

Comparative Administrative Law



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A Introduction (Lecture 1)

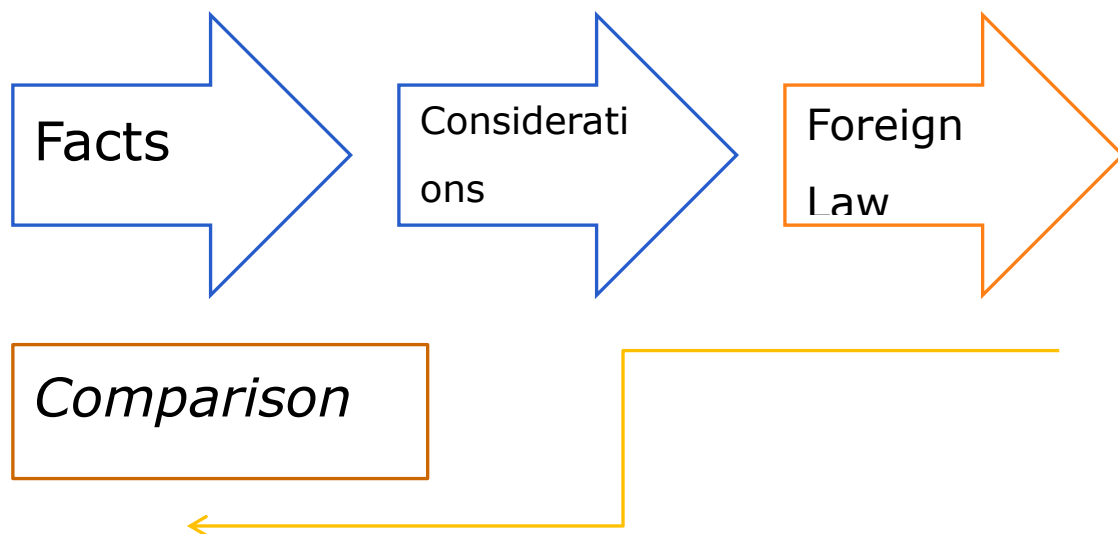
I. Key Questions

1. What are we looking for?

Many countries struggle with the amount of regulation that administrative authorities must implement. Although the subject areas of such regulation are quite diverse, the implementation is usually guided by some general rules, often unwritten. These rules form what is called "Administrative Law" (or "General Administrative Law").

2. What are we looking for?

- Institutions (e.g. regulatory agencies)
- Laws (e.g. administrative procedure)
- General Principles (e.g. rule of law)
- Cases (mostly)



3. How do we compare?

The course looks into these rules from a comparative perspective. Common problems that may arise in the administrative context are illustrated by cases and other materials. Students are asked to comment on these cases and compare them – if possible- to their own legal background.

4. Why do we compare?

- Knowledge of foreign jurisdictions
- New questions
- **Critical Assessment of one's own jurisdiction**
- "Best Practices" in Administrative Law?

B Sources (Lecture 1)

I. Codification of General Administrative Law

It has hardly been researched which consequences arise from the different degree of codification of the general administrative law.

- Does codification increase orientation, predictability and legal certainty?
- Does the codification lead to a "petrification" of general administrative law?
- Does codification enhance the legitimacy of administrative law?
- To which degree does the constitution shape administrative law and will there be conflicts in case of codification?
- Can uniformity be achieved only by codification?
- Which areas of general administrative law are suitable for a codification, which are not, and why and why not?

II. General Administrative Law Act (NL)



Below you will find an extract from a translation of the General Administrative Law Act of the Netherlands. Read the extract and ask yourself whether it regulates the issues you consider typical "General Administrative Law". What is missing and what would you not consider "Administrative Law"?

GENERAL ADMINISTRATIVE LAW

ACT

CHAPTER 1 INTRODUCTORY PROVISIONS

Title 1.1 Definitions and scope

Article 1:1

1. 'Administrative authority' means:
 - (a) an organ of a legal entity which has been established under public law, or
 - (b) another person or body which is invested with any public authority.
2. The following authorities, persons and bodies are not deemed to be administrative authorities:
 - (a) the legislature;
 - (b) the First and Second Chambers and the Joint Session of the States General;
 - (c) independent authorities established by law and charged with the administration of justice;
 - (d) the Council of State and its divisions;
 - (e) the General Chamber of Audit;
 - (f) the National Ombudsman and Deputy Ombudsmen;

- (g) the chairmen, members, registrars and secretaries of the authorities referred to at (b) to (f), the Procurator General, the Deputy Procurator General and the Advocates General to the Supreme Court, and committees composed of members of the authorities referred to at (b) to (f).
3. An authority, person or body excluded under subsection 2 is nonetheless deemed to be an administrative authority in so far as it makes orders or performs acts in relation to a public servant not appointed for life as referred to in 1 of the Central and Local Government Personnel Act, his surviving relatives or his successors in title.

Article 1:2

1. 'Interested party' means a person whose interest is directly affected by an order.
2. As regards administrative authorities, the interests entrusted to them are deemed to be their interests.
3. As regards legal entities, their interests are deemed to include the general and collective interests which they particularly represent in accordance with their objects and as evidenced by their actual activities.

Article 1:3

1. 'Order' means a written decision of an administrative authority constituting a public law act.
2. 'Administrative decision' means an order which is not of a general nature, including rejection of an application for such an order.
3. 'Application' means a request by an interested party for an order.
4. 'Policy rule' means an order, not being a generally binding regulation, which lays down a general rule for weighing interests, determining facts or interpreting statutory regulations in the exercise of a power of an administrative authority.

Article 1:4

1. 'Administrative court' means an independent authority established by law charged with the administration of justice in administrative matters.
2. A court forming part of the judiciary is deemed to be an administrative court in so far as Chapter 8, the Administrative Justice (Taxes) Act¹ or the Traffic Regulations (Administrative Enforcement) Act - Chapter VIII excluded - applies.

Article 1:5

1. 'Making an objection' means making use of a statutorily conferred power to seek redress against an order from the administrative authority which made the order.
2. 'Lodging an administrative appeal' means making use of a statutorily conferred power to seek redress against an order from an administrative authority other than the one which made the order.
3. 'Lodging an appeal' means lodging an administrative appeal or an appeal to an administrative court.

Article 1:6

This act does not apply to:

- (a) the investigation and prosecution of criminal offences or the execution of criminal law decisions;
- (b) the execution of measures depriving persons of their liberty under the Aliens Act;
- (c) the execution of other measures depriving persons of their liberty in an institution primarily dedicated to the execution of criminal law decisions;
- (d) orders and acts implementing the Military Disciplinary Law Act.

Title 1.2 Implementation of binding decisions of authorities of the European Communities

Article 1:7

1. If, under any statutory regulation, an opinion must be sought or external consultation held by an administrative authority regarding an order before such order can be made, the provision shall not apply if the sole purpose of the proposed order is to implement a binding decision of the Council of the European Union, the European Parliament and the Council jointly, or the Commission of the European Communities.
2. Subsection 1 shall not apply to requirements to obtain the consultation of the Council of State.

Article 1:8

1. If, under any statutory regulation, a draft order must be communicated by an administrative authority before such order can be made, the provision shall not apply if the sole purpose of the proposed order is to implement a binding decision of the Council of the European Union, the European Parliament and the Council jointly, or the Commission of the European Communities.
2. Subsection 1 shall not apply to the presentation of a draft order in council or ministerial regulation to the States General, if:
 - (a) an act of Parliament provides that the wish may be expressed by or on behalf of one of the Chambers of the States General, or by a number of members thereof, that the subject or entry into force of such order in council or ministerial regulation be regulated by Act of Parliament, or
 - (b) Article 21.6, Subsection 6, of the Environmental Management Act or Article 33 of the Pollution of Surface Waters Act applies.

Article 1:9

This title shall apply *mutatis mutandis* to bills.

CHAPTER 2 DEALINGS BETWEEN INDIVIDUALS AND ADMINISTRATIVE AUTHORITIES

Division 2.1 General provisions

Article 2:1

1. In looking after their interests in dealings with administrative authorities, anyone may be assisted or represented by a legal representative.
2. An administrative authority may require a legal representative to produce a written authorisation.

Article 2:2

1. An administrative authority may refuse to allow assistance or representation by a person against whom there are serious objections.
2. The interested party and the person referred to in subsection 1 shall be informed in writing of the refusal without delay.
3. Subsection 1 shall not apply to attorneys-at-law and procurators.

Article 2:3

1. An administrative authority shall send documents which manifestly come within the competence of another administrative authority to such authority without delay, while simultaneously informing the sender.
2. An administrative authority shall return to the sender as soon as possible documents which are not intended for it and are also not passed on to another administrative authority.

Article 2:4

1. An administrative authority shall perform its duties without prejudice.
2. An administrative authority shall ensure that persons belonging to it or working for it who have a personal interest in an order do not influence its decision-making on the matter.

Article 2:5

1. Anyone involved in the performance of the duties of an administrative authority who in the process gains access to information which they know, or should reasonably infer, to be of a confidential nature, and who is not already subject to a duty of secrecy by virtue of their office or profession or any statutory regulation, shall not disclose such information unless they are by statutory regulation obliged to do so or disclosure is necessary in consequence of their duties.

2. Subsection 1 shall also apply to institutions, and persons belonging to them or working for them, involved by an administrative authority in the performance of its duties, and to institutions and persons belonging to them or working for them performing a duty assigned to them by or pursuant to an Act of Parliament.

Division 2.2 Use of Languages in Dealings with Administrative Authorities

Article 2:6

1. Administrative authorities and persons working under their responsibility shall use the Dutch language, unless provided otherwise by statutory regulation.

2. Notwithstanding subsection 1, another language may be used if its use is more effective and the interests of third persons are not disproportionately harmed.

Article 2:7

1. Anyone may use the Frisian language in communications with administrative authorities in so far as the latter have their seat in the Province of Friesland.

2. Subsection 1 shall not apply if the administrative authority asks to use the Dutch language on the grounds that using the Frisian language would lead to a disproportionate burden on administrative communications.

Article 2:8

1. Administrative authorities may use the Frisian language in oral communications within the Province of Friesland.

2. Subsection 1 shall not apply if the other party asked for the Dutch language to be used on the grounds that using the Frisian language would lead to the oral communications taking an unsatisfactory course.

Article 2:9

1. Administrative authorities with their seat in the Province of Friesland that do not form part of central government may lay down rules on the use of the Frisian language in documents.

2. Our Minister whom it may concern may lay down rules on the use of the Frisian language in documents by parts of central government operating in the Province of Friesland or part thereof.

Article 2:10

1. A document in the Frisian language shall also be drawn up in the Dutch language if it:

(a) is meant exclusively or otherwise for use by authorities outside the Province of Friesland or central government authorities;

(b) contains generally binding regulations or policy rules; or

(c) is drawn up in direct preparation of regulations or rules as referred to at (b).

2. The notification, communication or deposit for inspection of the document referred to in subsection 1 shall in any event also be in the Dutch language, unless it can reasonably be assumed that there is no need for this.

Article 2:11

1. If a document is formulated in the Frisian language, the administrative authority shall provide a translation into the Dutch language on request.

2. The administrative authority may levy a charge for the translation not exceeding the cost thereof.

3. No charge shall be levied if the document:

(a) contains the minutes of a representative institution's meeting and the petitioner's interest is directly related to the subject matter, or contains the minutes of a representative institution's meeting and concerns the laying-down of generally binding regulations or policy rules, or

(b) contains an order or other act to which the petitioner is an interested party.

Article 2:12

1. Anyone may use the Frisian language at meetings of the representative institutions having their seat in the Province of Friesland.

2. What is said in the Frisian language shall be 'minuted' in the Frisian language.

CHAPTER 3 GENERAL PROVISIONS CONCERNING ORDERS

Division 3.1 Introductory provisions

Article 3:1

1. Orders containing generally binding regulations:

(a) shall only be subject to the provisions of division 3.2 in so far as they are not incompatible with the nature of the orders;

(b) shall not be subject to the provisions of division 3.6.

2. Divisions 3.2 to 3.5 shall apply *mutatis mutandis* to acts of administrative authorities other than orders in so far as they are not incompatible with the nature of the acts.

Division 3.2 The duty of care and the weighing of interests

Article 3:2

When preparing an order an administrative authority shall gather the necessary information concerning the relevant facts and the interests to be weighed.

Article 3:3

An administrative authority shall not use the power to make an order for a purpose other than that for which it was conferred.

Article 3:4

1. When making an order the administrative authority shall weigh the interests directly involved in so far as no limitation on this duty derives from a statutory regulation or the nature of the power being exercised.

2. The adverse consequences of an order for one or more interested parties may not be disproportionate to the purposes to be served by the order.

Division 3.3 Provision of advice

Article 3:5

1. In this division 'adviser' means a person or body that is charged by or pursuant to a statutory regulation with advising on orders to be made by an administrative authority and that does not work under the responsibility of the administrative authority concerned.

2. This division shall not apply to the consultation of the Council of State.

Article 3:6

1. If no statutory time limit is imposed on the adviser by statutory regulation, the administrative authority may indicate within what time limit an opinion is expected. This time limit may not be so short that the adviser is unable to discharge his duties properly.

2. If the opinion is not delivered on time its absence alone shall not be an obstacle to making the order.

Article 3:7

1. The administrative authority to which the opinion is delivered shall provide the adviser, at his request or otherwise, with the information needed to enable him to discharge his duties properly.

2. Article 10 of the Government Information (Public Access) Act shall apply *mutatis mutandis*.

Article 3:8

The name of the adviser who has delivered the opinion shall be stated in or with the order.

Article 3:9

If an order is based on an investigation carried out by an adviser into facts and actions, the administrative authority shall satisfy itself that the investigation was carried out with due care.

Article 3:9a

This division shall apply *mutatis mutandis* to bills.

Division 3.4 Public preparatory procedure

Article 3:10

1. The procedure for the preparation of orders provided in this division shall be followed if this is required by statutory regulation or by order of the administrative authority.

2. The regulations of division 4.1.1 regarding administrative decisions shall also apply to other orders which are made on application and prepared in accordance with this division.

Article 3:11

1. The administrative authority shall deposit the application for the order, or the draft of an order to be made on its own initiative or on application, together with the documents relating thereto, for inspection for a period of at least four weeks by those persons who are to be given the opportunity under article 3:13 to state their views.

2. Article 10 of the Government Information (Public Access) Act shall apply *mutatis mutandis*. If certain documents are not deposited for inspection under this provision, communication shall be given thereof.

3. A copy of the documents deposited for inspection shall be provided at no more than cost price.

4. In so far as not provided otherwise by statutory regulation, the deposit for inspection shall in any event take place at the offices of the administrative authority.

Article 3:12

1. The communication of the application or the draft shall be given in one or more newspapers or free local papers, or in any other suitable way, prior to the deposit of the application for inspection. Only the substance of the order needs to be stated.

2. If the order is by an administrative authority forming part of central government the communication shall be placed in the Government Gazette, unless provided otherwise by statutory regulation.

3. The communication shall state where and when the documents are to be deposited for inspection, who is to be given the opportunity to state his views and how this can be done under article 3:13.

Article 3:13

1. Interested parties may state their views on the application or the draft either orally or in writing, at their discretion.

2. It may be provided by statutory regulation or by the administrative authority that other persons are also to be given the opportunity to state their views either orally or in writing, at their discretion.

3. The time limit for stating a view shall not end earlier than the last day of the inspection period.

4. In the case of an order made on application, the applicant shall if necessary be given the opportunity to respond to the views stated.

5. A record shall be kept of views stated orally under the above subsections.

Division 3.5 Extensive public preparatory procedures

Paragraph 3.5.1 Introduction

Article 3:14

The procedures for the preparation of orders provided in paragraphs 3.5.2 to 3.5.5 and shall be followed if this is required by statutory regulation or by order of the administrative authority.

Article 3:15

By or pursuant to the statutory regulation referred to in article 3:14 or the order referred to therein administrative authorities may be designated which:

- (a) must be given the opportunity to deliver an opinion on the making of an order, or
- (b) must be involved in the preparatory procedures in some other way.

Paragraph 3.5.2 Filing of the application; admissibility

Article 3:16

The provisions of division 4.1.1 regarding administrative decisions shall also apply to other orders which are made on application and prepared in accordance with this division.

Article 3:17

1. The administrative authority shall note without delay the date of receipt on the application.
2. It shall send without delay the applicant an acknowledgement of receipt stating this date.
3. It shall send without delay the other administrative authorities involved a copy of the application and of the accompanying documents, stating the date of receipt.

Article 3:18

1. The power regulated in article 4:5 not to process an application on the grounds that it is incomplete may be exercised only if the applicant has been given the opportunity to amplify the application within eight weeks of the application being received.
2. The other administrative authorities involved shall be informed of requests to amplify an application and orders not to process an application.
3. If an administrative authority processes an application despite its being incomplete, it shall make a note of this on the application. If the applicant has been given the opportunity to amplify the application, the administrative authority shall state in such note the time limit set for this under article 4:5.

Paragraph 3.5.3. The draft order

Article 3:19

1. The administrative authority shall prepare a draft order as soon as possible. Unless article 3:29 has been applied, the administrative authority shall send the draft to the applicant and the other administrative authorities involved within twelve weeks of receiving the application.
2. No later than two weeks after the sending of the draft as referred to in subsection 1, information of the draft shall simultaneously be given by:
 - (a) deposit for inspection;

(b) a communication in one or more newspapers or free local papers such that the intended object is achieved as far as possible;

(c) a communication in the Government Gazette, in cases where an authority of the central or provincial government is the administrative authority.

Article 3:20

1. In the communications referred to in Article 3:19, Ssubsection 2, the administrative authority shall state at least:

(a) the substance of the application and the purport of the draft order;

(b) where and when the documents may be inspected;

(c) who has been given the opportunity to submit reservations concerning the draft, and how and within what time limit this may be done;

(d) that a person who submits reservations in writing may request that his personal particulars are not stated.

2. The administrative authority shall also inform the applicant and the other administrative authorities involved of this information.

Article 3:21

1. The following shall be deposited for inspection with the draft order:

(a) a copy of the application with the accompanying documents;

(b) if there has been prior consultation on the application, a report thereof;

(c) the reports produced and opinions delivered in connection with the draft, in so far as it can reasonably be assumed that they may be necessary for an assessment of the draft;

(d) a list of the reports and opinions not deposited for inspection and, in so far as it can reasonably be assumed that they are necessary for an assessment of the draft, of orders previously made on the same subject which are still in effect, together with a statement of where and when these documents may be inspected.

2. The administrative authority shall supplement the documents deposited for inspection with relevant new documents and information, including in any event the opinions and reservations submitted in accordance with paragraph 3.5.4 and the records of the reservations submitted orally and exchanges of views on the draft.

3. Article 10 of the Government Information (Public Access) Act shall apply *mutatis mutandis* unless provided otherwise by statutory regulation. If certain documents are not deposited for inspection, this shall be stated.

Article 3:22

1. The documents may be inspected during working hours for four weeks from the date on which the draft order is deposited for inspection. During this period the documents may also be inspected on request during at least three consecutive hours per week outside working hours. On request an oral explanation shall be given free of charge within this period.

2. After the period of four weeks the documents shall be deposited for inspection at times determined by the administrative authority until the period for lodging an appeal against the order expires.

3. A copy of the documents deposited for inspection shall be provided at no more than cost price.

Paragraph 3.5.4 Opinions and reservations

Article 3:23

1. The administrative authorities acting as advisers shall send their opinion to the administrative authority within four weeks of the date on which the draft is deposited for inspection.

2. The administrative authority shall send a copy of each opinion to the applicant and the other administrative authorities acting as advisers as soon as possible.

Article 3:24

1. Anyone may submit written reservations to the administrative authority within four weeks of the date on which the draft is deposited for inspection.

2. The date of receipt shall be noted on the document.

3. The administrative authority shall send a copy of each reservation submitted to the applicant and the other administrative authorities acting as advisers as soon as possible.

4. The personal particulars of a person who has submitted written reservations shall not be disclosed if he so requests. The request shall be made in writing to the administrative authority, stating the particulars referred to in the first sentence.

Article 3:25

1. During the period referred to in Article 3:24, Subsection 1, anyone shall, on request, be given the opportunity to exchange ideas on the draft order and submit reservations orally. The administrative authority shall give the applicant the opportunity to be present on such occasions.

2. A record shall be kept of reservations submitted orally and oral exchanges of ideas, including the substance of each reservation and the name and address of the person submitting it.

3. The record shall be sent to the applicant, the administrative authorities acting as advisers and those who have submitted oral reservations, as soon as possible, in any event within two weeks.

Article 3:26

It may be provided in the statutory regulation or order referred to in Article 3:14 that the right to submit reservations and engage in an exchange of ideas on the draft order may be exercised only by a category of persons designated therein, including in any event the interested parties.

Article 3:27

When notifying the order, the administrative authority shall state its considerations on the reservations submitted.

Paragraph 3.5.5 Decision on the application

Article 3:28

The administrative authority shall make its order on the application as soon as possible, but at the latest within six months of receiving the application unless Article 3:29 has been applied.

Article 3:29

1. If the application concerns a very complicated or controversial subject, the administrative authority may, within eight weeks of receiving the application, extend the periods referred to in Article 3:19, Subsection 1, Second Sentence, and Article 3:28 for a

reasonable period to be determined by the administrative authority in each case. Before taking such a decision, it shall give the applicant the opportunity to state his views on this.

2. The other administrative authorities involved shall be informed of an extending order at the time of its notification.

3. The administrative authority shall give communication of the extending order and of the filed application within, at the latest, ten weeks of receiving the application, Article 3:19, Subsection 2, Article 3:20, Subsection 1, (a) and (b), and Subsection 2 and Articles 3:21 and 3:22 applying *mutatis mutandis*.

Paragraph 3.5.6 Altering or repealing orders and other orders made by the administrative authority on its own initiative

Article 3:30

1. If an administrative authority intends to make on its own initiative an order altering or repealing a previous order, or to make another order, it shall draw up a draft order and give communication thereof, Article 3:19, Subsection 2, (b) and (c) applying *mutatis mutandis*. It may be provided in the statutory regulation or order referred to in Article 3:14 that Article 3:19, Subsection 2, (a) and Article 3:21 shall apply *mutatis mutandis*.

2. Before applying Subsection 1, the administrative authority shall give written communication to the other administrative authorities involved and, in the case of an altering or repealing order, to the one to whom the order to be altered or repealed was addressed, unless provided otherwise by statutory regulation or by order as referred to in Article 3:14. It shall at the same time give them the opportunity to deliver an opinion or state their views, as the case may be, on the intention, within a time limit to be determined by the authority.

3. If the intention is based on a request, the communication referred to in subsection 2 shall also be given to the petitioner. Article 3:44, Subsections 3 and 5 shall apply *mutatis mutandis*.

Article 3:31

1. In the communication referred to in Article 3:30, Subsection 1, the administrative authority shall at least state:

(a) the substance of the draft order and a brief statement of the reasons for it;

(b) who is to be given the opportunity to submit reservations concerning the draft, and how and within what time limit this may be done;

(c) that a person who submits reservations in writing may request that their personal particulars are not disclosed;

(d) if Article 3:30, subsection 1, second sentence, has been applied: where and when the documents may be inspected.

2. In the case of an altering or repealing order, the administrative authority shall also give communication of this information to the one to whom the order to be altered or repealed was addressed, the other administrative authorities involved and, if a request for altering or repealing has been made, to the submitter of the request. Article 3:44, Subsections 3 and 5, shall apply *mutatis mutandis*.

Article 3:32

1. Anyone may submit written reservations concerning a draft order to the administrative authority within two weeks of the communication referred to in article 3:30, subsection 1. Article 3:24, Subsections 2 and 4 and Article 3:26 shall apply *mutatis mutandis*.

2. The administrative authority shall send a copy of every reservation submitted to the administrative authorities acting as advisers as soon as possible and, in the case of an altering or repealing order, to the one to whom the order to be altered or repealed was addressed.

Article 3:33

1. The administrative authority shall make an altering or repealing order, or an order not to alter or repeal, as soon as possible, but at the latest within sixteen weeks of the date on which it gave the communication referred to in Article 3:30, subsection 2 to the one to whom the order to be altered or repealed was addressed.

2. Notwithstanding the provisions of Subsection 1, an order that is not preceded by a communication as referred to in Article 3:30, Subsection 2 shall be made within eight weeks of the communication referred to in Subsection 1 of that Article.

Division 3.6 Notification and communication

Article 3:40

An order shall not take effect until it has been notified.

Article 3:41

1. Orders which are addressed to one or more interested parties shall be notified by being sent or issued to these, including the applicant.

2. If an order cannot be notified in the manner provided in Subsection 1, it shall be notified in any other suitable way.

Article 3:42

1. Orders which are not addressed to one or more interested parties shall be notified by means of a notice of the order, or the substance thereof, placed in an official government publication, newspaper or free local paper, or in any other suitable way.

2. If notice is given only of the substance, the order shall at the same time be deposited for inspection. The notice shall state where and when the order will be deposited for inspection.

Article 3:43

1. When an order is notified, or as soon as possible thereafter, the ones who stated their views on it during the preparation shall be informed. An adviser as referred to in Article 3:5 shall in any event be informed if the order departs from the opinion.

2. If Division 3.4 has been applied in connection with the preparation of an order, the communication referred to in Subsection 1 may be made in the same way as that in which communication is given of the application or draft order in accordance with Article 3:12, Subsections 1 and 2.

3. When communication is given of an order it shall also be stated when and how the order was notified.

Article 3:44

1. In the case of orders prepared in accordance with the procedures in Division 3.5, the other administrative authorities involved shall be informed at the time of notification.

2. Within two weeks of notification the administrative authority shall give communication of the order:

(a) Article 3:19, Subsection 2 applying *mutatis mutandis*, and

(b) by sending a copy of the order to the ones who submitted reservations concerning the draft order.

3. Notwithstanding subsection 2 (b), the administrative authority may:

(a) if the volume of the order so warrants, merely communicate each of the ones referred to therein of the purport of the order and the considerations on their reservations;

(b) if a reservation has been submitted by more than five persons in the same document, merely send copies to the five persons whose names and addresses are listed first in that document;

(c) if a reservation has been submitted by more than five persons in the same document and the volume of the order so warrants, merely inform the five persons whose names and addresses are listed first in that document of the purport of the order and the considerations on their reservations;

(d) if more than 250 people would have to be informed, refrain from communication altogether.

4. When making the notification and giving the communications referred to in Subsections 1, 2 and 3, the administrative authority shall also state:

(a) when a copy of the order was deposited for inspection and the times and place at which the documents are available for inspection;

(b) whether alterations to the draft are contained in the order;

(c) if Subsection 3 has been applied, that this has happened and the reasons for this.

5. If Subsection 3 has been applied, the ones who have submitted reservations concerning the draft order may request the administrative authority to send them a copy of the order. This option shall be stated in the communication of the order in accordance with Subsections 2 and 3. This request shall be granted within two weeks, unless the administrative authority considers that such sending cannot reasonably be required.

6. The documents may be inspected during working hours for six weeks from the day on which a copy of the order is deposited for inspection. During this period the documents may also be inspected on request during at least three consecutive hours per week outside working hours. On request, an oral explanation shall be given free of charge within this period. A copy of the documents deposited for inspection shall be provided at no more than cost price.

7. Subsection 2 (a) - in so far as it concerns the application of Article 3:19, subsection 2, (b) and (c) - and Subsection 6, Second Sentence, shall not be applicable to an order refusing an application for an order as referred to in Article 3:30, Subsection 1 if the order was not preceded by a communication as referred to in that Subsection.

Article 3:45

1. If an objection may be made or an appeal may be lodged against an order, this shall be stated when notifying and giving communication of the order.

2. At the same time it shall be stated by whom, within what time limit and with which authority an objection may be made or an appeal may be lodged.

Division 3.7 Reasons for orders

Article 3:46

An order shall be based on proper reasons.

Article 3:47

1. The reasons shall be stated when the order is notified.

2. If possible, the statutory regulation on which the order is based shall be stated at that same time.

3. If, in the interests of speed, the reasons cannot be stated immediately when the order is published, the administrative authority shall give communication of them as soon as possible thereafter.

4. In such a case, Articles 3:41 to 3:43 inclusive shall apply *mutatis mutandis*.

Article 3:48

1. The reasons need not be stated if it can reasonably be assumed that there is no need for this.

2. If, however, an interested party asks within a reasonable period to be informed of the reasons, they shall be communicated to them as quickly as possible.

Article 3:49

To state the reasons of an order or part of an order, it is sufficient to refer to an opinion drawn up in this connection if the opinion itself contains the reasons and communication of the opinion has been or is given.

Article 3:50

If the administrative authority makes an order which derogates from an opinion drawn up for this purpose pursuant to a statutory regulation, this fact and the reasons for it shall be stated in the reasons for the order.

CHAPTER 4 SPECIAL PROVISIONS CONCERNING ORDERS

Title 4.1 Administrative decisions

Division 4.1.1 The application

Article 4:1

Unless provided otherwise by statutory regulation, an application for an administrative decision shall be lodged in writing with the administrative authority which is competent to decide on the application.

Article 4:2

1. The application shall be signed and shall contain at least:

- (a) the name and the address of the applicant;
- (b) the date;
- (c) a description of the administrative decision applied for.

2. The applicant shall also supply such information and documents as required for a decision on the application as it is reasonable to expect him to be able to obtain.

Article 4:3

1. The applicant may refuse to supply information and documents in so far as their importance to the decision of the administrative authority is outweighed by the importance of protecting privacy, including the results of medical and psychological examinations, or by the importance of protecting business and manufacturing data.

2. Subsection 1 shall not apply to information and documents designated by statutory regulation as having to be supplied.

Article 4:4

The administrative authority which is competent to decide on the application may specify a form to be used when lodging applications and supplying information, in so far as this is not provided by statutory regulation.

Article 4:5

1. If the applicant has not complied with any requirement made by statutory regulation for the application to be dealt with, or if the information and documents supplied are insufficient to allow the application to be assessed or the administrative decision to be prepared, the administrative authority may decide not to deal with the application, provided the applicant has been given the opportunity to amplify the application within such time limit as set by the administrative authority.

2. If the application, or any of the information or documents pertaining to it, is in a foreign language, and a translation is necessary for the application to be assessed or the administrative decision to be prepared, the administrative authority may decide not to deal with the application, provided the applicant has been given the opportunity to amplify the application by means of a translation within such time limit as set by the administrative authority.

3. If the application, or any of the information or documents pertaining to it, is sizeable or complicated, and a summary is necessary for the application to be assessed or the administrative decision to be prepared, the administrative authority may decide not to deal with the application, provided the applicant has been given the opportunity to amplify the application by means of a summary within such time limit as set by the administrative authority.

4. An order not to process the application shall be notified to the applicant within four weeks of the application being amplified or the time limit set for this purpose expiring without being used.

Article 4:6

1. If a new application is made after an administrative decision has been made rejecting all or part of an application, the applicant shall state any new facts that have emerged or circumstances that have altered.

2. If no new facts or altered circumstances are stated, the administrative authority may, without applying Article 4:5, reject the application by referring to its administrative decision rejecting the previous application.

Division 4.1.2 Preparation

Article 4:7

1. Before an administrative authority rejects all or part of an application for an administrative decision, it shall give the applicant the opportunity to state their views, if:

(a) the rejection is based on information about facts and interests relating to the applicant, and

(b) this information differs from information supplied by the applicant themselves in the matter.

2. Subsection 1 shall not apply if the difference from the application can be of only minor importance to the applicant.

Article 4:8

1. Before making an administrative decision about which an interested party who has not applied for the administrative decision may be expected to have reservations, an administrative authority shall give that interested party the opportunity to state their views, if:

(a) the administrative decision is based on information about facts and interests relating to the interested party, and

(b) this information was not supplied in the matter by the interested party themselves.

2. Subsection 1 shall not apply if the interested party has not complied with a statutory obligation to supply information.

Article 4:9

For the purposes of Articles 4:7 and 4:8, the interested party may state their views either in writing or orally.

Article 4:10

If Division 3.4 or 3:5 is applied in implementation of Articles 4:7 and 4:8, the administrative authority shall inform the applicant and the person to whom the administrative decision will be addressed.

Article 4.11

The administrative authority may refrain from applying Articles 4:7 and 4:8 in so far as:

- (a) the need for expedition precludes this;
- (b) the interested party has already been given the opportunity to state their views in connection with a previous administrative decision, or to another administrative authority, and no new facts or circumstances have occurred since then, or
- (c) the purpose of the administrative decision can be achieved only if the interested party is not informed of it beforehand.

Article 4:12

The administrative authority may also refrain from applying Articles 4:7 and 4:8 in the case of an administrative decision laying down a financial obligation or claim, if:

- (a) an objection may be made or an administrative appeal may be lodged against that administrative decision, and
- (b) the adverse consequences may be completely nullified after an objection or administrative appeal.

2. Subsection 1 shall not apply to an administrative decision:

- (a) refusing a subsidy under Article 4:35 or in accordance with Article 4:51;
- (b) fixing a subsidy at a lower amount under Article 4:46, Subsection 2, or
- (c) repealing the granting or fixing of a subsidy or altering it to the detriment of the recipient.

Division 4.1.3 Time limit for decisions

Article 4:13

1. An administrative decision shall be made within the time limit prescribed by statutory regulation, or, in the absence of such time limit, within a reasonable period after receiving the application.

2. The reasonable period referred to in subsection 1 shall in any event be deemed to have expired if the administrative authority has not made an administrative decision or given communication as referred to in Article 4:14 within eight weeks of receiving the application.

Article 4:14

If, in the absence of a time limit prescribed by statutory regulation, an administrative decision cannot be made within eight weeks, the administrative authority shall inform the applicant, stating a reasonable time limit for the administrative decision to be made.

Article 4:15

The time limit for making an administrative decision shall be suspended with effect from the day on which the administrative authority requests the applicant to amplify the application pursuant to Article 4:5 until the day on which the application has been amplified or the time limit set for this purpose expires without being used.

Title 4.2 Subsidies

[...]

Title 4.3 Policy rules Article 4:81

1. An administrative authority may establish policy rules in respect of a power conferred to it, which is exercised under its responsibility, or which has been delegated by it.

2. In other cases, an administrative authority may establish policy rules only in so far as this is provided by statutory regulation.

Article 4:82

To explain the reasons for an order it shall only be sufficient to refer to a fixed practice in so far as this practice is contained in a policy rule.

Article 4:83

When a policy rule is notified, the statutory regulation on which the power to which the order containing a policy rule relates, is based, shall, if possible, be stated.

Article 4:84

The administrative authority shall act in accordance with the policy rule unless, due to special circumstances, the consequences for one or more interested parties would be out of proportion to the purposes of the policy rule.

CHAPTER 5 ENFORCEMENT

Division 5.2 Supervision of observance

Article 5:11

‘Supervisor’ means a person who by or pursuant to statutory regulation has been charged with supervising the observance of the provisions made by or pursuant to any statutory regulation.

Article 5:12

1. When performing his duties a supervisor shall carry an identification card issued by the administrative authority under whose responsibility the supervisor works.

2. A supervisor shall immediately produce his identification card on request.

3. The identification card shall contain a photograph of the supervisor and shall in any event state their name and position. The model of the identification card shall be fixed by the Minister of Justice in a regulation.

Article 5:13

A supervisor shall exercise their powers only in so far as this can reasonably be assumed to be necessary for the performance of his duties.

Article 5:14

The powers to which the supervisor is entitled may be limited by statutory regulation or by order of the administrative authority which designates the supervisor as such.

Article 5:15

1. A supervisor, taking with them the requisite equipment, shall be entitled to enter every place, except for a dwelling without the consent of the occupant.
2. If necessary, they may gain entry with the assistance of the police.
3. They shall be entitled to take with them people designated by them for this purpose.

Article 5:16

A supervisor shall be entitled to require the provision of information.

Article 5:17

1. A supervisor shall be entitled to require inspection of business information and documents.
2. They shall be entitled to make copies of the information and documents.
3. If the copies cannot be made on the spot, they shall be entitled to take the information and documents away for this purpose for a short time in exchange for a written receipt issued by them.

Article 5:18

1. A supervisor shall be entitled to inspect and measure goods and take samples of them.
2. They shall be entitled to open packages for this purpose.
3. At the request of the interested party, the supervisor shall, if possible, take a second sample, unless provided otherwise by or pursuant to statutory regulation.
4. If the objects cannot be inspected, measured or sampled on the spot, they shall be entitled to take the objects away for this purpose for a short time in exchange for a written receipt issued by them.
5. Wherever possible the samples taken shall be returned.
6. The interested party shall, at their request, be informed as quickly as possible of the results of the inspection, measuring or sampling.

Article 5:19

1. A supervisor shall be entitled to inspect means of transport which are subject to their supervision.
2. They shall be entitled to inspect the cargo of means of transport which are reasonably assumed by them to be used for carrying things which are subject to their supervision.
3. They shall be entitled to require the driver of a means of transport to allow them to inspect the documents statutorily required which are subject to their supervision.
4. For the purpose of exercising these powers, they shall be entitled to require the driver of a vehicle or the master of a vessel to stop their means of transport and take it to a place designated by the supervisor.
5. How the demand to stop a vehicle or vessel is to be made shall be decided by the Minister of Justice in a regulation.

Article 5:20

1. Everyone shall be obliged to cooperate fully with a supervisor, who may reasonably demand this in the exercise of their powers, within such reasonable time limit as they may specify.

2. Any person who is bound by a duty of secrecy by virtue of their office or profession or by statutory regulation may refuse to cooperate in so far as their duty of secrecy makes this necessary.

Division 5.3 Enforcement action

Article 5:21

‘Enforcement action’ means physical acts taken by or on behalf of an administrative authority against what has been or is being done, kept or omitted in breach of obligations laid down by or pursuant to any statutory regulations.

Article 5:22

The power to take enforcement action exists only if it has been granted by or pursuant to an Act of Parliament.

Article 5:23

This division does not apply if action is taken for the immediate enforcement of public order.

Article 5:24

1. A decision that enforcement action is to be taken shall be made in writing. The written decision constitutes an administrative decision.

2. The administrative decision shall state what regulation has been or is being infringed upon.

3. It shall be notified to the offender, to the persons entitled to the use of the object in respect of which enforcement action will be taken and to the applicant.

4. The administrative decision shall contain a time limit within which the interested parties may prevent such action by taking measures themselves. The administrative authority shall specify the measures to be taken.

5. No time limit need be granted if swiftness is of the essence.

6. If the situation is so urgent that the administrative authority cannot put the decision to take enforcement action in writing beforehand, it shall arrange for it to be recorded in writing and notified as quickly as possible thereafter.

Article 5:25

1. An offender shall owe the costs incurred in connection with the taking of enforcement action unless it would not be reasonable for these costs or all of these costs to be borne by them.

2. The administrative decision shall state that the enforcement action is taken at the expense of the offender.

3. If, however, all or part of the costs will not be charged to the offender this shall be stated in the administrative decision.

4. The costs referred to in Subsection 1 shall include the costs connected with the preparation of enforcement action, in so far as these costs are incurred after the date on which the time limit referred to in Article 5:24, Subsection 4, expires.

5. The costs shall also be owed if the enforcement action is not taken or not taken in its entirety owing to the termination of the illegal state.

6. The costs referred to in Subsection 1 shall also include the costs resulting from the compensation for damage pursuant to Article 5:27, Subsection 6.

Article 5:26

1. An administrative authority which has taken enforcement action may collect the costs owed pursuant to Article 5:25, plus the costs incurred in connection with the collection, from the offender by writ of execution.

2. The writ of execution shall be served through bailiff's communication at the expense of the offender and shall constitute an enforceable title within the meaning of Book 2 of the Code of Civil Procedure.

3. For six weeks after the day of service may be opposed against the writ of execution by writ of summons served on the legal entity to which the administrative authority belongs.

4. The opposition shall have the effect of staying the writ of execution. At the request of the legal entity the court may end the stay of the writ of execution.

Article 5:27

1. In order to implement a decision to take enforcement action, persons designated for this purpose by the administrative authority taking enforcement action shall have access to every place, in so far as this may reasonably be deemed necessary for the performance of their duties.

2. An administrative authority taking enforcement action shall be entitled to issue an authorization as referred to in Article 2 of the Entry to Premises Act for gaining entry to a dwelling without the occupant's consent.

3. A place which is not involved in the infringement shall not be entered until the administrative authority taking enforcement action has given the person entitled at least 48 hours' notice in writing.

4. Subsection 3 shall not apply if timely communication is not possible because swiftness is of the essence. The communication shall then be given as quickly as possible.

5. The communication shall specify the way in which entry will take place.

6. The legal entity to which the administrative authority belongs shall reimburse the damage which is caused by the entry of a place as referred to in Subsection 3, in so far as it would not be reasonable for this to be borne by the person entitled, without prejudice to the right to recover this damage from the offender pursuant to Article 5:25, Subsection 6.

Article 5:28

The power to take enforcement action shall include the power to seal off buildings and sites and anything which may be in or on them.

Article 5:29

1. The power to take enforcement action shall include the removal and storage of goods suitable for this purpose, in so far as the use of enforcement action requires this.

2. If goods have been removed and stored, the administrative authority that has taken enforcement action shall draw up an official report of this and supply a copy to the person who had the goods under his control.

3. The administrative authority shall arrange for custody of the stored goods and shall return such goods to the person lawfully entitled to them.

4. The administrative authority shall be entitled to defer such return until the costs owed pursuant to Article 5:25 have been paid. If the person lawfully entitled is not also the

offender, the administrative authority shall be entitled to defer the return until the costs of custody have been paid.

Article 5:30

1. An administrative authority which has taken enforcement action shall be entitled, if goods removed and stored pursuant to Article 5:29, Subsection 1, cannot be returned within thirteen weeks of the removal, to sell the same or, if sale is not possible in its opinion, to transfer the ownership of the goods free of charge to a third party or to have them destroyed.

2. The administrative authority shall have a similar power within the same period if the costs referred to in Article 5:25 together with the costs estimated for the sale, transfer of ownership free of charge or destruction are so high that they are out of proportion to the value of the goods.

3. Sale, transfer of ownership or destruction shall not take place within two weeks of the provision of the copy referred to in Article 5:29, Subsection 2, unless it relates to a dangerous substance or a substance likely to perish beforehand.

4. For a period of three years after the date of sale, the one who was the owner at that time shall be entitled to the proceeds of the goods less the costs owed pursuant to Article 5:25, Subsection 1, and the costs of the sale. After the expiry of this period, any net proceeds of the sale shall pass to the legal entity to which the administrative authority belongs.

Article 5:31

A decision to take enforcement action shall not be taken as long as an administrative decision, already taken in respect of the relevant infringement, to impose a duty backed by a constraint penalty has not been repealed.

Division 5.4 Constraint

Article 5:32

1. An administrative authority which is entitled to take enforcement action may instead impose on the offender a duty backed by a constraint.

2. The aim of a duty backed by a constraint shall be to remedy the infringement or to prevent a further infringement or a repetition thereof.

3. The imposition of a duty backed by a constraint shall not be chosen if this would be contrary to the interest intended to be protected by the regulation that has been infringed.

4. The administrative authority shall fix the constraint as a lump sum, as a sum payable by unit of time during which a duty is not performed, or as a sum per infringement of the duty. The administrative authority shall also fix a sum above which no further penalty will be forfeited. The fixed amount shall be in reasonable proportion to the importance of the interest that has been infringed and the intended effect of the imposition of the constraint.

5. An administrative decision imposing a duty backed by a constraint which is intended to remedy an infringement or prevent a further infringement shall set a time limit within which the offender can perform the duty without the constraint being forfeited.

Article 5:33

1. Forfeited constraints shall accrue to the legal entity to which the administrative authority that has fixed the constrained belongings. The administrative authority may collect the sum concerned plus the costs incurred in connection with the collection, by writ of execution.

2. Article 5:26, Subsections 2 to 4 inclusive, shall apply.

Article 5:34

1. The administrative authority which has imposed a duty backed by a constraint may, at the request of the offender, lift the constraint, reduce it or stay its operation for a given period if it has become permanently or temporarily impossible for the offender to perform all or part of his obligations.

2. An administrative authority which has imposed a duty backed by a constraint may, at the request of the offender, lift the constraint if the decision has been in effect for a year without the constraint being forfeited.

Article 5:35

1. The power to collect forfeited sums shall be barred by prescription six months after the date on which they are forfeited.

2. The prescription shall be stayed by bankruptcy, application of the arrangement of purgation of debts of natural persons and every statutory impediment to collection of the constraint.

Article 5:36

A duty backed by a constraint shall not be imposed as long as a decision relating to the relevant infringement to take enforcement action has not been repealed.

CHAPTER 6 GENERAL PROVISIONS CONCERNING OBJECTIONS AND APPEALS

[...]

CHAPTER 7 SPECIAL PROVISIONS CONCERNING OBJECTIONS AND ADMINISTRATIVE APPEALS

[...]

CHAPTER 8 SPECIAL PROVISIONS CONCERNING APPEALS TO THE DISTRICT COURT

[...]

PART 10 PROVISIONS ON ADMINISTRATIVE AUTHORITIES

Title 10.1 Mandate and Delegation

Division 10.1.1 Mandate

Article 10:1

‘Mandate’ means the power to make orders in the name of an administrative authority.

Article 10:2

An order made by a mandatory within the limits of their power is deemed to be an order of the mandator.

Article 10:3

1. An administrative authority may grant a mandate unless provided otherwise by statutory regulation or unless the nature of the power is incompatible with the granting of a mandate.

2. A mandate may in any event not be granted if it concerns a power:
 - (a) to adopt generally binding regulations, unless provision for the granting of a mandate was made when the power was conferred;
 - (b) to make an order which must be made by a qualified majority or by means of a prescribed procedure which is otherwise incompatible with the granting of a mandate;
 - (c) to decide on a notice of appeal;
 - (d) to annul or refrain from approving an order made by another administrative authority.
3. A mandate to rule on an objection shall not be granted to the person who has made the order, pursuant to a mandate, against which the objection is brought.

Article 10:4

1. If the mandatary does not operate under the responsibility of the mandator, the granting of the mandate shall require the consent of the mandatary and, in appropriate cases, the person under whose responsibility they work.
2. Subsection 1 shall not apply if the power to grant the mandate has been conferred by statutory regulation.

Article 10:5

1. An administrative authority may grant a general mandate or a mandate for a specific case.
2. A general mandate shall be granted in writing. A mandate for a specific case shall in any event be granted in writing if the mandatary does not work under the responsibility of the mandator.

Article 10:6

1. The mandator may issue directions regarding the exercise of the mandated power either on a case-by-case basis or generally.
2. The mandatary shall provide the mandator at his request with information about the exercise of the power.

Article 10:7

The mandator shall remain competent to exercise the mandated power.

Article 10:8

1. The mandator may always repeal the mandate.
2. A general mandate shall be repealed in writing.

Article 10:9

1. The mandator may allow a sub-mandate to be granted.
2. The other provisions of this division shall apply *mutatis mutandis* to a sub-mandate.

Article 10:10

An order made pursuant to a mandate shall state on behalf of which administrative authority it was made.

Article 10:11

1. An administrative authority may determine that orders made by it may be signed on its behalf, unless provided otherwise by statutory regulation or unless this would be incompatible with the nature of the power.

2. In such a case the order shall show that it was made by the administrative authority itself.

Article 10:12

This division shall apply *mutatis mutandis* if an administrative authority grants a power of attorney to another person operating under its responsibility, to perform legal acts under private law, or grants an authorization for the performance of acts which constitute neither an order nor a legal act under private law.

Division 10.1.2 Delegation

Article 10:13

‘Delegation’ means the transfer by an administrative authority of its power to make orders to another one, who assumes responsibility for the exercise of this power.

Article 10:14

Delegation shall not occur to subordinates.

Article 10:15

Delegation may occur only if the power to delegate has been conferred by statutory regulation.

Article 10:16

1. An administrative authority may issue only policy rules concerning the exercise of a delegated power.

2. The one to whom the power has been delegated shall provide the administrative authority at its request with information about the exercise of the power.

Article 10:17

An administrative authority may no longer exercise a delegated power itself.

Article 10:18

An administrative authority may repeal the delegation of a power at any time.

Article 10:19

An order made pursuant to a delegated power shall cite the delegation order and its source.

Article 10:20

1. This division, apart from Article 10:16, shall apply *mutatis mutandis* to the transfer by an administrative authority to a third party of the power of another administrative authority to make orders.

2. It may be provided by statutory regulation or by the order for transfer that the administrative authority whose power is transferred may issue policy rules concerning the exercise of the power.

3. The one to whom the power is transferred shall, at their request, provide the transferor and the administrative authority originally empowered, with information about the exercise of their power.

Title 10.2 Supervision of administrative authorities

Division 10.2.1 Approval

Article 10:25

In this act 'approval' means the consent of another administrative authority required for the entry into force of an order of an administrative authority.

Article 10:26

Orders may be made subject to approval only in the cases specified by or pursuant to an Act of Parliament.

Article 10:27

Approval may be withheld only on account of conflict with the law or on another ground contained in an Act of Parliament in or pursuant to which the requirement of approval is prescribed.

Article 10:28

Approval of an order on which a district court has given judgment, or which implements the final judgment of a district court may not be withheld on legal grounds that conflict with those on which the judgment was based or partly based.

Article 10:29

1. An order may be partially approved only if partial entry into force is compatible with the nature and substance of the order.
2. Approval may not be granted for a determinate period or conditionally, nor may it be repealed.

Article 10:30

1. Approval shall not be granted partially or withheld until after the administrative authority which made the order has been given the opportunity for consultation.
2. The reasons for the order concerning approval shall refer to what has been dealt with in the consultations.

Article 10:31

1. Unless provided otherwise by statutory regulation, the order concerning approval shall be notified to the administrative authority that has made the order requiring approval within thirteen weeks of the date on which it was forwarded for approval.
2. The making of the order concerning approval may be deferred once for a maximum of thirteen weeks.
3. Notwithstanding Subsection 2, the making of the order concerning approval may be deferred once for a maximum of six months if the opinion of an adviser as referred to in Article 3:5 is required in respect of the approval.
4. Unless provided otherwise by statutory regulation, the approval shall be deemed to have been granted if no order concerning approval or an order for deferment, or, within the period referred to in Subsection 1, an order concerning approval has been notified to the administrative authority that has made the order that is subject to approval.

Article 10:32

1. This division shall apply *mutatis mutandis* if the consent of another administrative authority is required for the making of an order by an administrative authority.
2. The consent may specify a time limit within which the order should be made.

Division 10.2.2 Annulment

Article 10:33

This division shall apply if an administrative authority is competent to annul an order of another administrative authority other than during an administrative appeal.

Article 10:34

The power to annul may only be granted by an Act of Parliament.

Article 10:35

An order may only be annulled on account of conflict with the law or the public interest.

Article 10:36

An order may only be annulled partially if its partial continuation in force would be consistent with the nature and substance of the order.

Article 10:37

An order which forms the subject of a district court judgment or implements the final judgment of a district court may not be annulled on legal grounds that conflict with those on which the judgment was based or partly based.

Article 10:38

1. An order which still requires approval may not be annulled.
2. An order against which an objection may be made, or an appeal may be lodged or is pending, may not be annulled.

Article 10:39

1. An order for the performance of a legal act under civil law may not be annulled if thirteen weeks have passed since it has been notified.
2. If a stay has been granted in accordance with Article 10:43 within the time limit referred to in Subsection 1, the order may still be annulled within the period of the stay.
3. If an order as referred to in Subsection 1 is subject to approval, the period referred to in Subsection 1 shall start after the approval order has been notified. Subsections 1 and 2 shall apply *mutatis mutandis* to the approval order.

Article 10:40

An order which has been stayed in accordance with Article 10:43 may no longer be annulled after the stay has ended.

Article 10:41

1. An order shall not be annulled until after the administrative authority which made the order has been given the opportunity for consultation.

2. The reasons for the annulling order shall refer to what has been dealt with in the consultations.

Article 10:42

1. The annulling of an order shall extend to all the legal consequences intended by the order.

2. The annulling order may provide that all or part of the legal consequences of the annulled order will continue to have effect.

3. If an order for the conclusion of an agreement is annulled, the agreement shall, if it has already been entered into and in so far as the annulling order does not provide otherwise, not be executed or continue to be executed, without prejudice to the other party's right to compensation.

Division 10.2.3 Stay

Article 10:43

Pending the investigation whether there are reasons to annul an order, the order may be stayed by the administrative authority competent to annul it.

Article 10:44

1. A staying order shall determine the duration of the stay.

2. The stay of an order may be extended once.

3. The stay may not exceed a year, even after extension.

4. If an objection is made or an appeal is lodged against a stayed order, the stay shall nonetheless continue until thirteen weeks after the final decision on the objection or appeal.

5. The stay may be lifted.

Article 10:45

Articles 10:36, 10:37, 10:38, Subsection 1, 10:39, Subsections 1 and 3, and 10:42, Subsection 3, shall apply *mutatis mutandis* to a staying order.

CHAPTER 11 FINAL PROVISIONS

[...]

III. Questions on the Act

1. Is the Dutch General Administrative Law (GALA) covering the topics you consider as (General) Administrative Law? What is missing? Which parts of the GALA would you not consider Administrative Law?
2. Which rules are codified in your country?
3. If not codified: what is the source (Constitution, Court practice etc.)?
4. What are the consequences of codification? / What are the consequences of having Administrative Law in other forms?
5. (What differences do you see in substance to your country?)

C Public – Private (Lecture 2)

I. General Questions

1. **What do we qualify** (legal sources, governmental entities, activities, contracts etc.)?
2. **What are the criteria for qualification** (legal basis, public interest or mandate, ownership and control, special powers, interests of the parties etc.)?
3. **What are the consequences of a qualification** (procedure and legal remedies, application of administrative or private law, state liability, constitutional restraints etc.)?
4. (To what extent may government act through private entities, by private law contracts etc.?)

II. Department of Transportation et al. v. Association of American Railroads



Read the extract from the decision below and consider what criteria the Supreme Court uses to assess whether Amtrak is private or public. Do you agree with the criteria they used? Would you use other criteria in your country? Further, consider how the separation of powers relates to the assessment of the Supreme Court of whether Amtrak is private or public. Do you agree?

Summary of the facts

In 2008, Congress gave Amtrak (National Railroad Passenger Corporation) and the Federal Railroad Administration (FRA) the authority to issue “metrics and standards”. The Association of American Railroads (AAR) argued that allowing a private entity, like Amtrak, to exercise joint authority in the issuance violated the constitution.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

DEPARTMENT OF TRANSPORTATION ET AL
v. ASSOCIATION OF AMERICAN RAILROADS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

No. 13–1080. Argued December 8, 2014—Decided March 9, 2015

In 1970, Congress created the National Railroad Passenger Corporation (Amtrak). Congress has given Amtrak priority to use track systems owned by the freight railroads for passenger rail travel, at rates agreed to by the parties or, in case of a dispute, set by the Surface Transportation Board. And in 2008, Congress gave Amtrak and the Federal Railroad Administration (FRA) joint authority to issue “metrics and standards” addressing the performance and scheduling of passenger railroad services, see §207(a), 122 Stat. 4907, including Amtrak’s on-time performance and train delays caused by host railroads. Respondent, the Association of American Railroads, sued petitioners—the Department of Transportation, the FRA, and two officials—claiming that the metrics and standards must be invalidated because it is unconstitutional for Congress to allow and direct a private entity like Amtrak to exercise joint authority in their issuance. Its argument rested on the Fifth Amendment Due Process Clause and the constitutional provisions regarding separation of powers. The District Court rejected respondent’s claims, but the District of Columbia Circuit reversed as to the separation of powers claim, reasoning in central part that Amtrak is a private corporation and thus cannot constitutionally be granted regulatory power under §207.

Held: For purposes of determining the validity of the metrics and standards, Amtrak is a governmental entity. Pp. 6–12. (a) In concluding otherwise, the Court of Appeals relied on the statutory command that Amtrak “is not a department, agency, or instrumentality of the United States Government,” 49 U. S. C. §24301(a)(3), and the pronouncement that Amtrak “shall be operated and managed as a for profit corporation,” §24301(a)(2). But congressional pronouncements are not dispositive of Amtrak’s status as a governmental entity for purposes of separation of powers analysis under the Constitution, and an independent inquiry reveals the Court of Appeals’ premise that Amtrak is a private entity was flawed. As Amtrak’s ownership and corporate structure show, the political branches control most of Amtrak’s stock and its Board of Directors, most of whom are appointed by the President, §24302(a)(1), confirmed by the Senate, *ibid.*, and understood by the Executive Branch to be removable by the President at will. The political branches also exercise substantial, statutorily mandated supervision over Amtrak’s priorities and operations. See, *e.g.*, §24315. Also of significance, Amtrak is required by statute to pursue broad public objectives, see, *e.g.*, §§24101(b), 24307(a); certain aspects of Amtrak’s day-to-day operations are mandated by Congress,

see, e.g., §§24101(c)(6), 24902(b); and Amtrak has been dependent on federal financial support during every year of its existence. Given the combination of these unique features and Amtrak's significant ties to the Government, Amtrak is not an autonomous private enterprise. Amtrak was created by the Government, is controlled by the Government, and operates for the Government's benefit. Thus, in jointly issuing the metrics and standards with the FRA, Amtrak acted as a governmental entity for separation of powers purposes. And that exercise of governmental power must be consistent with the Constitution, including those provisions relating to the separation of powers. Pp. 6–10.

(b) Respondent's reliance on congressional statements about Amtrak's status is misplaced. *Lebron v. National Railroad Passenger Corp.*, 513 U. S. 374, teaches that, for purposes of Amtrak's status as a federal actor or instrumentality under the Constitution, the practical reality of federal control and supervision prevails over Congress' disclaimer of Amtrak's governmental status. Treating Amtrak as governmental for these purposes, moreover, is not an unbridled grant of authority to an unaccountable actor, for the political branches created Amtrak, control its Board, define its mission, specify many of its day-to-day operations, have imposed substantial transparency and accountability mechanisms, and, for all practical purposes, set and supervise its annual budget. Pp. 10–11.

(c) The Court of Appeals may address in the first instance any properly preserved issues respecting the lawfulness of the metrics and standards that may remain in this case, including questions implicating the Constitution's structural separation of powers and the Appointments Clause. Pp. 11–12.

721 F. 3d 666, vacated and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS,
Cite as: 575 U. S. ____ (2015) 3

Syllabus

C. J., and SCALIA, GINSBURG, BREYER, ALITO, SOTOMAYOR, and KAGAN, JJ.,
joined. ALITO, J., filed a concurring opinion. THOMAS, J., filed an opinion
concurring in the judgment.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 13–1080

DEPARTMENT OF TRANSPORTATION, ET AL .,
PETITIONERS *v.* ASSOCIATION OF AMERICAN
RAILROADS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[March 9, 2015]

JUSTICE KENNEDY delivered the opinion of the Court.

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

Respondent alleges the metrics and standards must be invalidated on the ground that Amtrak is a private entity and it was therefore unconstitutional for Congress to allow and direct it to exercise joint authority in their issuance. This argument rests on the Fifth Amendment Due Process Clause and the constitutional provisions regarding separation of powers. The District Court rejected both of respondent’s claims. The Court of Appeals for the District of Columbia Circuit reversed, finding that, for purposes of this dispute, Amtrak is a private entity and that Congress violated nondelegation principles in its grant of joint authority to Amtrak and the FRA. On that premise the Court of Appeals invalidated the metrics and standards.

Having granted the petition for writ of certiorari, 573 U. S. ____ (2014), this Court now holds that, for purposes of determining the validity of the metrics and standards, Amtrak is a governmental entity. Although Amtrak’s actions here were governmental, substantial questions respecting the lawfulness of the metrics and standards—including questions implicating the Constitution’s structural separation of powers and the Appointments Clause, U. S. Const., Art. II, §2, cl. 2—may still remain in

the case. As those matters have not yet been passed upon by the Court of Appeals, this case is remanded.

I

A

Amtrak is a corporation established and authorized by a detailed federal statute enacted by Congress for no less a purpose than to preserve passenger services and routes on our Nation's railroads. See *Lebron v. National Railroad Passenger Corporation*, 513 U. S. 374, 383–384 (1995); *National Railroad Passenger Corporation v. Atchison, T. & S. F. R. Co.*, 470 U. S. 451, 453–457 (1985); see also Rail Passenger Service Act of 1970, 84 Stat. 1328. Congress recognized that Amtrak, of necessity, must rely for most of its operations on track systems owned by the freight railroads. So, as a condition of relief from their commoncarrier duties, Congress required freight railroads to allow Amtrak to use their tracks and facilities at rates agreed to by the parties—or in the event of disagreement to be set by the Interstate Commerce Commission (ICC). See 45 U. S. C. §§561, 562 (1970 ed.). The Surface Transportation Board (STB) now occupies the dispute-resolution role originally assigned to the ICC. See 49 U. S. C. §24308(a) (2012 ed.). Since 1973, Amtrak has received a statutory preference over freight transportation in using rail lines, junctions, and crossings. See §24308(c). The metrics and standards at issue here are the result of a further and more recent enactment. Concerned by poor service, unreliability, and delays resulting from freight traffic congestion, Congress passed the Passenger Rail Investment and Improvement Act (PRIIA) in 2008. See 122 Stat. 4907. Section 207(a) of the PRIIA provides for the creation of the metrics and standards:

“Within 180 days after the date of enactment of this Act, the Federal Railroad Administration and Amtrak shall jointly, in consultation with the Surface Transportation

Board, rail carriers over whose rail lines Amtrak trains operate, States, Amtrak employees, nonprofit employee organizations representing Amtrak employees, and groups representing Amtrak passengers, as appropriate, develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations, including cost recovery, on-time performance and minutes of delay, ridership, on-board services, stations, facilities, equipment, and other services.” *Id.*, at 4916.

Section 207(d) of the PRIIA further provides:

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

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

Under §213(a) of the PRIIA, the metrics and standards also may play a role in prompting investigations by the STB and in subsequent enforcement actions. For instance, “[i]f the on-time performance of any intercity passenger train averages less than 80 percent for any 2 consecutive calendar quarters,” the STB may initiate an investigation “to determine whether and to what extent delays . . . are due to causes that could reasonably be addressed . . . by Amtrak or other intercity passenger rail operators.” *Id.*, at 4925–4926. While conducting an investigation under §213(a), the STB “has authority to review the accuracy of the train performance data and the extent to which scheduling and congestion contribute to delays” and shall “obtain information from all parties involved and identify reasonable measures and make recommendations to improve the service, quality, and on-time performance of the train.” *Id.*, at 4926. Following an investigation, the STB may award damages if it “determines that delays or failures to achieve minimum standards . . . are attributable to a rail carrier’s failure to provide preference to Amtrak over freight transportation.” *Ibid.* The STB is further empowered to “order the host rail carrier to remit” damages “to Amtrak or to an entity for which Amtrak operates intercity passenger rail service.” *Ibid.*

B

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

time performance and train delays caused by host railroads. The standards associated with the on-time performance metrics require on-time performance by Amtrak trains at least 80% to 95% of the time for each route, depending on the route and year. *Id.*, at 133–135. With respect to “host-responsible delays”—that is to say, delays attributed to the railroads along which Amtrak trains travel—the metrics and standards provide that “[d]elays must not be more than 900 minutes per 10,000 Train-Miles.” *Id.*, at 138. Amtrak conductors determine responsibility for particular delays. *Ibid.*, n. 23. In the District Court for the District of Columbia, respondent alleged injury to its members from being required to modify their rail operations, which mostly involve freight traffic, to satisfy the metrics and standards. Respondent claimed that §207 “violates the nondelegation doctrine and the separation of powers principle by placing legislative and rulemaking authority in the hands of a private entity [Amtrak] that participates in the very industry it is supposed to regulate.” *Id.*, at 176–177, Complaint ¶51. Respondent also asserted that §207 violates the Fifth Amendment Due Process Clause by “[v]esting the coercive power of the government” in Amtrak, an “interested private part[y].” *Id.*, at 177, ¶¶53–54. In its prayer for relief respondent sought, among other remedies, a declaration of §207’s unconstitutionality and invalidation of the metrics and standards. *Id.*, at 177.

The District Court granted summary judgment to petitioners on both claims. See 865 F. Supp. 2d 22 (DC 2012). Without deciding whether Amtrak must be deemed private or governmental, it rejected respondent’s nondelegation argument on the ground that the FRA, the STB, and the political branches exercised sufficient control over promulgation and enforcement of the metrics and standards so that §207 is constitutional. See *id.*, at 35. The Court of Appeals for the District of Columbia Circuit

reversed the judgment of the District Court as to the nondelegation and separation of powers claim, reasoning in central part that because “Amtrak is a private corporation with respect to Congress’s power to delegate . . . authority,” it cannot constitutionally be granted the “regulatory power prescribed in §207.” 721 F. 3d 666, 677 (2013). The Court of Appeals did not reach respondent’s due process claim. See *ibid.*

II

In holding that Congress may not delegate to Amtrak the joint authority to issue the metrics and standards—authority it described as “regulatory power,” *ibid.*—the Court of Appeals concluded Amtrak is a private entity for purposes of determining its status when considering the constitutionality of its actions in the instant dispute. That court’s analysis treated as controlling Congress’ statutory command that Amtrak “ ‘is not a department, agency, or instrumentality of the United States Government.’” *Id.*, at 675 (quoting 49 U. S. C. §24301(a)(3)). The Court of Appeals also relied on Congress’ pronouncement that Amtrak “ ‘shall be operated and managed as a for-profit corporation.’” 721 F. 3d, at 675 (quoting §24301(a)(2)); see also *id.*, at 677 (“Though the federal government’s involvement in Amtrak is considerable, Congress has both designated it a private corporation and instructed that it be managed so as to maximize profit. In deciding Amtrak’s status for purposes of congressional delegations, these declarations are dispositive”). Proceeding from this premise, the Court of Appeals concluded it was impermissible for Congress to “delegate regulatory authority to a private entity.” *Id.*, at 670; see also *ibid.* (holding *Carter v. Carter Coal Co.*, 298 U. S. 238 (1936), prohibits any such delegation of authority). That premise, however, was erroneous. Congressional pronouncements, though instructive as to matters within

Congress' authority to address, see, e.g., *United States ex rel. Totten v. Bombardier Corp.*, 380 F. 3d 488, 491–492 (CADC 2004) (Roberts, J.), are not dispositive of Amtrak's status as a governmental entity for purposes of separation of powers analysis under the Constitution. And an independent inquiry into Amtrak's status under the Constitution reveals the Court of Appeals' premise was flawed.

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

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

In addition to controlling Amtrak's stock and Board of Directors the political branches exercise substantial, statutorily mandated supervision over Amtrak's priorities and operations. Amtrak must submit numerous annual reports to Congress and the President, detailing such information as route-specific ridership and on-time performance. §24315. The Freedom of Information Act applies to Amtrak in any year in which it receives a federal subsidy, 5 U. S. C. §552, which thus far has been every year of its existence. Pursuant to its status under the Inspector General Act of 1978 as a " 'designated Federal entity,'" 5 U. S. C. App. §8G(a)(2), p. 521, Amtrak must maintain an inspector general, much like governmental agencies such as the Federal Communications Commission and the Securities and Exchange Commission. Furthermore, Congress conducts frequent oversight hearings into Amtrak's budget, routes, and prices. See, *e.g.*, Hearing on Reviewing Alternatives to Amtrak's Annual Losses in Food and Beverage Service before the Subcommittee on Government Operations of the House Committee on Oversight and Government Reform, 113th Cong., 1st Sess., 5 (2013) (statement of Thomas J. Hall, chief of customer service, Amtrak); Hearing on Amtrak's Fiscal Year 2014 Budget: The Starting Point for Reauthorization before the Subcommittee on Railroads, Pipelines, and Hazardous Materials of the House Committee on Transportation and Infrastructure, 113th Cong., 1st Sess., p. 6 (2013) (statement of Joseph H. Boardman, president and chief executive officer, Amtrak).

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

to the disabled and elderly, §24307(a); and ensure mobility in times of national disaster, §24101(c)(9).

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

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

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

requirements of the Constitution, including those provisions relating to the separation of powers.

Respondent urges that Amtrak cannot be deemed a governmental entity in this respect. Like the Court of Appeals, it relies principally on the statutory directives that Amtrak “shall be operated and managed as a for profit corporation” and “is not a department, agency, or instrumentality of the United States Government.” §§24301(a)(2)–(3). In light of that statutory language, respondent asserts, Amtrak cannot exercise the joint authority entrusted to it and the FRA by §207(a). On that point this Court’s decision in *Lebron v. National Railroad Passenger Corp.*, 513 U. S. 374 (1995), provides necessary instruction. In *Lebron*, Amtrak prohibited an artist from installing a politically controversial display in New York City’s Penn Station. The artist sued Amtrak, alleging a violation of his First Amendment rights. In response Amtrak asserted that it was not a governmental entity, explaining that “its charter’s disclaimer of agency status prevent[ed] it from being considered a Government entity.” *Id.*, at 392. The Court rejected this contention, holding “it is not for Congress to make the final determination of Amtrak’s status as a Government entity for purposes of determining the constitutional rights of citizens affected by its actions.” *Ibid.* To hold otherwise would allow the Government “to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form.” *Id.*, at 397. Noting that Amtrak “is established and organized under federal law for the very purpose of pursuing federal governmental objectives, under the direction and control of federal governmental appointees,” *id.*, at 398, and that the Government exerts its control over Amtrak “not as a creditor but as a policymaker,” the Court held Amtrak “is an agency or instrumentality of the United

States for the purpose of individual rights guaranteed against the Government by the Constitution.” *Id.*, at 394, 399.

Lebron teaches that, for purposes of Amtrak’s status as a federal actor or instrumentality under the Constitution, the practical reality of federal control and supervision prevails over Congress’ disclaimer of Amtrak’s governmental status. *Lebron* involved a First Amendment question, while in this case the challenge is to Amtrak’s joint authority to issue the metrics and standards. But “[t]he structural principles secured by the separation of powers protect the individual as well.” *Bond v. United States*, 564 U. S. ___, ___ (2011) (slip op., at 10). Treating Amtrak as governmental for these purposes, moreover, is not an unbridled grant of authority to an unaccountable actor. The political branches created Amtrak, control its Board, define its mission, specify many of its day-to-day operations, have imposed substantial transparency and accountability mechanisms, and, for all practical purposes, set and supervise its annual budget. Accordingly, the Court holds that Amtrak is a governmental entity, not a private one, for purposes of determining the constitutional issues presented in this case.

III

Because the Court of Appeals’ decision was based on the flawed premise that Amtrak should be treated as a private entity, that opinion is now vacated. On remand, the Court of Appeals, after identifying the issues that are properly preserved and before it, will then have the instruction of the analysis set forth here. Respondent argues that the selection of Amtrak’s president, who is appointed “not by the President . . . but by the other eight Board Members,” “call[s] into question Amtrak’s structure under the Appointments Clause,” Brief for Respondent 42; that §207(d)’s arbitrator provision “is a plain violation of the

nondelegation principle” and the Appointments Clause requiring invalidation of §207(a), *id.*, at 26; and that Congress violated the Due Process Clause by “giv[ing] a federally chartered, nominally private, for-profit corporation regulatory authority over its own industry,” *id.*, at 43. Petitioners, in turn, contend that “the metrics and standards do not reflect the exercise of ‘rulemaking’ authority or permit Amtrak to ‘regulate other private entities,’” and thus do not raise nondelegation concerns. Reply Brief 5 (internal citation omitted). Because “[o]urs is a court of final review and not first view,” *Zivotofsky v. Clinton*, 566 U. S. ___, ___ (2012) (slip op., at 12) (internal quotation marks omitted), those issues—to the extent they are properly before the Court of Appeals—should be addressed in the first instance on remand.

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

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 13–1080

DEPARTMENT OF TRANSPORTATION, ET AL ., .,
PETITIONERS *v.* ASSOCIATION OF AMERICAN
RAILROADS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[March 9, 2015]

JUSTICE ALITO, concurring.

[...]

This case, on its face, may seem to involve technical issues, but in discussing trains, tracks, metrics, and standards, a vital constitutional principle must not be forgotten: Liberty requires accountability.

When citizens cannot readily identify the source of legislation or regulation that affects their lives, Government officials can wield power without owning up to the consequences. One way the Government can regulate without accountability is by passing off a Government operation as an independent private concern. Given this incentive to regulate without saying so, everyone should pay close attention when Congress “sponsor[s] corporations that it specifically designate[s] *not* to be agencies or establishments of the United States Government.” *Lebron v. National Railroad Passenger Corporation*, 513 U. S. 374, 390 (1995).

Recognition that Amtrak is part of the Federal Government raises a host of constitutional questions.

[...]

III

I turn next to the Passenger Rail Investment and Improvement Act of 2008’s (PRIIA) arbitration provision. 122 Stat. 4907. Section 207(a) of the PRIIA provides that “the Federal Railroad Administration [(FRA)] and Amtrak shall jointly . . . develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations.” *Id.*, at 4916. In addition, §207(c) commands that “[t]o the extent practicable, Amtrak and its host rail carriers shall incorporate [those] metrics and standards . . . into their access and service agreements.” Under §213(a) of the

PRIIA, moreover, “the metrics and standards also may play a role in prompting investigations by the [Surface Transportation Board (STB)] and in subsequent enforcement actions.” *Ante*, at 4.

This scheme is obviously regulatory. Section 207 provides that Amtrak and the FRA “shall jointly” create new standards, cf. *e.g.*, 12 U. S. C. §1831m(g)(4)(B) (“The appropriate Federal banking agencies shall jointly issue rules of practice to implement this paragraph”), and that Amtrak and *private rail carriers* “shall incorporate” those standards into their agreements whenever “practicable,” cf. *e.g.*, *BP America Production Co. v. Burton*, 549 U. S. 84, 88 (2006) (characterizing a command to “audit and reconcile, to the extent practicable, all current and past lease accounts” as creating “duties” for the Secretary of the Interior (quoting 30 U. S. C. §1711(c)(1))). The fact that private rail carriers sometimes may be required by federal law to include the metrics and standards in their contracts by itself makes this a regulatory scheme.

“As is often the case in administrative law,” moreover, “the metrics and standards lend definite regulatory force to an otherwise broad statutory mandate.” 721 F. 3d 666, 672 (CA DC 2013). Here, though the nexus between regulation, statutory mandate, and penalty is not direct (for, as the Government explains, there is a pre-existing requirement that railroads give preference to Amtrak, see Brief for Petitioners 31–32 (citing 49 U. S. C. §§24308(c), (f)), the metrics and standards inherently have a “coercive effect,” *Bennett v. Spear*, 520 U. S. 154, 169 (1997), on private conduct. Even the United States concedes, with understatement, that there is “perhaps some incentivizing effect associated with the metrics and standards.” Brief for Petitioners 30. Because obedience to the metrics and standards materially reduces the risk of liability, railroads

face powerful incentives to obey. See *Bennett, supra*, at 169–171. That is regulatory power.

The language from §207 quoted thus far should raise red flags. In one statute, Congress says Amtrak is not an “agency.” 49 U. S. C. §24301(a)(3). But then Congress commands Amtrak to act like an agency, with effects on private rail carriers. No wonder the D. C. Circuit ruled as it did.

[...]

When it comes to private entities, however, there is not even a fig leaf of constitutional justification. Private entities are not vested with “legislative Powers.” Art. I, §1. Nor are they vested with the “executive Power,” Art. II, §1, cl. 1, which belongs to the President. Indeed, it raises “[d]ifficult and fundamental questions” about “the delegation of Executive power” when Congress authorizes citizen suits. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 197 (2000) (KENNEDY, J., concurring). A citizen suit to enforce existing law, however, is nothing compared to delegated power to create new law. By any measure, handing off regulatory power to a private entity is “legislative delegation in its most obnoxious form.” *Carter v. Carter Coal Co.*, 298 U. S. 238, 311 (1936).

For these reasons, it is hard to imagine how delegating “binding” tie-breaking authority to a private arbitrator to resolve a dispute between Amtrak and the FRA could be constitutional. No private arbitrator can promulgate binding metrics and standards for the railroad industry. Thus, if the term “arbitrator” refers to a private arbitrator, or even the *possibility* of a private arbitrator, the Constitution is violated. See 721 F. 3d, at 674 (“[T]hat the recipients of illicitly delegated authority opted not to make use of it is no

antidote. It is *Congress's* decision to delegate that is unconstitutional" (citing *Whitman, supra*, at 473)). As I read the Government's briefing, it does not dispute any of this (other than my characterization of the PRIIA as regulatory, which it surely is). Rather than trying to defend a private arbitrator, the Government argues that the Court, for reasons of constitutional avoidance, should read the word "arbitrator" to mean "public arbitrator." The Government's argument, however, lurches into a new problem: Constitutional avoidance works only if the statute is susceptible to an alternative reading and that such an alternative reading would itself be constitutional.

Here, the Government's argument that the word "arbitrator" does not mean "private arbitrator" is in some tension with the ordinary meaning of the word. Although Government arbitrators are not unheard of, we usually think of arbitration as a form of "private dispute resolution." See, e.g., *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U. S. 662, 685 (2010).

Likewise, the appointment of a public arbitrator here would raise serious questions under the Appointments Clause. Unless an "inferior Office[r]" is at issue, Article II of the Constitution demands that the President appoint all "Officers of the United States" with the Senate's advice and consent. Art. II, §2, cl. 2. This provision ensures that those who exercise the power of the United States are accountable to the President, who himself is accountable to the people. See *Free Enterprise Fund*, 561 U. S., at 497–498 (citing *The Federalist* No. 72, p. 487 (J. Cooke ed.

1961) (A. Hamilton)). The Court has held that someone "who exercis[es] significant authority pursuant to the laws of the United States" is an "Officer," *Buckley v. Valeo*, 424 U. S. 1, 126 (1976) (*per curiam*), and further that an officer who acts without supervision must be a principal officer, see *Edmond v. United States*, 520 U. S. 651, 663

(1997) (“[W]e think it evident that ‘inferior officers’ are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate”). While some officers may be principal even if they have a supervisor, it is common ground that an officer without a supervisor must be principal. See *id.*, at 667 (Souter, J., concurring in part and concurring in judgment).

Here, even under the Government’s public-arbitrator theory, it looks like the arbitrator would be making law without supervision—again, it is “binding arbitration.” Nothing suggests that those words mean anything other than what they say. This means that an arbitrator could set the metrics and standards that “shall” become part of a private railroad’s contracts with Amtrak whenever “practicable.” As to that “binding” decision, who is the supervisor? Inferior officers can do many things, but nothing final should appear in the Federal Register unless a Presidential appointee has at least signed off on it. See 75 Fed. Reg. 26839 (2010) (placing the metrics and standards in the Federal Register); *Edmond, supra*, at 665.

[...]

In sum, while I entirely agree with the Court that Amtrak must be regarded as a federal actor for constitutional purposes, it does not by any means necessarily follow that the present structure of Amtrak is consistent with the Constitution. The constitutional issues that I have outlined (and perhaps others) all flow from the fact that no matter what Congress may call Amtrak, the Constitution cannot be disregarded.

SUPREME COURT OF THE UNITED STATES

No. 13–1080

DEPARTMENT OF TRANSPORTATION, ET AL ., .,
PETITIONERS *v.* ASSOCIATION OF AMERICAN
RAILROADS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[March 9, 2015]

JUSTICE THOMAS, concurring in the judgment.

[...]

A

Until the case arrived in this Court, the parties proceeded on the assumption that Amtrak is a private entity, albeit one subject to an unusual degree of governmental control.¹ The Court of Appeals agreed. 721 F. 3d 666, 674–677 (CA DC 2013). Because it also concluded that Congress delegated regulatory power to Amtrak, *id.*, at 670–674, and because this Court has held that delegations of regulatory power to private parties are impermissible, *Carter v. Carter Coal Co.*, 298 U. S. 238, 311 (1936), it held the delegation to be unconstitutional, 721 F. 3d, at 677. Although no provision of the Constitution expressly forbids the exercise of governmental power by a private entity, our so-called “private nondelegation doctrine” flows logically from the three Vesting Clauses. Because a private entity is neither Congress, nor the President or one of his agents, nor the Supreme Court or an inferior court established by Congress, the Vesting Clauses would categorically

¹ See Brief for Appellees in No. 12–5204 (DC), pp. 23–29 (defending §207 under cases upholding statutes “assign[ing] an important role to a private party”); *id.*, at 29 (“Amtrak . . . is not a private entity comparable to the [private parties in a relevant precedent]. Although the government does not control Amtrak’s day-to-day operations, the government exercises significant structural control”).

preclude it from exercising the legislative, executive, or judicial powers of the Federal Government. In short, the “private nondelegation doctrine” is merely one application of the provisions of the Constitution that forbid Congress to allocate power to an ineligible entity, whether governmental or private.

For this reason, a conclusion that Amtrak is private – that is, not part of the Government at all – would necessarily mean that it cannot exercise these three categories of governmental power. But the converse is not true: A determination that Amtrak acts as a governmental entity in crafting the metrics and standards says nothing about whether it properly exercises governmental power when it does so. An entity that “was created by the Government, is controlled by the Government, and operates for the Government’s benefit,” ante, at 10 (majority opinion), but that is not properly constituted to exercise a power under one of the Vesting Clauses, is no better qualified to be a delegatee of that power than is a purely private one. To its credit, the majority does not hold otherwise. It merely refutes the Court of Appeals’ premise that Amtrak is private. But this answer could be read to suggest, wrongly, that our conclusion about Amtrak’s status has some constitutional significance for “delegation” purposes.

[...]

In this case, Congress has permitted a corporation subject only to limited control by the President to create legally binding rules. These rules give content to private railroads’ statutory duty to share their private infrastructure with Amtrak. This arrangement raises serious constitutional Questions on which the majority’s holding that Amtrak is a governmental entity is all but a non sequitur. These concerns merit close consideration by the courts below and

by this Court if the case reaches us again. We have too long abrogated our duty to enforce the separation of powers required by our Constitution. We have overseen and sanctioned the growth of an administrative system that concentrates the power to make laws and the power to enforce them in the hands of a vast and unaccountable administrative apparatus that finds no comfortable home in our constitutional structure. The end result may be trains that run on time (although I doubt it), but the cost is to our Constitution and the individual liberty it protects.

III. Questions on the Decision

1. Which criteria did the Supreme Court use to assess whether Amtrak is private or public?
2. Do you agree with the criteria they used?
3. What other criteria could also have been used? Would you use other criteria in your country?
4. How does the separation of powers relate to the assessment of the Supreme Court of whether Amtrak is private or public?
5. Do you know of other constitutional principles that have different consequences depending on whether something is private or public law?

IV. Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail



Read the extract from the decision and ask yourself what was decisive for the Supreme Court to qualify Queensland Rail. What significance did the court attach to the asserted “intention of the Parliament” or the labelling “is not a body corporate”? Do you agree with the argumentation? What role did profit play in the assessment?

Summary of the facts

In 2013, the Queensland Rail Transit Authority Act 2013 (Qld) established Queensland Rail Ltd to not be by the Fair Work Act (as was previously the case) but rather by the Industrial Relations Act 1999 on the basis that Queensland Rail wasn't a “body corporate”. The unions with which Queensland Rail had concluded industrial relations agreements argued that it was in fact a constitutional corporation and that their relations should still be regulated by the Fair Work Act.

HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, KIEFEL, BELL, GAGELER, KEANE AND NETTLE JJ

COMMUNICATIONS, ELECTRICAL,
ELECTRONIC, ENERGY, INFORMATION,
POSTAL, PLUMBING AND ALLIED SERVICES
UNION OF AUSTRALIA & ORS

PLAINTIFFS

AND

QUEENSLAND RAIL & ANOR

DEFENDANTS

*Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and
Allied Services Union of Australia v Queensland Rail*
[2015] HCA 11
8 April 2015

[...]

The issue

1 The *Queensland Rail Transit Authority Act 2013* (Q) ("the QRTA Act") established² the Queensland Rail Transit Authority ("the Authority"). The Authority is now called³ Queensland Rail. The Authority can create and be made subject to legal rights and duties, which are its rights and its duties⁴. It can sue and be sued in its name⁵. It can own property⁶.

2 The QRTA Act provides⁷ that the Authority "is not a body corporate". The QRTA Act provides⁸ that the Authority does not represent the State, and it follows from this provision, coupled with the provisions which give the Authority separate legal personality, that the Authority is not, and is not a part of, the body politic which is the State of Queensland⁹.

3 The Authority operates as a labour hire company, providing labour used by Queensland Rail Limited ("QRL") to operate railway services in Queensland. QRL is a company governed

² s 6(1).

³ s 63.

⁴ s 7.

⁵ s 7(4).

⁶ s 7(1)(b).

⁷ s 6(2).

⁸ s 6(3).

⁹ No party or intervener, other than the Attorney-General for Victoria, submitted that the Authority is part of the body politic which is the State of Queensland.

by the *Corporations Act 2001* (Cth). Pursuant to s 67 of the QRTA Act, the Authority holds all the shares in QRL.

4 Is the Authority a "trading or financial corporation formed within the limits of the Commonwealth" within the meaning of s 51(xx) of the Constitution? If it is, the relations between the Authority and its employees are governed by federal industrial relations legislation. If it is not, State industrial relations legislation applies.

5 The Authority accepts that it is an artificial legal entity formed within the limits of the Commonwealth. It submits that it is not a trading or financial corporation. Rather, it submits, it is an entity which is not a "corporation" and which is not a "trading or financial" corporation. These submissions should be rejected. The Authority is a trading or financial corporation within the meaning of s 51(xx).

The litigation

6 The plaintiffs are all associations or organisations of employees. Some are registered under the *Fair Work (Registered Organisations) Act 2009* (Cth); some are registered under the *Industrial Relations Act 1999* (Q) ("the Queensland Industrial Relations Act"). Members of the State organisations are also members of the federal associations.

7 In a proceeding brought in the original jurisdiction of this Court, the plaintiffs allege that the Authority is a trading corporation within the meaning of s 51(xx) of the Constitution. They allege that it follows that the Authority is a "constitutional corporation" as defined in s 12 of the *Fair Work Act 2009* (Cth)¹⁰, and a "national system employer"¹¹ for the purposes of that Act. The plaintiffs allege that provisions of the QRTA Act¹² (which apply the Queensland Industrial Relations Act to the Authority's employees and treat some federal enterprise agreements as certified under the Queensland Industrial Relations Act) are inconsistent with the *Fair Work Act 2009* and invalid to the extent of that inconsistency by operation of s 109 of the Constitution. The plaintiffs also allege that ss 691A-691D of the Queensland Industrial Relations Act (which apply to certain industrial instruments applying to "the employment of persons in a government entity"¹³) are inconsistent with the *Fair Work Act 2009*, and thus invalid by operation of s 109 of the Constitution so far as they purport to apply to the Authority, its employees or two identified industrial instruments¹⁴.

8 The second defendant to the proceeding (the Queensland Industrial Relations Commission) filed a submitting appearance.

9 The plaintiffs and the Authority (as the active defendant in the proceeding) agreed in stating questions of law for the opinion of the Full Court in the form of a special case based upon certain agreed facts. The first two questions ask whether the Authority is a "corporation" within the meaning of s 51(xx) and, if so, whether it is a "trading corporation". Question 3 asks whether the *Fair Work Act 2009* applies to the Authority and its employees to the exclusion of the QRTA Act or the Queensland Industrial Relations Act or both. Questions 4 and 5 relate to relief and costs.

¹⁰ "[A] corporation to which paragraph 51(xx) of the Constitution applies".

¹¹ s 14(1)(a).

¹² ss 69, 72 and 73.

¹³ s 691B(1).

¹⁴ QR Passenger Pty Limited Traincrew Union Collective Workplace Agreement 2009 and Queensland Rail Rollingstock and Operations Enterprise Agreement 2011.

Section 51(xx)

10 The questions stated by the parties assume that it is useful to direct separate attention to what is a "corporation" and what is a "trading corporation" within the meaning of s 51(xx). The validity of the assumption was not directly challenged by any party or intervener and it is convenient to proceed without examining that issue. But this must not obscure the obvious importance of recognising that the subject matter of s 51(xx) is not "corporations"; it is "foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth". And neither the word "corporations", where twice appearing, nor the collocation "trading or financial corporations formed within the limits of the Commonwealth" is to be construed without regard to the context within which the expression appears.

The competing submissions

11 The chief point of difference between the plaintiffs and the Authority was whether the Authority is a "corporation" within the meaning of the second limb of s 51(xx). The plaintiffs submitted that "an entity established under law with its own name, and with separate legal personality and perpetual succession, is a corporation within the meaning of s 51(xx)". The Attorney-General of the Commonwealth, intervening, proffered a generally similar description of what is a corporation: "any juristic entity with distinct, continuing legal personality (evidenced by, for example, perpetual succession, the right to hold property and the right to sue and be sued) that is not a body politic reflected or recognised in the Constitution".

12 By contrast, the Authority (with the support of the Attorneys-General for New South Wales and Victoria) submitted that not all artificial entities having separate legal personality are corporations. The Authority submitted that "the intention of Parliament is the defining feature of whether an artificial juristic entity is created as a corporation, and that intention is manifested either by express words or by necessary implication". Hence, so the Authority submitted, the express provision, by s 6(2) of the QRTA Act, that the Authority "is not a body corporate" is especially significant because it reveals the intention of the Parliament and requires the conclusion that the Authority is not a "corporation".

13 The Attorney-General for Victoria submitted that a State has broad scope to create bodies which have a separate legal existence as right and duty bearing entities but which are, or are not, corporations. The submission proffered no criterion for identifying the characteristics that are necessary or sufficient to identify the entity as a "corporation", other than to submit that "[i]f Parliament intended to establish a corporation, it may be expected in a modern statute that express terms of incorporation would be used". Hence, the submission appeared to go no further than the Authority's submission that it is the "intention" of the enacting Parliament which is determinative.

14 The Authority further submitted that, even if it is a "corporation", it is not a "trading or financial corporation". No party or intervener suggested that the Authority is a financial corporation and that aspect of the second limb of s 51(xx) may be left aside from further examination. The Authority accepted that, apart from the case where a corporation is dormant or has barely begun to trade, an "activities" test¹⁵ determines whether it is a "trading corporation". But it submitted that its activities do not warrant it being classed as a trading

¹⁵ cf *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190; [1979] HCA 6.

corporation because its only activity is to provide employees to a company not at arm's length (QRL) for an amount which yields no profit for the Authority.

A "corporation"?

15 For the purposes of deciding this case, it is not necessary to attempt to state exhaustively the defining characteristics of a corporation (whether a "foreign corporation" or a "trading or financial corporation"). Whether the Authority is a trading corporation can be answered without attempting that task.

16 The QRTA Act creates the Authority as a distinct entity. The Authority can have rights and duties. It is, therefore, a separate legal entity: one of those "basic units" of the legal system which "possess the capacity of being parties to the claim-duty and power-liability relationships"¹⁶.

17 At the time of federation¹⁷, and for centuries before that time¹⁸, the only artificial persons in English law were corporations, and corporations were either aggregate or sole. The development of the trust in English law had permitted the establishment and maintenance of arrangements about property and its use without the interposition or creation of any separate artificial legal entity. And in this respect English law differed markedly from systems of law such as that provided by the German Civil Code¹⁹ under which "the advantage of corporateness could be acquired by societies of divers sorts and kinds"²⁰.

18 The Authority is neither a corporation sole nor a corporation aggregate of a kind that existed at the time of federation. It bears no resemblance to any of the ecclesiastical²¹ or other forms²² of corporation sole then known, and it has no corporators who join, or are joined, together to form the separate entity. (The QRTA Act provides²³ expressly that "the Authority is not constituted by the members of the board".)

19 But the Authority expressly disclaimed any argument that "corporation" as used in either limb of s 51(xx) should be read as restricted to corporations of a kind that were known to foreign law or to English or colonial law at the time of federation. And the Authority was right to do so. It is not to be supposed that the only kinds of "foreign corporations" and "trading or financial corporations" with respect to which s 51(xx) gives legislative power are bodies constituted and organised in the way in which corporations of those kinds were constituted and organised in 1900.

¹⁶ Paton, *A Text-Book of Jurisprudence*, 3rd ed (1964) at 351-352.

¹⁷ See, for example, Maitland, "The Corporation Sole", (1900) 16 *Law Quarterly Review* 335 at 335.

¹⁸ Coke, *The First Part of the Institutes of the Lawes of England, or, A Commentarie upon Littleton*, (1628) at §1, 2a, §413, 250a.

¹⁹ Maitland, "Trust and Corporation", in Fisher (ed), *The Collected Papers of Frederic William Maitland*, (1911), vol 3, 321.

²⁰ Maitland, "The Making of the German Civil Code", in Fisher (ed), *The Collected Papers of Frederic William Maitland*, (1911), vol 3, 474 at 482.

²¹ See Maitland, "The Corporation Sole", (1900) 16 *Law Quarterly Review* 335.

²² See, for example, *Fulwood's Case* (1591) 4 Co Rep 64b [76 ER 1031] (concerning the Chamberlain of the City of London as a corporation sole) and *The Case of Sutton's Hospital* (1612) 10 Co Rep 23a [77 ER 960] (concerning the King as a corporation sole). See also *Financial Administration and Audit Act 1977* (Q), s 43 and *Financial Accountability Act 2009* (Q), s 53 (preserving, continuing and constituting the Treasurer of Queensland as a corporation sole for some purposes).

²³ s 14(2).

- 20 Foreign corporations are constituted and organised according to the law of another jurisdiction. That law may, and commonly will, differ from Australian law, sometimes markedly. Absent referral of power under s 51(xxxvii), the trading or financial corporations formed within the limits of the Commonwealth to which s 51(xx) refers will typically be constituted and organised according to the laws of a State. (No party or intervener challenged *New South Wales v The Commonwealth (The Incorporation Case)*²⁴.) Hence, often, the entities with which s 51(xx) deals are entities which owe their existence and form to a law other than a law of the federal Parliament.
- 21 Before and after federation, there were many radical changes to the legislation (both English and colonial) under which corporations could be constituted and were regulated. Relevant nineteenth century developments were described in *New South Wales v The Commonwealth (Work Choices Case)*²⁵ and need not be repeated here. It is enough to observe that issues about corporations and their regulation had been in "legislative and litigious ferment"²⁶ in the later years of the nineteenth century and, after initial hesitation, were seen as warranting the grant of national legislative power.
- 22 There is no reason to read s 51(xx) as granting power to deal only with classes of artificial legal entities having characteristics fixed at the time of federation. To read the provision in that way would hobble its operation. The course of events in the nineteenth century described in the *Work Choices Case* points firmly against reading the provision as so restricted. And there is no textual or contextual reason to conclude that the Parliament's power with respect to trading or financial corporations formed within the limits of the Commonwealth should be frozen in time by limiting the power to entities of a kind that existed at federation. Nor is there any textual or contextual reason to conclude that the Parliament should have legislative power with respect only to those entities constituted and organised under the laws of foreign states which are entities of a kind generally similar to those that existed or could be formed under foreign law as it stood in all its various forms in 1900.
- 23 Accepting, then, that the Authority was right to disclaim an argument that a "corporation" must be an entity of a kind known in 1900, what is it that marks an artificially created legal entity as a "trading or financial corporation formed within the limits of the Commonwealth"? As has been noted, the Authority sought to answer this question by reference only to whether the Parliament providing for the creation of the entity "intended" to create a "corporation". But this answer gave no fixed content to what is a "corporation". The Authority's submissions proffered no description, let alone definition, of what it means to say that the entity created is or is not a "corporation". Hence the "intention" to which the Authority referred, and upon which it relied as providing the sole criterion for determining what is or is not within the legislative power of the Commonwealth, was an intention of no fixed content. Rather, it was an intention to apply, or in this case not to apply, a particular label. A labelling intention of this kind provides no satisfactory criterion for determining the content of federal legislative power.

Section 6(2)

- 24 The Authority's submissions about "intention" were closely related to, even dependent upon, s 6(2) of the QRTA Act and its provision that the Authority is not a "body corporate". But how is s 6(2) to be construed, and what is the work that it does?

²⁴ (1990) 169 CLR 482; [1990] HCA 2.

²⁵ (2006) 229 CLR 1 at 90-98 [96]-[124]; [2006] HCA 52.

²⁶ *Work Choices Case* (2006) 229 CLR 1 at 95 [113].

25 The Authority's submissions treated "body corporate" (in s 6(2)) as synonymous with "corporation" (in the phrase "trading or financial corporations"). But treating the two different expressions in that way assumed rather than demonstrated that a statutorily created artificial legal entity (that is not a body politic) may be a form of right and duty bearing entity which is distinct from entities called (interchangeably) either "corporations" or "bodies corporate". That is, the submissions took as their premise that there is a class of artificial right and duty bearing entities (other than bodies politic) called either "corporations" or "bodies corporate" and a class of those entities which are not, and cannot be, described by either expression.

26 The assumed division of artificial legal entities that are not bodies politic between "corporations" or "bodies corporate" on the one hand, and "other artificial legal entities" on the other, cannot be made. No criteria which would differentiate between the two supposed classes of entities were identified. Neither s 6(2) itself, nor the QRTA Act more generally, supports a division of that kind. The premise for the Authority's submissions is not established.

27 If s 6(2) does not support (or make) a division of artificial legal entities between "corporations" or "bodies corporate" and "other artificial legal entities", what is the purpose or effect of its provision?

28 Taken as a whole, the QRTA Act makes plain that it proceeds on the footing that the Authority's relations with its employees are not governed by the *Fair Work Act* 2009. It may be accepted, therefore, that one purpose of the QRTA Act was to create an entity which would provide labour to QRL in circumstances where the relations between employer and employee would be governed by State industrial relations law. If s 6(2) were to be understood as intended to do no more than take the Authority outside the federal industrial relations law, by taking the Authority outside the reach of s 51(xx), it would be necessary to observe that a State Parliament cannot determine the limits of federal legislative power. More particularly, it would be necessary to observe that whether an entity is a corporation of a kind referred to in s 51(xx) presents an issue of substance, not mere form or label. But s 6(2) has a larger purpose than simply attaching a label designed to avoid the application of an otherwise applicable federal law.

29 Providing that the Authority "is not a body corporate" engages other Queensland statutory provisions. In particular, although the Authority is what the *Government Owned Corporations Act* 1993 (Q) ("the GOC Act") calls a "government entity"²⁷, the Authority is not a government entity that is "established as a body corporate under an Act or the Corporations Act"²⁸. Because that is so, the Authority cannot be declared²⁹ by regulation to be a "government owned corporation" for the purposes of the GOC Act. In addition, it may be that the provision that the Authority is not a body corporate could be said to deny the application of s 46 of the *Acts Interpretation Act* 1954 (Q). Section 46 provides that a provision of an Act relating to offences punishable on indictment or summary conviction "applies to bodies corporate as well as individuals". Whether s 6(2) of the QRTA Act does have the effect of denying the operation of s 46 of the *Acts Interpretation Act* need not be decided.

30 The exclusion of the application of the GOC Act by s 6(2) of the QRTA Act providing that the Authority is not a body corporate means that the provision is more than mere labelling. Section 6(2) takes its place, and is to be given its meaning and application, in the context provided by the Queensland statute book generally and the GOC Act in particular. Understood

²⁷ s 4(b).

²⁸ s 5(a).

²⁹ s 5(b).

in that context, s 6(2) provides that the entity which the QRTA Act creates is one with which other provisions of Queensland law engage in a particular way. Section 6(2) is not to be understood as providing that the entity created is one of a genus of artificial legal entities distinct from what s 51(xx) refers to as "corporations".

The decided cases

31 Reference was made in argument to a number of decisions which it was suggested throw light on whether the Authority is a "corporation". Particular emphasis was given to this Court's decisions in *Chaff and Hay Acquisition Committee v J A Hemphill and Sons Pty Ltd*³⁰ and *Williams v Hursey*³¹, as well as some of the cases about the status of trade unions in the United Kingdom³². But neither of the cases in this Court decided any issue about the reach of the legislative power conferred by s 51(xx) and, of course, the British trade union cases were even further removed from the issues which must be decided in this case. Not only are the British trade union cases about issues far removed from the issues in this case, they are decisions which were very much the product of their times and the legislation which then governed the organisation of labour and liability for trade disputes. They offer no useful guidance to the resolution of the present issues. It is, however, necessary to say something about each of the decisions of this Court and the decision of the Supreme Court of the United States in *Liverpool Insurance Company v Massachusetts*³³, which was referred³⁴ to in *Chaff and Hay Acquisition Committee*.

32 The issue in *Chaff and Hay Acquisition Committee* was whether the committee, a statutory body created under South Australian legislation, was a legal entity which the courts of New South Wales should recognise as competent to sue or be sued in its own name. This Court held that the committee had an independent legal existence which should be recognised. It rejected arguments that recognition should not be given to the committee because it was "to operate as a Crown agent"³⁵ or that it had but a temporary existence³⁶. As the Full Court of the Supreme Court of New South Wales did³⁷, this Court noted³⁸ that the statute constituting the committee had not used express words of incorporation³⁹ and that the committee was not "created a corporation according to the requirements of English law in force in South Australia"⁴⁰. But neither of those observations was treated as determinative of the issue that was before the Court: could the committee sue and be sued in its own name? Understood in the light of that issue, what was said in *Chaff and Hay Acquisition Committee* gives no direct assistance in deciding this case. In particular, and contrary to the tenor of the Authority's submissions, *Chaff and Hay Acquisition Committee* does not support drawing a distinction between corporations of the kind or kinds referred to in s 51(xx) and other forms of artificial legal entity that are not bodies politic.

³⁰ (1947) 74 CLR 375; [1947] HCA 20.

³¹ (1959) 103 CLR 30; [1959] HCA 51.

³² *Taff Vale Railway v Amalgamated Society of Railway Servants* [1901] AC 426; *National Union of General and Municipal Workers v Gillian* [1946] KB 81; *Bonsor v Musicians' Union* [1956] AC 104.

³³ 77 US 566 (1870).

³⁴ (1947) 74 CLR 375 at 388 per Starke J.

³⁵ (1947) 74 CLR 375 at 379.

³⁶ (1947) 74 CLR 375 at 384.

³⁷ *J A Hemphill & Sons Pty Ltd v Chaff and Hay Acquisition Committee* (1946) 47 SR (NSW) 218 at 220.

³⁸ (1947) 74 CLR 375 at 385 per Latham CJ, 388 per Starke J.

³⁹ cf *Mackenzie-Kennedy v Air Council* [1927] 2 KB 517 at 534.

⁴⁰ (1947) 74 CLR 375 at 388 per Starke J.

33 In *Liverpool Insurance Company*, the Supreme Court of the United States decided⁴¹ that, despite declarations in the English statutes constituting the insurance company that it was not a corporation, "[s]uch local policy can have no place here in determining whether an association, whose powers are ascertained and its privileges conferred by law, is an incorporated body". Especially was that so when, as the Supreme Court rightly observed⁴², what was said in the relevant English statutes was directed to denying that the members of the insurance company had limited liability and did not detract from what the Court called the "true character" of the company.

34 The decision in *Liverpool Insurance Company* offers no guidance about the reach of the legislative power given by s 51(xx). It does emphasise, however, the need to examine the reasons for, and effect to be given to, a legislative declaration that a body is or is not a "body corporate" or a "corporation".

35 *Williams v Hursey* concerned the liability of an organisation of employees to damages for the tort of conspiracy and directed particular attention to whether the Waterside Workers' Federation and its Hobart "branch" could sue or be sued. The Federation was an organisation registered under the *Conciliation and Arbitration Act* 1904 (Cth); the Hobart branch was not registered under that Act or the *Trade Unions Act* 1889 (Tas), which reproduced the English *Trade Union Acts* of 1871 and 1876. Members of the Hobart branch were also members of the registered organisation.

36 Fullagar J, with whose reasons Dixon CJ and Kitto J agreed, made two points of present relevance. First, he said⁴³ that the *Conciliation and Arbitration Act* 1904 gave the Federation, as a registered organisation, "what I would not hesitate to call a corporate character – an independent existence as a legal person". Second, Fullagar J said⁴⁴ that "[t]he notion of qualified legal *capacity* is intelligible, but the notion of qualified legal *personality* is not" (emphasis added). Hence, the section of the *Conciliation and Arbitration Act* 1904 which provided that every registered organisation "shall for the purposes of the Act have perpetual succession and a common seal, and may own possess and deal with any real or personal property"⁴⁵ was, without more, "quite enough to give to a registered organization the full character of a corporation"⁴⁶. Neither the particular statutory root of incorporation nor the particular capacities which the body was given were treated as determining whether it had "the full character of a corporation". Rather, independent existence as a legal person, which is to say recognition as a right and duty bearing entity, was the determinative consideration.

37 *Williams v Hursey* points firmly against accepting the Authority's submissions that corporations, or bodies corporate, form a class of statutorily created right and duty bearing entities distinct from another class of statutorily created right and duty bearing entities identified only according to whether the constituting legislation (and legislature) "intended" to create the entity concerned as a corporation. It also points against accepting the submissions of the Attorney-General for Victoria that the power of a State to create artificial legal entities gives it a "broad scope" to create a right and duty bearing entity which is not a corporation for the purposes of s 51(xx).

41 77 US 566 at 576 (1870).

42 77 US 566 at 576 (1870).

43 (1959) 103 CLR 30 at 52.

44 (1959) 103 CLR 30 at 52.

45 (1959) 103 CLR 30 at 52 per Fullagar J, citing s 136 of the *Conciliation and Arbitration Act* 1904.

46 (1959) 103 CLR 30 at 52.

38 Like the Federation considered in *Williams v Hursey*, the Authority is created as a separate right and duty bearing entity. It may own, possess and deal with real or personal property. It is an entity which is to endure regardless of changes in those natural persons who control its activities and, in that sense, has "perpetual succession". Its constituting Act provides for mechanisms by which its assumption of rights and duties may be formally recorded and signified. The Authority has "the full character of a corporation".

A "trading corporation"?

39 As already noted, the Authority submitted that its activities were not such as to make it a trading corporation. In its written submissions, the Authority submitted that it dealt only with a related entity, QRL, and made no profit from those dealings, and that these "peculiar" activities did not make it a trading corporation. The Authority did not elaborate on these matters in oral argument.

40 By contrast, some of the interveners, especially the Attorney-General of the Commonwealth and the Attorney-General for Victoria, advanced detailed submissions about what test or tests should be applied in deciding whether a corporation is a trading corporation. In order to decide this case, however, it is not necessary to examine those submissions in any detail. Instead, it is enough to conclude that no matter whether attention is directed to the constitution and purposes of the Authority, or what it now does, or some combination of those considerations, the Authority must be found to be a trading corporation.

41 The QRTA Act established the Authority as an entity having functions which included "managing railways"⁴⁷, "controlling rolling stock on railways"⁴⁸, "providing rail transport services, including passenger services"⁴⁹ and "providing services relating to rail transport services"⁵⁰. The QRTA Act provides⁵¹ that the Authority is to "carry out its functions as a commercial enterprise". Provision is made⁵² for the Authority to pay dividends to the State and, to that end, the Authority is obliged⁵³ to give the responsible Ministers in May each year an estimate of its profit for the financial year. Not only that, the Authority is liable⁵⁴ to pay to the Treasurer, for payment into the consolidated fund of the State, amounts equivalent to the amounts for which the Authority would have been liable if it had been liable to pay tax imposed under a Commonwealth Act. In light of these provisions, the conclusions that the Authority was constituted with a view to engaging in trading and doing so with a view to profit are irresistible.

42 Even if the Authority is treated as now doing nothing more than supplying labour to QRL (a related entity) for the purposes of QRL providing rail services and even if, as the Authority submitted, the Authority chooses to supply that labour at a price which yields it no profit, those features of its activities neither permit nor require the conclusion that the Authority is not a trading corporation. Labour hire companies are now a common form of enterprise. The engagement of personnel by one enterprise for supply of their labour to another enterprise is a trading activity. That the parties to the particular supply arrangement are related entities does not deny that characterisation of the activity. That the prices for supply are struck at a level

47 s 9(1)(a).
48 s 9(1)(b).
49 s 9(1)(c).
50 s 9(1)(d).
51 s 10(1).
52 s 55.
53 s 56(1)(a).
54 s 62.

which yields no profit to the supplier likewise does not deny that the supplier is engaged in a trading activity.

43 In combination, these considerations require the conclusion that the Authority is a trading corporation. It is not necessary to consider which of them is or are necessary or sufficient to support the conclusion.

Inconsistency of laws

44 Little attention was given in oral argument to the question asked in the special case about inconsistency between the QRTA Act and the *Fair Work Act 2009* or between the Queensland Industrial Relations Act and the *Fair Work Act 2009*. Instead, argument proceeded on the footing that, if the Authority is held to be a trading corporation, the inconsistency consequences urged by the plaintiffs would follow. The answer which is given to the question about inconsistency of laws follows from the conclusion that the Authority is a trading corporation but should be framed by reference to the particular provisions which were the focus of the litigation.

Conclusion and orders

45 The plaintiffs are entitled to have the questions asked in the special case answered substantially in their favour. Having regard, however, to what has been said about the parties' assumption that it is useful to ask a separate question about whether the Authority is a "corporation" within the meaning of s 51(xx), it is better to provide no answer to that question and, instead, answer the second question, which directs attention to whether the Authority is a "trading corporation". What relief the plaintiffs should have in the proceedings is a matter better dealt with by a single Justice.

The questions in the special case should be answered as follows:

[...]

2 [...] [I]s Queensland Rail a trading corporation within the meaning of s 51(xx) of the Commonwealth Constitution?

Answer: Yes.

3 If so, does the *Fair Work Act 2009* (Cth) apply to Queensland Rail and its employees by the operation of s 109 of the Constitution, to the exclusion of the [*Queensland Rail Transit Authority Act 2013* (Q)] or the *Industrial Relations Act 1999* (Q) or both?

Answer: Except to say that the *Fair Work Act 2009* (Cth) applies to Queensland Rail as a "national system employer" for the purposes of that Act and that

(a) ss 69, 72 and 73 of the *Queensland Rail Transit Authority Act 2013* (Q) and

(b) ss 691A-691D of the *Industrial Relations Act 1999* (Q)

are to that extent inconsistent with the *Fair Work Act 2009* (Cth) and invalid in so far as they apply to Queensland Rail or its employees or the QR Passenger Pty Limited Traincrew Union Collective Workplace Agreement 2009 and Queensland Rail Rollingstock and Operations Enterprise Agreement 2011, it is not necessary to answer this question.

[This means that the plaintiffs succeeded in establishing that the *Fair Work Act 2009* still applies and consequently with it the industrial relations agreements which are based thereon.]

[...]

V. Questions on the Decision

1. What was decisive for the Supreme Court to qualify Queensland Rail?
2. What significance did the court attach to the asserted “intention of the Parliament” or the labelling “is not a body corporate”?
3. Do you agree with the argumentation?
4. What role did profit play in the assessment?

D Administrative Action (Lecture 3)

I. General Questions

1. Why does the form of administrative action matter? (legal protection, due process, administrative prerogatives etc.)?
2. Possible challenges of administrative acts (informal governmental actions etc.)
3. What are the particularities if an agency stipulates rules and regulations? (legal basis, legal effects, procedure etc.)?

II. ECHR, Decision *Yöyler v. Turkey* (Nr. 26973/95) of 24 July 2003



Read the extract from the decision and ask yourself what impact the form of administrative action has when the court applies Article 13 of the European Convention of Human Rights. What are the reasons for this court practice? Which problems in administrative law may arise because of this court practice?

Summary of the facts

Mr Yöyler had been imprisoned several times due to his involvement with several political organisations. He alleged that State security forces destroyed his house after he left his village. The State denied these allegations.



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FOURTH SECTION

[In its composition before 1 November 2001]

CASE OF YÖYLER v. TURKEY

(Application no. 26973/95)

JUDGMENT

STRASBOURG,

24 July 2003

FINAL

24/10/2003

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

[...]

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

1. The applicant, Mr Celalettin Yöyler, is a Turkish citizen who was born in 1941 and is at present living in Istanbul (Turkey). Until June 1994 the applicant lived in the village of Dirimpınar, attached to the Malazgirt district in the province of Muş. Between 1966 and 1994 the applicant was the *imam* (religious leader) of the village. As a result of his involvement with a number of political organisations, including the Social Democratic Populist Party (SHP), the People's Labour Party (HEP) and the Democracy Party (DEP), of which he became the local leader, he was imprisoned on a number of occasions. The applicant left and had never returned to his village prior to the alleged events in question, since he had been threatened with death.

The application concerns the applicant's allegations that State security forces destroyed his house.

A. The facts

2. The facts surrounding the destruction of the applicant's house are in dispute between the parties.

1. Facts as presented by the applicant

3. In 1994 three young women from the village, all of whom were related to the applicant's extended family, decided to join the PKK.

4. On 15 September 1994 the gendarme unit commander of Malazgirt came to the village and threatened to burn the village to the ground if the women were not brought to him within three days.

5. The applicant's family and the families of the young women, frightened by this threat, loaded up their possessions and fled. However, the gendarmes, accompanied by special teams, forced them to return to the village and to unload their possessions. They gathered the families into a house by force, where they assaulted certain of them, including the applicant's wife. They withdrew from the village telling the villagers to take good photographs of their houses, as that was all they would have to remember them by.

6. On 18 September 1994, at 8 p.m., special gendarme teams and village guards came to the village. Villagers were ordered to go into their homes and to turn off their lamps. The security forces then took diesel oil from the villagers' tractors and barrels and set fire to the houses of the applicant and his family. The applicant was out of the village, in İzmir, when his house was burned down.

7. On 23 September 1994 the applicant filed a criminal complaint with the Karşıyaka public prosecutor in İzmir for submission to the Malazgirt public prosecutor, calling for an on-site investigation and the institution of proceedings against the perpetrators. This document was registered as no. 35798 by the Karşıyaka public prosecutor's office.

8. On 24 September 1994 the applicant made a press statement through a human rights body, the Human Rights Association, which was carried the same day in the pro-Kurdish newspaper *Özgür Ülke*.

9. On 8 November 1994 the public prosecutor (no. 31583) sent a letter to the Gendarme Command in Malazgirt requesting a report on the matters raised in the applicant's allegations. He repeated his request in letters of 8 December 1994 (no. 30965) and 2 February 1995 (no. 31583).

10. By letter of 2 March 1995, the Gendarme Central Command in Malazgirt replied to the prosecutor's letter of 8 December 1994 by submitting the records of the statements they had taken. The prosecutor took further statements in May 1995, and the gendarme commander M.A. in June and November 1995. Since November 1995, there has been no development in the investigation.

2. Facts as presented by the Government

11. The applicant left the village of Dirimpinar of his own free will, together with his spouse and children. He settled first in Adapazarı and then in Istanbul or Izmir. The Government submitted various records of the statements taken by the authorities in relation to the burning of the applicant's house.

(a) Statements taken on 29 May 1995

12. Mr Muhsettin Yöyler, the mayor (*muhtar*) of the village of Dirimpinar, stated to the public prosecutor that on the night of the incident, he had seen some persons setting fire to the applicant's house but as they had their faces covered, he had not been able to recognise them. He did, however, recognise one of them, Ahmet (A.K.), a village guard from the village of Nurettin.

The statement by the applicant's fellow villager, Mr Abdulcebbar Sezen, revealed that the applicant had not been in the village during the incident, but that his family had been.

(b) Statements dated 19 June 1995 before the gendarme commander M.A.

13. Mr Muhsettin Yöyler claimed that although he had seen the applicant's house burning, he had not seen who had set fire to it, as it was dark.

Mr Süleyman Yılmaz and Mr Ömer Sezen from the same village made identical statements.

(c) Statements of 22 November 1995 given by the applicant's fellow villagers to the gendarme commander M.A.

14. Mr Aydın Sezen declared before the same gendarme commander that the applicant had always acted in a subversive manner towards the State, that his house had indeed been burned, that he had not seen who had set fire to it, but it had definitely not been the security forces. He also added that all the villagers were pleased that the applicant had left the village. In a further statement, Mr Muhsettin Yöyler told M.A. that the applicant had always been a PKK supporter, that the applicant and his family had not been in the village on the night of the incident, that he had not seen who had set fire to the house, but that he was sure that it was not the security forces. He also stated that the applicant himself might perhaps have done it.

15. Mr Abdulcebbar Sezen was recorded as having declared to the police officer that the applicant was a member of the PKK, that he used to be a source of trouble in the village and that the villagers were pleased that he had left the village. He also stated that the applicant's house had definitely not been burned by the security forces or the gendarmes and that the security forces had always helped the villagers.

16. Mr Muhlis Umulgan recalled having declared that the applicant was collaborating with the PKK, that on the night of the incident he had seen the applicant's house burning but had been afraid to go out, as he knew that the PKK were in the region at the time. He added that the security forces had not set fire to the applicant's house.

17. As to Süleyman Yılmaz, he declared that the applicant had not been in the village when the incident had occurred, that three days before the fire his spouse and children had left the village as well, taking the furniture, and that although some days before the incident security forces had been in the village, they had not been there during the incident. He finally stated that he did not know who had set fire to the applicant's house but was sure that it had not been the gendarmes.

18. The investigation could not continue in the applicant's absence. According to a letter of 2 April 1995 from the Gendarme Central Command in Malazgirt, the applicant had left Dirimpinar for an unknown place, probably Adapazarı.

[...]

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

19. The applicant, referring to the circumstances of the destruction of his home and eviction of his family from their village, maintained that there had been a breach of Article 3 of the Convention, which reads:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

20. The Government rejected this complaint as being without any basis.

21. The Court reiterates that Article 3 of the Convention enshrines one of the fundamental values of a democratic society. Even in the most difficult of circumstances, such as the fight against organised terrorism and crime, the Convention prohibits in absolute terms treatment contrary to this provision. Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and/or mental effects and, in some cases, the sex, age and state of health of the victim (see *Selçuk and Asker v. Turkey*, judgment of 24 April 1998, *Reports of Judgments and Decisions* 1998-II, p. 909, §§ 75-76).

22. The Court notes that the applicant's home was burned before the eyes of members of his family, depriving them of shelter and support and obliging them to leave the place where they lived and their family friends. In the Court's opinion, even assuming that the motive behind this impugned act was to punish the applicant and his relatives for their alleged involvement in the PKK, that would not provide a justification for such ill-treatment.

23. The Court considers that the destruction of the applicant's home and possessions, as well as the anguish and distress suffered by members of his family, must have caused him suffering of sufficient severity for the acts of the security forces to be categorised as inhuman treatment within the meaning of Article 3 (see *Selçuk and Asker*, cited above, p. 910, §§ 77-78).

24. The Court concludes that there has been a violation of Article 3 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION AND ARTICLE 1 OF PROTOCOL NO. 1

25. The applicant complained of the deliberate destruction of his home and property. He relied on Article 8 of the Convention, which reads:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

and Article 1 of Protocol No. 1, which provides:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

26. The Government denied the factual basis of the applicant's complaints and averred that his allegations were unsubstantiated.

27. The Court has found it established that the security forces deliberately destroyed the applicant's house and property, obliging his family to leave their village (see paragraph 64 above). There is no doubt that these acts, in addition to giving rise to a violation of Article 3, constituted grave and unjustified interference with the applicant's rights to respect for his private and family life and home, and to the peaceful enjoyment of his possessions (see *Menteş and Others v. Turkey*, judgment of 28 November 1997, *Reports* 1997-VIII, p. 2711, § 73, and *Dulaş v. Turkey*, no. 25801/94, § 60, 30 January 2001, unreported).

28. The Court therefore concludes that there has been a violation of Article 8 of the Convention and of Article 1 of Protocol No. 1.

IV. ALLEGED VIOLATIONS OF ARTICLES 6 AND 13 OF THE CONVENTION

29. The applicant complained that he had been denied an effective remedy by which to challenge the destruction of his home and possessions by the security forces, and to had been denied access to court to assert his civil rights. He relied on Article 6 § 1 of the Convention, which provides, in so far as relevant:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal...”

and Article 13 of the Convention, which provides:

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

A. Article 6 § 1 of the Convention

30. The applicant submitted that his right to access to court to assert his civil rights had been denied on account of the failure of the authorities to conduct an effective investigation into his allegations. In his opinion, without such an investigation he had no chance of succeeding in obtaining compensation in civil proceedings.

31. The Government maintained that the applicant had failed to pursue the remedies available in domestic law. Had the applicant filed a civil action, he would have enjoyed effective access to a court.

32. The Court notes that the applicant did not bring an action before the civil courts for the reasons given in the admissibility decision of 13 January 1997. It is therefore impossible to determine whether the national courts would have been able to adjudicate on the applicant's claims had he initiated proceedings. In the Court's view, however, the applicant's complaints mainly pertain to the lack of an effective investigation into the deliberate destruction of his family home and possessions by the security forces. It will therefore examine this complaint from the standpoint of Article 13, which imposes a more general obligation on States to provide an effective remedy in respect of alleged violations of the Convention (see *Selçuk and Asker*, cited above, p. 912, § 92).

The Court therefore finds it unnecessary to determine whether there has been a violation of Article 6 § 1 of the Convention.

B. Article 13 of the Convention

33. The applicant submitted that he had no effective remedy available in respect of his Convention grievances. With reference to previous cases concerning the destruction of villages, the applicant asserted that there was an administrative practice of violating Article 13 of the Convention in south-east Turkey and that he was a victim of that practice.

34. The Government argued that the applicant had deliberately ceased to pursue remedies in domestic law. In this connection, they pointed out that after filing a criminal complaint with the Public Prosecutor's office in İzmir, the applicant had disappeared without leaving any address to the judicial authorities. Despite this omission, the judicial authorities had carried out an effective investigation into the applicant's allegations by taking statements from his fellow villagers and committing a suspect for trial on charges of setting the applicant's house on fire.

35. The Court reiterates that Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an “arguable complaint” under the Convention and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be “effective” in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see *Dulaş*, cited above, § 65).

36. Where an individual has an arguable claim that his or her home and possessions have been purposely destroyed by agents of the State, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigation procedure (see *Menteş and Others*, cited above, pp. 2715-16, § 89).

37. The Court points out that it has already found that the applicant's home and possessions were destroyed in violation of Articles 3 and 8 of the Convention and Article 1 of Protocol No. 1. The applicant's complaints in this regard are therefore “arguable” for the purposes of Article 13 (see *Boyle and Rice v. the United Kingdom* judgment of 27 April 1988, Series A no. 131, p. 23, § 52, and *Dulaş*, cited above, § 67).

38. The Court has previously held that the implementation of the criminal law in respect of unlawful acts allegedly carried out with the involvement of the security forces discloses particular characteristics in south-east Turkey in the first half of the 1990s and that the defects found in the investigatory system in force in that region undermined the effectiveness of criminal law protection during this period. This practice permitted or fostered a lack of accountability of members of the security forces for their actions which was not compatible with the rule of law in a democratic society respecting the fundamental rights and freedoms guaranteed under the Convention (see *Bilgin v. Turkey*, no. 23819/94, § 119, 16 November 2000, unreported).

39. Turning to the particular circumstances of the case, the Court notes that the applicant filed a petition of complaint with the Karşıyaka public prosecutor's office shortly after the destruction of his house. On receipt of this petition, the Malazgirt Public Prosecutor's office instigated an investigation into the applicant's allegations. However, there were striking defects and omissions in the investigation. The Court would observe that the applicant's fellow villagers denied the content and veracity of the statements taken by the gendarmes, stating that they had been asked to sign blank sheets of paper and statements which had been written in advance and which had not been read out to them (see paragraph 57 above). The Court, having found these three witnesses' evidence credible, considers this practice totally incompatible with the notion of an investigation required by Article 13 of the Convention. The Court also points to its earlier finding that the statements taken from fifteen village guards were of a stereotyped nature - giving the impression that they had been prepared by the public prosecutor - and that therefore no particular weight can be attached to them (see paragraph 63 above).

40. Furthermore, the Court notes that the public prosecutors did not make any attempt to interview members of the security forces during the course of the investigation, despite the fact that the applicant had clearly named gendarmes as the perpetrators of the burning of his house and possessions. The Court finds it striking that there seemed to be a general reluctance on the part of the public prosecutors to admit that members of the security forces might have been involved in the destruction of property (see paragraph 62 above). Moreover, the prosecuting

authorities visited the scene of the incident more than two years and three months after they had received the applicant's criminal complaint (see paragraph 33 (xvi) above).

41. On 9 September 1996 jurisdiction over the investigation was transferred to the Malazgirt Administrative Council, which decided to discontinue the criminal proceedings against the gendarmes (see paragraph 33 (xv) above). However, the Court has already found in a number of cases that the investigation carried out by this body cannot be regarded as independent since it is composed of civil servants, who are hierarchically dependent on the governor, and an executive officer is linked to the security forces under investigation, (see *Güleç v. Turkey*, judgment of 27 July 1998, Reports 1998-IV, pp. 1732-1733, § 80).

42. Finally, the Court considers it regrettable that the judicial authorities prosecuted and detained Ahmet Kınay, although he was not the perpetrator of the crime and no criminal complaint had been lodged against him. It notes that apparently this was due to a statement dated 20 June 1995, prepared by the gendarmes and bearing the name and the signature of Muhsettin Yöyler, who denied that he had ever made such a statement and told the Court's delegates that the signature on the document was a fake. In the Court's opinion, this is a significant fact, which demonstrates that no serious investigation was conducted into the applicant's Convention grievances and that the involvement of the gendarmes in the investigation resulted in the cover-up of certain facts.

43. As to the Government's assertion that the investigation was undermined by the applicant's failure to leave an address with the authorities, the Court notes that it is true that attempts were made to locate the applicant with a view to obtaining his statements in regard to his allegations. However, it should be borne in mind that, following the destruction of his family home, the applicant had no permanent address to give to the authorities since he was moving from one city to another in order to find a shelter for himself and his family. His feelings of vulnerability and insecurity are also of some relevance in this connection (see *Menteş and Others*, cited above, p. 2707, § 59). Accordingly, the Court considers that the personal circumstances of the applicant and the omissions and the defects in the domestic investigation outweigh his failure to provide his address to the authorities.

44. In the light of the foregoing, the Court concludes that the authorities failed to conduct a thorough and effective investigation into the applicant's allegations and that access to any other available remedy, including a claim for compensation, has thus also been denied him.

45. There has therefore been a breach of Article 13 of the Convention.

[...]

III. ECHR, Decision *Verein Klimaseniorinnen Schweiz and Others v. Switzerland* (Nr. 53600/20) of 9 April 2024



Below you will find a concise summary of the relevant procedural facts in the *Klimaseniorinnen* case. Read it through and ask yourself what the question of victim status or direct impact entails for the possibility of judicial review of non-formal administrative actions or even omissions.

Summary of the facts

The case concerns an action brought by a group of elderly Swiss women against the Swiss state for the failure to implement sufficient measures against climate change. At last, before the ECtHR, they (successfully) argued that the state's omission violated – inter alia – their right to respect for private and family life (Art. 8 ECHR).

The procedural question at hand

Procedural issue at hand was whether the applicants had standing to object against the state omissions in question. Art. 25a of the *Swiss Federal Administrative Procedure Act* stipulates that persons may demand – inter alia – a decree which acknowledges the situation (state action or omission) at hand and provides a legal assessment thereof – which in turn provides the basis for possible subsequent court proceedings against the administrative authority/-ies concerned. However, this requires that applicants must be directly impacted by said actions or omissions and thereby possess victim status – just as required by the ECHR.

Can a group indicative of a large demographic of Swiss society possess victim status against practices whose consequences (abstractly) target the whole world population?

The relevant Swiss federal administrative authorities and courts consistently denied the applicant's victim status as the consequences of (alleged) shortcomings in climate change mitigation are too general and thereby not sufficiently individually targeted. Thereby, the applicants were refused said decrees on that procedural ground.

The court's application of Art. 6 ECHR

In order for Art. 6 ECHR to be applicable, there has to be a genuine and serious dispute over a right under national law, which implies that proceedings must be *directly decisive* for an applicant's civil right(s) which – in the environmental context – requires a personal danger which is serious, specific and imminent.

The application under Art. 25a of the aforementioned Swiss act is essential for addressing the impact of adverse effects on the enjoyment of e.g. the right to life under the Swiss Federal Constitution and Art. 8 ECHR. The elderly as a demographic are categorically more significantly and critically endangered by a worsened climate than the general public and the notion “directly decisive” is thus to be interpreted more

broadly in order to conform to the collective nature of climate change itself, as the protection of rights would otherwise be impossible in that context.

Insofar, Art. 6 ECHR is applicable and [most of] the group accordingly possess[es] victim status.

Violation of Art. 6 ECHR?

The access to a court must be practical and effective and *in casu*, the authorities' and courts' denial of victim status without due consideration of the arguments of urgency and severity constituted a disproportionate interference with that right, impacting its "very essence".

Consequently, the court found a violation of Art. 6 ECHR [in the case of most applicants]. (Note that the examination under Art. 13 ECHR was redundant as its requirements are absorbed by the stricter ones of Art. 6 ECHR.)

IV. Questions on the Decisions

1. What impact has the form of administrative action when the court applies Articles 6 and 13 of the European Convention of Human Rights?
2. What are the reasons for this court practice?
3. Which problems in administrative law may arise out of this court practice?
4. Do you agree with the court's relatively broad interpretation of the notion of *victim status* in the *Klimaseniorinnen* case? What consequences may the possibility of an *action popularis* have on the efficiency of administrative activity? And what about the protection of rights in transnational contexts?

V. General Administrative Law Act (NL)



Below you will find an extract from a translation of the General Administrative Law Act of the Netherlands. Read the extract and ask yourself what procedural rights are guaranteed in case of an "order" (in Switzerland an administrative decision). Is something missing? What advantages or disadvantages do you see in codifying them in an act?

GENERAL ADMINISTRATIVE LAW ACT

[...]

CHAPTER 7 SPECIAL PROVISIONS CONCERNING OBJECTIONS AND ADMINISTRATIVE APPEALS

Division 7.1 Notice of objection preceding appeal to an administrative court

Article 7:1

1. The one who has the right to appeal against an order to an administrative court shall lodge an objection against the order before lodging an appeal, unless the order:

- (a) has been made in respect of an objection or an administrative appeal;
- (b) is subject to approval;
- (c) is one approving another order or refusing such approval; or
- (d) was prepared in accordance with one of the procedures provided in division 3.5.

2. An appeal may be lodged against the decision on the objection in accordance with the regulations which govern the lodging of an appeal against the order against which the objection was made.

Division 7.2 Special provisions on objections

Article 7:2

1. Before an administrative authority decides on an objection, it shall give the interested parties the opportunity to be heard.

2. For this purpose the administrative authority shall in any event inform the petitioner and the interested parties who stated their views when the order was being prepared.

Article 7:3

Interested parties need not be heard, if:

- (a) the objection is manifestly inadmissible,
- (b) the objection is manifestly unfounded,
- (c) the interested parties have stated that they do not wish to exercise their right to be heard, or
- (d) the objection is completely satisfied and the interests of other interested parties cannot be prejudiced as a result.

Article 7:4

1. Interested parties may submit further documents until ten days before the hearing.

2. The administrative authority shall deposit the notice of objection and all other documents relating to the case for inspection by interested parties for at least one week prior to the hearing.

3. The communication to attend the hearing shall draw the attention of interested parties to subsection 1 and state when and where the documents will be deposited for inspection.

4. Interested parties may obtain copies of these documents at no more than cost price.

5. Subsection 2 need not be applied in so far as the interested parties agree to this.

6. The administrative authority may also refrain from applying subsection 2, either at the request of an interested party or otherwise, in so far as there are compelling reasons for secrecy. Communication shall be given of the application of this provision.

7. Compelling reasons shall in any event be deemed not to exist in so far as there is an obligation under the Government Information (Public Access) Act to grant a request for information contained in such documents.

8. If the compelling reason is fear of damage to the physical or mental health of an interested party, inspection of the documents in question may be restricted to a legal representative who is either an attorney-at-law or a physician.

Article 7:5

1. Unless the hearing is conducted wholly or partly by the administrative authority itself or by the chairman or a member thereof, the hearing shall be conducted by: (a) a person who was not involved in the preparation of the disputed order, or (b) two or more persons of whom the majority, including the person chairing the hearing, were not involved in the preparation of the disputed order.

2. Unless provided otherwise by statutory regulation, the administrative authority shall decide whether the hearing takes place in public.

Article 7:6

1. Interested parties shall be heard in one another's presence.

2. Interested parties may be heard separately, either on the initiative of the administrative authority or on request, if it is reasonable to assume that a joint hearing would prejudice the proper conduct of the proceedings, or that facts or circumstances will become known during the hearing which should be kept secret for compelling reasons.

3. If interested parties are heard separately, each of them shall be informed of the matters dealt with during the hearing when he was not present.

4. The administrative authority may also refrain from applying subsection 3, either at the request of an interested party or otherwise, in so far as there are compelling reasons for secrecy. Article 7:4, subsection 6, second sentence, and subsections 7 and 8 shall apply *mutatis mutandis*.

Article 7:7

A record shall be kept of the hearing.

Article 7:8

1. At the request of the interested party witnesses and experts whom he has brought with him may be heard.

2. The costs of witnesses and experts shall be borne by the interested party who has brought them with him.

Article 7:9

If, after the hearing, facts or circumstances which may be of substantial importance to the decision to be made on the objection become known to the administrative authority, the interested parties shall be informed and given the opportunity to be heard on the subject.

Article 7:10

1. The administrative authority shall decide within six weeks of receiving the notice of objection, or within ten weeks if a committee as referred to in article 7:13 has been established.

2. The time limit shall be suspended with effect from the day on which the petitioner is requested to remedy an omission as referred to in article 6:6 until the day on which the omission is remedied or the time limit set for this purpose expires without being used.

3. The administrative authority may defer the decision for a maximum of four weeks. Written communication shall be given of the deferral.

4. Further postponement shall be possible in so far as the petitioner agrees to this and the interests of other interested parties cannot be prejudiced by this or these parties have agreed to this.

Article 7:11

1. If the objection is admissible, the disputed order shall be reviewed on the basis thereof.

2. In so far as the review provides grounds for so doing, the administrative authority shall rescind the disputed order and, in so far as necessary, make a new order replacing it.

Article 7:12

1. The decision on the objection shall be based on proper reasons, which shall be stated when the decision is notified. If it has been decided not to have a hearing under article 7:3, it shall also be stated on what grounds.

2. The decision shall be notified by being sent or issued to the persons to whom it is addressed. If it concerns an order which is not addressed to one or more interested parties, the decision shall be notified in the same way as the order was notified.

3. As soon as possible after the decision is notified, the interested parties who stated their views in the objection procedure or when the disputed order was being prepared, shall be informed.

4. Article 6:23 shall apply *mutatis mutandis* to the communication referred to in subsection 3, which shall also state, with a view to the start of the time limit for appeal, as clearly as possible when the decision was notified in accordance with subsection 2.

Article 7:13

1. This article shall apply if an advisory committee has been established for the decision on the objection:

- (a) which consists of a chairman and at least two members,
- (b) whose chairman is not part of, and not employed under the responsibility of, the administrative authority, and
- (c) which complies with any other requirements which may be prescribed by statutory regulation.

2. The acknowledgement of receipt referred to in article 6:14 shall state that a committee will advise on the objection.

3. The hearing shall be conducted by the committee. The committee may direct that the hearing is to be conducted by the chairman or a member who is not part of, and not employed under the responsibility of, the administrative authority.

4. The committee shall decide on the application of article 7:4, subsection 6, article 7:5, subsection 2, and, in so far as not provided otherwise by statutory regulation, article 7:3.

5. A representative of the administrative authority shall be invited to attend the hearing and shall be given the opportunity to explain the authority's position.

6. The opinion of the committee shall be made in writing and shall include a report of the hearing.

7. If the decision on the objection departs from the opinion of the committee, the reasons why the opinion was not followed shall be stated in the decision, and the opinion shall be sent with the decision.

Article 7:14

Article 3:6, subsection 2, divisions 3.4 and 3.5, articles 3:41 to 3:45 inclusive, division 3.7, with the exception of article 3:49, and Chapter 4 shall not apply.

Article 7:15

No fee shall be payable for the processing of the objection.

Division 7.3 Special provisions on administrative appeals

Article 7:16

1. Before an appeals authority decides on an appeal it shall give the interested parties the opportunity to be heard.
2. The appeals authority shall in any event inform the submittant of the notice of appeal, as well as the administrative authority which made the order and the interested parties who stated their views when the order was being prepared or in the objection procedure.

Article 7:17

Interested parties need not be heard, if:

- (a) the appeal is manifestly inadmissible, or
- (b) the appeal is manifestly unfounded, or
- (c) the interested parties have stated that they do not wish to exercise their right to be heard.

Article 7:18

1. Interested parties may submit further documents until ten days before the hearing.
2. The appeals authority shall deposit the notice of appeal and all other documents relating to the case for inspection by interested parties for at least one week prior to the hearing.
3. The communication to attend the hearing shall draw the attention of interested parties to subsection 1 and shall state when and where the documents will be deposited for inspection.
4. Interested parties may obtain copies of these documents at no more than cost price.
5. Subsection 2 need not be applied in so far as the interested parties agree to this.
6. The appeals authority may also refrain from applying subsection 2, either at the request of an interested party or otherwise, in so far as there are compelling reasons for secrecy. Communication shall be given of the application of this provision.
7. Compelling reasons shall in any event be deemed not to exist in so far as there is an obligation under the Government Information (Public Access) Act to grant a request for information contained in such documents.
8. If the compelling reason is fear of damage to the physical or mental health of an interested party, inspection of the documents in question may be restricted to a legal representative who is either an attorney-at-law or a physician.

Article 7:19

1. The hearing shall be conducted by the appeals authority.
2. The conduct of the hearing may be assigned by or pursuant to act of Parliament to an advisory committee consisting of one or more members who are not part of, and not employed under the responsibility of, the appeals authority.
3. The hearing shall take place in public, unless the appeals authority decides otherwise at the request of an interested party or, if there are compelling reasons, on its own initiative.

Article 7:20

1. Interested parties shall be heard in one another's presence.
2. Interested parties may be heard separately, either on the initiative of the administrative authority or on request, if it is reasonable to assume that a joint hearing would prejudice the proper conduct of the proceedings or that facts or circumstances will become known during the hearing which should be kept secret for compelling reasons.
3. If interested parties are heard separately, each of them shall be informed of the matters dealt with during the hearing when he was not present.
4. The appeals authority may also refrain from applying subsection 3, either at the request of an interested party or otherwise, in so far as there are compelling reasons for secrecy. Article 7:18, subsection 6, second sentence, and subsections 7 and 8, shall apply *mutatis mutandis*.

Article 7:21

A record shall be kept of the hearing.

Article 7:22

1. At the request of the interested party, witnesses and experts whom he has brought with him may be heard.
2. The costs of witnesses and experts shall be borne by the interested party who has brought them with him.

Article 7:23

If, after the hearing, facts or circumstances which may be of substantial importance to the decision to be made on the appeal become known to the appeals authority, the interested parties shall be informed and given the opportunity to be heard on the subject.

Article 7:24

1. The appeals authority shall decide within sixteen weeks of receiving the notice of appeal.
2. If, however, the appeals authority is part of the same legal entity as the administrative authority against whose order the appeal is brought, it shall decide within six weeks of receiving the appeal or, if a committee as referred to in article 7:19, subsection 2 is established, within ten weeks.
3. The time limit shall be suspended with effect from the day on which the submittant of the notice of appeal is requested to remedy an omission as referred to in article 6:6 until the day on which the omission is remedied or the time limit set for this purpose expires without being used.
4. The appeals authority may defer the decision for a maximum of eight weeks.
5. In the case referred to in subsection 2, however, the appeals authority may defer the decision for a maximum of four weeks.
6. Written communication shall be given of the deferral.
7. Further postponement shall be possible in so far as the submittant agrees to this and the interests of other interested parties cannot be prejudiced by this or these parties have agreed to this.

Article 7:25

In so far as the appeals authority considers that the appeal is admissible and wellfounded, it shall annul the disputed order and, in so far as necessary, make a new order replacing it.

Article 7:26

1. The decision on the appeal shall be based on proper reasons, which shall be stated when the decision is notified. If it has been decided not to have a hearing under article 7:17, it shall also be stated on what grounds.
2. If the decision departs from the opinion of a committee as referred to in article 7:19, subsection 2, the reasons why the opinion was not followed shall be stated in the decision and the opinion shall be sent with the decision.
3. The decision shall be notified by being sent or issued to the persons to whom it is addressed. If it concerns an order which is not addressed to one or more interested parties, the decision shall be notified in the same way as the order was notified.
4. As soon as possible after the decision is notified, the administrative authority against whose order the appeal was brought, the ones to whom the disputed order was addressed and the interested parties who have stated their views in the appeal procedure shall be informed.
5. Article 6:23 shall apply mutatis mutandis to the communication referred to in subsection 4, which shall also state, with a view to the start of the time limit for appeal, as clearly as possible, when the decision was notified in accordance with subsection 3.

Article 7:27

Article 3:6, subsection 2, divisions 3.4 and 3.5, articles 3:41 to 3:45 inclusive, division 3.7, with the exception of article 3:49, and Chapter 4 shall not apply.

Article 7:28

No fee shall be payable for the processing of the appeal.

CHAPTER 8 SPECIAL PROVISIONS CONCERNING APPEALS TO THE DISTRICT COURT

Title 8.1 General provisions "

[...]

Division 8.1.4. Challenge and excusal

Article 8:15

At the request of a party, any of the judges dealing with a case may be challenged on the ground of facts or circumstances which could prejudice the judicial impartiality.

Article 8:16

1. The request shall be made as soon as the facts or circumstances become known to the petitioner.
2. The request shall be made in writing, stating the grounds. After the start of the hearing, or after the start of the hearing of parties or witnesses in the preliminary inquiry, the request may also be made orally.
3. All the facts and circumstances must be presented together.

4. A subsequent challenge to the same judge shall not be dealt with unless facts or circumstances are adduced which did not become known to the petitioner until after the previous request.
5. If the request is made , the hearing shall be adjourned.

Article 8:17

A judge who has been challenged may acquiesce in the challenge.

Article 8:18

1. The challenge shall be dealt with as soon as possible by a three-judge section of which the judge who has been challenged is not a member.
2. The petitioner and the judge who has been challenged shall be given the opportunity to be heard. The district court may determine, on its own initiative or at the request of the petitioner or the judge who has been challenged, that they will not be heard in each other's presence.
3. The district court shall decide as soon as possible. The decision shall state the reasons and shall be communicated without delay to the petitioner , the other parties and the judge who has been challenged.
4. In the event of abuse, the district court may order that no subsequent requests shall be dealt with. This shall be stated in the decision.
5. The decision is final.

Article 8:19

1. Any of the judges dealing with a case may ask to be excused from dealing with it on the ground of facts or circumstances as referred to in article 8:15.
2. The request shall be in writing, stating the reasons. After the start of the hearing, or after the start of the hearing of parties or witnesses in the preliminary inquiry, the request may also be made orally.
3. If the request is made in court, the hearing shall be adjourned.

Article 8:20

1. The request to be excused from dealing with the case shall be heard as soon as possible by a three-judge section of which the judge who has asked to be excused is not a member.
2. The district court shall decide as soon as possible. The decision shall state the reasons and shall be communicated without delay to the parties and the judge who asked to be excused.
3. The decision is final.

Division 8.1.5 The parties

Article 8:21

1. Natural persons who are not competent to be parties to litigation shall be represented in the proceedings by their civil-law representatives. For a statutory representative the authorisation of the subdistrict court as referred to in article 349 of Book 1 of the Civil Code is not required.
2. The persons referred to in subsection 1 may represent themselves in the action if they may be deemed to have a reasonable understanding of their interests.
3. If no statutory representative is present, or he is not available and the case is urgent, the district court may appoint a provisional representative. The appointment shall cease to have

effect as soon as a statutory representative is present or the statutory representative is available once again.

Article 8:22

1. In the event of bankruptcy or suspension of payment of debts or application of the arrangement of purgation of debts, articles 25, 27 and 31 of the Bankruptcy Act shall apply *mutatis mutandis*.
2. Article 25, subsection 2 and article 27 shall not apply if the parties are invited to appear in court before the declaration of bankruptcy.

Article 8:23

1. An administrative authority which is a body shall be represented in the action by one or more members designated by the administrative authority.
2. The Crown shall be represented in the proceedings by Our Minister whom it may concern or one or more of Our Ministers whom it may concern, as the case may be.

Article 8:24

1. The parties may be assisted or represented by a legal representative.
2. The district court may require a legal representative to produce a written authorisation.
3. Subsection 2 shall not apply to attorneys-at-law and procurators.

Article 8:25

1. The district court may refuse to allow assistance or representation by a person against whom there are serious objections.
2. The party concerned and the person referred to in subsection 1 shall be informed without delay of the refusal and the reason for it.
3. Subsection 1 shall not apply to attorneys-at-law and procurators.

Article 8:26

1. Until the end of the hearing the district court may allow interested parties to be joined as parties in the proceedings on its own initiative, at the request of a party or at their own request.
2. If the district court suspects that there are unknown interested parties, it may announce in the Government Gazette that a case is pending before it. The announcement may also be made by other means in addition to the announcement in the Government Gazette.

Article 8:27

1. Parties who have been summoned by the district court to appear in person, or to appear in person or represented by a legal representative, whether or not to provide information, are obliged to appear and provide the information required. The attention of the parties shall be drawn to this and to article 8:31.
2. In the case of a legal entity or an administrative authority which is a body the district court may summon one or more specified administrators or members.

Article 8:28

Parties who have been requested by the district court to provide written information shall provide the information required. The attention of the parties shall be drawn to this and to article 8:31.

Article 8:29

1. Parties who are obliged to provide information or submit documents may, if there are compelling reasons, refuse to provide such information or submit such documents, or inform the district court that it alone may take cognizance of the information or documents concerned.
2. Compelling reasons shall in any event be deemed not to exist for an administrative authority in so far as there is an obligation under the Government Information (Public Access) Act to grant a request for information contained in the documents to be submitted.
3. The district court shall decide whether the refusal or restriction on the cognizance referred to in subsection 1 is justified.
4. If the district court decides that the refusal is justified, the obligation shall cease to have effect.
5. If the district court decides that the restriction on the cognizance of the information is justified, it may not give judgment based wholly or partly on the information or documents without the consent of the other parties.

Article 8:30

The parties shall cooperate in an investigation as referred to in article 8:47, subsection 1. The attention of the parties shall be drawn to this and to article 8:31.

Article 8:31

If a party fails to comply with the obligation to appear, provide information, submit documents or cooperate in an investigation as referred to in article 8:47, subsection 1, the district court may draw such conclusions from this as it sees fit.

Article 8:32

1. The district court may, if it is feared that the physical or mental health of a party would be damaged if he or she were to take cognizance of documents, direct that this may be done only by a legal representative who is an attorney-at-law or physician or has been given special permission by the district court.
2. The district court may, if the privacy of a person would be disproportionately invaded by a party taking cognizance of the documents, determine that this may be done only by a legal representative who is an attorney-at-law or physician or has been given special permission by the district court.

[...]

VI. Questions on the General Administrative Law Act (NL)

1. What procedural rights are guaranteed in case of an “order” (in Switzerland an administrative decision)?
2. Is something missing?
3. What advantages or disadvantages do you see in codifying them in an act?

VII. Perez, Secretary of Labour, et al. v. Mortgage Bankers Association et al.

Summary of the facts

The Fair Labor Standards Act (FLSA) requires employers to pay overtime wages to employees who work more than 40 hours per week. However there exist exemptions to this rule. Since 2006, mortgage loan officers (people who assist prospective buyers in finding and applying for mortgage offers) qualified for the exemption. In 2010, however, the Deputy Administrator issued a new pronouncement declaring that mortgage loan officers did not qualify for the exemption. Mortgage Bankers Association (MBA), in representing mortgage loan officers, argued that the agency could not change its interpretation without first going through a notice-and-comment period required by the Administrative Procedure Act.

(Slip Opinion) OCTOBER TERM, 2014

1

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

PEREZ, SECRETARY OF LABOR, ET AL . v.
MORTGAGE BANKERS ASSOCIATION ET AL .

CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR

THE DISTRICT OF COLUMBIA CIRCUIT

No. 13–1041. Argued December 1, 2014—Decided March 9, 2015*

The Administrative Procedure Act (APA) establishes the procedures federal administrative agencies use for “rule making,” defined as the process of “formulating, amending, or repealing a rule.” 5 U. S. C. §551(5). The APA distinguishes between two types of rules: So-called “legislative rules” are issued through notice-and-comment rulemaking, see §§553(b), (c), and have the “force and effect of law,” *Chrysler Corp. v. Brown*, 441 U. S. 281, 302–303. “Interpretive rules,” by contrast, are “issued . . . to advise the public of the agency’s construction of the statutes and rules which it administers,” *Shalala v. Guernsey Memorial Hospital*, 514 U. S. 87, 99, do not require notice-and-comment rulemaking, and “do not have the force and effect of law,” *ibid*.

In 1999 and 2001, the Department of Labor’s Wage and Hour Division issued letters opining that mortgage-loan officers do not qualify for the administrative exemption to overtime pay requirements under the Fair Labor Standards Act of 1938. In 2004, the Department issued new regulations regarding the exemption. Respondent Mortgage Bankers Association (MBA) requested a new

interpretation of the revised regulations as they applied to mortgage-loan officers, and in 2006, the Wage and Hour Division issued an opinion letter finding that mortgage-loan officers fell within the administrative exemption under the 2004 regulations. In 2010, the Department again altered its interpretation of the administrative exemption. Without notice or an opportunity for comment, the Department withdrew the 2006

*Together with No. 13–1052, *Nickols et al. v. Mortgage Bankers Association*, also on certiorari to the same court.

2 PEREZ *v.* MORTGAGE BANKERS ASSN. opinion letter and issued an Administrator’s Interpretation concluding that mortgage-loan officers do not qualify for the administrative exemption.

MBA filed suit contending, as relevant here, that the Administrator’s Interpretation was procedurally invalid under the D. C. Circuit’s decision in *Paralyzed Veterans of Am. v. D. C. Arena L. P.*, 117 F. 3d 579. The *Paralyzed Veterans* doctrine holds that an agency must use the APA’s notice-and-comment procedures when it wishes to issue a new interpretation of a regulation that deviates significantly from a previously adopted interpretation. The District Court granted summary judgment to the Department, but the D. C. Circuit applied *Paralyzed Veterans* and reversed.

Held: The *Paralyzed Veterans* doctrine is contrary to the clear text of the APA’s rulemaking provisions and improperly imposes on agencies an obligation beyond the APA’s maximum procedural requirements.

Pp. 6–14.

- (a) The APA’s categorical exemption of interpretive rules from the notice-and-comment process is fatal to the *Paralyzed Veterans* doctrine. The D. C. Circuit’s reading of the APA conflates the differing purposes of §§1 and 4 of the Act. Section 1 requires agencies to use the same procedures when they amend or repeal a rule as they used to issue the rule, see 5 U. S. C. §551(5), but it does not say what procedures an agency must use when it engages in rulemaking. That is the purpose of §4. And §4 specifically exempts interpretive rules from notice-and-comment requirements. Because an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures to amend or repeal that rule. Pp. 7–8.
- (b) This straightforward reading of the APA harmonizes with longstanding principles of this Court’s administrative law jurisprudence, which has consistently held that the APA “sets forth the full extent of judicial authority to review executive agency action for procedural correctness,” *FCC v. Fox Television Stations, Inc.*, 556 U. S. 502, 513. The APA’s rulemaking provisions are no exception: §4 establishes “the maximum procedural requirements” that courts may impose upon agencies engaged in rulemaking. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U. S. 519, 524. By mandating notice-and-comment procedures when an agency changes its interpretation of one of the regulations it enforces, *Paralyzed Veterans* creates a judge-made procedural right that is inconsistent with Congress’ standards. Pp. 8–9.
- (c) MBA’s reasons for upholding the *Paralyzed Veterans* doctrine are unpersuasive. Pp. 9–14.
 - (1) MBA asserts that an agency interpretation of a regulation Cite as: 575 U. S. ____ (2015) 3 that significantly alters the agency’s prior interpretation effectively amends the underlying regulation. That assertion conflicts with the ordinary meaning of the words “amend” and “interpret,” and it is impossible to reconcile with the longstanding recognition that interpretive rules do not have the force and effect of law. MBA’s theory is particularly odd in light of the limitations of the *Paralyzed Veterans* doctrine, which applies only when an agency has previously adopted an interpretation of its regulation. MBA fails to explain why its

argument regarding revised interpretations should not also extend to the agency's first interpretation. *Christensen v. Harris County*, 529 U. S. 576, and *Shalala v. Guernsey Memorial Hospital*, 514 U. S. 87, distinguished. Pp. 9–12.

- (2) MBA also contends that the *Paralyzed Veterans* doctrine reinforces the APA's goal of procedural fairness. But the APA already provides recourse to regulated entities from agency decisions that skirt notice-and-comment provisions by placing a variety of constraints on agency decisionmaking, *e.g.*, the arbitrary and capricious standard. In addition, Congress may include safe-harbor provisions in legislation to shelter regulated entities from liability when they rely on previous agency interpretations. See, *e.g.*, 29 U. S. C. §§259(a), (b)(1). Pp. 12–13.
- (3) MBA has waived its argument that the 2010 Administrator's Interpretation should be classified as a legislative rule. From the beginning, this suit has been litigated on the understanding that the Administrator's Interpretation is an interpretive rule. Neither the District Court nor the Court of Appeals addressed this argument below, and MBA did not raise it here in opposing certiorari. P. 14. 720 F. 3d 966, reversed.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, BREYER, and KAGAN, JJ., joined, and in which ALITO, J., joined except for Part III–B. ALITO, J., filed an opinion concurring in part and concurring in the judgment. SCALIA, J., and THOMAS, J., filed opinions concurring in the judgment.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 13–1041 and 13–1052

THOMAS E. PEREZ, SECRETARY OF LABOR, ET AL.,
PETITIONERS

13–1041 v.
MORTGAGE BANKERS ASSOCIATION ET AL.

JEROME NICKOLS, ET AL., PETITIONERS
13–1052 v.

MORTGAGE BANKERS ASSOCIATION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT
OF

APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[March 9, 2015]

JUSTICE SOTOMAYOR delivered the opinion of the Court.

When a federal administrative agency first issues a rule interpreting one of its regulations, it is generally not required to follow the notice-and-comment rulemaking procedures of the Administrative Procedure Act (APA or Act). See 5 U. S. C. §553(b)(A). The United States Court of Appeals for the District of Columbia Circuit has nevertheless held, in a line of cases beginning with *Paralyzed Veterans of Am. v. D. C. Arena L. P.*, 117 F. 3d 579 (1997), that an agency must use the APA’s notice-and-comment procedures when it wishes to issue a new interpretation of a regulation that deviates significantly from one the agency has previously adopted. The question in these cases is whether the rule announced in *Paralyzed Veterans* is consistent with the APA. We hold that it is not.

I

A

The APA establishes the procedures federal administrative agencies use for “rule making,” defined as the process of “formulating, amending, or repealing a rule.” §551(5). “Rule,” in turn, is defined broadly to include “statement[s] of general or particular applicability and future effect” that are designed to “implement, interpret, or prescribe law or policy.” §551(4).

Section 4 of the APA, 5 U. S. C. §553, prescribes a threestep procedure for so-called “notice-and-comment rulemaking.” First, the agency must issue a “[g]eneral notice of proposed rule making,” ordinarily by publication in the Federal Register. §553(b). Second, if “notice [is] required,” the agency must “give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments.” §553(c). An agency must consider and respond to significant comments received during the period for public comment. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.

S. 402, 416 (1971); *Thompson v. Clark*, 741 F.2d 401, 408 (CADC 1984). Third, when the agency promulgates the final rule, it must include in the rule's text "a concise general statement of [its] basis and purpose." §553(c). Rules issued through the notice-and-comment process are often referred to as "legislative rules" because they have the "force and effect of law." *Chrysler Corp. v. Brown*, 441 U. S. 281, 302–303 (1979) (internal quotation marks omitted).

Not all "rules" must be issued through the notice-and-comment process. Section 4(b)(A) of the APA provides that, unless another statute states otherwise, the notice-and-comment requirement "does not apply" to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U. S. C. §553(b)(A). The term "interpretative rule," or "interpretive rule,"⁵⁵ is not further defined by the APA, and its precise meaning is the source of much scholarly and judicial debate. See generally Pierce, Distinguishing Legislative Rules From Interpretative Rules, 52 Admin. L. Rev. 547 (2000); Manning, Nonlegislative Rules, 72 Geo. Wash. L. Rev. 893 (2004). We need not, and do not, wade into that debate here. For our purposes, it suffices to say that the critical feature of interpretive rules is that they are "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Shalala v. Guernsey Memorial Hospital*, 514 U. S. 87, 99 (1995) (internal quotation marks omitted). The absence of a notice-and-comment obligation makes the process of issuing interpretive rules comparatively easier for agencies than issuing legislative rules. But that convenience comes at a price: Interpretive rules "do not have the force and effect of law and are not accorded that weight in the adjudicatory process." *Ibid.*

B

These cases began as a dispute over efforts by the Department of Labor to determine whether mortgage-loan officers are covered by the Fair Labor Standards Act of 1938 (FLSA), 52 Stat. 1060, as amended, 29 U. S. C. §201 *et seq.* The FLSA "establishe[s] a minimum wage and overtime compensation for each hour worked in excess of 40 hours in each workweek" for many employees. *Integrity Staffing Solutions, Inc. v. Busk*, 574 U. S. ___, ___ (2014) (slip op., at 3). Certain classes of employees, however, are exempt from these provisions. Among these exempt individuals are those "employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman . . ." §213(a)(1). The

exemption for such employees is known as the "administrative" exemption.

⁵⁵ The latter is the more common phrasing today, and the one we use throughout this opinion.

The FLSA grants the Secretary of Labor authority to “defin[e]” and “delimit” the categories of exempt administrative employees. *Ibid.* The Secretary’s current regulations regarding the administrative exemption were promulgated in 2004 through a notice-and-comment rulemaking. As relevant here, the 2004 regulations differed from the previous regulations in that they contained a new section providing several examples of exempt administrative employees. See 29 CFR §541.203. One of the examples is “[e]mployees in the financial services industry,” who, depending on the nature of their day-to-day work, “generally meet the duties requirements for the administrative exception.” §541.203(b). The financial services example ends with a caveat, noting that “an employee whose primary duty is selling financial products does not qualify for the administrative exemption.” *Ibid.* In 1999 and again in 2001, the Department’s Wage and Hour Division issued letters opining that mortgage-loan officers do not qualify for the administrative exemption. See Opinion Letter, Loan Officers/Exempt Status, 6A LRR, Wages and Hours Manual 99:8351 (Feb. 16, 2001); Opinion Letter, Mortgage Loan Officers/Exempt Status, *id.*, at 99:8249. (May 17, 1999). In other words, the Department concluded that the FLSA’s minimum wage and maximum hour requirements applied to mortgage-loan officers. When the Department promulgated its current FLSA regulations in 2004, respondent Mortgage Bankers Association (MBA), a national trade association representing real estate finance companies, requested a new opinion interpreting the revised regulations. In 2006, the Department issued an opinion letter finding that mortgageloan officers fell within the administrative exemption under the 2004 regulations. See App. to Pet. for Cert. in No. 13–1041, pp. 70a–84a. Four years later, however, the Wage and Hour Division again altered its interpretation of the FLSA’s administrative exemption as it applied to mortgage-loan officers. *Id.*, at 49a–69a. Reviewing the provisions of the 2004 regulations and judicial decisions addressing the administrative exemption, the Department’s 2010 Administrator’s Interpretation concluded that mortgage-loan officers “have a primary duty of making sales for their employers, and, therefore, do not qualify” for the administrative exemption. *Id.*, at 49a, 69a. The Department accordingly withdrew its 2006 opinion letter, which it now viewed as relying on “misleading assumption[s] and selective and narrow analysis” of the exemption example in §541.203(b). *Id.*, at 68a. Like the 1999, 2001, and 2006 opinion letters, the 2010 Administrator’s Interpretation was issued without notice or an opportunity for comment.

C

MBA filed a complaint in Federal District Court challenging the Administrator’s Interpretation. MBA contended that the document was inconsistent with the

2004 regulation it purported to interpret, and thus arbitrary and capricious in violation of §10 of the APA, 5 U. S. C. §706. More pertinent to this case, MBA also argued that the Administrator’s Interpretation was procedurally invalid in light of the D. C. Circuit’s decision in *Paralyzed Veterans*, 117 F. 3d 579. Under the *Paralyzed Veterans* doctrine, if “an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish” under the APA “without notice and comment.” *Alaska Professional Hunters Assn., Inc. v. FAA*, 177 F. 3d 1030, 1034 (CADC 1999). Three former mortgage-loan officers—Beverly Buck, Ryan Henry, and Jerome Nickols—subsequently intervened in the case to defend the Administrator’s Interpretation.⁵⁶

The District Court granted summary judgment to the Department. *Mortgage Bankers Assn. v. Solis*, 864 F. Supp. 2d 193 (DC 2012). Though it accepted the parties’ characterization of the Administrator’s Interpretation as an interpretive rule, *id.*, at 203, n. 7, the District Court determined that the *Paralyzed Veterans* doctrine was inapplicable because MBA had failed to establish its reliance on the contrary interpretation expressed in the Department’s 2006 opinion letter. The Administrator’s Interpretation, the District Court further determined, was fully supported by the text of the 2004 FLSA regulations. The court accordingly held that the 2010 interpretation was not arbitrary or capricious.⁵⁷

The D. C. Circuit reversed. *Mortgage Bankers Assn. v. Harris*, 720 F. 3d 966 (2013). Bound to the rule of *Paralyzed Veterans* by precedent, the Court of Appeals rejected the Government’s call to abandon the doctrine. 720 F. 3d., at 967, n. 1. In the court’s view, “[t]he only question” properly before it was whether the District Court had erred in requiring MBA to prove that it relied on the Department’s prior interpretation. *Id.*, at 967. Explaining that reliance was not a required element of the *Paralyzed Veterans* doctrine, and noting the Department’s concession that a prior, conflicting interpretation of the 2004 regulations existed, the D. C. Circuit concluded that the 2010 Administrator’s Interpretation had to be vacated. We granted certiorari, 573 U. S. __ (2014), and now reverse.

II

The *Paralyzed Veterans* doctrine is contrary to the clear

text of the APA’s rulemaking provisions, and it improperly imposes on agencies an obligation beyond the “maximum procedural requirements” specified in the APA, *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U. S. 519, 524 (1978).

⁵⁶ Buck, Henry, and Nickols are petitioners in No. 13–1052 and respondents in No. 13–1041.

⁵⁷ MBA did not challenge this aspect of the District Court’s decision on appeal.

A

The text of the APA answers the question presented. Section 4 of the APA provides that “notice of proposed rule making shall be published in the Federal Register.” 5 U. S. C. §553(b). When such notice is required by the APA, “the agency shall give interested persons an opportunity to participate in the rule making.” §553(c). But §4 further states that unless “notice or hearing is required by statute,” the Act’s notice-and-comment requirement “does not apply . . . to interpretative rules.” §553(b)(A). This exemption of interpretive rules from the notice-and-comment process is categorical, and it is fatal to the rule announced in *Paralyzed Veterans*.

Rather than examining the exemption for interpretive rules contained in §4(b)(A) of the APA, the D. C. Circuit in *Paralyzed Veterans* focused its attention on §1 of the Act. That section defines “rule making” to include not only the initial issuance of new rules, but also “repeal[s]” or “amend[ments]” of existing rules. See §551(5). Because notice-and-comment requirements may apply even to these later agency actions, the court reasoned, “allow[ing] an agency to make a fundamental change in its interpretation of a substantive regulation without notice and comment” would undermine the APA’s procedural framework. 117 F. 3d, at 586.

This reading of the APA conflates the differing purposes of §§1 and 4 of the Act. Section 1 defines what a rulemaking is. It does not, however, say what procedures an agency must use when it engages in rulemaking. That is the purpose of §4. And §4 specifically exempts interpretive rules from the notice-and-comment requirements that apply to legislative rules. So, the D. C. Circuit correctly read §1 of the APA to mandate that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance. See *FCC v. Fox Television Stations, Inc.*, 556 U. S. 502, 515 (2009) (the APA “make[s] no distinction . . . between initial agency action and subsequent agency action undoing or revising that action”). Where the court went wrong was in failing to apply that accurate understanding of §1 to the exemption for interpretive rules contained in §4: Because an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretive rule.

B

The straightforward reading of the APA we now adopt harmonizes with longstanding principles of our administrative law jurisprudence. Time and again, we have reiterated that the APA “sets forth the full extent of judicial authority to review executive agency action for procedural correctness.” *Fox Television Stations, Inc.*, 556 U. S., at 513. Beyond the APA’s minimum requirements, courts lack authority “to impose upon [an] agency its own

notion of which procedures are ‘best’ or most likely to further some vague, undefined public good.” *Vermont Yankee*, 435 U. S., at 549. To do otherwise would violate “the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure.” *Id.*, at 544. These foundational principles apply with equal force to the APA’s procedures for rulemaking. We explained in *Vermont Yankee* that §4 of the Act “established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures.” *Id.*, at 524. “Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them.” *Ibid.*

The *Paralyzed Veterans* doctrine creates just such a judge-made procedural right: the right to notice and an opportunity to comment when an agency changes its interpretation of one of the regulations it enforces. That requirement may be wise policy. Or it may not. Regard less, imposing such an obligation is the responsibility of Congress or the administrative agencies, not the courts. We trust that Congress weighed the costs and benefits of placing more rigorous procedural restrictions on the issuance of interpretive rules. See *id.*, at 523 (when Congress enacted the APA, it “settled long-continued and hardfought contentions, and enact[ed] a formula upon which opposing social and political forces have come to rest” (internal quotation marks omitted)). In the end, Congress decided to adopt standards that permit agencies to promulgate freely such rules—whether or not they are consistent with earlier interpretations. That the D. C. Circuit would have struck the balance differently does not permit that court or this one to overturn Congress’ contrary judgment. Cf. *Law v. Siegel*, 571 U. S. ___, ___ (2014) (slip op., at 11).

III

MBA offers several reasons why the *Paralyzed Veterans* doctrine should be upheld. They are not persuasive.

A

MBA begins its defense of the *Paralyzed Veterans* doctrine by attempting to bolster the D. C. Circuit’s reading of the APA. “*Paralyzed Veterans*,” MBA contends, “simply acknowledges the reality that where an agency significantly alters a prior, definitive interpretation of a regulation, it has effectively amended the regulation itself,” something that under the APA requires use of notice-and-comment procedures. Brief for Respondent 20–21.

The act of “amending,” however, in both ordinary parlance and legal usage, has its own meaning separate and apart from the act of “interpreting.” Compare Black’s Law Dictionary 98 (10th ed. 2014) (defining “amend” as “[t]o

change the wording of ” or “formally alter . . . by striking out, inserting, or substituting words”), with *id.*, at 943 (defining “interpret” as “[t]o ascertain the meaning and significance of thoughts expressed in words”). One would not normally say that a court “amends” a statute when it interprets its text. So too can an agency “interpret” a regulation without “effectively amend[ing]” the underlying source of law. MBA does not explain *how*, precisely, an interpretive rule changes the regulation it interprets, and its assertion is impossible to reconcile with the longstanding recognition that interpretive rules do not have the force and effect of law. See *Chrysler Corp.*, 441 U. S., at 302, n. 31 (citing Attorney General’s Manual on the Administrative Procedure Act 30, n. 3 (1947)); *Skidmore v. Swift & Co.*, 323 U. S. 134, 140 (1944).

MBA’s “interpretation-as-amendment” theory is particularly odd in light of the limitations of the *Paralyzed Veterans* doctrine. Recall that the rule of *Paralyzed Veterans* applies only when an agency has previously adopted an interpretation of its regulation. Yet in that initial interpretation as much as all that come after, the agency is giving a definite meaning to an ambiguous text—the very act MBA insists requires notice and comment. MBA is unable to say why its arguments regarding revised interpretations should not also extend to the agency’s first interpretation.⁵⁸

Next, MBA argues that the *Paralyzed Veterans* doctrine is more consistent with this Court’s “functional” approach to interpreting the APA. Relying on *Christensen v. Harris County*, 529 U. S. 576 (2000), and *Shalala v. Guernsey Memorial Hospital*, 514 U. S. 87, MBA contends that we have already recognized that an agency may not “avoid notice-and-comment procedures by cloaking its actions in the mantle of mere ‘interpretation.’” Brief for Respondent 23–24.

Neither of the cases MBA cites supports its argument. Our decision in *Christensen* did not address a change in agency interpretation. Instead, we there refused to give deference to an agency’s interpretation of an unambiguous regulation, observing that to defer in such a case would allow the agency “to create *de facto* a new regulation.” 529 U. S., at 588. Put differently, *Christensen* held that the agency interpretation at issue was substantively invalid because it conflicted with the text of the regulation the agency purported to interpret. That holding is irrelevant to this suit and to the *Paralyzed Veterans* rule, which assesses whether an agency interpretation is *procedurally* invalid.

⁵⁸ MBA alternatively suggests that interpretive rules have the force of law because an agency’s interpretation of its own regulations may be

entitled to deference under *Auer v. Robbins*, 519 U. S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U. S. 410 (1945). Even in cases where an agency’s interpretation receives *Auer* deference, however, it is the court that ultimately decides whether a given regulation means what the agency says. Moreover, *Auer* deference is not an inexorable command in all cases. See *Christopher v. SmithKline Beecham Corp.*, 567 U. S. ___, ___ (2012) (slip op., at 10) (*Auer* deference is inappropriate “when the agency’s interpretation is plainly erroneous or inconsistent with the regulation” or “when there is reason to suspect that the agency’s interpretation does not reflect the agency’s fair and considered judgment” (internal quotation marks omitted)); *Thomas Jefferson Univ. v. Shalala*, 512 U. S. 504, 515 (1994) (“[A]n agency’s interpretation of a . . . regulation that conflicts with a prior interpretation is entitled to considerably less deference than a consistently held agency view” (internal quotation marks omitted)).

As for *Guernsey*, that case is fully consistent with—indeed, confirms—what the text of the APA makes plain: “Interpretive rules do not require notice and comment.”

514 U. S., at 99. Sidestepping this inconvenient language, MBA instead quotes a portion of the Court’s opinion stating that “APA rulemaking would still be required if [an agency] adopted a new position inconsistent with . . . existing regulations.” *Id.*, at 100. But the statement on which MBA relies is dictum. Worse, it is dictum taken out of context. The “regulations” to which the Court referred were two provisions of the Medicare reimbursement scheme. And it is apparent from the Court’s description of these regulations in Part II of the opinion that they were legislative rules, issued through the notice-and-comment process. See *id.*, at 91–92 (noting that the disputed regulations were codified in the Code of Federal Regulations). Read properly, then, the cited passage from *Guernsey* merely means that “an agency may only change its interpretation if the revised interpretation is consistent with the underlying regulations.” Brief for Petitioners in No. 13–1052, p. 44.

B

In the main, MBA attempts to justify the *Paralyzed Veterans* doctrine on practical and policy grounds. MBA contends that the doctrine reinforces the APA’s goal of “procedural fairness” by preventing agencies from unilaterally and unexpectedly altering their interpretation of important regulations. Brief for Respondent 16. There may be times when an agency’s decision to issue an interpretive rule, rather than a legislative rule, is driven primarily by a desire to skirt notice-and-comment provisions. But regulated entities are not without recourse in such situations. Quite the opposite. The APA contains a variety of constraints on agency decisionmaking—the arbitrary and capricious standard being among the most notable. As we held in *Fox Television Stations*, and underscore again today, the APA requires an agency to provide more substantial justification when “its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has

engendered serious reliance interests that must be taken into account. It would be arbitrary and capricious to ignore such matters.” 556 U. S., at 515 (citation omitted); see also *id.*, at 535 (KENNEDY, J., concurring in part and concurring in judgment).

In addition, Congress is aware that agencies sometimes alter their views in ways that upset settled reliance interests. For that reason, Congress sometimes includes in the statutes it drafts safe-harbor provisions that shelter regulated entities from liability when they act in conformance with previous agency interpretations. The FLSA includes one such provision: As amended by the Portal-to-Portal Act of 1947, 29 U. S. C. §251 *et seq.*, the FLSA provides that “no employer shall be subject to any liability” for failing “to pay minimum wages or overtime compensation” if it demonstrates that the “act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation” of the Administrator of the Department’s Wage and Hour Division, even when the guidance is later “modified or rescinded.” §§259(a), (b)(1). These safe harbors will often protect parties from liability when an agency adopts an interpretation that conflicts with its previous position.⁵⁹

C

MBA changes direction in the second half of its brief, contending that if the Court overturns the *Paralyzed Veterans* rule, the D. C. Circuit’s judgment should nonetheless be affirmed. That is so, MBA says, because the agency interpretation at issue—the 2010 Administrator’s Interpretation—should in fact be classified as a legislative rule.

We will not address this argument. From the beginning, the parties litigated this suit on the understanding that the Administrator’s Interpretation was—as its name suggests—an interpretive rule. Indeed, if MBA did not think the Administrator’s Interpretation was an interpretive rule, then its decision to invoke the *Paralyzed Veterans* doctrine in attacking the rule is passing strange. After all, *Paralyzed Veterans* applied only to interpretive rules. Consequently, neither the District Court nor the D. C. Circuit considered MBA’s current claim that the Administrator’s Interpretation is actually a legislative rule. Beyond that, and more important still, MBA’s brief in opposition to certiorari did not dispute petitioners’ assertions—in their framing of the question presented and in the substance of their petitions—that the Administrator’s Interpretation is an interpretive rule. Thus, even assuming MBA did not waive the argument

⁵⁹ The United States acknowledged at argument that even in situations where a statute does not contain a safe-harbor provision similar to the one included in the FLSA, an agency’s ability to pursue enforcement actions against regulated entities for conduct in conformance with prior agency interpretations may be limited by principles of retroactivity. See Tr. of Oral Arg. 44–45. We have no occasion to consider how such principles might apply here.

below, it has done so in this Court. See this Court's Rule 15.2; *Carcieri v. Salazar*, 555 U. S. 379, 395–396 (2009).

* * *

For the foregoing reasons, the judgment of the United States Court of Appeals for the District of Columbia Circuit is reversed.

It is so ordered.

[...]

E Administrative Discretion (Lecture 3)

I. General Questions

1. What is the role of courts in the administrative system? (What is “applying” the law?)
2. What is the idea of administrative discretion?
3. What is the role of the legislator in framing judicial review and administrative discretion?

II. Associated Provincial Picture Houses Ltd vs. Wednesbury Corporation

Summary of the facts

The Sunday Entertainments Act 1932 allows local licensing authorities to open cinemas on Sundays. Associated Provincial Picture Houses was granted a licence by the Wednesbury Corporation to operate a cinema on the condition that no children under 15, whether accompanied by an adult or not, were admitted on Sundays. Associated Provincial Picture Houses argued that Wednesbury's condition was unacceptable and outside the power of the corporation to impose.

IN THE SUPREME COURT OF JUDICATURE KING'S BENCH

Royal Courts of Justice

10 November 1947

Before:

**MASTER OF THE ROLLS
(Lord Greene)**

**LORD JUSTICE SOMERVELL and
JUSTICE SINGLETON**

***ASSOCIATED PROVINCIAL PICTURE
HOUSES LTD***

**Plaintiffs
(Appellant)**

WEDNESBURY CORPORATION

**Defendants
(Respondents)**

**MR GALLOP K.C. and MR S. LAMB (instructed by Messrs. Norman, Hart & Mitchell) appeared on behalf of the Plaintiffs (Appellants).
MR FITZGERALD K.C. and MR V. GATTIE (instructed by Messrs. Pritchard & Co.) appeared on behalf of the Defendants (Respondents).**

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MASTER OF THE ROLLS: In the action out of which this appeal arises, the plaintiffs, who are the proprietors of a cinema theatre in Wednesbury, sought to obtain from the court a declaration that a certain condition imposed by the defendants, the corporation of Wednesbury, on the grant of a licence for Sunday performances in that cinema was ultra vires. The action was dismissed by Mr Justice Henn Collins and, in my opinion, his decision was clearly right. The powers and duties of the Local Authority are to be found in the Sunday Entertainments Act, 1932. That Act legalized the opening of cinemas on Sundays, subject to certain specified conditions and subject to such conditions as the licensing authority think fit to impose. The licensing authority are the licensing authority set up under the Cinematograph Act, 1909, and in this case are the council of the borough of Wednesbury. Before the Act of 1932, the opening of cinematograph theatres on Sundays was, in fact, illegal. Local authorities had purported in some cases to allow Sunday opening under the licences which they granted, but that permission was strictly irregular. The position under the Act now with regard to licensing is stated conveniently by Mr Justice Atkinson in *Harman v. Butt* [1944] Kings Bench at page 493. He there says:

"It is apparent that there are at least three totally different occasions on which licensing justices may be called on to exercise their discretion to issue a licence and to determine on what conditions the licence shall be issued. The application may be under the Cinematograph Act, 1909, relating to six days of the week, excluding Sundays. It may be one relating solely to Sundays under the Sunday Entertainments Act, 1932, where in the case of a borough the majority of the local government electors have expressed a desire for Sunday performances. Thirdly, it may be one where the local government electors have expressed no such wish, but where the application is made for the benefit of those members of the forces who are stationed in the neighbourhood for the time being."

Under a regulation, the commanding officer of forces stationed in the neighbourhood had power to make a representation to the licensing authority and the case of *Harman v. Butt* [1944] Kings Bench 491, was, in fact, a case where that had taken place.

The actual words in question here are to be found in s.1, sub-s.1, of the Sunday Entertainments Act of 1932:

SUNDAY ENTERTAINMENTS ACT 1932 CHAPTER 51.

An Act to permit and regulate the opening and use of places on Sundays for certain entertainments and for debates, and for purposes connected with the matters aforesaid. [13th July 1932.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

**1.—(1) The authority having power, in any area to which this section extends, to grant licences under the Cinematograph Act, 1909, may, notwithstanding anything in any enactment relating to Sunday observance, allow places in that area licensed under the said Act to be opened and used on Sundays for the purpose of cinematograph entertainments, subject to such conditions as the authority think fit to impose :
Provided that no place shall be allowed to be so opened and used unless among the conditions subject to which it is allowed to be so opened and used there are included conditions for securing—**

- (a) that no person will be employed by any employer on any Sunday in connection with a cinematograph entertainment or any other entertainment or exhibition given therewith who has been employed on each of the six previous days either by that employer in any occupation or by any other employer in connection with similar entertainments or exhibitions; and**
- (b) that such sums as may be specified by the authority not exceeding the amount estimated by the authority as the amount of the profits which will be received from cinematograph entertainments given while the place is open on Sundays, and from any other entertainment or exhibition given therewith, and calculated by reference to such estimated profits or to such proportion of them as the authority think fit, will be paid as to the prescribed percentage thereof, if any, to the authority for the purpose of being transmitted to the Cinematograph Fund constituted in accordance with the provisions of this Act, and as to the remainder thereof to such persons as may be specified by the authority for the purpose of being applied to charitable objects; and for the purpose of any conditions imposed by an authority as to the payment of sums calculated by reference to such estimated profits as aforesaid, the profits shall be computed in such manner as the authority may direct.**

The power to impose conditions is expressed in quite general terms. The sub-section goes on to refer to certain conditions which must be imposed, but with those we are not concerned. In the present case, the defendants imposed the following condition in their licence:

"No children under the age of fifteen years shall be admitted to any entertainment, whether accompanied by an adult or not."

Mr. Gallop, for the plaintiffs, argued that it was not competent for the Wednesbury Corporation to impose any such condition and he said that if they were entitled to impose a condition prohibiting the admission of children, they should at least have limited it to cases where the children were not accompanied by their parents or a guardian or some adult. His argument was

that the imposition of that condition was unreasonable and that in consequence it was ultra vires the corporation. The plaintiffs' contention is based, in my opinion, on a misconception as to the effect of this Act in granting this discretionary power to local authorities. The courts must always, I think, remember this: first, we are dealing with not a judicial act, but an executive act; secondly, the conditions which, under the exercise of that executive act, may be imposed are in terms, so far as language goes, put within the discretion of the local authority without limitation. Thirdly, the statute provides no appeal from the decision of the local authority.

What, then, is the power of the courts? They can only interfere with an act of executive authority if it be shown that the authority has contravened the law. It is for those who assert that the local authority has contravened the law to establish that proposition. On the face of it, a condition of the kind imposed in this case is perfectly lawful. It is not to be assumed prima facie that responsible bodies like the local authority in this case will exceed their powers; but the court, whenever it is alleged that the local authority have contravened the law, must not substitute itself for that authority. It is only concerned with seeing whether or not the proposition is made good. When an executive discretion is entrusted by Parliament to a body such as the local authority in this case, what appears to be an exercise of that discretion can only be challenged in the courts in a strictly limited class of case. As I have said, it must always be remembered that the court is not a court of appeal. When discretion of this kind is granted the law recognizes certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion, in my opinion, is an absolute one and cannot be questioned in any court of law. What then are those principles? They are well understood. They are principles which the court looks to in considering any question of discretion of this kind. The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters. There have been in the cases expressions used relating to the sort of things that authorities must not do, not merely in cases under the Cinematograph Act but, generally speaking, under other cases where the powers of local authorities came to be considered. I am not sure myself whether the permissible grounds of attack cannot be defined under a single head. It has been perhaps a little bit confusing to find a series of grounds set out. Bad faith, dishonesty - those of course, stand by themselves - unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have all been referred to, according to the facts of individual cases, as being

matters which are relevant to the question. If they cannot all be confined under one head, they at any rate, I think, overlap to a very great extent. For instance, we have heard in this case a great deal about the meaning of the word "unreasonable."

It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Lord Justice Warrington in *Short v. Poole Corporation* [1926] Chancery 66 at pages 90 and 91, gave the example of the redhaired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.

In the present case, it is said by Mr. Gallop that the authority acted unreasonably in imposing this condition. It appears to me quite clear that the matter dealt with by this condition was a matter which a reasonable authority would be justified in considering when they were making up their mind what condition should be attached to the grant of this licence. Nobody, at this time of day, could say that the well-being and the physical and moral health of children is not a matter which a local authority, in exercising their powers, can properly have in mind when those questions are germane to what they have to consider. Here Mr. Gallop did not, I think, suggest that the council were directing their mind to a purely extraneous and irrelevant matter, but he based his argument on the word "unreasonable," which he treated as an independent ground for attacking the decision of the authority; but once it is conceded, as it must be conceded in this case, that the particular subject-matter dealt with by this condition was one which it was competent for the authority to consider, there, in my opinion, is an end of the case. Once that is granted, Mr. Gallop is bound to say that the decision of the authority is wrong because it is unreasonable, and in saying that he is really saying that the ultimate arbiter of what is and is not reasonable is the court and not the local authority. It is just there, it seems to me, that the argument breaks down. It is clear that the local authority are entrusted by Parliament with the decision on a matter which the knowledge and experience of that authority can best be trusted to deal with. The subject-matter with which the condition deals is one relevant for its

consideration. They have considered it and come to a decision upon it. It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, I think, is quite right; but to prove a case of that kind would require something overwhelming, and, in this case, the facts do not come anywhere near anything of that kind. I think Mr. Gallop in the end agreed that his proposition that the decision of the local authority can be upset if it is proved to be unreasonable, really meant that it must be proved to be unreasonable in the sense that the court considers it to be a decision that no reasonable body could have come to. It is not what the court considers unreasonable, a different thing altogether. If it is what the court considers unreasonable, the court may very well have different views to that of a local authority on matters of high public policy of this kind. Some courts might think that no children ought to be admitted on Sundays at all, some courts might think the reverse, and all over the country I have no doubt on a thing of that sort honest and sincere people hold different views. The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another. It is the local authority that are set in that position and, provided they act, as they have acted, within the four corners of their jurisdiction, this court, in my opinion, cannot interfere.

This case, in my opinion, does not really require reference to authority when once the simple and well known principles are understood on which alone a court can interfere with something *prima facie* within the powers of the executive authority, but reference has been made to a number of cases. I can deal, I think, quite shortly with them. First, Mr Justice Henn Collins followed a decision of Mr Justice Atkinson in the case I have mentioned of *Harman v. Butt* [1944] Kings Bench 491. In that case a condition of this character had been imposed and I think the only difference between the two cases is that in *Harman v. Butt* [1944] Kings Bench 491. the licence to open on Sundays originated in a representation by the commanding officer of forces stationed in the neighbourhood. Mr Justice Atkinson dealt with the matter thus [1944] Kings Bench 491 at page 499:

"I am satisfied that the defendants were entitled to consider matters relating to the welfare, including the spiritual well-being, of the community and of any section of it, and I hold that this condition that no child under the age of sixteen should be admitted to this cinematograph theatre on Sunday is not *ultra vires* on the ground that it is not confined to the user of the premises by the licensee, but relates to the interest of a section of the community."

Then he goes on to deal with the question of reasonableness. That was a case in which the decision, in my opinion, is unassailable. There are two other cases relied upon. One is *R. v Burnley Justices* 85 Law Journal Reports, King's Bench 1565, and another not dissimilar case on one point, *Ellis v. Dubowski* [1921] 3 Kings Bench 621. Those were cases where the illegal

element which the authority had imported into the conditions imposed consisted of a delegation of their powers to some outside body. It was not that the delegation was a thing which no reasonable person could have thought was a sensible thing to do. It was outside their powers altogether to pass on this discretion which the legislature had confided to them to some outside body. Another case on which Mr. Gallop relied is *Roberts v. Hopwood* [1925] AC 578. That was a totally different class of case. The district auditor had surcharged the members of a council who had made payments of a minimum wage of 4l. a week to their lowest grade of workers. That particular sum had been fixed by the local authority not by reference to any of the factors which go to determine a scale of wages, but by reference to some other principle altogether, and the substance of the decision was that they had not fixed 4l. a week as wages at all and that they had acted unreasonably. When the case is examined, the word "unreasonable" is found to be used rather in the sense that I mentioned a short while ago, namely, that in fixing 4l. they had fixed it by reference to a matter which they ought not to have taken into account and to the exclusion of those elements which they ought to have taken into consideration in fixing a sum which could fairly be called a wage. That is no authority whatsoever to support the proposition that the court has power, a sort of overriding power, to decide what is reasonable and what is unreasonable. The court has nothing of the kind.

I do not think I need take up time by referring to other authorities, but I might say this in conclusion. An early case under the Cinematograph Act, 1909, much discussed before us, was *Theatre de Luxe (Halifax) Ltd v. Gledhill* [1915] 2 Kings Bench 49. That was a decision of a Divisional Court as to the legality of a condition imposed under the Act to the following effect: "Children under fourteen years of age shall not be allowed to enter into or be in the licensed premises after the hour of 9 p.m. unaccompanied by a parent or guardian. No child under the age of ten years shall be allowed in the licensed premises under any circumstances after 9 p.m." That case was heard by a Divisional Court of the King's Bench Division, consisting of Lush, Rowlatt and Mr Justice Atkin. The majority, consisting of Justice Lush and Mr Justice Rowlatt held that the condition was ultra vires as there was no connexion, as the headnote says, "between the ground upon which the condition was imposed, namely, regard for the health and welfare of young children generally, and the subject-matter of the licence, namely, the use of the premises for the giving of cinematograph exhibitions." That case is one which, I think, I am right in saying has never been referred to with approval, but often referred to with disapproval, though it has never been expressly overruled. I myself take the view that the decision of the majority in that case puts much too narrow a construction upon the licensing power given by that Act, which, of course, is not the same Act as we have to consider here. Mr Justice Atkin on the other hand, delivered a dissenting judgment in which he expressed the opinion that the

power to impose conditions was nothing like so restricted as the majority had thought. Quoting again from the headnote, his opinion was "that the conditions must be (1.) reasonable; (2.) in respect of the use of the licensed premises; (3.) in the public interest. Subject to that restriction there is no fetter upon the power of the licensing authority." If I may venture to express my own opinion about that, I think that Mr Justice Atkin was right in considering that the restrictions on the power of imposing conditions were nothing like so broad as the majority thought, but I am not sure that his language may not perhaps be read in rather a different sense from that which I think he must have intended. I do not find in the language that he used any justification for thinking that it is for the court to decide on the question of reasonable-ness rather than the local authority. I do not read him as in any way dissenting from the view which I have ventured to express, that the task of the court is not to decide what it thinks is reasonable, but to decide whether what is prima facie within the power of the local authority is a condition which no reasonable authority, acting within the four corners of their jurisdiction, could have decided to impose. Similarly, when he refers to the public interest, I do not read him as saying more than that the public interest is a proper and legitimate thing which the council or the licensing authority can and ought to have in mind. He certainly does not suggest anywhere that the court is entitled to set up its view of the public interest against the view of the local authority. Once the local authority have properly taken into consideration a matter of public interest such as, in the present case, the moral and physical health of children, there is, it seems to me, nothing in what Mr Justice Atkin says to suggest that the court could interfere with a decision because it took a different view as to what was in the public interest. It is obviously a subject on which different minds may have different views. I do not read him as saying any more than that the local authority can and should take that matter into account in coming to their decision.

In the result, this appeal must be dismissed. I do not wish to repeat myself but I will summarize once again the principle applicable. The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local

authority have contravened the law by acting in excess of the powers which Parliament has confided in them. The appeal must be dismissed with costs.

LORD JUSTICE SOMERVELL: I agree that the appeal must be dismissed for the reasons which have been given by the Master of the Rolls, and I do not desire to add anything.

JUSTICE SINGLETON: I agree.

Order: Appeal dismissed with costs.

III. U.S.: From Chevron to Loper Bright



The following two U.S. cases below indicate a shift in how far the U.S. Supreme Court permits administrative discretion. How does the two-step approach in Chevron differ from the rule established in Loper Bright and what are the implications of the overruling of the former for the scope of administrative discretion and the separation of powers?

A) *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)

Summary of the facts

The Clean Air Act addresses states that had failed to attain the air quality standards established by the Environmental Protection Agency (EPA). The Act required the establishment of rules regarding “the source of air pollution”. Firstly, the EPA defined a source as any device in a manufacturing plant that produced pollution. In 1981, the EPA adopted a new definition that didn’t consider the environmental impact of each device of the plant as long as the total emissions from the plant itself did not increase. The Natural Resources Defense Council, an environmental protection group, challenged the EPA regulation.

CHEVRON U.S.A. INC.
v.
**NATURAL RESOURCES
DEFENSE COUNCIL,
INC.**

**SUPREME COURT OF
THE UNITED STATES**

467 U.S. 837

**February 29, 1984, Argued
June 25, 1984, Decided ***

* Together with No. 82-1247,
American Iron & Steel Institute et
al. v. Natural Resources Defense
Council, Inc., et al.; and No.
82-1591, Ruckelshaus, Adminis-
trator, Environmental Protection
Agency v. Natural Resources De-
fense Council, Inc., et al., also on
certiorari to the same court.

SUBSEQUENT HISTORY: As Amended.

PRIOR HISTORY: CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA
CIRCUIT

DISPOSITION: 222 U. S. App. D. C. 268,
685 F.2d 718, reversed.

JUDGES: STEVENS, J., delivered the opi-
nion of the Court, in which all other Members
joined, except MARSHALL and REHN-
QUIST, JJ., who took no part in the consid-
eration or decision of the cases, and O'CON-
NOR, J., who took no part in the decision of
the cases.

OPINION BY: STEVENS

OPINION

[*839] JUSTICE STEVENS delivered the
opinion of the Court.

In the Clean Air Act Amendments of 1977,
Pub. L. 95-95, 91 Stat. 685, Congress enacted
certain requirements applicable **[*840]** to
States that had not achieved the national air
quality standards established by the Environ-
mental Protection Agency (EPA) pursuant to
earlier legislation. The amended Clean Air Act
required these "nonattainment" States to es-
tablish a permit program regulating "new or
modified major stationary sources" of air pol-
lution. Generally, a permit may not be issued
for a new or modified major stationary source
unless several stringent conditions are met. ¹
The EPA regulation promulgated to imple-
ment this permit requirement allows a State to
adopt a plantwide definition of the term "sta-
tionary source." ² Under this definition, an
existing plant that contains several pollu-
tion-emitting devices may install or modify
one piece of equipment without meeting the
permit conditions if the alteration will not in-
crease the total emissions from the plant. The
question presented by these cases is whether
EPA's decision to allow States to treat all of the
pollution-emitting devices within the same
industrial grouping as though they were en-
cased within a single "bubble" is based on a
reasonable construction of the statutory term
"stationary source."

¹ Section 172(b)(6), 42 U. S. C. § 7502(b)(6),
provides:

"The plan provisions required by subsection (a)
shall —

.....

"(6) require permits for the construction and
operation of new or modified major stationary
sources in accordance with section 173 (relating
to permit requirements)." 91 Stat. 747.

² "(i) 'Stationary source' means any building,
structure, facility, or installation which emits or
may emit any air pollutant subject to regulation
under the Act.

"(ii) 'Building, structure, facility, or installation' means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel." 40 CFR §§ 51.18(j)(1)(i) and (ii) (1983).

I

The EPA regulations containing the plantwide definition of the term stationary source were promulgated on October [*841] 14, 1981. 46 Fed. Reg. 50766. Respondents³ filed a timely petition for review in the United States Court of Appeals for the District of Columbia Circuit pursuant to 42 U. S. C. § 7607(b)(1).⁴ The Court of Appeals set aside the regulations. *National Resources Defense Council, Inc. v. Gorsuch*, 222 U. S. App. D. C. 268, 685 F.2d 718 (1982).

3 National Resources Defense Council, Inc., Citizens for a Better Environment, Inc., and North Western Ohio Lung Association, Inc.

4 Petitioners, Chevron U. S. A. Inc., American Iron and Steel Institute, American Petroleum Institute, Chemical Manufacturers Association, Inc., General Motors Corp., and Rubber Manufacturers Association were granted leave to intervene and argue in support of the regulation.

The court observed that the relevant part of the amended Clean Air Act "does not explicitly define what Congress envisioned as a 'stationary source, to which the permit program . . . should apply,'" and further stated that the precise issue was not "squarely addressed in the legislative history." *Id.*, at 273, 685 F.2d, at 723. In light of its conclusion that the legislative history bearing on the question was "at best contradictory," it reasoned that "the purposes of the non-attainment program should guide our decision here." *Id.*, at 276, n. 39, 685 F.2d, at 726, n. 39.⁵ Based on two of its precedents concerning the applicability of the bubble concept to certain Clean Air Act pro-

grams,⁶ the court stated that the bubble concept was "mandatory" in programs designed merely to maintain existing air quality, but held that it was "inappropriate" in programs enacted to improve air quality. *Id.*, at 276, 685 F.2d, at 726. Since the purpose of the permit [*842] program -- its "*raison d'etre*," in the court's view -- was to improve air quality, the court held that the bubble concept was inapplicable in these cases under its prior precedents. *Ibid.* It therefore set aside the regulations embodying the bubble concept as contrary to law. We granted certiorari to review that judgment, 461 U.S. 956 (1983), and we now reverse.

5 The court remarked in this regard:

"We regret, of course, that Congress did not advert specifically to the bubble concept's application to various Clean Air Act programs, and note that a further clarifying statutory directive would facilitate the work of the agency and of the court in their endeavors to serve the legislators' will." 222 U. S. App. D. C., at 276, n. 39, 685 F.2d, at 726, n. 39.

6 *Alabama Power Co. v. Costle*, 204 U. S. App. D. C. 51, 636 F.2d 323 (1979); *ASARCO Inc. v. EPA*, 188 U. S. App. D. C. 77, 578 F.2d 319 (1978).

The basic legal error of the Court of Appeals was to adopt a static judicial definition of the term "stationary source" when it had decided that Congress itself had not commanded that definition. Respondents do not defend the legal reasoning of the Court of Appeals.⁷ Nevertheless, since this Court reviews judgments, not opinions,⁸ we must determine whether the Court of Appeals' legal error resulted in an erroneous judgment on the validity of the regulations.

7 Respondents argued below that EPA's plantwide definition of "stationary source" is contrary to the terms, legislative history, and purposes of the amended Clean Air Act. The court below rejected respondents' arguments based on the language and legislative history of the Act. It did

agree with respondents contention that the regulations were inconsistent with the purposes of the Act, but did not adopt the construction of the statute advanced by respondents here. Respondents rely on the arguments rejected by the Court of Appeals in support of the judgment, and may rely on any ground that finds support in the record. See *Ryerson v. United States*, 312 U.S. 405, 408 (1941); *LeTulle v. Scofield*, 308 U.S. 415, 421 (1940); *Langnes v. Green*, 282 U.S. 531, 533-539 (1931).

8 E. g., *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956); *J. E. Riley Investment Co. v. Commissioner*, 311 U.S. 55, 59 (1940); *Williams v. Norris*, 12 Wheat. 117, 120 (1827); *McClung v. Silliman*, 6 Wheat. 598, 603 (1821).

II

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, [*843] as well as the agency, must give effect to the unambiguously expressed intent of Congress.⁹ If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute,¹⁰ as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.¹¹

9 The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. See, e. g., *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981); *SEC v. Sloan*, 436 U.S. 103, 117-118 (1978); *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 745-746 (1973); *Volkswagenwerk v. FMC*, 390 U.S. 261, 272 (1968); *NLRB v. Brown*, 380 U.S. 278, 291 (1965); *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385

(1965); *Social Security Board v. Nierotko*, 327 U.S. 358, 369 (1946); *Burnet v. Chicago Portrait Co.*, 285 U.S. 1, 16 (1932); *Webster v. Luther*, 163 U.S. 331, 342 (1896). If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

10 See generally, R. Pound, *The Spirit of the Common Law* 174-175 (1921).

11 The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding. *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S., at 39; *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978); *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 75 (1975); *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Unemployment Compensation Comm'n v. Aragon*, 329 U.S. 143, 153 (1946); *McLaren v. Fleischer*, 256 U.S. 477, 480-481 (1921).

"The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation [*844] of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.¹² Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.¹³

12 See, e. g., *United States v. Morton*, ante, at 834; *Schweiker v. Gray Panthers*, 453 U.S. 34, 44 (1981); *Batterton v. Francis*, 432 U.S. 416, 424-426 (1977); *American Telephone & Tele-*

graph Co. v. United States, 299 U.S. 232, 235-237 (1936).

13 *E. g.*, *INS v. Jong Ha Wang*, 450 U.S. 139, 144 (1981); *Train v. Natural Resources Defense Council, Inc.*, 421 U.S., at 87.

We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer,¹⁴ and the principle of deference to administrative interpretations

"has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations. See, *e. g.*, *National Broadcasting Co. v. United States*, 319 U.S. 190; *Labor Board v. Hearst Publications, Inc.*, 322 U.S. 111; *Republic Aviation Corp. v. [*845] Labor Board*, 324 U.S. 793; *Securities & Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194; *Labor Board v. Seven-Up Bottling Co.*, 344 U.S. 344.

". . . If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *United States v. Shimer*, 367 U.S. 374, 382, 383 (1961).

Accord, *Capital Cities Cable, Inc. v. Crisp, ante*, at 699-700.

¹⁴ *Aluminum Co. of America v. Central Lincoln Peoples' Util. Dist.*, *ante*, at 389; *Blum v. Bacon*, 457 U.S. 132, 141 (1982); *Union Electric Co. v. EPA*, 427 U.S. 246, 256 (1976); *Investment Company Institute v. Camp*, 401 U.S. 617, 626-627 (1971); *Unemployment Compensation*

Comm'n v. Aragon, 329 U.S., at 153-154; *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 131 (1944); *McLaren v. Fleischer*, 256 U.S., at 480-481; *Webster v. Luther*, 163 U.S., at 342; *Brown v. United States*, 113 U.S. 568, 570-571 (1885); *United States v. Moore*, 95 U.S. 760, 763 (1878); *Edwards' Lessee v. Darby*, 12 Wheat. 206, 210 (1827).

In light of these well-settled principles it is clear that the Court of Appeals misconceived the nature of its role in reviewing the regulations at issue. Once it determined, after its own examination of the legislation, that Congress did not actually have an intent regarding the applicability of the bubble concept to the permit program, the question before it was not whether in its view the concept is "inappropriate" in the general context of a program designed to improve air quality, but whether the Administrator's view that it is appropriate in the context of this particular program is a reasonable one. Based on the examination of the legislation and its history which follows, we agree with the Court of Appeals that Congress did not have a specific intention on the applicability of the bubble concept in these cases, and conclude that the EPA's use of that concept here is a reasonable policy choice for the agency to make.

III

In the 1950's and the 1960's Congress enacted a series of statutes designed to encourage and to assist the States in curtailing air pollution. See generally *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 63-64 (1975). The Clean Air Amendments of 1970, Pub. L. 91-604, 84 Stat. 1676, "sharply increased federal authority and responsibility [*846] in the continuing effort to combat air pollution," 421 U.S., at 64, but continued to assign "primary responsibility for assuring air quality" to the several States, 84 Stat. 1678. Section 109 of the 1970 Amendments directed the EPA to promulgate National Ambient Air Quality Standards (NAAQS's)¹⁵ and § 110

directed the States to develop plans (SIP's) to implement the standards within specified deadlines. In addition, § 111 provided that major new sources of pollution would be required to conform to technology-based performance standards; the EPA was directed to publish a list of categories of sources of pollution and to establish new source performance standards (NSPS) for each. Section 111(e) prohibited the operation of any new source in violation of a performance standard.

15 Primary standards were defined as those whose attainment and maintenance were necessary to protect the public health, and secondary standards were intended to specify a level of air quality that would protect the public welfare.

Section 111(a) defined the terms that are to be used in setting and enforcing standards of performance for new stationary sources. It provided:

"For purposes of this section:

.....

"(3) The term 'stationary source' means any building, structure, facility, or installation which emits or may emit any air pollutant." 84 Stat. 1683.

In the 1970 Amendments that definition was not only applicable to the NSPS program required by § 111, but also was made applicable to a requirement of § 110 that each state implementation plan contain a procedure for reviewing the location of any proposed new source and preventing its construction if it would preclude the attainment or maintenance of national air quality standards.¹⁶

16 See §§ 110(a)(2)(D) and 110(a)(4).

In due course, the EPA promulgated NAAQS's, approved SIP's, and adopted detailed regulations governing NSPS's [*847] for various categories of equipment. In one of its

programs, the EPA used a plantwide definition of the term "stationary source." In 1974, it issued NSPS's for the nonferrous smelting industry that provided that the standards would not apply to the modification of major smelting units if their increased emissions were offset by reductions in other portions of the same plant.¹⁷

17 The Court of Appeals ultimately held that this plantwide approach was prohibited by the 1970 Act, see *ASARCO Inc.*, 188 U. S. App. D. C., at 83-84, 578 F.2d, at 325-327. This decision was rendered after enactment of the 1977 Amendments, and hence the standard was in effect when Congress enacted the 1977 Amendments.

Nonattainment

The 1970 legislation provided for the attainment of primary NAAQS's by 1975. In many areas of the country, particularly the most industrialized States, the statutory goals were not attained.¹⁸ In 1976, the 94th Congress was confronted with this fundamental problem, as well as many others respecting pollution control. As always in this area, the legislative struggle was basically between interests seeking strict schemes to reduce pollution rapidly to eliminate its social costs and interests advancing the economic concern that strict schemes would retard industrial development with attendant social costs. The 94th Congress, confronting these competing interests, was unable to agree on what response was in the public interest: legislative proposals to deal with nonattainment failed to command the necessary consensus.¹⁹

18 See Report of the National Commission on Air Quality, *To Breathe Clean Air*, 3.3-20 through 3.3-33 (1981).

19 Comprehensive bills did pass both Chambers of Congress; the Conference Report was rejected in the Senate. 122 Cong. Rec. 34375-34403, 34405-34418 (1976).

In light of this situation, the EPA published an Emissions Offset Interpretative Ruling in December 1976, see 41 Fed. Reg. 55524, to "fill the gap," as respondents put it, until Congress acted. The Ruling stated that it was intended to [*848] address "the issue of whether and to what extent national air quality standards established under the Clean Air Act may restrict or prohibit growth of major new or expanded stationary air pollution sources." *Id.*, at 55524-55525. In general, the Ruling provided that "a major new source may locate in an area with air quality worse than a national standard only if stringent conditions can be met." *Id.*, at 55525. The Ruling gave primary emphasis to the rapid attainment of the statute's environmental goals.²⁰ Consistent with that emphasis, the construction of every new source in nonattainment areas had to meet the "lowest achievable emission rate" under the current state of the art for that type of facility. See *Ibid.* The 1976 Ruling did not, however, explicitly adopt or reject the "bubble concept."²¹

²⁰ For example, it stated:

"Particularly with regard to the primary NAAQS's, Congress and the Courts have made clear that economic considerations must be subordinated to NAAQS achievement and maintenance. While the ruling allows for some growth in areas violating a NAAQS if the net effect is to insure further progress toward NAAQS achievement, the Act does not allow economic growth to be accommodated at the expense of the public health." 41 Fed. Reg. 55527 (1976).

²¹ In January 1979, the EPA noted that the 1976 Ruling was ambiguous concerning this issue:

"A number of commenters indicated the need for a more explicit definition of 'source.' Some readers found that it was unclear under the 1976 Ruling whether a plant with a number of different processes and emission points would be considered a single source. The changes set forth below define a source as 'any structure, building, facility, equipment, installation, or operation (or combination thereof) which is located on one or more contiguous or adjacent properties and which is owned or operated by the same person

(or by persons under common control).' This definition precludes a large plant from being separated into individual production lines for purposes of determining applicability of the offset requirements." 44 Fed. Reg. 3276.

IV

The Clean Air Act Amendments of 1977 are a lengthy, detailed, technical, complex, and comprehensive response to a major social issue. A small portion of the statute -- 91 Stat. [*849] 745-751 (Part D of Title I of the amended Act, 42 U. S. C. §§ 7501-7508) -- expressly deals with nonattainment areas. The focal point of this controversy is one phrase in that portion of the Amendments.²²

²² Specifically, the controversy in these cases involves the meaning of the term "major stationary sources" in § 172(b)(6) of the Act, 42 U. S. C. § 7502(b)(6). The meaning of the term "proposed source" in § 173(2) of the Act, 42 U. S. C. § 7503(2), is not at issue.

Basically, the statute required each State in a nonattainment area to prepare and obtain approval of a new SIP by July 1, 1979. In the interim those States were required to comply with the EPA's interpretative Ruling of December 21, 1976. 91 Stat. 745. The deadline for attainment of the primary NAAQS's was extended until December 31, 1982, and in some cases until December 31, 1987, but the SIP's were required to contain a number of provisions designed to achieve the goals as expeditiously as possible.²³

²³ Thus, among other requirements, § 172(b) provided that the SIP's shall --

"(3) require, in the interim, reasonable further progress (as defined in section 171(1)) including such reduction in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology;

"(4) include a comprehensive, accurate, current inventory of actual emissions from all sources (as provided by rule of the Administrator) of

each such pollutant for each such area which is revised and resubmitted as frequently as may be necessary to assure that the requirements of paragraph (3) are met and to assess the need for additional reductions to assure attainment of each standard by the date required under paragraph (1);

"(5) expressly identify and quantify the emissions, if any, of any such pollutant which will be allowed to result from the construction and operation of major new or modified stationary sources for each such area; . . .

.....

"(8) contain emission limitations, schedules of compliance and such other measures as may be necessary to meet the requirements of this section." 91 Stat. 747.

Section 171(1) provided:

"(1) The term 'reasonable further progress' means annual incremental reductions in emissions of the applicable air pollutant (including substantial reductions in the early years following approval or promulgation of plan provisions under this part and section 110(a)(2)(I) and regular reductions thereafter) which are sufficient in the judgment of the Administrator, to provide for attainment of the applicable national ambient air quality standard by the date required in section 172(a)." *Id.*, at 746.

[*850] Most significantly for our purposes, the statute provided that each plan shall

"(6) require permits for the construction and operation of new or modified major stationary sources in accordance with section 173. . . ." *Id.*, at 747.

Before issuing a permit, § 173 requires (1) the state agency to determine that there will be sufficient emissions reductions in the region to offset the emissions from the new source and also to allow for reasonable further progress toward attainment, or that the increased emissions will not exceed an allowance for growth established pursuant to § 172(b)(5); (2) the applicant to certify that his other sources in the State are in compliance with the SIP, (3) the agency to determine that the applicable SIP is

otherwise being implemented, and (4) the proposed source to comply with the lowest achievable emission rate (LAER).²⁴

24 Section 171(3) provides:

"(3) The term 'lowest achievable emission rate' means for any source, that rate of emissions which reflects --

"(A) the most stringent emission limitation which is contained in the implementation plan of any State for such class or category of source, unless the owner or operator of the proposed source demonstrates that such limitations are not achievable, or

"(B) the most stringent emission limitation which is achieved in practice by such class or category of source, whichever is more stringent.

"In no event shall the application of this term permit a proposed new or modified source to emit any pollutant in excess of the amount allowable under applicable new source standards of performance."

The LAER requirement is defined in terms that make it even more stringent than the applicable new source performance standard developed under § 111 of the Act, as amended by the 1970 statute.

[*851] The 1977 Amendments contain no specific reference to the "bubble concept." Nor do they contain a specific definition of the term "stationary source," though they did not disturb the definition of "stationary source" contained in § 111(a)(3), applicable by the terms of the Act to the NSPS program. Section 302(j), however, defines the term "major stationary source" as follows:

"(j) Except as otherwise expressly provided, the terms 'major stationary source' and 'major emitting facility' mean any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant (including any major emitting facility or source of fugitive emissions of any such pollutant, as determined by rule by the Administrator)." 91 Stat. 770.

V

The legislative history of the portion of the 1977 Amendments dealing with nonattainment areas does not contain any specific comment on the "bubble concept" or the question whether a plantwide definition of a stationary source is permissible under the permit program. It does, however, plainly disclose that in the permit program Congress sought to accommodate the conflict between the economic interest in permitting capital improvements to continue and the environmental interest in improving air quality. Indeed, the House Committee Report identified the economic interest as one of the "two main purposes" of this section of the bill. It stated:

"Section 117 of the bill, adopted during full committee markup establishes a new section 127 of the Clean Air Act. The section has two main purposes: (1) to allow reasonable economic growth to continue in an area while making reasonable further progress to assure attainment of the standards by a fixed date; and (2) to allow [*852] States greater flexibility for the former purpose than EPA's present interpretative regulations afford.

"The new provision allows States with nonattainment areas to pursue one of two options. First, the State may proceed under EPA's present 'tradeoff' or 'offset' ruling. The Administrator is authorized, moreover, to modify or amend that ruling in accordance with the intent and purposes of this section.

"The State's second option would be to revise its implementation plan in accordance with this new provision." H. R. Rep. No. 95-294, p. 211 (1977).²⁵

²⁵ During the floor debates Congressman Waxman remarked that the legislation struck

"a proper balance between environmental controls and economic growth in the dirty air areas of America. . . . There is no other single issue which more clearly poses the conflict between

pollution control and new jobs. We have determined that neither need be compromised. . . .

"This is a fair and balanced approach, which will not undermine our economic vitality, or impede achievement of our ultimate environmental objectives." 123 Cong. Rec. 27076 (1977).

The second "main purpose" of the provision -- allowing the States "greater flexibility" than the EPA's interpretative Ruling -- as well as the reference to the EPA's authority to amend its Ruling in accordance with the intent of the section, is entirely consistent with the view that Congress did not intend to freeze the definition of "source" contained in the existing regulation into a rigid statutory requirement.

The portion of the Senate Committee Report dealing with nonattainment areas states generally that it was intended to "supersede the EPA administrative approach," and that expansion should be permitted if a State could "demonstrate that these facilities can be accommodated within its overall plan to provide for attainment of air quality standards." S. Rep. No. 95-127, p. 55 (1977). The Senate Report notes the value of "case-by-case review of each new or modified major source of pollution that seeks to locate in a region exceeding an ambient standard," explaining that such a review "requires matching reductions from existing sources against [*853] emissions expected from the new source in order to assure that introduction of the new source will not prevent attainment of the applicable standard by the statutory deadline." *Ibid.* This description of a case-by-case approach to plant additions, which emphasizes the net consequences of the construction or modification of a new source, as well as its impact on the overall achievement of the national standards, was not, however, addressed to the precise issue raised by these cases.

Senator Muskie made the following remarks:

"I should note that the test for determining whether a new or modified source is subject to the EPA interpretative regulation [the Offset

Ruling] -- and to the permit requirements of the revised implementation plans under the conference bill -- is whether the source will emit a pollutant into an area which is exceeding a national ambient air quality standard for that pollutant -- or precursor. Thus, a new source is still subject to such requirements as 'lowest achievable emission rate' even if it is constructed as a replacement for an older facility resulting in a net reduction from previous emission levels.

"A source -- including an existing facility ordered to convert to coal -- is subject to all the nonattainment requirements as a modified source if it makes any physical change which increases the amount of any air pollutant for which the standards in the area are exceeded." 123 Cong. Rec. 26847 (1977).

VI

As previously noted, prior to the 1977 Amendments, the EPA had adhered to a plantwide definition of the term "source" under a NSPS program. After adoption of the 1977 Amendments, proposals for a plantwide definition were considered in at least three formal proceedings.

In January 1979, the EPA considered the question whether the same restriction on new construction in nonattainment areas that had been included in its December 1976 Ruling [*854] should be required in the revised SIP's that were scheduled to go into effect in July 1979. After noting that the 1976 Ruling was ambiguous on the question "whether a plant with a number of different processes and emission points would be considered a single source," 44 Fed. Reg. 3276 (1979), the EPA, in effect, provided a bifurcated answer to that question. In those areas that did not have a revised SIP in effect by July 1979, the EPA rejected the plantwide definition; on the other hand, it expressly concluded that the plantwide approach would be permissible in certain cir-

cumstances if authorized by an approved SIP. It stated:

"Where a state implementation plan is revised and implemented to satisfy the requirements of Part D, including the reasonable further progress requirement, the plan requirements for major modifications may exempt modifications of existing facilities that are accompanied by intrasource offsets so that there is no net increase in emissions. The agency endorses such exemptions, which would provide greater flexibility to sources to effectively manage their air emissions at least cost." *Ibid.*²⁶

²⁶ In the same Ruling, the EPA added:

"The above exemption is permitted under the SIP because, to be approved under Part D, plan revisions due by January 1979 must contain adopted measures assuring that reasonable further progress will be made. Furthermore, in most circumstances, the measures adopted by January 1979 must be sufficient to actually provide for attainment of the standards by the dates required under the Act, and in all circumstances measures adopted by 1982 must provide for attainment. See Section 172 of the Act and 43 F R 21673-21677 (May 19, 1978). Also, Congress intended under Section 173 of the Act that States would have some latitude to depart from the strict requirements of this Ruling when the State plan is revised and is being carried out in accordance with Part D. Under a Part D plan, therefore, there is less need to subject a modification of an existing facility to LAER and other stringent requirements if the modification is accompanied by sufficient intrasource offsets so that there is no net increase in emissions." 44 Fed. Reg. 3277 (1979).

[*855] In April, and again in September 1979, the EPA published additional comments in which it indicated that revised SIP's could adopt the plantwide definition of source in nonattainment areas in certain circumstances. See *id.*, at 20372, 20379, 51924, 51951, 51958. On the latter occasion, the EPA made a formal rulemaking proposal that would have permitted the use of the "bubble concept" for new

installations within a plant as well as for modifications of existing units. It explained:

"Bubble' Exemption: The use of offsets inside the same source is called the 'bubble.' EPA proposes use of the definition of 'source' (see above) to limit the use of the bubble under nonattainment requirements in the following respects:

"i. Part D SIPs that include all requirements needed to assure reasonable further progress and attainment by the deadline under section 172 and that are being carried out need not restrict the use of a plantwide bubble, the same as under the PSD proposal.

"ii. Part D SIPs that do not meet the requirements specified must limit use of the bubble by including a definition of 'installation' as an identifiable piece of process equipment." ²⁷

[*856] Significantly, the EPA expressly noted that the word "source" might be given a plantwide definition for some purposes and a narrower definition for other purposes. It wrote:

"Source means any building structure, facility, or installation which emits or may emit any regulated pollutant. 'Building, structure, facility or installation' means plant in PSD areas and in nonattainment areas except where the growth prohibitions would apply or where no adequate SIP exists or is being carried out." *Id.*, at 51925. ²⁸

The EPA's summary of its proposed Ruling discloses a flexible rather than rigid definition of the term "source" to implement various policies and programs:

"In summary, EPA is proposing two different ways to define source for different kinds of NSR programs:

"(1) For PSD and complete Part D SIPs, review would apply only to plants, with an unrestricted plant-wide bubble.

"(2) For the offset ruling, restrictions on construction, and incomplete Part D SIPs, review would apply to both plants and individual pieces of process equipment, causing the plant-wide bubble not to apply for new and modified major pieces of equipment.

"In addition, for the restrictions on construction, EPA is proposing to define 'major modification' so as to prohibit the bubble entirely. Finally, an alternative discussed but not favored is to have only pieces of process equipment reviewed, resulting in no plant-wide bubble and allowing minor pieces of equipment to escape NSR **[*857]** regardless of whether they are within a major plant." *Id.*, at 51934.

²⁷ *Id.*, at 51926. Later in that Ruling, the EPA added:

"However, EPA believes that complete Part D SIPs, which contain adopted and enforceable requirements sufficient to assure attainment, may apply the approach proposed above for PSD, with plant-wide review but no review of individual pieces of equipment. Use of only a plant-wide definition of source will permit plant-wide offsets for avoiding NSR of new or modified pieces of equipment. However, this is only appropriate once a SIP is adopted that will assure the reductions in existing emissions necessary for attainment. *See* 44 FR 3276 col. 3 (January 16, 1979). If the level of emissions allowed in the SIP is low enough to assure reasonable further progress and attainment, new construction or modifications with enough offset credit to prevent an emission increase should not jeopardize attainment." *Id.*, at 51933.

²⁸ In its explanation of why the use of the "bubble concept" was especially appropriate in preventing significant deterioration (PSD) in clean air areas, the EPA stated: "In addition, application of the bubble on a plant-wide basis encourages voluntary upgrading of equipment, and growth in productive capacity." *Id.*, at 51932.

In August 1980, however, the EPA adopted a regulation that, in essence, applied the basic reasoning of the Court of Appeals in these

cases. The EPA took particular note of the two then-recent Court of Appeals decisions, which had created the bright-line rule that the "bubble concept" should be employed in a program designed to maintain air quality but not in one designed to enhance air quality. Relying heavily on those cases,²⁹ EPA adopted a dual definition of "source" for nonattainment areas that required a permit whenever a change in either the entire plant, or one of its components, would result in a significant increase in emissions even if the increase was completely offset by reductions elsewhere in the plant. The EPA expressed the opinion that this interpretation was "more consistent with congressional intent" than the plantwide definition because it "would bring in more sources or modifications for review," 45 Fed. Reg. 52697 (1980), but its primary legal analysis was predicated on the two Court of Appeals decisions.

29 "The dual definition also is consistent with *Alabama Power* and *ASARCO*. *Alabama Power* held that EPA had broad discretion to define the constituent terms of 'source' so as best to effectuate the purposes of the statute. Different definitions of 'source' can therefore be used for different sections of the statute. . . .

"Moreover, *Alabama Power* and *ASARCO* taken together suggest that there is a distinction between Clean Air Act programs designed to *enhance* air quality and those designed only to *maintain* air quality. . . .

.

"Promulgation of the dual definition follows the mandate of *Alabama Power*, which held that, while EPA could not define 'source' as a combination of sources, EPA had broad discretion to define 'building,' 'structure,' 'facility,' and 'installation' so as to best accomplish the purposes of the Act." 45 Fed. Reg. 52697 (1980).

In 1981 a new administration took office and initiated a "Government-wide reexamination of regulatory burdens and complexities." 46 Fed. Reg. 16281. In the context of that [*858] review, the EPA reevaluated the various arguments that had been advanced in connection

with the proper definition of the term "source" and concluded that the term should be given the same definition in both nonattainment areas and PSD areas.

In explaining its conclusion, the EPA first noted that the definitional issue was not squarely addressed in either the statute or its legislative history and therefore that the issue involved an agency "judgment as how to best carry out the Act." *Ibid*. It then set forth several reasons for concluding that the plantwide definition was more appropriate. It pointed out that the dual definition "can act as a disincentive to new investment and modernization by discouraging modifications to existing facilities" and "can actually retard progress in air pollution control by discouraging replacement of older, dirtier processes or pieces of equipment with new, cleaner ones." *Ibid*. Moreover, the new definition "would simplify EPA's rules by using the same definition of 'source' for PSD, nonattainment new source review and the construction moratorium. This reduces confusion and inconsistency." *Ibid*. Finally, the agency explained that additional requirements that remained in place would accomplish the fundamental purposes of achieving attainment with NAAQS's as expeditiously as possible.³⁰ These conclusions were expressed [*859] in a proposed rulemaking in August 1981 that was formally promulgated in October. See *id.*, at 50766.

30 It stated:

"5. States will remain subject to the requirement that for all nonattainment areas they demonstrate attainment of NAAQS as expeditiously as practicable and show reasonable further progress toward such attainment. Thus, the proposed change in the mandatory scope of nonattainment new source review should not interfere with the fundamental purpose of Part D of the Act.

"6. New Source Performance Standards (NSPS) will continue to apply to many new or modified facilities and will assure use of the most up-to-date pollution control techniques regard-

less of the applicability of nonattainment area new source review.

"7. In order to avoid nonattainment area new source review, a major plant undergoing modification must show that it will not experience a significant net increase in emissions. Where overall emissions increase significantly, review will continue to be required." 46 Fed. Reg. 16281 (1981).

VII

In this Court respondents expressly reject the basic rationale of the Court of Appeals' decision. That court viewed the statutory definition of the term "source" as sufficiently flexible to cover either a plantwide definition, a narrower definition covering each unit within a plant, or a dual definition that could apply to both the entire "bubble" and its components. It interpreted the policies of the statute, however, to mandate the plantwide definition in programs designed to maintain clean air and to forbid it in programs designed to improve air quality. Respondents place a fundamentally different construction on the statute. They contend that the text of the Act requires the EPA to use a dual definition -- if either a component of a plant, or the plant as a whole, emits over 100 tons of pollutant, it is a major stationary source. They thus contend that the EPA rules adopted in 1980, insofar as they apply to the maintenance of the quality of clean air, as well as the 1981 rules which apply to nonattainment areas, violate the statute.³¹

³¹ "What EPA may not do, however, is define all four terms to mean *only* plants. In the 1980 PSD rules, EPA did just that. EPA compounded the mistake in the 1981 rules here under review, in which it abandoned the dual definition." Brief for Respondents 29, n. 56.

Statutory Language

The definition of the term "stationary source" in § 111(a)(3) refers to "any building, structure, facility, or installation" which emits air

pollution. See *supra*, at 846. This definition is applicable only to the NSPS program by the express terms of the statute; the text of the statute does not make this definition [*860] applicable to the permit program. Petitioners therefore maintain that there is no statutory language even relevant to ascertaining the meaning of stationary source in the permit program aside from § 302(j), which defines the term "major stationary source." See *supra*, at 851. We disagree with petitioners on this point.

The definition in § 302(j) tells us what the word "major" means -- a source must emit at least 100 tons of pollution to qualify -- but it sheds virtually no light on the meaning of the term "stationary source." It does equate a source with a facility -- a "major emitting facility" and a "major stationary source" are synonymous under § 302(j). The ordinary meaning of the term "facility" is some collection of integrated elements which has been designed and constructed to achieve some purpose. Moreover, it is certainly no affront to common English usage to take a reference to a major facility or a major source to connote an entire plant as opposed to its constituent parts. Basically, however, the language of § 302(j) simply does not compel any given interpretation of the term "source."

Respondents recognize that, and hence point to § 111(a)(3). Although the definition in that section is not literally applicable to the permit program, it sheds as much light on the meaning of the word "source" as anything in the statute.

³² As respondents point out, use of the words "building, structure, facility, or installation," as the definition of source, could be read to impose the permit conditions on an individual building that is a part of a plant.³³ A "word may have a character of its own not to be submerged by its association." *Russell Motor Car Co. v. United States*, 261 U.S. 514, 519 [*861] (1923). On the other hand, the meaning of a word must be ascertained in the context of

achieving particular objectives, and the words associated with it may indicate that the true meaning of the series is to convey a common idea. The language may reasonably be interpreted to impose the requirement on any discrete, but integrated, operation which pollutes. This gives meaning to all of the terms -- a single building, not part of a larger operation, would be covered if it emits more than 100 tons of pollution, as would any facility, structure, or installation. Indeed, the language itself implies a "bubble concept" of sorts: each enumerated item would seem to be treated as if it were encased in a bubble. While respondents insist that each of these terms must be given a discrete meaning, they also argue that § 111(a)(3) defines "source" as that term is used in § 302(j). The latter section, however, equates a source with a facility, whereas the former defines "source" as a facility, among other items.

32 We note that the EPA in fact adopted the language of that definition in its regulations under the permit program. 40 CFR §§ 51.18(j)(1)(i), (ii) (1983).

33 Since the regulations give the States the option to define an individual unit as a source, see 40 CFR § 51.18(j)(1) (1983), petitioners do not dispute that the terms can be read as respondents suggest.

We are not persuaded that parsing of general terms in the text of the statute will reveal an actual intent of Congress.³⁴ [*862] We know full well that this language is not dispositive; the terms are overlapping and the language is not precisely directed to the question of the applicability of a given term in the context of a larger operation. To the extent any congressional "intent" can be discerned from this language, it would appear that the listing of overlapping, illustrative terms was intended to enlarge, rather than to confine, the scope of the agency's power to regulate particular sources in order to effectuate the policies of the Act.

34 The argument based on the text of § 173, which defines the permit requirements for non-attainment areas, is a classic example of circular reasoning. One of the permit requirements is that "the proposed source is required to comply with the lowest achievable emission rate" (LAER). Although a State may submit a revised SIP that provides for the waiver of another requirement -- the "offset condition" -- the SIP may not provide for a waiver of the LAER condition for any proposed source. Respondents argue that the plantwide definition of the term "source" makes it unnecessary for newly constructed units within the plant to satisfy the LAER requirement if their emissions are offset by the reductions achieved by the retirement of older equipment. Thus, according to respondents, the plantwide definition allows what the statute explicitly prohibits -- the waiver of the LAER requirement for the newly constructed units. But this argument proves nothing because the statute does not prohibit the waiver unless the proposed new unit is indeed subject to the permit program. If it is not, the statute does not impose the LAER requirement at all and there is no need to reach any waiver question. In other words, § 173 of the statute merely deals with the consequences of the definition of the term "source" and does not define the term.

Legislative History

In addition, respondents argue that the legislative history and policies of the Act foreclose the plantwide definition, and that the EPA's interpretation is not entitled to deference because it represents a sharp break with prior interpretations of the Act.

Based on our examination of the legislative history, we agree with the Court of Appeals that it is unilluminating. The general remarks pointed to by respondents "were obviously not made with this narrow issue in mind and they cannot be said to demonstrate a Congressional desire. . . ." *Jewell Ridge Coal Corp. v. Mine Workers*, 325 U.S. 161, 168-169 (1945). Respondents' argument based on the legislative history relies heavily on Senator Muskie's observation that a new source is subject to the LAER requirement.³⁵ But the full statement is

ambiguous and like the text of § 173 itself, this comment does not tell us what a new source is, much less that it is to have an inflexible definition. We find that the legislative history as a whole is silent on the precise issue before us. It is, however, consistent with the view that the EPA should have broad discretion in implementing the policies of the 1977 Amendments.

35 See *supra*, at 853. We note that Senator Muskie was not critical of the EPA's use of the "bubble concept" in one NSPS program prior to the 1977 amendments. See *ibid*.

[*863] More importantly, that history plainly identifies the policy concerns that motivated the enactment; the plantwide definition is fully consistent with one of those concerns -- the allowance of reasonable economic growth -- and, whether or not we believe it most effectively implements the other, we must recognize that the EPA has advanced a reasonable explanation for its conclusion that the regulations serve the environmental objectives as well. See *supra*, at 857-859, and n. 29; see also *supra*, at 855, n. 27. Indeed, its reasoning is supported by the public record developed in the rulemaking process,³⁶ as well as by certain private studies.³⁷

36 See, for example, the statement of the New York State Department of Environmental Conservation, pointing out that denying a source owner flexibility in selecting options made it "simpler and cheaper to operate old, more polluting sources than to trade up. . . ." App. 128-129.

37 "Economists have proposed that economic incentives be substituted for the cumbersome administrative-legal framework. The objective is to make the profit and cost incentives that work so well in the marketplace work for pollution control. . . . [The 'bubble' or 'netting' concept] is a first attempt in this direction. By giving a plant manager flexibility to find the places and processes within a plant that control emissions most cheaply, pollution control can be achieved more quickly and cheaply." L. Lave & G.

Omenn, *Cleaning the Air: Reforming the Clean Air Act 28* (1981) (footnote omitted).

Our review of the EPA's varying interpretations of the word "source" -- both before and after the 1977 Amendments -- convinces us that the agency primarily responsible for administering this important legislation has consistently interpreted it flexibly -- not in a sterile textual vacuum, but in the context of implementing policy decisions in a technical and complex arena. The fact that the agency has from time to time changed its interpretation of the term "source" does not, as respondents argue, lead us to conclude that no deference should be accorded the agency's interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations **[*864]** and the wisdom of its policy on a continuing basis. Moreover, the fact that the agency has adopted different definitions in different contexts adds force to the argument that the definition itself is flexible, particularly since Congress has never indicated any disapproval of a flexible reading of the statute.

Significantly, it was not the agency in 1980, but rather the Court of Appeals that read the statute inflexibly to command a plantwide definition for programs designed to maintain clean air and to forbid such a definition for programs designed to improve air quality. The distinction the court drew may well be a sensible one, but our labored review of the problem has surely disclosed that it is not a distinction that Congress ever articulated itself, or one that the EPA found in the statute before the courts began to review the legislative work product. We conclude that it was the Court of Appeals, rather than Congress or any of the decisionmakers who are authorized by Congress to administer this legislation, that was primarily responsible for the 1980 position taken by the agency.

Policy

The arguments over policy that are advanced in the parties' briefs create the impression that respondents are now waging in a judicial forum a specific policy battle which they ultimately lost in the agency and in the 32 jurisdictions opting for the "bubble concept," but one which was never waged in the Congress. Such policy arguments are more properly addressed to legislators or administrators, not to judges.³⁸

38 Respondents point out if a brand new factory that will emit over 100 tons of pollutants is constructed in a nonattainment area, that plant must obtain a permit pursuant to § 172(b)(6) and in order to do so, it must satisfy the § 173 conditions, including the LAER requirement. Respondents argue if an old plant containing several large emitting units is to be modernized by the replacement of one or more units emitting over 100 tons of pollutant with a new unit emitting less -- but still more than 100 tons -- the result should be no different simply because "it happens to be built not at a new site, but within a *pre-existing plant*." Brief for Respondents 4.

[*865] In these cases the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex,³⁹ the agency considered the matter in a detailed and reasoned fashion,⁴⁰ and the decision involves reconciling conflicting policies.⁴¹ Congress intended to accommodate both interests, but did not do so itself on the level of specificity presented by these cases. Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the

agency. For judicial purposes, it matters not which of these things occurred.

39 See, e. g., *Aluminum Co. of America v. Central Lincoln Peoples' Util. Dist.*, *ante*, at 390.

40 See *SEC v. Sloan*, 436 U.S., at 117; *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 287, n. 5 (1978); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

41 See *Capital Cities Cable, Inc. v. Crisp*, *ante*, at 699-700; *United States v. Shimer*, 367 U.S. 374, 382 (1961).

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices -- resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the **[*866]** agency charged with the administration of the statute in light of everyday realities.

When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges -- who have no constituency -- have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial

ones: "Our Constitution vests such responsibilities in the political branches." *TVA v. Hill*, 437 U.S. 153, 195 (1978).

We hold that the EPA's definition of the term "source" is a permissible construction of the statute which seeks to accommodate progress in reducing air pollution with economic growth. "The Regulations which the Administrator has adopted provide what the agency could allowably view as . . . [an] effective reconciliation of these twofold ends. . . ." *United States v. Shimer*, 367 U.S., at 383.

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE MARSHALL and JUSTICE REHNQUIST took no part in the consideration or decision of these cases.

JUSTICE O'CONNOR took no part in the decision of these cases.

REFERENCES

[omitted]

B) *Loper Bright Enterprises v. Raimondo*, 603 U.S. ____ (2024), 144 S. Ct. 2244

Summary of the facts

A group of commercial fishermen took legal action against the National Marine Fisheries Service after it enacted a rule that required industry to fund at-sea monitoring programs at an estimated cost of \$710 per day. The fishermen argued that the Magnuson-Stevens Fishery Conservation and Management Act of 1976 did not authorise the Service to create industry-funded monitoring requirements and that the Service thus failed to follow proper rulemaking procedure.

Opinion of the Court

The view that interpretation of ambiguous statutory provisions amounts to policymaking suited for political actors rather than courts is especially mistaken, for it rests on a profound misconception of the judicial role. It is reasonable to assume that Congress intends to leave policymaking to political actors. But resolution of statutory ambiguities involves legal interpretation. That task does not suddenly become policymaking just because a court has an “agency to fall back on.” *Kisor*, 588 U. S., at 575 (opinion of the Court). Courts interpret statutes, no matter the context, based on the traditional tools of statutory construction, not individual policy preferences. Indeed, the Framers crafted the Constitution to ensure that federal judges could exercise judgment free from the influence of the political branches. See *The Federalist*, No. 78, at 522–525. They were to construe the law with “[c]lear heads . . . and honest hearts,” not with an eye to policy preferences that had not made it into the statute. 1 *Works of James Wilson* 363 (J. Andrews ed. 1896).

That is not to say that Congress cannot or does not confer discretionary authority on agencies. Congress may do so, subject to constitutional limits, and it often has. But to stay out of discretionary policymaking left to the political branches, judges need only fulfill their obligations under the APA to independently identify and respect such delegations of authority, police the outer statutory boundaries of those delegations, and ensure that agencies exercise their discretion consistent with the APA. By forcing courts to instead pretend that ambiguities are necessarily delegations, *Chevron* does not prevent judges from making policy. It prevents them from judging.

3

In truth, *Chevron*’s justifying presumption is, as Members of this Court have often recognized, a fiction. See *Buffington v. McDonough*, 598 U. S. ___, ___ (2022) (GORSUCH,

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J., dissenting from denial of certiorari) (slip op., at 11); *Cuozzo*, 579 U. S., at 286 (THOMAS, J., concurring); Scalia, 1989 *Duke L. J.*, at 517; see also *post*, at 15 (opinion of KAGAN, J.). So we have spent the better part of four decades imposing one limitation on *Chevron* after another, pruning its presumption on the understanding that “where it is in doubt that Congress actually intended to delegate particular interpretive authority to an agency, *Chevron* is ‘inapplicable.’” *United States v. Mead Corp.*, 533 U. S. 218, 230 (2001) (quoting *Christensen v. Harris County*, 529 U. S. 576, 597 (2000) (Breyer, J., dissenting)); see also *Adams Fruit Co. v. Barrett*, 494 U. S. 638, 649 (1990).

Consider the many refinements we have made in an effort to match *Chevron*’s presumption to reality. We have said that *Chevron* applies only “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.” *Mead*, 533 U. S., at 226–227. In practice, that threshold requirement—sometimes called *Chevron* “step zero”—largely limits *Chevron* to “the fruits of notice-and-comment rulemaking or formal adjudication.” 533 U. S., at 230. But even when those processes are used, deference is still not warranted “where the regulation is ‘procedurally defective’—that is, where the agency errs by failing to follow the correct procedures in issuing the regulation.” *Encino Motorcars, LLC v. Navarro*, 579 U. S. 211, 220 (2016) (quoting *Mead*, 533 U. S., at 227).

Even where those procedural hurdles are cleared, substantive ones remain. Most notably, *Chevron* does not apply if the question at issue is one of “deep ‘economic and political significance.’” *King v. Burwell*, 576 U. S. 473, 486 (2015). We have instead expected Congress to delegate such authority “expressly” if at all, *ibid.*, for “[e]xtraordinary grants of regulatory authority are rarely accomplished through ‘modest words,’ ‘vague terms,’ or ‘subtle device[s],’”

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West Virginia v. EPA, 597 U. S. 697, 723 (2022) (quoting *Whitman v. American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001); alteration in original). Nor have we applied *Chevron* to agency interpretations of judicial review provisions, see *Adams Fruit Co.*, 494 U. S., at 649–650, or to statutory schemes not administered by the agency seeking deference, see *Epic Systems Corp. v. Lewis*, 584 U. S. 497, 519–520 (2018). And we have sent mixed signals on whether *Chevron* applies when a statute has criminal applications. Compare *Abramski v. United States*, 573 U. S. 169, 191 (2014), with *Babbitt v. Sweet Home Chapter, Communities for Great Ore.*, 515 U. S. 687, 704, n. 18 (1995).

Confronted with this byzantine set of preconditions and exceptions, some courts have simply bypassed *Chevron*, saying it makes no difference for one reason or another.⁷ And even when they do invoke *Chevron*, courts do not always heed the various steps and nuances of that evolving doctrine. In one of the cases before us today, for example, the First Circuit both skipped “step zero,” see 62 F. 4th, at 628, and refused to “classify [its] conclusion as a product of *Chevron* step one or step two”—though it ultimately appears to have deferred under step two, *id.*, at 634.

⁷ See, e.g., *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 45 F. 4th 306, 313–314 (CADC 2022), abrogated by *Garland v. Cargill*, 602 U. S. ____ (2024); *County of Amador v. United States Dept. of Interior*, 872 F. 3d 1012, 1021–1022 (CA9 2017); *Estrada-Rodriguez v. Lynch*, 825 F. 3d 397, 403–404 (CA8 2016); *Nielsen v. AECOM Tech. Corp.*, 762 F. 3d 214, 220 (CA2 2014); *Alaska Stock, LLC v. Houghton Mifflin Harcourt Publishing Co.*, 747 F. 3d 673, 685, n. 52 (CA9 2014); *Jurado-Delgado v. Attorney Gen. of U. S.*, 498 Fed. Appx. 107, 117 (CA3 2009); see also D. Brookins, *Confusion in the Circuit Courts: How the Circuit Courts Are Solving the Mead-Puzzle by Avoiding It Altogether*, 85 Geo. Wash. L. Rev. 1484, 1496–1499 (2017) (documenting *Chevron* avoidance by the lower courts); A. Vermeule, *Our Schmittian Administrative Law*, 122 Harv. L. Rev. 1095, 1127–1129 (2009) (same); L. Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 Vand. L. Rev. 1443, 1464–1466 (2005) (same).

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This Court, for its part, has not deferred to an agency interpretation under *Chevron* since 2016. See *Cuozzo*, 579 U. S., at 280 (most recent occasion). But *Chevron* remains on the books. So litigants must continue to wrestle with it, and lower courts—bound by even our crumbling precedents, see *Agostini v. Felton*, 521 U. S. 203, 238 (1997)—understandably continue to apply it.

The experience of the last 40 years has thus done little to rehabilitate *Chevron*. It has only made clear that *Chevron*’s fictional presumption of congressional intent was always unmoored from the APA’s demand that courts exercise independent judgment in construing statutes administered by agencies. At best, our intricate *Chevron* doctrine has been nothing more than a distraction from the question that matters: Does the statute authorize the challenged agency action? And at worst, it has required courts to violate the APA by yielding to an agency the express responsibility, vested in “the reviewing court,” to “decide all relevant questions of law” and “interpret . . . statutory provisions.” §706 (emphasis added).

IV

The only question left is whether *stare decisis*, the doctrine governing judicial adherence to precedent, requires us to persist in the *Chevron* project. It does not. *Stare decisis* is not an “inexorable command,” *Payne v. Tennessee*, 501 U. S. 808, 828 (1991), and the *stare decisis* considerations most relevant here—“the quality of [the precedent’s] reasoning, the workability of the rule it established, . . . and reliance on the decision,” *Knick v. Township of Scott*, 588 U. S. 180, 203 (2019) (quoting *Janus v. State, County, and Municipal Employees*, 585 U. S. 878, 917 (2018))—all weigh in favor of letting *Chevron* go.

Chevron has proved to be fundamentally misguided. Despite reshaping judicial review of agency action, neither it nor any case of ours applying it grappled with the APA—

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the statute that lays out how such review works. Its flaws were nonetheless apparent from the start, prompting this Court to revise its foundations and continually limit its application. It has launched and sustained a cottage industry of scholars attempting to decipher its basis and meaning. And Members of this Court have long questioned its premises. See, e.g., *Pereira v. Sessions*, 585 U. S. 198, 219–221 (2018) (Kennedy, J., concurring); *Michigan*, 576 U. S., at 760–764 (THOMAS, J., concurring); *Buffington*, 598 U. S. ___ (opinion of GORSUCH, J.); B. Kavanaugh, Fixing Statutory Interpretation, 129 Harv. L. Rev. 2118, 2150–2154 (2016). Even Justice Scalia, an early champion of *Chevron*, came to seriously doubt whether it could be reconciled with the APA. See *Perez*, 575 U. S., at 109–110 (opinion concurring in judgment). For its entire existence, *Chevron* has been a “rule in search of a justification,” *Knick*, 588 U. S., at 204, if it was ever coherent enough to be called a rule at all.

Experience has also shown that *Chevron* is unworkable. The defining feature of its framework is the identification of statutory ambiguity, which requires deference at the doctrine’s second step. But the concept of ambiguity has always evaded meaningful definition. As Justice Scalia put the dilemma just five years after *Chevron* was decided: “How clear is clear?” 1989 Duke L. J., at 521.

We are no closer to an answer to that question than we were four decades ago. “[A]mbiguity’ is a term that may have different meanings for different judges.” *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U. S. 546, 572 (2005) (Stevens, J., dissenting). One judge might see ambiguity everywhere; another might never encounter it. Compare L. Silberman, *Chevron—The Intersection of Law & Policy*, 58 Geo. Wash. L. Rev. 821, 822 (1990), with R. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 Vand. L. Rev. En Banc 315, 323 (2017). A rule of law that is so wholly “in the eye of the

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beholder,” *Exxon Mobil Corp.*, 545 U. S., at 572 (Stevens, J., dissenting), invites different results in like cases and is therefore “arbitrary in practice,” *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U. S. 271, 283 (1988). Such an impressionistic and malleable concept “cannot stand as an every-day test for allocating” interpretive authority between courts and agencies. *Swift & Co. v. Wickham*, 382 U. S. 111, 125 (1965).

The dissent proves the point. It tells us that a court should reach *Chevron*’s second step when it finds, “at the end of its interpretive work,” that “Congress has left an ambiguity or gap.” *Post*, at 1–2. (The Government offers a similar test. See Brief for Respondents in No. 22–1219, pp. 7, 10, 14; Tr. of Oral Arg. 113–114, 116.) That is no guide at all. Once more, the basic nature and meaning of a statute does not change when an agency happens to be involved. Nor does it change just because the agency has happened to offer its interpretation through the sort of procedures necessary to obtain deference, or because the other preconditions for *Chevron* happen to be satisfied. The statute still has a best meaning, necessarily discernible by a court deploying its full interpretive toolkit. So for the dissent’s test to have any meaning, it must think that in an agency case (unlike in any other), a court should give up on its “interpretive work” before it has identified that best meaning. But how does a court know when to do so? On that point, the dissent leaves a gap of its own. It protests only that some other interpretive tools—all with pedigrees more robust than *Chevron*’s, and all designed to help courts identify the meaning of a text rather than allow the Executive Branch to displace it—also apply to ambiguous texts. See *post*, at 27. That this is all the dissent can come up with, after four decades of judicial experience attempting to identify ambiguity under *Chevron*, reveals the futility of the

exercise.⁸

Because *Chevron* in its original, two-step form was so indeterminate and sweeping, we have instead been forced to clarify the doctrine again and again. Our attempts to do so have only added to *Chevron*'s unworkability, transforming the original two-step into a dizzying breakdance. See *Adams Fruit Co.*, 494 U. S., at 649–650; *Mead*, 533 U. S., at 226–227; *King*, 576 U. S., at 486; *Encino Motorcars*, 579 U. S., at 220; *Epic Systems*, 584 U. S., at 519–520; on and on. And the doctrine continues to spawn difficult threshold questions that promise to further complicate the inquiry should *Chevron* be retained. See, e.g., *Cargill v. Garland*, 57 F. 4th 447, 465–468 (CA5 2023) (plurality opinion) (May the Government waive reliance on *Chevron*? Does *Chevron* apply to agency interpretations of statutes imposing criminal penalties? Does *Chevron* displace the rule of lenity?), *aff'd*, 602 U. S. ____ (2024).

Four decades after its inception, *Chevron* has thus become an impediment, rather than an aid, to accomplishing the basic judicial task of “say[ing] what the law is.” *Marbury*, 1 Cranch, at 177. And its continuing import is far from clear. Courts have often declined to engage with the doctrine, saying it makes no difference. See n. 7, *supra*. And as noted, we have avoided deferring under *Chevron* since 2016. That trend is nothing new; for decades, we have often declined to invoke *Chevron* even in those cases where it might appear to be applicable. See W. Eskridge & L. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations From Chevron to Hamdan*, 96 Geo. L. J. 1083, 1125 (2008). At this point, all

⁸Citing an empirical study, the dissent adds that *Chevron* “fosters agreement among judges.” *Post*, at 28. It is hardly surprising that a study might find as much; *Chevron*'s second step is supposed to be hospitable to agency interpretations. So when judges get there, they tend to agree that the agency wins. That proves nothing about the supposed ease or predictability of identifying ambiguity in the first place.

that remains of *Chevron* is a decaying husk with bold pretensions.

Nor has *Chevron* been the sort of “‘stable background’ rule” that fosters meaningful reliance. *Post*, at 8, n. 1 (opinion of KAGAN, J.) (quoting *Morrison v. National Australia Bank Ltd.*, 561 U. S. 247, 261 (2010)). Given our constant tinkering with and eventual turn away from *Chevron*, and its inconsistent application by the lower courts, it instead is hard to see how anyone—Congress included—could reasonably expect a court to rely on *Chevron* in any particular case. And even if it were possible to predict accurately when courts will apply *Chevron*, the doctrine “does not provide ‘a clear or easily applicable standard, so arguments for reliance based on its clarity are misplaced.’” *Janus*, 585 U. S., at 927 (quoting *South Dakota v. Wayfair, Inc.*, 585 U. S. 162, 186 (2018)). To plan on *Chevron* yielding a particular result is to gamble not only that the doctrine will be invoked, but also that it will produce readily foreseeable outcomes and the stability that comes with them. History has proved neither bet to be a winning proposition.

Rather than safeguarding reliance interests, *Chevron* affirmatively destroys them. Under *Chevron*, a statutory ambiguity, no matter why it is there, becomes a license authorizing an agency to change positions as much as it likes, with “[u]nexplained inconsistency” being “at most . . . a reason for holding an interpretation to be . . . arbitrary and capricious.” *Brand X*, 545 U. S., at 981. But statutory ambiguity, as we have explained, is not a reliable indicator of actual delegation of discretionary authority to agencies. *Chevron* thus allows agencies to change course even when Congress has given them no power to do so. By its sheer breadth, *Chevron* fosters unwarranted instability in the law, leaving those attempting to plan around agency action in an eternal fog of uncertainty.

Chevron accordingly has undermined the very “rule of law” values that *stare decisis* exists to secure. *Michigan v.*

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Bay Mills Indian Community, 572 U. S. 782, 798 (2014). And it cannot be constrained by admonishing courts to be extra careful, or by tacking on a new batch of conditions. We would need to once again “revis[e] its theoretical basis . . . in order to cure its practical deficiencies.” *Montejo v. Louisiana*, 556 U. S. 778, 792 (2009). *Stare decisis* does not require us to do so, especially because any refinements we might make would only point courts back to their duties under the APA to “decide all relevant questions of law” and “interpret . . . statutory provisions.” §706. Nor is there any reason to wait helplessly for Congress to correct our mistake. The Court has jettisoned many precedents that Congress likewise could have legislatively overruled. See, e.g., *Patterson v. McLean Credit Union*, 485 U. S. 617, 618 (1988) (*per curiam*) (collecting cases). And part of “judicial humility,” *post*, at 3, 25 (opinion of KAGAN, J.), is admitting and in certain cases correcting our own mistakes, especially when those mistakes are serious, see *post*, at 8–9 (opinion of GORSUCH, J.).

This is one of those cases. *Chevron* was a judicial invention that required judges to disregard their statutory duties. And the only way to “ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion,” *Vasquez v. Hillery*, 474 U. S. 254, 265 (1986), is for us to leave *Chevron* behind.

By doing so, however, we do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory *stare decisis* despite our change in interpretive methodology. See *CBOCS West, Inc. v. Humphries*, 553 U. S. 442, 457 (2008). Mere reliance on *Chevron* cannot constitute a “special justification” for overruling such a holding, because to say a precedent relied on *Chevron* is, at best, “just an argument that the precedent was wrongly decided.” *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U. S. 258, 266 (2014) (quoting *Dickerson v. United States*, 530 U. S. 428, 443 (2000)). That is not enough to justify overruling a statutory precedent.

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Inc., 573 U. S. 258, 266 (2014) (quoting *Dickerson v. United States*, 530 U. S. 428, 443 (2000)). That is not enough to justify overruling a statutory precedent.

* * *

The dissent ends by quoting *Chevron*: “‘Judges are not experts in the field.’” *Post*, at 31 (quoting 467 U. S., at 865). That depends, of course, on what the “field” is. If it is legal interpretation, that has been, “emphatically,” “the province and duty of the judicial department” for at least 221 years. *Marbury*, 1 Cranch, at 177. The rest of the dissent’s selected epigraph is that judges “‘are not part of either political branch.’” *Post*, at 31 (quoting *Chevron*, 467 U. S., at 865). Indeed. Judges have always been expected to apply their “judgment” *independent* of the political branches when interpreting the laws those branches enact. The Federalist No. 78, at 523. And one of those laws, the APA, bars judges from disregarding that responsibility just because an Executive Branch agency views a statute differently.

Chevron is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires. Careful attention to the judgment of the Executive Branch may help inform that inquiry. And when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it. But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.

Because the D. C. and First Circuits relied on *Chevron* in deciding whether to uphold the Rule, their judgments are vacated, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

F Principles (Lecture 4)

I. Article 5 of the Swiss Constitution



Below you will find article 5 of the Swiss Federal Constitution. What principles are stated in this article? Do you think that some principles are missing? At what level (parliamentary act, constitution) are these principles regulated in your country?

Art. 5 Rule of law

- ¹ All activities of the state are based on and limited by law.
- ² State activities must be conducted in the public interest and be proportionate to the ends sought.
- ³ State institutions and private persons shall act in good faith.
- ⁴ The Confederation and the Cantons shall respect international law.

II. General Questions

1. What do we understand by the principle of legality?
2. What do we understand by the principle of proportionality?
3. How do these principles affect our understanding of the role of courts and administration?

III. Bank Mellat v Her Majesty's Treasury (No. 1)



Read the extract from the decision and ask yourself what principles are behind the court's arguments. Would you agree with the argumentation? Are there other principles you would consider in your country?

Summary of the facts

The Treasury identified the Bank Mellat as having provided banking and financial services to entities involved in Iran's nuclear weapons program. Therefore, it ordered all persons to not enter into or continue commercial dealings with Bank Mellat or any of its UK subsidiaries. The Bank applied to have the order set aside. In addition to this substantive appeal, some of the evidence relied upon by the Treasury was of a sensitive nature and had resulted in a closed session at first instance and the subsequent production of a closed judgment.

This judgment concerned the use of a closed material procedure in the Supreme Court.



Trinity
Term [2013]
UKSC 38

On appeal from: [2011] EWCA Civ 1

JUDGMENT

Bank Mellat (Appellant) v Her Majesty's Treasury (Respondent) (No. 1)

before

**Lord Neuberger, President
Lord Hope, Deputy President
Lady Hale
Lord Kerr Lord Clarke Lord
Dyson Lord Sumption Lord
Reed Lord Carnwath**

JUDGMENT GIVEN ON

19 June 2013

Heard on 19, 20 and 21 March 2013

Appellant
Michael Brindle QC
Amy Rogers
Dr Gunnar Beck
(Instructed by Zaiwalla
Treasury and Co)

Respondent
Jonathan Swift QC
Tim Eicke QC
Robert Wastell
(Instructed by
Solicitors)

Special Advocates

Advocate to the Court

Martin Chamberlain QC
QC Melanie Plimmer
(Instructed by the Special
Treasury Advocates Support Office)

Robin Tam
(Instructed by
Solicitors)

Intervener
Nicholas Vineall QC

(Instructed by Zaiwalla
Liberty) and Co)

Intervener
Dinah Rose QC
Charlotte Kilroy
(Instructed by

LORD NEUBERGER (with whom Lady Hale, Lord Clarke, Lord Sumption and Lord Carnwath agree)

1. This judgment is concerned with two connected questions:
 - (i) Is it possible in principle for the Supreme Court to adopt a closed material procedure on an appeal? If so,
 - (ii) Is it appropriate to adopt a closed material procedure on this particular appeal?

A closed material procedure involves the production of material which is so confidential and sensitive that it requires the court not only to sit in private, but to sit in a closed hearing (ie a hearing at which the court considers the material and hears submissions about it without one of the parties to the appeal seeing the material or being present), and to contemplate giving a partly closed judgment (ie a judgment part of which will not be seen by one of the parties).

Open justice and natural justice

2. The idea of a court hearing evidence or argument in private is contrary to the principle of open justice, which is fundamental to the dispensation of justice in a modern, democratic society. However, it has long been accepted that, in rare cases, a court has inherent power to receive evidence and argument in a hearing from which the public and the press are excluded, and that it can even give a judgment which is only available to the parties. Such a course may only be taken (i) if it is strictly necessary to have a private hearing in order to achieve justice between the parties, and, (ii) if the degree of privacy is kept to an absolute minimum – see, for instance *A v Independent News & Media Ltd* [2010] EWCA Civ 343, [2010] 1 WLR 2262, and *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42, [2011] 1 WLR 1645. Examples of such cases include litigation where children are involved, where threatened breaches of privacy are being alleged, and where commercially valuable secret information is in issue.

3. Even more fundamental to any justice system in a modern, democratic society is the principle of natural justice, whose most important aspect is that every party has a right to know the full case against him, and the right to test and challenge that case

fully. A closed hearing is therefore even more offensive to fundamental principle than a private hearing. At least a private hearing cannot be said, of itself, to give rise to inequality or even unfairness as between the parties. But that cannot be said of an arrangement where the court can look at evidence or hear arguments on behalf of one party without the other party (“the excluded party”) knowing, or being able to test, the contents of that evidence and those arguments (“the closed material”), or even being able to see all the reasons why the court reached its conclusions.

4. In *Al Rawi v Security Service* [2012] 1 AC 531, Lord Dyson made it clear that, although “the open justice principle may be abrogated if justice cannot otherwise be achieved” (para 27), the common law would in no circumstances permit a closed material procedure. As he went on to say at [2012] 1 AC 531, para 35, having explained that, in this connection, there was no difference between civil and criminal proceedings:

“[T]he right to be confronted by one’s accusers is such a fundamental element of the common law right to a fair trial that the court cannot abrogate it in the exercise of its inherent power. Only Parliament can do that”.

5. The effect of the Strasbourg Court’s decisions in *Chahal v United Kingdom* (1996) 23 EHRR 413 and *A and others v United Kingdom* [2009] ECHR 301 is that Article 6 of the European Convention on Human Rights (“Article 6”, which confers the right of access to the courts) is not infringed by a closed material procedure, provided that appropriate conditions are met. Those conditions, in very summary terms, would normally include the court being satisfied that (i) for weighty reasons, such as national security, the material has to be kept secret from the excluded party as well as the public, (ii) a hearing to determine the issues between the parties could not fairly go ahead without the material being shown to the judge, (iii) a summary, which is both sufficiently informative and as full as the circumstances permit, of all the closed material has been made available to the excluded party, and (iv) an independent advocate, who has seen all the material, is able to challenge the need for the procedure, and, if there is a closed hearing, is present throughout to test the accuracy and relevance of the material and to make submissions about it.

6. The importance of the requirement that a proper summary, or gist, of the closed material be provided is apparent from the decision of the House of Lords in *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, [2010] 2 AC 269. At para 59, Lord Phillips said that an excluded party “must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations”, and that this need not include “the detail or the sources of the evidence forming the basis of the allegations”. As he went on to explain:

“Where, however, the open material consists purely of general assertions and the case against the [excluded party] is based solely or to a decisive degree on closed materials the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be.”

7. The nature and functions of a special advocate are discussed in *Al Rawi* [2012] 1 AC 531, by Lord Dyson, paras 36-37, and by Lord Kerr, para 94. As Lord Dyson said, the use of special advocates has “limitations”, despite the fact that the rule-makers and the judges have done their best to ensure that they are given all the facilities that they need, and despite the fact that the Treasury Solicitor has ensured (to the credit of the Government) that they are of consistently high quality.

8. In a number of statutes, Parliament has stipulated that, in certain limited and specified circumstances, a closed material procedure may, indeed must, be adopted by the courts. Of course, it is open to any party affected by such legislation to contend that, in one respect or another, its provisions, or the ways in which they are being applied, infringe Article 6. However, subject to that, and save maybe in an extreme case, the courts are obliged to apply the law in this area, as in any other area, as laid down in statute by Parliament.

The statutory and factual background to this appeal

9. The statute in question in this case is the Counter-Terrorism Act 2008 (“the 2008 Act”), which, as its name suggests, is concerned with enabling steps to be taken to prevent terrorist financing and the proliferation of nuclear weapons, and thereby to improve the security of citizens of the United Kingdom. The particular provisions which apply in the present case are in Parts 5 and 6 of the 2008 Act. The first relevant provision is section 62, which is in Part 5 and “confer[s] powers on the Treasury to act against terrorist financing, money laundering and certain other activities” in accordance with Schedule 7.

10. Paragraphs 1(4), 3(1) and 4(1) of Schedule 7 to the 2008 Act permit the Treasury to “give a direction” to any “credit or financial institution”, if “the Treasury reasonably believes” that “the development or production of nuclear weapons in [a] country ... poses a significant risk to the national interests of the United Kingdom”. According to paras 9 and 13 of the schedule, such a direction may “require” the person on whom it is served “not to enter into or to continue to participate in ... a specified description of transactions or business relationships with a designated person”. Paragraph 14 requires any such direction to be approved by affirmative resolution of Parliament.

11. Pursuant to these provisions, on 9 October 2009, the Treasury made the order the subject of these proceedings, the Financial Restrictions (Iran) Order 2009 (“the 2009 Order”), which, three days later, was laid before Parliament, where it was

approved. The 2009 Order, which was in force for a year, directed “all persons operating in the financial sector” not to “enter into, or ... continue to participate in, any transaction or business relationship” with two companies, one of which was Bank Mellat (“the Bank”), or any branch of either of those two companies.

12. The Bank is a large Iranian bank, with some 1800 branches and nearly 20 million customers, mostly in Iran, but also in other countries, including the United Kingdom. In 2009, prior to the 2009 Order, it was issuing letters of credit in an aggregate sum of over US\$11bn, of which around 25% arose out of business transacted in this country. It has a 60% owned subsidiary bank incorporated and carrying on business here, which was at all material times regulated by the Financial Services Authority. The Order effectively shut down the United Kingdom operations of the Bank and its subsidiary, and it is said to have damaged the Bank’s reputation and goodwill both in this country and abroad.

13. The first section of Part 6 of the 2008 Act is section 63, of which subsection (2) gives any person affected by a direction the right to apply to the High Court (or the Court of Session) to set it aside, and any such application is defined by section 65 as “financial restrictions proceedings”. The Bank issued such proceedings to set aside the Order on 20 November 2009. The Government took the view that some of the evidence relied on by the Treasury to justify the 2009 Order was of such sensitivity that it could not be shown to the Bank or its representatives. Mitting J accepted the Government’s case that justice required that the evidence in question be put before the court and that it had to be dealt with by a closed material procedure. Accordingly, he gave appropriate directions as to how the hearing should proceed.

14. The two day hearing before him was partly in open court and partly a closed hearing. The open hearing involved all evidence and arguments (save the closed material) being produced at a public hearing, with both parties, the Bank and the Treasury, seeing the evidence and addressing the court through their respective counsel, in the normal way. The closed hearing was conducted in private, in the absence of the Bank, its counsel, and the public, and involved the Treasury producing the closed material and making submissions on it through counsel. The interests of the Bank were protected, at least to an extent, by (i) the Treasury providing the Bank with a document which gave the gist of the closed material, and (ii) the presence at the closed hearing of special advocates, who had been cleared to see the material, and who made such submissions as they could on behalf of the Bank about the closed material.

15. Following the two-day hearing, Mitting J handed down two judgments on 11 June 2010. The first judgment was an open judgment, in which the Judge dismissed the Bank’s application for the reasons which he explained - [2010] EWHC 1332 (QB). The second judgment was a closed judgment, which was seen by the Treasury, but not by the Bank, and is, of course, not publicly available. The closed judgment was

much shorter than the open judgment, although it should be added that the open judgment is not particularly long.

16. In his open judgment, Mitting J referred to his closed judgment in two passages. At [2010] EWHC 1332 (QB), para 16, the Judge considered, *inter alia*, the activities of one of the Bank's former customers, Novin. Having referred to the fact that Novin had been "designated by the [UN] Security Council ... as a company which 'operates within ... and has transferred funds on behalf of' the Atomic Energy Organisation of Iran ("AEOI"), he said that "[b]y reason of the designation and for reasons set out in the closed judgment I accept that Novin was an AEOI financial conduit and did facilitate Iran's nuclear weapons programme". At [2010] EWHC 1332 (QB), para 18, the Judge considered the activities of another of the Bank's former customers, Doostan International and its managing director, Mr Shabani. He said that "[f]or reasons which are set out in the closed judgment, I am not satisfied that Mr Shabani has made a full disclosure ... and am satisfied that he and Doostan have played a part in the Iranian nuclear weapons programme".

17. The Bank appealed, and the appeal was heard by the Court of Appeal largely by way of an ordinary, open, hearing. However, there was a short closed hearing at which they considered the closed judgment of Mitting J, and at which the special advocates, but not representatives of the Bank, were present. The Bank's appeal was dismissed by the Court of Appeal (Maurice Kay and Pitchford LJJ, Elias LJ dissenting in part) in an open judgment, which was handed down on 13 January 2011 – [2011] EWCA Civ 1. In the last paragraph of his judgment, [2011] EWCA Civ 1, para 83, Maurice Kay LJ said that although the Court "held a brief closed hearing in the course of the appeal", he did not "find it necessary to refer to it or to the closed judgment of Mitting J".

18. The Bank then appealed to this Court. Before the hearing of the appeal, it was clear that the Treasury would ask this Court to look at the closed judgment of Mitting J. Therefore, it was agreed between the parties that the first day of the three day appeal should be given over to the question of whether the Supreme Court could conduct a closed hearing. At the end of that day's argument, we announced that, by a majority, we had decided that we could do so and that we would give our reasons later.

19. The second day and most of the third day of the hearing were given over to submissions made in open court by counsel for the Bank (and counsel for certain interested parties, shareholders in the Bank) in support of the appeal, and to submissions in reply on behalf of the Treasury. We were then asked by counsel for the Treasury to go into closed session in order to consider the closed judgment of Mitting J. This was opposed by counsel for the Bank and by the special advocates. While we were openly sceptical about the necessity of acceding to the application, by a bare majority we decided to do so. Accordingly, the Court had a closed hearing which lasted about 20 minutes, at which we heard brief submissions on behalf of the Treasury and counter-submissions from the special advocates. We then resumed the open hearing for the purpose of counsel for the Bank making his closing submissions.

20. Contemporaneously with this judgment, we are giving our judgment on the substantive issue, namely whether the 2009 Order should be quashed. The purpose of this judgment is (i) to explain why we decided that we had power to have a closed material hearing, and (ii) to consider the closed material procedure we adopted on this appeal, and to give some guidance for the future in relation to the closed material hearing procedure on appeals.

The closed material procedure in the courts of England and Wales

21. The practice and procedure of the civil courts of England and Wales (the County Court, the High Court and the Court of Appeal) are governed by the Civil Procedure Act 1997 (“the 1997 Act”). Section 1(1) of the 1997 Act provides for the practice and procedure to be set out in the Civil Procedure Rules (“CPR”), and states that they are to be made, and modified, by the negative statutory instrument procedure. Section 1(3) of the 1997 Act states that the power to make the CPR “is to be exercised with a view to securing that the civil justice system is accessible, fair and efficient”.

22. The underlying purpose of the CPR is enshrined in the so-called “overriding objective” in CPR 1(1), which requires every case to be dealt with “justly”. By CPR 1(2), this expression is stipulated to include “so far as is practicable ...ensuring that the parties are on an equal footing [and] ensuring that [every case] is dealt with ... fairly”. The CPR contain detailed rules with regard to procedures before, during and after trial, which seek to ensure that all civil proceedings are conducted in a way which is fair and effective, and, in particular for present purposes, in a way which achieves, as far as is possible in this imperfect, complex and unequal world, openness and equality of treatment as between the parties.

23. In a series of provisions in Part 6 of the 2008 Act, Parliament has recognised that financial restrictions proceedings may require the rules of general application in the CPR to be changed or adapted if a closed material procedure is to be permitted. The first of those provisions is section 66(1), which explains that:

“The following provisions apply to rules of court relating to—

- (a) financial restrictions proceedings, or
- (b) proceedings on an appeal relating to financial restrictions proceedings.”

Section 66(2) requires the “rules of court” to have regard to “the need to secure that” both (a) directions made under schedule 7 to the 2008 Act “are properly reviewed”, and (b) that information is not disclosed “when [it] would be contrary to the public interest”.

24. Section 66(3) of the 2008 Act states that “rules of court” may make provision for various aspects of financial restrictions proceedings, including (a) “the mode of proof and about evidence” and (c) “about legal representation”. Section 66(4) states that “[r]ules of court” may (a) enable “the proceedings to take place without full particulars of the [direction] being given to a party ...”, (b) enable “the court to conduct proceedings in the absence of any person, including a party ...”, (c) deal with “the functions of ... a special advocate”, (d) empower the court “to give [an excluded] party ... a summary of evidence taken in the party’s absence.”

25. Section 67 of the 2008 Act is concerned with rules about disclosure in cases covered by section 66(1). Section 67(2) provides that, subject to the ensuing subsections, “[r]ules of court” must secure that the Treasury give disclosure on the normal principles - ie that they must disclose material which (i) they rely on, (ii) adversely affects their case, and (iii) supports the case of another party. Section 67(3) states that “[r]ules of court” must secure that (a) the Treasury can apply not to disclose material, (b) they can do so under a closed material procedure, with a special advocate present, and (c) the court should accede to the application “if it considers that the disclosure of the material would be contrary to the public interest”, in which case (d) the court must “consider requiring the Treasury to provide a summary of the material to every party”, provided that (e) the summary should not include material “the disclosure of which would be contrary to the public interest”. Section 67(6) emphasises that nothing in the section should require the court to act in such a way as to contravene Article 6.

26. Section 68 of the 2008 Act is concerned with the appointment of special advocates for the purpose of financial restrictions proceedings. Section 72 of the 2008 Act enabled the Lord Chancellor to make the original rules referred to in the preceding sections. Section 72(4) provides that (a) any such rules should be laid before both Houses of Parliament, and (b) if they are not approved within forty days, any such rules will “cease to have effect”.

27. The final provision in Part 6 of the 2008 Act is section 73, the interpretation section, which states that, for the purposes of Part 6 of the 2008 Act:

“‘rules of court’ means rules for regulating the practice and procedure to be followed in the High Court or the Court of Appeal or in the Court of Session”.

28. Pursuant to sections 66 and 67 of the 2008 Act, the Civil Procedure (Amendment No 2) Rules (SI 2008/3085) were made by the Lord Chancellor on 2 December 2008, laid before Parliament the next day, and came into force on 4 December 2008. As a result, the CPR now include a new rule 79, which applies to “Proceedings under the Counter-Terrorism Act 2008”. CPR 79.2 (1) modifies the overriding objective “and so far as relevant any other rule”, to accommodate (2) the

court's duty to "ensure that information is not disclosed contrary to the public interest".

29. CPR 79 then goes on to modify, disapply or replace many of the generally applicable provisions of the CPR in relation to proceedings under the 2008 Act. Most of these variations arise from the provision for a closed material procedure in some such proceedings. Thus, the CPR are amended to take into account the potential need for (i) involvement of special advocates (in e.g. CPR 79.8, CPR 79.18-21), (ii) an application for a closed material procedure (dealt with in CPR 79.11 and CPR 79.25), (iii) directions if such a procedure is ordered (in CPR 79.26), (iv) modification of the rules in relation to evidence and disclosure, including disapplication of CPR 31 relating to public interest immunity (in CPR 79.22), and (v) the possibility of a closed judgment (in CPR 79.28).

The statutory provisions and procedural rules of the Supreme Court

30. The Supreme Court was created by the Constitutional Reform Act 2005 ("the 2005 Act"). Section 40(2) of the 2005 Act states that "[a]n appeal lies to the Court from any order or judgment of the Court of Appeal in England and Wales in civil proceedings". The effect of section 40(3) is that the right of appeal to the Supreme Court from any Scottish court remains the same as it was in relation to appeals to the House of Lords. Section 40(5) states that the Supreme Court "has power to determine any question necessary to be determined for the purposes of doing justice in an appeal to it under any enactment". Section 40(6) provides that "[a]n appeal under subsection (2) lies only with the permission of the Court of Appeal or the Supreme Court...".

31. Section 45(1) of the 2005 Act provides that the President of the Supreme Court "may make rules (to be known as 'Supreme Court Rules') governing the practice and procedure to be followed in the Court". Section 45(3) states that this power must be exercised so as to ensure that "(a) the Court is accessible, fair and efficient", and "(b) the rules are both simple and simply expressed". Section 46 of the 2005 Act states that these rules (1) must be submitted to the Lord Chancellor by the President of the Supreme Court (or, in the case of the initial rules, the senior Lord of Appeal in Ordinary), and then (2) must be laid before Parliament by the Lord Chancellor, and (3) are then subject to the negative resolution procedure.

32. Pursuant to sections 45 and 46 of the 2005 Act, the Supreme Court Rules 2009 (SI 2009/1603) were duly made and laid before Parliament, and came into force on 1 October 2009, the day on which the Supreme Court opened. These rules ("SCR") now govern the procedure of this Court. They are far simpler than the CPR (unsurprisingly, as they are only concerned with appeals, indeed appeals which are almost always second, or even third, appeals).

33. SCR 2 is headed "Scope and objective", and SCR 2(2) states that "the overriding objective" of the SCR is "to secure that the Court is accessible, fair and efficient". The SCR contain no provisions which enable public interest immunity to

be avoided, and no express provisions for closed procedures other than SCR 27(2), as set out in the next paragraph. Thus, SCR 22(1)(b) provides for the service by the appellant of “an appendix ... of the essential documents which were in evidence before, or which record the proceedings in, the courts below”, and SCR 28 states that a Supreme Court judgment “may be ... delivered in open court; or ... promulgated by the Registrar”. However, it is to be noted that SCR 29(1) begins by stating that “In relation to an appeal ..., the Supreme Court has all the powers of the court below”.

34. SCR 27 is headed “Hearing in open court”, and it provides:

“(1) Every contested appeal shall be heard in open court except where it is necessary in the interests of justice or in the public interest to sit in private for part of an appeal hearing.

(2) Where the Court considers it necessary for a party ... to be excluded from a hearing or part of a hearing in order to secure that information is not disclosed contrary to the public interest, the Court must conduct the hearing, or that part of it from which the party [is] excluded, in private but the Court may exclude a party ... only if a person who has been appointed as a special advocate to represent the interests of that party is present when the party [is] excluded.

(3) Where the Court decides it is necessary for the Court to sit in private, it shall announce its reasons for so doing publicly before the hearing begins.

.....”

Can the Supreme Court conduct a closed material procedure: introductory

35. If a closed material procedure was lawfully conducted at the first instance hearing, it would seem a little surprising if an appellate court was precluded from adopting such a procedure on an appeal from the first instance judgment. As the advocate to the Court said in the course of his full and balanced argument, one would normally expect an appeal court to be entitled to have access to all the material available to the court below and to see all the reasoning of the court below. Otherwise, it is hard to see how an appeal process could be conducted fairly or even sensibly. And, if that involves the appellate court seeing and considering closed material, it would seem to follow that that court would have to adopt a closed material procedure.

36. However, particularly in the light of the fundamental principle established in *Al Rawi* [2012] 1 AC 531, the question needs to be looked at with great care. In particular, it is necessary to enquire whether statute requires the Supreme Court to adopt a closed material procedure, at least in some circumstances, on an appeal from the Court of Appeal upholding (or reversing) a first instance decision on an application under section 63(2) of the 2008 Act. As was said by counsel for Liberty (interveners on this appeal), supported by counsel for the Bank, any contention that a

closed material procedure in a particular court in particular circumstances is sanctioned by a statute must be closely and critically scrutinised.

The case for saying that this Court can conduct a closed material procedure

37. The contention that this court has the power to have a closed material procedure is based on section 40(2) of the 2005 Act, supported by section 40(5). The argument proceeds as follows. (i) Section 40(2) provides that an appeal lies to the Supreme Court against “any” judgment of the Court of Appeal; (ii) that must extend to a judgment which is wholly or partially closed; (iii) in order for an appeal against a wholly or partially closed judgment to be effective, the hearing would have to involve, normally only in part, a closed material procedure; (iv) such a conclusion is reinforced by the power accorded to the Court by section 40(5) to “determine any question necessary ... for the purposes of doing justice”, as justice will not be able to be done in some such cases if the appellate court cannot consider the closed material.

38. The strength of this argument is reinforced when one considers the possible outcomes if the Supreme Court cannot consider a closed judgment (or the closed part of the judgment) under a closed material procedure. If that were the case, then, as I see it, there would be five possible consequences.

39. The first possibility would be that the appeal could not be entertained: that cannot be right, because it would conflict with section 40(2), which simply and unambiguously confers on the Supreme Court the power to hear appeals from “any” judgment of the Court of Appeal. The Supreme Court frequently refuses permission to bring an appeal from the Court of Appeal, but that is covered by section 40(6) of the 2005 Act, which expressly provides for such permission. It is one thing to cut down section 40(2) by providing that permission to appeal can be refused on a case by case basis expressly catered for in section 40(6); it is quite another to suggest that a whole class of appeals is impliedly excluded from the wide and general words of section 40(2).

40. The second possibility would be that the Supreme Court could consider the whole judgment, with the closed part being considered in open court. While it can be said that such a course would not involve a breach of any specific provision of Part 6 of the 2008 Act, if construed on a strictly semantic basis, it would wholly undermine its purpose, and the procedural structure it has set up. Unsurprisingly, this second possibility was not canvassed in argument.

41. The third possibility would be that the appeal could be entertained, but only on the basis that the Supreme Court could not look at the closed material. In an extreme case, where the whole judgment of the Court of Appeal was closed, this would be impossible, and would run into the same difficulty under section 40(2) as identified in para 39 above. Even in a case where the Court of Appeal judgment was only closed in part, such a course would be self-evidently unsatisfactory and would seriously risk injustice, and in some cases it would be absurd.

42. The fourth possibility would be that the Court was bound to allow the appeal; the fifth possibility would be that, conversely, the Court was bound to dismiss the appeal. There are clearly theoretical arguments in favour of either course, but it is unnecessary to consider them, because each of those courses is self-evidently equally unsatisfactory. If either of them was correct, it would mean that, when exercising its power to give permission under section 40(6) of the 2005 Act, the Supreme Court would effectively be deciding the appeal, and, indeed, would be doing so without seeing the whole of the judgment below, and without hearing oral argument.

43. In my view, subject to any arguments to the contrary, this analysis establishes that the Supreme Court can conduct a closed material procedure where it is satisfied that it may be necessary to do so in order to dispose of an appeal. This conclusion is reinforced by section 40(5) of the 2005 Act. An appeal under section 40(2) is “an appeal ... under any enactment”. Accordingly, where an appeal is brought against a decision under the 2008 Act, the Supreme Court has “power to determine any question necessary to be determined for the purposes of doing justice in” such an appeal. On any appeal where the judgment is wholly or partly closed, it seems to me that this court could not do justice, or at least would run a very serious risk of not doing justice, if it could not consider the closed material, and it could only do that if it adopted a closed material procedure.

44. It might, I suppose, be said that adopting a closed material procedure on any appeal would involve the antithesis of “doing justice in” that appeal. In a case where Parliament and the CPR have lawfully provided for a closed material procedure at first instance and in the Court of Appeal, I am of the view that, on the contrary, for this Court to entertain an appeal without considering the closed material would, at least in many cases, not be doing justice, either in the sense of fairly determining the appeal or in the sense of being seen fairly to determine the appeal, notwithstanding that the material will be considered in a closed hearing.

45. The view that the Supreme Court can conduct a closed material procedure also derives some support from the provisions of SCR 27(2), and from SCR 29(1). However, if the Supreme Court would not otherwise have the power to conduct a closed material procedure, it could not, in my view, derive such a power solely from its rules. Accordingly those two rules can fairly be said to do no more than to give comfort to my conclusion.

46. It is right to mention that on this appeal, we are not being invited to consider a closed judgment of the Court of Appeal, as they did not find it necessary to give a closed judgment or even to include a closed paragraph in their open judgment. However, the trial judge gave a closed judgment, and, if it is open to this Court to consider, in a closed material procedure, a closed Court of Appeal judgment for the reasons just discussed, it must follow that we can consider, in a closed material procedure, a closed judgment given by the trial judge.

47. Accordingly, I conclude that, unless there are stronger arguments to the contrary, the Supreme Court has power to entertain a closed material procedure on appeals against decisions of the courts of England and Wales on applications brought under section 63(2) of the 2008 Act.

The arguments that we cannot conduct a closed material procedure

48. Having reached this provisional conclusion, it is right to acknowledge and consider the contrary arguments. Those arguments are:

- i. A closed material procedure is such a serious inroad into natural justice that it can only be justified by clear and unambiguous statutory words, such as are found in Part 6 of the 2008 Act, but not in the 2005 Act;
- ii. Parliament has plainly limited the closed material procedure under the 2008 Act to the High Court, the Court of Appeal and the Court of Session;
- iii. It is appropriate to exclude the Supreme Court from the courts which can have a closed material procedure, given its role as a constitutional court and ultimate guardian of the common law;
- iv. A closed material procedure requires a set of rules such as CPR 79 which are detailed and appropriately modify the generally applicable rules, and there is no such set of rules for the Supreme Court.

49. None of these points meets the basic argument which persuades me that it is open to the Supreme Court to undertake a closed material procedure, but they nonetheless merit careful attention. Before discussing them, however, it is right to address Liberty's understandable reliance on the fact that, in *Al Rawi* [2012] 1 AC 531, this Court uncompromisingly set its face against introducing a closed material procedure.

50. The stand taken by this Court in *Al Rawi* [2012] 1 AC 531 remains unquestioned, but it does not amount to any sort of indication that there could be no circumstances in which those concerned with the administration of justice could reasonably introduce a closed material procedure. Indeed, at the end of the short passage quoted in para 4 above from Lord Dyson's judgment, he acknowledged that Parliament can do so.

51. Having said that, any judge, indeed anybody concerned about the dispensation of justice, must regard the prospect of a closed material procedure, whenever it is mooted and however understandable the reasons it is proposed, with distaste and concern. However, such distaste and concern do not dictate the outcome in a case where a statute provides for such a procedure; rather, they serve to emphasise the care with which the courts must consider the ambit and effect of the statute in question.

52. At a relatively high level, in terms of constitutional principle and governmental functions, it seems to me that the following propositions apply. (i) The

executive has a duty to maintain national security, which includes both stopping the financing of terrorism and nuclear proliferation and ensuring that some of the information relating to the financing of terrorism remains confidential; (ii) the rule of law requires that any steps aimed at preventing financing of terrorism which damage a person should be reviewable by the courts, and, as far as possible in open court and in accordance with natural justice; (iii) given that such reviews will often involve the executive relying on confidential material, it is for the legislature to decide and to prescribe in general how the tension between the need for natural justice and the need to maintain confidentiality is to be resolved in the national interest; (iv) in the absence of a written constitution, it is the European Convention, through Article 6, as signed up to by the executive and interpreted by the courts, which operates as a principled control mechanism on what the legislature can prescribe in this connection; (v) it is for the courts to decide, within the parameters laid down by the legislature, how the tension between the two needs of natural justice and confidentiality is to be resolved in any particular case.

53. In the more specific context of the issues with which the 2008 Act is concerned, it would be unreasonable not to accept that (i) the Act's aims of fighting the spread of terrorist activity and nuclear proliferation, and improving the security of UK citizens, are important aspects of the most fundamental duties of the executive, and (ii) those aims would be at real risk of being severely hampered if the courts hearing financial restrictions proceedings could not adopt a closed material procedure. Point (i) is self-evident: the two most fundamental functions of the executive are the maintenance of the defence of the realm and of the rule of law, and the 2008 Act appears to me to be within the scope of both those functions. In relation to point (ii), if there can be no closed material procedure, either (a) sensitive material would be seen by a person who may be supporting terrorism or nuclear proliferation, which might advance the very activities which the 2008 Act is designed to deter, or (b) such material would not be put in evidence, in which case a direction under that Act, which was appropriate and in the public interest, may be discharged for lack of evidential support.

54. The legislature has laid down in Part 6 of the 2008 Act, as expanded by CPR 79, how challenges to a direction under schedule 7 to the 2008 Act should be dealt with by the courts, and this includes a closed material procedure, which aims to strike a balance between two competing public interests, and it is a balance which has been held by the Strasbourg Court to be compatible in principle with Article 6. Whether or not one agrees with it, the justification for the way in which the balance has been struck by the legislature in Part 6 of the 2008 Act is clear, lawful and rational. It is against that background that the issue of principle raised on this appeal must be judged.

55. Turning now to the four arguments raised by the intervener and the Bank, there is a basic principle that fundamental rights cannot be taken away by a generally or ambiguously expressed provision in a statute – see eg per Lord Hoffmann in *R v*

Secretary of State, Ex p Simms [2000] 2 AC 115, 132. There is also a basic principle that fundamental rights can only be overridden by a statutory provision through express words or by necessary implication, not merely by reasonable implication – see eg per Lord Hobhouse in *R (Morgan Grenfell) v Special Commissioners* [2003] 1 AC 563, para 45.

56. While these two basic principles are of fundamental importance, they should not be applied without regard to the purpose and context of the statutory provision in issue. Section 40(2) is plainly intended to render every decision of the Court of Appeal to be capable of being appealed to the Supreme Court (unless specifically precluded by another statute), and, as explained, where it is necessary for this court to consider closed material in order to dispose of the appeal justly, this would only be achievable if a closed material procedure could be adopted. In any event, I am unconvinced that the wording of section 40(2) of the 2005 Act could be fairly described as “general” in the sense that that word is used in *Simms* [2000] 2 AC 115, 132: it would be more accurate to describe it as being broad, indeed as broad as possible, in its intended application. Further, if section 40(2) is to be given its full natural meaning, then, for the reasons discussed in the preceding section of this judgment, it necessarily means that the Supreme Court can adopt a closed material procedure.

57. It is true that section 67, read together with section 73, of the 2008 Act only extends to the rules of the Court of Appeal, High Court and Court of Session, but there were no Supreme Court Rules when that Act was passed. Indeed, there was no Supreme Court at that time: the Judicial Committee of the House of Lords, the Law Lords, were still in place, although they had a very short life expectancy (as an institution). They sat as a committee of the House of Lords, and could have been expected to look after their own procedure. It is true that the 2005 Act had been enacted by the time that the Bill which became the 2008 Act was being considered, but those drafting and debating the Bill would have known that the 2005 Act contained sections 40(2) and (5); they would also have known that the SCR had yet to be promulgated, and could have assumed that they would provide for a closed material procedure – as indeed they do in SCR 27(2), and, indirectly, in SCR 29(1).

58. In any event, rules governing what should be done before and during a trial have to be far more detailed than those governing what should be done before and during an appeal. Given that there were to be very detailed procedures prescribed for a closed material procedure at first instance (and on the first appeal), Parliament could fairly have assumed that there would be no need for very detailed provisions for a closed material procedure in this Court: again, in the light of SCR 27(2) and 29(1), such a view would have been prescient. It is true that sections 66-73 of the 2008 Act apply to the Court of Appeal as well as to the High Court, but that is because the CPR apply to both courts.

59. I am unimpressed by the argument that the Supreme Court was intentionally excluded from the ambit of closed material procedures in sections 66-73 of the 2008

Act, because of the Court's status. If that was the legislative intention, one would have expected it not only to have been spelt out, but to have been catered for, especially in the light of section 40(2) of the 2005 Act. It seems most unlikely that Parliament would have left section 40(2) unamended, while intending the Supreme Court to be unable to adopt a closed material procedure. If it had had such an intention, Parliament would, in my view, have provided that, in relation to cases where the courts below had adopted a closed material procedure, appeals to the Supreme Court were excluded, or could only proceed on a certain specified procedural basis. Otherwise, on this hypothesis, Parliament would have intended to leave this Court with the series of unsatisfactory options considered in paras 39-42 above.

60. The notion that the Supreme Court's constitutional role is so important that it cannot conduct a closed material procedure has a certain appeal (particularly perhaps to a Supreme Court Justice), but I am unimpressed by it. The Supreme Court is not a special constitutional court, but it generally limits the appeals it considers to those that raise points of general public importance. If the Supreme Court were to adopt a closed material procedure on an appeal, it would be most unlikely to result in a judgment which contained any statements of general public importance, or even of general significance, which were in closed form. Almost by definition, the closed evidence will be factual (including, possibly, expert) in nature, and it will normally be specific to the particular case. It is hard to believe that there could be circumstances in which it would be impossible for the Court to provide an open judgment which dealt clearly and comprehensively with all the points of any general legal significance in the appeal, even if some of the discussion of the details of the evidence and arguments has to remain closed. And if such circumstances did arise, then the problem would be a measure of the extraordinary sensitivity of the material concerned, which would make it all the more important that it remained closed. Having read in draft the judgment of Lord Hope, I would like to record my agreement with what he says in paras 98-100 in connection with this Court giving a closed judgment.

61. We were taken to other statutes which provide for a closed material procedure, but all that they establish, in my view, is that there is more than one drafting technique available to prescribe for such procedures.

62. All in all, therefore, I am unpersuaded by the various arguments raised against my provisional view that it is open to this Court to adopt a closed material procedure in an appeal under the 2008 Act if justice requires it.

IV. Questions on the Decision

1. What principles are behind the court's arguments?
2. Would you agree with the argumentation?
3. Are there other principles you would consider in your country?

V. **Bank Mellat v Her Majesty's Treasury (No. 2)**



Read the extract from the decision below. What other principle(s) does the Supreme Court consider to be related to the principle of proportionality? How does the principle of proportionality differ from the principle of proportionality as understood in your country? Do you agree with the application of the principle of proportionality in the matter?

Summary of the facts

This judgment concerned the Bank's appeal against the Court of Appeal's decision to approve of the 2009 Order.



**Trinity
Term [2013]
UKSC 39**

On appeal from: [2011] EWCA Civ 1

JUDGMENT

Bank Mellat (Appellant) v Her Majesty's Treasury (Respondent) (No. 2)

before

**Lord Neuberger, President
Lord Hope, Deputy President
Lady Hale
Lord Kerr
Lord Clarke
Lord Dyson
Lord
Sumption
Lord Reed
Lord
Carnwath**

JUDGMENT GIVEN ON

19 June 2013

Heard on 19, 20 and 21 March 2013

Appellant

Michael Brindle QC
Amy Rogers
Dr Gunnar Beck
(Instructed by Zaiwalla
and Co)

Respondent

Jonathan Swift QC
Tim Eicke QC
Robert Wastell
(Instructed by Treasury
Solicitors)

Special Advocates

Martin Chamberlain QC
QC Melanie Plimmer
(Instructed by Special
Advocates Support Office)

Advocate to the Court

Robin Tam
(Instructed by Treasury
Solicitors)

Intervener

Nicholas Vineall QC
(Instructed by Zaiwalla
and Co)

1. LORD SUMPTION (with whom Lady Hale, Lord Kerr, and Lord Clarke agree in whole; Lord Neuberger and Lord Dyson agree only on the procedural grounds, Lord Carnwath only on the substantive grounds)

Introduction

2. This appeal is about measures taken by H.M. Treasury to restrict access to the United Kingdom's financial markets by a major Iranian commercial bank, Bank Mellat, on the account of its alleged connection with Iran's nuclear weapons and ballistic missile programmes.

3. The proliferation of nuclear weapons is an international issue of great importance to the security of the United Kingdom and the international community. For a number of years, Iran has had a major industrial programme which the United Kingdom, along with the rest of the international community, believes to be directed to the development of the technical capability to produce nuclear weapons and to the improvement of its ballistic missile capabilities. Between 2006 and 2008 the United Nations Security Council adopted a number of resolutions under Article 41 of the United Nations Charter, which

deals with threats to international peace and security. Security Council Resolution 1737 (2006) called on Iran to suspend various proliferation-sensitive nuclear activities, and called on states to take measures to control the trade in certain critical materials, components, equipment and services. Paragraph 12 of this Resolution also required states to freeze the assets in their national territory of a number of persons or organisations identified in Annex I as being involved in Iran's nuclear and ballistic missile programmes. Resolution 1747 (2007) extended these provisions to a number of additional persons and organisations identified in Annex I to the new resolution. These included entities providing ancillary services to Iran's nuclear and armaments industries, among them two banks. Security Council Resolution 1803 (2008) strengthened the measures required by Resolutions 1737 and 1747. In relation to the provision of banking and other financial services to support Iran's weapons programmes, the new resolution called upon all states to

“exercise vigilance over the activities of financial institutions in their territories with all banks domiciled in Iran, in particular with Bank Melli and Bank Saderat, and their branches and subsidiaries abroad, in order to avoid such activities contributing to the proliferation sensitive nuclear activities, or to the development of nuclear weapon delivery systems.”

[...]

5. If the conditions in paragraph 1 as to the existence of a relevant risk are satisfied, the Treasury may give a direction to one or more persons “operating in the financial sector” (essentially credit and financial institutions) regulating their dealings with any “designated person”. A “designated person” includes any person carrying on business in or resident or incorporated in the foreign country in question: see paragraph 9(1). The direction may require the financial institutions to whom it is addressed to exercise an enhanced customer due diligence so as to obtain information about the designated person and those of its activities which contribute to the risk (paragraph 10). It may require enhanced monitoring (paragraph 11) or systematic reporting (paragraph 12) to the same end. But the most draconian provision is paragraph 13, which provides that the direction may require those to whom it is addressed “not to enter into or continue to participate in... any transaction or business relationship with a designated person.” Under paragraph 16(4), any direction made in the exercise of these powers expires a year after it is made. A direction made under Schedule 7 must be contained in an order: see paragraph 14(1). By section 96, any order under the Act must be made by statutory instrument.

6. It will be apparent that for designated persons with a substantial business in the United Kingdom, especially if they are banks, the exercise of the power conferred by paragraph 13 will have extremely serious and possibly irreversible consequences. The Act provides three relevant safeguards against the unwarranted use of this power. First, under Schedule 7, paragraph 14(2), if the direction contains requirements of a kind mentioned in paragraph 13 of Schedule 7 (limiting or ceasing business with a designated person) it must be laid before Parliament after being made and unless approved by affirmative resolution within 28 days will cease to have effect at the end of that period. Second, Schedule 7, paragraph 9(6) provides that the requirements imposed by a direction must be proportionate having regard, in the case within paragraph 1(4) to the risk referred

to in that paragraph. This means the risk to the national interests of the United Kingdom presented by the development of nuclear weapons, radiological, biological or chemical weapons in the foreign country. Third, section 63 of the Act provides a special procedure by which a person affected by any “decision” of the Treasury, including a decision under Schedule 7, may apply to the High Court to set it aside, applying the principles applicable on an application for judicial review.

7. On 9 October 2009 the Treasury made an order, the Financial Restrictions (Iran) Order 2009 SI 2009/2725, which came into force three days later on 12 October. It was made under Schedule 7, paragraph 13 of the Act and required all persons operating in the financial sector not to enter into or to continue to participate in any transaction or business relationship with Bank Mellat or any of its branches or with a shipping line called IRISL. The direction was laid before Parliament on 12 October 2009. It was approved by the Delegated Legislation Committee of the House of Commons on 28 October and by the Grand Committee of the House of Lords on 2 November.

[...]

15. In his open judgment Mitting J made the following findings, which represent at best a very partial acceptance of the Treasury’s case on the facts:

- a. Bank Mellat “has in place a mechanism, which it operates conscientiously, to ensure that it does not provide banking services to Security Council designated entities and individuals.” This finding reflected the Bank’s evidence, which described its due diligence procedures.
- b. Novin Energy Company was a “financial conduit” for AEOI and did facilitate Iran’s nuclear weapons programme. But once it was designated in Security Council Resolution 1747, the Bank ran down and eventually terminated its relationship with it.
- c. Doostan International had played a part in the Iranian nuclear weapons programme. The Bank holds accounts for Doostan and for its managing director Mr Shabani, but the Bank had investigated the position in good faith and found nothing unusual or suspicious. Mitting J considered that the position with regard to Doostan “does not greatly matter”.
- d. Mitting J was not satisfied on the information available to him that the Bank had provided banking services to the two individuals said to be senior officials of the AIO. Their names are very common in Iran and it had not proved possible to identify them in the Bank’s records.
- e. Bank Mellat is not controlled by the Iranian government, which exercises voting rights only in respect of the 20% of the shares which it owns. Nonetheless some pressure would be brought to bear on the Iranian government by the direction.

16. In substance, therefore, Mitting J found that while the Bank had provided banking services to two entities, Novin and Doostan, which were involved in the Iranian nuclear

weapons and ballistic missiles programmes, this had happened without their knowledge and in spite of their conscientiously operated procedures to avoid doing so. The judge nevertheless dismissed the Bank's substantive grounds of application because these very facts demonstrated "the risk that is in any event obvious, that however careful the bank may be, the bank's facilities are open to use by entities participating in Iran's nuclear weapons programme." The judge put the point in this way at para 16:

"The Treasury's case is not that the bank has knowingly assisted Security Council designated entities after designation, or even that it has knowingly assisted entities liable to be designated, but which have not yet been, by providing banking facilities to them, but that it has the capacity to do so, has in one instance done so and is likely to do so in the future. The fundamental justification for the Order *is* that, even as an unknowing and unwilling actor, the bank is, by reason of its international reach, well placed to assist entities to facilitate the development of nuclear weapons, by providing them with banking facilities, in particular trade finance. Concealment of the true nature of imported goods paid for by a letter of credit is straight forward: all that an issuing bank sees are documents. On presentation of compliant documents describing innocent goods, the bank must pay, whatever the nature of the goods in fact imported. Access to the international financial system is, as the Financial Action Task Force reported on 18 June 2008, essential for what it describes as "proliferators". I accept Mr Robertson's conclusion, in paragraph 57 of his statement, that Iran's banking system provides many of the financial services which underpin procurement of the raw materials and components needed for its nuclear and ballistic missile programmes."

[...]

The Bank's substantive grounds

19. The bank now accepts, at least for the purpose of this litigation, that the statutory prerequisites in Schedule 1, paragraph 1 of the Act for the making of the direction were satisfied. In other words, the Treasury reasonably believed that Iran's nuclear and ballistic missiles programmes posed a significant risk to the national interests of the United Kingdom. But that is not enough to justify the order. This is because unlike the Iran (Financial Sanctions) Order 2007, a Schedule 7 direction is not a sanctions regime. Its purpose is directly to restrict the availability of financial services which contribute to the relevant risk. Directions made under it are essentially preventative and remedial rather than punitive or deterrent. Thus Schedule 7 applies in the same way to the risk of terrorist financing and money-laundering associated with a foreign country as it does to the risk of nuclear proliferation. All of the specific directions for which Schedule 7 provides are addressed to the particular risks whose existence has given rise to the direction. They require things to be done by the financial institutions to whom they are addressed with a view to directly restricting the contribution which the designated person may make to that risk, whether it be by gathering or reporting of information relating to its activities or, as in the present case, by wholly ceasing business dealings with him. Critically, paragraph 9(6) of Schedule 7 posits a functional relationship between the conduct which may be required by the direction and the particular risk which justified the making of it in the first place. It follows that the

essential question raised by the Bank's substantive objections to the direction is whether the interruption of commercial dealings with Bank Mellat in the United Kingdom's financial markets bore some rational and proportionate relationship to the statutory purpose of hindering the pursuit by Iran of its weapons programmes.

20. The requirements of rationality and proportionality, as applied to decisions engaging the human rights of applicants, inevitably overlap. The classic formulation of the test is to be found in the advice of the Privy Council, delivered by Lord Clyde, in *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 at 80. But this decision, although it was a milestone in the development of the law, is now more important for the way in which it has been adapted and applied in the subsequent case-law, notably *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 (in particular the speech of Lord Steyn), *R v Shayler* [2003] 1 AC 247 at paras 57-59 (Lord Hope of Craighead), *Huang v Secretary of State for the Home Department* [2007] 2 AC 167 at para 19 (Lord Bingham of Cornhill) and *R (Quila) v Secretary of State for the Home Department* [2012] 1 AC 621 at para 45. Their effect can be sufficiently summarised for present purposes by saying that the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them. Before us, the only issue about them concerned (iii), since it was suggested that a measure would be disproportionate if any more limited measure was capable of achieving the objective. For my part, I agree with the view expressed in this case by Maurice Kay LJ that this debate is sterile in the normal case where the effectiveness of the measure and the degree of interference are not absolute values but questions of degree, inversely related to each other. The question is whether a less intrusive measure could have been used without unacceptably compromising the objective. Lord Reed, whose judgment I have had the advantage of seeing in draft, takes a different view on the application of the test, but there is nothing in his formulation of the concept of proportionality (see his paras 68-76) which I would disagree with.

21. None of this means that the court is to take over the function of the decision-maker, least of all in a case like this one. As Maurice Kay LJ observed in the Court of Appeal, this case lies in the area of foreign policy and national security which would once have been regarded as unsuitable for judicial scrutiny. The measures have been opened up to judicial scrutiny by the express terms of the Act because they may engage the rights of designated persons or others under the European Human Rights Convention. Even so, any assessment of the rationality and proportionality of a Schedule 7 direction must recognise that the nature of the issue requires the Treasury to be allowed a large margin of judgment. It is difficult to think of a public interest as important as nuclear non-proliferation. The potential consequences of nuclear proliferation are quite serious enough to justify a precautionary approach. In addition, the question whether some measure is apt to limit the risk posed for the national interest by nuclear proliferation in a foreign country, depends on an experienced judgment of the international implications of a wide range of information, some of which may be secret. This is pre-eminently a

matter for the executive. For my part, I wholly endorse the view of Lord Reed that “the making of government and legislative policy cannot be turned into a judicial process.”

22. Nonetheless there are, as it seems to me, two serious difficulties about the conclusion which both Mitting J and the Court of Appeal reached in the present case. The first is that it does not explain, let alone justify, the singling out of Bank Mellat, if as both courts below agreed the problem is a general problem of international banking. The second is that the justification for the direction which they have found was not the one which ministers advanced when laying the direction before Parliament, and was in some respects inconsistent with it.

23. As I have pointed out, by reference to the various statements of Treasury ministers, the justification for the measure which was given to Parliament was that there was a particular problem about Bank Mellat which did not apply to the generality of Iranian banks. As the Exchequer Secretary pointed out on 17 December 2009, the direction was a targeted measure which did not apply to transactions with other banks. That must mean, and would certainly have conveyed to Parliament, either (i) that Bank Mellat was knowingly collaborating in transactions related to the Iranian programmes, or at least turning a blind eye to them, or else (ii) that Bank Mellat, even on the footing that it was acting in good faith had unacceptably low standards of customer due diligence, which made it especially liable to let through such transactions. The existence of special problems at Bank Mellat was also a substantial part of the justification put forward in the more detailed explanation given in Mr Robertson in his witness statement. Unfortunately, it was the part which the judge did not accept. The judge has found that Bank Mellat had a conscientiously applied policy of not providing banking facilities and banking services to entities identified in the United Nations list as being connected to the Iranian weapons programmes. He has found that it wound down and then terminated its relationship with Novin once it had been added to the list, and that an investigation into Doostan had thrown up nothing unusual or suspicious. When (after the hearing before Mitting J) Doostan was added to the list of entities connected with the Iranian weapons programmes by the United Nations Security Council, the relationship with them was terminated as it had been in Novin’s case. The judge made no finding about the inadequacy of Bank Mellat’s controls. Neither the Treasury ministers when justifying the measure to Parliament nor Mr Robertson when explaining it to the court suggested that they were particularly lax. Mr Robertson did say that in general Iranian standards of due diligence were low. This, he said, made them vulnerable to being used to channel illicit finance, and meant that UK financial institutions dealing with them could not assume that they would necessarily have procedures in place to screen out transactions of concern. Mr Robertson did not, however, suggest that Bank Mellat was especially deficient in this respect and the judge’s finding about their procedures suggests that they were satisfactory, at any rate in relation to the weapons programmes. Against this background, the emphasis of the Treasury’s argument underwent a radical shift after the order was challenged towards a justification based on the risk that Bank Mellat might be the “unwitting and unwilling” channel by which the entities directly involved in the Iranian weapons programmes financed their importation of materials, services and equipment.

24. Mitting J and the Court of Appeal accepted this argument. They considered that the justification for the direction was to be found not in any problem specific to Bank Mellat but in the general problem for the banking industry of preventing their facilities from being used for purposes connected with the Iranian weapons programmes. As the

judge pointed out, concealment of the true nature of the imported goods paid for by letters of credit is straightforward. “However careful a bank may be,” he said, “the bank’s facilities are open to use by entities participating in Iran’s nuclear weapons programme.” For this reason, he thought that the direction represented the only “reasonably practicable means of ensuring reliably that the facilities of an Iranian bank with international reach will not be used for the purpose of facilitating the development of nuclear weapons by Iran.” However, the direction made no attempt to prevent every Iranian bank with an international reach from facilitating Iran’s weapons programmes, but only one of them. Indeed, by emphasising that it remained open to international traders to use other banks, the Exchequer Secretary apparently invited them to use instead channels of trade finance many, perhaps all of which would be affected by precisely the same inherent problems as Bank Mellat.

25. A measure may respond to a real problem but nevertheless be irrational or disproportionate by reason of its being discriminatory in some respect that is incapable of objective justification. The classic illustration is *A v Secretary of State for the Home Department* [2005] 2 AC 68, another case in which the executive was entitled to a wide margin of judgment for reasons very similar to those which I have acknowledged apply in the present case. The House of Lords was concerned with a derogation from the Convention permitting the detention of non-nationals whose presence in the United Kingdom was considered by the Home Secretary to be a risk to national security and who could not be deported. The House held that this was not a proportionate response to the terrorist threat which provoked it: see in particular paras 31, 43-44 (Lord Bingham of Cornhill), 132 (Lord Hope of Craighead), and 228 (Baroness Hale of Richmond). No one disputed that the executive had been entitled to regard the applicants as a threat to national security. Plainly, therefore, the legislation in question contributed something to the statutory purpose of protecting the United Kingdom against terrorism, if only by keeping some potential terrorists in prison. It was nevertheless disproportionate, principally because it applied only to foreign nationals. That was relevant for two reasons. One was that the distinction was arbitrary, because the threat posed by comparable UK nationals, to whom the legislation did not apply, was qualitatively similar, although quantitatively smaller. The other was that it substantially reduced the contribution which the legislation could make to the control of terrorism, and made it difficult to suggest that the measure was necessary. This was because if (as the Committee assumed) the threat from UK nationals could be adequately addressed without depriving them of their liberty, no reason was shown why the same should not be true of foreign nationals. As Lord Hope put it at para 132, “the distinction raises an issue of discrimination, ... but as the distinction is irrational, it goes to the heart of the issue about proportionality also.”

26. Every case turns on its own facts, and analogies with other decided cases can be misleading. The suppression of terrorism and the prevention of nuclear proliferation are comparable public interests, but the individual right to liberty engaged in *A v Secretary of State for the Home Department* can fairly be regarded as the most fundamental of all human rights other than the right to life and limb. The right to the peaceful enjoyment of business assets protected by article 1 of the First Protocol, is not in the same category of human values. But the principle is not fundamentally different.

27. I would not go so far as to say that the Schedule 7 direction in this case had no rational connection with the objective of frustrating as far as possible Iran’s weapons programmes. On the footing that a precautionary approach is justified, the elimination of

any Iranian bank from the United Kingdom's financial markets may well have added something to Iran's practical problem in financing transactions associated with those programmes, just as the incarceration of some potential terrorists under Part IV of the Crime and Security Act 2001 may have made some difference to the reduction of terrorism. But I think that the distinction between Bank Mellat and other Iranian banks which was at the heart of the case put to Parliament by ministers was an arbitrary and irrational distinction and that the measure as a whole was disproportionate. This is because once it is found that the problem is not specific to Bank Mellat but an inherent risk of banking, the risk posed by Bank Mellat's access to those markets is no different from that posed by the access which comparable banks continued to enjoy. Moreover, the discriminatory character of the direction must drastically reduce its effectiveness as a means of impeding the Iranian weapons programmes. As the Exchequer Secretary herself pointed out, "as long as all financial sanctions and relevant risk warnings are complied with, alternative banks may be used." Nothing in the Treasury's case explains why we should accept that it is necessary to eliminate Bank Mellat's business in London in order to achieve the objective of the statute, if the same objective can be sufficiently achieved in the case of comparable banks by requiring them to observe financial sanctions and relevant risk warnings. It may well be that other Iranian banks have not been found to number among their clients entities involved in Iran's nuclear and ballistic missile programmes. But it follows from the fact that this is a problem inherent in the conduct of international banking business that they are as likely to do so as Bank Mellat. The direction was irrational in its incidence and disproportionate to any contribution which it could rationally be expected to make to its objective. I conclude that that it was unlawful.

The Bank's procedural grounds

28. I also consider that the Bank is entitled to succeed on the ground that it received no notice of the Treasury's intention to make the direction, and therefore had no opportunity to make representations.

29. The duty to give advance notice and an opportunity to be heard to a person against whom a draconian statutory power is to be exercised is one of the oldest principles of what would now be called public law. In *Cooper v Board of Works for the Wandsworth District* (1863) 14 CB (NS) 180, the Defendant local authority exercised without warning a statutory power to demolish any building erected without complying with certain preconditions laid down by the Act. "I apprehend", said Willes J at 190, "that a tribunal which is by law invested with power to affect the property of one Her Majesty's subjects is bound to give such subject an opportunity of being heard before it proceeds, and that rule is of universal application and founded upon the plainest principles of justice."

30. In *R v Secretary of State for the Home Department Ex p Doody* [1994] 1 AC 531, 560, Lord Mustill, with the agreement of the rest of the Committee of the House of Lords, summarised the case-law as follows:

"My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the

general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.”

31. It follows that, unless the statute deals with the point, the question whether there is a duty of prior consultation cannot be answered in wholly general terms. It depends on the particular circumstances in which each direction is made. Some directions that might be made under Schedule 7 of the Act could not reasonably give rise to an obligation on the Treasury’s part to consult the targeted entity, for example because there was a real problem about the implicit or explicit disclosure of secret intelligence or because prior consultation might frustrate the object of the direction by enabling the targeted entity to evade its operation, notably in a case involving money-laundering or terrorism. In this case, the Treasury has raised only two practical difficulties about consulting the Bank in advance of the direction. The first was the difficulty raised by Mr Robertson that “it would not have been appropriate to have notified Bank Mellat of the Treasury’s intention to make the direction contained in the 2009 Order before 12 October 2009, because this would have provided it with the opportunity to rearrange business relationships or transactions with the UK financial sector to ensure (for example) that they were indirect and so not caught by the prohibitions.” The judge rejected this, pointing out that the Bank could just as easily do that after the direction as before. That conclusion, which seems inescapable, has not been challenged on appeal. The second practical difficulty was raised by way of submission in the Court of Appeal and dealt with in the judgment of Maurice Kay LJ, who thought that it had “some force”. This was the supposed practical difficulty of permitting representations in a situation where there is closed material. I have to say that for my part I am not impressed by this difficulty. In justifying the direction in the course of these proceedings, the Treasury disclosed the gist of the closed material including the provision of banking facilities to Novin and Doostan and their alleged provision to Mr Taghizadeh and Mr Esbati. I cannot see why they should have had any greater difficulty in disclosing before the making of the direction the material that they were quite properly required to disclose afterwards.

32. In my opinion, unless the Act expressly or impliedly excluded any relevant duty of consultation, it is obvious that fairness in this case required that Bank Mellat should have had an opportunity to make representations before the direction was made. In the first place, although in point of form directed to other financial institutions in the United Kingdom, this was in fact a targeted measure directed at two specific companies, Bank Mellat and IRISL. It deprived Bank Mellat of the effective use of the goodwill of their English business and of the free disposal of substantial deposits in London. It had, and was intended to have, a serious effect on their business, which might well be irreversible at any rate for a considerable period of time. Secondly, it came into effect almost

immediately. The direction was made on a Friday and came into force at 10.30 a.m. on the following Monday. It had effect for up to 28 days before being approved by Parliament. Third, for the reasons which I have given, there were no practical difficulties in the way of an effective consultation exercise. While the courts will not usually require decision-makers to consult substantial categories of people liable to be affected by a proposed measure, the number of people to be consulted in this case was just one, Bank Mellat, and possibly also IRISL depending on the circumstances of their case. I cannot agree with the view of Maurice Kay LJ that it might have been difficult to deny the same advance consultation to the generality of financial institutions in the United Kingdom, who were required to cease dealings with Bank Mellat. They were the addressees of the direction, but not its targets. Their interests were not engaged in the same way or to the same extent as Bank Mellat's. Fourth, the direction was not based on general policy considerations, but on specific factual allegations of a kind plainly capable of being refuted, being for the most part within the special knowledge of the Bank. For these reasons, I think that consultation was required as a matter of fairness. But the principle which required it is more than a principle of fairness. It is also a principle of good administration. The Treasury made some significant factual mistakes in the course of deciding whether to make the direction, and subsequently in justifying it to Parliament. They believed that Bank Mellat was controlled by the Iranian state, which it was not. They were aware of a number of cases in which Bank Mellat had provided banking services to entities involved in the Iranian weapons programmes, but did not know the circumstances, which became apparent only when the Bank began these proceedings and served their evidence. The quality of the decision-making processes at every stage would have been higher if the Treasury had had the opportunity before making the direction to consider the facts which Mitting J ultimately found.

33. In these circumstances, the only ground on which it could be said that the Treasury was not obliged to consult Bank Mellat in advance, was that such a duty, although it would otherwise have arisen at common law in the particular circumstances of this case, was excluded by the Act in cases such as the present one. It was certainly not expressly excluded. But the submission is that it was impliedly excluded on two overlapping grounds: (i) that the statutory right of recourse to the courts after the making of the direction, which is provided by section 63 of the Act, is enough to satisfy any duty of fairness, or at least must have been intended by Parliament to be enough; and (ii) that consultation is not in law required before the making of subordinate legislation, especially when it is subject to the affirmative resolution procedure. Mitting J and the majority of the Court of Appeal rejected the Bank's procedural case on both grounds.

34. I shall deal first with the implications of the statutory right of recourse to the courts.

35. The duty of fairness governing the exercise of a statutory power is a limitation on the discretion of the decision-maker which is implied into the statute. But the fact that the statute makes some provision for the procedure to be followed before or after the exercise of a statutory power does not of itself impliedly exclude either the duty of fairness in general or the duty of prior consultation in particular, where they would otherwise arise. As Byles J observed in *Cooper v Board of Works for the Wandsworth District* (1863) 14 CB(NS) 190, 194, "the justice of the common law will supply the omission of the legislature." In *Lloyd v McMahon* 1987] 1 AC 625, 702-3, Lord Bridge of Harwich regarded it as

“well established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness.”

Like Lord Bingham in *R (West) v Parole Board* [2005] 1 WLR 350 at para 29, I find it hard to envisage cases in which the maximum *expressio unius exclusio alterius* could suffice to exclude so basic a right as that of fairness.

36. It does not of course follow that a duty of prior consultation will arise in every case. The basic principle was stated by Lord Reid forty years ago in *Wiseman v Borneman* [1971] AC 297, 308, in terms which are consistent with the ordinary rules for the construction of statutes and remain good law:

“Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances, and I would be sorry to see this fundamental general principle degenerate into a series of hard-and-fast rules. For a long time the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation.”

Cf. Lord Morris of Borth-y-Gest at 309B-C.

37. Leaving aside, for a moment, the fact that the direction was required to be made by statutory instrument subject to Parliamentary approval, it is not in my view implicit in section 63 that the right of recourse to the courts is the sole guarantee of fairness. Nor is it implicit that what the common law would otherwise require to achieve fairness is excluded. I say this for three reasons. The first is that section 63 largely reproduces the rights which a person affected by the direction would have anyway. It confers on him the right to apply to the High Court for an adjudication based on the principles of judicial review, and on the court such powers as could be made on judicial review. The only difference which section 63 makes is that permission is not required for such an application. The express provision of a right of recourse to the courts is essentially a peg on which to hang the various procedural provisions in sections 66-72. It would I think be surprising if the mere fact that the right of persons affected to apply for judicial review had been superseded by a statutory application with substantially the same ambit, were to make all the difference to the content of the Treasury's common law duty of fairness. Whatever else Parliament may have intended by enacting section 63, it cannot in my view have intended to reduce the procedural rights of those affected by the Treasury's orders. Second, the statutory right of recourse will not be sufficient to achieve fairness in every case and is certainly not enough to achieve it in cases like this one, falling under Schedule 7, paragraph 13. This is because a direction may take effect, as it did in this case, immediately or almost immediately and, subject to Parliamentary scrutiny, will remain in effect unless and until it is set aside by the Court. An application under section 63 is likely to require evidence on both sides. With the best will in the world it is unlikely to be determined in less than three months and may take considerably longer even without allowing for appeals. In this case, some seven months elapsed before

Mitting J gave judgment. This may not matter much in the case of a direction to exercise heightened customer due diligence or to monitor or report. But it matters a great deal when the direction is in the draconian terms permitted by paragraph 13. A direction to financial institutions to cease business with a designated person is apt to achieve serious and immediate damage while it remains in effect, extending well beyond transactions related to nuclear proliferation. Even if it is set aside, the impact on the designated person's goodwill may be substantial and in some cases irreversible. In some cases, where the decision impugned infringed the applicants' Convention rights, damages will be recoverable after the event. Claims for damages are, however, far from straightforward, and loss can be difficult to prove to the standard which the courts have traditionally required. Third, the recognition of a duty of prior consultation would not frustrate the purpose of the statutory scheme, nor would it cut across its practical operation. Schedule 7 directions made in circumstances like these are not the kind of directions whose effectiveness depends on the ability to strike without warning. As the judge pointed out, the kind of avoiding action which a designated person might be minded to take could equally be taken after the direction had been made.

38. I turn, therefore, to the implications of the fact that the direction is required to be made in subordinate legislation, subject to Parliamentary approval.

39. The Treasury submit that the legislative form of a Schedule 7 direction takes it out of the area in which the courts can imply a duty of fairness or prior consultation. This is self-evident in the case of primary legislation. There is not yet a statute into which such a duty of consultation can be implied. Parliament is not in any event required to be fair. Even if a legitimate expectation has been created, the courts cannot, consistently with the constitutional function of Parliament, control the right of a minister, in his capacity as a member of Parliament, to introduce a bill in either house: *R (on the application of Wheeler) v Office of the Prime Minister* [2008] EWHC 1409 (Admin.) at para 49; *R (on the application of UNISON) v Secretary of State for Health* [2010] EWHC 2655 (Admin.).

40. The position in relation to secondary legislation is necessarily different, because a statutory instrument is made under powers conferred by statute. These powers are accordingly subject to whatever express or implied limitations or conditions can be derived from the parent Act as a matter of construction. In *R v Electricity Commissioners Ex p London Electricity Joint Committee Company (1920) Limited* [1924] 1 KB 171, 208, Lord Atkin observed at a very early stage in the development of public law that he knew of "no authority which compels me to hold that a proceeding cannot be a judicial proceeding subject to prohibition or certiorari because it is subject to confirmation or approval, even where the approval has to be that of the Houses of Parliament." It has sometimes been suggested that this applies only where the ground of objection to a statutory instrument is that it is wholly outside the power conferred by the Act. This was the view expressed by Lord Jauncey and affirmed by the Inner House in *City of Edinburgh District Council v Secretary of State for Scotland* 1985 SC 261. He considered that where Parliament had reserved the right to consider the merits (as opposed to the *vires*) of a statutory instrument, it was not open to the courts to review their rationality or their procedural fairness.

41. I do not think that this distinction is sustainable. In *F. Hoffman La Roche and Co v Secretary of State for Trade and Industry* [1975] AC 295, the applicants objected to a

statutory instrument under the Monopolies and Mergers Act 1965 regulating the prices of their medicines, which had been approved by Parliament under the affirmative resolution procedure. The relevant power was to make orders giving effect to a report of the Monopolies Commission, which the applicants alleged was vitiated by a failure to observe the rules of natural justice. The issue was about the availability of an injunction enforcing the order in circumstances where the Secretary of State was not prepared to give an undertaking in damages. Moreover, it is fair to say that the applicants' case was that the Commission's report was invalid for procedural reasons, and therefore that there was no report on which the Secretary of State could found any power to make the order. But Lord Diplock considered the status of the order generally, at 365:

“In constitutional law a clear distinction can be drawn between an Act of Parliament and subordinate legislation, even though the latter is contained in an order made by statutory instrument approved by resolutions of both Houses of Parliament. Despite this indication that the majority of members of both Houses of the contemporary Parliament regard the order as being for the common weal, I entertain no doubt that the courts have jurisdiction to declare it to be invalid if they are satisfied that in making it the Minister who did so acted outwith the legislative powers conferred upon him by the previous Act of Parliament under which the order is ultra vires by reason of its contents (patent defects) or by reason of defects in the procedure followed prior to its being made (latent defects).”

42. In *R (Asif Javed) v Secretary of State for the Home Department* [2002] QB 129, the Court of Appeal held that it was entitled to review the rationality of a minister's exercise of a statutory power to designate Pakistan by order as a country in which there was “in general no serious risk of persecution”, notwithstanding that the order had been laid before Parliament in draft under the affirmative resolution procedure and the position in Pakistan to some extent discussed. Lord Phillips of Worth Matravers MR, echoing the language of Atkin LJ, said at para 51 that there was no “principle of law that circumscribes the extent to which the court can review an order that has been approved by both Houses of Parliament under the affirmative resolution procedure.” The order was declared to be unlawful.

43. These statements seem to me to be correct in principle. If a statutory power to make delegated legislation is subject to limitations, the question whether those limitations have been observed goes to the lawfulness of the exercise of the power. It is therefore reviewable by the courts. In principle, this applies as much to an implied limitation as to an express one, and as much to a limitation on the manner in which the power may be exercised as it does to a limitation on the matters which are within the scope of the power. The reason why this does not intrude upon the constitutional primacy of Parliament is not simply that delegated legislation, however approved, does not have the status of primary legislation. It is that a statutory instrument is the instrument of the minister (or other decision-maker) who is empowered by the enabling Act to make it. The fact that it requires the approval of Parliament does not alter that. The focus of the court is therefore on his decision to make it, and not on Parliament's decision to approve it. If that is true (as I think it is) as a matter of general principle, it is particularly true of the statutory judicial review for which section 63 of the Counter-Terrorism Act provides. Under section 63(2) the application is to set aside a “decision of the Treasury”. The relevant decision of the Treasury is the decision under Schedule 7, paragraph 1 to “give a

direction". If the court sets aside that decision, it is then required by section 63(4) to quash the resulting order.

44. Where the courts have declined to review the procedural fairness of statutory orders on the ground that they have been subject to Parliamentary scrutiny, they have not generally done so on the ground that Parliamentary scrutiny excludes the duty of fairness in general or the duty of prior consultation in particular. These decisions have generally been justified by reference to three closely related concepts which for my part I would not wish to challenge or undermine in any way. First, when a statutory instrument has been reviewed by Parliament, respect for Parliament's constitutional function calls for considerable caution before the courts will hold it to be unlawful on some ground (such as irrationality) which is within the ambit of Parliament's review. This applies with special force to legislative instruments founded on considerations of general policy. Second, there is a very significant difference between statutory instruments which alter or supplement the operation of the Act generally, and those which are targeted at particular persons. The courts originally developed the implied duty to consult those affected by the exercise of statutory powers and receive their representations as a tool for limiting the arbitrary exercise of statutory powers for oppressive objects, normally involving the invasion of the property or personal rights of identifiable persons. *Cooper v Board of Works for the Wandsworth District* (1863) 14 CB (NS) 180 was a case of this kind, and when Willes J (at 190) described the duty to give the subject an opportunity to be heard as a rule of "universal application", he was clearly thinking of this kind of case. Otherwise the proposition would be far too wide. While the principle is not necessarily confined to such cases, they remain the core of it. By comparison, the courts have been reluctant to impose a duty of fairness or consultation on general legislative orders which impact on the population at large or substantial parts of it, in the absence of a legitimate expectation, generally based on a promise or established practice. Third, a court may conclude in the case of some statutory powers that Parliamentary review was enough to satisfy the requirement of fairness, or that in the circumstances Parliament must have intended that it should be. It is particularly likely to take this view where the measure impugned is a general legislative measure. The reason is that when we speak of a duty of fairness, we are speaking not of the substantive fairness of the measure itself but of the fairness of the procedure by which it was adopted. Parliamentary scrutiny of general legislative measures made by ministers under statutory powers will often be enough to satisfy any requirement of procedural fairness. The same does not necessarily apply to targeted measures against individuals.

45. These considerations lie behind the judgments in the Court of Appeal in *R on the application of BAPIO Action Limited v Secretary of State for the Home Department* [2007] EWCA Civ. 1139, which both Mitting J and Maurice Kay LJ in the Court of Appeal placed at the forefront of their reasoning. *BAPIO* was a judicial review of the decision of the Home Secretary to amend the Immigration Rules without prior consultation so as to abolish permit-free training for doctors without a right of abode in the United Kingdom. There were transitional provisions for those who had already begun their training under the old rules, which protected almost all those who might have claimed to have a legitimate expectation based on the old rules. Sedley LJ, who delivered the leading judgment, began by referring to a dictum of Lord Scarman in *Nottinghamshire County Council v Secretary of State for the Environment* [1986] AC 240. This was a judicial review of the Secretary of State's assessment of the proper level of expenditure by a local authority. It was a classic issue of general policy, involving decisions about the use of resources and the level of taxation, potentially affecting every householder in

Britain, and quite obviously exceptionally difficult to challenge on rationality grounds. Lord Scarman said, at 250, in a passage that is not always quoted in full:

“To sum it up, the levels of public expenditure and the incidence and distribution of taxation are matters for Parliament, and, within Parliament, especially for the House of Commons... If a statute, as in this case, requires the House of Commons to approve a minister’s decision before he can lawfully enforce it, and if the action proposed complies with the terms of the statute..., it is not for the judges to say that the action has such unreasonable consequences that the guidance upon which the action is based and of which the House of Commons had notice was perverse and must be set aside. For that is a question of policy for the minister and the Commons, unless there has been bad faith or misconduct by the minister. Where Parliament has legislated that the action to be taken by the Secretary of State must, before it is taken, be approved by the House of Commons, it is no part of the judges' role to declare that the action proposed is unfair, unless it constitutes an abuse of power in the sense which I have explained.”

Sedley LJ rightly pointed out in *BAPIO* that this reasoning was “predicated on the inapt nature of the subject-matter – public finance – for judicial scrutiny, not upon a quasi-immunity from judicial review of delegated legislation or rules which have been laid before Parliament.” He pointed out that there was no such immunity, and that the Immigration Rules would be reviewable for want of power to make them or for irrationality. Turning to the question whether they were reviewable for procedural unfairness he said this:

“The real obstacle which I think stands in the appellants' way is the difficulty of propounding a principle which reconciles fairness to an adversely affected class with the principles of public administration that are also part of the common law. These are not based on administrative convenience or potential embarrassment. They arise from the separation of powers and the entitlement of executive government to formulate and reformulate policy, albeit subject to such constraints as the law places upon the process and the product. One set of such constraints in modern public law are the doctrines of legitimate expectation, both procedural and substantive.”

I agree with this in the cases to which Sedley LJ was referring, namely those in which delegated legislation was an expression of legislative policy. I think that it represents a more nuanced and accurate statement of the law than the more hard-edged formulations of Maurice Kay LJ and Rimer LJ in the same case.

46. The present case, however, is entirely different. In point of form, a statutory instrument embodying a Schedule 7 direction is legislation. But, as Megarry J observed in *Bates v Lord Hailsham of St. Marylebone* [1972] 1 WLR 1373, the fact that an order takes the form of a statutory instrument is not decisive: “what is important is not its form but its nature, which is plainly legislative” (page 1378). The Treasury direction designating Bank Mellat under Schedule 7, paragraph 13, was not legislative in nature.

There is a difference between the sovereign's legislation and his commands. The one speaks generally and impersonally, the other specifically and to nominate persons. As David Hume pointed out in his *Treatise of Human Nature* (Book III, Part ii, sec 2-6), "all civil laws are general, and regard alone some essential circumstances of the case, without taking into consideration the characters, situations and connexions of the person concerned." The Treasury direction in this case was a command. The relevant legislation and the whole legislative policy on which it was based, were contained in the Act itself. The direction, although made by statutory instrument, involved the application of a discretionary legislative power to Bank Mellat and IRISL and nothing else. It was as good an example as one could find of a measure targeted against identifiable individuals. Moreover, as I have pointed out in dealing with the Bank's substantive complaints, it singled out Bank Mellat from other Iranian banks on account of the Bank's conduct or, in Hume's words, its "characteristics, situations and connexions". It directly affected the Bank's property and business assets. If the direction had not been required to be made by statutory instrument, there would have been every reason in the absence of any practical difficulties to say that the Treasury had a duty to give prior notice to the Bank and to hear what they had to say. In a case like this, is the position any different because a statutory instrument was involved? I think not. That was simply the form which the specific application of this particular legislation was required to take.

47. With a measure such as this one, targeted against "designated persons", it is not possible to say that procedural fairness is sufficiently guaranteed by Parliamentary scrutiny or to suppose that Parliament in enacting the Counter-Terrorism Act ever thought it was. The justification for the direction depends on the particular character and conduct of the designated person, about which Parliament cannot have the same plenitude of information as it is assumed to have about matters of general legislative policy. Many of the essential facts about the particular target will be peculiarly within the designated person's knowledge, and even those known to the Treasury will not necessarily be publicly disclosed.

48. In some cases, the procedure might be regarded as fair even in the case of a targeted measure, and even if the target did not have an opportunity to be heard before the order was made, if he was in a position to make effective representations in the course of the passage of the affirmative resolutions through Parliament. But this was hardly a realistic alternative to prior consultation in the present case. In the first place, the Bank was not in a position to defend itself against the Treasury's allegation that they had had dealings with entities involved in the Iranian weapons programmes until the Treasury identified the entities that they were referring to. They did not identify them in the course of justifying the order in Parliament. They were first identified in correspondence with the Bank's solicitors on 3 December 2009, after the present proceedings had been begun and a month after the Parliamentary processes were complete. Second, unlike other statutory instruments made under the Counter-Terrorism Act, an order giving effect to a Schedule 7 direction is not laid before Parliament in draft before taking effect. It may and in this case did take effect upon being made and was capable of continuing in effect for up to 28 days in advance of an affirmative resolution. This is quite long enough to achieve substantial damage to the interests of the designated person. Third, Schedule 7, paragraph 14(5), expressly excludes the application of the hybrid instrument procedure to such an order. The hybrid instrument procedure is a procedure under the standing orders of the House of Lords which applies to certain instruments directly affecting private or local interests in a manner different from other persons or interests in the same category. Its effect is to allow the House to receive petitions from parties affected. The result is to

exclude any right which a designated person might otherwise have had to make representations by petition as part of the formal Parliamentary process. In my view, these factors underline the value and the importance in the interests of fairness of the Treasury giving the Bank an opportunity to be heard before the order was made.

49. I conclude that the Treasury's direction designating Bank Mellat was unlawful for want of prior notice to them or any procedure enabling them to be heard in advance of the order being made. This makes it unnecessary to consider the more difficult question whether a duty of prior consultation arose by virtue of Article 6 of the European Convention on Human Rights or Article 1 of the First Protocol.

Conclusion

50. I would allow the appeal, set aside the decision of the Treasury to make the direction and quash the order giving effect to it.

[...]

VI. Questions on the Decision

1. What other principle(s) does the Supreme Court consider to be related to the principle of proportionality?
2. How does the principle of proportionality differ from the principle of proportionality as understood in your country?
3. Do you agree with the application of the principle of proportionality in the matter?

G Legitimate Expectations (Lecture 5)

I. General Questions

1. What are "legitimate expectations" (categories, e.g. formal in substance; prerequisites, e.g. basis, good faith, action, damage etc.)?
2. How do legitimate expectations differ from other administrative law principles (reasonableness, proportionality etc.)?
3. Should legitimate expectations be accepted as an administrative law principle? If so to what extent? What are the likely consequences (and dangers) of such a doctrine?

II. Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority

Summary of the facts

The applicant was a property developer which had acquired state land for redevelopment. In Singapore, to ensure that land is used according to land usage policy, it is common for state leases to specify, as a condition of the lease, the permitted uses of the land and the maximum gross floor area for these permissible uses of the land. However, a payment, known as the "differential premium" is payable for lifting these restrictions. The Singapore Land Authority is responsible for assessing the differential premium payable. The applicant argued that they had a legitimate expectation in the way the differential premium would be calculated because of information available from the Singapore Land Authority's circulars to developers and from its website. The circulars and website stated that the differential premium would be calculated based on a Table of Development Charge Rates (DC Table) published by the Urban Redevelopment Authority.

Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority [2013] SGHC 262

- Case Number** : Originating Summons No 457 of 2013
- Decision Date** : 27 November 2013
- Tribunal/Court** : High Court
- Coram** : Tay Yong Kwang J
- Counsel Name(s)** : Alvin Yeo SC, Lim Wei Lee, Lionel Leo and Edmund Koh (WongPartnership LLP) for the applicant; Edwin Tong, Kristy Tan and Peh Aik Hin (Allen & Gledhill LLP) for the respondent; Aurill Kam, Lim Wei Shin, Terence Ang and Leon Ryan (Attorney- General's Chambers) for the Attorney-General.
- Parties** : Chiu Teng @ Kallang Pte Ltd — Singapore Land Authority

Administrative Law – Judicial review

Tay Yong Kwang J:

1 This case concerns the judicial review of the Singapore Land Authority's ("the SLA") assessment of the differential premium ("DP") payable for the lifting of title restrictions for two particular plots of land. The applicant alleges that the assessment of the DP was done without reference to the Development Charge Table of Rates ("the DC Table") published by the Urban Redevelopment Authority ("the URA"). The applicant thus seeks a quashing order against the assessed DP and a mandatory order to direct the SLA to assess the DP in accordance with the DC Table. The Attorney-General, a non-party to the action, also made submissions during the hearing before me.

[...]

The issues

50 Accordingly two main issues arose for consideration in this case:

- (a) Was the SLA's decision to assess the DP through a spot valuation instead of abiding by the DC Table irrational and/or unreasonable?
- (b) Should the doctrine of substantive legitimate expectation be recognised in Singapore law? If so, can the applicant avail itself of this doctrine?

Was the SLA's decision to assess DP via a spot valuation irrational and/or unreasonable?

51 The applicant's first argument is that the SLA's decision to assess the DP by means of a spot valuation was irrational and/or unreasonable. The assessment, it submitted, ought to have been in accordance with the DC Table.

[The court compared notions of irrationality/unreasonableness and legitimate expectations in the common law jurisdictions of England, Canada, Australia and Hong Kong.]

97 *UDL Marine (Singapore) Pte Ltd v Jurong Town Corp* [2011] 3 SLR 94 ("UDL Marine") concerned a case where a tenant applied unsuccessfully to its landlord, a statutory board, for the renewal of a lease. The application for leave for judicial review was dismissed on the ground that the respondent's act of not renewing the lease was not susceptible to judicial review because it was exercising its *private* contractual rights not to renew the lease. Lai Siu Chiu J commented, *obiter*, that both parties had not submitted on the issue of legitimate expectation. Nevertheless, she doubted that the doctrine of substantive legitimate expectation was part of Singapore law because of the presence of competing tensions and her concern that the need to check against inconsistent treatment must be balanced against the undesirable effects of excessively fettering administrative discretion (at [65] and [66]).

98 In *Borissik Svetlana v Urban Redevelopment Authority* [2009] 4 SLR(R) 92 ("Borissik Svetlana"), the applicant was a joint owner of a semi-detached house who

applied for leave for judicial review of the Urban Redevelopment Authority's decision to deny the applicant's application for the construction of a detached bungalow. Leave was denied on the ground that the applicant had not exhausted all her remedies before applying for judicial review. Tan Lee Meng J nevertheless found, *obiter*, that the applicant could not point to any promise made to her by a person with actual or ostensible authority. Tan J went on to state (at [49]):

[*De Smith's Judicial Review* (Sweet & Maxwell, 6th Ed, 2007) lists four conditions for the creation of a legitimate expectation, namely that the expectation must be:

- (i) clear, unambiguous and devoid of relevant qualification;
- (ii) induced by the conduct of the decision maker;
- (iii) made by a person with actual or ostensible authority; and
- (iv) applicable to the applicants, who belong to the class of persons to whom the representation is reasonably expected to apply.

It is unclear if Tan J was referring to a procedural or substantive legitimate expectation. However, at [46], Tan J said:

Finally, the applicant's claim that she had a legitimate expectation that the proposal to redevelop No 2 would be approved **will be considered**. [emphasis added]

The above passage seems to suggest that Tan J had procedural, rather than substantive, legitimate expectation in mind.

99 The Court of Appeal case of *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 ("*Yong Vui Kong*") concerned an appellant who was convicted of a drug trafficking offence and sentenced to death. In a concurring judgment, Andrew Phang and V K Rajah JJA addressed the appellant's argument that a legitimate expectation had arisen that it is the President who would make the decision as to whether the appellant would be pardoned. Citing *Regina v Director of Public Prosecutions, Ex parte Kebilene* [2000] 2 AC 326, they held that such a legitimate expectation could not arise on the facts because clear statutory words will override any expectation. In this respect, Art 22P(1) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) clearly states that the President shall act "on the advice of the Cabinet".

100 Prior case law has thus not addressed, head-on, the issue of whether the doctrine of substantive legitimate expectation is part of Singapore law. Lai J in *UDL Marine* did not have any submissions on this issue before her and doubted that the doctrine existed. Tan J in *Borissik Svetlana* ostensibly had procedural, rather than substantive, legitimate expectation in mind when he cited a framework espoused in the sixth edition of *De Smith*. Andrew Phang and V K Rajah JJA in *Yong Vui Kong* did not address the issue of whether substantive legitimate expectation is part of Singapore law. They dismissed the appellant's argument on the basis that no substantive legitimate expectation could have arisen on the facts.

Summary of respective submissions

101 The applicant here relied chiefly on *Borissik Svetlana* for the proposition that the doctrine of substantive legitimate expectation has received implicit judicial recognition in Singapore. The applicant submitted that Tan J had in that case assumed

that judicial review could be used to protection legitimate expectations of substantive benefit. The applicant further contended that a legitimate expectation arose on the facts. Firstly, the SLA Circulars and the SLA website constituted clear and unambiguous representations that the DP would be computed on the basis of the DC Table. Secondly, in deciding whether to acquire the Land and in determining the appropriate price it was willing to pay, the applicant was induced by the representations. Thirdly, the SLA Circulars and the SLA website were circulated by a person with actual or ostensible authority. Lastly, the applicant belonged to the class of persons to whom the representations were reasonably expected to apply. The applicant also argued that there was no way for it to discover that the SLA had considered directly-alienated land to be an exception to the prescribed method of assessment. There was no publicly available document which stated that directly-alienated land was an exception to the prescribed method of assessment. There was in fact no way for the applicant to find out that the Land was directly alienated to its former owner. The Land Return Clauses in the two lease documents merely state that the DP would be payable in accordance with the DP Clauses. The DP Clause is found in all state leases and there is therefore nothing to disturb the applicant's understanding that the DP would be assessed in accordance with the DC Table.

102 The SLA relied on *UDL Marine* for the proposition that the High Court had, in that case, doubted the existence of the doctrine of substantive legitimate expectation in our law. The SLA, however, conceded that local jurisprudence has not definitively pronounced whether the doctrine of substantive legitimate expectation is part of Singapore law. The SLA submitted that the reasons for and against the said doctrine are finely balanced. In England, the doctrine is hedged with qualifications. Even then, the English approach was categorically rejected by the Australian High Court in *Ex p Lam*, where the court found that the English position did not sit well with the Australian constitutional framework. The SLA also asserted that no expectations whatsoever arose in this case. The threshold for a representation that is clear, unambiguous and devoid of qualification is a high one. Further, the applicant in fact already knew or ought to have known that the DP in its case would be assessed via a spot valuation by the Chief Valuer at 100% in enhancement in land value. There were media releases concerning the redevelopment of a property located at Market Street. Any reasonable developer would have noticed that the leases contained a special covenant — the Land Return Clause — which is not ordinarily found in other State leases.

103 The Attorney-General argued that the doctrine of substantive legitimate expectation should not be adopted in Singapore for three reasons. First, the doctrine was developed in England against the backdrop of the Human Rights Act 1998 and the pressure to assimilate European doctrine into the common law. Second, the underlying rationale of the doctrine is that of abuse of power, which is not principled. Third, the doctrine is inconsistent with the doctrine of separation of powers as enshrined in the Singapore Constitution. In any event, no legitimate expectation arose on the facts. There was no clear, unambiguous or unqualified representation. The SLA Circulars were directed to the general public and did not have the character of a contract. There was also no inducement.

My decision on the doctrine of legitimate expectation

104 The above analysis (at [97] to [100]) shows that case law in Singapore has not addressed directly the issue of whether the doctrine of substantive legitimate expectations is part of Singapore law.

The separation of powers

105 Both the SLA and the Attorney-General placed especial emphasis on the cases of *Ex p Lam* and *Mount Sinai* [*the Australian and Canadian cases compared in this case yet left out of this reader for the sake of simplification*]. I shall deal with both cases in turn.

106 Both the SLA and the Attorney-General relied on *Ex p Lam* for the proposition that the doctrine of substantive legitimate expectation was influenced by European law and is inconsistent with the Australian Constitution and, more specifically, the separation of powers. As Singapore and Australia both have written constitutions, the reasoning in *Ex p Lam* also applies to Singapore.

107 As a preliminary matter, I note that this line of reasoning was present in only McHugh and Gummow JJ's speech and thus did not command the assent of the majority of the court. Gleeson CJ and Hayne J, in separate speeches, did not consider the question of whether the doctrine of substantive legitimate expectation ought to be part of Australian law. Callinan J opined that the said doctrine is not part of Australian law but did not cite the Australian Constitution and the separation of powers as a reason for this holding [...]. This line of reasoning was also not adopted by the Canadian Supreme Court in *Mount Sinai*.

108 Secondly, although European law may have influenced English law, is the English system of government, with its unwritten Constitution, fundamentally different from the Singaporean and Australian systems of government with their written Constitutions? Implicit in the SLA's and the Attorney-General's argument is that a written constitution is a pre-requisite for the separation of powers. According to this argument, the written constitutions of Australia and Singapore explicitly demarcate the powers that are to be allocated to the legislative, executive and judicial branches respectively and it would therefore tantamount to judicial overreach for the judiciary to enforce substantive legitimate expectations. However, it is clear that the UK system, despite the absence of a written constitution, also recognises the separation of powers. In the House of Lords decision of *Regina v Secretary of State for the Home Department, Ex parte Fire Brigades Union and others* [1995] 2 AC 513 ("*Ex p Fire Brigades*"), Lord Keith of Kinkel said (at 567D – E):

It is a feature of the peculiarly British conception of the separation of powers that Parliament, the executive and the courts have each their distinct and largely exclusive domain. Parliament has a legally unchallengeable right to make whatever laws it thinks right. The executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws, and see that they are obeyed. *This requires the courts on occasion to step into the territory which belongs to the executive, to verify not only that the powers asserted accord with the substantive law created by Parliament but also that the manner in which they are exercised conforms with the standards of fairness which Parliament must have intended.* Concurrently with this judicial function Parliament has its own special means of ensuring that the executive, in the exercise of delegated functions, performs in a way which Parliament finds appropriate. [emphasis added in bold and in italics]

109

As a side-note, this case was decided when the House of Lords was still functioning as a court of law, 14 years before the establishment of the Supreme Court of the United Kingdom in 2009 which formalized the separation of the legislative and the judicial functions of the House of Lords in order to comply with the European Convention on Human Rights. In this respect, I refer to a consultation paper entitled *Constitutional Reform: A Supreme Court for the United Kingdom* (July 2003, CP11/03) (available at

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It is not always understood that the decisions of the ‘House of Lords’ are in practice decisions of the Appellate Committee and that non judicial members of the House never take part in the judgments. Nor is the extent to which the Law Lords themselves have decided to refrain from getting involved in political issues in relation to legislation on which they might later have to adjudicate always appreciated. The fact that the Lord Chancellor, as the Head of the Judiciary, was entitled to sit in the Appellate and Judicial Committees and did so as Chairman, added to the perception that their independence might be compromised by the arrangements. *The Human Rights Act, specifically in relation to Article 6 of the European Convention on Human Rights, now requires a stricter view to be taken not only of anything which might undermine the independence or impartiality of a judicial tribunal, but even of anything which might appear to do so.* [emphasis added in bold and in italics]

110 It cannot be argued, therefore, that the doctrine of substantive legitimate expectation should not be law in Singapore simply because Singapore has a written constitution while England, which recognises the doctrine, does not. Instead, this issue should be looked at from first principles.

111 If private individuals are expected to fulfil what they have promised, why should a public authority be permitted to renege on its promises or ignore representations made by it? If an individual or a corporation makes plans in reliance on existing publicized representations made by a public authority, there appears no reason in principle why such reliance should not be protected. [emphasis added in bold]

112 The upholding of legitimate expectations is eminently within the powers of the judiciary. In the context of private law, this is expressed through the enforcement of contracts (which upholds bargains freely made) and the equitable doctrine of estoppel (which upholds the reliance interest of a representee if a representor resiles from his representation inequitably). However, in the public law sphere, in deciding whether a legitimate expectation ought to be upheld, the court must remember that there are concerns and interests larger than the private expectation of an individual or a corporation. If there is a public interest which overrides the expectation, then the expectation ought not to be given effect to. In this way, I believe the judiciary can fulfil its constitutional role without arrogating to itself the unconstitutional position of being a super-legislature or a super-executive.

113 In my view, there ought to be no difference in principle between procedural and substantive legitimate expectations. The reasons enumerated above do not distinguish between the procedural and the substantive and apply equally to both.

[...]

The doctrine and its requirements

118 In my opinion, the doctrine of legitimate expectation should be recognised in our law as a stand-alone head of judicial review and substantive relief should be granted under the doctrine subject to certain safeguards. Having regard to the case law from the various common law jurisdictions and applying some commonsensical principles, I believe the doctrine can operate effectively and fairly in the following manner without the court overstepping its judicial role:

- a. The applicant must prove that the statement or representation made by the public authority was unequivocal and unqualified;
 - i. If the statement or representation is open to more than one natural interpretation, the interpretation applied by the public authority will be adopted; and
 - ii. The presence of a disclaimer or non-reliance clause would cause the statement or representation to be qualified.
- b. The applicant must prove the statement or representation was made by someone with actual or ostensible authority to do so on behalf of the public authority;
- c. The applicant must prove that the statement or representation was made to him or to a class of persons to which he clearly belongs;
- d. The applicant must prove that it was reasonable for him to rely on the statement or representation in the circumstances of his case.
 - i. If the applicant knew that the statement or representation was made in error and chose to capitalize on the error, he will not be entitled to any relief;
 - ii. Similarly, if he suspected that the statement or representation was made in error and chose not to seek clarification when he could have done so, he will not be entitled to any relief;
 - iii. If there is reason and opportunity to make enquiries and the applicant did not, he will not be entitled to any relief.
- e. The applicant must prove that he did rely on the statement or representation and that he suffered a detriment as a result;
- f. Even if all the above requirements are met, the court should nevertheless not grant relief if:
 - i. Giving effect to the statement or representation will result in a breach of the law or the State's international obligations;
 - ii. Giving effect to the statement or representation will infringe the accrued rights of some member of the public;
 - iii. The public authority can show an overriding national or public interest which justifies the frustration of the applicant's expectation.

Application of the doctrine's requirements to the facts

119 I shall first deal with the statements or representations set out in the SLA website. The use of the website is governed by its Terms of Use [...] which explicitly state that "the SLA does not make any representations or warranties whatsoever" including "any representations or warranties as to the accuracy, completeness, reliability, timeliness, currentness, quality or fitness for any particular purpose of the Contents of this Site". The representations set out in the SLA website were therefore

qualified and cannot found a claim for substantive relief under the doctrine of legitimate expectation. Faced with such a wide disclaimer, the applicant should have written to the SLA to confirm its alleged understanding of how the policy would work in practice and, more specifically, how it would impact the particular transaction that the applicant was contemplating getting into. It did not do so and cannot now claim relief under the doctrine.

120 I next consider the SLA Circulars. The SLA Circulars were circulated to the public at large. However, realistically speaking, the only people who would have read (or would be expected to read) the SLA Circulars were property developers or their advisors. The applicant, a property developer, is clearly within the class of persons that the SLA Circulars were targeted at.

121 The SLA Circulars did contain unequivocal and unqualified statements or representations. The 2000 SLA Circular stated that the “determination of DP will be based on the published [DC Table] rates”. The 2007 SLA Circular reiterated this by its statement that the “determination of DP will still be based on the published [DC Table] rates”. Both circulars also enumerated certain exceptions to the applicability of DC Table: where the use as spelt out in the particular title restriction does not fit into any of the use groups and where the lease tenure is upgraded (only the 2000 Circular). The two Circulars stated that the SLA reserves the right to determine if title restrictions should be lifted. However this does not mean that the SLA also reserves the further right to deviate from the DC Table if title restrictions are indeed lifted. Both Circulars did not state that there might be other unpublished exceptions or policies.

122 There was no dispute that the SLA Circulars and the SLA website were published by or with the authority of the SLA.

123 The applicant must prove that it was reasonable for him to rely on the statement or representation. The applicant must also prove that he did rely on the statement or representation and that he suffered a detriment as a result. The applicant averred that it had relied upon the representation in the SLA Circulars that DC Table rates would apply in purchasing the land. It would appear therefore that reliance was placed on the SLA’s publications and if the applicant now has to pay a much higher DP than was represented, there would definitely be detriment caused to the applicant. However, was it reasonable for the applicant to have relied on the SLA’s publications in the circumstances of this case?

124 The Land Return Clause (present in the leases of both Plots) [...] provided that the applicant as lessee was obliged to notify the lessor, the Singapore Government, if the land in question was not used for the purposes specified. Upon notification, the Government would have a year to decide whether or not to buy over the land at Land Acquisition Act (Cap 152, 1985 Rev Ed) rates. Such rates might turn out to be lower than the price which the land would have fetched in the market, simply because potential purchasers would have paid a higher price in the anticipation of getting approval for a change of the use of the land or for an increase in the plot ratio. In particular, s 33(5)(e) of the Land Acquisition Act explicitly states that:

the market value of the acquired land shall be deemed not to exceed the price which a bona fide purchaser might reasonably be willing to pay, after taking into account the zoning and density requirements and any other restrictions imposed by or under the Planning Act (Cap. 232) as at the date of acquisition and any restrictive covenants in the title of the acquired land, and **no account shall be taken of any potential value of**

the land for any other use more intensive than that permitted by or under the Planning Act as at the date of acquisition. [emphasis added]

The applicant in purchasing the Land took upon itself the risk of compulsory acquisition which, if it had occurred, could have resulted in a huge loss.

125 The SLA furnished evidence that the Land Return Clause was present in only 242 State leases, representing only 1.25% of the total number of State leases. The applicant, an experienced property developer, would have known that the Land Return Clause was peculiar and atypical of State leases. The applicant tried to understate this by arguing that the Land Return Clause merely referred back to the DP Clause for the computation of the DP payable and that it was therefore unaware of the significance of the Land Return Clause. I was not convinced by this. The Land Return Clause should have alerted an experienced property developer like the applicant to the fact that the Land was not under a “normal” State lease.

126 It was widely reported in the local media in 2008 that Capitaland had to pay a DP equivalent to 100% of the enhancement in land value to redevelop the Market Street Car Park. At the hearing, the applicant tried to downplay this by saying that it understood 100% of the enhancement in land value to mean 100% of the enhancement in land value as indicated by the DC Table (because the convention after the 2007 SLA Circular was to charge 70%, an increase from the 50% payable under the 2000 SLA Circular). I accept that the local media reports did not state the method upon which the 100% enhancement in value was calculated. However, the press release by Capitaland on 3 January 2008 (almost two years before Lot 1338M was acquired), stated that the said redevelopment was subject to two conditions, one of which was “the payment by the lessee (CCT) of 100% of the enhancement in land value as assessed by the Chief Valuer in a spot valuation”.

127 Considering the evidence cumulatively, the irresistible inference is that the applicant ought to have known that the DP for the Land would not be assessed according to the DC Table. At the very least, the applicant should have written to the SLA to ask if DC Table rates would be applied to State leases which contain the Land Return Clause, especially in the light of the widely-reported Market Street Car Park redevelopment. In fact, the applicant started construction work sometime after 8 April 2011 and before the SLA letter dated 29 November 2011, where the SLA first approved the lifting of title restrictions and stated that the DP would be assessed at 100% of the enhancement in land value in a spot valuation. The construction costs could very easily have been incurred for nothing had the SLA not given approval for the lifting of title restrictions in the first place.

128 As an experienced property developer going into a multi-million dollar transaction, it was therefore not reasonable for the applicant to have relied solely on the SLA’s publications in the circumstances of this case. It was in the business of making money from land development. It had many professional advisors and could have easily checked with the SLA on what the DP would be if it decided to buy the Land and embark on its redevelopment plans. In any case, the SLA had made it clear in its correspondence with the applicant that the DP was assessed without reference to the DC Table.

129 Assuming that the applicant had satisfied the first five requirements (which it clearly had not) for invoking the doctrine of legitimate expectation to claim relief, there would still be the safeguards in the sixth requirement to consider. As the SLA has rightfully pointed out, it is under a statutory duty to “optimise land resources” (s 6(1)(a)

of the SLA Act) and to “have regard to efficiency and economy and to the social, industrial and commercial and economic needs of Singapore” in the carrying out of its functions (s 6(2)(a) of the SLA Act). Its statutory duty would encompass getting the best returns for the State when it deals with State land. This would in turn benefit the public at large. It is therefore unacceptable in the circumstances here to argue that the State’s finances would not suffer as much as the applicant’s if the SLA were to make an exception for this case and not apply its unpublished policy relating to directly-alienated State land to the Land here. The overriding public interest must therefore prevail over the financial interests of a commercial enterprise like the applicant in this case.

Conclusion and costs

130 The applicant has failed to show irrationality on the part of the SLA or to establish a legitimate expectation on the facts of this case. Accordingly, its application for judicial review on these grounds is dismissed.

131 The applicant is to pay the costs of the SLA and of the Attorney-General, such costs to be agreed or taxed. The parties may also agree that the costs be fixed by me. In that event, I will fix the amount of costs after hearing their submissions on the appropriate quantum to award.

III. Piano Teacher Case



Read the short summary of the case and think about what principles should be taken into account in a case of legitimate expectation. On which of these principles is the court’s argumentation based? Do you agree with the argumentation?

Short Summary of the case BGE 137 I 69

1. Overview

- Revocation of an initially incorrect ordinance; Art. 9 of the Swiss Constitution
- The supervisory authority is also competent to revoke the ordinance, which was originally issued by the supervised authority
- Requirements for revocation of an ordinance (decision):
 - There are opposed interests of A) a correct implementation of the law (principle of legality) and B) the protection of legitimate expectations (if the requirements for the protection are met in the first place)
 - Assessment of the requirements for the protection of legitimate expectations
 - Consideration/deliberation of the respective interests

2. Facts and Findings

X, a pianist and conservatory student (Music College) was an aspiring music teacher. He had experienced difficulties to perform his final exam in front of an audience due to emotional stress. Therefore, he was granted an exception to repeat that same exam in front of the examination board and without a public audience. The examination board offered him this setting. He passed the exam and received a written protocol from the examination board. Hereinafter, he received a written statement in the form of an administrative decision that he had successfully completed his educational training for his teaching certificate.

The director of the school requested that the certificate should not be issued because X had not completed the aforementioned exam in front of a public audience. Subsequently, the competent authority (EKSD) decided to refuse the issuing of the certificate. The supervisory authority (EKSD) argued that the exam was not performed in accordance with the law and that the initial administrative decision (decision that X passed the exam) was therefore incorrect and had to be revoked although it was already legally binding.

The Federal Court argues that X had reason to believe that the procedure was correct and that the examination board was competent to decide that he could perform the exam without the presence of an audience. Therefore, he relied on the initial administrative decision that he had passed the exam.

The decision to revoke a (already legally binding) administrative decision is subject to strict rules: Such an administrative decision cannot be revoked if the interest of protection of legitimate expectations is considered to be higher than the interest of the correct implementation of the law. There are exceptions of this rule; in particular if there is a substantial public interest in the correct implementation of the law.

In this case the court considered X's interest of the protection of his legitimate expectations based on Art. 9 of the Swiss Federal Constitution to be higher than the interest to implement the formal "correct" law provisions; particularly with regard to arrangements he had already made. He would face serious disadvantages if the initial decision was revoked.

The court decided that the authority was bound by the initial administrative decision and that the administrative decision could not be revoked.

IV. Questions on the Decision

1. What principles should be taken into account in a case of legitimate expectation?
2. On which of these principles is the court's argumentation based?
3. Do you agree with the argumentation?

H Good Administration (Lecture 5)

I. Article 41 of Charter of Fundamental Rights of the European Union



Read the article below and think about the advantages and disadvantages of codifying the right to good administration as a fundamental right. Do you think there is something missing in the article that you think would be important for “good administration”? Are there further guarantees codified as fundamental rights in your country to ensure “good administration”?

Article 41

Right to good administration

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.
2. This right includes:
 - (a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
 - (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
 - (c) the obligation of the administration to give reasons for its decisions.
3. Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.
4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

II. Questions on the Article

1. What are the advantages and disadvantages of codifying the right to good administration as a fundamental right?
2. Do you think there is something missing in the article that you think would be for “good administration”?

3. Are there further guarantees codified as fundamental rights in your country to ensure “good administration”?

III. Annual Report of the European Ombudsman



Read the report and think about what is considered as “good administration” in it.

Would you agree? What else would you understand under “good administration”?

[Link to the Annual Report 2024](#)

IV. Questions on the Report

1. What is in the report considered as “good administration”?
2. Do you agree with that?
3. What else would you understand under “good administration”?