

Administrative Process
Spring 2009
Prof. David Franklin
First Day Reading Assignment

The casebook for this course is Gary Lawson, *Federal Administrative Law* (4th ed. 2007). There is also a photocopied handout, available on the law school website and in hard copy on the seventh floor. The reading for our first class meeting (Monday, January 12) is handout pages 1-4; casebook pages 1-8; and casebook pages 24-30. Please be prepared! See you then.

**Administrative Process
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Handout Packet

BOYCE MOTOR LINES, Inc.

v.

UNITED STATES.

342 U.S. 337 (1952)

Mr. Justice CLARK delivered the opinion of the Court.

The petitioner is charged with the violation of a regulation promulgated by the Interstate Commerce Commission under 18 U.S.C. § 835.¹ The Regulation provides:

‘Drivers of motor vehicles transporting any explosive, inflammable liquid, inflammable compressed gas, or poisonous gas shall avoid, so far as practicable, and, where feasible, by prearrangement of routes, driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings.’

(49 CFR § 197.1(b).) The statute directs that ‘(w)hoever knowingly violates’ the Regulation shall be subject to fine or imprisonment or both.²

The indictment, in counts 1, 3, and 5, charges that petitioner on three separate occasions sent one of its trucks carrying carbon bisulphide, a dangerous and inflammable liquid, through the Holland Tunnel, a congested thoroughfare. In each instance, the truck was en route from Cascade Mills, New York, to Brooklyn, New York. On the third of these trips the load of carbon bisulphide exploded in the tunnel and about sixty persons were injured. The indictment further states that ‘there were other available and more practicable routes for the transportation of said shipment, and * * * the (petitioner) well knew that the transportation of the shipment of carbon bisulphide * * * into the * * * Holland Tunnel was in violation of the regulations promulgated * * * by the Interstate Commerce Commission. * * *’ There is no allegation as to the feasibility of prearrangement of routes, and petitioner is not charged with any omission in that respect.

The District Court dismissed those counts of the indictment which were based upon the Regulation in question, holding it to be invalid on the ground that the words ‘so far as practicable

¹ 18 U.S.C. § 835: ‘The Interstate Commerce Commission shall formulate regulations for the safe transportation within the limits of the jurisdiction of the United States of explosives and other dangerous articles, including flammable liquids, flammable solids, oxidizing materials, corrosive liquids, compressed gases, and poisonous substances, which shall be binding upon all common carriers engaged in interstate or foreign commerce which transport explosives or other dangerous articles by land, and upon all shippers making shipments of explosives or other dangerous articles via any common carrier engaged in interstate or foreign commerce by land or water. * * *

‘Such regulations shall be in accord with the best-known practicable means for securing safety in transit, covering the packing, marking, loading, handling while in transit, and the precautions necessary to determine whether the material when offered is in proper condition to transport.’

² ‘Whoever knowingly violates any such regulation shall be fined not more than \$1,000 or imprisoned not more than one year, or both; and, if the death or bodily injury of any person results from such violation, shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.’ 18 U.S.C § 835 (sixth paragraph).

and where feasible' are 'so vague and indefinite as to make the standard of guilt conjectural.' The Court of Appeals for the Third Circuit reversed, holding that the Regulation, interpreted in conjunction with the statute, establishes a reasonably certain standard of conduct. We granted certiorari.

A criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation. But few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.

In *Sproles v. Binford*, 286 U.S. 374 (1932), these principles were applied in upholding words in a criminal statute similar to those now before us. Chief Justice Hughes, speaking for a unanimous court, there said: "Shortest practicable route' is not an expression too vague to be understood. The requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding. * * * The use of common experience as a glossary is necessary to meet the practical demands of legislation.'⁷

The Regulation challenged here is the product of a long history of regulation of the transportation of explosives and inflammables. Congress recognized the need for protecting the public against the hazards involved in transporting explosives as early as 1866. The inadequacy of the legislation then enacted led to the passage, in 1908, of the Transportation of Explosives Act, which was later extended to cover inflammables. In accordance with that Act, the Commission in the same year issued regulations applicable to railroads. In 1934 the Commission exercised its authority under the Act to promulgate regulations governing motor trucks, including the Regulation here in question. In 1940 this Regulation was amended to substantially its present terminology. That terminology was adopted only after more than three years of study and a number of drafts. The trucking industry participated extensively in this process, making suggestions relating to drafts submitted to carriers and their organizations, and taking part in several hearings. The Regulation's history indicates the careful consideration which was given to the difficulties involved in framing a regulation which would deal practically with this aspect of the problem presented by the necessary transportation of dangerous explosives on the highways.

The statute punishes only those who knowingly violate the Regulation. This requirement of the presence of culpable intent as a necessary element of the offense does much to destroy any force in the argument that application of the Regulation would be so unfair that it must be held invalid. That is evident from a consideration of the effect of the requirement in this case. To

⁷ The provision which was there challenged and upheld was concerned basically with a requirement as to distance, a requirement applying within necessary limits of practicability, just as the Regulation here challenged is concerned basically with avoidance of designated points of danger, within like limits of practicability.

sustain a conviction, the Government not only must prove that petitioner could have taken another route which was both commercially practicable and appreciably safer (in its avoidance of crowded thoroughfares, etc.) than the one it did follow. It must also be shown that petitioner knew that there was such a practicable, safer route and yet deliberately took the more dangerous route through the tunnel, or that petitioner willfully neglected to exercise its duty under the Regulation to inquire into the availability of such an alternative route.¹⁵

In an effort to give point to its argument, petitioner asserts that there was no practicable route its trucks might have followed which did not pass through places they were required to avoid. If it is true that in the congestion surrounding the lower Hudson there was no practicable way of crossing the River which would have avoided such points of danger to a substantially greater extent than the route taken, then petitioner has not violated the Regulation. But that is plainly a matter for proof at the trial. We are not so conversant with all the routes in that area that we may, with no facts in the record before us, assume the allegations of the indictment to be false. We will not thus distort the judicial notice concept to strike down a regulation adopted only after much consultation with those affected and penalizing only those who knowingly violate its prohibition.

We therefore affirm the judgment of the Court of Appeals remanding the cause to the District Court with directions to reinstate counts 1, 3, and 5 of the indictment.

Mr. Justice JACKSON, with whom Mr. Justice BLACK and Mr. Justice FRANKFURTER join, dissenting.

Congress apparently found the comprehensive regulation needed for the transportation of explosives and inflammables too intricate and detailed for its own processes. It delegated the task of framing regulations to the Interstate Commerce Commission and made a knowing violation of them criminal. Where the federal crimemaking power is delegated to such a body, we are justified in requiring considerable precision in its exercise.

This regulation does not prohibit carriage of explosives. It presupposes that they must be transported, and, therefore, attempts to lay down a rule for choice of routings. Petitioner was admonished to avoid congested thoroughfares, places where crowds are assembled, streetcar tracks, tunnels, viaducts and dangerous crossings. Nobody suggests that it was possible to avoid all of these in carrying this shipment from its origin to its destination. Nor does the regulation require that all of any one of them be avoided except 'so far as practicable.' I do not disagree with the opinion of Chief Justice Hughes and the Court in *Sproles v. Binford*, 286 U.S. 374, that, in the context in which it was used, "'Shortest practicable route' is not an expression too vague to be understood." A basic standard was prescribed with definiteness—distance. That ordinarily was to prevail, and, if departed from, the trucker was to be prepared to offer practical justifications.

¹⁵ The officers, agents, and employees of every motor carrier concerned with the transportation of explosives and other dangerous articles are required to 'become conversant' with this and other regulations applying to such transportation. 49 CFR § 197.02.

But the regulation before us contains no such definite standard from which one can start in the calculation of his duty. It leaves all routes equally open and all equally closed. The carrier must choose what is 'practicable,' not, as in the *Sproles* case, by weighing distance against obstacles to passage. We may, of course, take judicial notice of geography. Delivery of these goods was impossible except by passing through many congested thoroughfares and either tunnels, viaducts or bridges. An explosion would have been equally dangerous and equally incriminating in any of them. What guidance can be gleaned from this regulation as to how one could with reasonable certainty make a choice of routes that would comply with its requirements?

It is said, however, that definiteness may be achieved on the trial because expert testimony will advise the jury as to what routes are preferable. Defects in that solution are twofold: first, there is no standard by which to direct, confine and test the expert opinion testimony and, second, none to guide a jury in choosing between conflicting expert opinions.

It is further suggested that a defendant is protected against indefiniteness because conviction is authorized only for knowing violations. The argument seems to be that the jury can find that defendant knowingly violated the regulation only if it finds that it knew the meaning of the regulation he was accused of violating. With the exception of *Screws v. United States*, 325 U.S. 91, which rests on a very particularized basis, the knowledge requisite to knowing violation of a statute is factual knowledge as distinguished from knowledge of the law. I do not suppose the Court intends to suggest that if petitioner knew nothing of the existence of such a regulation its ignorance would constitute a defense.

This regulation prescribes no duty in terms of a degree of care that must be exercised in moving the shipment. The utmost care would not protect defendant from prosecution under it. One can learn his duty from such terms as 'reasonable care' or 'high degree of care.' Of course, one may not be sure whether a trier of fact will find particular conduct to measure up to the requirements of the law, but he may learn at least what he must strive for, and that is more than he can learn from this regulation.

This question is before this Court on the indictment only. In some circumstances we might feel it better that a case should proceed to trial and our decision be reserved until a review of the conviction, if one results. But a trial can give us no better information than we have now as to whether this regulation contains sufficiently definite standards and definition of the crime. An acquittal or disagreement would leave this unworkable, indefinite regulation standing as the only guide in a matter that badly needs intelligible and rather tight regulation. It would remain, at least to some extent, as an incoherent barrier against state enactment or enforcement of local regulations of the same subject. Would it not be in the public interest as well as in the interest of justice to this petitioner to pronounce this vague regulation invalid, so that those who are responsible for the supervision of this dangerous traffic can go about the business of framing a regulation that will specify intelligible standards of conduct?

KENT
v.
DULLES

357 U.S. 116 (1958)

Mr. Justice DOUGLAS delivered the opinion of the Court.

This case concerns two applications for passports, denied by the Secretary of State. One was by Rockwell Kent who desired to visit England and attend a meeting of an organization known as the 'World Council of Peace' in Helsinki, Finland. The Director of the Passport Office informed Kent that issuance of a passport was precluded by s 51.135 of the Regulations promulgated by the Secretary of State on two grounds:³ (1) that he was a Communist and (2) that he had had 'a consistent and prolonged adherence to the Communist Party line.' The letter of denial specified in some detail the facts on which those conclusions were based. Kent was also advised of his right to an informal hearing under s 51.137 of the Regulations. But he was also told that whether or not a hearing was requested it would be necessary, before a passport would be issued, to submit an affidavit as to whether he was then or ever had been a Communist.⁴ Kent did not ask for a hearing but filed a new passport application listing several European countries he desired to visit. When advised that a hearing was still available to him, his attorney replied that Kent took the position that the requirement of an affidavit concerning Communist Party membership 'is unlawful and that for that reason and as a matter of conscience,' he would not supply one. He did, however, have a hearing at which the principal evidence against him was from his book *It's Me O Lord*, which Kent agreed was accurate. He again refused to submit the affidavit, maintaining that any matters unrelated to the question of his citizenship were irrelevant to the Department's consideration of his application. The Department advised him that no further consideration of his application would be given until he satisfied the requirements of the Regulations. * * *

³ 22 CFR § 51.135 provides: 'In order to promote the national interest by assuring that persons who support the world Communist movement of which the Communist Party is an integral unit may not, through use of United States passports, further the purposes of that movement, no passport, except one limited for direct and immediate return to the United States, shall be issued to: '(a) Persons who are members of the Communist Party or who have recently terminated such membership under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they continue to act in furtherance of the interests and under the discipline of the Communist Party; '(b) Persons, regardless of the formal state of their affiliation with the Communist Party, who engage in activities which support the Communist movement under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they have engaged in such activities as a result of direction, domination, or control exercised over them by the Communist movement; '(c) Persons, regardless of the formal state of their affiliation with the Communist Party, as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement.'

⁴ Section 51.142 of the Regulations provides: 'At any stage of the proceedings in the Passport Division or before the Board, if it is deemed necessary, the applicant may be required, as a part of his application, to subscribe, under oath or affirmation, to a statement with respect to present or past membership in the Communist Party. If applicant states that he is a Communist, refusal of a passport in his case will be without further proceedings.'

A passport not only is of great value--indeed necessary--abroad; it is also an aid in establishing citizenship for purposes of re-entry into the United States. * * * But throughout most of our history--until indeed quite recently--a passport, though a great convenience in foreign travel, was not a legal requirement for leaving or entering the United States. * * * Apart from minor exceptions to be noted, it was first made a requirement by § 215 of the Act of June 27, 1952, 66 Stat. 190, 8 U.S.C. § 1185, which states that, after a prescribed proclamation by the President, it is 'unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.' And the Proclamation necessary to make the restrictions of this Act applicable and in force has been made. * * *

[I]n 1856 Congress enacted what remains today as our basic passport statute. Prior to that time various federal officials, state and local officials, and notaries public had undertaken to issue either certificates of citizenship or other documents in the nature of letters of introduction to foreign officials requesting treatment according to the usages of international law. By the Act of August 18, 1856, Congress put an end to those practices. This provision, as codified by the Act of July 3, 1926, reads,

'The Secretary of State may grant and issue passports * * * under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports.' * * *

Under the 1926 Act and its predecessor a large body of precedents grew up which repeat over and again that the issuance of passports is 'a discretionary act' on the part of the Secretary of State. The scholars, the courts, the Chief Executive, and the Attorneys General all so said. This long-continued executive construction should be enough, it is said, to warrant the inference that Congress had adopted it. * * * But the key to that problem, as we shall see, is in the manner in which the Secretary's discretion was exercised, not in the bare fact that he had discretion.

* * *

Freedom to travel is, indeed, an important aspect of the citizen's 'liberty.' We need not decide the extent to which it can be curtailed. We are first concerned with the extent, if any, to which Congress has authorized its curtailment.

The difficulty is that while the power of the Secretary of State over the issuance of passports is expressed in broad terms, it was apparently long exercised quite narrowly. So far as material here, the cases of refusal of passports generally fell into two categories. First, questions pertinent to the citizenship of the applicant and his allegiance to the United States had to be resolved by the Secretary, for the command of Congress was that 'No passport shall be granted or issued to or verified for any other persons than those owing allegiance, whether citizens or not, to the United States.' 32 Stat. 386, 22 U.S.C. § 212. Second, was the question whether the applicant was participating in illegal conduct, trying to escape the toils of the law, promoting passport frauds, or otherwise engaging in conduct which would violate the laws of the United States. * * *

The grounds for refusal asserted here do not relate to citizenship or allegiance on the one hand or to criminal or unlawful conduct on the other. Yet, so far as relevant here, those two are

the only ones which it could fairly be argued were adopted by Congress in light of prior administrative practice. One can find in the records of the State Department rulings of subordinates covering a wider range of activities than the two indicated. But as respects Communists these are scattered rulings and not consistently of one pattern. We can say with assurance that whatever may have been the practice after 1926, at the time the Act of July 3, 1926, was adopted, the administrative practice, so far as relevant here, had jelled only around the two categories mentioned. We, therefore, hesitate to impute to Congress, when in 1952 it made a passport necessary for foreign travel and left its issuance to the discretion of the Secretary of State, a purpose to give him unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose.

More restrictive regulations were applied in 1918 and in 1941 as war measures. We are not compelled to equate this present problem of statutory construction with problems that may arise under the war power. Cf. *Youngstown Sheet & Tube Co. v. Sawyer*.

In a case of comparable magnitude, *Korematsu v. United States*, 323 U.S. 214, 218 (1944), we allowed the Government in time of war to exclude citizens from their homes and restrict their freedom of movement only on a showing of 'the gravest imminent danger to the public safety.' There the Congress and the Chief Executive moved in coordinated action; and, as we said, the Nation was then at war. No such condition presently exists. No such showing of extremity, no such showing of joint action by the Chief Executive and the Congress to curtail a constitutional right of the citizen has been made here.

Since we start with an exercise by an American citizen of an activity included in constitutional protection, we will not readily infer that Congress gave the Secretary of State unbridled discretion to grant or withhold it. If we were dealing with political questions entrusted to the Chief Executive by the Constitution we would have a different case. But there is more involved here. In part, of course, the issuance of the passport carries some implication of intention to extend the bearer diplomatic protection, though it does no more than 'request all whom it may concern to permit safely and freely to pass, and in case of need to give all lawful aid and protection' to this citizen of the United States. But that function of the passport is subordinate. Its crucial function today is control over exit. And, as we have seen, the right of exit is a personal right included within the word 'liberty' as used in the Fifth Amendment. If that 'liberty' is to be regulated, it must be pursuant to the lawmaking functions of the Congress. *Youngstown Sheet & Tube Co. v. Sawyer*, supra. And if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests. See *Panama Refining Co. v. Ryan* * * * Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them. * * * We hesitate to find in this broad generalized power an authority to trench so heavily on the rights of the citizen.

Thus we do not reach the question of constitutionality. We only conclude that § 1185 and § 211a do not delegate to the Secretary the kind of authority exercised here. We deal with beliefs, with associations, with ideological matters. We must remember that we are dealing here with citizens who have neither been accused of crimes nor found guilty. They are being denied their freedom of movement solely because of their refusal to be subjected to inquiry into their beliefs and associations. They do not seek to escape the law nor to violate it. They may or may

not be Communists. But assuming they are, the only law which Congress has passed expressly curtailing the movement of Communists across our borders [the Internal Security Act of 1950] has not yet become effective. It would therefore be strange to infer that pending the effectiveness of that law, the Secretary has been silently granted by Congress the larger, the more pervasive power to curtail in his discretion the free movement of citizens in order to satisfy himself about their beliefs or associations.

To repeat, we deal here with a constitutional right of the citizen, a right which we must assume Congress will be faithful to respect. We would be faced with important constitutional questions were we to hold that Congress by § 1185 and § 211a had given the Secretary authority to withhold passports to citizens because of their beliefs or associations. Congress has made no such provision in explicit terms; and absent one, the Secretary may not employ that standard to restrict the citizens' right of free movement.

Reversed.

[The dissenting opinion of Justice Clark, with whom Justices Burton, Harlan and Whittaker concurred, is omitted.]

PUBLIC CITIZEN

**v.
YOUNG**

831 F.2d 1108 (D.C. Cir. 1987)

WILLIAMS, Circuit Judge:

The Color Additive Amendments of 1960 establish an elaborate system for regulation of color additives in the interests of safety. A color additive may be used only after the Food and Drug Administration (“FDA”) has published a regulation listing the additive for such uses as are safe. Such listing may occur only if the color additive in question satisfies (among other things) the requirements of the applicable “Delaney Clause,” one of three such clauses in the total system for regulation of color additives, food and animal food and drugs. The Clause prohibits the listing of any color additive “found ... to induce cancer in man or animal.” ...

The FDA listed Orange No. 17 and Red No. 19 for use in externally applied cosmetics on August 7, 1986. In the listing notices, it carefully explained the testing processes for both dyes and praised the processes as “current state-of-the-art toxicological testing.” In both notices it specifically rejected industry arguments that the Delaney Clause did not apply because the tests were inappropriate for evaluation of the dyes. It thus concluded that the studies established that the substances caused cancer in the test animals.

The notices then went on to describe two quantitative risk assessments of the dyes, one by the Cosmetic, Toiletry and Fragrance Association (“CTFA,” an intervenor here and the industry proponent of both dyes) and one by a special scientific review panel made up of Public Health Service scientists.⁵

The assessments considered the risk to humans from the substances when used in various cosmetics—lipsticks, face powders and rouges, hair cosmetics, nail products, bathwater products, and wash-off products. The scientific review panel found the lifetime cancer risks of the substances extremely small: for Orange No. 17, it calculated them as one in 19 billion at worst, and for Red No. 19 one in nine million at worst. The FDA explained that the panel had used conservative assumptions in deriving these figures, and it characterized the risks as “so trivial as to be effectively no risk.” It concluded that the two dyes were safe.

The FDA candidly acknowledged that its safety findings represented a departure from past agency practice: “[a] strictly literal application of the Delaney Clause would prohibit FDA from finding [both dyes] safe, and therefore, prohibit FDA from permanently listing [them]....” Because the risks presented by these dyes were so small, however, the agency declared that it had “inherent authority” under the *de minimis* doctrine to list them for use in spite of this language. It indicated that as a general matter any risk lower than a one-in-one-million lifetime risk would meet the requirements for a *de minimis* exception to the Delaney Clause.

Assuming that the quantitative risk assessments are accurate, as we do for these purposes, it seems altogether correct to characterize these risks as trivial. For example, CTFA notes that a consumer would

⁵ Agencies have used quantitative risk assessments in a variety of regulatory contexts. For example, the Occupational Safety and Health Administration is under a mandate to establish standards “reasonably necessary or appropriate to provide safe or healthful ... places of employment,” 29 U.S.C. § 652(8) (1982), which was construed in *Industrial Union Dep’t v. American Petroleum Institute*, 448 U.S. 607, 639-40 (1980), to call for promulgation of standards only where appropriate to remedy a “significant risk of material health impairment.” In fulfillment of this mandate, OSHA used quantitative risk assessment in promulgating a rule on exposure limits to airborne inorganic arsenic. The FDA itself has used the technique in evaluating safety where the Delaney Clause did not apply.

run a one-in-a-million lifetime risk of cancer if he or she ate *one* peanut with the FDA-permitted level of aflatoxins once every 250 days (liver cancer). Another activity posing a one-in-a-million lifetime risk is spending 1,000 minutes (less than 17 hours) every year in the city of Denver—with its high elevation and cosmic radiation levels—rather than in the District of Columbia. Most of us would not regard these as high-risk activities. Those who indulge in them can hardly be thought of as living dangerously. Indeed, they are risks taken without a second thought by persons whose economic position allows them a broad range of choice. ...

It may help put the one-in-a-million lifetime risk in perspective to compare it with a conceded dangerous activity, in which millions nonetheless engage, cigarette smoking. Each one-in-a-million risk amounts to less than one *200,000th* the lifetime risk incurred by the average male smoker. Thus, a person would have to be exposed to more than 2,000 chemicals bearing the one-in-a-million lifetime risk, at the rates assumed in the risk assessment, in order to reach 100th the risk involved in smoking. To reach that level of risk with chemicals equivalent to the less risky dye (Orange No. 17), he would have to be exposed to more than 40 million such chemicals.

The Delaney Clause of the Color Additive Amendments provides as follows:

a color additive ... (ii) shall be deemed unsafe, and shall not be listed, for any use which will not result in ingestion of any part of such additive, if, after tests which are appropriate for the evaluation of the safety of additives for such use, or after other relevant exposure of man or animal to such additive, it is found by the Secretary to induce cancer in man or animal...

21 U.S.C. § 376(b)(5)(B).

The natural—almost inescapable—reading of this language is that if the Secretary finds the additive to “induce” cancer in animals, he must deny listing. Here, of course, the agency made precisely the finding that Orange No. 17 and Red No. 19 “induce[] cancer when tested in laboratory animals.” ...

The setting of the clause supports this strict reading. Adjacent to it is a section governing safety generally and directing the FDA to consider a variety of factors, including probable exposure, cumulative effects, and detection difficulties. The contract in approach seems to us significant. For all safety hazards other than carcinogens, Congress made safety the issue, and authorized the agency to pursue a multifaceted inquiry in arriving at an evaluation. For carcinogens, however, it framed the issue in the simple form, “If A [finding that cancer is induced in man or animals], then B [no listing].” There is language inviting administrative discretion, but it relates only to the process leading to the finding of carcinogenicity: “appropriate” tests or “other relevant exposure,” and the agency’s “evaluation” of such data. Once the finding is made, the dye “shall be deemed unsafe, and shall not be listed.”

Courts (and agencies) are not, of course, helpless slaves to literalism. One escape hatch, invoked by the government and CTFA here, is the *de minimis* doctrine, shorthand for *de minimis non curat lex* (“the law does not concern itself with trifles”). The doctrine—articulated in recent times in a series of decisions by Judge Leventhal—serves a number of purposes. One is to spare agency resources for more important matters. But that is a goal of dubious relevance here. The finding of trivial risk necessarily followed not only the elaborate animal testing, but also the quantitative risk assessment process itself; indeed, application of the doctrine required additional expenditure of agency resources.

More relevant is the concept that “notwithstanding the ‘plain meaning’ of a statute, a court must look beyond the words to the purpose of the act where its literal terms lead to ‘absurd or futile results.’” Imposition of pointless burdens on regulated entities is obviously to be avoided if possible, especially as

burdens on them almost invariably entail losses for their customers: here, obviously, loss of access to the colors made possible by a broad range of dyes. ...

Assuming as always the validity of the risk assessments, we believe that the risks posed by the two dyes would have to be characterized as “acceptable.” Accordingly, if the statute were to permit a *de minimis* exception, this would appear to be a case for its application. ...

Moreover, failure to employ a *de minimis* doctrine may lead to regulation that not only is “absurd or futile” in some general cost-benefit sense but also is directly contrary to the *primary* legislative goal. In a certain sense, precisely that may be the effect here. The primary goal of the Act is human safety, but literal application of the Delaney Clause may in some instances increase risk. No one contends that the Color Additive Amendments impose a zero-risk standard for non-carcinogenic substances; if they did, the number of dyes passing muster might prove miniscule. As a result, makers of drugs and cosmetics who are barred from using a carcinogenic dye carrying a one-in-20-million lifetime risk may use instead a noncarcinogenic, but toxic, dye carrying, say, a one-in-10-million lifetime risk. The substitution appears to be a clear loss for safety. ...

Here, we cannot find that exemption of exceedingly small (but measurable) risks tends to implement the legislative design of the color additive Delaney Clause. The language itself is rigid; the context—an alternative design admitting administrative discretion for all risks other than carcinogens—tends to confirm that rigidity. ...

The [1960] Delaney Clause arose in the House bill and was, indeed, what principally distinguished the House from the Senate bill. The House included it in H.R. 7624, and the Senate accepted the language without debate. The House committee gave considerable attention to the degree of discretion permitted under the provision. The discussion points powerfully against any *de minimis* exception, and is not contradicted either by consideration on the House floor or by a post-enactment colloquy in the Senate. ...

Like all legislative history, this is hardly conclusive. But short of an explicit declaration in the statute barring use of a *de minimis* exception, this is perhaps as strong as it is likely to get. Facing the explicit claim that the Clause was “extraordinarily rigid,” a claim well supported by the Clause’s language in contrast with the bill’s grants of discretion elsewhere, Congress persevered.

Moreover, our reading of the legislative history suggests some possible explanations for Congress’s apparent rigidity. One is that Congress, and the nation in general (at least as perceived by Congress), appear to have been truly alarmed about the risks of cancer. This concern resulted in a close focus on substances increasing cancer threats and a willingness to take extreme steps to lessen even small risks. Congress hoped to reduce the incidence of cancer by banning carcinogenic dyes, and may also have hoped to lessen public fears by demonstrating strong resolve.

A second possible explanation for Congress’s failure to authorize greater administrative discretion is that it perceived color additives as lacking any great value. ...

Finally, as we have already noted, the House committee (or its amanuenses) considered the possibility that its no-threshold assumption might prove false and contemplated a solution: renewed consideration by Congress. ...

The CTFA also argues that in a number of respects scientific advance has rendered obsolete any inference of congressional insistence on rigidity. CTFA notes that while in 1958 (date of enactment of the food additive Delaney Clause) there were only four known human carcinogens, by 1978 there were 37 substances known to produce cancer in humans and over 500 in animals. They identify an impressive

array of food ingredients now found to be animal carcinogens and that appear in a large number of food products. These include many items normally viewed as essential ingredients in a healthy diet, such as vitamins C and D, calcium, protein, and amino acids. If the color additive Delaney Clause has no *de minimis* exception, it follows (they suggest) that the food additive one must be equally rigid. The upshot would be to deny the American people access to a healthy food supply.

As a historical matter, the argument is overdrawn: the House committee was clearly on notice that certain common foods and nutrients were suspected carcinogens.

Beyond that, it is not clear that an interpretation of the food additive Delaney Clause identical with our interpretation of the color additive clause would entail the feared consequences. The food additive *definition* contains an exception for substances “generally recognized” as safe (known as the “GRAS” exception), an exception that has no parallel in the color additive definition. That definition may permit a *de minimis* exception at a stage that logically precedes the FDA’s ever reaching the food additive Delaney Clause. ...

Finally, even a court decision construing the food additive provisions to require a ban on dietary essentials would not, in fact, bring about such a ban. [T]he FDA could bring critical new discoveries to Congress’s attention. If the present law would lead to the consequences predicted, we suppose that the FDA would do so, and that Congress would respond. ...

In sum, we hold that the Delaney Clause of the Color Additive Amendments does not contain an implicit *de minimis* exception for carcinogenic dyes with trivial risks to humans. We based this decision on our understanding that Congress adopted an “extraordinarily rigid” position, denying the FDA authority to list a dye once it found it to “induce cancer in ... animals” in the conventional sense of the term. We believe that, in the color additive context, Congress intended that if this rule produced unexpected or undesirable consequences, the agency should come to it for relief. That moment may well have arrived, but we cannot provide the desired escape. ...

Review Exercises: Appointment and Removal

1. Would it be constitutional for Congress to provide that the following officers may only be removed by the President with Senate concurrence?
 - a) The chairperson of the National Labor Relations Board
 - b) The Deputy Assistant Undersecretary of Veterans Affairs
 - c) A local postmaster in Portland, Oregon
2. Congress passes a statute giving the Chairman of the Federal Reserve Board a twelve-year term and providing that he may be removed only by statute or via impeachment. Constitutional?
3. Would it be constitutional for Congress to provide that the following officers could be removed by the President only for cause?
 - a) The Secretary of State
 - b) The Secretary of Commerce
 - c) An Assistant Secretary of Commerce whose appointment requires Senate confirmation
 - d) An Assistant Secretary of Commerce whose appointment does not require Senate confirmation
 - e) The Chairman of the Federal Communications Commission
 - f) The Chief Judge of the Tax Court
 - g) An ordinary civil service employee
 - h) A local postmaster in Portland, Oregon
 - i) The Administrator of the EPA
 - j) The members of a new, “quasi-judicial” Federal Pardons Commission
4. Congress establishes by statute a Federal Salary Commission. The statute provides that the six-member Commission will be composed of two members of Congress appointed by the House and Senate leadership respectively, two judges appointed by the Chief Justice of the United States, and two persons appointed by the President. The FSC is given the power to make annual recommendations as to salary levels for officials in Congress, the Judiciary, and the Senior Executive Service. The recommended salaries are to take effect on a specified date unless rescinded by statute. Constitutional?
5. Congress enacts a statute vesting the appointment of all Article III district court and circuit court judges in the Supreme Court of the United States. Constitutional?

OFFICE OF PERSONNEL MANAGEMENT

v.

RICHMOND

496 U.S. 414 (1990)

Justice KENNEDY delivered the opinion of the Court.

...Respondent was a welder at the Navy Public Works Center in San Diego, California. He left this position in 1981 after petitioner, the Office of Personnel Management (OPM), approved his application for a disability retirement. OPM determined that respondent's impaired eyesight prevented him from performing his job and made him eligible for a disability annuity under 5 U.S.C. § 8337(a). Section 8337(a) provides this benefit for disabled federal employees who have completed five years of service. The statute directs, however, that the entitlement to disability payments will end if the retired employee is "restored to an earning capacity fairly comparable to the current rate of pay of the position occupied at the time of retirement." ...

Prior to 1982, an individual was deemed restored to earning capacity, and so rendered ineligible for a disability annuity, if "in *each of 2 succeeding calendar years* the income of the annuitant from wages or self-employment ... equals at least 80 percent of the current rate of pay of the position occupied immediately before retirement."

The provision was amended in 1982 ... to change the measuring period for restoration of earning capacity from two years to one. ...

After taking disability retirement for his vision impairment, respondent undertook part-time employment as a schoolbus driver. From 1982 to 1985, respondent earned an average of \$12,494 in this job, leaving him under the 80% limit for entitlement to continued annuity payments. In 1986, however, he had an opportunity to earn extra money by working overtime. Respondent asked an employee relations specialist at the Navy Public Works Center's Civilian Personnel Department for information about how much he could earn without exceeding the 80% eligibility limit. Relying upon the terms of the repealed pre-1982 statute, under which respondent could retain the annuity unless his income exceeded the 80% limit in *two* consecutive years, the specialist gave respondent incorrect advice. The specialist also gave respondent a copy of Attachment 4 to Federal Personnel Manual Letter 831-64, published by OPM, which also stated the former 2-year eligibility rule. The OPM form was correct when written in 1981; but when given to respondent, the form was out of date and therefore inaccurate. Respondent returned to the Navy in January 1987 and again was advised in error that eligibility would be determined under the old 2-year rule.

After receiving the erroneous information, respondent concluded that he could take on the extra work as a schoolbus driver in 1986 while still receiving full disability benefits for impaired vision so long as he kept his income for the previous and following years below the statutory level. He earned \$19,936 during 1986, exceeding the statutory eligibility limit. OPM discontinued respondent's disability annuity on June 30, 1987. The annuity was restored on January 1, 1988, since respondent did not earn more than allowed by the statute in 1987. Respondent thus lost his disability payments for a 6-month period, for a total amount of \$3,993.

... The Court of Appeals [ordered the government to pay this money. The] majority decided that “[b]ased on the Supreme Court’s acknowledgment that the estoppel against the government is not foreclosed and based on court of appeals rulings applying estoppel against the government, our view is that estoppel is properly applied against the government in the present case.” ...

[We reverse.] From our earliest cases, we have recognized that equitable estoppel will not lie against the Government as it lies against private litigants. The principles of these and many other cases were reiterated in *Federal Crop Ins. Corporation v. Merrill*, 332 U.S. 380 (1947), the leading case in our modern line of estoppel decisions.... Despite the clarity of these earlier decisions, dicta in our more recent cases have suggested the possibility that there might be some situation in which estoppel against the Government could be appropriate....

Since [then], federal courts have continued to accept estoppel claims under a variety of rationales and analyses. In sum, Courts of Appeals have taken our statements as an invitation to search for an appropriate case in which to apply estoppel against the Government, yet we have reversed every finding of estoppel that we have reviewed.... But it remains true that we need not embrace a rule that no estoppel will lie against the Government in any case in order to decide this case. We leave for another day whether an estoppel claim could ever succeed against the Government. A narrower ground of decision is sufficient to address the type of suit presented here, a claim for payment of money from the Public Treasury contrary to a statutory appropriation.

The Appropriations Clause of the Constitution, Art. I, § 9, cl. 7, provides that: “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” For the particular type of claim at issue here, a claim for money from the Federal Treasury, the Clause provides an explicit rule of decision. Money may be paid out only through an appropriation made by law; in other words, the payment of money from the Treasury must be authorized by a statute. All parties here agree that the award respondent seeks would be in direct contravention of the federal statute upon which his ultimate claim to the funds must rest, 5 U.S.C. § 8337....

Our cases underscore the straightforward and explicit command of the Appropriations Clause. “It means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.” ...

Just as the pardon power cannot override the command of the Appropriations Clause, so too judicial use of the equitable doctrine of estoppel cannot grant respondent a money remedy that Congress has not authorized. ...

We have not had occasion in past cases presenting claims of estoppel against the Government to discuss the Appropriations Clause, for reasons that are apparent. Given the strict rule against estoppel applied as early as 1813 in *Lee v. Munroe & Thornton*, 7 Cranch 366, claims of estoppel could be dismissed on that ground without more....

The obvious practical consideration ... for adherence to the requirement of the Clause is the necessity, existing now as much as at the time the Constitution was ratified, of preventing fraud and corruption.... But the Clause has a more fundamental and comprehensive purpose, of direct relevance to the case before us. It is to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according

to the individual favor of Government agents or the individual pleas of litigants.

Extended to its logical conclusion, operation of estoppel against the Government in the context of payment of money from the Treasury could in fact render the Appropriations Clause a nullity. If agents of the Executive were able, by their unauthorized oral or written statements to citizens, to obligate the Treasury for the payment of funds, the control over public funds that the Clause reposes in Congress in effect could be transferred to the Executive....

The whole history and practice with respect to claims against the United States reveals the impossibility of an estoppel claim for money in violation of a statute. Congress' early practice was to adjudicate each individual money claim against the United States, on the ground that the Appropriations Clause forbade even a delegation of individual adjudicatory functions where payment of funds from the Treasury was involved. As the business of the Federal Legislature has grown, Congress has placed the individual adjudication of claims based on the Constitution, statutes, or contracts, or on specific authorizations of suit against the Government, with the Judiciary. But Congress has always reserved to itself the power to address claims of the very type presented by respondent, those founded not on any statutory authority, but upon the claim that "the equities and circumstances of a case create a moral obligation on the part of the Government to extend relief to an individual."

In so-called "congressional reference" cases, Congress refers proposed private bills to the United States Claims Court for an initial determination of the merits of the claim, but retains final authority over the ultimate appropriation. Congress continues to employ private legislation to provide remedies in individual cases of hardship. ...

Even short of collusion by individual officers or improper executive attempts to frustrate legislative policy, acceptance of estoppel claims for Government funds could have pernicious effects. It ignores reality to expect that the Government will be able to "secure perfect performance from its hundreds of thousands of employees scattered throughout the continent." To open the door to estoppel claims would only invite endless litigation over both real and imagined claims of misinformation by disgruntled citizens, imposing an unpredictable drain on the public fisc. Even if most claims were rejected in the end, the burden of defending such estoppel claims would itself be substantial.

Also questionable is the suggestion that if the Government is not bound by its agents' statements, then citizens will not trust them and will instead seek private advice from lawyers, accountants, and others, creating wasteful expenses. Although mistakes occur, we may assume with confidence that Government agents attempt conscientious performance of their duties and in most cases provide free and valuable information to those who seek advice about Government programs. A rule of estoppel might create not more reliable advice, but less advice. The natural consequence of a rule that made the Government liable for the statements of its agents would be a decision to cut back and impose strict controls upon Government provision of information in order to limit liability. Not only would valuable informational programs be lost to the public, but the greatest impact of this loss would fall on those of limited means, who can least afford the alternative of private advice. ...

Whether there are any extreme circumstances that might support estoppel in a case not involving

payment from the Treasury is a matter we need not address. As for monetary claims, it is enough to say that this Court has never upheld an assertion of estoppel against the Government by a claimant seeking public funds. In this context there can be no estoppel, for courts cannot estop the Constitution. The judgment of the Court of Appeals is reversed.

[A concurring opinion by Justice WHITE, joined by Justice BLACKMUN, is omitted.]

Justice STEVENS, concurring in the judgment.

Although I join the Court's judgment, I cannot accept its reasoning. The Appropriations Clause of the Constitution has nothing to do with this case. Payments of pension benefits to retired and disabled federal servants are made "in Consequence of Appropriations made by Law" even if in particular cases they are the product of a mistaken interpretation of a statute or regulation. The Constitution contemplates appropriations that cover programs—not individual appropriations for individual payments. The Court's creative reliance on constitutional text is nothing but a red herring.

The dispute in this case is not about whether an appropriation has been made; it is instead about what rules govern administration of an appropriation that has been made. Once the issue is appropriately framed, it quickly becomes obvious that the Court's resolution of it is untenable. Three hypothetical changes in the facts of this case will illustrate the error in the Court's approach. Assume, first, that the forfeiture involved a permanent and total loss of pension benefits rather than a 6-month hiatus. Suppose also that respondent was a disabled serviceman, totally incapable of productive work, who was promised that his benefits would be unaffected if he enlisted in the Reserve forces to show his continuing commitment to his country. Finally, assume that respondent was activated briefly for the sole purpose of enhancing his earnings, thereby depriving him of his pension permanently. Would the Court apply the harsh rule against estoppel that it announces today? I think not. Unless it found in the statute some unambiguous abrogation of estoppel principles, the Court would apply them to nullify the forfeiture. In doing so, the Court would construe the statute in a way consistent with congressional intent and would ensure that the Executive administered the funds appropriated in a manner consistent with the terms of the appropriation.

This case, however, does not involve such extreme facts. Respondent's loss of benefits was serious but temporary, and, even if we assume that respondent was not adequately compensated for the stress of his increased workload, his additional earnings certainly mitigated the shortfall in benefits. I agree with Justice MARSHALL that there are strong equities favoring respondent's position, but I am persuaded that unless the 5-to-4 decision in *Federal Crop Ins. Corporation v. Merrill*, 332 U.S. 380 (1947), is repudiated by Congress or this Court, this kind of maladministration must be tolerated....

[Justice MARSHALL, joined by Justice BRENNAN, dissented, agreeing with Justice STEVENS about the Appropriations Clause but concluding that the facts merited estoppel.]

UNITED STATES

v.

MENDOZA

464 U.S. 154 (1984)

Justice REHNQUIST delivered the opinion of the Court.

In 1978 respondent Sergio Mendoza, a Filipino national, filed a petition for naturalization under a statute which by its terms had expired 32 years earlier. Respondent's claim for naturalization was based on the assertion that the government's administration of the Nationality Act denied him due process of law. Neither the District Court nor the Court of Appeals for the Ninth Circuit ever reached the merits of his claim, because they held that the government was collaterally estopped from litigating that constitutional issue because of an earlier decision against the government in a case brought by other Filipino nationals in the United States District Court for the Northern District of California. We hold that the United States may not be collaterally estopped on an issue such as this, adjudicated against it in an earlier lawsuit brought by a different party. We therefore reverse the judgment of the Court of Appeals.

The facts bearing on respondent's claim to naturalization are not in dispute. In 1942 Congress passed the Nationality Act, § 701 of which provided that non-citizens who served honorably in the Armed Forces of the United States during World War II were exempt from some of the usual requirements for nationality. In particular, such veterans were exempt from the requirement of residency within the United States and literacy in the English language. Congress later provided by amendment that all naturalization petitions seeking to come under § 701 must be filed by December 31, 1946. Section 702 of the Act provided for the overseas naturalization of aliens in active service who were eligible for naturalization under § 701 but who were not within the jurisdiction of any court authorized to naturalize aliens. In order to implement that provision, the Immigration and Naturalization Service from 1943 to 1946 sent representatives abroad to naturalize eligible alien servicemen.

Respondent Mendoza served as a doctor in the Philippine Commonwealth Army from 1941 until his discharge in 1946. Because Japanese occupation of the Philippines had made naturalization of alien servicemen there impossible before the liberation of the Islands, the INS did not designate a representative to naturalize eligible servicemen there until 1945. Because of concerns expressed by the Philippine government to the United States, however, to the effect that large numbers of Filipinos would be naturalized and would immigrate to the United States just as the Philippines gained their independence, the Attorney General subsequently revoked the naturalization authority of the INS representative. Thus all naturalizations in the Philippines were halted for a nine-month period from late October 1945 until a new INS representative was appointed in August of 1946.

Respondent's claim for naturalization is based on the contention that that conduct of the government deprived him of due process of law in violation of the Fifth Amendment to the United States Constitution, because he was present in the Philippines during part, but not all, of the nine-month period during which there was no authorized INS representative there. The naturalization examiner recommended denial of Mendoza's petition, but the District Court

granted the petition without reaching the merits of Mendoza's constitutional claim. The District Court concluded that the government could not relitigate the due process issue because that issue had already been decided against the government in *In re Naturalization of 68 Filipino War Veterans*, 406 F.Supp. 931 (N.D.Cal.1975) (hereinafter "68 Filipinos"), a decision which the government had not appealed.

Noting that the doctrine of nonmutual offensive collateral estoppel has been conditionally approved by this Court in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), the Court of Appeals concluded that the District Court had not abused its discretion in applying that doctrine against the United States in this case.... For the reasons which follow, we agree with the government that *Parklane Hosiery's* approval of nonmutual offensive collateral estoppel is not to be extended to the United States.

Under the judicially-developed doctrine of collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation. Collateral estoppel, like the related doctrine of res judicata, serves to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." In furtherance of those policies, this Court in recent years has broadened the scope of the doctrine of collateral estoppel beyond its common law limits. *Ibid.* It has done so by abandoning the requirement of mutuality of parties, *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971), and by conditionally approving the "offensive" use of collateral estoppel by a non-party to a prior lawsuit. *Parklane Hosiery, supra.*⁴

In *Standefer v. United States*, 447 U.S. 10 (1980), however, we emphasized the fact that *Blonder-Tongue* and *Parklane Hosiery* involved disputes over private rights between private litigants. We noted that "[i]n such cases, no significant harm flows from enforcing a rule that affords a litigant only one full and fair opportunity to litigate an issue, and [that] there is no sound reason for burdening the courts with repetitive litigation." *Ibid.* Here, as in *Montana v. United States, supra*, the party against whom the estoppel is sought is the United States; but here, unlike in *Montana*, the party who seeks to preclude the government from relitigating the issue was not a party to the earlier litigation.

We have long recognized that "the Government is not in a position identical to that of a private litigant," both because of the geographic breadth of government litigation and also, most importantly, because of the nature of the issues the government litigates. It is not open to serious dispute that the government is a party to a far greater number of cases on a nationwide basis than even the most litigious private entity; in 1982, the United States was a party to more than 75,000 of the 206,193 filings in the United States District Courts. In the same year the United States was a party to just under 30% of the civil cases appealed from the District Courts to the Court of Appeals. Government litigation frequently involves legal questions of substantial public importance; indeed, because the proscriptions of the United States Constitution are so generally

4 Offensive use of collateral estoppel occurs when a plaintiff seeks to foreclose a defendant from relitigating an issue the defendant has previously litigated unsuccessfully in another action against the same or a different party. Defensive use of collateral estoppel occurs when a defendant seeks to prevent a plaintiff from relitigating an issue the plaintiff has previously litigated unsuccessfully in another action against the same or a different party.

directed at governmental action, many constitutional questions can arise only in the context of litigation to which the government is a party. Because of those facts the government is more likely than any private party to be involved in lawsuits against different parties which nonetheless involve the same legal issues.

A rule allowing nonmutual collateral estoppel against the government in such cases would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue. Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari. Indeed, if nonmutual estoppel were routinely applied against the government, this Court would have to revise its practice of waiting for a conflict to develop before granting the government's petitions for certiorari.

The Solicitor General's policy for determining when to appeal an adverse decision would also require substantial revision.⁶ The Court of Appeals faulted the government in this case for failing to appeal a decision that it now contends is erroneous. But the government's litigation conduct in a case is apt to differ from that of a private litigant. Unlike a private litigant who generally does not forego an appeal if he believes that he can prevail, the Solicitor General considers a variety of factors, such as the limited resources of the government and the crowded dockets of the courts, before authorizing an appeal. The application of nonmutual estoppel against the government would force the Solicitor General to abandon those prudential concerns and to appeal every adverse decision in order to avoid foreclosing further review.

In addition to those institutional concerns traditionally considered by the Solicitor General, the panoply of important public issues raised in governmental litigation may quite properly lead successive Administrations of the Executive Branch to take differing positions with respect to the resolution of a particular issue. While the Executive Branch must of course defer to the Judicial Branch for final resolution of questions of constitutional law, the former nonetheless controls the progress of government litigation through the federal courts. It would be idle to pretend that the conduct of government litigation in all its myriad features, from the decision to file a complaint in the United States District Court to the decision to petition for certiorari to review a judgment of the Court of Appeals, is a wholly mechanical procedure which involves no policy choices whatever.

For example, in recommending to the Solicitor General in 1977 that the government's appeal in *68 Filipinos* be withdrawn, newly appointed INS Commissioner Castillo commented that such a course "would be in keeping with the policy of the [new] Administration," described as "a course of compassion and amnesty." But for the very reason that such policy choices are made by one Administration, and often reevaluated by another Administration, courts should be careful when they seek to apply expanding rules of collateral estoppel to government litigation. The government of course may not now undo the consequences of its decision not to appeal the District Court judgment in the *68 Filipinos* case; it is bound by that judgment under the principles of *res judicata*. But we now hold that it is not further bound in a case involving a litigant who was not a party to the earlier litigation....

⁶ The Attorney General has delegated discretionary authority to the Solicitor General to determine when to appeal from a judgment adverse to the interests of the United States. 28 C.F.R. § 0.20(b).

We hold, therefore, that nonmutual offensive collateral estoppel simply does not apply against the government in such a way as to preclude relitigation of issues such as those involved in this case. The conduct of government litigation in the courts of the United States is sufficiently different from the conduct of private civil litigation in those courts so that what might otherwise be economy interests underlying a broad application of collateral estoppel are outweighed by the constraints which peculiarly affect the government. We think that our conclusion will better allow thorough development of legal doctrine by allowing litigation in multiple forums. Indeed, a contrary result might disserve the economy interests in whose name estoppel is advanced by requiring the government to abandon virtually any exercise of discretion in seeking to review judgments unfavorable to it. The doctrine of res judicata, of course, prevents the government from relitigating the same cause of action against the parties to a prior decision, but beyond that point principles of nonmutual collateral estoppel give way to the policies just stated.

Our holding in this case is consistent with each of our prior holdings to which the parties have called our attention, and which we reaffirm. Today in a companion case we hold that the government may be estopped under certain circumstances from relitigating a question when the parties to the two lawsuits are the same. *United States v. Stauffer Chemical Co.*, 464 U.S. 165 (1983). None of those cases, however, involve the effort of a party to estop the government in the absence of mutuality.

The concerns underlying our disapproval of collateral estoppel against the government are for the most part inapplicable where mutuality is present.... The application of an estoppel when the government is litigating the same issue with the same party avoids the problem of freezing the development of the law because the government is still free to litigate that issue in the future with some other party. And, where the parties are the same, estopping the government spares a party that has already prevailed once from having to relitigate—a function it would not serve in the present circumstances. We accordingly hold that the Court of Appeals was wrong in applying nonmutual collateral estoppel against the government in this case. Its judgment is therefore reversed.

NATIONAL PETROLEUM REFINERS ASSOCIATION

v.

FEDERAL TRADE COMMISSION

482 F.2d 672 (D.C. Cir. 1973)

J. SKELLY WRIGHT, Circuit Judge.

This case presents an important question concerning the powers and procedures of the Federal Trade Commission. We are asked to determine whether the Commission, under its governing statute, the Trade Commission Act, and specifically 15 U.S.C. § 46(g), is empowered to promulgate substantive rules of business conduct or, as it terms them, "Trade Regulation Rules." The effect of these rules would be to give greater specificity and clarity to the broad standard of illegality—"unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce"—which the agency is empowered to prevent. Once promulgated, the rules would be used by the agency in adjudicatory proceedings aimed at producing cease and desist orders against violations of the statutory standard. The central question in such adjudicatory proceedings would be whether the particular defendant's conduct violated the rule in question.

The case is here on appeal from a District Court ruling that the Commission lacks authority under its governing statute to issue rules of this sort. ... Specifically at issue in the District Court was the Commission's rule declaring that failure to post octane rating numbers on gasoline pumps at service stations was an unfair method of competition and an unfair or deceptive act or practice.⁶ The plaintiffs in the District Court, appellees here, are two trade associations and 34 gasoline refining companies. Plaintiffs attacked the rule on several grounds, but the District Court disposed of the case solely on the question of the Commission's statutory authority to issue such rules. That is the only question presented for our consideration on appeal. ...

As always, we must begin with the words of the statute creating the Commission and delineating its powers. Section 5 directs the Commission to "prevent persons, partnerships, or corporations ... from using unfair methods of competition in commerce and unfair or deceptive acts or

⁶ The rule provides:

"In connection with the sale or consignment of motor gasoline for general automotive use, in commerce as 'commerce' is defined in the Federal Trade Commission Act, it constitutes an unfair method of competition and an unfair or deceptive act or practice for refiners or others who sell to retailers, when such refiners or other distributors own or lease the pumps through which motor gasoline is dispensed to the consuming public, to fail to disclose clearly and conspicuously in a permanent manner on the pumps the minimum octane number or numbers of the motor gasoline being dispensed. In the case of those refiners or other distributors who lease pumps, the disclosure required by this section should be made as soon as it is legally practical; for example, not later than the end of the current lease period. Nothing in this section should be construed as applying to gasoline sold for aviation purposes.

"NOTE: For the purposes of this section, 'octane number' shall mean the octane number derived from the sum of research (R) and motor (M) octane numbers divided by 2; (R + M)/2. The research octane (R) and motor octane number (M) shall be as described in the American Society for Testing and Materials (ASTM) 'Standard Specifications for Gasoline' D 439-70, and subsequent revisions, and ASTM Test Methods D 2699 and D 2700."

36 Fed.Reg. 23871 (1971).

practices in commerce.” Section 5(b) of the Trade Commission Act specifies that the Commission is to accomplish this goal by means of issuance of a complaint, a hearing, findings as to the facts, and issuance of a cease and desist order. ...

Appellees argue that since Section 5 mentions only adjudication as the means of enforcing the statutory standard, any supplemental means of putting flesh on that standard, such as rulemaking, is contrary to the overt legislative design. But Section 5(b) does not use limiting language suggesting that adjudication alone is the only proper means of elaborating the statutory standard. ... Nor are we persuaded by appellees’ argument that, despite the absence of limiting language in Section 5 regarding the role of adjudication in defining the meaning of the statutory standard, we should apply the maxim of statutory construction *expressio unius est exclusio alterius* ... For the Trade Commission Act includes a provision which specifically provides for rule-making... . Section 6(g) of the Act states that the Commission may “[f]rom time to time * * * classify corporations and * * * make rules and regulations for the purpose of carrying out the provisions of sections 41 to 46 and 47 to 58 of this title.”⁷ ...

Of course, it is at least arguable that [Section 6(g) only empowers the Commission] to promulgate procedural, as opposed to substantive, rules for administration of the Section 5 adjudication and enforcement powers. But we see no reason to import such a restriction on the “rules and regulations” permitted by Section 6(g). ... The substantive rule here unquestionably implements the statutory plan. Section 5 adjudications-trial type proceedings-will still be necessary to obtain cease and desist orders against offenders, but Section 5 enforcement through adjudication will be expedited, simplified, and thus “carried out” by use of this substantive rule. And the overt language of both Section 5 and Section 6, read together, supports its use in Section 5 proceedings.

Our belief that “rules and regulations” in Section 6(g) should be construed to permit the Commission to promulgate binding substantive rules as well as rules of procedure is reinforced by the construction courts have given similar provisions in the authorizing statutes of other administrative agencies. ... In *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), for example, the Supreme Court upheld the Federal Communications Commission’s chain broadcasting rules regulating programming arrangements between networks and affiliates, in part on the basis of the FCC’s generalized rule-making authority in 47 U.S.C. § 303(r). It rejected arguments similar to those made here, ruling that this authority extended beyond specification of technical and financial qualifications to be used as guides in the administration of the Commission’s license-granting power. It permitted the FCC to use rule-making to elaborate the terms of its mandate to pursue the “public convenience, interest, or necessity,” by framing rules carrying out public policy objectives like affiliate independence and avoidance of undue network control over programming in the hope that listeners would be ensured a diversity of program offerings.

United States v. Storer Broadcasting Co., 351 U.S. 192 (1956), took the FCC’s rulemaking power a step further, holding that applicants for licenses could be rejected before receiving a hearing specified by statute in the event they did not comply with the Commission’s rule limiting networks’ power to own stock in affiliates and did not give sufficient reasons why the rule

⁷ 15 U.S.C. § 45 is § 5 of the Trade Commission Act.

should be waived. ...

Storer and its successors are, of course, closely related to the question we face here. For a major component of appellees' complaint is the abridgement of their interest in having the Trade Commission Act's standard of illegality elaborated only in an adjudicatory context. In our view, this argument was adequately answered in *Storer*, at least to the extent the FTC's rule serves the "purpose of shortening and simplifying the adjudicative process and of clarifying the law in advance," and thus, in *Storer's* language, aids the Commission in the "orderly conduct of its business." ...

[T]here is little question that the availability of substantive rule-making gives any agency an invaluable resource-saving flexibility in carrying out its task of regulating parties subject to its statutory mandate. More than merely expediting the agency's job, use of substantive rule-making is increasingly felt to yield significant benefits to those the agency regulates. Increasingly, courts are recognizing that use of rule-making to make innovations in agency policy may actually be fairer to regulated parties than total reliance on case-by-case adjudication. ...

[U]tilizing rule-making procedures opens up the process of agency policy innovation to a broad range of criticism, advice and data that is ordinarily less likely to be forthcoming in adjudication. Moreover, the availability of notice before promulgation and wide public participation in rule-making avoids the problem of singling out a single defendant among a group of competitors for initial imposition of a new and inevitably costly legal obligation. ...

Such benefits are especially obvious in cases involving initiation of rules of the sort the FTC has promulgated here. The Commission's statement on basis and purpose indicated that the decision to impose the obligation of octane rating disclosure on gasoline dealers entailed careful consideration of automobile engine requirements, automobile dealers' practices in instructing purchasers how to care for their engines, consumer gasoline purchasing habits, and costs to gasoline dealers. In addition, the Commission had to choose exactly what kind of disclosure was the fairest. In short, a vast amount of data had to be compiled and analyzed, and the Commission, armed with these data, had to weigh the conflicting policies of increasingly knowledgeable consumer decision-making against alleged costs to gasoline dealers which might be passed on to the consumer. True, the decision to impose a bright-line standard of behavior might have been evolved by the Commission in a single or a succession of adjudicatory proceedings, much as the Supreme Court has imposed *per se* rules of business behavior in antitrust cases. But evolution of bright-line rules is often a slow process and may involve the distinct disadvantage of acting without the broad range of data and argument from all those potentially affected that may be flushed out through use of legislative-type rule-making procedures. ... And utilizing rule-making in advance of adjudication here minimizes the unfairness of using a purely case-by-case approach requiring "compliance by one manufacturer while his competitors [engaging in similar practices] remain free to violate the Act." ...

There is little disagreement that the Commission will be able to proceed more expeditiously, give greater certainty to businesses subject to the Act, and deploy its internal resources more efficiently with a mixed system of rule-making and adjudication than with adjudication alone. With the issues in Section 5 proceedings reduced by the existence of a rule delineating what is a violation of the statute or what presumptions the Commission proposes to rely upon, proceedings

will be speeded up. For example, in an adjudication proceeding based on a violation of the octane rating rule at issue here, the central question to be decided will be whether or not pumps owned by a given refiner are properly marked. Without the rule, the Commission might well be obliged to prove and argue that the absence of the rating markers in each particular case was likely to have injurious and unfair effects on consumers or competition. Since this laborious process might well have to be repeated every time the Commission chose to proceed subsequently against another defendant on the same ground, the difference in administrative efficiency between the two kinds of proceedings is obvious. Furthermore, rules, as contrasted with the holdings reached by case-by-case adjudication, are more specific as to their scope, and industry compliance is more likely simply because each company is on clearer notice whether or not specific rules apply to it.

Moreover, when delay in agency proceedings is minimized by using rules, those violating the statutory standard lose an opportunity to turn litigation into a profitable and lengthy game of postponing the effect of the rule on their current practice. As a result, substantive rules will protect the companies which willingly comply with the law against what amounts to the unfair competition of those who would profit from delayed enforcement as to them. This, too, will minimize useless litigation and is likely to assist the Commission in more effectively allocating its resources. ...

Any fears that the agency could successfully use rule-making power as a means of oppressive or unreasonable regulation seem exaggerated in view of courts' general practice in reviewing rules to scrutinize their statement of basis and purpose to see whether the major issues of policy pro and con raised in the submissions to the agency were given sufficient consideration. The Commission is hardly free to write its own law of consumer protection and antitrust since the statutory standard which the rules may define with greater particularity is a legal standard. Although the Commission's conclusions as to the standard's reach are ordinarily shown deference, the standard must "get [its] final meaning from judicial construction." ...

Our conclusion as to the scope of Section 6(g) is not disturbed by the fact that the agency itself did not assert the power to promulgate substantive rules until 1962 and indeed indicated intermittently before that time that it lacked such power.... The various statements made by Commission representatives questioning its authority to promulgate rules which are to be used with binding effect on subsequent adjudications are not determinative of the question before us. True, the accustomed judicial practice is to give "great weight" to an agency's construction of its own enabling legislation, particularly when such a construction stretches back, as here, to a time close to the agency's origin. The argument for judicial deference is not so strong where, as here, the question does not require special agency competence or expertise, requiring the agency, for example, to make a complex judgment involving its areas of expertise, competition and impact of business practices on consumer behavior. Here, the question is simply one of statutory interpretation concerning the procedures and setting in which the Commission may elaborate its statutory standard. Since this sort of question calls largely for the exercise of historical analysis and logical and analogical reasoning, it is the everyday staple of judges as well as agencies. Thus we feel confident in making our own judgment as to the proper construction of Section 6(g). We are, of course, reassured by the fact that the Commission itself, as distinguished from its former spokesmen, has come to the same conclusion.

A more troubling obstacle to the Commission's position here is the argument that Congress was made fully aware of the formerly restrictive view of the Commission's power and passed a series of laws granting limited substantive rule-making authority to the Commission in discrete areas allegedly on the premise that the 1914 debate withheld such authority. ...

The view that the Commission lacked substantive rule-making power has been clearly brought to the attention of Congress and, rather than simply failing to act on the question, Congress, in expanding the agency's powers in several discrete areas of marketing regulation, affirmatively enacted limited grants of substantive rule-making authority in the Wool Products Act of 1939, the Fur Products Labeling Act of 1951, the Flammable Fabrics Act of 1953 as amended in 1967, the Textile Fiber Products Identification Act of 1958, and the Fair Packaging and Labeling Act of 1967. Thus it is argued that Congress would not have granted the agency such powers unless it had felt that otherwise the agency lacked rule-making authority.

Conceding the greater force of this argument than one premised on congressional inaction, we believe it must not be accepted blindly. In such circumstances, it is equally possible that Congress granted the power out of uncertainty, understandable caution, and a desire to avoid litigation. ... For there is ample evidence that, while some of the limited rule-making legislation may well have been influenced by the belief that the 1914 Act did not grant the Commission substantive rule-making power, at least during the passage of the Packaging and Labeling Act of 1967, this assumption was not accepted and was thought by many congressmen to be an open question, despite the protestations of the Commission's chairman that the agency was powerless under the 1914 Act.... Where there is solid reason, as there plainly is here, to believe that Congress, in fact, has not wholeheartedly accepted the agency's viewpoint and instead enacted legislation out of caution and to eliminate the kind of disputes that invariably attend statutory ambiguity, we believe that relying on the *de facto* ratification argument is unwise. In such circumstances, we must perform our customary task of coming to an independent judgment as to the statute's meaning, confident that if Congress believes that its creature, the Commission, thus exercises too much power, it will repeal the grant.⁴⁰ ...

We rely, therefore, on the plain language of Section 6(g) which gives the Commission the authority to "make rules and regulations for the purpose of carrying out the provisions of [Section 5]." We hold that under the terms of its governing statute, and under Section 6(g) in particular, the Federal Trade Commission is authorized to promulgate rules defining the meaning of the statutory standards of the illegality the Commission is empowered to prevent. Thus we must reverse the District Court's judgment and remand this case for further proceedings.

It is so ordered.

⁴⁰ We are aware, of course, that in both the just concluded 92nd Congress and the current 93rd Congress legislation granting the FTC limited substantive rule-making power in the area of "unfair and deceptive practices" has been under consideration.

AIR LINE PILOTS ASSOCIATION

**v.
QUESADA**

276 F.2d 892 (2d Cir. 1960)

LUMBARD, Chief Judge.

On December 1, 1959 the defendant, Elwood R. Quesada, Administrator of the Federal Aviation Agency, promulgated a regulation which provides:

“No individual who has reached his 60th birthday shall be utilized or serve as a pilot on any aircraft while engaged in air carrier operations.”

This regulation took effect on March 15, 1960.

The plaintiffs, thirty-five individual pilots, their collective bargaining representative, Air Line Pilots Association, and its president, brought the suit in January 1960 for a declaratory judgment that the regulation was null and void and for an injunction against its threatened application. The complaint alleged—and the plaintiffs contend on this appeal—that the regulation is invalid because it was issued without the holding of adjudicatory hearings required by the Administrative Procedure Act, and by § 609 of the Federal Aviation Act of 1958, before an airman’s license may be amended, modified, suspended or revoked, and because it was arbitrary, discriminatory and without reasonable relation to the standards set forth in § 601 of the Act, under which it was issued. The plaintiffs also claim that the regulation, by terminating their right to pilot planes in commercial service after age sixty, deprives them of property in their pilots’ licenses without due process of law.

The Federal Aviation Act was passed by Congress for the purpose of centralizing in a single authority—indeed, in one administrator—the power to frame rules for the safe and efficient use of the nation’s airspace. The Administrator was given the authority, theretofore divided between the Civil Aeronautics Board and the Civil Aeronautics Authority:

“* * * To promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time: ...

“(5) Reasonable rules and regulations governing, in the interest of safety, the maximum hours or periods of service of airmen, and other employees, of air carriers; and

“(6) Such reasonable rules and regulations, or minimum standards, governing other practices, methods, and procedure, as the Administrator may find necessary to provide adequately for national security and safety in air commerce.”³

³ Federal Aviation Act of 1958, § 1(a), 49 U.S.C.A. § 1421(a). Section 601(b) goes on to state in part: “In prescribing standards, rules, and regulations * * * the Administrator shall give full consideration to the duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest. ...

Pursuant to this statutory authority the Administrator and his medical staff in the fall of 1958 began a study concerning the aging process and the diseases and physiological deterioration that accompany it in an effort to determine whether a maximum age should be set for service by commercial pilots. The Administrator took counsel with various experts in aviation medicine and safety and, among other things, determined the practices followed by five foreign air lines with respect to a mandatory retirement age. Finally, in June 1959 the Administrator published a proposed regulation in substance the same as that ultimately prescribed. In accordance with the rule-making requirements of § 4 of the Administrative Procedure Act, opportunity was afforded for the submission of written data and briefs. About one hundred comments, including those of the plaintiff association, were received. A large majority favored the regulation. No hearing was held since the Administrator determined, as he was entitled to under the rulemaking provisions of the Administrative Procedure Act, that a hearing would not “serve a useful purpose” and that it was not “necessary in the public interest.”

Plaintiffs assert that since the certificates of all commercial pilots are in effect modified by the regulation, and in the case of pilots already sixty, terminated, promulgation of the regulation was not rule-making within the meaning of the Administrative Procedure Act, but that the Administrator was obliged to proceed by holding an adjudicative hearing for each airman affected and by the entry of an “order.” Alternatively, they say that whether one labels the issuance of the regulation rule-making or not, § 609 of the Federal Aviation Act requires the Administrator to hold a hearing and permit each pilot affected to submit evidence as to the fairness of the regulation before his certificate can be amended.

Section 2 of the Administrative Procedure Act, 5 U.S.C. § 1001, defines a “rule” as “any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy...” The regulation before us is just such a statement. It is directed to all the commercial airlines and to the more than 18,000 licensed commercial pilots. It looks to the future. It has the character of legislative enactment carried out on an administrative level. Adjudication, on the other hand, whether administrative or judicial, is the application of a statute or other legal standard to a given fact situation involving particular individuals. Promulgation of the age sixty limitation by the Administrator was the very antithesis of adjudication; it was the formulation of a general rule to be applied to individual pilots at a subsequent time. We think the directive was properly issued in accordance with the rule-making requirements of § 4 of the Administrative Procedure Act. See *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956).

The Administrator’s action does not lose the character of rule-making because it modifies the plaintiff pilots’ claimed property rights in their licenses and their contractual rights under collective bargaining agreements to pilot planes beyond age sixty. Nor does the regulation violate due process because it modifies pilots’ rights without affording each certificate holder a hearing. Administrative regulations often limit in the public interest the use that persons may make of their property without affording each one affected an opportunity to present evidence upon the fairness of the regulation. Obviously, unless the incidental limitations upon the use of

The Administrator shall exercise and perform his powers and duties under this chapter in such manner as will best tend to reduce or eliminate the possibility of, or recurrence of, accidents in air transportation. ...”

airmen's certificates were subject to modification by general rules, the conduct of the Administrator's business would be subject to intolerable burdens which might well render it impossible for him effectively to discharge his duties. All changes in certificates would be subject to adjudicative hearings, including appeals to the court, and each pilot whose license was affected—here some 18,000—might demand to be heard individually. When met with a similar challenge, Justice Holmes stated:

“Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving him a chance to be heard.”

Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441, 445 (1915).

All private property and privileges are held subject to limitations that may reasonably be imposed upon them in the public interest. Only when the limitations are too stringent in relation to the public interest to be served are they invalid. The limitations here are entirely reasonable.

The plaintiffs strenuously urge that, however things may be under the Administrative Procedure Act, the statutory scheme of the Federal Aviation Act shows that Congress intended to afford airmen the greater protection of an individual hearing before their certificates may be modified. We disagree. Section 609 of the Act states that “the Administrator may ... reexamine any civil airman,” and if, as a result of such reexamination, the Administrator “determines that safety in air commerce ... and the public interest requires, (he) may issue an order amending, modifying, suspending, or revoking ... (any) airman certificate.” The certificate holder must be advised of the “charges or other reasons relied upon by the Administrator” for his action, and a hearing must be afforded with a right of appeal and trial de novo before the Civil Aeronautics Board and ultimate right of review in the courts of appeals. It is clear that Congress intended that the section should apply only when an order of the Administrator is directed to an individual airman and is concerned with conduct or other facts peculiar to that airman. Use of “airman” in the singular, the reference to “charges,” the word “order” in contrast with “regulation” in § 601, and the statement that upon review the Board shall not “be bound by findings of fact of the Administrator” all strongly suggest that § 609 is not intended to apply when a general directive of the Administrator is promulgated, though the regulation may in fact modify airmen's certificates. ...

The immediate impetus to the legislation was a series of major air crashes culminating in the midair collision of two large airlines over the Grand Canyon in 1956 with the loss of 128 lives. Congress believed there was a need for a more streamlined and efficient means for safety rule-making in place of the system of divided duties and responsibilities existing under the Civil Aeronautics Act, [E]laborate procedural requirements ... are patently incompatible with the expedition with which Congress intended that the Administrator should act in the promulgation of safety rules. The clear public interest in the speedy adoption of rules relating to air safety far outweighs any possible advantage in a multitude of piecemeal and time-consuming hearings

brought by each contesting airman.¹⁰ ...

Plaintiffs assert that the age sixty limitation is arbitrary and discriminatory and without relation to any requirements of safety. For purposes of judicial review, such an argument must mean that the Administrator had no reasonable basis for his exercise of judgment. Surely this is not the fact in the case before us as there is considerable support for the Administrator's action. The Administrator found that the number of commercial pilots over sixty years of age has until recent years been very few but is increasing rapidly; that older pilots because of their seniority under collective bargaining agreements often fly the newest, largest, and fastest planes; that available medical studies show that sudden incapacitation due to heart attacks or strokes become more frequent as men approach age sixty and present medical knowledge is such that it is impossible to predict with accuracy those individuals most likely to suffer attacks; that a number of foreign air carriers contacted had mandatory retirement ages of sixty or less; and that numerous aviation safety experts advocated establishing a maximum age of sixty or younger. In spite of these considerations, plaintiffs ask us to weigh other arguments against the establishment of a maximum age and to hold that the Administrator's action was unreasonable. It is not the business of courts to substitute their untutored judgment for the expert knowledge of those who are given authority to implement the general directives of Congress. The Administrator is an expert in his field; this is the very reason he was given the responsibility for the issuance of air safety regulations. We can only ask whether the regulation is reasonable in relation to the standards prescribed in the statute and the facts before the Administrator. Of that there can be no doubt in this case.

Nor is the regulation discriminatory because it applies only to the piloting of commercial aircraft, and does not restrict pilots with respect to other planes. The Administrator did not act unreasonably in placing greater limitations on the certificates of pilots flying planes carrying large numbers of passengers who have no opportunity to select a pilot of their own choice. The Federal Aviation Act contemplates just such distinctions between the regulations governing 'air commerce' and those governing other air transportation.

The preliminary injunction was properly denied. The order is affirmed.

¹⁰ Apart from the fact that we doubt that the Administrator is required by the statute to afford anyone an opportunity to apply for an exemption from any requirement of the regulations, we think it is probable that the present statute and regulations do afford just such an opportunity. ...

YETMAN
v.
GARVEY

261 F.3d 664 (7th Cir. 2001)

FLAUM, Chief Judge.

... In *Baker v. FAA*, 917 F.2d 318 (7th Cir. 1990), a group of airline captains sought review of an FAA order which had denied their petition for exemptions from an agency rule that prohibits those who have reached the age of sixty from serving as pilots. While we ultimately affirmed the decision of the FAA not to grant the requested exemptions, we cautioned the agency that its Age Sixty Rule was not sacrosanct and untouchable. Further, we counseled the FAA that serious consideration should be given to the petitioners' position that granting exemptions would not increase the risk of air travel accidents. Since that decision, over a decade has passed, but the FAA has held fast to its blanket policy of denying requests for exemptions. Thus, once again, a group of pilots, all either past the age of sixty or approaching that age, have come before this court in an effort to have us declare that the FAA's policy constitutes an abuse of discretion.¹

In reviewing the agency's denial of the petition for exemptions in *Baker*, we recognized that by its insistence on precise data, the FAA had in a certain sense insulated itself from attack. "Admittedly, petitioners in this case face a Catch-22: from one perspective they cannot get exemptions until they show they can fly large passenger aircraft[s] safely, and they cannot show they can fly such planes safely until they get exemptions." While it may seem unfair that by virtue of the Age Sixty Rule these pilots are being denied the opportunity to prove that they warrant exemptions, nevertheless, it is the petitioners' burden to present persuasive evidence that granting exemptions would not impair safety. ...

We recognize that the FAA's requirements for granting exemptions to the Age Sixty Rule are [demanding]. Yet, the rigorous nature of the FAA's exemption requirements is not pertinent at this juncture. Our inquiry is limited to examining whether the FAA has appropriately considered the evidence, and provided sufficient justifications for its decisions. We cannot say that the FAA has failed to take into account new advances in medical technology. ... Yet given the fact the FAA has nevertheless denied every petition for exemption, an argument could be made that the FAA has examined these studies and protocols only to satisfy the burden which we have placed on the agency. However, that would require that we delve into the motivations of the agency, an inappropriate inquiry under our deferential standard of review. While our review of the evidence submitted by the petitioners might lead us to conclude that a strict age sixty cutoff, without exceptions, is a rule better suited to 1959 than to 2001, this court is not an expert in aerospace medicine, and Congress did not endow this court with the duty to make such a policy judgment. The FAA has the discretionary power to establish a rigid policy. ...

For the foregoing reasons, we affirm the order of the FAA.

¹ Most recently, the Professional Pilots Federation, a group devoted to abolishing the Age Sixty Rule, brought suit against the FAA in the D.C. Circuit, claiming that the Age Sixty Rule violates the Age Discrimination and Employment Act ("ADEA"). The court denied the Federation's challenge, holding that nothing in the ADEA could be read to restrict the FAA from making age a criterion for employment when it acts in its capacity as the guarantor of public safety in the air.

When is Process Due? An Exercise

In each of the following examples, a citizen wants to be able to participate in a hearing conducted by the government before adverse official action is taken against him or her. For present purposes, do not concern yourself with what the hearing would look like; assume it would involve notice of the proposed government action and some opportunity to present oral arguments and evidence.

Please rank the following claims of entitlement to a hearing, from worthiest to least worthy. Don't worry about caselaw or doctrine. Be prepared to discuss the judgments and intuitions that guide your conclusions. Your rankings are solely for the purpose of in-class discussion and will not be looked at or graded by me.

- a) Alice is a bus driver for a local public transit authority. Her employment is at will. She has just received a pink slip informing her that she is to be discharged at the end of the month. Alice wants a hearing before she is fired.
- b) Bob lives in a small town where the police chief routinely circulates to shopkeepers a flier picturing "suspected shoplifters." He has learned that his face appears on the flier the police chief is about to distribute. Bob wants a hearing before the flier is distributed.
- c) Clarissa has just learned that the state highway department has decided to condemn her house by eminent domain in order to demolish it and build an interchange for a new federally-assisted highway. Clarissa wants a hearing before her house is demolished.
- d) Donald owns a chain of hotels and casinos. He has just learned that the local district attorney has decided to seek an indictment against him for fraud. Donald wants a hearing with the district attorney before the grand jury meets to consider whether to indict him.
- e) Emilio owns a small machine shop. His shop has been cited by the local safety inspector, who has said that the company must install safety railings at considerable cost or else shut down. Emilio wants a hearing before the citation goes into effect.

Ada VAN HARKEN, et al.

v.

CITY OF CHICAGO

103 F.3d 1346 (7th Cir. 1997)

POSNER, Chief Judge.

In 1990 the City of Chicago adopted a new system for the adjudication of parking violations. Chi. Munic. Code ch. 9-100. That system is challenged in this class action on behalf of persons who, either having been adjudged liable for a parking violation in contested proceedings under the new procedures and paid their fines or having received a parking ticket and still having time to contest it, claim that the new procedures violate the due process clauses of the United States and Illinois constitutions. The district judge dismissed the suit for failure to state a claim under either constitution. * * *

In Illinois before 1987 and in a majority of the states to this day, parking violations were and are technically criminal violations even when the maximum punishment is a modest fine; and the violator was and in the other states is entitled to the usual safeguards of the criminal process. A number of states, however, have decriminalized parking violations and substituted a civil penalty system. * * * Illinois joined these states in 1987 by authorizing its municipalities to adopt such systems if they wanted. 625 ILCS § 5/11-208.3. Chicago took up the invitation, as we said, in 1990. Under the system, the parking ticket the police officer writes is prima facie evidence of a violation. The owner of the car can either pay the fine written on the ticket (which cannot exceed \$100) or challenge the ticket either in writing or in person. These challenges are adjudicated not by regular judges or other employees of the City or State but by private lawyers whom the City hires as part-time hearing officers. The police officer who wrote the ticket is not expected to participate in the hearing, other than through the ticket itself, which is treated as the equivalent of an affidavit. Ordinarily, the only live participant in the hearing besides the hearing officer will be the respondent, that is, the recipient of the ticket. A manual that the City has issued to its hearing officers directs them to conduct a searching cross-examination of the respondent. The hearing officer can subpoena witnesses (including, of course, the police officer who wrote the ticket), and can consider any documentary evidence (photographs, for example) submitted by the respondent. The hearing is tape recorded. If the hearing officer finds a violation and imposes a fine, the respondent can seek judicial review in the Circuit Court of Cook County upon the payment of the normal fee for filing a case in that court, which is \$200.

The plaintiffs make two main arguments for why the City's new system for the adjudication of parking violations denies due process. The first is that because such violations have traditionally been treated as criminal offenses, though of the lowest order—below misdemeanors—the state may not reclassify them as civil, and reduce the procedural safeguards required in criminal proceedings, unless it reduces the sanction. Before the new ordinance, the appellants tell us, the maximum fine for a parking violation was \$100 and was a criminal punishment; under the new ordinance, the maximum fine is still \$100, so it must be a criminal punishment still, and the violator must therefore be entitled to the full panoply of procedural safeguards. Both steps in this argument are wrong. The first also rests on an erroneous factual premise. The maximum fine before the new ordinance was not \$100 but \$200, * * * although

apparently no fine above \$100 was imposed. * * * That is a detail. The important point is that nothing in the due process clause forbids the reclassification of criminal offenses as civil violations. Of course the state would not be permitted by reclassifying murder as a civil violation to impose the death penalty without the procedural protections that the courts have interpreted the Constitution as requiring in capital cases; but the reason would be the severity of the punishment. A criminal fine of \$100 is much less severe than many incontestably civil penalties, so if the state decides to convert it to a civil penalty there is no reason to impose the safeguards of criminal procedure. It is extraordinarily common, moreover, for a statute to carry both civil and criminal penalties. If the legislature repeals the criminal penalties, does this mean that the civil penalties, which remain, are now criminal, because they are replacing criminal penalties in those cases in which, before the repeal, the criminal rather than the civil penalty would have been imposed? The implication of the plaintiffs' argument is that the answer is "yes," which shows how strange the argument is. And even if, as we do not for a moment believe, some weird ratchet decreed that once a criminal penalty, always a criminal penalty, nothing in the Constitution prevents a state from relaxing the conventional safeguards of the criminal process in tandem with a lightening of the penalties. * * *

The due process clause is not a straitjacket, preventing state governments from experimenting with more efficient methods of delivering governmental services, in this case the provision of a municipal road system. The traditional system, mindlessly assimilating a parking ticket to an indictment for murder, was archaic and ineffective. * * * Its age did not entrench it against reform.

The plaintiffs' second argument is that the procedures prescribed by the new ordinance are inadequate even for civil proceedings. The test for due process in the sense of procedural minima, as set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), requires a comparison of the costs and benefits of whatever procedure the plaintiff contends is required. The use of cost-benefit analysis to determine due process is not to every constitutional scholar's or judge's taste, but it is the analysis prescribed by the Supreme Court and followed by the lower courts including our own. * * * It has become orthodox and we are bound to follow it; nor is it challenged by the plaintiffs.

The costs of procedural safeguards are fairly straightforward, which is not to say easy to quantify. For example, the cost of requiring the police officer who writes the ticket to appear in person at every hearing at which the ticket is challenged—one of the procedural safeguards that the plaintiffs in this case claim is required by the due process clause—depends on the number and length of hearings, the average time the police officer requires to get to and from the hearing, the reduction in his productivity from the interruption of his normal workday that attendance at such hearings requires, and the expense to the City of hiring additional policemen. We were told at argument without contradiction that the City issues 4 million parking tickets a year, of which 5 percent are challenged (200,000), a third of those in person rather than by mail and thus requiring an oral hearing (67,000). If the ticketing officer were required to attend, the number of hearings requested would undoubtedly be higher, because respondents would think it likely that the officer wouldn't show up—a frequent occurrence at hearings on moving violations. Suppose the number of hearings would be double what it is under the challenged procedures (that is, would be 134,000), but the police would show up at only half, putting us back to 67,000; and suppose that a hearing at which a police officer showed up cost him on average 2 hours away from his

other work. Then this procedural safeguard for which the plaintiffs are contending would cost the City 134,000 police hours a year, the equivalent of 67 full-time police officers at 2,000 hours a year per officer. In addition, more hearing officers would be required, at some additional cost to the City, because each hearing would be longer as a result of the presence of another live witness. And all these are simply the monetary costs. Acquittals of violators due solely to the ticketing officer's failure to appear would undermine the deterrent efficacy of the parking laws and deprive the City of revenues to which it was entitled as a matter of substantive justice.

The benefits of a procedural safeguard are even trickier to estimate than the costs. The benefits depend on the harm that the safeguard will avert in cases in which it prevents an erroneous result and the likelihood that it will prevent an erroneous result. We know the harm here to the innocent car owner found "guilty" and forced to pay a fine: it is the fine, and it can be anywhere from \$10 to \$100, for an average of \$55. We must ask how likely it is that error would be averted if the ticketing officer were present at the hearing and therefore subject to cross-examination. Suppose that in his absence the probability of an erroneous determination that the respondent really did commit a parking violation is 5 percent, and the officer's presence would cut that probability in half, to 2.5 percent. Then the average saving to the innocent respondent from this additional procedural safeguard would be only \$1.38 ($\$55 \times .025$)—a trivial amount.

These calculations are inexact, to say the least; but they help to show, what is pretty obvious without them, that the benefits of requiring the police officer to appear at every hearing are unlikely to exceed the costs. Assuming that oral testimony is more persuasive in general than written, the only basis on which the plaintiffs can complain about the police officer's absence is that it prevents them from cross-examining him. In short, they are claiming that they have a right of confrontation. There is no absolute right of confrontation in civil cases. See *Richardson v. Perales*, 402 U.S. 389, 402, 407 (1971). In particular cases, live testimony and cross-examination might be so important as to be required by due process, although the principal case so holding—*Goldberg v. Kelly*, 397 U.S. 254, 268 (1970)—may not have much life left after *Mathews v. Eldridge*, supra. *Goldberg* granted a right of confrontation to persons denied welfare benefits; *Mathews* withdrew it for persons denied disability benefits. The basis for distinction was the hardship to persons taken off welfare, and of course it has no counterpart here. Moreover, the ordinance empowers the hearing officer to subpoena witnesses. That provides an adequate safety valve for those cases, if any (there may be none), in which fair consideration of the respondent's defense would require, as a constitutional imperative, the recognition of a right of confrontation.

This discussion disposes not only of the plaintiffs' objection to dispensing with the attendance of the police officer but also of their objection to the hearing officers' being instructed to cross-examine respondents. As the only live witness at the hearing the respondent has a natural advantage over the City, whose only witness, the police officer, is not present to contradict whatever far-fetched tale the respondent thinks up. A searching examination of the respondent is a legitimate counter to this advantage.

This point casts a retrospective aura of unreality over the plaintiffs' complaint about the absence of the ticketing officer. In some cases his absence will hurt the respondent by preventing cross-examination, but in most it will help the respondent by giving him the last

word. No net disadvantage to respondents is plausible. It is apparent that substituting the ticket for the officer was designed not to make it more difficult for the respondent to avoid a finding of liability, but merely to save the expense of tying up police officers' time in hearings when they should be out on the street protecting the public safety.

The plaintiffs also object to the fact that the hearing officers are hired by, and can be fired at will by, the City's Director of Revenue, who may want to maximize the City's "take" from parking tickets. Actually, this cannot be assumed. The Director of Revenue is appointed by and serves at the pleasure of the Mayor, whose concerns transcend the collection of parking fines. The enforcement of the parking laws is not merely a program for raising revenues; it is also designed to facilitate traffic flow. Compliance, which produces no revenue, may be as important to the City as noncompliance, which produces revenue but also clogs the streets. Compliance is not reliably promoted by absence of fair adjudication of contested parking violations; indeed, if parking fines are assessed randomly, you might as well park illegally, as you are as likely to be fined if you park legally. And drivers are voters, and so cannot be treated with an utter disregard for their predictable indignation at being fined for parking violations that they did not commit.

So it is possible that the plaintiffs are being too cynical about the Director of Revenue. But even if they are not, we do not think that the adjudicative reliability of the hearing officers is fatally compromised by the manner of their appointment and by their lack of secure tenure. The officers are not paid by the number of hearings that they resolve against the respondent; they are not paid any portion of the fines they impose, as in *Tumey v. Ohio*, 273 U.S. 510, 520 (1927); they have no quota of fines that they must impose on pain of losing their jobs or having their pay reduced; and they have no other financial stake in the outcome of the cases that they adjudicate, as in *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821-25 (1986). If their very indirect, very tenuous stake (a fear that if a hearing officer lets off too many alleged parking violators, the Director of Revenue may get angry and fire him) were enough to disqualify them on constitutional grounds, elected judges, who face significant pressure from the electorate to be "tough" on crime, would be disqualified from presiding at criminal trials, especially in capital cases. They are not. * * *

The plaintiffs' best case, but not good enough, held that due process prevented a mayor from wearing a second hat as a judge administering his village's traffic and other ordinances that provided for fines and forfeitures. *Ward v. Village of Monroeville*, 409 U.S. 57 (1972). The mayor did not have a direct pecuniary stake in the decisions of the mayor's court, but his indirect stake was great. Between a third and a half of the village's total revenues came from the fines and forfeitures decreed by the court, so that failure to maintain a stern policy of conviction might make it impossible for him to balance the village's budget. Nothing like that is suggested here, and there is the additional difference that the hearing officers have no municipal governmental responsibilities. If the Director of Revenue or his subordinates were hearing these parking cases, the plaintiffs would have a stronger case. Slightly stronger, at any rate, for the mere fact that an administrative or adjudicative body derives a financial benefit from fines or penalties that it imposes is not in general a violation of due process, * * * though in exceptional cases * * * it may be.

The hearing officers are not, it is true, as well insulated from the pressures of their political superiors as administrative law judges. But they are almost certainly cheaper (they

receive \$35 an hour, with no benefits, and are paid only when they are working), a relevant consideration under the cost-benefit formula of the *Mathews* case; and we must not forget that the maximum penalty that they are empowered to impose is only \$100. The less that is at stake, other things being equal, the less process is due; that is the teaching of *Mathews*. With the benefits of stricter procedures as slight as our earlier example suggested they are, the costs that would be incurred in maintaining a corps of “real” judges justify the City’s preference for a cheaper alternative.

We conclude that the City’s procedures for dealing with parking violations satisfy the requirements of due process. But this conclusion owes nothing to the respondent’s appellate remedy. An appeal that, quite apart from the time of the appellant and any attorney’s fee, costs more to file than the maximum gain that the appeal can yield the appellant is an illusory remedy. We are unimpressed by the City’s argument that it cannot be blamed because it does not fix the fee for filing a case in the circuit court (a state court) and because it lacks statutory authorization to create its own appellate remedy for the parking violators. The first point is irrelevant, because one branch of state government, as the City is for purposes of the Fourteenth Amendment, cannot justify a denial of due process by pointing to the actions of another branch (and the state legislature). See *Lovell v. Griffin*, 303 U.S. 444, 450 (1938). The second is incorrect, since there is nothing to prevent the City from establishing within the Bureau of Parking Enforcement a tier of appellate hearing officers. * * *

[*Affirmed.*]

Hamdi v. Rumsfeld
542 U.S. 507 (2004)

JUSTICE O'CONNOR announced the judgment of the Court....

[Yaser Esam Hamdi, a United States citizen, was captured by U.S. troops in Afghanistan in late 2001 and was subsequently detained without formal charges or proceedings and without access to a lawyer. After holding that the President had the authority to designate U.S. citizens “enemy combatants” and detain them, the Supreme Court used the *Mathews v. Eldridge* framework to determine what procedures Hamdi was constitutionally entitled to in order to challenge his “enemy combatant” designation.]

It is beyond question that substantial interests lie on both sides of the scale in this case. Hamdi’s “private interest ... affected by the official action” is the most elemental of liberty interests—the interest in being free from physical detention by one’s own government. ... “We have always been careful not to ‘minimize the importance and fundamental nature’ of the individual’s right to liberty,” and we will not do so today.

On the other side of the scale are the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States. ...[T]he law of war and the realities of combat may render such detentions both necessary and appropriate, and our due process analysis need not blink at those realities. Without doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them.

The Government also argues at some length that its interests in reducing the process available to alleged enemy combatants are heightened by the practical difficulties that would accompany a system of trial-like process. In its view, military officers who are engaged in the serious work of waging battle would be unnecessarily and dangerously distracted by litigation half a world away, and discovery into military operations would both intrude on the sensitive secrets of national defense and result in a futile search for evidence buried under the rubble of war. To the extent that these burdens are triggered by heightened procedures, they are properly taken into account in our due process analysis.

Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation’s commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.

With due recognition of these competing concerns, we believe that neither the process proposed by the Government nor the process apparently envisioned by the District Court below strikes the proper constitutional balance when a United States citizen is detained in the United States as an enemy combatant. ...

We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.

At the same time, the exigencies of the circumstances may demand that, aside from these core elements, enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution

would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided. Thus, once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria. A burden-shifting scheme of this sort would meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error while giving due regard to the Executive once it has put forth meaningful support for its conclusion that the detainee is in fact an enemy combatant. In the words of *Mathews*, process of this sort would sufficiently address the "risk of erroneous deprivation" of a detainee's liberty interest while eliminating certain procedures that have questionable additional value in light of the burden on the Government. ...

In sum, while the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting, the threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen's core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator. ...

Thus, while we do not question that our due process assessment must pay keen attention to the particular burdens faced by the Executive in the context of military action, it would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his government, simply because the Executive opposes making available such a challenge. Absent suspension of the writ by Congress, a citizen detained as an enemy combatant is entitled to this process. ...

Aside from unspecified "screening" processes, and military interrogations in which the Government suggests Hamdi could have contested his classification, Hamdi has received no process. An interrogation by one's captor, however effective an intelligence-gathering tool, hardly constitutes a constitutionally adequate factfinding before a neutral decisionmaker. That even purportedly fair adjudicators "are disqualified by their interest in the controversy to be decided is, of course, the general rule." *Tumey v. Ohio*, 273 U. S. 510, 522 (1927). Plainly, the "process" Hamdi has received is not that to which he is entitled under the Due Process Clause.

There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal. Indeed, it is notable that military regulations already provide for such process in related instances, dictating that tribunals be made available to determine the status of enemy detainees who assert prisoner-of-war status under the Geneva Convention. In the absence of such process, however, a court that receives a petition for a writ of habeas corpus from an alleged enemy combatant must itself ensure that the minimum requirements of due process are achieved. ... We have no reason to doubt that courts faced with these sensitive matters will pay proper heed both to the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns.

Procedural requirements for agency adjudication and rulemaking: some problems

After *Florida East Coast*...

1. Industrial, an electric utility, applies to the Environmental Protection Agency (EPA) for permission to discharge heated water into a nearby river. EPA's enabling statute prohibits the discharge of any pollutant unless the discharging entity has obtained a permit from the EPA. Industrial concedes that its discharges do not meet EPA's effluent limitations. Instead, it seeks an exemption from those effluent limitations pursuant to § 316(a) of the enabling statute, which requires a permit to be issued to any discharging entity who, "after public hearing," can demonstrate to the satisfaction of the agency that the EPA's standards are more stringent than necessary to protect aquatic wildlife.

a) Industrial's permit request is denied without a public hearing. Has the agency acted unlawfully? What are Industrial's best arguments?

b) A public hearing is held before an ALJ at which Industrial and a local environmental group, Save the River, are permitted to offer evidence and cross-examine one another's witnesses. The ALJ denies Industrial's request for a permit. Industrial appeals to the Administrator of the EPA, who assembles a panel of six in-house advisers to assist with his technical review. This panel submits a report finding that Industrial had met its burden of proof. Relying on this report, and without any further oral hearing, the Administrator grants Industrial's permit request. You are the lawyer for Save the River. Has the agency acted unlawfully? What are your best arguments?

c) Same facts as b), except that the enabling statute makes no reference to a "public hearing." Now does Save the River lose? Again, what are your best arguments?

d) What if EPA decides to resolve, through adjudication, the question of whether its effluent limitations *in general* are more stringent than necessary to protect aquatic wildlife, i.e., whether to relax its nationwide effluent limitations? From the information you've been given, can it do that? If it does, must it provide an oral hearing? A decision "on the record"?

After *Vermont Yankee*...

2. An agency, acting pursuant to § 553 of the APA, refuses to hold oral hearings prior to promulgating a new rule. Unlawful?

3. An agency, acting pursuant to § 553 of the APA, issues a notice of proposed rulemaking (NPRM), collects comments from interested parties, and then issues a rule.

a) The rule is based on information that the agency failed to disclose in the NPRM, despite the fact that the information was already in the agency's possession at the time the NPRM was issued. Unlawful?

b) The rule is based on information that came into the agency's possession during the comment period, but the agency failed to initiate a new round of notice and comment based on the new information. Unlawful?

c) The rule differs in its subject matter from the proposed rule described in the NPRM. Unlawful?

d) The rule differs in some of its substance and details from the proposed rule described in the NPRM. Unlawful?

e) The rule contains a "statement of basis and purpose," as required by § 553. This statement fails to respond to some important questions raised during the comment period by important industry or public-interest groups. Unlawful?

BABBITT
v.
SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON

515 U.S. 687 (1995)

Justice STEVENS delivered the opinion of the Court.

The Endangered Species Act of 1973 contains a variety of protections designed to save from extinction species that the Secretary of the Interior designates as endangered or threatened. Section 9 of the Act makes it unlawful for any person to “take” any endangered or threatened species. The Secretary has promulgated a regulation that defines the statute’s prohibition on takings to include “significant habitat modification or degradation where it actually kills or injures wildlife.” This case presents the question whether the Secretary exceeded his authority under the Act by promulgating that regulation.

I

Section 9(a)(1) of the Act provides the following protection for endangered species: “[W]ith respect to any endangered species of fish or wildlife listed pursuant to § 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to * * * take any such species within the United States or the territorial sea of the United States.” 16 U.S.C. § 1538(a)(1). Section 3(19) of the Act defines the statutory term “take”: “The term ‘take’ means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19).

The Act does not further define the terms it uses to define “take.” The Interior Department regulations that implement the statute, however, define the statutory term “harm”:

Harm in the definition of ‘take’ in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.

50 CFR § 17.3 (1994). This regulation has been in place since 1975.

A limitation on the § 9 “take” prohibition appears in § 10(a)(1)(B) of the Act, which Congress added by amendment in 1982. That section authorizes the Secretary to grant a permit for any taking otherwise prohibited by § 9(a)(1)(B) “if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.” * * *

Respondents in this action are small landowners, logging companies, and families dependent on the forest products industries in the Pacific Northwest and in the Southeast, and organizations that represent their interests. They brought this declaratory judgment action * * * to challenge the statutory validity of the Secretary’s regulation defining “harm,” particularly the inclusion of habitat modification and degradation in the definition. Respondents challenged the regulation on its face. Their complaint alleged that application of the “harm” regulation to the

red-cockaded woodpecker, an endangered species, and the northern spotted owl, a threatened species, had injured them economically. * * *

II

Because this case was decided on motions for summary judgment, we may appropriately make certain factual assumptions in order to frame the legal issue. First, we assume respondents have no desire to harm either the red-cockaded woodpecker or the spotted owl; they merely wish to continue logging activities that would be entirely proper if not prohibited by the ESA. On the other hand, we must assume *arguendo* that those activities will have the effect, even though unintended, of detrimentally changing the natural habitat of both listed species and that, as a consequence, members of those species will be killed or injured. The Secretary * * * submits that the § 9 prohibition on takings, which Congress defined to include “harm,” places on respondents a duty to avoid harm that habitat alteration will cause the birds unless respondents first obtain a permit pursuant to § 10.

The text of the Act provides three reasons for concluding that the Secretary’s interpretation is reasonable. First, an ordinary understanding of the word “harm” supports it. The dictionary definition of the verb form of “harm” is “to cause hurt or damage to; injure.” Webster’s Third New International Dictionary 1034 (1966). In the context of the ESA, that definition naturally encompasses habitat modification that results in actual injury or death to members of an endangered or threatened species.

Respondents argue that the Secretary should have limited the purview of “harm” to direct applications of force against protected species, but the dictionary definition does not include the word “directly” or suggest in any way that only direct or willful action that leads to injury constitutes “harm.” Moreover, unless the statutory term “harm” encompasses indirect as well as direct injuries, the word has no meaning that does not duplicate the meaning of other words that § 3 uses to define “take.” A reluctance to treat statutory terms as surplusage supports the reasonableness of the Secretary’s interpretation.¹¹

Second, the broad purpose of the ESA supports the Secretary’s decision to extend protection against activities that cause the precise harms Congress enacted the statute to avoid. In *TVA v. Hill*, 437 U.S. 153 (1978), we described the Act as “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” * * *

Third, the fact that Congress in 1982 authorized the Secretary to issue permits for takings that § 9(a)(1)(B) would otherwise prohibit, “if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity,” strongly suggests that Congress understood

¹¹ In contrast, if the statutory term “harm” encompasses such indirect means of killing and injuring wildlife as habitat modification, the other terms listed in § 3—“harass,” “pursue,” “hunt,” “shoot,” “wound,” “kill,” “trap,” “capture,” and “collect”—generally retain independent meanings. Most of those terms refer to deliberate actions more frequently than does “harm,” and they therefore do not duplicate the sense of indirect causation that “harm” adds to the statute. In addition, most of the other words in the definition describe either actions from which habitat modification does not usually result (e.g., “pursue,” “harass”) or effects to which activities that modify habitat do not usually lead (e.g., “trap,” “collect”). To the extent the Secretary’s definition of “harm” may have applications that overlap with other words in the definition, that overlap reflects the broad purpose of the Act.

§ 9(a)(1)(B) to prohibit indirect as well as deliberate takings. * * *

The Court of Appeals made three errors in asserting that “harm” must refer to a direct application of force because the words around it do.¹⁵ First, the court’s premise was flawed. Several of the words that accompany “harm” in the § 3 definition of “take,” especially “harass,” “pursue,” “wound,” and “kill,” refer to actions or effects that do not require direct applications of force. Second, to the extent the court read a requirement of intent or purpose into the words used to define “take,” it ignored § 9’s express provision that a “knowing” action is enough to violate the Act. Third, the court employed [the interpretive canon known as] *noscitur a sociis* to give “harm” essentially the same function as other words in the definition, thereby denying it independent meaning. The canon, to the contrary, counsels that a word “gathers meaning from the words around it.” The statutory context of “harm” suggests that Congress meant that term to serve a particular function in the ESA, consistent with but distinct from the functions of the other verbs used to define “take.” The Secretary’s interpretation of “harm” to include indirectly injuring endangered animals through habitat modification permissibly interprets “harm” to have “a character of its own not to be submerged by its association.” * * *

We need not decide whether the statutory definition of “take” compels the Secretary’s interpretation of “harm,” because our conclusions that Congress did not unambiguously manifest its intent to adopt respondents’ view and that the Secretary’s interpretation is reasonable suffice to decide this case. See generally *Chevron*. The latitude the ESA gives the Secretary in enforcing the statute, together with the degree of regulatory expertise necessary to its enforcement, establishes that we owe some degree of deference to the Secretary’s reasonable interpretation.

III

Our conclusion that the Secretary’s definition of “harm” rests on a permissible construction of the ESA gains further support from the legislative history of the statute. The Committee Reports accompanying the bills that became the ESA do not specifically discuss the meaning of “harm,” but they make clear that Congress intended “take” to apply broadly to cover indirect as well as purposeful actions. The Senate Report stressed that “[t]ake’ is defined... in the broadest possible manner to include every conceivable way in which a person can ‘take’ or attempt to ‘take’ any fish or wildlife.” The House Report stated that “the broadest possible terms” were used to define restrictions on takings. The House Report underscored the breadth of the “take” definition by noting that it included “harassment, whether intentional or not.” The Report explained that the definition “would allow, for example, the Secretary to regulate or prohibit the activities of birdwatchers where the effect of those activities might disturb the birds and make it difficult for them to hatch or raise their young.” These comments, ignored in the

¹⁵ The dissent makes no effort to defend the Court of Appeals’ reading of the statutory definition as requiring a direct application of force. Instead, it tries to impose on § 9a limitation of liability to “affirmative conduct intentionally directed against a particular animal or animals.” Under the dissent’s interpretation of the Act, a developer could drain a pond, knowing that the act would extinguish an endangered species of turtles, without even proposing a conservation plan or applying for a permit under § 9(a)(1)(B); unless the developer was motivated by a desire “to get at a turtle,” no statutory taking could occur. Because such conduct would not constitute a taking at common law, the dissent would shield it from § 9 liability, even though the words “kill” and “harm” in the statutory definition could apply to such deliberate conduct. We cannot accept that limitation. In any event, our reasons for rejecting the Court of Appeals’ interpretation apply as well to the dissent’s novel construction.

dissent's welcome but selective foray into legislative history, support the Secretary's interpretation that the term "take" in § 9 reached far more than the deliberate actions of hunters and trappers. * * *

IV

When it enacted the ESA, Congress delegated broad administrative and interpretive power to the Secretary. The task of defining and listing endangered and threatened species requires an expertise and attention to detail that exceeds the normal province of Congress. Fashioning appropriate standards for issuing permits under § 10 for takings that would otherwise violate § 9 necessarily requires the exercise of broad discretion. The proper interpretation of a term such as "harm" involves a complex policy choice. When Congress has entrusted the Secretary with broad discretion, we are especially reluctant to substitute our views of wise policy for his. See *Chevron*. In this case, that reluctance accords with our conclusion, based on the text, structure, and legislative history of the ESA, that the Secretary reasonably construed the intent of Congress when he defined "harm" to include "significant habitat modification or degradation that actually kills or injures wildlife."

In the elaboration and enforcement of the ESA, the Secretary and all persons who must comply with the law will confront difficult questions of proximity and degree; for, as all recognize, the Act encompasses a vast range of economic and social enterprises and endeavors. These questions must be addressed in the usual course of the law, through case-by-case resolution and adjudication.

The judgment of the Court of Appeals is reversed.

[The concurring opinion of Justice O'CONNOR is omitted.]

Justice SCALIA, with whom the CHIEF JUSTICE and Justice THOMAS join, dissenting:

I think it unmistakably clear that the legislation at issue here (1) forbade the hunting and killing of endangered animals, and (2) provided federal lands and federal funds for the acquisition of private lands, to preserve the habitat of endangered animals. The Court's holding that the hunting and killing prohibition incidentally preserves habitat on private lands imposes unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use. I respectfully dissent.

* * * In my view petitioners must lose—the regulation must fall—even under the test of *Chevron*, so I shall assume that the Court is correct to apply *Chevron*.

The regulation has three features which, for reasons I shall discuss at length below, do not comport with the statute. First, it interprets the statute to prohibit habitat modification that is no more than the cause-in-fact of death or injury to wildlife. Any "significant habitat modification" that in fact produces that result by "impairing essential behavioral patterns" is made unlawful, regardless of whether that result is intended or even foreseeable, and no matter how long the chain of causality between modification and injury.

Second, the regulation does not require an “act”: the Secretary’s officially stated position is that an omission will do. * * *

The third and most important unlawful feature of the regulation is that it encompasses injury inflicted, not only upon individual animals, but upon populations of the protected species. “Injury” in the regulation includes “significantly impairing essential behavioral patterns, including breeding.” Impairment of breeding does not “injure” living creatures; it prevents them from propagating, thus “injuring” a population of animals which would otherwise have maintained or increased its numbers. What the face of the regulation shows, the Secretary’s official pronouncements confirm. The Final Redefinition of “harm” accompanying publication of the regulation said that “harm” is not limited to “direct physical injury to an individual member of the wildlife species,” and refers to “injury to a population.”

None of these three features of the regulation can be found in the statutory provisions supposed to authorize it. The term “harm” in § 1532(19) has no legal force of its own. An indictment or civil complaint that charged the defendant with “harming” an animal protected under the Act would be dismissed as defective, for the only operative term in the statute is to “take.” If “take” were not elsewhere defined in the Act, none could dispute what it means, for the term is as old as the law itself. To “take,” when applied to wild animals, means to reduce those animals, by killing or capturing, to human control. See, e.g., 11 Oxford English Dictionary (1933) (“take ... To catch, capture (a wild beast, bird, fish, etc.)”); Webster’s New International Dictionary of the English Language (2d ed. 1949) (take defined as “to catch or capture by trapping, snaring, etc., or as prey”). * * * The taking prohibition * * * is only part of the regulatory plan of § 1538(a)(1), which covers all the stages of the process by which protected wildlife is reduced to man’s dominion and made the object of profit. It is obvious that “take” in this sense—a term of art deeply embedded in the statutory and common law concerning wildlife—describes a class of acts (not omissions) done directly and intentionally (not indirectly and by accident) to particular animals (not populations of animals).

The Act’s definition of “take” does expand the word slightly (and not unusually), so as to make clear that it includes not just a completed taking, but the process of taking, and all of the acts that are customarily identified with or accompany that process (“to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect”); and so as to include attempts. § 1532(19). The tempting fallacy—which the Court commits with abandon—is to assume that once defined, “take” loses any significance, and it is only the definition that matters. The Court treats the statute as though Congress had directly enacted the § 1532(19) definition as a self-executing prohibition, and had not enacted § 1538(a)(1)(B) at all. But § 1538(a)(1)(B) is there, and if the terms contained in the definitional section are susceptible of two readings, one of which comports with the standard meaning of “take” as used in application to wildlife, and one of which does not, an agency regulation that adopts the latter reading is necessarily unreasonable, for it reads the defined term “take”—the only operative term—out of the statute altogether.

That is what has occurred here. The verb “harm” has a range of meaning: “to cause injury” at its broadest, “to do hurt or damage” in a narrower and more direct sense. See, e.g., 1 N. Webster, An American Dictionary of the English Language (1828) (“harm, v.t. To hurt; to injure; to damage; to impair soundness of body, either animal or vegetable”); American College Dictionary 551 (1970) (“harm ... n. injury; damage; hurt: to do him bodily harm”). In

fact the more directed sense of “harm” is a somewhat more common and preferred usage; “harm has in it a little of the idea of specially focused hurt or injury, as if a personal injury has been anticipated and intended.” J. Opdycke, *Mark My Words: A Guide to Modern Usage and Expression* 330 (1949). See also *American Heritage Dictionary of the English Language* (1981) (“Injure has the widest range.... Harm and hurt refer principally to what causes physical or mental distress to living things”). To define “harm” as an act or omission that, however remotely, “actually kills or injures” a population of wildlife through habitat modification, is to choose a meaning that makes nonsense of the word that “harm” defines—requiring us to accept that a farmer who tills his field and causes erosion that makes silt run into a nearby river which depletes oxygen and thereby “impairs [the] breeding” of protected fish, has “taken” or “attempted to take” the fish. It should take the strongest evidence to make us believe that Congress has defined a term in a manner repugnant to its ordinary and traditional sense.

Here the evidence shows the opposite. “harm” is merely one of 10 prohibitory words in § 1532(19), and the other 9 fit the ordinary meaning of “take” perfectly. To “harass, pursue, hunt, shoot, wound, kill, trap, capture, or collect” are all affirmative acts (the provision itself describes them as “conduct,” see § 1532(19)) which are directed immediately and intentionally against a particular animal—not acts or omissions that indirectly and accidentally cause injury to a population of animals. The Court points out that several of the words (“harass,” “pursue,” “wound,” and “kill”) “refer to actions or effects that do not require direct applications of force.” That is true enough, but force is not the point. Even “taking” activities in the narrowest sense, activities traditionally engaged in by hunters and trappers, do not all consist of direct applications of force; pursuit and harassment are part of the business of “taking” the prey even before it has been touched. What the nine other words in § 1532(19) have in common—and share with the narrower meaning of “harm” described above, but not with the Secretary’s ruthless dilation of the word—is the sense of affirmative conduct intentionally directed against a particular animal or animals.

The Court contends that the canon [of *noscitur a sociis*] cannot be applied to deprive a word of all its “independent meaning.” That proposition is questionable to begin with, especially as applied to long lawyers’ listings such as this. If it were true, we ought to give the word “trap” in the definition its rare meaning of “to clothe” (whence “trappings”)—since otherwise it adds nothing to the word “capture.” In any event, the Court’s contention that “harm” in the narrow sense adds nothing to the other words underestimates the ingenuity of our own species in a way that Congress did not. To feed an animal poison, to spray it with mace, to chop down the very tree in which it is nesting, or even to destroy its entire habitat in order to take it (as by draining a pond to get at a turtle), might neither wound nor kill, but would directly and intentionally harm.

The penalty provisions of the Act counsel this interpretation as well. Any person who “knowingly” violates § 1538(a)(1)(B) is subject to criminal penalties under § 1540(b)(1) and civil penalties under § 1540(a)(1); moreover, under the latter section, any person “who otherwise violates” the taking prohibition (i.e., violates it unknowingly) may be assessed a civil penalty of \$500 for each violation, with the stricture that “[e]ach such violation shall be a separate offense.” This last provision should be clear warning that the regulation is in error, for when combined with the regulation it produces a result that no legislature could reasonably be thought to have intended: A large number of routine private activities—farming, for example, ranching, roadbuilding, construction and logging—are subjected to strict-liability penalties when they

fortuitously injure protected wildlife, no matter how remote the chain of causation and no matter how difficult to foresee (or to disprove) the “injury” may be (e.g., an “impairment” of breeding).

The Court says that “[to] read a requirement of intent or purpose into the words used to define ‘take’ ... ignore[s] [§ 1540’s] express provision that a ‘knowing’ action is enough to violate the Act.” This presumably means that because the reading of § 1532(19) advanced here ascribes an element of purposeful injury to the prohibited acts, it makes superfluous (or inexplicable) the more severe penalties provided for a “knowing” violation. That conclusion does not follow, for it is quite possible to take protected wildlife purposefully without doing so knowingly. * * * The hunter who shoots an elk in the mistaken belief that it is a mule deer has not knowingly violated § 1538(a)(1)(B)—not because he does not know that elk are legally protected (that would be knowledge of the law, which is not a requirement), but because he does not know what sort of animal he is shooting. The hunter has nonetheless committed a purposeful taking of protected wildlife, and would therefore be subject to the (lower) strict-liability penalties for the violation.

* * * [The] Court seeks support from a provision which was added to the Act in 1982, the year after the Secretary promulgated the current regulation. The provision states:

[T]he Secretary may permit, under such terms and conditions as he shall prescribe * * * any taking otherwise prohibited by section 1538(a)(1)(B)... if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

16 U.S.C. § 1539(a)(1)(B). * * * The Court claims * * * that the provision “strongly suggests that Congress understood [§ 1538(a)(1)(B)] to prohibit indirect as well as deliberate takings.” That would be a valid inference if habitat modification were the only substantial “otherwise lawful activity” that might incidentally and nonpurposefully cause a prohibited “taking.” Of course it is not. This provision applies to the many otherwise lawful takings that incidentally take a protected species—as when fishing for unprotected salmon also takes an endangered species of salmon. * * *

The Endangered Species Act is a carefully considered piece of legislation that forbids all persons to hunt or harm endangered animals, but places upon the public at large, rather than upon fortuitously accountable individual landowners, the cost of preserving the habitat of endangered species. There is neither textual support for, nor even evidence of congressional consideration of, the radically different disposition contained in the regulation that the Court sustains. For these reasons, I respectfully dissent.

“Risk-risk tradeoffs”

Regulations targeted to *reduce* a certain health risk often have the unanticipated consequence of *increasing* another (“ancillary”) risk. For each of the following examples, assume the truth of the given statement and consider these questions: Should the relevant agency be permitted to take the ancillary risk into account? Should it be *required* to take the ancillary risk into account? Why or why not?

- 1) Airbags make adult passengers safer, but may increase risks for babies who are allowed to ride in the front seat.
- 2) Some studies suggest that mandatory seat-belt laws make people feel safer in their cars, encouraging them to drive faster and leading to more accidents.
- 3) The introduction of unwieldy, “child-proof” caps on medicine bottles caused some parents to leave the caps off, leading to some poisoning deaths.
- 4) Fuel economy standards, designed to improve the environment, encourage development and use of smaller, more dangerous cars.
- 5) Regulations requiring infants riding in airplanes to have their own seats (and seat belts) rather than ride in their parents’ laps end up encouraging more families to drive to their out-of-town destinations—a riskier form of travel.
- 6) Regulations designed to make nuclear power safer also make it more expensive, causing consumers to turn to coal-fired power plants, which present their own health risks.
- 7) By focusing its attention on promulgating a regulation of formaldehyde (which will end up costing between \$70 and \$120 billion per life saved) OSHA diverts its attention away from formulating a similar regulation for asbestos (which will cost only \$3 million per life saved).
- 8) By taking time to ensure the safety of a new AIDS drug, the FDA delays the drug’s entry into the market, depriving some people of the drug for a significant period of time.
- 9) Increased regulation leads to increased costs for companies, as well as reduced profits, fewer jobs, and lower incomes. Individuals with higher incomes tend to live longer. Using assumptions like these, some economists have estimated that government regulation can be expected to induce approximately one fatality for every \$7.5 million in costs it generates.

HECKLER

v.

CHANEY

470 U.S. 821 (1985)

Justice REHNQUIST delivered the opinion of the Court.

... Respondents are several prison inmates convicted of capital offenses and sentenced to death by lethal injection of drugs. They petitioned the Food and Drug Administration (FDA), alleging that under the circumstances the use of these drugs for capital punishment violated the Federal Food, Drug, and Cosmetic Act, and requesting that the FDA take various enforcement actions to prevent these violations. The FDA refused their request. We review here a decision of the Court of Appeals for the District of Columbia Circuit, which held the FDA's refusal to take enforcement actions both reviewable and an abuse of discretion, and remanded the case with directions that the agency be required "to fulfill its statutory function."

Respondents have been sentenced to death by lethal injection of drugs under the laws of the States of Oklahoma and Texas. Those States, and several others, have recently adopted this method for carrying out the capital sentence. Respondents first petitioned the FDA, claiming that the drugs used by the States for this purpose, although approved by the FDA for the medical purposes stated on their labels, were not approved for use in human executions. They alleged that the drugs had not been tested for the purpose for which they were to be used, and that, given that the drugs would likely be administered by untrained personnel, it was also likely that the drugs would not induce the quick and painless death intended. They urged that use of these drugs for human execution was the "unapproved use of an approved drug" and constituted a violation of the Act's prohibitions against "misbranding." They also suggested ... that the FDA was required to approve the drugs as "safe and effective" for human execution before they could be distributed in interstate commerce. See 21 U.S.C. § 355. They therefore requested the FDA to take various investigatory and enforcement actions to prevent these perceived violations; they requested the FDA to affix warnings to the labels of all the drugs stating that they were unapproved and unsafe for human execution, to send statements to the drug manufacturers and prison administrators stating that the drugs should not be so used, and to adopt procedures for seizing the drugs from state prisons and to recommend the prosecution of all those in the chain of distribution who knowingly distribute or purchase the drugs with intent to use them for human execution.

The FDA Commissioner responded, refusing to take the requested actions. The Commissioner first detailed his disagreement with respondents' understanding of the scope of FDA jurisdiction over the unapproved use of approved drugs for human execution, concluding that FDA jurisdiction in the area was generally unclear but in any event should not be exercised to interfere with this particular aspect of state criminal justice systems. He went on to state:

"Were FDA clearly to have jurisdiction in the area, moreover, we believe we would be authorized to decline to exercise it under our inherent discretion to decline to pursue certain enforcement matters. The unapproved use of approved drugs is an area in which the case law is far from uniform. Generally, enforcement

proceedings in this area are initiated only when there is a serious danger to the public health or a blatant scheme to defraud. We cannot conclude that those dangers are present under State lethal injection laws, which are duly authorized statutory enactments in furtherance of proper State functions....”

... The District Court granted summary judgment for petitioner. A divided panel of the Court of Appeals for the District of Columbia Circuit reversed. ...

The court found “law to apply” in the form of a FDA policy statement which indicated that the agency was “obligated” to investigate the unapproved use of an approved drug when such use became “widespread” or “endanger[ed] the public health.” The court held that this policy statement constituted a “rule” and was considered binding by the FDA. ...

The Court of Appeals’ decision addressed three questions: (1) whether the FDA had jurisdiction to undertake the enforcement actions requested, (2) whether if it did have jurisdiction its refusal to take those actions was subject to judicial review, and (3) whether if reviewable its refusal was arbitrary, capricious, or an abuse of discretion. In reaching our conclusion that the Court of Appeals was wrong, however, we need not and do not address the thorny question of the FDA’s jurisdiction. For us, this case turns on the important question of the extent to which determinations by the FDA *not to exercise* its enforcement authority over the use of drugs in interstate commerce may be judicially reviewed. That decision in turn involves the construction of two separate but necessarily interrelated statutes, the APA and the FDCA. ...

This Court has not had occasion to interpret [the] second exception in § 701(a) in any great detail. On its face, the section does not obviously lend itself to any particular construction; indeed, one might wonder what difference exists between § (a)(1) and § (a)(2). The former section seems easy in application; it requires construction of the substantive statute involved to determine whether Congress intended to preclude judicial review of certain decisions. ... But one could read the language “committed to agency discretion *by law*” in § (a)(2) to require a similar inquiry. In addition, commentators have pointed out that construction of § (a)(2) is further complicated by the tension between a literal reading of § (a)(2), which exempts from judicial review those decisions committed to agency “discretion,” and the primary scope of review prescribed by § 706(2)(A)—whether the agency’s action was “arbitrary, capricious, or an *abuse of discretion*.” How is it, they ask, that an action committed to agency discretion can be unreviewable and yet courts still can review agency actions for abuse of that discretion? The APA’s legislative history provides little help on this score. Mindful, however, of the common-sense principle of statutory construction that sections of a statute generally should be read “to give effect, if possible, to every clause,” we think there is a proper construction of § (a)(2) which satisfies each of these concerns.

This Court first discussed § (a)(2) in *Citizens to Preserve Overton Park v. Volpe*, [where we] first addressed the “threshold question” of whether the agency’s action was at all reviewable. After setting out the language of § 701(a), the Court stated:

“In this case, there is no indication that Congress sought to prohibit judicial review and there is most certainly no ‘showing of “clear and convincing evidence” of a ... legislative intent’ to restrict access to judicial review....

Similarly, the Secretary's decision here does not fall within the exception for action 'committed to agency discretion.' This is a very narrow exception. ... The legislative history of the Administrative Procedure Act indicates that it is applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' ..."

The above quote answers several of the questions raised by the language of § 701(a), although it raises others. First, it clearly separates the exception provided by § (a)(1) from the § (a)(2) exception. The former applies when Congress has expressed an intent to preclude judicial review. The latter applies in different circumstances; even where Congress has not affirmatively precluded review, review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion. In such a case, the statute ("law") can be taken to have "committed" the decisionmaking to the agency's judgment absolutely. This construction avoids conflict with the "abuse of discretion" standard of review in § 706—if no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for "abuse of discretion." In addition, this construction satisfies the principle of statutory construction mentioned earlier, by identifying a separate class of cases to which § 701(a)(2) applies.

To this point our analysis does not differ significantly from that of the Court of Appeals. That court purported to apply the "no law to apply" standard of *Overton Park*. We disagree, however, with that court's insistence that the "narrow construction" of § (a)(2) required application of a presumption of reviewability even to an agency's decision not to undertake certain enforcement actions. Here we think the Court of Appeals broke with tradition, case law, and sound reasoning.

Overton Park did not involve an agency's refusal to take requested enforcement action. It involved an affirmative act of approval under a statute that set clear guidelines for determining when such approval should be given. Refusals to take enforcement steps generally involve precisely the opposite situation, and in that situation we think the presumption is that judicial review is not available. This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion. This recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement.

The reasons for this general unsuitability are many. First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities. ...

In addition to these administrative concerns, we note that when an agency refuses to act it

generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect. Similarly, when an agency *does* act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner. The action at least can be reviewed to determine whether the agency exceeded its statutory powers. Finally, we recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to “take Care that the Laws be faithfully executed.”

We of course only list the above concerns to facilitate understanding of our conclusion that an agency's decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2). For good reasons, such a decision has traditionally been “committed to agency discretion,” and we believe that the Congress enacting the APA did not intend to alter that tradition.... In so stating, we emphasize that the decision is only presumptively unreviewable; the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers.⁴ Thus, in establishing this presumption in the APA, Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers. Congress may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue. How to determine when Congress has done so is the question left open by *Overton Park*.

[The Court examined the text of the FDCA and found no relevant language setting forth specific criteria for action or establishing a mandatory tone. Describing the FDCA's “policy statement” as “singularly unhelpful,” the Court found it both vague and contradicted by a general FDA regulation characterizing its enforcement discretion as unreviewable.]

We therefore conclude that the presumption that agency decisions not to institute proceedings are unreviewable under 5 U.S.C. § 701(a)(2) is not overcome by the enforcement provisions of the FDCA. The FDA's decision not to take the enforcement actions requested by respondents is therefore not subject to judicial review under the APA. The general exception to reviewability provided by § 701(a)(2) for action “committed to agency discretion” remains a narrow one, but within that exception are included agency refusals to institute investigative or enforcement proceedings, unless Congress has indicated otherwise. In so holding, we essentially leave to Congress, and not to the courts, the decision as to whether an agency's refusal to institute proceedings should be judicially reviewable. No colorable claim is made in this case that the agency's refusal to institute proceedings violated any constitutional rights of respondents, and we do not address the issue that would be raised in such a case. Cf. *Johnson v. Robison*, 415 U.S. 361, 366 (1974); *Yick Wo v. Hopkins*, 118 U.S. 356, 372-374 (1886). The fact that the drugs involved in this case are ultimately to be used in imposing the death penalty must not lead this

⁴ We do not have in this case a refusal by the agency to institute proceedings based solely on the belief that it lacks jurisdiction. Nor do we have a situation where it could justifiably be found that the agency has “consciously and expressly adopted a general policy” that is so extreme as to amount to an abdication of its statutory responsibilities. Although we express no opinion on whether such decisions would be unreviewable under § 701(a)(2), we note that in those situations the statute conferring authority on the agency might indicate that such decisions were not “committed to agency discretion.”

Court or other courts to import profound differences of opinion over the meaning of the Eighth Amendment to the United States Constitution into the domain of administrative law.

The judgment of the Court of Appeals is reversed.

[The concurring opinion of Justice BRENNAN is omitted.]

Justice MARSHALL, concurring in the judgment.

Easy cases at times produce bad law, for in the rush to reach a clearly ordained result, courts may offer up principles, doctrines, and statements that calmer reflection, and a fuller understanding of their implications in concrete settings, would eschew. In my view, the “presumption of unreviewability” announced today is a product of that lack of discipline that easy cases make all too easy. ... Because this “presumption of unreviewability” is fundamentally at odds with rule-of-law principles firmly embedded in our jurisprudence, because it seeks to truncate an emerging line of judicial authority subjecting enforcement discretion to rational and principled constraint, and because, in the end, the presumption may well be indecipherable, one can only hope that it will come to be understood as a relic of a particular factual setting in which the full implications of such a presumption were neither confronted nor understood.

I write separately to argue for a different basis of decision: that refusals to enforce, like other agency actions, are reviewable in the absence of a “clear and convincing” congressional intent to the contrary, but that such refusals warrant deference when, as in this case, there is nothing to suggest that an agency with enforcement discretion has abused that discretion.

In response to respondents’ petition, the FDA Commissioner stated that the FDA would not pursue the complaint

“under our inherent discretion to decline to pursue certain enforcement matters. The unapproved use of approved drugs is an area in which the case law is far from uniform. Generally, enforcement proceedings in this area are initiated only when there is a serious danger to the public health or a blatant scheme to defraud. We cannot conclude that those dangers are present under State lethal injection laws.... [W]e decline, as a matter of enforcement discretion, to pursue supplies of drugs under State control that will be used for execution by lethal injection.”

The FDA may well have been legally required to provide this statement of basis and purpose for its decision not to take the action requested. Under the Administrative Procedure Act, such a statement is required when an agency denies a “written application, petition, or other request of an interested person made in connection with any agency proceedings.” 5 U.S.C. § 555(e). Whether this written explanation was legally required or not, however, it does provide a sufficient basis for holding, *on the merits*, that the FDA’s refusal to grant the relief requested was within its discretion.

First, respondents on summary judgment neither offered nor attempted to offer any evidence that the reasons for the FDA’s refusal to act were other than the reasons stated by the agency. Second, ... the FDCA is not a mandatory statute that requires the FDA to prosecute all violations

of the Act. Thus, the FDA clearly has significant discretion to choose which alleged violations of the Act to prosecute. Third, the basis on which the agency chose to exercise this discretion—that other problems were viewed as more pressing—generally will be enough to pass muster. Certainly it is enough to do so here, where the number of people currently affected by the alleged misbranding is around 200, and where the drugs are integral elements in a regulatory scheme over which the States exercise pervasive and direct control. ...

The Court, however, is not content to rest on this ground. Instead, the Court transforms the arguments for deferential review on the merits into the wholly different notion that “enforcement” decisions are presumptively unreviewable altogether—unreviewable whether the resource-allocation rationale is a sham, unreviewable whether enforcement is declined out of vindictive or personal motives, and unreviewable whether the agency has simply ignored the request for enforcement. But surely it is a far cry from asserting that agencies must be given substantial leeway in allocating enforcement resources among valid alternatives to suggesting that agency enforcement decisions are presumptively unreviewable *no matter what factor caused the agency to stay its hand*.

This “presumption of unreviewability” is also a far cry from prior understandings of the Administrative Procedure Act. As the Court acknowledges, the APA presumptively entitles any person “adversely affected or aggrieved by agency action,” 5 U.S.C. § 702—which is defined to include the “failure to act,” 5 U.S.C. § 551(13)—to judicial review of that action. That presumption can be defeated if the substantive statute precludes review, § 701(a)(1), or if the action is committed to agency discretion *by law*, § 701(a)(2), but as Justice Harlan’s opinion in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967), made clear in interpreting the APA’s judicial review provisions:

“The legislative material elucidating [the APA] manifests a congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the Administrative Procedure Act’s ‘generous review provisions’ must be given a ‘hospitable’ interpretation.... [O]nly upon a showing of ‘clear and convincing evidence’ of a contrary legislative intent should the courts restrict access to judicial review.”

...Rather than confront *Abbott Laboratories*, perhaps the seminal case on judicial review under the APA, the Court chooses simply to ignore it. ...

[A]rguments about prosecutorial discretion do not necessarily translate into the context of agency refusals to act.... Criminal prosecutorial decisions vindicate only intangible interests, common to society as a whole, in the enforcement of the criminal law. The conduct at issue has already occurred; all that remains is society’s general interest in assuring that the guilty are punished. In contrast, requests for administrative enforcement typically seek to prevent concrete and future injuries that Congress has made cognizable—injuries that result, for example, from misbranded drugs, such as alleged in this case, or unsafe nuclear power plants—or to obtain palpable benefits that Congress has intended to bestow—such as labor union elections free of corruption. Entitlements to receive these benefits or to be free of these injuries often run to specific classes of individuals whom Congress has singled out as statutory beneficiaries. The interests at stake in review of administrative enforcement decisions are thus more focused and in many

circumstances more pressing than those at stake in criminal prosecutorial decisions. ...

Perhaps most important, the *sine qua non* of the APA was to alter inherited judicial reluctance to constrain the exercise of discretionary administrative power—rationalize and make fairer the exercise of such discretion.... Judicial review is available under the APA in the absence of a clear and convincing demonstration that Congress intended to preclude it precisely so that agencies, whether in rulemaking, adjudicating, acting or failing to act, do not become stagnant backwaters of caprice and lawlessness. ...

The “tradition” of unreviewability upon which the majority relies is refuted most powerfully by a firmly entrenched body of lower court case law that holds reviewable various agency refusals to act.... The lower courts, facing the problem of agency inaction and its concrete effects more regularly than do we, have responded with a variety of solutions to assure administrative fidelity to congressional objectives: a demand that an agency explain its refusal to act, a demand that explanations given be further elaborated, and injunctions that action “unlawfully withheld or unreasonably delayed,” 5 U.S.C. § 706, be taken. Whatever the merits of any particular solution, one would have hoped the Court would have acted with greater respect for these efforts by responding with a scalpel rather than a blunderbuss.

To be sure, the Court no doubt takes solace in the view that it has created only a “presumption” of unreviewability, and that this “presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers.” But this statement implies far too narrow a reliance on positive law, either statutory or constitutional, as the sole source of limitations on agency discretion not to enforce. In my view, enforcement discretion is also channeled by traditional background understandings against which the APA was enacted and which Congress hardly could be thought to have intended to displace in the APA. For example, a refusal to enforce that stems from a conflict of interest, that is the result of a bribe, vindictiveness or retaliation, or that traces to personal or other corrupt motives ought to be judicially remediable. Even in the absence of statutory “guidelines” precluding such factors as bases of decision, Congress should not be presumed to have departed from principles of rationality and fair process in enacting the APA. Moreover, the agency may well narrow its own enforcement discretion through historical practice, from which it should arguably not depart in the absence of explanation, or through regulations and informal action. Traditional principles of rationality and fair process do offer “meaningful standards” and “law to apply” to an agency’s decision not to act, and no presumption of unreviewability should be allowed to trump these principles. ...

AMERICAN HORSE PROTECTION ASSOCIATION, INC.

**v.
LYNG**

812 F.2d 1 (D.C. Cir. 1987)

WILLIAMS, Circuit Judge:

The American Horse Protection Association (the "Association") appeals from a grant of summary judgment to the Secretary of Agriculture in its challenge to regulations under the Horse Protection Act, 15 U.S.C. §§ 1821-1831 (the "Act"). We find that summary judgment was inappropriate in view of the Secretary's failure to offer a satisfactory explanation of his refusal to institute rule making proceedings.

The regulations at issue concern the practice of deliberately injuring show horses to improve their performance in the ring. This practice, called soring, may involve fastening heavy chains or similar equipment, called action devices, on a horse's front limbs. As a result of wearing action devices, the horse may suffer intense pain as its forefeet touch the ground. This pain causes it to adopt a high-stepping gait that is highly prized in Tennessee walking horses and certain other breeds.... In the Horse Protection Act, Congress sought to end this practice by forbidding the showing or selling of sored horses. Exercising broadly phrased rulemaking power under 15 U.S.C. § 1828, the Secretary issued regulations that prohibited soring devices and other soring methods in both general and specific terms. The general prohibition, 9 C.F.R. § 11.2(a) (1986), states:

Notwithstanding the provisions of paragraph (b) of this section [containing specific prohibitions], no chain, boot, roller, collar, action device, nor any other device, method, practice, or substance shall be used with respect to any horse at any horse show, horse exhibition, or horse sale or auction if such use causes or can reasonably be expected to cause such horse to be sore.

The regulations' specific prohibitions include the use of chains weighing more than eight or ten ounces (depending on the age of the horse), rollers weighing more than fourteen ounces, and certain padded shoes on young horses. Lighter chains and rollers are not specifically prohibited.

Use of action devices in violation of either the general or specific prohibitions is unlawful under 15 U.S.C. § 1824(7) and may subject the violator to both criminal and civil penalties under 15 U.S.C. § 1825. Under the general prohibition, however, there is no penalty unless the use of the device is shown to have caused soreness or the device can "reasonably be expected to cause" soreness. Use of pain killers may make detection of actual soring difficult. The regulations give no guidance as to when a device not specifically prohibited may reasonably be expected to cause soreness. There are no such definitional difficulties, of course, when a violation involves a device specifically prohibited.

The Association here contends that developments since these regulations were originally promulgated have demonstrated their inadequacy and that, accordingly, the Secretary should revise them in a new rulemaking. In fact, in its original rulemaking the agency made quite clear

its recognition that the premises for not enacting broader specific prohibitions might erode. In its notice of proposed rulemaking, it stated that it relied on evidence from three test clinics which appeared to exonerate action devices weighing less than those that it proposed to forbid. When the final rule was issued, the agency stated that it would consider prohibiting all action devices and padded shoes if the practice of soring continued. At the same time it also mentioned that the agency had recently commissioned “a study of soring methods and techniques at a major university” that might eventually result in further changes in the regulations.

This study was conducted at the Auburn University School of Veterinary Medicine between September 1978 and December 1982. The Auburn study evaluated use of eight- and ten-ounce chains and fourteen-ounce rollers—devices that the agency had declined to prohibit on the grounds that they did not cause soring when properly used under actual training conditions. The study concluded that ten-ounce chains caused lesions, bleeding, edema, and inflammation. It also considered the effects of eight- and ten-ounce chains and fourteen-ounce rollers on scarred horses, and found that these devices caused raw lesions. *Id.* at 43-46. The effects of these devices thus fell within the statutory definition of sore.... The Auburn study also made preliminary findings on the effects of padded shoes, suggesting they caused problems not suspected at the time of the initial rulemaking. Compare *J.A.* at 48-50 with 44 Fed.Reg. at 25,174. The Association relies on these results in challenging the Agriculture Department’s regulations.

Even before the Auburn study was completed, however, the agency considered revising its regulations on action devices. In a May 1981 letter to the Administrator of the Animal and Plant Health Inspection Service (“APHIS”), the Agriculture Department’s Office of General Counsel recognized that soring had not been eliminated and argued that the gaps in the regulations were “undermining the Department’s ability to achieve effective enforcement of the law and ... preventing the attainment of the goal Congress ha[d] set.” The letter cited administrative cases interpreting the regulations to allow soring with “legal” action devices, i.e., those not covered by the specific prohibitions.

Bureaucratic activity surged briefly, then ebbed. The Administrator of APHIS endorsed the letter from the Office of General Counsel, “OGC’s comments make sense,” and asked his staff for recommendations on possible changes. In early 1982, representatives of the Association met with the Administrator to propose a ban on all action devices and pads. In March, the Administrator informed the group by letter that the agency’s Veterinary Services staff had already prepared a justification for such a ban and was currently drafting a proposed rulemaking to implement it. In July, he confirmed that such regulations had been drafted and that the agency had intended to publish the proposals “as soon as possible.” But, he reported, these plans were now being held in abeyance in order to observe the “self-regulation efforts of the industry.”

In March 1984, agency officials met with representatives of the walking horse industry, the Association, and others to discuss enforcement of the Act. The Association again requested a rulemaking. In a letter to the Association discussing this meeting, the Deputy Administrator of Veterinary Services wrote, “The apparent inconsistency of the current regulations regarding the weight of action devices with the law and research performed at Auburn University has been a matter of concern for Veterinary Services and the Office of the General Counsel for some time.” Nevertheless, he reported that the agency would withhold publication of the proposed rule

pending further studies by the industry. He also reported the industry representatives' remark "that the allowable weight of action devices could not be lowered and still retain the desired gait." Perhaps supposing that industry approval was required for any change in the regulations, the Deputy Administrator said, "We are ... disappointed that no consideration has been given to restricting the weight of action devices."

The reviewability of a refusal to institute a rulemaking has been a source of some uncertainty since the Supreme Court held refusals to take ad hoc enforcement steps presumptively unreviewable in *Heckler v. Chaney*, 470 U.S. 821 (1985). Although the Court expressly noted that *Chaney* did not "involve the question of agency discretion not to invoke rulemaking proceedings," its reasoning applies to some extent to a refusal to institute a rulemaking. Our examination of *Chaney* persuades us, however, that it does not bar review of the agency's decision here.

The *Chaney* Court relied on three features of nonenforcement decisions in arriving at its negative presumption. First, such decisions require a high level of agency expertise and coordination in setting priorities. Second, the agency in such situations will not ordinarily be exercising "its coercive power over an individual's liberty or property rights." (emphasis in original). Third, such nonenforcement decisions are akin to prosecutorial decisions not to indict, which traditionally involve executive control and judicial restraint. The first and second of these features are likely to be involved in an agency's refusal to institute a rulemaking, but the third is another matter.

Chaney says little about this third feature. To a degree, of course, it recapitulates and underscores the prior points about resource allocation and non-coercion. The analogy between prosecutorial discretion and agency nonenforcement is strengthened, however, by two other shared characteristics. First, both prosecutors and agencies constantly make decisions not to take enforcement steps; such decisions thus are numerous. Second, both types of nonenforcement are typically based mainly on close consideration of the facts of the case at hand, rather than on legal analysis. Refusals to institute rulemakings, by contrast, are likely to be relatively infrequent and more likely to turn upon issues of law. This analysis of the third *Chaney* feature finds support in the Court's distinguishing of cases where an agency "has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." Such abdications are likely both to be infrequent and to turn on matters remote from the specific facts of individual cases.

Furthermore, the Administrative Procedure Act ("APA") serves to distinguish between *Chaney* nonenforcement decisions and refusals to institute rulemakings. The *Chaney* Court noted that "when an agency does act to enforce, that action itself provides a focus for judicial review" since a court can "at least ... determine whether the agency exceeded its statutory powers." APA provisions governing agency refusals to initiate rulemakings give a similar focal point. The APA requires agencies to allow interested persons to "petition for the issuance, amendment, or repeal of a rule," 5 U.S.C. § 553(e), and, when such petitions are denied, to give "a brief statement of the grounds for denial," § 555(e). These two provisions suggest that Congress expected that agencies denying rulemaking petitions must explain their actions.

Thus, refusals to institute rulemaking proceedings are distinguishable from other sorts of

nonenforcement decisions insofar as they are less frequent, more apt to involve legal as opposed to factual analysis, and subject to special formalities, including a public explanation. *Chaney* therefore does not appear to overrule our prior decisions allowing review of agency refusals to institute rulemakings.

The District Court was thus correct in finding that this case requires a determination of whether the Secretary's failure to act was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under 5 U.S.C. § 706(2)(A). Review under the "arbitrary and capricious" tag line, however, encompasses a range of levels of deference to the agency, and *Chaney* surely reinforces our frequent statements that an agency's refusal to institute rulemaking proceedings is at the high end of the range. Such a refusal is to be overturned "only in the rarest and most compelling of circumstances," which have primarily involved "plain errors of law, suggesting that the agency has been blind to the source of its delegated power."

In these, as in more typical reviews, however, we must consider whether the agency's decisionmaking was "reasoned." ...

Finally, a refusal to initiate a rulemaking naturally sets off a special alert when a petition has sought modification of a rule on the basis of a radical change in its factual premises. [We have held] that "an agency may be forced by a reviewing court to institute rulemaking proceedings if a significant factual predicate of a prior decision on the subject (either to promulgate or not to promulgate specific rules) has been removed." The Association argues that this principle applies here.

In considering a refusal to grant a rulemaking petition, the court must examine "the petition for rulemaking, comments pro and con ... and the agency's explanation of its decision to reject the petition." The record before us contains no formal rulemaking petition, but we have no difficulty in characterizing the Association's requests for action as such. Neither the Agriculture Department's regulations nor the APA specifies any formalities for a rulemaking petition....

The agency's explanation for its refusal to proceed with the rulemaking is contained in its correspondence with the Association (discussed below) and in the two litigation affidavits of the Deputy Administrator of Veterinary Services of the APHIS. In response to the claim that the Auburn study presented new facts that merited a new rulemaking, the Deputy Administrator's first affidavit stated:

6. I have reviewed studies and other materials, relating to action devices, presented by humane groups, Walking Horse industry groups, and independent institutions, including the study referred to in the Complaint.
7. On the basis of this information, I believe that the most effective method of enforcing the Act is to continue the current regulations.

The second affidavit cites statistics indicating that the agency wrote up a generally diminishing number of alleged violations over the period beginning in 1979 and ending in 1984, although the number of horses exhibited and examined did not generally decline.

On the basis of the litigation affidavits, the District Court found that "the agency has provided a

rational basis for its conclusion not to regulate....” We cannot agree. The two conclusory sentences quoted above are insufficient to assure a reviewing court that the agency’s refusal to act was the product of reasoned decisionmaking. See *State Farm*. There is no articulation of “the factual and policy bases for [the] decision.” We are adjured to take a critical view of an agency’s “*post hoc* rationalization,” see *Overton Park*, but under even the most charitable view the agency’s *post hoc* conclusory statement lacks substance. Nor do the figures on reduced findings of violations suffice. These are apparently intended to suggest that soring is being eliminated by dint of agency efforts. Litigation affidavits of Association members suggest, however, that soring continues to be widespread. Furthermore, the agency’s correspondence with the Association (which was not discussed by the District Court) casts doubt on the agency’s benign interpretation of this data.

In this correspondence the agency indicated that its concerns about the regulations were great enough in 1982 to cause it to draft new ones. The reason given later in 1982 for not publishing these proposed regulations—to give industry self-regulation a chance to work—was by 1984 too stale to justify continued inaction. Moreover, in 1984 the Deputy Administrator admitted the “apparent inconsistency of the current regulations regarding the weight of action devices with the law and the [Auburn] research.” In the face of this “apparent inconsistency,” the Deputy Administrator passively noted his disappointment that industry representatives “felt that the allowable weight of action devices could not be lowered and still retain the desired gait.”

This statement suggests a belief that the Act was a sort of compromise between industry proponents of soring and persons who regarded the practice as barbarous....

We see nothing ambiguous in the Act’s treatment of soring methods. The Act was clearly designed to end soring. It explicitly finds that soring is “cruel and inhumane,” flatly prohibits the showing in a horse show of “any horse which is sore,” and makes it a criminal offense knowingly to do so. Moreover, Congress amended the Act in 1976 “to stop an inhumane and harmful practice that the Congress thought would end when it enacted [the original Act], but which has not in fact ended.” S.Rep. 418, 94th Cong., 1st Sess. 1 (1975).

There is no indication in the Act or the legislative history that Congress was concerned with the ability of horse owners to “retain the desired gait,” at least insofar as the desired gait required soring. To be sure, the legislative history shows concern for owners who refused to adopt the practice of soring, but instead used “patient, careful training ... and natural breeding” to achieve the distinctive walk. Soring, which causes horses to perform beyond their natural ability, put these owners at a competitive disadvantage. The Act sought to do away not only with the unnecessary cruelty of soring, but also with this unfair competition. But it shows no solicitude for owners who favor soring. ...

In sum, we conclude that the Secretary has not presented a reasonable explanation of his failure to grant the rulemaking petition of the Association, particularly in light of the apparent message of the Auburn study. Moreover, what he has said strongly suggests that he has been blind to the nature of his mandate from Congress.

The Association seeks an order directing the Secretary to institute rulemaking proceedings. Our cases make clear, however, that such a remedy is appropriate “only in the rarest and most

compelling of circumstances.”...

The findings of the Auburn study may or may not remove a “significant factual predicate” of the original rules’ gaps. The issues as to the Auburn study’s validity and significance lie within the institutional competence of the Secretary. See *State Farm*. He therefore must be given a reasonable opportunity to explain his decision or to institute a new rulemaking proceeding on action devices and other soring practices.

We vacate the judgment of the District Court and remand to that Court with instructions to remand the case to the Secretary for further consideration consistent with this opinion.

MASSACHUSETTS
v.
ENVIRONMENTAL PROTECTION AGENCY

127 S. Ct. 1438 (2007)

Justice STEVENS delivered the opinion of the Court.

A well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere. Respected scientists believe the two trends are related. For when carbon dioxide is released into the atmosphere, it acts like the ceiling of a greenhouse, trapping solar energy and retarding the escape of reflected heat. It is therefore a species—the most important species—of a “greenhouse gas.”

Calling global warming “the most pressing environmental challenge of our time,” a group of States, local governments, and private organizations, alleged in a petition for certiorari that the Environmental Protection Agency (EPA) has abdicated its responsibility under the Clean Air Act to regulate the emissions of four greenhouse gases, including carbon dioxide. Specifically, petitioners asked us to answer two questions concerning the meaning of § 202(a)(1) of the Act: whether EPA has the statutory authority to regulate greenhouse gas emissions from new motor vehicles; and if so, whether its stated reasons for refusing to do so are consistent with the statute.

Section 202(a)(1) of the Clean Air Act, 42 U.S.C. § 7521(a)(1), provides:

The [EPA] Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare”

The Act defines “air pollutant” to include “any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive ... substance or matter which is emitted into or otherwise enters the ambient air.” § 7602(g). “Welfare” is also defined broadly: among other things, it includes “effects on ... weather ... and climate.” § 7602(h).

When Congress enacted these provisions, the study of climate change was in its infancy. In 1959, shortly after the U.S. Weather Bureau began monitoring atmospheric carbon dioxide levels, an observatory in Mauna Loa, Hawaii, recorded a mean level of 316 parts per million. This was well above the highest carbon dioxide concentration—no more than 300 parts per million—revealed in the 420,000-year-old ice-core record. By the time Congress drafted § 202(a)(1) in 1970, carbon dioxide levels had reached 325 parts per million.

In the late 1970’s, the Federal Government began devoting serious attention to the possibility that carbon dioxide emissions associated with human activity could provoke climate change. In 1978, Congress enacted the National Climate Program Act, which required the President to establish a program to “assist the Nation and the world to understand and respond to natural and man-induced climate processes and their implications,” President Carter, in turn, asked the National Research Council, the working arm of the National Academy of Sciences, to investigate the subject. The Council’s response was unequivocal: “If carbon dioxide continues to increase, the study group finds no reason to doubt that climate changes will result and no reason to believe that these changes will be negligible A wait-and-see policy may mean waiting until it is too late.”

Congress next addressed the issue in 1987, when it enacted the Global Climate Protection Act. Finding that “manmade pollution—the release of carbon dioxide, chlorofluorocarbons, methane, and other trace gases into the atmosphere—may be producing a long-term and substantial increase in the average temperature on Earth,” Congress directed EPA to propose to Congress a “coordinated national policy on global climate change,” and ordered the Secretary of State to work “through the channels of multilateral diplomacy” and coordinate diplomatic efforts to combat global warming. Congress emphasized that “ongoing pollution and deforestation may be contributing now to an irreversible process” and that “[n]ecessary actions must be identified and implemented in time to protect the climate.”

Meanwhile, the scientific understanding of climate change progressed. In 1990, the Intergovernmental Panel on Climate Change (IPCC), a multinational scientific body organized under the auspices of the United Nations, published its first comprehensive report on the topic. Drawing on expert opinions from across the globe, the IPCC concluded that “emissions resulting from human activities are substantially increasing the atmospheric concentrations of ... greenhouse gases [which] will enhance the greenhouse effect, resulting on average in an additional warming of the Earth’s surface.”

Responding to the IPCC report, the United Nations convened the “Earth Summit” in 1992 in Rio de Janeiro. The first President Bush attended and signed the United Nations Framework Convention on Climate Change (UNFCCC), a nonbinding agreement among 154 nations to reduce atmospheric concentrations of carbon dioxide and other greenhouse gases for the purpose of “prevent[ing] dangerous anthropogenic [*i.e.*, human-induced] interference with the [Earth’s] climate system.” The Senate unanimously ratified the treaty.

Some five years later—after the IPCC issued a second comprehensive report in 1995 concluding that “[t]he balance of evidence suggests there is a discernible human influence on global climate”—the UNFCCC signatories met in Kyoto, Japan, and adopted a protocol that assigned mandatory targets for industrialized nations to reduce greenhouse gas emissions. Because those targets did not apply to developing and heavily polluting nations such as China and India, the Senate unanimously passed a resolution expressing its sense that the United States should not enter into the Kyoto Protocol. President Clinton did not submit the protocol to the Senate for ratification.

On October 20, 1999, a group of 19 private organizations filed a rulemaking petition asking EPA to regulate “greenhouse gas emissions from new motor vehicles under § 202 of the Clean Air Act.” Petitioners maintained that 1998 was the “warmest year on record”; that carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are “heat trapping greenhouse gases”; that greenhouse gas emissions have significantly accelerated climate change; and that the IPCC’s 1995 report warned that “carbon dioxide remains the most important contributor to [man-made] forcing of climate change.” The petition further alleged that climate change will have serious adverse effects on human health and the environment. As to EPA’s statutory authority, the petition observed that the agency itself had already confirmed that it had the power to regulate carbon dioxide. In 1998, Jonathan Z. Cannon, then EPA’s General Counsel, prepared a legal opinion concluding that “CO₂ emissions are within the scope of EPA’s authority to regulate,” even as he recognized that EPA had so far declined to exercise that authority. Cannon’s successor, Gary S. Guzy, reiterated that opinion before a congressional committee just two weeks before the rulemaking petition was filed.

Fifteen months after the petition’s submission, EPA requested public comment on “all the issues raised in [the] petition,” adding a “particular” request for comments on “any scientific, technical, legal, economic or other aspect of these issues that may be relevant to EPA’s consideration of this petition.” 66 Fed.Reg. 7486, 7487 (2001). EPA received more than 50,000 comments over the next five months. See 68 Fed.Reg. 52924 (2003).

Before the close of the comment period, the White House sought “assistance in identifying the areas in the science of climate change where there are the greatest certainties and uncertainties” from the National Research Council, asking for a response “as soon as possible.” The result was a 2001 report titled *Climate Change: An Analysis of Some Key Questions* (NRC Report), which, drawing heavily on the 1995 IPCC report, concluded that “[g]reenhouse gases are accumulating in Earth’s atmosphere as a result of human activities, causing surface air temperatures and subsurface ocean temperatures to rise. Temperatures are, in fact, rising.”

On September 8, 2003, EPA entered an order denying the rulemaking petition. 68 Fed.Reg. 52922. The agency gave two reasons for its decision: (1) that contrary to the opinions of its former general counsels, the Clean Air Act does not authorize EPA to issue mandatory regulations to address global climate change; and (2) that even if the agency had the authority to set greenhouse gas emission standards, it would be unwise to do so at this time.

In concluding that it lacked statutory authority over greenhouse gases, EPA observed that Congress “was well aware of the global climate change issue when it last comprehensively amended the [Clean Air Act] in 1990,” yet it declined to adopt a proposed amendment establishing binding emissions limitations. Congress instead chose to authorize further investigation into climate change. EPA further reasoned that Congress’ “specially tailored solutions to global atmospheric issues,”—in particular, its 1990 enactment of a comprehensive scheme to regulate pollutants that depleted the ozone layer—counseled against reading the general authorization of § 202(a)(1) to confer regulatory authority over greenhouse gases.

EPA stated that it was “urged on in this view” by this Court’s decision in *FDA v. Brown & Williamson Tobacco Corp.* (2000). In that case, relying on “tobacco[’s] unique political history,” we invalidated the Food and Drug Administration’s reliance on its general authority to regulate drugs as a basis for asserting jurisdiction over an “industry constituting a significant portion of the American economy.”

EPA reasoned that climate change had its own “political history”: Congress designed the original Clean Air Act to address *local* air pollutants rather than a substance that “is fairly consistent in its concentration throughout the *world’s* atmosphere”; declined in 1990 to enact proposed amendments to force EPA to set carbon dioxide emission standards for motor vehicles; and addressed global climate change in other legislation. Because of this political history, and because imposing emission limitations on greenhouse gases would have even greater economic and political repercussions than regulating tobacco, EPA was persuaded that it lacked the power to do so. In essence, EPA concluded that climate change was so important that unless Congress spoke with exacting specificity, it could not have meant the agency to address it.

Having reached that conclusion, EPA believed it followed that greenhouse gases cannot be “air pollutants” within the meaning of the Act. The agency bolstered this conclusion by explaining that if carbon dioxide were an air pollutant, the only feasible method of reducing tailpipe emissions would be to improve fuel economy. But because Congress has already created detailed mandatory fuel economy standards subject to Department of Transportation (DOT) administration, the agency concluded that EPA regulation would either conflict with those standards or be superfluous.

Even assuming that it had authority over greenhouse gases, EPA explained in detail why it would refuse to exercise that authority. The agency began by recognizing that the concentration of greenhouse gases has dramatically increased as a result of human activities, and acknowledged the attendant increase in global surface air temperatures. EPA nevertheless gave controlling importance to the NRC Report’s statement that a causal link between the two “cannot be unequivocally established.” Given that residual uncertainty, EPA concluded that regulating greenhouse gas emissions would be unwise.

The agency furthermore characterized any EPA regulation of motor-vehicle emissions as a “piecemeal approach” to climate change, and stated that such regulation would conflict with the President’s “comprehensive approach” to the problem. That approach involves additional support for technological innovation, the creation of nonregulatory programs to encourage voluntary private-sector reductions in greenhouse gas emissions, and further research on climate change—not actual regulation. According to EPA, unilateral EPA regulation of motor-vehicle greenhouse gas emissions might also hamper the President’s ability to persuade key developing countries to reduce greenhouse gas emissions.

[The Court first held that the state of Massachusetts had standing under Article III of the Constitution to challenge in federal court the EPA’s denial of the petition for rulemaking. The Court began its analysis by asserting that “States are not normal litigants for the purposes of invoking federal jurisdiction,” and that Massachusetts therefore “is entitled to special solicitude in our standing analysis.” It then proceeded to hold that the prerequisites for Article III standing were met as to Massachusetts, summarizing its holding as follows: “In sum—at least according to petitioners’ uncontested affidavits—the rise in sea levels associated with global warming has already harmed and will continue to harm Massachusetts. The risk of catastrophic harm, though remote, is nevertheless real. That risk would be reduced to some extent if petitioners received the relief they seek. We therefore hold that petitioners have standing to challenge the EPA’s denial of their rulemaking petition.” The Court then proceeded to the merits.]

The scope of our review of the merits of the statutory issues is narrow. As we have repeated time and again, an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* (1984). That discretion is at its height when the agency decides not to bring an enforcement action. Therefore, in *Heckler v. Chaney* (1985), we held that an agency’s refusal to initiate enforcement proceedings is not ordinarily subject to judicial review. Some debate remains, however, as to the rigor with which we review an agency’s denial of a petition for rulemaking.

There are key differences between a denial of a petition for rulemaking and an agency’s decision not to initiate an enforcement action. See *American Horse Protection Assn., Inc. v. Lyng* (D.C. Cir. 1987). In contrast to nonenforcement decisions, agency refusals to initiate rulemaking “are less frequent, more apt to involve legal as opposed to factual analysis, and subject to special formalities, including a public explanation.” *Id.*; see also 5 U.S.C. § 555(e). They moreover arise out of denials of petitions for rulemaking which (at least in the circumstances here) the affected party had an undoubted procedural right to file in the first instance. Refusals to promulgate rules are thus susceptible to judicial review, though such review is “extremely limited” and “highly deferential.”

EPA concluded in its denial of the petition for rulemaking that it lacked authority under 42 U.S.C. § 7521(a)(1) to regulate new vehicle emissions because carbon dioxide is not an “air pollutant” as that term is defined in § 7602. In the alternative, it concluded that even if it possessed authority, it would decline to do so because regulation would conflict with other administration priorities. As discussed earlier, the Clean Air Act expressly permits review of such an action. § 7607(b)(1). We therefore “may reverse any such action found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” § 7607(d)(9).

On the merits, the first question is whether § 202(a)(1) of the Clean Air Act authorizes EPA to regulate greenhouse gas emissions from new motor vehicles in the event that it forms a “judgment” that such emissions contribute to climate change. We have little trouble concluding that it does. In relevant part, § 202(a)(1) provides that EPA “shall by regulation prescribe ... standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in [the Administrator’s] judgment cause, or contribute to, air pollution which may reasonably be anticipated

to endanger public health or welfare.” 42 U.S.C. § 7521(a)(1). Because EPA believes that Congress did not intend it to regulate substances that contribute to climate change, the agency maintains that carbon dioxide is not an “air pollutant” within the meaning of the provision.

The statutory text forecloses EPA’s reading. The Clean Air Act’s sweeping definition of “air pollutant” includes “*any* air pollution agent or combination of such agents, including *any* physical, chemical ... substance or matter which is emitted into or otherwise enters the ambient air” § 7602(g) (emphasis added). On its face, the definition embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word “any.” Carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are without a doubt “physical [and] chemical ... substance [s] which [are] emitted into ... the ambient air.” The statute is unambiguous.²⁶

Rather than relying on statutory text, EPA invokes postenactment congressional actions and deliberations it views as tantamount to a congressional command to refrain from regulating greenhouse gas emissions. Even if such postenactment legislative history could shed light on the meaning of an otherwise-unambiguous statute, EPA never identifies any action remotely suggesting that Congress meant to curtail its power to treat greenhouse gases as air pollutants. That subsequent Congresses have eschewed enacting binding emissions limitations to combat global warming tells us nothing about what Congress meant when it amended § 202(a)(1) in 1970 and 1977. And unlike EPA, we have no difficulty reconciling Congress’ various efforts to promote interagency collaboration and research to better understand climate change with the agency’s pre-existing mandate to regulate “any air pollutant” that may endanger the public welfare. Collaboration and research do not conflict with any thoughtful regulatory effort; they complement it.

EPA finally argues that it cannot regulate carbon dioxide emissions from motor vehicles because doing so would require it to tighten mileage standards, a job (according to EPA) that Congress has assigned to DOT. But that DOT sets mileage standards in no way licenses EPA to shirk its environmental responsibilities. EPA has been charged with protecting the public’s “health” and “welfare,” a statutory obligation wholly independent of DOT’s mandate to promote energy efficiency. The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency.

While the Congresses that drafted § 202(a)(1) might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete. The broad language of § 202(a)(1) reflects an intentional effort to confer the flexibility necessary to forestall such obsolescence. “[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.” Because greenhouse gases fit well within the Clean Air Act’s capacious definition of “air pollutant,” we hold that EPA has the statutory authority to

²⁶ In dissent, Justice SCALIA maintains that because greenhouse gases permeate the world’s atmosphere rather than a limited area near the earth’s surface, EPA’s exclusion of greenhouse gases from the category of air pollution “agent[s]” is entitled to deference under *Chevron*. EPA’s distinction, however, finds no support in the text of the statute, which uses the phrase “the ambient air” without distinguishing between atmospheric layers. Moreover, it is a plainly unreasonable reading of a sweeping statutory provision designed to capture “*any* physical, chemical ... substance or matter which is emitted into or otherwise enters the ambient air.” 42 U.S.C. § 7602(g). Justice SCALIA does not (and cannot) explain why Congress would define “air pollutant” so carefully and so broadly, yet confer on EPA the authority to narrow that definition whenever expedient by asserting that a particular substance is not an “agent.” At any rate, no party to this dispute contests that greenhouse gases both “ente[r] the ambient air” and tend to warm the atmosphere. They are therefore unquestionably “agent[s]” of air pollution.

regulate the emission of such gases from new motor vehicles.

The alternative basis for EPA's decision—that even if it does have statutory authority to regulate greenhouse gases, it would be unwise to do so at this time—rests on reasoning divorced from the statutory text. While the statute does condition the exercise of EPA's authority on its formation of a “judgment,” that judgment must relate to whether an air pollutant “cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare.” Put another way, the use of the word “judgment” is not a roving license to ignore the statutory text. It is but a direction to exercise discretion within defined statutory limits.

If EPA makes a finding of endangerment, the Clean Air Act requires the agency to regulate emissions of the deleterious pollutant from new motor vehicles. EPA no doubt has significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies. But once EPA has responded to a petition for rulemaking, its reasons for action or inaction must conform to the authorizing statute. Under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do. To the extent that this constrains agency discretion to pursue other priorities of the Administrator or the President, this is the congressional design.

EPA has refused to comply with this clear statutory command. Instead, it has offered a laundry list of reasons not to regulate. For example, EPA said that a number of voluntary executive branch programs already provide an effective response to the threat of global warming, that regulating greenhouse gases might impair the President's ability to negotiate with “key developing nations” to reduce emissions, and that curtailing motor-vehicle emissions would reflect “an inefficient, piecemeal approach to address the climate change issue.”

Although we have neither the expertise nor the authority to evaluate these policy judgments, it is evident they have nothing to do with whether greenhouse gas emissions contribute to climate change. Still less do they amount to a reasoned justification for declining to form a scientific judgment. In particular, while the President has broad authority in foreign affairs, that authority does not extend to the refusal to execute domestic laws. In the Global Climate Protection Act of 1987, Congress authorized the State Department—not EPA—to formulate United States foreign policy with reference to environmental matters relating to climate. EPA has made no showing that it issued the ruling in question here after consultation with the State Department. Congress did direct EPA to consult with other agencies in the formulation of its policies and rules, but the State Department is absent from that list.

Nor can EPA avoid its statutory obligation by noting the uncertainty surrounding various features of climate change and concluding that it would therefore be better not to regulate at this time. If the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming, EPA must say so. That EPA would prefer not to regulate greenhouse gases because of some residual uncertainty—which, contrary to Justice SCALIA's apparent belief, is in fact all that it said—is irrelevant. The statutory question is whether sufficient information exists to make an endangerment finding.

In short, EPA has offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change. Its action was therefore “arbitrary, capricious, ... or otherwise not in accordance with law.” We need not and do not reach the question whether on remand EPA must make an endangerment finding, or whether policy concerns can inform EPA's actions in the event that it makes such a finding. Cf. *Chevron*. We hold only that EPA must ground its reasons for action or inaction in the statute.

[Chief Justice ROBERTS, joined by Justice SCALIA, Justice THOMAS, and Justice ALITO, dissented from the Court’s standing analysis. He wrote: “I would reject these challenges as nonjusticiable. Such a conclusion involves no judgment on whether global warming exists, what causes it, or the extent of the problem. Nor does it render petitioners without recourse. This Court’s standing jurisprudence simply recognizes that redress of grievances of the sort at issue here is the function of Congress and the Chief Executive, not the federal courts.” He added: “Relaxing Article III standing requirements because asserted injuries are pressed by a State, however, has no basis in our jurisprudence, and support for any such ‘special solicitude’ is conspicuously absent from the Court’s opinion.” Chief Justice ROBERTS concluded that Massachusetts could not establish the causation and redressability prongs of the Article III standing test.]

Justice SCALIA, with whom the Chief Justice, Justice THOMAS, and Justice ALITO join, dissenting.

I join the Chief Justice’s opinion in full, and would hold that this Court has no jurisdiction to decide this case because petitioners lack standing. The Court having decided otherwise, it is appropriate for me to note my dissent on the merits.

The provision of law at the heart of this case is § 202(a)(1) of the Clean Air Act (CAA), which provides that the Administrator of the Environmental Protection Agency (EPA) “shall by regulation prescribe ... standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which *in his judgment* cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” 42 U.S.C. § 7521(a)(1) (emphasis added). As the Court recognizes, the statute “condition[s] the exercise of EPA’s authority on its formation of a ‘judgment.’” There is no dispute that the Administrator has made no such judgment in this case.

The question thus arises: Does anything *require* the Administrator to make a “judgment” whenever a petition for rulemaking is filed? Without citation of the statute or any other authority, the Court says yes. Why is that so? When Congress wishes to make private action force an agency’s hand, it knows how to do so. Where does the CAA say that the EPA Administrator is required to come to a decision on this question whenever a rulemaking petition is filed? The Court points to no such provision because none exists.

Instead, the Court invents a multiple-choice question that the EPA Administrator must answer when a petition for rulemaking is filed. The Administrator must exercise his judgment in one of three ways: (a) by concluding that the pollutant *does* cause, or contribute to, air pollution that endangers public welfare (in which case EPA is required to regulate); (b) by concluding that the pollutant *does not* cause, or contribute to, air pollution that endangers public welfare (in which case EPA is *not* required to regulate); or (c) by “provid[ing] some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether” greenhouse gases endanger public welfare (in which case EPA is *not* required to regulate).

I am willing to assume, for the sake of argument, that the Administrator’s discretion in this regard is not entirely unbounded—that if he has no reasonable basis for deferring judgment he must grasp the nettle at once. The Court, however, with no basis in text or precedent, rejects all of EPA’s stated “policy judgments” as not “amount[ing] to a reasoned justification,” effectively narrowing the universe of potential reasonable bases to a single one: Judgment can be delayed *only* if the Administrator concludes that “the scientific uncertainty is [too] profound.” The Administrator is precluded from concluding *for other reasons* “that it would ... be better not to regulate at this time.” Such other reasons—perfectly valid reasons—were set forth in the agency’s statement.

The Court dismisses [the EPA's] analysis as "rest[ing] on reasoning divorced from the statutory text." "While the statute does condition the exercise of EPA's authority on its formation of a 'judgment,' ... that judgment must relate to whether an air pollutant 'cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare.'" True but irrelevant. When the Administrator *makes* a judgment whether to regulate greenhouse gases, that judgment must relate to whether they are air pollutants that "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1). But the statute says *nothing at all* about the reasons for which the Administrator may *defer* making a judgment—the permissible reasons for deciding not to grapple with the issue at the present time. Thus, the various "policy" rationales that the Court criticizes are not "divorced from the statutory text," except in the sense that the statutory text is silent, as texts are often silent about permissible reasons for the exercise of agency discretion. The reasons the EPA gave are surely considerations executive agencies *regularly* take into account (and *ought* to take into account) when deciding whether to consider entering a new field: the impact such entry would have on other Executive Branch programs and on foreign policy. There is no basis in law for the Court's imposed limitation.

EPA's interpretation of the discretion conferred by the statutory reference to "its judgment" is not only reasonable, it is the most natural reading of the text. The Court nowhere explains why this interpretation is incorrect, let alone why it is not entitled to deference under *Chevron*. As the Administrator acted within the law in declining to make a "judgment" for the policy reasons above set forth, I would uphold the decision to deny the rulemaking petition on that ground alone.

Even on the Court's own terms, however, the same conclusion follows. As mentioned above, the Court gives EPA the option of determining that the science is too uncertain to allow it to form a "judgment" as to whether greenhouse gases endanger public welfare. Attached to this option (on what basis is unclear) is an essay requirement: "If," the Court says, "the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming, EPA must say so." But EPA *has* said precisely that—and at great length, based on information contained in a 2001 report by the National Research Council (NRC). ... I simply cannot conceive of what else the Court would like EPA to say.

Even before reaching its discussion of the word "judgment," the Court makes another significant error when it concludes that "§ 202(a)(1) of the Clean Air Act *authorizes* EPA to regulate greenhouse gas emissions from new motor vehicles in the event that it forms a 'judgment' that such emissions contribute to climate change." For such authorization, the Court relies on what it calls "the Clean Air Act's capacious definition of 'air pollutant.'"

"Air pollutant" is defined by the Act as "any air pollution agent or combination of such agents, including any physical, chemical, ... substance or matter which is emitted into or otherwise enters the ambient air." 42 U.S.C. § 7602(g). The Court is correct that "[c]arbon dioxide, methane, nitrous oxide, and hydrofluorocarbons," fit within the second half of that definition: They are "physical, chemical, ... substance[s] or matter which [are] emitted into or otherwise ente[r] the ambient air." But the Court mistakenly believes this to be the end of the analysis. In order to be an "air pollutant" under the Act's definition, the "substance or matter [being] emitted into ... the ambient air" must also meet the *first* half of the definition—namely, it must be an "air pollution agent or combination of such agents." The Court simply pretends this half of the definition does not exist.

The Court's analysis faithfully follows the argument advanced by petitioners, which focuses on the word "including" in the statutory definition of "air pollutant." As that argument goes, anything that *follows* the word "including" must necessarily be a subset of whatever *precedes* it. Thus, if greenhouse gases qualify

under the phrase following the word “including,” they must qualify under the phrase preceding it. Since greenhouse gases come within the capacious phrase “any physical, chemical, ... substance or matter which is emitted into or otherwise enters the ambient air,” they must also be “air pollution agent[s] or combination[s] of such agents,” and therefore meet the definition of “air pollutant[s].”

That is certainly one possible interpretation of the statutory definition. The word “including” can indeed indicate that what follows will be an “illustrative” sampling of the general category that precedes the word. Often, however, the examples standing alone are broader than the general category, and must be viewed as limited in light of that category. The Government provides a helpful (and unanswered) example: “The phrase ‘any American automobile, including any truck or minivan,’ would not naturally be construed to encompass a foreign-manufactured [truck or] minivan.” The general principle enunciated—that the speaker is talking about *American* automobiles—carries forward to the illustrative examples (trucks and minivans), and limits them accordingly, even though in isolation they are broader. Congress often uses the word “including” in this manner. In 28 U.S.C. § 1782(a), for example, it refers to “a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation.” Certainly this provision would not encompass criminal investigations underway in a *domestic* tribunal. See also, *e.g.*, 2 U.S.C. § 54(a) (“The Clerk of the House of Representatives shall, at the request of a Member of the House of Representatives, furnish to the Member, for official use only, one set of a privately published annotated version of the United States Code, including supplements and pocket parts”); 22 U.S.C. § 2304(b)(1) (“the relevant findings of appropriate international organizations, including nongovernmental organizations”).

In short, the word “including” does not require the Court’s (or the petitioners’) result. It is perfectly reasonable to view the definition of “air pollutant” in its entirety: An air pollutant *can* be “any physical, chemical, ... substance or matter which is emitted into or otherwise enters the ambient air,” but only if it retains the general characteristic of being an “air pollution agent or combination of such agents.” This is precisely the conclusion EPA reached: “[A] substance does not meet the CAA definition of ‘air pollutant’ simply because it is a ‘physical, chemical, ... substance or matter which is emitted into or otherwise enters the ambient air.’ It must also be an ‘air pollution agent.’” Once again, in the face of textual ambiguity, the Court’s application of *Chevron* deference to EPA’s interpretation of the word “including” is nowhere to be found.² Evidently, the Court defers only to those reasonable interpretations that it favors.

Using (as we ought to) EPA’s interpretation of the definition of “air pollutant,” we must next determine whether greenhouse gases are “agent[s]” of “air pollution.” If so, the statute would authorize regulation; if not, EPA would lack authority.

Unlike “air pollutants,” the term “air pollution” is not itself defined by the CAA; thus, once again we must accept EPA’s interpretation of that ambiguous term, provided its interpretation is a “permissible construction of the statute.” *Chevron*. In this case, the petition for rulemaking asked EPA for “regulation of [greenhouse gas] emissions from motor vehicles to reduce the risk of global climate change.” 68 Fed.Reg. 52925. Thus, in deciding whether it had authority to regulate, EPA had to determine whether the concentration of greenhouse gases assertedly responsible for “global climate change” qualifies as “air pollution.” EPA began with the commonsense observation that the “[p]roblems associated with atmospheric concentrations of CO₂” bear little resemblance to what would naturally be termed “air pollution[.]” ... In other words, regulating the buildup of CO₂ and other greenhouse gases in the upper

² Not only is EPA’s interpretation reasonable, it is far more plausible than the Court’s alternative. As the Court correctly points out, “all airborne compounds of whatever stripe,” would qualify as “physical, chemical, ... substance[s] or matter which [are] emitted into or otherwise ente[r] the ambient air,” 42 U.S.C. § 7602(g). It follows that *everything* airborne, from Frisbees to flatulence, qualifies as an “air pollutant.” This reading of the statute defies common sense.

reaches of the atmosphere, which is alleged to be causing global climate change, is not akin to regulating the concentration of some substance that is *polluting the air*.

We need look no further than the dictionary for confirmation that this interpretation of “air pollution” is eminently reasonable. The definition of “pollute,” of course, is “[t]o make or render impure or unclean.” Webster’s New International Dictionary 1910 (2d ed.1949). And the first three definitions of “air” are as follows: (1) “[t]he invisible, odorless, and tasteless mixture of gases which surrounds the earth”; (2) “[t]he body of the earth’s atmosphere; esp., the part of it near the earth, as distinguished from the upper rarefied part”; (3) “[a] portion of air or of the air considered with respect to physical characteristics or as affecting the senses.” *Id.* at 54. EPA’s conception of “air pollution”—focusing on impurities in the “ambient air” “at ground level or near the surface of the earth”—is perfectly consistent with the natural meaning of that term.

In the end, EPA concluded that since “CAA authorization to regulate is generally based on a finding that an air pollutant causes or contributes to air pollution,” the concentrations of CO₂ and other greenhouse gases allegedly affecting the global climate are beyond the scope of CAA’s authorization to regulate. “[T]he term ‘air pollution’ as used in the regulatory provisions cannot be interpreted to encompass global climate change.” Once again, the Court utterly fails to explain why this interpretation is incorrect, let alone so unreasonable as to be unworthy of *Chevron* deference.

The Court’s alarm over global warming may or may not be justified, but it ought not distort the outcome of this litigation. This is a straightforward administrative-law case, in which Congress has passed a malleable statute giving broad discretion, not to us but to an executive agency. No matter how important the underlying policy issues at stake, this Court has no business substituting its own desired outcome for the reasoned judgment of the responsible agency.