on the Administrative Procedure Act (1947)*, written under the direction of Attorney General (and later Supreme Court Justice) Tom C. Clark. It is referred to in hundreds of cases where the meaning of the APA is in play – most recently in *Benzman v. Whitman*, 523 F.3d 119, 130 (2d Cir.  2008), a case involving claims against the EPA stemming from injuries sustained by workers on the World Trade Center site after the catastrophic events of September 11, 2001. The workers claimed they were mislead by characterizations made by EPA Administrator Whitman regarding allegedly toxic airborne dust particles. At issue, *inter alia*, is the meaning of section 706 of the APA, and the matter of agency inaction, for which the court turned to the Manual to guide interpretation.

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**For More Information**
