Administrative Law
Law 6400 – Section 12
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Supplementary Materials

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SELECTED PROVISIONS OF STATE CONSTITUTIONS

Connecticut State Constitution:

ARTICLE SECOND.
OF THE DISTRIBUTION OF POWERS.

The powers of government shall be divided into three distinct departments, and each of them confided to a separate magistracy, to wit, those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.

Virginia State Constitution:

Article III:
Section 1. Departments to be distinct.

The legislative, executive, and judicial departments shall be separate and distinct, so that none exercise the powers properly belonging to the others, nor any person exercise the power of more than one of them at the same time; provided, however, administrative agencies may be created by the General Assembly with such authority and duties as the General Assembly may prescribe. Provisions may be made for judicial review of any finding, order, or judgment of such administrative agencies.

Texas State Constitution:

Article II. THE POWERS OF GOVERNMENT

Sec. 1. SEPARATION OF POWERS OF GOVERNMENT AMONG THREE DEPARTMENTS.

The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: those which are Legislative to one, those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

UNITED STATES v. STORER BROADCASTING COMPANY
351 U.S. 192 (1956)

MR. JUSTICE REED delivered the opinion of the Court.

The Federal Communications Commission issued, on August 19, 1948, a notice of proposed rulemaking under the authority of 47 U.S.C. §§ 303(r), 311, 313 and 314, * * * (Communications Act of 1934, as amended, * * *). It was proposed, so far as is pertinent to this case, to amend Rules 3.35, 3.240 and 3.636 relating to Multiple Ownership of standard [that is, AM], FM and television broadcast stations. Those rules provide that licenses for broadcasting stations will not be granted if the applicant, directly or indirectly, has an interest in other stations beyond a limited number. The purpose of the limitations is to avoid overconcentration of broadcasting facilities.

As required by 5 U.S.C. § 1003(b), * * * the notice permitted 'interested' parties to file statements or briefs. * * * Respondent, licensee of a number of radio and television stations, filed a statement objecting to the proposed changes, as did other interested broadcasters. Respondent based its objections largely on the fact that the proposed rules did not allow one person to hold as many FM and television stations as standard stations. Storer argued that such limitations might cause irreparable financial damage to owners of standard stations if an obsolescent standard station could not be augmented by FM and television facilities.

In November 1953 the Commission entered an order amending the Rules in question without significant changes from the proposed forms.[1] A review was sought in due course by respondent in the Court of Appeals for the District of Columbia Circuit. * * * Respondent alleged it owned or controlled, within the meaning of the Multiple Ownership Rules, seven standard radio, five FM radio and five television broadcast stations. It asserted that the Rules complained of were in conflict with the statutory mandates that applicants should be granted licenses if the public interest would be served and that applicants must have a hearing before denial of an application. 47 U.S.C. § 309(a) and (b), * * *.[5]

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[1] Section 3.636 will illustrate the problem: '§ 3.636 Multiple ownership. (a) No license for a television broadcast station shall be granted to any party (including all parties under common control) if: * * * Such party * * * directly or indirectly owns, operates, [or] controls * * * any other television broadcast station if the grant of such license would result in a concentration of control of television broadcasting in a manner inconsistent with public interest, convenience, or necessity. In determining whether there is such a concentration of control, consideration will be given to the facts of each case * * *. The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party * * * to have a direct or indirect interest in * * * more than five television broadcast stations.'

[5] 47 U.S.C. § 309, * * *:

'Examination; action by Commission.

'(a) If upon examination of any application provided for in section 308 of this title the Commission shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application. * * *

'(b) If upon examination of any such application the Commission is unable to make the finding specified in subsection (a) of this section, it shall forthwith notify the applicant and other known parties in interest of the grounds and reasons for its inability to make such finding. * * * Following such notice, the applicant shall be given an opportunity to reply. If the Commission, after considering such reply, shall be unable to make the finding specified in subsection (a) of this section,

* * * On the day the amendments to the Rules were adopted, a pending application of Storer for an additional television station at Miami was dismissed on the basis of the Rules.

* * * In its petition for review Storer prayed the court to vacate the provisions of the Multiple Ownership Rules insofar as they denied to an applicant already controlling the allowable number of stations a 'full and fair hearing' to determine whether additional licenses to the applicant would be in the public interest. * * *

The Commission asserts that its power to make regulations gives it the authority to limit concentration of stations under a single control.[9] It argues that rules may go beyond the technical aspects of radio, that rules may validly give concreteness to a standard of public interest, and that the right to a hearing does not exist where an applicant admittedly does not meet those standards as there would be no facts to ascertain. The Commission shows that its regulations permit applicants to seek amendments and waivers of or exceptions to its Rules.[10] It adds:

> 'This does not mean, of course, that the mere filing of an application for a waiver * * * would necessarily require the holding of a hearing, for if that were the case a rule would no longer be a rule. It means only that it might be an abuse of discretion to fail to hear a request for a waiver which showed, on its face, the existence of circumstances making application of the rule inappropriate.'

Respondent * * * urges that an application cannot be rejected under 47 U.S.C. § 309, * * * without a 'full hearing' to applicant. We agree that a 'full hearing' under § 309 means that every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. * * * Such a hearing is essential for wise and just application of the authority of administrative boards and agencies.

We do not read the hearing requirement, however, as withdrawing from the power of the Commission the rulemaking authority necessary for the orderly conduct of its business. As conceded

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> it shall formally designate the application for hearing on the grounds or reasons then obtaining and shall notify the applicant * * * specifying with particularity the matters and things in issue * * *. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate * * *.'

[9] 'The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its function.' 47 U.S.C. § 154(i), * * *. 'Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall-- '(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter: '(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, * * *.' 47 U.S.C. § 303, * * *.

[10] FN10. 47 CFR, Rev.1953, § 1.361(c): '(c) Applications which, because of the nature of the particular rule, regulation, or requirement involved, are patently not in accordance with the Commission's rules, regulations, or other requirements will be considered defective and will be dismissed unless accompanied by a request of the applicant for waiver of, or exception to, any rule, regulation, or requirements with which the application is in conflict. Such requests shall show the nature of the waiver or exception desired and set forth the reasons in support thereof.' * * *

by Storer, 'Section 309(b) does not require the Commission to hold a hearing before denying a license to operate a station in ways contrary to those that the Congress has determined are in the public interest.' The challenged Rules contain limitations against licensing not specifically authorized by statute. But that is not the limit of the Commission's rulemaking authority. 47 U.S.C. § 154(i) and § 303(r), * * * grant general rulemaking power not inconsistent with the Act or law.

This Commission, like other agencies, deals with the public interest. * * * Its authority covers new and rapidly developing fields. Congress sought to create regulation for public protection with careful provision to assure fair opportunity for open competition in the use of broadcasting facilities. Accordingly, we cannot interpret § 309(b) as barring rules that declare a present intent to limit the number of stations consistent with a permissible 'concentration of control.' It is but a rule that announces the Commission's attitude on public protection against such concentration. The Communications Act must be read as a whole and with appreciation of the responsibilities of the body charged with its fair and efficient operation. The growing complexity of our economy induced the Congress to place regulation of businesses like communication in specialized agencies with broad powers. Courts are slow to interfere with their conclusions when reconcilable with statutory directions. We think the Multiple Ownership Rules, as adopted, are reconcilable with the Communications Act as a whole. An applicant files his application with knowledge of the Commission's attitude toward concentration of control.

In *National Broadcasting Co. v. United States*, * * * similar rules prohibiting certain methods of chain broadcasting were upheld despite a claim that the Rules caused licenses to be denied without 'examination of written applications presented * * * as required by §§ 308 and 309.' * * * The *National Broadcasting* case validated numerous regulations couched in the prohibitory language of the present regulations. * * *

In the *National Broadcasting* case we called attention to the necessity for flexiblity in the Rules there involved. '[The] Commission provided that 'networks will be given full opportunity, on proper application for new facilities or renewal of existing licenses, to call to our attention any reasons why the principle should be modified or held inapplicable." * * * We said: 'The Commission therefore did not bind itself inflexibly to the licensing policies expressed in the Regulations. In each case that comes before it the Commission must still exercise an ultimate judgment whether the grant of a license would serve the 'public interest, convenience, or necessity.' If time and changing circumstances reveal that the 'public interest' is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations.' * * * That flexibility is here under the present § 309(a) and (b) and the FCC's regulations. See n. 10, supra. We read the Act and Regulations as providing a 'full hearing' for applicants who have reached the existing limit of stations, upon their presentation of applications conforming to Rules 1.361(c) and 1.702, that set out adequate reasons why the Rules should be waived or amended. The Act, considered as a whole, requires no more. We agree with the contention of the Commission that a full hearing, such as is required by § 309(b), note 5, supra, would not be necessary on all such applications. As the Commission has promulgated its Rules after extensive administrative hearings, it is necessary for the accompanying papers to set forth reasons, sufficient if true, to justify a change or waiver of the Rules. We do not think Congress intended the Commission to waste time on applications that do not state a valid basis for a hearing. If any applicant is aggrieved by a refusal, the way for review is open.

We reverse the judgment of the Court of Appeals and remand the case to that court so that it may consider respondent's other objections to the Multiple Ownership Rules.

Reversed and remanded.

MR. JUSTICE DOUGLAS concurs in the result.

[The opinions of Justice Harlan and Justice Frankfurter, which concerned jurisdictional questions, are omitted.]

Notes and Questions

1. What is the Federal Communications Commission? Of which branch of the United States government is it a part? In answering these questions, you may wish to consider the statute creating the Commission, codified in Title 47 of the United States Code, which states in part:

> **§ 151. Purposes of chapter; Federal Communications Commission created.** . . . [T]here is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.
>
> **§ 154. Federal Communications Commission.**
>
> **(a) Number of commissioners; appointment.** The Federal Communications Commission (in this chapter referred to as the "Commission") shall be composed of five commissioners appointed by the President, by and with the advice and consent of the Senate, one of whom the President shall designate as chairman. . . .
>
> **(c)(1)** A commissioner – **(A)** shall be appointed for a term of 5 years; . . .
>
> **(i) Duties and powers.** The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

No statute specifies whether a Commissioner may be removed from office during the 5-year term provided in § 154(c), and if so, how and by whom.

2. What function did § 309 of the Commission's governing statute (reproduced in footnote 5 of the Court's opinion), instruct the Commission to carry out? How, according to the statute, was the Commission supposed to carry out that function? With which branch of government would you associate the kinds of actions authorized by § 309?

3. What particular action of the Commission was challenged in this case? How would you characterize that action? With which branch of government would you associate that kind of action? What statute authorized the Commission to take the challenged action?

4. The private parties who challenged the Commission's action asserted that it was illegal because it did not provide them with a "full hearing." Why did the private parties want such a hearing? What would they have endeavored to prove at such a hearing? Think carefully about these questions. In considering them, take another look at footnote 5 of the Court's opinion. According to the statute there set forth, how is the FCC supposed to process an application for a broadcasting license?

5. The action of the Commission was challenged in and reviewed by federal courts—ultimately, by the Supreme Court. Why? The statute authorized the Commission to grant or deny broadcast licenses. Why do the courts have anything to say about what the Commission does?

6. As the case illustrates, almost every administrative law case involves a statute, the exact language of which is often critical to an understanding of the case. The need to look carefully at the statute is a general one, and one that is often neglected by administrative law practitioners and by judges. The following advice was written about cases involving statutes of limitation, but it applies equally well to administrative law cases:

II. Statute Reading

§ 1.03 General Techniques

> The primary technique to use in saving a case is an obvious one: read the statute. However, perhaps because we have been trained so extensively in researching prior case law and in learning how to distinguish cases, lawyers frequently do not adequately read the actual statutes which appear to bar their client's case.
>
> One of the first techniques that you should use—and certainly one that should be used before you have completed your research—is to read the statute. Indeed, paraphrasing an old aphorism, "when everything else fails, read the statute."
>
> After having read many cases in which individuals have been victorious over a statute of limitations defense, let me emphasize the primary technique:
>
> **READ THE STATUTE!**
>
> Amplifying this technique, you should consider doing the following:
>
> (1) Read the statute.
> (2) Reread the statute.
> (3) Reread the statute word by word, applying it to the case.
> (4) Forget the case. Then read the statute again later.
> (5) Photocopy the statute and periodically reread it. You might even keep the copy in your wallet or purse to have it available.

(6) Consider placing a photocopy of the statute on your desk or enlarge it as you would an exhibit and put in on your wall.
(7) Go to step number 1.

> The foregoing procedure, psychologically, will cause a variety of events to happen. First, you may—after one or two readings—find that the terms of the statute do not apply to your client's case and therefore the statute does not bar it. * * *
>
> If the statute still seems to apply, by following the listed techniques and by repetitively reading the statute, you will place the statute in your mind. Then your subconscious will begin to work on the problem when you are not even actively trying to think about it. By thinking about the problem extensively and then "forgetting" about it, you may frequently reach an "a-ha" experience in which you suddenly realize that the solution to your problem was "obvious."

Adolph J. Levy, *Solving Statute of Limitations Problems* § 1.03 (1987).

A principal difficulty in the study of administrative law, and in a general administrative law practice, is that each new case may be about a different, and possibly unfamiliar, statutory scheme. Close attention to the language of a new statutory scheme is essential. But familiarity with a statute is no safeguard against error: indeed, lawyers and judges are all too likely to neglect the language of a familiar statute precisely because they believe they know it already. Throughout the course, and in your practice if you should become an administrative lawyer, train yourself to pay close attention to the exact terms of the statutes that are at issue in each case.

Additional excerpt from *A.L.A. Schechter Poultry Corporation v. United States*, 295 U.S. 495 (1935): In reading *Schechter Poultry*, when you get to the end of p. 40, insert the following, which goes in the ellipsis at the very bottom of the page, after the words "throughout the country":

> Such a sweeping delegation of legislative power finds no support in the decisions upon which the government especially relies. By the Interstate Commerce Act * * * Congress has itself provided a code of laws regulating the activities of the common carriers subject to the act, in order to assure the performance of their services upon just and reasonable terms, with adequate facilities and without unjust discrimination. Congress from time to time has elaborated its requirements, as needs have been disclosed. To facilitate the application of the standards prescribed by the act, Congress has provided an expert body. That administrative agency, in dealing with particular cases, is required to act upon notice and hearing, and its orders must be supported by findings of fact which in turn are sustained by evidence. * * * When the Commission is authorized to issue, for the construction, extension, or abandonment of lines, a certificate of 'public convenience and necessity,' or to permit the acquisition by one carrier of the control of another, if that is found to be 'in the public interest,' we have pointed out that these provisions are not left without standards to guide determination. The authority conferred has direct relation to the standards prescribed for the service of common carriers, and can be exercised only upon findings, based upon evidence, with respect to particular conditions of transportation. * * *
>
> Similarly, we have held that the Radio Act of 1927 established standards to govern radio communications, and, in view of the limited number of available broadcasting frequencies, Congress authorized allocation and licenses. The Federal Radio Commission was created as the licensing authority, in order to secure a reasonable equality of opportunity in radio transmission and reception. The authority of the Commission to grant licenses 'as public convenience, interest or necessity requires' was limited by the nature of radio communications, and by the scope, character, and quality of the services to be rendered and the relative advantages to be derived through distribution of facilities. These standards established by Congress were to be enforced upon hearing and evidence by an administrative body acting under statutory restrictions adapted to the particular activity. * * *

Notes and Questions

1. What, in the Court's view, distinguished the (unconstitutional) National Industrial Recovery Act from the (permissible) instruction by Congress to the Federal Communications Commission to grant broadcast licenses whenever the "public interest, convenience, and necessity" would be served thereby? What distinguished it from the power previously given, with the Court's approval, to the Federal Trade Commission or the Interstate Commerce Commission?

2. As mentioned on p. 31 of the Casebook, in the *J.W. Hampton* case in 1928, the Supreme

Court said that Congress may, by statute, delegate power to the executive branch provided it lays down an "intelligible principle" to guide the exercise of that power. The Supreme Court articulated another, frequently cited formulation of the nondelegation standard in *Yakus v. United States*, 321 U.S. 414 (1944), in which the Court approved the Emergency Price Control Act. That statute, passed by Congress during World War II, authorized a Price Administrator to fix maximum prices for commodities and rents at levels that in his judgment would "be generally fair and equitable" and would "effectuate the purposes of this Act." The statute stated several purposes, such as "to stabilize prices," "to . . . prevent profiteering . . . resulting from abnormal market conditions," and so on.

In approving the statute against a nondelegation challenge, the Supreme Court said:

> The Constitution . . . does not require that Congress find for itself every fact . . . or that it make for itself detailed determinations . . . . The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct . . . . These essentials are preserved when Congress has specified the basic conditions of fact upon whose existence . . . it directs that its statutory command shall be effective. . . .
>
> [T]he only concern of courts is to ascertain whether the will of Congress has been obeyed. This depends not upon the breadth of the definition of the facts or conditions which the administrative officer is to find but upon the determination whether the definition sufficiently marks the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will. . . .
>
> [I]t is irrelevant that Congress might itself have prescribed the maximum prices or have provided a more rigid standard by which they are to be fixed. . . . Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers. . . . Only if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose of preventing inflation.

Additional excerpts from *Whitman v. American Trucking Ass'n*:

Insert at the bottom of p. 58 (in the ellipsis):

> [S]ince the first step in assessing whether a statute delegates legislative power is to determine what authority the statute confers, we address that issue of interpretation first . . . .
>
> Section 109(b)(1) instructs the EPA to set primary ambient air quality standards "the attainment and maintenance of which ... are requisite to protect the public health" with "an adequate margin of safety." 42 U.S.C. § 7409(b)(1). . . . [T]his text does not permit the EPA to consider costs in setting the standards. The language . . . "is absolute." . . . The EPA, "based on" the information about health effects contained in the technical "criteria" documents compiled under § 108(a)(2), 42 U.S.C. § 7408(a)(2), is to identify the maximum airborne concentration of a pollutant that the public health can tolerate, decrease the concentration to provide an "adequate" margin of safety, and set the standard at that level. Nowhere are the costs of achieving such a standard made part of that initial calculation.

Insert at the bottom of p. 59 (in the ellipsis):

> In the history of the Court we have found the requisite "intelligible principle" lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring "fair competition." *See Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). We have, on the other hand, upheld the validity of § 11(b)(2) of the Public Utility Holding Company Act of 1935, 49 Stat. 821, which gave the Securities and Exchange Commission authority to modify the structure of holding company systems so as to ensure that they are not "unduly or unnecessarily complicate[d]" and do not "unfairly or inequitably distribute voting power among security holders." . . . We have approved the wartime conferral of agency power to fix the prices of commodities at a level that " 'will be generally fair and equitable and will effectuate the [in some respects conflicting] purposes of th[e] Act.' " *Yakus v. United States*, 321 U.S. 414 (1944). And we have found an "intelligible principle" in various statutes authorizing regulation in the "public interest." . . . In short,

we have "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." . . .

It is true enough that the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred. . . .While Congress need not provide any direction to the EPA regarding the manner in which it is to define "country elevators," which are to be exempt from new-stationary-source regulations governing grain elevators, *see* 42 U.S.C. § 7411(i), it must provide substantial guidance on setting air standards that affect the entire national economy. But even in sweeping regulatory schemes we have never demanded, as the Court of Appeals did here, that statutes provide a "determinate criterion" for saying "how much [of the regulated harm] is too much." . . . In *Touby*, for example, we did not require the statute to decree how "imminent" was too imminent, or how "necessary" was necessary enough, or even—most relevant here—how "hazardous" was too hazardous. . . . Similarly, the statute at issue in *Lichter* authorized agencies to recoup "excess profits" paid under wartime Government contracts, yet we did not insist that Congress specify how much profit was too much. . . .It is therefore not conclusive for delegation purposes that, as respondents argue, ozone and particulate matter are "nonthreshold" pollutants that inflict a continuum of adverse health effects at any airborne concentration greater than zero, and hence require the EPA to make judgments of degree.

Statutory Background for US v. Murry

The case of United States v. Murry, 413 U.S. 508 (1973), p. 104 of your Casebook, involved a challenge to § 5(b) of the Food Stamp Act of 1964, which provided:

> Any household which includes a member who has reached his eighteenth birthday and who is claimed as a dependent child for Federal income tax purposes by a taxpayer who is not a member of an eligible household, shall be ineligible to participate in any food stamp program . . . during the tax period such dependency is claimed and for a period of one year after the expiration of such tax period.

Statutory Backgound for *Les v. Reilly*

(excerpted from the 9th Circuit's decision)

The Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. §§ 301–394 (West 1972 & Supp.1992), is designed to ensure the safety of the food we eat by prohibiting the sale of food that is "adulterated." 21 U.S.C. § 331(a). Adulterated food is in turn defined . . . [to include food containing any "food additive that is unsafe."] 21 U.S.C. § 342(a)(2)(C). A food "additive" is defined broadly as "any substance the intended use of which results or may reasonably be expected to result ... in its becoming a component ... of any food." 21 U.S.C. § 321(s). A food additive is considered unsafe unless there is a specific exemption for the substance or a regulation prescribing the conditions under which it may be used safely. 21 U.S.C. § 348(a).

Before 1988, the four pesticide chemicals with which we are here concerned—benomyl, mancozeb, phosmet and trifluralin—were all the subject of regulations issued by the EPA permitting their use.1 In October 1988, however, the EPA published a list of substances, including the pesticides at issue here, that had been found to induce cancer. Regulation of Pesticides in Food: Addressing the Delaney Paradox Policy Statement, 53 Fed.Reg. 41,104, 41,119 (Oct. 19, 1988). As known carcinogens, the four pesticides ran afoul of a special provision of the FFDCA known as the Delaney clause, which prescribes that additives found to induce cancer can never be deemed "safe" for purposes of the FFDCA. The Delaney clause is found in FFDCA section 409, 21 U.S.C. § 348. That section limits the conditions under which the Secretary may issue regulations allowing a substance to be used as a food additive:

> No such regulation shall issue if a fair evaluation of the data before the Secretary—(A) fails to establish that the proposed use of the food additive, under the conditions of use to be specified in the regulation, will be safe: Provided, That no additive shall be deemed to be safe if it is found to induce cancer when ingested by man or animal, or if it is found, after tests which are appropriate for the evaluation of the safety of food additives, to induce cancer in man or animal....

21 U.S.C. § 348(c)(3).

Notes and Questions

As the court observes, the FFDCA contains a general safety standard, which prohibits the sale of food containing any food additive that is "unsafe." It also contains the more specific Delaney clause.

In 1996, the FDA, in response to a petition filed by the Procter & Gamble Company, approved a food additive consisting of sucrose polyester, known as "Olestra" and marketed by P&G under the name "Olean." *See* FDA, *Food Additives Permitted for Direct Addition to Food for Human Consumption; Olestra*, 61 Fed. Reg. 3118 (Jan. 30, 1996). Olestra was a fat substitute, intended for use as an ingredient in savory snacks such as potato chips, which would allow those snacks to have their usual taste but be lower in calories. The FDA determined that Olestra met the general statutory standard even though it caused some digestive problems for some consumers. The agency noted that "a demonstration of absolute harmlessness is not required to sustain the approval of a food additive." *Id*. at 3119. The FDA initially mandated that foods containing Olestra bear a warning label stating that "This Product Contains Olestra. Olestra may cause abdominal cramping and loose stools. Olestra inhibits the absorption of some vitamins and other nutrients. Vitamins A, D, E, and K have been added." The agency removed this labeling requirement in 2003. *See Food Additives Permitted for Direct Addition to Food for Human Consumption; Olestra*, 68 Fed. Reg. 46364 (Aug. 5, 2003).

What does the approval of Olestra imply regarding the definition of the term "unsafe" in the FFDCA's general safety standard? How is the Delaney Clause different from the general standard?

NORTHERN PIPELINE CONSTRUCTION CO. v. MARATHON PIPE LINE CO.
458 U.S. 50 (1982)

JUSTICE BRENNAN announced the judgment of the Court and delivered an opinion in which JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS joined.

The question presented is whether the assignment by Congress to bankruptcy judges of the jurisdiction granted in 28 U.S.C. § 1471 * * * [by] the Bankruptcy Act of 1978 violates Art. III of the Constitution.

I

A

* * * [The Bankruptcy Act of 1978 (Act) comprehensively revised the law of bankruptcy. Under the prior law, United States District Courts acted as bankruptcy courts, although they referred most proceedings to a bankruptcy "referee," with appeal lying from the referee's decision to the district court. The 1978 Act established a "United States Bankruptcy Court" in each federal judicial district. The Act provided that the judges of these courts would be appointed by the President, by and with the advice and consent of the Senate, for 14-year terms and could be removed by each circuit's Judicial Council for "incompetency, misconduct, neglect of duty or physical or mental disability." Their salaries would be set by statute and could be changed by statute.

[The Act vested the new bankruptcy courts with jurisdiction over all "civil proceedings arising under title 11 [the bankruptcy title] or arising in or related to cases under title 11." 28 U.S.C. § 1471(b). The Act essentially empowered bankruptcy courts to hear any claim, state or federal, as to which either the plaintiff or the defendant was in bankruptcy. The Act also gave bankruptcy courts jurisdiction over matters more distinctively related to the bankruptcy process, such as actions to "avoid" (i.e., recover) certain payments made by a party shortly before filing for bankruptcy.

[The Act vested the judges of the bankruptcy courts with all of the "powers of a court of equity, law, and admiralty," except that they could "not enjoin another court or punish a criminal contempt not committed in the presence of the judge of the court or warranting a punishment of imprisonment." It permitted bankruptcy judges to hold jury trials, issue declaratory judgments, issue writs of habeas corpus under certain circumstances, issue all writs necessary in aid of the bankruptcy court's jurisdiction, and issue any order, process or judgment necessary or appropriate to carry out Title 11.

[The Act provided for appeal from the decision of a bankruptcy court to the district court in the same district, except that each judicial circuit could choose instead to create special panels of three bankruptcy judges to hear appeals from bankruptcy courts. Further appeal would then be available from either the district court or the special panel to the court of appeals. Also, with party consent, appeal could be taken from a bankruptcy court directly to a court of appeals.]

B

This case arises out of proceedings initiated in the United States Bankruptcy Court for the District of Minnesota after appellant Northern Pipeline Construction Co. (Northern) filed a petition for reorganization in January 1980. In March 1980 Northern, pursuant to the Act, filed in that court a suit against appellee Marathon Pipe Line Co. (Marathon). Appellant sought damages for alleged breaches of contract and warranty, as well as for alleged misrepresentation, coercion, and duress.

Marathon sought dismissal of the suit, on the ground that the Act unconstitutionally conferred Art. III judicial power upon judges who lacked life tenure and protection against salary diminution. The United States intervened to defend the validity of the statute.

The Bankruptcy Judge denied the motion to dismiss. 6 B.R. 928 (1980). But on appeal the District Court entered an order granting the motion, on the ground that "the delegation of authority in 28 U.S.C. § 1471 to the Bankruptcy Judges to try cases which are otherwise relegated under the Constitution to Article III judges" was unconstitutional. Both the United States and Northern filed notices of appeal in this Court. * * *

II

A

* * * The Federal Judiciary was * * * designed by the Framers to stand independent of the Executive and Legislature—to maintain the checks and balances of the constitutional structure, and also to guarantee that the process of adjudication itself remained impartial. * * *

As an inseparable element of the constitutional system of checks and balances, and as a guarantee of judicial impartiality, Art. III both defines the power and protects the independence of the Judicial Branch. It provides that "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Art. III, § 1. The inexorable command of this provision is clear and definite. The judicial power of the United States must be exercised by courts having the attributes prescribed in Art. III. Those attributes are also clearly set forth: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." Art. III, § 1.

The "good Behaviour" Clause guarantees that Art. III judges shall enjoy life tenure, subject only to removal by impeachment. * * * The Compensation Clause guarantees Art. III judges a fixed and irreducible compensation for their services. * * * Both of these provisions were incorporated into the Constitution to ensure the independence of the Judiciary from the control of the Executive and Legislative Branches of government. * * *

B

It is undisputed that the bankruptcy judges whose offices were created by the Bankruptcy Act of 1978 do not enjoy the protections constitutionally afforded to Art. III judges. The bankruptcy judges do not serve for life subject to their continued "good Behaviour." * * * [T]he salaries of the bankruptcy judges are not immune from diminution by Congress. * * * In short, there is no doubt that the bankruptcy judges created by the Act are not Art. III judges.

* * * [W]e turn to the question presented for decision: whether the Bankruptcy Act of 1978 violates the command of Art. III that the judicial power of the United States must be vested in courts whose judges enjoy the protections and safeguards specified in that Article.

Appellants suggest two grounds for upholding the Act's conferral of broad adjudicative powers upon judges unprotected by Art. III. First, it is urged that "pursuant to its enumerated Article I powers, Congress may establish legislative courts that have jurisdiction to decide cases to which the Article III judicial power of the United States extends." * * * Referring to our precedents upholding the validity of "legislative courts," appellants suggest that "the plenary grants of power

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

III

* * * [A]ppellants rely upon cases in which we have identified certain matters that "congress may or may not bring within the cognizance of [Art. III courts], as it may deem proper." * * * But when properly understood, these precedents represent no broad departure from the constitutional command that the judicial power of the United States must be vested in Art. III courts.[15] Rather, they reduce to three narrow situations not subject to that command, each recognizing a circumstance in which the grant of power to the Legislative and Executive Branches was historically and constitutionally so exceptional that the congressional assertion of a power to create legislative courts was consistent with, rather than threatening to, the constitutional mandate of separation of powers. These precedents simply acknowledge that the literal command of Art. III, assigning the judicial power of the United States to courts insulated from Legislative or Executive interference, must be interpreted in light of the historical context in which the Constitution was written, and of the structural imperatives of the Constitution as a whole.

Appellants first rely upon a series of cases in which this Court has upheld the creation by Congress of non-Art. III "territorial courts." This exception from the general prescription of Art. III dates from the earliest days of the Republic, when it was perceived that the Framers intended that as to certain geographical areas, in which no State operated as sovereign, Congress was to exercise the general powers of government. * * * *American Ins. Co. v. Canter*, 1 Pet. 511 (1828). * * * The Court followed the same reasoning when it reviewed Congress' creation of non-Art. III courts in the District of Columbia. It noted that there was in the District "no division of powers between the general and state governments. Congress has the entire control over the district for every purpose of government; and it is reasonable to suppose, that in organizing a judicial department here, all judicial power necessary for the purposes of government would be vested in the courts of justice." * * * [*Palmore v. United States*, 411 U.S. 389 (1973).] * * *

Appellants next advert to a second class of cases—those in which this Court has sustained the exercise by Congress and the Executive of the power to establish and administer courts-martial. The situation in these cases strongly resembles the situation with respect to territorial courts: It too involves a constitutional grant of power that has been historically understood as giving the political

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[15] JUSTICE WHITE's dissent finds particular significance in the fact that Congress could have assigned all bankruptcy matters to the state courts. * * * But, of course, virtually all matters that might be heard in Art. III courts could also be left by Congress to state courts. This fact is simply irrelevant to the question before us. Congress has no control over state-court judges; accordingly the principle of separation of powers is not threatened by leaving the adjudication of federal disputes to such judges. * * *

Branches of Government extraordinary control over the precise subject matter at issue. Article I, § 8, cls. 13, 14, confer upon Congress the power "[t]o provide and maintain a Navy," and "[t]o make Rules for the Government and Regulation of the land and naval Forces." The Fifth Amendment, which requires a presentment or indictment of a grand jury before a person may be held to answer for a capital or otherwise infamous crime, contains an express exception for "cases arising in the land or naval forces." And Art. II, § 2, cl. 1, provides that "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." Noting these constitutional directives, the Court in *Dynes v. Hoover*, 20 How. 65 (1857), explained:

> "These provisions show that Congress has the power to provide for the trial and punishment of military and naval offences in the manner then and now practiced by civilized nations; and that the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other." * * *

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

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

This doctrine may be explained in part by reference to the traditional principle of sovereign immunity, which recognizes that the Government may attach conditions to its consent to be sued. * * * But the public-rights doctrine also draws upon the principle of separation of powers, and a historical understanding that certain prerogatives were reserved to the political Branches of Government. The doctrine extends only to matters arising "between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments," * * * and only to matters that historically could have been determined exclusively by those departments. * * * The understanding of these cases is that the Framers expected that Congress would be free to commit such matters completely to nonjudicial

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[18] Congress' power to create legislative courts to adjudicate public rights carries with it the lesser power to create administrative agencies for the same purpose, and to provide for review of those agency decisions in Art. III courts. * * *

executive determination, and that as a result there can be no constitutional objection to Congress' employing the less drastic expedient of committing their determination to a legislative court or an administrative agency. * * *

The public-rights doctrine is grounded in a historically recognized distinction between matters that could be conclusively determined by the Executive and Legislative Branches and matters that are "inherently ... judicial." * * * For example, the Court in *Murray's Lessee* looked to the law of England and the States at the time the Constitution was adopted, in order to determine whether the issue presented was customarily cognizable in the courts. * * * Concluding that the matter had not traditionally been one for judicial determination, the Court perceived no bar to Congress' establishment of summary procedures, outside of Art. III courts, to collect a debt due to the Government from one of its customs agents.[20] * * *

The distinction between public rights and private rights has not been definitively explained in our precedents.[22] Nor is it necessary to do so in the present cases, for it suffices to observe that a matter of public rights must at a minimum arise "between the government and others."[23] * * * In contrast, "the liability of one individual to another under the law as defined," * * * is a matter of private rights. Our precedents clearly establish that only controversies in the former category may be removed from Art. III courts and delegated to legislative courts or administrative agencies for their determination.[24] * * * Private-rights disputes, on the other hand, lie at the core of the historically recognized judicial power.

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

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[20] Doubtless it could be argued that the need for independent judicial determination is greatest in cases arising between the Government and an individual. But the rationale for the public-rights line of cases lies not in political theory, but rather in Congress' and this Court's understanding of what power was reserved to the Judiciary by the Constitution as a matter of historical fact.

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

[23] Congress cannot "withdraw from [Art. III] judicial cognizance *any* matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." *Murray's Lessee v. Hoboken Land & Improvement Co.,* 18 How. 272, 284 (1856) (emphasis added). It is thus clear that the presence of the United States as a proper party to the proceeding is a necessary but not sufficient means of distinguishing "private rights" from "public rights." And it is also clear that even with respect to matters that arguably fall within the scope of the "public rights" doctrine, the presumption is in favor of Art. III courts. * * * Moreover, when Congress assigns these matters to administrative agencies, or to legislative courts, it has generally provided, and we have suggested that it may be required to provide, for Art. III judicial review. * * *

[24] Of course, the public-rights doctrine does not extend to any criminal matters, although the Government is a proper party. * * *

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

Recognizing that the present cases may not fall within the scope of any of our prior cases permitting the establishment of legislative courts, appellants argue that we should recognize an additional situation beyond the command of Art. III, sufficiently broad to sustain the Act. Appellants contend that Congress' constitutional authority to establish "uniform Laws on the subject of Bankruptcies throughout the United States," Art. I, § 8, cl. 4, carries with it an inherent power to establish legislative courts capable of adjudicating "bankruptcy-related controversies." * * *

Appellants' contention, in essence, is that pursuant to any of its Art. I powers, Congress may create courts free of Art. III's requirements whenever it finds that course expedient. * * *

The flaw in appellants' analysis is that it provides no limiting principle. It thus threatens to supplant completely our system of adjudication in independent Art. III tribunals and replace it with a system of "specialized" legislative courts. True, appellants argue that under their analysis Congress could create legislative courts pursuant only to some "specific" Art. I power, and "only when there is a particularized need for distinctive treatment." * * * But these "limitations" are wholly illusory. For example, Art. I, § 8, empowers Congress to enact laws, inter alia, regulating interstate commerce and punishing certain crimes. Art. I, § 8, cls. 3, 6. On appellants' reasoning Congress could provide for the adjudication of these and "related" matters by judges and courts within Congress' exclusive control. The potential for encroachment upon powers reserved to the Judicial Branch through the device of "specialized" legislative courts is dramatically evidenced in the jurisdiction granted to the courts created by the Act before us. The broad range of questions that can be brought into a bankruptcy court because they are "related to cases under title 11," 28 U.S.C. § 1471(b) * * *, is the clearest proof that even when Congress acts through a "specialized" court, and pursuant to only one of its many Art. I powers, appellants' analysis fails to provide any real protection against the erosion of Art. III jurisdiction by the unilateral action of the political Branches. In short, to accept appellants' reasoning, would require that we replace the principles delineated in our precedents, rooted in history and the Constitution, with a rule of broad legislative discretion that could effectively eviscerate the constitutional guarantee of an independent Judicial Branch of the Federal Government. * * *

In sum, Art. III bars Congress from establishing legislative courts to exercise jurisdiction over all matters related to those arising under the bankruptcy laws. The establishment of such courts does

not fall within any of the historically recognized situations in which the general principle of independent adjudication commanded by Art. III does not apply. Nor can we discern any persuasive reason, in logic, history, or the Constitution, why the bankruptcy courts here established lie beyond the reach of Art. III.

IV

Appellants advance a second argument for upholding the constitutionality of the Act: that "viewed within the entire judicial framework set up by Congress," the bankruptcy court is merely an "adjunct" to the district court, and that the delegation of certain adjudicative functions to the bankruptcy court is accordingly consistent with the principle that the judicial power of the United States must be vested in Art. III courts. * * * As support for their argument, appellants rely principally upon *Crowell v. Benson*, 285 U.S. 22 (1932), and *United States v. Raddatz*, 447 U.S. 667 (1980), cases in which we approved the use of administrative agencies and magistrates as adjuncts to Art. III courts. * * *

The essential premise underlying appellants' argument is that even where the Constitution denies Congress the power to establish legislative courts, Congress possesses the authority to assign certain factfinding functions to adjunct tribunals. It is, of course, true that while the power to adjudicate "private rights" must be vested in an Art. III court, see Part III, *supra*,

> "this Court has accepted factfinding by an administrative agency, ... as an adjunct to the Art. III court, analogizing the agency to a jury or a special master and permitting it in admiralty cases to perform the function of the special master." * * *

The use of administrative agencies as adjuncts was first upheld in *Crowell v. Benson*. * * * The congressional scheme challenged in *Crowell* empowered an administrative agency, the United States Employees' Compensation Commission, to make initial factual determinations pursuant to a federal statute requiring employers to compensate their employees for work-related injuries occurring upon the navigable waters of the United States. The Court began its analysis by noting that the federal statute administered by the Compensation Commission provided for compensation of injured employees "irrespective of fault," and that the statute also prescribed a fixed and mandatory schedule of compensation. * * * The agency was thus left with the limited role of determining "questions of fact as to the circumstances, nature, extent and consequences of the injuries sustained by the employee for which compensation is to be made." * * * The agency did not possess the power to enforce any of its compensation orders: On the contrary, every compensation order was appealable to the appropriate federal district court, which had the sole power to enforce it or set it aside, depending upon whether the court determined it to be "in accordance with law" and supported by evidence in the record. * * * The Court found that in view of these limitations upon the Compensation Commission's functions and powers, its determinations were "closely analogous to findings of the amount of damages that are made, according to familiar practice, by commissioners or assessors." * * * Observing that "there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges," * * * the Court held that Art. III imposed no bar to the scheme enacted by Congress. * * *

Crowell involved the adjudication of congressionally created rights. But this Court has sustained the use of adjunct factfinders even in the adjudication of constitutional rights—so long as those adjuncts were subject to sufficient control by an Art. III district court. In *United States v. Raddatz* * * *, the Court upheld the 1978 Federal Magistrates Act, which permitted district court judges to refer certain pretrial motions, including suppression motions based on alleged violations of constitutional rights, to a magistrate for initial determination. The Court observed that the magistrate's proposed findings and recommendations were subject to de novo review by the district court, which was free to rehear the evidence or to call for additional evidence. * * * Moreover, it was noted that the magistrate considered motions only upon reference from the district court, and that the magistrates were appointed, and subject to removal, by the district court. * * * In short, the ultimate decisionmaking authority respecting all pretrial motions clearly remained with the district court. * * * Under these circumstances, the Court held that the Act did not violate the constraints of Art. III. * * *

Together these cases establish two principles that aid us in determining the extent to which Congress may constitutionally vest traditionally judicial functions in non-Art. III officers. First, it is clear that when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated—including the assignment to an adjunct of some functions historically performed by judges. * * * Second, the functions of the adjunct must be limited in such a way that "the essential attributes" of judicial power are retained in the Art. III court. * * *

These two principles assist us in evaluating the "adjunct" scheme presented in these cases. * * * [W]hile *Crowell* certainly endorsed the proposition that Congress possesses broad discretion to assign factfinding functions to an adjunct created to aid in the adjudication of congressionally created statutory rights, *Crowell* does not support the further proposition necessary to appellants' argument—that Congress possesses the same degree of discretion in assigning traditionally judicial power to adjuncts engaged in the adjudication of rights not created by Congress. * * *

Appellants' proposition was also implicitly rejected in *Raddatz*. * * * Critical to the Court's decision to uphold the Magistrates Act was the fact that the ultimate decision was made by the district court. * * *

[W]hen Congress creates a statutory right, it clearly has the discretion, in defining that right, to create presumptions, or assign burdens of proof, or prescribe remedies; it may also provide that persons seeking to vindicate that right must do so before particularized tribunals created to perform the specialized adjudicative tasks related to that right. Such provisions do, in a sense, affect the exercise of judicial power, but they are also incidental to Congress' power to define the right that it has created. No comparable justification exists, however, when the right being adjudicated is not of congressional creation. In such a situation, substantial inroads into functions that have traditionally been performed by the Judiciary cannot be characterized merely as incidental extensions of Congress' power to define rights that it has created. Rather, such inroads suggest unwarranted encroachments upon the judicial power of the United States, which our Constitution reserves for Art. III courts.

We hold that the Bankruptcy Act of 1978 carries the possibility of such an unwarranted encroachment. Many of the rights subject to adjudication by the Act's bankruptcy courts, like the rights implicated in *Raddatz*, are not of Congress' creation. Indeed, the cases before us, which center

upon appellant Northern's claim for damages for breach of contract and misrepresentation, involve a right created by state law, a right independent of and antecedent to the reorganization petition that conferred jurisdiction upon the Bankruptcy Court. Accordingly, Congress' authority to control the manner in which that right is adjudicated, through assignment of historically judicial functions to a non-Art. III "adjunct," plainly must be deemed at a minimum. Yet it is equally plain that Congress has vested the "adjunct" bankruptcy judges with powers over Northern's state-created right that far exceed the powers that it has vested in administrative agencies that adjudicate only rights of Congress' own creation.

Unlike the administrative scheme that we reviewed in *Crowell*, the Act vests all "essential attributes" of the judicial power of the United States in the "adjunct" bankruptcy court. First, the agency in *Crowell* made only specialized, narrowly confined factual determinations regarding a particularized area of law. In contrast, the subject-matter jurisdiction of the bankruptcy courts encompasses not only traditional matters of bankruptcy, but also "all civil proceedings arising under title 11 or arising in or related to cases under title 11." 28 U.S.C. § 1471(c). * * * Second, while the agency in *Crowell* engaged in statutorily channeled factfinding functions, the bankruptcy courts exercise "*all* of the jurisdiction" conferred by the Act on the district courts, § 1471(c) (emphasis added). Third, the agency in *Crowell* possessed only a limited power to issue compensation orders pursuant to specialized procedures, and its orders could be enforced only by order of the district court. By contrast, the bankruptcy courts exercise all ordinary powers of district courts, including the power to preside over jury trials * * *, the power to issue declaratory judgments * * *, the power to issue writs of habeas corpus * * *, and the power to issue any order, process, or judgment appropriate for the enforcement of the provisions of Title 11. * * * Fourth, while orders issued by the agency in *Crowell* were to be set aside if "not supported by the evidence," the judgments of the bankruptcy courts are apparently subject to review only under the more deferential "clearly erroneous" standard. * * * Finally, the agency in *Crowell* was required by law to seek enforcement of its compensation orders in the district court. In contrast, the bankruptcy courts issue final judgments, which are binding and enforceable even in the absence of an appeal. In short, the "adjunct" bankruptcy courts created by the Act exercise jurisdiction behind the facade of a grant to the district courts, and are exercising powers far greater than those lodged in the adjuncts approved in either *Crowell* or *Raddatz*.[39]

We conclude that 28 U.S.C. § 1471 * * * has impermissibly removed most, if not all, of "the essential attributes of the judicial power" from the Art. III district court, and has vested those attributes in a non-Art. III adjunct. Such a grant of jurisdiction cannot be sustained as an exercise of Congress' power to create adjuncts to Art. III courts.

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[39] Appellants suggest that *Crowell* and *Raddatz* stand for the proposition that Art. III is satisfied so long as some degree of appellate review is provided. But that suggestion is directly contrary to the text of our Constitution: "The Judges, both of the supreme *and inferior* Courts, shall hold their Offices during good Behaviour, and shall ... receive [undiminished] Compensation." Art. III, § 1 (emphasis added). Our precedents make it clear that the constitutional requirements for the exercise of the judicial power must be met at all stages of adjudication, and not only on appeal, where the court is restricted to considerations of law, as well as the nature of the case as it has been shaped at the trial level. * * *

V

* * * The judgment of the District Court is affirmed. * * *

It is so ordered.

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

* * * From the record before us, the lawsuit in which Marathon was named defendant seeks damages for breach of contract, misrepresentation, and other counts which are the stuff of the traditional actions at common law tried by the courts at Westminster in 1789. There is apparently no federal rule of decision provided for any of the issues in the lawsuit; the claims of Northern arise entirely under state law. No method of adjudication is hinted, other than the traditional common-law mode of judge and jury. The lawsuit is before the Bankruptcy Court only because the plaintiff has previously filed a petition for reorganization in that court.

The cases dealing with the authority of Congress to create courts other than by use of its power under Art. III do not admit of easy synthesis. * * * I need not decide whether these cases in fact support a general proposition and three tidy exceptions, as the plurality believes, or whether instead they are but landmarks on a judicial "darkling plain" where ignorant armies have clashed by night, as JUSTICE WHITE apparently believes them to be. None of the cases has gone so far as to sanction the type of adjudication to which Marathon will be subjected against its will under the provisions of the 1978 Act. To whatever extent different powers granted under that Act might be sustained under the "public rights" doctrine of *Murray's Lessee v. Hoboken Land & Improvement Co.* * * * and succeeding cases, I am satisfied that the adjudication of Northern's lawsuit cannot be so sustained.

I am likewise of the opinion that the extent of review by Art. III courts provided on appeal from a decision of the bankruptcy court in a case such as Northern's does not save the grant of authority to the latter under the rule espoused in *Crowell v. Benson*. * * * All matters of fact and law in whatever domains of the law to which the parties' dispute may lead are to be resolved by the bankruptcy court in the first instance, with only traditional appellate review by Art. III courts apparently contemplated. Acting in this manner the bankruptcy court is not an "adjunct" of either the district court or the court of appeals.

I would, therefore, hold so much of the Bankruptcy Act of 1978 as enables a Bankruptcy Court to entertain and decide Northern's lawsuit over Marathon's objection to be violative of Art. III of the United States Constitution. * * *

[The dissenting opinion of Chief Justice Burger is omitted.]

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

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

* * * [Justice White criticized the plurality's opinion for taking an unrealistic view of bankruptcy proceedings, which Justice White regarded as being "constantly enmeshed in state-law issues." He observed that normally state law claims would not be heard in Article III courts, but rather in state courts. He also noted that bankruptcy judges had considered certain state-law issues even prior to the reforms instituted by the 1978 Act.]

[Justice White then engaged in a detailed review of prior cases concerning Article I courts, demonstrating that the Court had taken a "mystifying" variety of approaches to this area of law.]

IV

The complicated and contradictory history of the issue before us leads me to conclude that * * * [t]here is no difference in principle between the work that Congress may assign to an Art. I court and that which the Constitution assigns to Art. III courts. Unless we want to overrule a large number of our precedents upholding a variety of Art. I courtsCnot to speak of those Art. I courts that go by the contemporary name of "administrative agencies"Cthis conclusion is inevitable. * * *

To say that the Court has failed to articulate a principle by which we can test the constitutionality of a putative Art. I court, or that there is no such abstract principle, is not to say that this Court must always defer to the legislative decision to create Art. I, rather than Art. III, courts. Article III is not to be read out of the Constitution; rather, it should be read as expressing one value that must be balanced against competing constitutional values and legislative responsibilities. This Court retains the final word on how that balance is to be struck.

* * * [S]uch a balancing approach stands behind many of the decisions [upholding] Art. I courts. * * * [This] sort of "practical" judgment was voiced, even if not relied upon, in *Crowell* * * *: "[W]e are unable to find any constitutional obstacle to the action of the Congress in availing itself of a method shown by experience to be essential in order to apply its standards to the thousands of cases involved." * * * And even in *Murray's Lessee*, there was a discussion of the "necessity" of Congress' adopting an approach that avoided adjudication in an Art. III court. * * *

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

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

Similarly, as long as the proposed Art. I courts are designed to deal with issues likely to be of little interest to the political branches, there is less reason to fear that such courts represent a dangerous accumulation of power in one of the political branches of government. * * *

V

I believe that the new bankruptcy courts established by the Bankruptcy Act of 1978 * * * satisfy this standard.

First, ample provision is made for appellate review by Art. III courts. * * * [T]here is in every instance a right of appeal to at least one Art. III court. * * *

Second, no one seriously argues that the Bankruptcy Act of 1978 represents an attempt by the political branches of government to aggrandize themselves at the expense of the third branch or an attempt to undermine the authority of constitutional courts in general. Indeed, the congressional perception of a lack of judicial interest in bankruptcy matters was one of the factors that led to the establishment of the bankruptcy courts: Congress feared that this lack of interest would lead to a failure by federal district courts to deal with bankruptcy matters in an expeditious manner. * * * Bankruptcy matters are, for the most part, private adjudications of little political significance. * * *

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

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

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

Notes and Questions

1. This case concerns the bankruptcy laws, which may be unfamiliar to you. For purposes of this case, a very simplified understanding of how bankruptcy works is sufficient. Bankruptcy procedures seek to provide an orderly resolution of the situation of a debtor that cannot pay its debts. Usually, bankruptcy is sought by a debtor which is insolvent (i.e. its liabilities exceed its assets). In the absence of bankruptcy procedures, whichever creditors managed to collect on the debts owed to them first would exhaust the debtor's assets, leaving nothing for the other creditors. To prevent this, upon the filing of a bankruptcy petition, all of the debtor's creditors must cease efforts to collect the debts owed to them. The bankruptcy court totals up the debtor's assets and its liabilities, calculates what percentage the assets are of the liabilities, and distributes the assets to the creditors ratably. Thus, if, for example, the debtor's assets are ten percent of its liabilities, each creditor will get paid at the rate of ten cents on the dollar. (In practice, there are numerous complications: some creditors may be "secured," having a claim on particular assets of the debtor; some creditors may have statutory priority over others; the debtor, if a corporation, may be seeking liquidation or reorganization; and so on. But for this case this simplified picture is enough.)

2. Which *asset* of Northern Pipeline was at the heart of this case?

3. The plurality opinion refers to "the constitutional command that the judicial power of the United States must be vested in Art. III courts." But what constitutes an exercise of "the judicial power"? If an executive branch official receives a request for welfare benefits, for a tax refund, or for a change in immigration status, and acts on that request by applying the relevant law to the facts, is that an exercise of judicial power? Is the matter any different if the executive branch makes its decision through the use of adjudication-like procedures that give interested parties a greater opportunity to participate? What was it about the adjudicatory decision at issue in *Northern Pipeline* that made it an exercise of judicial power?

4. Does the plurality opinion contain a convincing explanation of why some of the Constitution's grants of powers to Congress (such as powers over the territories, the District of Columbia, and the military) carry with them the power to create Article I courts but others (such as the bankruptcy power) do not?

5. What is the scope of the "public rights" exception discussed by the plurality? Define it as precisely as you can.

Note the plurality's assertion that the public rights exception applies only to disputes "between the government and others." Imagine that you were a party to two disputes: first, a property dispute between you and a neighbor about the boundary line between your properties, and second, a tax dispute between you and the federal government about whether you paid the correct amount of income tax in a given year. In which dispute do you think it would be more important that the adjudicator be an Article III judge with life tenure and salary protection? Which dispute would you be more content to have decided by a judge who served for a fixed term of years without these protections?

Can you justify the contours of the public rights exception? See footnote 20 in the plurality opinion.

6. What is the "adjunct" exception? Define it as precisely as you can and distinguish it from the "public rights" exception.

7. Apart from the difference in the result, how does the overall approach taken by Justice White in his dissenting opinion differ from that taken by the plurality in its opinion?

8. Does Article III create a "constitutional command that the judicial power of the United States must be vested in Art. III courts," subject to "three narrow situations not subject to that command" (see Justice Brennan's plurality opinion), or does it "express[] one value that must be balanced against competing constitutional values and legislative responsibilities" (see Justice White's dissenting opinion)?

9. *Northern Pipeline* concerned a decision-making body that was designated as a "court." Equally important, however, are the innumerable situations in which disputes, either between the government and a private party or between two private parties, are resolved, at least in the first instance, by decision-making bodies that are designated as "administrative agencies." Would the considerations in *Northern Pipeline* have been any different if Congress had created a "National Bankruptcy Administration" to administer the bankruptcy laws? Is it any more or less permissible for Congress to vest dispute-resolution authority in a federal agency than it is for Congress to vest such authority in an Article I court?

Three years later, in THOMAS v. UNION CARBIDE AGRICULTURAL PRODUCTS CO., 473 U.S. 568 (1985), the Court used quite different analysis. The case concerned a statutory scheme for providing compensation for data.

Manufacturers of pesticides must register their pesticides with the Environmental Protection Agency. To do so, they must submit research data concerning the product's health, safety, and environmental effects. After one company had borne the considerable expense of producing such data, other companies would sometimes seek registration of the same pesticide based on the first company's data. Congress created a scheme whereby a second company would be permitted to use the first company's data but was obliged to pay the first company compensation. If the two companies could not agree on the amount of compensation, either company could seek binding arbitrarion and an arbitrator would decide the amount. The arbitrator's decision would be subject to judicial review only for "fraud, misrepresentation, or other misconduct." The arbitrator's decision was enforced through an "internal" system of sanctions: if the second company refused to accept the decision, it could not register its pesticide; if the first company refused to accept it, the second company was entitled to use the first company's data without compensation.

Pesticide manufacturers challenged the provision for binding arbitration as contrary to Article III of the Constitution. In an opinion by Justice O'Connor, the Court approved the statutory scheme.

The Court noted that (1) the right to compensation depended on the federal statute, not on any state law cause of action, (2) although the case was one between private parties, the right to compensation under the statutory scheme bore many of the characteristics of a "public" right—in particular, it was "an integral part of a program safeguarding the public health," (3) the scheme incorporated its own internal system of sactions and "relie[d] only tangentially, if at all, on the Judicial Branch for enforcement," and (4) that the scheme did permit some judicial review of arbitrators' decisions. The Court concluded that "Congress . . . may create a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." Justice Brennan, concurring in the judgment, agreed that the case could be viewed as involving "public rights" that did not have to be resolved by an Article III tribunal.

Notes and Questions

1. What does *Thomas* do to the "public rights" exception set forth in *Northern Pipeline*? What are the boundaries of the exception after *Thomas*?

2. The Court suggested that one factor favoring the scheme was that it relied only tangentially on the judicial branch for enforcement. Is the lack of judicial involvement in enforcement of an adjudicatory decision a plus factor or a minus factor in the Article III test? What did *Northern Pipeline* say about this point?

3. *Thomas* set the stage for the substantial reformulation of the Article III test that occurred in the next case (*CFTC v. Schor*, which is in the casebook).

Pages 144-151 of your casebook deal with general statutes that regulate all, or at least many, administrative agencies, as opposed to agency-specific statutes. It's worth looking at some of these statutes in more detail than your casebook provides. Two of them, the Unfunded Mandates Act and the Congressional Review Act, are presented below.

THE UNFUNDED MANDATES ACT

§ 1531. Regulatory process

Each agency shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law).

§ 1532. Statements to accompany significant regulatory actions

(a) In general

Unless otherwise prohibited by law, before promulgating any general notice of proposed rulemaking that is likely to result in promulgation of any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement containing--

(1) an identification of the provision of Federal law under which the rule is being promulgated;

(2) a qualitative and quantitative assessment of the anticipated costs and benefits of the Federal mandate, including the costs and benefits to State, local, and tribal governments or the private sector, as well as the effect of the Federal mandate on health, safety, and the natural environment and such an assessment shall include--

(A) an analysis of the extent to which such costs to State, local, and tribal governments may be paid with Federal financial assistance (or otherwise paid for by the Federal Government); and

(B) the extent to which there are available Federal resources to carry out the intergovernmental mandate;

* * *

(4) estimates by the agency of the effect on the national economy * * * * * *

§ 1534. State, local, and tribal government input

(a) In general

Each agency shall, to the extent permitted in law, develop an effective process to permit elected officers of State, local, and tribal governments (or their designated employees with authority to act on their behalf) to provide meaningful and timely input in the development of regulatory proposals containing significant Federal intergovernmental mandates.
* * *

§ 1535. Least burdensome option or explanation required

(a) In general

Except as provided in subsection (b) of this section, before promulgating any rule for which a written statement is required under section 1532 of this title, the agency shall identify and consider a reasonable number of regulatory alternatives and from those alternatives select the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule, for--

(1) State, local, and tribal governments, in the case of a rule containing a Federal intergovernmental mandate; and

(2) the private sector, in the case of a rule containing a Federal private sector mandate.

(b) Exception

The provisions of subsection (a) of this section shall apply unless--

(1) the head of the affected agency publishes with the final rule an explanation of why the least costly, most cost-effective or least burdensome method of achieving the objectives of the rule was not adopted; or

(2) the provisions are inconsistent with law.
* * *

§ 1571. Judicial review

(a) Agency statements on significant regulatory actions

(1) In general

Compliance or noncompliance by any agency with the provisions of sections 1532 and 1533(a)(1) and (2) of this title shall be subject to judicial review only in accordance with this section.

(2) Limited review of agency compliance or noncompliance

(A) Agency compliance or noncompliance with the provisions of sections 1532 and 1533(a)(1) and (2) of this title shall be subject to judicial review only under section 706(1) of Title 5, and only as provided under subparagraph (B).

(B) If an agency fails to prepare the written statement (including the preparation of the estimates, analyses, statements, or descriptions) under section 1532 of this title or the written plan under section 1533(a)(1) and (2) of this title, a court may compel the agency to prepare such written statement.

(3) Review of agency rules

In any judicial review under any other Federal law of an agency rule for which a written statement or plan is required under sections 1532 and 1533(a)(1) and (2) of this title, the inadequacy or failure to prepare such statement (including the inadequacy or failure to prepare any estimate, analysis, statement or description) or written plan shall not be used as a basis for staying, enjoining, invalidating or otherwise affecting such agency rule.

* * *

(b) Judicial review and rule of construction

Except as provided in subsection (a) of this section--

(1) any estimate, analysis, statement, description or report prepared under this chapter, and any compliance or noncompliance with the provisions of this chapter, and any determination concerning the applicability of the provisions of this chapter shall not be subject to judicial review; and

(2) no provision of this chapter shall be construed to create any right or benefit, substantive or procedural, enforceable by any person in any administrative or judicial action.

Notes and Questions

1. What does the Unfunded Mandates Act accomplish? Which of its provisions regulate the substance of agency rules, and which just require additional paperwork? Considering the sections that regulate the substance of agency rules, what do those sections actually require?

2. Suppose a state or local government, or a private citizen, believes that an agency, in promulgating a rule, failed to comply with the Unfunded Mandates Act. What can be done about the alleged noncompliance? Consider three separate possibilities: (a) the agency has promulgated a rule without preparing the report required by § 1532, (b) the agency has promulgated a rule accompanied by what purports to be the report required by § 1532, but an interested party claims that the report is deficient under the statute in various respects, and (3) an agency promulgates a rule with

an adequate report, but has failed, without adequate explanation, to implement the least burdensome regulatory option as required by § 1535.

Congressional Review Act

Public Law 104-121, the "Contract with America Advancement Act of 1996," added a new Chapter 8 to Title 5 of the United States Code, commonly known as the Congressional Review Act. The main features of the new chapter are its requirement that agency rules be submitted to Congress before taking effect and its provision that Congress may disapprove a new rule by enacting a joint resolution of disapproval. Section 801 of title 5 now provides:

> **§ 801. Congressional review**
>
> (a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing--
>
> (i) a copy of the rule;
>
> (ii) a concise general statement relating to the rule, including whether it is a major rule; and
>
> (iii) the proposed effective date of the rule.
>
> (B) On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress--
>
> (i) a complete copy of the cost-benefit analysis of the rule, if any;
>
> (ii) the agency's actions relevant to sections 603, 604, 605, 607, and 609;
>
> (iii) the agency's actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and
>
> (iv) any other relevant information or requirements under any other Act and any relevant Executive orders.
>
> * * *

Section 801(a) goes on to provide that a "major rule" shall not take effect until after a prescribed period for congressional consideration:

> (3) A major rule relating to a report submitted under paragraph (1) shall take effect on the latest of--
>
> (A) the later of the date occurring 60 days after the date on which--
>
> (i) the Congress receives the report submitted under paragraph (1); or
>
> (ii) the rule is published in the Federal Register, if so published;
>
> (B) if the Congress passes a joint resolution of disapproval described in section 802 relating to the rule, and the President signs a veto of such resolution, the earlier date--

(i) on which either House of Congress votes and fails to override the veto of the President; or

(ii) occurring 30 session days after the date on which the Congress received the veto and objections of the President; or

(C) the date the rule would have otherwise taken effect, if not for this section (unless a joint resolution of disapproval under section 802 is enacted).

The President has a limited ability to exempt the effectiveness of a new major rule from the delay provided in section 801(a)(3). *See* 5 U.S.C. § 801(c). Also, rules other than major rules "shall take effect as otherwise provided by law after submission to Congress under paragraph (1)." 5 U.S.C. § 801(a)(4). However, as section 801 goes on to provide, Congress may disapprove any new rule:

(b)(1) A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule.

(2) A rule that does not take effect (or does not continue) under paragraph (1) may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.

Section 802 sets forth the procedures for Congress to enact a joint resolution of disapproval:

§ 802. Congressional disapproval procedure

(a) For purposes of this section, the term "joint resolution" means only a joint resolution introduced in the period beginning on the date on which the report referred to in section 801(a)(1)(A) is received by Congress and ending 60 days thereafter (excluding days either House of Congress is adjourned for more than 3 days during a session of Congress), the matter after the resolving clause of which is as follows: "That Congress disapproves the rule submitted by the _____ relating to _____, and such rule shall have no force or effect." (The blank spaces being appropriately filled in).

* * *

This section also contains special rules prescribing expedited procedures for debating and voting on joint resolutions described in subsection (a). These rules prevent joint resolutions of disapproval from "dying in committee" in the Senate or from being filibustered there.

The remaining sections provide definitions and some special rules:

§ 804. Definitions

For purposes of this chapter--

* * *

(2) The term "major rule" means any rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in--

(A) an annual effect on the economy of $100,000,000 or more;

(B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

(C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

The term does not include any rule promulgated under the Telecommunications Act of 1996 and the amendments made by that Act.

* * *

§ 805. Judicial review

No determination, finding, action, or omission under this chapter shall be subject to judicial review.

§ 806. Applicability; severability

(a) This chapter shall apply notwithstanding any other provision of law.

(b) If any provision of this chapter or the application of any provision of this chapter to any person or circumstance, is held invalid, the application of such provision to other persons or circumstances, and the remainder of this chapter, shall not be affected thereby.

§ 807. Exemption for monetary policy

Nothing in this chapter shall apply to rules that concern monetary policy proposed or implemented by the Board of Governors of the Federal Reserve System or the Federal Open Market Committee.

§ 808. Effective date of certain rules

Notwithstanding section 801--

(1) any rule that establishes, modifies, opens, closes, or conducts a regulatory program for a commercial, recreational, or subsistence activity related to hunting, fishing, or camping, or

(2) any rule which an agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest,

shall take effect at such time as the Federal agency promulgating the rule determines.

Notes and Questions

1. What does this new chapter accomplish? Is this just extra paperwork, or should it be expected to have a significant effect on the rulemaking process?

2. Is this new chapter, and particularly §§ 801(b) and 802 thereof, constitutional?

3. What is the impact of § 805? What happens if an agency disregards its obligations under this chapter?

4. How often would you expect agency rules to be disapproved pursuant to the Congressional Review Act? Can you see any reasons why "joint resolutions of disapproval" passed under the act would be either common or rare?

5. The first example of Congress exercising the power of disapproval pursuant to §§ 801(b) and 802 occurred in 2001, after the Department of Labor promulgated a rule relating to ergonomics. See below. Note the date of the resolution. Why might this have been a particularly propitious time for passage of a joint resolution of disapproval?

S.J. Res. 6, 107th Congress
Passed March 7, 2001

Joint Resolution

Providing for congressional disapproval of the rule submitted by the Department of Labor under chapter 8 of title 5, United States Code, relating to ergonomics.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

That Congress disapproves the rule submitted by the Department of Labor relating to ergonomics (published at 65 Fed. Reg. 68261 (2000)), and such rule shall have no force or effect.

THE WHITE HOUSE
March 20, 2001

STATEMENT BY THE PRESIDENT

Today I have signed into law S.J. Res. 6, a measure that repeals an unduly burdensome and overly broad regulation dealing with ergonomics. This is the first time the Congressional Review Act has

been put to use. This resolution is a good and proper use of the Act because the different branches of our Government need to be held accountable.

There needs to be a balance between and an understanding of the costs and benefits associated with Federal regulations. In this instance, though, in exchange for uncertain benefits, the ergonomics rule would have cost both large and small employers billions of dollars and presented employers with overwhelming compliance challenges. Also, the rule would have applied a bureaucratic one-size-fits-all solution to a broad range of employers and workers—not good government at work.

The safety and health of our Nation's workforce is a priority for my Administration. Together we will pursue a comprehensive approach to ergonomics that addresses the concerns surrounding the ergonomics rule repealed today. We will work with the Congress, the business community, and our Nation's workers to address this important issue.

GEORGE W. BUSH

On July 25, 2023, Congress amended 5 U.S.C. § 552(b) by adding: "and (4) the Internet address of a summary of not more than 100 words in length of the proposed rule, in plain language, that shall be posted on the Internet website under section 206(d) of the E-Government Act of 2002 (44 U.S.C. 3501 note) (commonly known as regulations.gov)."

Additional excerpts from *INS v. Chadha*

Insert at the ellipsis at the bottom of p. 191, just after heading "IV":

[W]e must nevertheless establish that the challenged action under § 244(c)(2) is of the kind to which the procedural requirements of Art. I, § 7 apply. Not every action taken by either House is subject to the bicameralism and presentment requirements of Art. I. . . . Whether actions taken by either House are, in law and fact, an exercise of legislative power depends not on their form but upon "whether they contain matter which is properly to be regarded as legislative in its character and effect." . . .

Examination of the action taken here by one House pursuant to § 244(c)(2) reveals that it was essentially legislative in purpose and effect. . . . [T]he House took action that had the purpose and effect of altering the legal rights, duties and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the legislative branch. . . . The one-House veto operated in this case to overrule the Attorney General and mandate Chadha's deportation; absent the House action, Chadha would remain in the United States. Congress has acted and its action has altered Chadha's status. . . .[16]

Insert on p. 192, where Justice Powell's opinion is listed as "omitted":

In my view, the case may be decided on a narrower ground. When Congress finds that a particular person does not satisfy the statutory criteria for permanent residence in this country it has assumed a judicial function in violation of the principle of separation of powers. Accordingly, I concur only in the judgment.

Insert at the end of the excerpt from Justice White's opinion on p. 169:

. . . [B]y virtue of congressional delegation, legislative power can be exercised by independent agencies and Executive departments without the passage of new

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[16] [In its brief, the U.S. House of Representatives noted that under the statute, the Attorney General had the power to alter Chadha's deportation status and could do so without the approval of either house of Congress.] . . . To be sure, some administrative agency action—rule making, for example—may resemble "lawmaking." . . . Clearly, however, "[i]n the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." . . . When the Attorney General performs his duties pursuant to § 244, he does not exercise "legislative" power. . . . The bicameral process is not necessary as a check on the Executive's administration of the laws because his administrative activity cannot reach beyond the limits of the statute that created it—a statute duly enacted pursuant to Art. I, §§ 1, 7. The constitutionality of the Attorney General's execution of the authority delegated to him by § 244 involves only a question of delegation doctrine. . . . It is clear, therefore, that the Attorney General acts in his presumptively Art. II capacity when he administers the Immigration and Nationality Act. Executive action under legislatively delegated authority that might resemble "legislative" action in some respects is not subject to the approval of both Houses of Congress and the President for the reason that the Constitution does not so require. . . .

legislation. . . . When agencies are authorized to prescribe law through substantive rulemaking, the administrator's regulation is not only due deference, but is accorded "legislative effect." . . .

If Congress may delegate lawmaking power to independent and executive agencies, it is most difficult to understand Article I as forbidding Congress from also reserving a check on legislative power for itself. Absent the veto, the agencies receiving delegations of legislative or quasi-legislative power may issue regulations having the force of law without bicameral approval and without the President's signature. It is thus not apparent why the reservation of a veto over the exercise of that legislative power must be subject to a more exacting test. In both cases, it is enough that the initial statutory authorizations comply with the Article I requirements. . . .

The Court also takes no account of perhaps the most relevant consideration: However resolutions of disapproval under § 244(c)(2) are formally characterized, in reality, a departure from the status quo occurs only upon the concurrence of opinion among the House, Senate, and President. Reservations of legislative authority to be exercised by Congress should be upheld if the exercise of such reserved authority is consistent with the distribution of and limits upon legislative power that Article I provides. . . .

The central concern of the presentation and bicameralism requirements of Article I is that when a departure from the legal status quo is undertaken, it is done with the approval of the President and both Houses of Congress—or, in the event of a presidential veto, a two-thirds majority in both Houses. This interest is fully satisfied by the operation of § 244(c)(2). The President's approval is found in the Attorney General's action in recommending to Congress that the deportation order for a given alien be suspended. The House and the Senate indicate their approval of the Executive's action by not passing a resolution of disapproval within the statutory period. Thus, a change in the legal status quo—the deportability of the alien—is consummated only with the approval of each of the three relevant actors. . . .

THE JEWELS OF THE PRINCESS OF ORANGE

2 Op. Atty. Gen 482 (1831)

[Jewels belonging to the Princess of Orange, a member of the royal family of the Netherlands, were stolen and brought to the United States in violation of U.S. revenue laws. The United States seized them and the district attorney of New York (a federal official, the precursor to the modern United States Attorney) instituted a forfeiture action, which would have resulted in the jewels becoming the property of the United States. The Princess requested that the forfeiture proceeding be discontinued and the jewels returned. The Secretary of State asked the Attorney General whether the President had the power to order the district attorney to discontinue the forfeiture action.]

To the SECRETARY OF STATE.

* * * [The Attorney General concluded that the jewels were not subject to forfeiture, because the Princess, their true owner, was innocent of any offense against the revenue laws, and that the district attorney, acting on his own initiative, could, therefore, choose to discontinue the forfeiture suit against them.]

Assuming that the district attorney possesses the power to discontinue a prosecution, the next inquiry is, Can the President lawfully direct him, in any case, to do so? And this, I understand, is the chief point of difficulty.

I think the President does possess the power. The interest of the country and the purposes of justice manifestly require that he should possess it; and its existence is necessarily implied by the duties imposed upon him in that clause of the constitution * * *, which enjoins him to take care that the laws be faithfully executed. Cases readily suggest themselves which show the necessity of such a power to enable him to discharge this duty.

* * * [S]uppose a national ship of a friendly power to come within our waters, and to be seized by the collector, and to be libelled by the district attorney, upon some notion that she was liable to forfeiture: could those officers be allowed to put in jeopardy the peace of the nation? And is there no power in the President to order the prosecution to be discontinued?

It may be said that the cases put are cases of public and national property, where such a prosecution on the part of the United States might put to hazard the peace of the country. This, however, does not affect the argument on the question of power to interfere. There is no specific grant of power in the constitution which authorizes the President to order the discontinuance of a prosecution against the public property of a foreign nation; and the circumstance that such a prosecution would endanger the peace of the United States, would not confer on the President the right to interfere, although it would be a strong reason for exercising the power if he possessed it. And if he does possess it in such cases, and it is not specifically granted by the constitution, it must be derived from the general supervisory powers which belong to his office, and which are necessary to enable him to perform the duty imposed upon him, of seeing that the law is faithfully executed. And if the right is derived from this source, then it is a general power, and may be equally exercised, in the discretion of the President, whether the property libelled be national or private. The national character of the property would not be a test of the existence of the power, but would only furnish a reason for its exercise; and the right to interfere being admitted to exist, the question

presented would always be, not whether the claimant was a nation or an individual, but whether the public interest or the principles of justice required the President to act.

Indeed, a case might readily be imagined, in which justice to an individual would equally require the existence of the power and its exercise by the President. For, suppose a merchant ship, bound from one foreign port to another, is piratically seized upon by the crew, and brought into the United States, and the goods of the merchant are seized for a breach of our revenue laws, and a libel filed against them; and suppose the officers continue the prosecution after these facts are made known to the government; if the President was satisfied that such a prosecution was not a faithful execution of the laws, but unjust and oppressive to the innocent merchant, would he not have a right to order the prosecution to be discontinued?

If it should be said that, the district attorney having the power to discontinue the prosecution, there is no necessity for inferring a right in the President to direct him to exercise it, I answer, that the direction of the President is not required to communicate any new authority to the distinct attorney, but to direct him or aid him in the execution of the power he is admitted to possess. It might, indeed, happen that a district attorney was prosecuting a suit in the name of the United States, against their interest and against justice, and for the purpose of oppressing an individual: such a prosecution would not be a faithful execution of the law; and upon the President being satisfied that the forms of law were abused for such a purpose, and being bound to take care that the law was faithfully executed, it would become his duty to take measures to correct the procedure. And the most natural and proper measure to accomplish that object would be, to order the district attorney to discontinue the prosecution. The district attorney might refuse to obey the President's order; and if he did refuse, the prosecution, while he remained in office, would still go on; because the President could give no order to the court or the clerk to make any particular entry. He could only act through his subordinate officer, the district attorney, who is responsible to him, and who holds his office at his pleasure. And if that officer still continued a prosecution which the President was satisfied ought to be discontinued, the removal of the disobedient officer, and the substitution of one more worthy in his place, would enable the President, through him, faithfully to execute the law. And it is for this, among other reasons, that the power of removing the district attorney resides in the President.

I have put the case of a district attorney who wilfully violates his duty, in order to show the necessity of the power in the President for which I am contending. But another class of cases frequently occur, in which the district attorney himself may believe that the prosecution ought to be discontinued, but feels that it would be indiscreet and rash in him to incur the whole responsibility of dismissing it. And no case would better illustrate this class of cases than the one which has given rise to this discussion. The amount of property claimed to be forfeited to the United States is very large. The collector insists that a great part of it is liable to condemnation. It is known to have attracted the attention of the President, and to have become the subject of a correspondence with the minister of a foreign power. It would be indiscreet in the highest degree in Mr. Hamilton, the district attorney, to dismiss such a prosecution on his own responsibility, without first obtaining the approbation of the President. * * *

The district attorney stands in relation to the President on very different grounds from that of the court. The judicial power is wholly independent of the Executive. The President's direction or approbation would be no justification for their acts. He has no right to interfere with their

proceedings; and if they misbehave themselves in office, they are not responsible to him. But the district attorney is made dependent upon him, for the very purpose of placing him under his control; and the act of May 15, 1820, which directs the district attorney to conform to the directions of the agent of the Treasury, (whose powers have since been transferred to the Solicitor,) shows that, in the discharge of his official duties, he is to subject to the direction of the executive department.

* * * Upon the whole, I consider the district attorney as under the control and direction of the President, in the institution and prosecution of suits in the name and on behalf of the United States; and that it is within the legitimate power of the President to direct him to institute or to discontinue a pending suit, and to point out to him, his duty, whenever the interest of the United States is directly or indirectly concerned. And I find, on examination, that the practice of the government has conformed to this opinion; and that, in many instances where the interference of the Executive was asked for, the cases have been referred to the Attorney General, and, in every case, the right to interfere and direct the district attorney is assumed or asserted.

It may be said that these cases were not prosecutions for forfeitures incurred by a breach of the revenue laws; and that, the authority to remit for the violation of the revenue laws being given to the Secretary of the Treasury, it cannot afterwards be exercised by the President. In reply to this, I answer: First, that the case upon which the President in requested now to act, is not one given to the Secretary of the Treasury. He is authorized to act where a forfeiture has been actually incurred—where an offence against the laws is admitted or proved. But the case presented to the President, if sufficiently made out, is one in which no offence has been committed, and no forfeiture has been incurred. And if it is shown to be one of this character, then it is not given to the Secretary of the Treasury, and he has no power over it. In the second place, if this case were clearly embraced in the powers given to the Treasury Department, it would not, and could not, deprive the President of the powers which belong to him under the constitution. The power conferred on the Secretary, by the law of Congress, would be merely in aid of the President, and to lighten the labors of his office. It could not restrain or limit his constitutional powers.

And if either of these answers be sufficient, it follows that a prosecution for a forfeiture incurred by a breach of the revenue laws stands on the same principles with a forfeiture occasioned by a breach of any other law of the United States, and is equally under the control and the direction of the President. * * *

R. B. TANEY

Notes and Questions

1. According to the Attorney General's analysis, are officers who serve at the pleasure of the President *required by law* to obey the President's orders?

2. According to the Attorney General, what happens if the President issues an order to an officer who serves at the President's pleasure, and the officer refuses to comply? In particular, can the President assume the powers of the officer and act in the officer's place, and thereby carry out the order despite the officer's refusal?