



ADMINISTRATIVE LAW

WEEK NINE
Tuesday, October 19, 2021
Professor Julia M. Glencer

AGENDA

Part 1

6:00 to 7:15 Congress & the Non-Delegation Doctrine

-----Break-----

7:25 to 8:10 Congress & Tools to Control Regulatory Policy

Part 2

8:10 to 8:20 *Read:* Excerpt of Feinstein Article

8:25 to 8:50 *Watch:* Congressional Hearing Snippets

8:50 to 9:00 Reactions and & Wrap-Up

Congress & the Non-Delegation Doctrine



QUICK REVIEW

Statutory Interpretation
Separation of Powers

THEORIES of STATUTORY INTERPRETATION



Textualism: Focuses on *words* of the statute



Purposivism: Focuses on the *purpose* of the statute



Pragmatic & Dynamic Interpretation: Focuses on the *practical consequences* of the various interpretations of the statute

SEPARATION OF POWERS – What are you? Do you *even* know?



Formalist?

- Typically insist on a **firm textual basis** in the Constitution for any exercise of government power
- Tend to understand the structuralist features of our government in terms of **literal language and original intent**
- Usually committed to strong **"separation"** between branches

Functionalism?

- Tend to ask whether the action of one branch **interferes** with the core functions of another
- Sharing** of powers & alliances not repugnant so long as basic separation not impaired
- Usually willing to consider **changed circumstances** and **broad objectives** like efficiency

SEPARATION OF POWERS: How Do the Admin Agencies Fit In?

Formalist?

- Under formalist thinking, the creation of independent admin. agencies is a violation of the Constitution.
- Why? Basically b/c admin agencies are exercising powers given by Articles I, II and III to the branches.
- See admin agencies as exercising unconstitutional power in midst of branches that cannot control them.

Functionalist?

- Admin. agencies with real power to act are necessary to make government operate.
- Admin. agencies are overseen and controlled through things like the "intelligible principle" requirement for delegation, the APA, and judicial review.
- Separation of powers case law has to respect and be consistent with case law involving other Constitutional provisions *[this will make more sense after your readings for next week . . .]*

NON-DELEGATION DOCTRINE

NON-DELEGATION DOCTRINE

- Where It Comes From
- What It Means
- A Sense of Its History (thru 3 time periods)
- Key Excerpts:
 - *Whitman v. Am. Trucking Assns., Inc.*, 531 U.S. 457 (2001)
 - *Dept. of Trans. v. Ass'n of Am. Railroads*, 575 U.S. 43 (2015)
 - *Gundy v. U.S.*, 139 S. Ct. 2116 (June 2019)
- Select "Theoretical" Ideas Worth Remembering
- Delegation to Other Actors *[review slides on your own]*

THIS IS CONFUSING . . .



- "Scholars have . . . identified non-delegation concerns as the motivation behind a number of administrative law doctrines." ADMIN LAW at 806.
- **Why?** Because some admin law doctrines seem to embrace the legislative role of admin agencies, which then seems to place those doctrines in *tension* with the non-delegation doctrine:
 - ✓ Procedural due process (ala *Londoner* distinction)
 - ✓ Test for distinguishing legislative rules from policy statements for notice & comment process
 - ✓ *Chevron* deference

NON-DELEGATION DOCTRINE

- What are the two key Constitutional provisions implicated here?
 - **U.S. Const. Art. I, § 1 (vesting)**
 - **U.S. Const. Art. I, § 8, cl. 18 (N & P)**

NON-DELEGATION DOCTRINE

U.S. Const. Art. I, § 1 (vesting)

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

NON-DELEGATION DOCTRINE

U.S. Const. Art. I, § 8, cl. 18 (N & P)

*The Congress shall have Power . . . to make all Laws which shall be **necessary and proper** for **carrying into Execution** the foregoing Powers and all other Powers vested by this Constitution in the Government of this United States or any Department of Officer thereof.*

“[S]cholars disagree on whether the Constitution’s vesting clauses should be seen as grants of power or as simply distinguishing among the branches.”

ADMIN. LAW at 801.

NON-DELEGATION DOCTRINE

Non-delegation doctrine in a *nutshell*?

“The non-delegation doctrine considers what limits, in any, the Constitution places on Congress’s power to give [admin] agencies the power to promulgate regulations [or legislative-type rules.]”

William D. Arazia, *A SHORT & HAPPY GUIDE TO ADMINISTRATIVE LAW* 13 (West Acad. Pub. 2018).

NON-DELEGATION DOCTRINE

Period 1

- Founding to New Deal
- Contains foundational precedent still being cited (you saw them in *Gundy*)
- Period of **upholding** delegation

Period 2

- Years around New Deal
- Three cases wherein United States Supreme Court **invalidated** delegation:
- *Panama Refining* (President)
- *Schechter Poultry* (President)
- *Carter Coal* (Private entity)

Period 3

- 1944 (*Yakus*) through today . . .
- *Yakus* seen as hailing a return to the practice of **upholding** rather than broad delegations

Period 4?

• Are we poised at the edge of a new period?



“I’m an originalist, [Justice] Scalia once said. I am not a nut.”

Jim Saksa, *Barrett, With Scalia as Model, May Be Moderate on Regulation*, ROLL CALL (Oct. 8, 2020) (available at <https://www.rollcall.com/2020/10/08/barrett-with-scalia-as-model-may-be-a-moderate-on-regulation/>).

HISTORY: Period 1 (Founding to New Deal)

- *Wayman v. Southard*, 10 Wheat. 42 (1826) (Marshall, C.J.)
 - "It will not be contended that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress **may certainly delegate to others** powers which the legislature may rightfully exercise itself."
 - "The line has not been exactly been drawn which separates those important subjects which must be entirely regulated by the legislature itself from those of less interest in which a general provision may be made and power given to those who are to act under such general provisions **to fill up the details.**"



HISTORY: Period 1 (Founding to New Deal)

- *Field v. Clark*, 143 U.S. 649 (1892).
- "The [Tariff Act of 1890] does not in any real sense invest the President with the power of legislation. As the suspension was absolutely required when the President ascertained the existence of a particular fact, it cannot be said that in ascertaining that fact, and in issuing his proclamation in obedience to the legislative will, he exercised the function of making laws. **Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency.**"
- **In other words, Congress delegated only the fact-finding function, not the policy choice itself. This is permissible.**

HISTORY: Period 1 (Founding to New Deal)

- *United States v. Grimaud*, 220 U.S. 506 (1911).
- Statutes giving executive officers power to make rules & regulations do not confer legislative power.
- "[W]hen Congress . . . legislated and indicated its will, it could give to those who were to act under such general provisions **'power to fill up the details'** by the establishment of administrative rules and regulations [which, when violated] could be punished by fine or imprisonment [or penalties] fixed by Congress . . ."
- **In other words, Congress legislated and made its will known; the delegate only implementing that will.**

HISTORY: Period 1 (Founding to New Deal)

- *J.W. Hampton, Jr. & Co. v. U.S.*, 276 U.S. 394 (1928).
- This case is the source of the "intelligible principle" principle.
- **"If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."**
- "The President's role was not making of law. He was the mere agent of the lawmaking department to ascertain and declare the events upon which its expressed will was to take effect."

- **Wayman**: Congress gave authority **to courts** to make rules governing their own proceedings.
- **Field**: Congress gave power and duty **to President** to *suspend duty-free import* if he was "satisfied" that the exporting nation was imposing duties that were "reciprocally unequal and unreasonable."
- **Grimaud**: Congress gave authority **to Secretary of Agriculture** to *make rules & regulations* governing land set aside by President for public forest reserves "as will ensure the objectives of such reservations." (**Remember**: Congress had already made violation of such rules into criminal misdemeanors).
- **J.W. Hampton**: Congress gave authority **to President** to *change statutory tariffs* on goods when President, after investigating production costs domestically v. abroad, found that the statutory tariffs "do not equalize" the differences in costs of production.

THE Wayman SEEDS . . .

- **Sub-delegation**
(Congress may delegate power it may rightfully exercise itself)
- The **"fill-up the details"** concept



HISTORY: Period 2 (Years Around New Deal)

- *Panama Canal* (1935).
- **Invalid**
- NIRA
- industry
- conservation
- stem
- Court
- for the

NO STANDARD

HISTORY: Period 2 (V New Deal)

- *ALA S* (1935).
- **Invalid**
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NO STANDARD

As **Justice Cardozo** famously said:

"The delegated power of legislation which has found expression in this code is *not* canalized within banks that keep it from overflowing. It is unconfined and vagrant.

THIS IS DELEGATION RUNNING RIOT."



- NIRA Sec. 3 enacted against backdrop of Depression, economic crisis
- Gave President power to approve proposed code of "fair competition" upon finding (1) trade/industry proposing the code imposed no "inequitable restriction" on membership to the trade/industry, and (2) the proposed code was not designed to create monopoly or to oppress/discriminate against small enterprises.
- *Schechter Poultry Co.*, convicted of violation an approved code, challenged constitutionality of NIRA.

- Court acknowledged crisis backdrop

But noted that extraordinary conditions do NOT create or enlarge constitutional power.

- "[T]he authority sought to be conferred by Sec. 3 was *not merely* to deal with unfair competitive practices *but to authorize new and controlling prohibitions through codes* . . . the President would approve, or prescribe, as wise or beneficent measures . . . to bring about . . . rehabilitation, correction, and development" in the trades/industries.

"For that *legislative undertaking*, Sec. 3 sets up **no standards** aside from the statement of the general aims of rehabilitation, correction and expansion." (Hmmm. But isn't that a standard?)

HISTORY: Period 2 (Years Around New Deal)

- *Carter v. Carter Coal*, 298 U.S. 238 (1936).
- **Invalidation No. 3** (narrower coverage, case often unmentioned)
- There were numerous other Constitutional challenges raised to the Bituminous Coal Conservation Act.
- Justice Sutherland stated the price & wage control provisions violated Fifth Amendment due process clause because they delegated legislative authority to private industry.
- "***This is legislative delegation in its most obnoxious form.***" because it is "not even delegation to an official or an official body, presumptively disinterested, but to private persons [via a system of tax incentives] whose interests may be and often are adverse to the interests of others in the same business."

- Two invalidations for delegation with **NO STANDARDS**:
 - *Panama Refining*
 - *Schechter Poultry* (which also disapproved of giving raw legislative power to the President)
- One invalidation for **delegation to a private entity**: *Carter*

HISTORY: Period 3 (*Yakus* to today) [Key test!]

- *Yakus v. U.S.*, 321 U.S. 414 (1944).
 - “The essentials of the legislative function are the [1] determination of the legislative policy and [2] its formulation and promulgation as a defined and binding rule of conduct.”
 - “These essentials **are preserved** when Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data by a designated administrative agency, it directs that its statutory command shall be effective.”

The delegation upheld in *Yakus*:

- Emergency Price Control Act of 1942
- Created Office of Price Administration, headed by Price Administrator
- Price Administrator authorized by Congress to promulgate regulations fixing prices of commodities, after consulting with industry, which “**in his judgment will be generally fair and equitable and will effectuate the purposes of [the Act].**”
- Instructed by Congress to give weight to the prices prevailing in October 1941 and to release a “statement of considerations.”

“It is no objection that the determination of facts and inferences to be drawn from them . . . *call for the exercise of judgment*. . . . The **standards prescribed** by the present Act, with the aid of the statement of considerations required to be made by the Administrator, are **sufficiently definite and precise** to enable Congress, the courts and the public to ascertain whether the Administrator in fixing the designated prices, has conformed to those standards.”

HISTORY: Period 3 (*Yakus* to today)

- *Industrial Union Dept., AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607 (1980) (Benzene)
- Majority invalidated a new OSHA standard based on the way it read the OSHA Act and thus **dodged** a non-delegation problem.
 - This mix of using statutory construction used to avoid or to obviate a delegation problem is something to keep an eye on . . .
- Justice Rehnquist would have invalidated that portion of the Act that allows OSHA to regulate toxic chemicals as an **unconstitutional delegation of legislative authority**.

Concurring in *Benzene*, Rehnquist, J. articulated 3 purposes of the non-delegation doctrine:

- (1) to ensure important choices of social policy are made by Congress (i.e., the branch responsive to the public will).
- (2) to ensure that, should Congress find it necessary to delegate authority, it provides the delegatee with an “intelligible principle” to guide exercise of any delegated discretion.
- (3) to ensure that courts, charged with reviewing the exercise of delegated legislative discretion, have an ascertainable standard against which to test the delegatee’s exercise of that discretion.

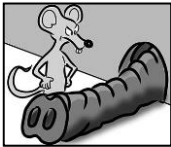
MODERN ERA . . .

- ***Whitman v. Am. Trucking Assns., Inc.*, 531 U.S. 457 (2001).** Two main issues:

- (1) whether, in setting the NAASQs, EPA was to consider costs; and
- (2) whether there was an unconditional of legislative authority.

- Clean Air Act Sec. 109(b)(1) instructed the EPA to set “ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on the criteria [documents of Sec. 108] and allowing an adequate margin of safety, **are requisite to protect the public health.**”

Elephant-in-mousethole doctrine



Congress “does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouse holes.”

Whitman, 531 U.S. at 468.

TELL ME ABOUT . . .

- ***Whitman on non-delegation:***
- **Majority (written by Justice Scalia)** –
- Justice Thomas (concurring) –
- Justice Stevens & Justice Souter (concurring in part and concurring in the judgment) –

WHITMAN'S LIST . . .

- *Touby* (U.S. 1991) (AG authorized to designate drug as a controlled substance for purposes of criminal law enforcement if “**necessary to avoid an imminent hazard to the public safety**”).
- *Am. Power & Light* (U.S. 1946) (SEC authorized to modify structure of holding companies to ensure not “**unduly or unnecessarily complicated**” and do not “**unfairly or inequitably**” distribute voting power).
- *Yakus* (U.S. 1944) (agency authorized to fix prices at level “**generally fair and equitable**”).
- *Nat'l Broadcasting* (U.S. 1943) (FCC authorized to regulate airwaves “**in public interest**”).
- *New York Cen. Sec.* (U.S. 1932) (ICC authorized to approve RR consolidation “**in public interest**”).

ANS LISTED

Delegation in *Whitman* deemed to be “well within the outer limits of our non-delegation precedents.”

531 U.S. at 474.

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

Id. (citing *Misretta v. U.S.*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

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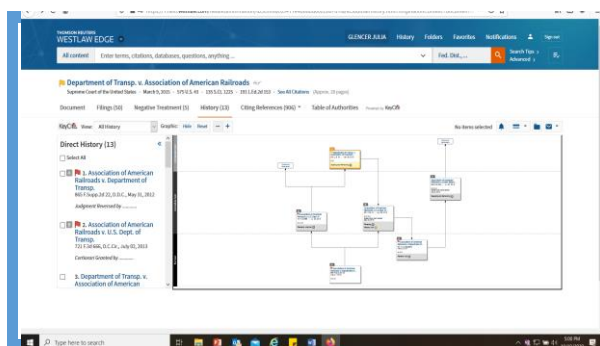
- **Whitman on non-delegation:**
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“It seems clear that an [admin] agency’s exercise of rule-making authority pursuant to a valid delegation from Congress **is** ‘legislative.’ As long as the delegation provides a sufficiently **intelligible principle**, there is nothing unconstitutional about it.”

Whitman, 531 U.S. at 489-490 (Stevens, concurring in part & concurring in the judgment).

- *Dept. of Trans. v. Ass’n of Am. Railroads*, 575 U.S. 43 (2015).
- Passenger Rail Investment & Improvement Act, Sec. 207(a), granted Amtrak & Federal Railroad Administration “joint authority” to issue “metrics and standards” to address performance & scheduling of passenger RR services after consultation with other public entities & rail carriers.
- Carriers sued, raising host of Constitutional issues, including non-delegation.
- D.C. Cir. *held what?*
- Supreme Court majority *did what?*



TEA LEAVES . . .



Many people reading the “tea leaves” on the fate of the non-delegation doctrine after *Dept. of Trans.* in 2015

- Justice Alito (concurring): *What did he say about the non-delegation doctrine?*
- Justice Thomas (concurring in judgment): *What did he say about the non-delegation doctrine?*

[When your textbook went to press, we didn't yet have *Gundy* . . .]

“We should return to the original meaning of the Constitution: The Government may create generally applicable rules of private conduct only through the proper exercise of legislative power. I accept that this would inhibit the Government from acting with the speed and efficiency Congress has sometimes found desirable.”

Dept. of Transp., 575 U.S. at 86, 91 (Thomas, J., concurring in the judgment)

“ . . . Congress has permitted a corporation [Amtrak] subject only to limited control by the President to create legally binding rules. . . . This arrangement raises serious constitutional questions . . . [that] merit close consideration . . . We have too long abrogated our duty to enforce the separation of powers . . . 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.”

Id. at 91 (Thomas, J., concurring in the judgment).



Gundy v. U.S.



“[I]n our increasingly complex society, . . . this Court has understood that ‘Congress simply cannot do its job absent an ability to delegate power under broad general directives.’ . . . [A] statutory delegation is constitutional [if] Congress ‘lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.’

Gundy, 139 S. Ct. at 2123 (emphasis added).

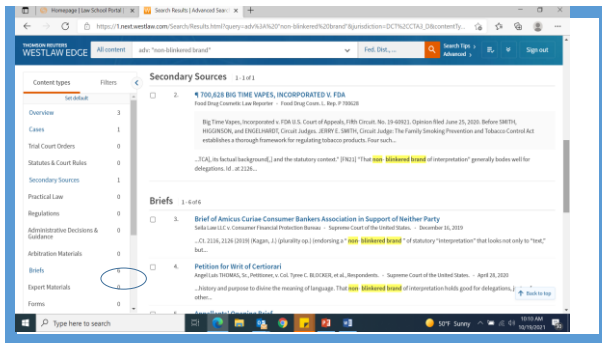
Given that standard, a nondelegation inquiry always begins (and often almost ends) with statutory interpretation. The constitutional question is whether Congress has supplied an intelligible principle to guide the delegatee's use of discretion. So the answer requires construing the challenged statute to figure out what task it delegates and what instructions it provides. . . . Only after a court has determined a challenged statute's meaning can it decide whether the law sufficiently guides executive discretion to accord with Article I. And indeed, once a court interprets the statute, it may find that the constitutional question all but answers itself.

Gundy, 139 S. Ct. at 2123 (emphasis added).

THRESHOLD QUESTION OF STATUTORY CONSTRUCTION

“It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.’ . . . And beyond context and structure, the Court often looks to ‘history [and] purpose’ to divine the meaning of language. . . . That non-blinkered brand of interpretation holds good for delegations, just as for other statutory provisions. To define the scope of delegated authority, we have looked to the text in ‘context’ and in light of the statutory ‘purpose.’ . . . In keeping with that method, we again do so today.”

Gundy, 139 S. Ct. at 2126.



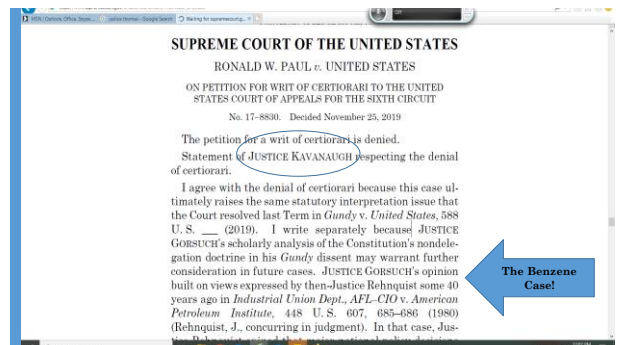
THE DELEGATION . . .

“The Attorney General shall have the **authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter . . .** and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b).”

34 U.S.C. § 20913(d).

- *Reynolds* (U.S. 2012) – “Everything in *Reynolds* started from the premise that Congress meant for SONRA’s registration requirements to apply to pre-Act offenders.”
- “On that understanding, the Attorney General’s role under § 20913(d) was **important but limited**: It was to apply SONRA to pre-Act offenders as soon as he thought it feasible to do so.”
- That statutory delegation would involve “implementation delay.” But no more than that.
- Justice Kagan’s *independent examination* (meaning *independent of Reynolds*) lead to the same place – that Congress had made it crystal clear that SONRA was to apply to *all* pre-Act offenders and thus, the Attorney General **was only delegated authority to address implementation issues**.

- This limited delegation of authority to address implementation issue “easily passes constitutional muster.”
- This statutory authority “as compared to the delegations we have upheld in the past, is *distinctly small-bore*.”
- Eleven Courts of Appeals had already deemed this delegation to be **constitutional**.
- Justice Kagan really stressing the need for Congress to be able to give the executive “flexibility” to deal with “real world constraints.”



The Benzene Case!

SELECT IDEAS ON THE NON-DELEGATION DOCTRINE

Ideas abound on this topic and
some are truly worth remembering.



The non-delegation doctrine is not exactly a myth, but it is perhaps no longer open for any real change.

- Definite eruption of concern with delegation in the 1930's
- "The creation of agencies and commissions filled with experts who could effectively make the regulatory policy that shaped the economy *was no doubt innovative and required significant rethinking of traditional governmental forms*. But state and federal judges did not hesitate to give their stamp of approval to those institutional innovations. Traditional constitutional principles were thought to be capacious enough to accommodate the new administrative structures."

Keith Whittington & Jason Iuliano, *The Myth of the Non-Delegation Doctrine*, 165 U. PA. L. REV. 379, 429 (2017).

Assuming the "intelligible principle" standard is here to stay, perhaps there are better ways to make it effective:

- by reading statutes narrowly to avoid delegation problem where possible (species of constitutional avoidance).
- by ensuring that the underlying statutory scheme is read in a way that fosters judicial review of the administrative agency's actions (even if it is not otherwise problematic under the non-delegation doctrine).



The identity of the delegatee may matter, perhaps mainly to a functionalist judge . . .

President

- Pattern for early delegations
- 2 of the 3 cases invalidating a delegation in the New Deal era (*Schechter Poultry* & *Panama Refining*) were delegations to the President
- President not subject to APA or Sunshine (disclosure) acts
- Courts loathe to review decisions made personally by the President

Cabinet Head Free-Standing Agency

- Common modern pattern
- Tends to result in further layers of delegation (such as Dept. of Transportation to the FAA)
- Takes advantage of existing checks on admin power (judicial review, process for making it participatory & transparent via notice & comment, Sunshine Acts)

Is delegation just a "dodge" of hard issues by a perpetually gridlocked Congress? Some say yes/some say no.

Prof. David Schoenbrod

- *Yes!*
- "When Congress delegates, it tends to do only half its job – to distribute rights without imposing commensurate duties. . . . In striking poses popular to each and every constituency, *Congress ducks the key conflicts*. . . . Delegation allows legislators to claim credit for the benefits which a regulatory statute promises yet escape the blame for the burdens it will impose."

Professor Schuck

- *No!*
- "[T]he particular attributes of a legislature's delegation – its breadth, type, and level – *are themselves fundamental policy choices*. . . . [for, as the legislators & legislative committees know] the resolution of these questions may well determine the nature and effectiveness of the regulatory scheme being established."

Delegation ruins a sense of collective Congress.

- The Constitution creates a collective Congress whose members are "invested in the difficult process of lawmaking for the public good because this is the only way to exercise power," but delegation can "unravel" the "institutional interests of Congress."
- "Delegation . . . provides numerous benefits to legislators by allowing them to influence and control administration. Individual legislators thus have persistent incentives to delegate because they can serve their personal interests by shaping how [admin] agencies exercise their delegated authority. . . . [D]elegation [thus] realigns the ambitions of congressmen away from Congress . . . [and changes the nature of the] Madisonian checks and balances."

Neomi Rao [*remember her?*] *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1464-65 (2015).



The entire landscape of the non-delegation doctrine fosters unconstitutional behavior and has created a persistent crisis.

- “The prominence given to non-delegation, combined with the courts unwillingness to enforce that postulate, has generated a **low level but persistent crisis of legitimacy for modern government**. . . Congress is shirking its duty to legislate, executive agencies are exercising forbidden authority, and judges are violating their oath by letting both of them get away with it. This **massive breach of the Constitution** can only encourage cynicism about the government.”

Thomas W. Merrill, *Rethinking Art. I, Sec. 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2100-2101 (2004).

Delegation issues should be addressed via administrative law, not Constitutional law.

- “Courts owe Congress a greater deal of leeway to formulate delegations under Constitutional law than they owe [admin] agencies to exercise those delegations under administrative law. . . . That is not to say that Congress always has good motives for delegating. But courts must give Congress the benefit of the doubt if we are to have modern government.”

Lisa Shultz Bressman, *Disciplining Delegation After Whitman v. Am. Trucking Ass'ns.*, 87 CORNELL L. REV. 452, 460 (2002).

Due process provides a better Constitutional standard against which to measure the permissibility of delegation.

- “Federal courts should abandon the traditional non-delegation doctrine and embrace **due process** as the primary constitutional constraint on congressional delegation. . . . Congress may delegate lawmaking authority to administrative agencies if it channels that authority through a combination of substantive, procedural, and structural safeguards. . . . Congressional delegations meet this standard when they include an ‘intelligible principle’ to guide agency discretion together with deliberative procedural requirements and structural constraints such as political accountability and judicial review.”
- “The due process model thus takes seriously the nondelegation doctrine’s republican ideals while . . . better reconcil[ing] congressional delegation with the Constitution’s ensuring commitment to individual liberty.”

Evan J. Criddle, *When Delegation Begets Domination: Due Process in the Administrative State*, 44 GA. L. REV. 117, 211 (2011).

Scholars have spent too much time & effort asking if delegation is permitted. Ask instead whether delegation is appropriate.

- “Debates about whether Congress can delegate have crowded out debates about whether Congress *ought* to delegate. . . . Surely the power that we, the people, have give them through the Constitution comes impressed with an obligation to reflect carefully upon whether what may be done should be done.”



Cynthia R. Farina, *Deconstructing Non-Delegation*, 33 HARV. J. L. & PUB. POLY 1, 87, 95 (2010) (emphasis added).

Rethinking or retreating from the non-delegation doctrine and its recognition of an “intelligible principle doctrine” in favor of NO DELEGATION would bring modern American government “to a screeching halt.”

- Separation of Powers concerns cannot justify overturning decades of legislation & practice, especially given “other goals such as ensuring *effective government* and *politically accountable government*.”

Cass Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2015 SUP. CT. REV. 41 (2016) (emphasis added).

Many state courts have discerned a non-delegation doctrine in their own state Constitution.

- State courts more likely than federal courts to find that doctrine *violated* (but still not often & their decisions also fostered rise of complex, powerful administrative state).
- Tend to be more articulate & elaborate in explaining the logic of their state Constitution’s non-delegation doctrine.
- State courts likewise:
 - struggle with discerning the line between appropriate/inappropriate “policy-making” role for state admin agencies v. state legislature
 - are sensitive to problems with private delegations & delegations with financial interests attached

"[Pa. Const., Art. II, § 1] states: 'The legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives.' . . . To avoid violating this provision, the General Assembly must make the 'basic policy choices involved in [its] 'legislative power' " when it authorizes some other entity to act. . . . The restriction on delegation is not absolute, however, and the General Assembly may "assign the authority and discretion to execute or administer a law" to some other entity if it makes "the basic policy choices" and 'include[s] 'adequate standards which will guide and restrain the exercise of the delegated administrative functions.' . . . Accordingly, a "law must contain some intelligible principle to which the person or body authorized to [act] is directed to conform." Further, a law must include 'procedural mechanisms that serve to limit or prevent the arbitrary and capricious exercise of the delegated power.'"



Pennsylvania AFL-CIO v. Commonwealth, 219 A.3d 306, 314 (Pa. Commw. Ct. 2019) (emphasis added).

DELEGATION: To Other Actors

There is a lot of this already and it is increasing, so you need to know it's out there and raising a host of related but different issues.

BREAK



DELEGATION: To Other Actors

- Entities that are partially federal/private
- State actors
- Private entities
- International actors

DELEGATION: To Other Actors

- Entities that are partially federal/private
 - U.S. Postal Service, Amtrak, Nat'l Guard, GAO
 - Government-sponsored entities (like Fannie Mae/Freddie Mac)
- Very numerous; come in a variety of complex structures, often powerful.
- You would research these . . .

DELEGATION: To Other Actors

- Delegation to **STATES** is VERY common.
- State actors thought to be a safer bet for delegation (because still politically accountable and subject to Constitutional restraints).
- Tends to be a "concurrent delegation" (3 general methods)
 - States expected to implement federal law by conforming to standards set by federal executive.
 - States & federal agencies implementing same provisions/working together to enforce the same act.
 - State official executing federal law under direct supervision of a federal agency.

DELEGATION: To Other Actors

- Use of **public/private entities** or **fully private entities** as part of the regulatory decision-making process has radically expanded.
- “[P]rivate actors are deeply embedded in public governance.”
- Can be contractual or deeply embedded into the surrounding statutory scheme.
- Raises different kinds of “delegation” concerns.

DELEGATION: To Other Actors

- May escape built-in checks & balances.
- May be biased, tendency to act in own self-interest.
- May escape the protections built into purely governmental schemes for individual rights.
- May serve to aggrandize executive power (i.e., outsourcing as method of achieving executive goals).

DELEGATION: To Other Actors

- Supporters urge:
 - Regulatory schemes *can be* carefully tailored to protect against abuses (such as private rights violations) while exploiting the benefits of these innovative arrangements.
- Using “privatization” as a means of creating “publicization” and thus spreading government’s reach into traditionally private realm and thereby fostering public goals.

DELEGATION: To Other Actors

- Delegation to **INTERNATIONAL ENTITIES** becoming more common.
- Most nations now participate in “dense network[s] of international cooperation.”
- Differentiate delegation of authority from voluntary commitment.
 - Usually due to existence of entity with ability to take binding action requiring nations to comply and expend resources.

DELEGATION: To Other Actors

- Delegation to **INTERNATIONAL ENTITIES** becoming more common.
- Three typical types of these international bodies:
 - **Adjudicatory bodies** (like NAFTA arbitral panels)
 - **Monitoring & enforcement bodies** (like Int’l Atomic Energy Association which can inspect & punish non-compliance)
 - **Policy-making bodies** (like WTO which can adopt binding interpretations of int’l trade agreements)

Congress & the Tools to Control Regulatory Policy



POLI-SCI APPROACH TO DELEGATION

Focuses not on the constitutionality of delegation of power from Congress to admin agencies, but on:

- When Congress delegates
- How it structures those delegations (*ex ante*)
- How it oversees those delegations (*ex post*)
- Which branch ultimately ends up controlling it

POLI-SCI APPROACH TO DELEGATION

- Many believe Congress is VERY aware that it needs to carefully structure and oversee delegated authority to remain in charge.
- Congress tends to delegate on issues that are:
 - *too inefficient* to legislate the result desired.
 - *too information-intensive* or *too uncertain* for the legislature to handle.
- Congress does exercise more intensive oversight of greater delegations.



Unified Government is when the same party controls both the White House & both houses of Congress.

POLI-SCI APPROACH TO DELEGATION

The antidote to drift?
MONITORING.
But monitoring is time consuming and costly.

POLI-SCI APPROACH TO DELEGATION

Ex Ante

Before enactment, Congress sets up controls in the structure & process imposed thru the enabling or implementing legislation.

After-the-fact efforts to control: appropriations, spending, hearings, investigations, etc.

Ex Post

POLI-SCI APPROACH TO DELEGATION

POLICE PATROLS

- Form of direct oversight
- Congress (on its own initiative) reviews samples of admin agency activity looking for violations of goals set by the legislature
- Hope is that known surveillance will discourage infractions



FIRE ALARMS

- Less active/less direct
- Congress builds rules, procedures & informal practices into legislation to enable citizens & interested groups to charge admin agencies with violating legislative goals
- Remedies can come from Congress or from agency itself or from the courts





POLI-SCI APPROACH TO DELEGATION

- Some dispute Congress's ability – through structure & process – to control delegation and argue that the President has institutional advantages in directing admin agency action:
 - (1) President as party leader
 - (2) Executive can engage in autonomous policy innovation
 - (3) Ability of executive to shape national policy agenda
- This means the executive may be “constrained” by Congress

POLI-SCI APPROACH TO DELEGATION



CONCEPTUAL RESEARCH VERSUS EMPIRICAL RESEARCH

CONCEPTUAL RESEARCH
Conceptual research is a type of research that is generally related to abstract ideas or concepts

Involves abstract idea and concepts; however, it doesn't involve any practical experiments

Philosophical research studies are an example

EMPIRICAL RESEARCH
Any research study where conclusions of the study are drawn from evidence verifiable by observation or experience rather than theory or pure logic

Involves phenomena that are observable and measurable

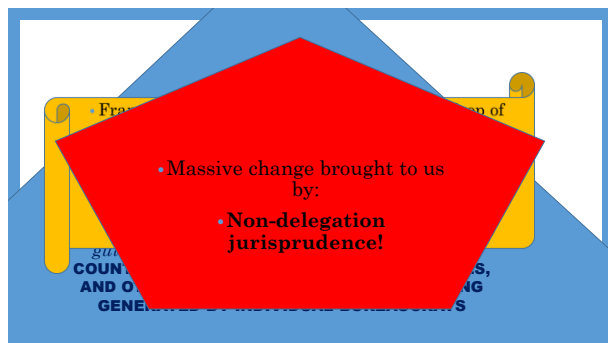
Includes both quantitative and qualitative studies

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CONGRESSIONAL CONTROL OF REGULATORY POLICY

- a. Delegation of Regulatory Power ✓
- b. Congressional Control of Regulatory Policy

- (1) Legislation and Vetoes [You read *Chadha*; slides here]
- (2) Appropriations & Spending [You didn't read; I cover]
- (3) Oversight & Investigations* [Excerpt & Video]
- ➡ (4) Direct Control Over Regulatory Actors [You read *Bowsher*]



- This massive change transformed roles of Congress & President.
 - Congress shifted to a more reactive role.
 - President (as head of the Executive Branch in which the admin agencies sit) now forces Congress to “check” policy set & pursued by Executive.
 - Stakes are high (power itself and impression on public).
 - Divided government and increasing polarization result in competition (not cooperation) between Congress & President in using and overseeing admin state.

CONGRESSIONAL CONTROL THROUGH:

(2) Appropriations & Spending

APPROPRIATIONS & SPENDING

- Admin agencies and their activities must be funded.
- That happens through the annual “appropriations process” consisting of appropriation-style legislation to authorize funding.
- The “appropriations process” has a MUST PASS nature and that lends itself to the use of Congressional measures to direct regulatory action.
 - *But some of these measures are odd* in the sense that they are not used in a typical legislative process.

APPROPRIATIONS & SPENDING

- Two key Constitutional provisions:
 - *“All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.”*
U.S. CONST., Art. I, § 7, cl. 1.
 - *“No money shall be drawn from the Treasury, but in consequence of Appropriations made by Law. . .”*
U.S. CONST., Art. I, § 9, cl. 7.



APPROPRIATIONS & SPENDING

- Mandatory v. discretionary spending
 - Whether a spending item is mandatory or discretionary depends on the substantive legislation that authorized it.
 - If a spending item is mandatory, its nature can only be changed by substantive legislation, NOT simply by appropriations-style legislation.
 - MOST federal government spending is mandatory (upwards of 60%) and thus it HAS to be funded.



APPROPRIATIONS & SPENDING



Anti-Deficiency Act of 1884 prohibits all federal officials & employees from spending or obligating funds beyond the amount already appropriated.

Result is often furloughs.

APPROPRIATIONS & SPENDING

- How does Congress use the appropriations process to control regulatory outcomes?
- Mainly through “appropriations riders”
 - What is a “rider”?
 - “[A] provision added to an unrelated bill that ‘rides’ the targeted bill through the legislative process and becomes law when the President signs the bill[.]”

ADMIN LAW at 850 (internal quotation omitted).



APPROPRIATIONS & SPENDING

- Three kinds of riders to know about:
 - Limitations riders
 - Legislative riders
 - Deregulatory riders
- Riders have been used since early 19th Century to enact controversial measures, but in greater frequency since 1990's.
- Riders force quick, but less deliberative, action by Congress



• *Limitation* riders

- Associated exclusively with appropriations bills
- Used to prohibit admin agencies from expending any of the appropriated funding to engage in a certain proscribed activity.
- These are the classic form of rider.
- Surface frequently but not always enacted.

• *Legislative* riders

- Used to amend an existing law or direct an agency to take a particular action (thereby rendering what might have otherwise been an otherwise unlawful administrative action under existing law suddenly lawful).
- *Controversial!* Not limited in time; need not be directly associated to the appropriations bills being ridden.

• *Deregulatory* riders

- A particular class of rider “designed to stall, modify, or eliminate an ongoing regulatory program . . . that [likely cannot be] dismantled through the normal legislative process.”
- Some say these allow a determined minority of legislators to advanced special interest at the expense of broader public interest.



APPROPRIATIONS & SPENDING

- Riders are not inherently good or evil.
- But can and are used *very* aggressively in terms of directing admin agency action.
 - To direct federal admin agency to develop a rule in a particular area:
 - Even to delineate exactly what the rule shall contain
 - To set deadline for issuance of particular rule
 - To direct federal admin agency to take particular enforcement action.

APPROPRIATIONS & SPENDING

- Presidential “Impoundment” (as a tool in same arena)
- Basically a refusal to spend appropriated funding.
 - “*Programmatic impoundment*” long tolerated because President has some level of inherent discretion in executing the law and this can be smartly used to save funding.
 - “*Policy impoundment*” problematic – where President refuses to spend due to disagreement with the purposes for which Congress has appropriated the funding.

APPROPRIATIONS & SPENDING

- One major change impacting the activity of appropriations & spending . . .
- The ability to admin agencies to gather & rely upon funds outside of appropriations, i.e., self-financing.
- Mainly collected fees (licenses, permits, patents, regulatory approvals, etc.) and settlements.
- Changes the power differential; Congress’ “power of the purse” not so effective.



APPROPRIATIONS & SPENDING

- Admin agencies submit budgetary requests every year to Congress for use by the Committees on Appropriation.
- Complex documents with lots technical information and financial forecasting.
- Written to be very persuasive.
- *Excerpt of BUDGET ESTIMATES FISCAL YEAR 2021 – NAT'L HIGHWAY TRAFFIC SAFETY ADMINISTRATION (Dept. of Transportation).*



- National Highway Traffic Safety Administration (NHTSA)
- Mission: “[T]o save lives, prevent injuries, and reduce economic costs due to road traffic crashes. This mission is accomplished through education, research, development of safety standards, and enforcement activities.”

FY 2022 budget request sought \$ 1,023,867,000

Vehicle Safety	Highway Safety Research & Development	Highway Traffic Safety Grants
\$ 245,550,000	\$ 155,300,000	\$ 623,017,000

CONGRESSIONAL CONTROL THROUGH:

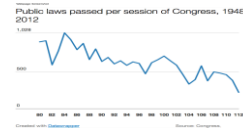
(1) Legislation and Vetoes

LEGISLATION AND VETOES

- Of course, Congress is free to correct or redirect an administrative agency's course through legislation!
- But two barriers impact that simple truism:
 - Institutional (enacting legislation is hard by design)
 - Political (enacting legislation made harder by polarization & gridlock)
- Less than 10% of enacted laws proceed through textbook process; rise in "unorthodox lawmaking" mechanisms.

LEGISLATION AND VETOES

- How dysfunctional *is* Congress nowadays?



- *Outlook:* Perhaps every stalemate is an opportunity? (veto points v. opportunity points)

LEGISLATION AND VETOES

- **The Congressional Review Act of 1995**
 - Amendment to Regulatory Flexibility Act to require *major* admin agency rules (major meaning economic impact) to be laid before Congress for 60 legislative days before taking effect.
 - Must be disapproved by *joint* resolution (House & Senate and laid before President).
 - Fast track procedures limit debate/amendment and committee process.
 - A disapproval not only invalidates the proposed rule but also effectively narrows the admin agency's original statutory authority.

LEGISLATION AND VETOES

- *INS v. Chadha*, 462 U.S. 919 (1983).
 - **Invalidated the use of a one-House veto (ostensibly . . .)**
 - Lots of statutes at that time contained a one-House veto as a method of controlling regulatory policy.
 - Know what *Chadha* stands for and appreciate the history lesson in your own government that the case offers.

LEGISLATION AND VETOES

Every Bill which shall have passed **the House of Representatives and the Senate**, shall, before it become a Law, be presented to **the President** of the United States . . . Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

- U.S. CONST., Art. I, § 7.

LEGISLATION AND VETOES



INS v. Chadha, 462 U.S. 919 (1983).

- Immigration & Nationality Act of 1952 delegated discretion to Attorney General "suspend deportation" of an alien when various conditions met and Attorney General found that deportation would result in "extreme hardship" of certain defined types. Attorney General sub-delegated to INS.
- That decision NOT to deport was conditioned upon – under Sec. 244(c)(2) – neither house of Congress disagreeing.

- **Chief Justice Burger for Majority:** Lawmaking is a power to be shared by both Houses of Congress and the President (i.e., constitutionally dictated bicameralism) and this activity was fundamentally *legislative*. Unconstitutional to let one House handle.
- **Justice Powell** (concurring): Activity fundamentally *adjudicatory* and therefore unconstitutional as an encroachment on judicial power
- **Justice White** (dissenting): This is only Congress seeking to reserve a check on admin agency action and doing so through the initial legislation that satisfied bicameralism.

KEY QUOTES FROM CHADHA

- “[Bicameralism and the Presidential veto] are interdependent. By providing that no law could take effect without the concurrence of the prescribed majority of the Members of both Houses, the Framers reemphasized their belief, [consistent with the] Presentment Clauses, that *legislation should not be enacted unless it has been carefully and fully considered by the Nation's elected officials*. These observations are consistent with what many of the Framers expressed . . . in pointing up the need to divide and disperse power in order to protect liberty: ‘In republican government, the legislative authority necessarily predominates. The remedy . . . is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit. The Federalist No. 51 . . .’

Chadha, 462 U.S. at 949-50 (emphasis added).

KEY QUOTES FROM CHADHA

“It emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7 represents the Framers' decision that the legislative power of the Federal government be exercised in accord with *a single, finely wrought and exhaustively considered, procedure.*”

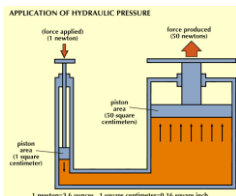
Id. at 951 (emphasis added).

KEY QUOTES FROM CHADHA

“The Constitution sought to divide the delegated powers of the new federal government into three defined categories, legislative, executive and judicial, to assure, as nearly as possible, that each Branch of government would confine itself to its assigned responsibility. The *hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted*. Although *not “hermetically” sealed from one another*, . . . the powers delegated to the three Branches are functionally identifiable. When any Branch acts, it is presumptively exercising the power the Constitution has delegated to it. . . . When the Executive acts, it presumptively acts in an executive or administrative capacity as defined in Art. II. And when, as here, one House of Congress purports to act, it is presumptively acting within its assigned sphere.”

Id. at 951-52 (emphasis added).

HYDRAULIC PRESSURE & HERMETICALLY SEALED . . .



KEY QUOTES FROM CHADHA

“Not every action taken by either House is subject to the bicameralism and presentment requirements of Art. I. . . . Whether actions taken by either House are, in law and fact, an exercise of legislative power depends not on their form but upon “whether they contain matter which is properly to be regarded as legislative in its character and effect.” . . . Examination of the action taken here by one House . . . reveals that it was essentially legislative in purpose.”

Id. at 952 (emphasis added).

Footnote 16 in *CHADHA*

In footnote 16, the Majority conceded that *some* administrative agency action resembles lawmaking.

- What the Attorney General was doing when he performed his delegated function, was not legislative but executive, and subject to the checks built into the authorizing act by Congress.
- Congressional authority to delegate portions of its power to administrative agencies cannot support an argument that Congress can also constitutionally control administration of the laws by way of an [otherwise unconstitutional] congressional veto.

WAS *CHADHA* CITED IN *GUNDY*?

- “Nor have we abandoned enforcing other sides of the separation-of-powers triangle between the legislative, executive, and judiciary. We have not hesitated to prevent Congress from ‘confer[ring] the Government’s ‘judicial Power’ on entities outside Article III.’ We’ve forbidden the executive from encroaching on legislative functions by wielding a line-item veto. **We’ve prevented Congress from delegating its collective legislative power to a single House.** (*Chadha*) And we’ve policed legislative efforts to control executive branch officials. These cases show that, when the separation of powers is at stake, we don’t just throw up our hands. . . . And abdication here would be no more appropriate. To leave this aspect of the constitutional structure alone undefended would serve only to accelerate the flight of power from the legislative to the executive branch, turning the latter into a vortex of authority that was constitutionally reserved for the people’s representatives in order to protect their liberties.”

Gundy v. U.S. 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting)

JUSTICE POWELL, CONCURRING

Stressed respect due to Congress and invokes long-standing concept of deciding a constitutional case on *narrower ground*.

- “Congress clearly views this procedure as essential to controlling the delegation of power to administrative agencies. One reasonably may disagree with Congress’ assessment of the veto’s utility, but the respect due in its judgment as a coordinate branch of government cautions that our holding should be no more extensive than necessary to decide this case. In my view, the case may be decided on a narrower ground.”

Characterized the activity as *adjudicatory* in nature.

- “On its face, the House’s action appears to be *clearly adjudicatory*. The House did not enact a general rule; rather, it made its own determination that six specific persons did not comply with certain statutory criteria. . . . Unlike the judiciary or an administrative agency, Congress is not bound by established substantive rules . . . [nor] to the procedural safeguards such as a right to counsel and a hearing”

JUSTICE WHITE, DISSENTING

- Diagnosed a Hobson’s choice for Congress of refraining from delegating authority and leaving important issues unresolved VS. delegating without oversight to administrative agencies unresponsive to the public.
- Saw the 1-House veto as more than just efficient, convenient, and useful; it was an indispensable political invention allowing resolution of policy differences, assuring accountability of administrative agencies, and preserving congressional control.
- Disputed that the 1-House veto allows the making of law; it’s merely a way of retaining a “check” (a check, moreover, passed through bicameralism & presentment in the enabling act).

IMPORTANT NOTES AFTER *CHADHA*

- So-called “private bills” are problematic and likely could not have achieved Congressional will (to deport Chadha).
- Some argue the substantive context was entitled to more attention in *Chadha* because legislative vetoes are often embedded in legislation generated in highly political situations, especially those related to governmental work.
- The remedy in *Chadha* – **severing the own constitutional provision containing the one-House vote** – was hard for lower courts to implement in subsequent cases against other acts, especially where the one-House veto power appeared to be the *quid pro quo* for the underlying delegation to an administrative agency or government official.

CHADHA DEFIED?



- “Between the time *Chadha* was decided [in 1983] and 2004, more than 400 new legislative vetoes appeared in legislation signed into law by [Presidents Reagan, Clinton & both Bushes]. The vast majority of these attached committee and subcommittee veto conditions to agency use an appropriated funds. . . . *Chadha* drove underground” a set of legislative choices that used to operate in plain sight. Neal Devins & Louis Fisher, *THE DEMOCRATIC CONSTITUTION* 94-96 (2004).
- Administrative agencies comply because they have to live with Congressional review and the fact that Congress & Congressional subcommittees authorize, monitor and fund their programs.

- a. Delegation of Regulatory Power
- b. Congressional Control of Regulatory Policy

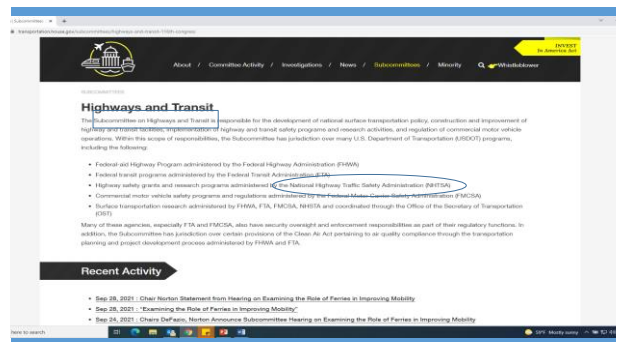
- ✓ (1) Legislation and Vetoes
- ✓ (2) Appropriations & Spending
- (3) Oversight & Investigations
- ✓ (4) Direct Control Over Regulatory Actors

CONGRESSIONAL CONTROL THROUGH:


(3) Oversight and Investigations

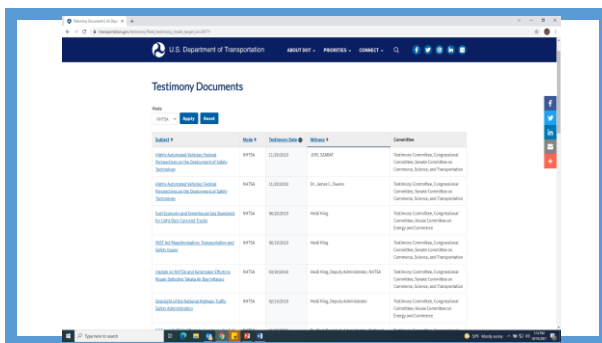
OVERSIGHT & INVESTIGATION

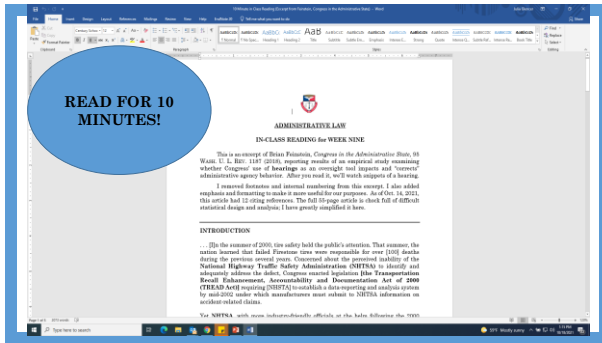
- Complex system of committees & subcommittees divide oversight of the administrative state (since 1960's).
 - "The machinery of congressional oversight is enormous."
- Jack Beerman, Congressional Administration, 43 SAN DIEGO L. REV. 61, 124 (2006).*
- Based on the use of **police patrols** & **fire alarms**.



OVERSIGHT & INVESTIGATION

- Huge outlay of time & resources devoted to conducting oversight
 - Dedicated committee staff
 - Dedicated non-partisan assistance (GAO, CRS, CBO).
 - Tools to foster investigation including subpoena power for witnesses & documents
 - Days & days devoted to conducting investigatory hearings
 - Is the oversight effective?
 - Some believe overrun by opportunistic committees/committee chairs with preferences that diverge from norm and who wish to cater to special or local interests.
 - Some believe beholden to partisanship
 - Some believe effective (*and could be even more so . . .*)
- 





READ FOR 10 MINUTES!

ADMINISTRATIVE LAW
IN-CLASS READING for WEEK NINE

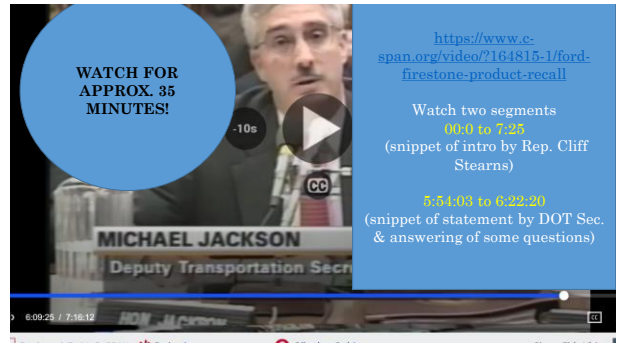
This is an excerpt of Brian Feinstein, Congress in the Administrative State, 65 Wash. U. L. Rev. 1417 (2018), reporting results of an empirical study examining whether Congress' use of hearings or an oversight tool impacts and "corrects" administrative agency behavior. After you read it, we'll reach aspects of a hearing.

I revised footnotes and internal numbering from this excerpt. I also added emphasis and formatting to make it more useful for our purposes. As of 10/14/2021, this article had 12 citing references. The full 19-page article is check full of difficult annotated design and evidence. I am greatly simplified it here.

INTRODUCTION

On the evening of 2008 the safety held the public's attention. That evening, the nation learned that failed Firestone tires were responsible for over 100 deaths during the previous several years. Concerned about the potential liability of the National Highway Traffic Safety Administration (NHTSA) to identify and adequately address the defect, Congress enacted legislation: *How Transportation Recall Enhancement, Accountability and Documentation Act of 2008* (TRERAD) requiring NHTSA to establish a data-reporting and analysis system by mid-2010 under which manufacturers must submit to NHTSA information on vehicle-related defects.

Yet NHTSA, with some inordinately officials, at the time illustrate the "TRERAD"



WATCH FOR APPROX. 35 MINUTES!

<https://www.congress.gov/video/2164815-1/ford-firestone-product-recall>

Watch two segments
00:00 to 7:25
(snippet of intro by Rep. Cliff Stearns)

5:54:03 to 6:22:20
(snippet of statement by DOT Sec. & answering of some questions)

MICHAEL JACKSON
Deputy Transportation Sec