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Privatization and the Constitution: Selected Legal Issues

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Summary

Privatization is a broad term that encompasses various types of public-private arrangements, including contractual relationships with private entities for goods or services and government-funded voucher programs that allow individuals to purchase private goods or services. In other contexts, Congress has empowered private entities or chartered corporations to deliver services previously provided by governmental entities or to advance legislative objectives. Congress has created various corporations, including Amtrak and the Communications Satellite Corporation. More recently, in the 114th and 115th Congresses, legislation was proposed to create a corporation to provide air traffic control services that are currently administered by the Federal Aviation Administration.

While the federal government employs various forms of privatization, Congress's authority to delegate governmental functions and services to other entities has its constitutional limits. Constitutional principles, such as the nondelegation doctrine, the Due Process Clause, and the Appointments Clause, may constrain Congress's authority to delegate federal authority to private, governmental, or quasi-governmental entities.

Courts have defined these constitutional limits when reviewing Congress's efforts to privatize public services or functions. When reviewing privatization issues, a court must first determine whether the entity in question is a private or governmental entity. While certain entities such as traditional federal agencies can be readily characterized as governmental entities, the distinction between a public and a private entity can be unclear. For example, corporations established by Congress are not always treated as private entities by the courts. The Supreme Court has held that a legislative declaration that an entity is either a private or governmental actor is not dispositive for purposes of determining the entity's status. Therefore, courts have weighed various factors in making this threshold determination.

The court's determination of an entity's governmental or private status typically guides its review of delegations of authority. Courts have applied different tests for private versus governmental entities in reviewing challenges under the "nondelegation doctrine." This doctrine, as interpreted by the courts, limits Congress's authority to delegate its legislative power to the other entities. In general, courts have upheld delegations of authority to governmental entities such as federal agencies. However, courts have subjected private entities to a higher level of scrutiny and limited the types of services and functions that Congress can delegate to them.

Congressional delegations of power to government entities, including government-created corporations, may implicate other provisions of the Constitution. For instance, case law has explored whether delegation of power to quasi-governmental actors violates the Due Process Clause of the Fifth Amendment. The increased use of corporations that have both public and private aspects has complicated how courts have analyzed due process challenges to the authority delegated to these entities. Further, the Constitution's requirements regarding the appointment of certain federal officials under the Appointments Clause may be relevant to government privatization efforts. The Appointments Clause of Article II of the Constitution generally requires "officers of the United States" to be appointed by the President "with the Advice and Consent of the Senate," although Congress may vest the appointment of "inferior" officers "in the President alone, in the Courts of Law, or in the Heads of Departments." In contrast, non-officers are not subject to any constitutionally required method of appointment. A crucial threshold question respecting the Appointments Clause is who constitutes an "officer" of the United States.

This report focuses on the constitutional principles and judicial decisions that may constrain certain types of privatization that involve private and government-created entities.

Contents

Judicial Review of Privatization 2
Is an Entity a Governmental or Private Entity? 3
Applying Constitutional Principles to Privatization 5
Nondelegation Doctrine 6
Delegation to Official Governmental Entities 6
Delegations to Private Entities 7
The Due Process Clause and Delegations to Governmental Entities 9
Due Process Concerns in Carter Coal 10
Government-Created Corporations 11
Appointments Clause 13
The Removal Power 18

Contacts

Author Information 20

Privatization is a broad term that generally refers to the transfer of public or governmental functions or services to private entities.[1] Privatization of government functions involves a "host of arrangements," including public-private contractual relationships where private entities provide goods or services for the government or the public.[2] For example, federal agencies often contract with private entities to assist in the rulemaking process, including drafting proposed regulations and preparing legal opinions.[3] Other types of privatization include government-funded voucher programs or other subsidies that allow individuals to purchase private goods or services.[4]

In other contexts, Congress has empowered private entities or created entities in a variety of forms to (1) deliver services or perform functions previously provided by governmental entities or (2) advance legislative objectives.[5] One form of privatization is the creation of government corporations. As noted by the U.S. Government Accountability Office: "The federal government has created entities using a corporate device, in various forms and contexts, for a long time."[6] Congress has created numerous corporations, including Amtrak and the Communications Satellite Corporation (COMSAT). Congress established Amtrak in 1970 as a for-profit corporation to take over the passenger rail service from private railroad companies.[7] In addition, Congress created COMSAT, a publicly traded corporation, in the Communications Satellite Act of 1962, to develop a commercial communications satellite system.[8] More recently, in the 114th and 115th Congresses, legislation was proposed to create a nonprofit corporation to provide air traffic control services that are currently administered by the Federal Aviation Administration.[9] Other

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[1] Jody Freeman, *Extending Public Law Norms through Privatization*, 116 HARV. L. REV. 1285, 1286-87 (2003*). See also* Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1230 (2003) ("Although the term 'privatization' covers a variety of different activities, a useful definition encompasses the range of efforts by governments to move public functions into private hands and to use market-style competition."); Gillian E. Metzer, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1377 (2003) (describing "privatization" as "conventionally understood to signify a transfer of public responsibilities to private hands"); Martha Albertson Fineman, *Introduction* to PRIVATIZATION, VULNERABILITY, AND SOCIAL RESPONSIBILITY: A COMPARATIVE PERSPECTIVE 1, 1 (Martha Albertson Fineman et al. eds. 2017) (broadly defining "privatization" as an "active 'withdrawal of the state from many areas of social life' [that] can take many forms") (quoting DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM (2005)).

[2] "Agencies form contracts with private parties; they specify terms at the outset, and they maintain degrees of supervisory authority. As a practical matter, however, it is the private contractors who deliver many of the services traditionally reserved to government." Alfred C. Jr. Aman & Joseph C. Dugan, *The Human Side of Public-Private Partnerships: From New Deal Regulation to Administrative Law Management*, 102 IOWA L. REV. 883, 886 (2017). *See generally* GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY (Jody Freeman & Martha Minow, eds., 2009) (discussing various types of government contracting).

[3] *See* Kimberly N. Brown, *Public Laws and Private Lawmakers*, 93 WASH. U. L. REV. 615, 621-22 (2016) (describing how federal agencies "outsource its delegated rulemaking powers to the private sector").

[4] *See* Kathy Abrams, *Three Faces of Privatization, in* PRIVATIZATION, VULNERABILITY, AND SOCIAL RESPONSIBILITY: A COMPARATIVE PERSPECTIVE 9, 11-14 (Martha Albertson Fineman et al. eds. 2017) (discussing voucher programs where the state provides parents with funding that can be used for children to attend private schools).

[5] *See generally* Anne Joseph O'Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841 (2014) (analyzing government-created corporations and organizations).

[6] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 15-51, 15-66 (2008) (discussing various types of corporate entities created by the government).

[7] Rail Passenger Service Act of 1970 (RPSA), Pub. L. No. 91-518, § 101, 84 Stat. 1328 (1970).

[8] Communications Satellite Act of 1962, 87 Pub. L. 624, 76 Stat. 419 (1962).

[9] 21st Century Aviation, Innovation, Reform, and Reauthorization Act, H.R. 2997, 115th Cong. §§ 201-243 (2017). For a more detailed discussion and analysis of the constitutional questions that Title II of H.R. 2997 could potentially raise, CRS has published a general congressional distribution memorandum, "Legal Analysis of Title II of H.R. 2997, 21st Century Aviation, Innovation, Reform, and Reauthorization (AIRR) Act" (July 26, 2017), which is available to

recent privatization efforts include legislative proposals to establish a wholly owned government corporation to provide bond guarantees and loans for state or local government-sponsored transportation, energy, water, communications, or educational facility infrastructure projects.[10]

While the federal government employs various forms of privatization,[11] the transfer of government functions and services to other entities has its constitutional limits. As explained by Supreme Court Justice William J. Brennan: "The Government is free, of course, to 'privatize' some functions it would otherwise perform. But such privatization ought not automatically release those who perform Government functions from constitutional obligations."[12] Congressional efforts to privatize or delegate functions or services may raise constitutional questions regarding Congress's authority to empower other entities.

- To what extent can Congress transfer or delegate authority to other entities?
- Are these entities considered private or governmental actors?
- Does such delegation of authority implicate due process concerns?
- Are managing directors and employees who govern a government-created corporation considered "Officers of the United States" subject to the requirements of the Appointments Clause?

This report[13] will explore these questions by reviewing how courts apply constitutional principles to privatization differently, depending on whether the authority is delegated to governmental entities, private entities, or government-created corporations.

Judicial Review of Privatization

To define what constitutional limits could apply when Congress delegates authority to an entity to perform a governmental function, courts must first determine whether the entity in question is a private or governmental entity. The answer to this threshold question is central to how a court would review the constitutional issues underlying the delegation of authority to that entity. As one legal scholar explained, "the public-private distinction is primary—all other legal distinctions are subsumed beneath this first-order division of legal life."[14] For example, constitutional provisions, such as the Due Process Clause, apply only to governmental entities,[15] while the private nondelegation doctrine that prohibits the delegation of governmental functions to

congressional clients upon request. *See also* Aviation Innovation, Reform, and Reauthorization Act of 2016, H.R. 4441, 114th Cong. §§ 211-229 (2016).

[10] Partnership to Build America Act of 2017, H.R. 1669, 115th Cong. (2017).

[11] *See* Metzer, *supra* note 1, at 1369 (describing "privatization" as a "long standing" "national obsession"). *See also* Kimberly N. Brown, *Public Laws and Private Lawmakers*, 93 WASH. U. L. REV. 615, 619 (2016) (explaining that "'privatization' and 'outsourcing' cover a broad spectrum of public-private relationships that exist across the federal government infrastructure") (internal citations omitted).

[12] S.F. Arts & Ath., Inc. v. United States Olympic Comm., 483 U.S. 522, 560 (1987) (Brennan, J., dissenting).

[13] Other potential constitutional issues related to other types of privatization such as outsourcing of federal agency services to private contractors or federal sponsored voucher programs are beyond the scope of this report.

[14] William J. Novak, *Public-Private Governance A Historical Introduction*, *in* GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 23, 25 (Jody Freeman & Martha Minow, eds., 2009).

[15] *See infra* "The Due Process Clause and Delegations to Governmental Entities."

nongovernmental entities is relevant only if Congress improperly delegates authority to private entities.[16]

Is an Entity a Governmental or Private Entity?

While certain entities such as federal agencies can be readily characterized as governmental entities, the distinction between a public and a private entity is often unclear for government-created corporations.[17] Courts cannot rely on the legislative origins of these corporate entities because the Supreme Court has held that a legislative declaration that an entity is either a private or governmental entity is not dispositive for purposes of determining the entity's status.[18] Thus, courts have developed various tests and weighed different factors to classify these entities. Recent case law highlights "the judiciary's unsettled approach to analyzing the constitutional status of 'boundary agencies' that sit at the public-private border."[19] For "boundary agencies" set up as private corporations with varying degrees of governmental involvement and oversight, it is unclear whether courts would consider these corporations as private or governmental entities and what test courts would apply in reviewing constitutional challenges to their authority.[20]

In the most recent Supreme Court case on this issue, *Department of Transportation v. Association of American Railroads*,[21] the Supreme Court reviewed a determination by the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) that concluded that Amtrak was a private entity "with respect to Congress's power to delegate regulatory authority."[22] Consistent with that threshold determination, the D.C. Circuit invalidated joint regulations established by Amtrak and the Federal Railroad Administration (FRA) pursuant to the Passenger Rail Investment and Improvement Act of 2008 (PRIIA).[23] These joint regulations set performance metrics and standards to enforce Amtrak's statutory priority over other trains.[24] The standards would have been used in part to determine when the Surface Transportation Board should investigate if delays in Amtrak's passenger rail service are being caused by freight railroad operators failing to comply with their statutory mandate to prioritize Amtrak traffic over freight traffic on their tracks.[25] The Association of American Railroads (AAR), a trade association acting on behalf of its freight railroad members, filed suit to challenge the PRIIA as an unconstitutional delegation of authority to a private entity and a violation of the Fifth Amendment's Due Process

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[16] *See infra* "Delegations to Private Entities."

[17] *See* Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL'Y 931, 940 (2014) ("The public-private distinction is fuzzy, and statutory labels aren't always dispositive."); Donna M. Nagy, *Playing Peekaboo with Constitutional Law: The PCAOB and Its Public/Private Status*, 80 NOTRE DAME L. REV. 975, 1030 (2005) ("[E]xpanded privatization has served to blur the distinction between the spheres of public and private.").

[18] Dep't of Transp. v. Ass'n of Am. R.R., 135 S. Ct. 1225, 1228 (2015); Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 394 (1995).

[19] *The Supreme Court 2014 Term: Leading Case: Federal Statutes & Regulations: Passenger Rail Investment and Improvement Act—Nondelegation—Department of Transportation v. Association of American Railroads*, 129 HARV. L. REV. 341, 350 (2015); *see also* O'Connell, *supra* note 5, at 894.

[20] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 15-86-87 (2008) (discussing how the distinction between what is public or private is "indistinct" for "quasi-private," "quasi-governmental," "hybrid organizations," and "twilight zone corporations") (internal quotations and citations omitted).

[21] Dep't of Transp. v. Ass'n of Am. R.R., 135 S. Ct. 1225, 1228 (2015).

[22] Ass'n of Am. R.R. v. Dep't of Transp., 721 F.3d 666, 677 (D.C. Cir. 2013) [hereinafter *American Railroads I*].

[23] P.L. 110-432, Div. B,122 Stat. 4848 (2008).

[24] *Id.* § 207.

[25] *Id.* § 213(a); 49 U.S.C. § 24308(f)(1).

Clause.[26] The D.C. Circuit concluded that "[f]ederal lawmakers cannot delegate regulatory authority to a private entity. To do so would be 'legislative delegation in its most obnoxious form.'"[27]

On appeal, the Supreme Court vacated the D.C. Circuit opinion, holding that "Amtrak is a governmental entity, not a private one, for purposes of determining the constitutional issues presented in [the] case."[28] The Court reasoned 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."[29] As a result, the Court gave little weight to Congress's declaration that Amtrak "is not a department, agency, or instrumentality of the United States Government' and 'shall be operated and managed as a for-profit corporation.'"[30]

In concluding that Amtrak was a governmental entity, the Court relied on a multifactor test,[31] looking to Amtrak's (1) ownership and corporate structure; (2) political branches' supervision over its priorities and operations; (3) statutory goals; (4) day-to-day management; and (5) federal financial support.[32] The Court determined that:

> 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

[26] *American Railroads I*, 721 F.3d at 670.

[27] *Id.* (quoting *Carter Coal*, 298 U.S. 238, 311 (1936)).

[28] *Dep't of Transp.*, 135 S. Ct. at 1233. *See also* Lebron v. National Railroad Passenger Corp., 513 U.S. 374, 394 (1995) (holding that Amtrak "is an agency or instrumentality of the United States for the purpose of individual [First Amendment] rights guaranteed against the Government by the Constitution").

[29] *Dep't of Transp.*, 135 S. Ct. at 1233.

[30] *Id.* at 1231.

[31] Prior to the Supreme Court's decisions regarding Amtrak's status as a government agent in *Lebron* and *Association of American Railroads*, some courts applied a "symbiotic relationship" test as defined in *Jackson v. Metro. Edison Co.*to determine if specific actions of a private entity were subject to constitutional limitations. 419 U.S. 345, 357 (1974). The test in these "state action" cases reviewed whether there was "a sufficiently close nexus between the [government] and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the [government] itself." *Id.* at 351. Using this test, courts have held that discrete employment actions of Amtrak were not considered governmental action. *See, e.g.*, Anderson v. Nat'l R.R. Passenger Corp., 754 F.2d 202, 204 (7th Cir. 1984) (holding that Amtrak was not a state actor in a challenge to employee termination). In contrast, the Supreme Court in both *Lebron* and *Association of American Railroads* held that Amtrak was a government entity for certain constitutional challenges. *Dep't of Transp.*, 135 S. Ct. at 1228-33; *Lebron*, 513 U.S. at 394. The Court in *Association of American Railroads* followed its 1995 decision in *Lebron* that addressed a First Amendment challenge to Amtrak's refusal to display a political advertisement. *Lebron*, 513 U.S. at 377. These Supreme Court decisions in *Lebron* and *Association of American Railroads* cast doubt on whether the "symbiotic relationship test" and the case law that focuses on the particular actions of an entity to determine if it is governmental in nature is applicable in certain constitutional challenges. In *Lebron*, the Court determined that it was "unnecessary to traverse the difficult terrain" of traditional state action analysis, remarking that "[i]t is fair to say that 'our cases deciding when private action might be deemed that of the state have not been a model of consistency.'" *Lebron*, 513 U.S. at 378 (quoting Edmonson v. Leesville Concrete Co., 500 U.S. 614, 632 (1991) (O'Connor, J., dissenting). Further, the Court in *Association of American Railroads* did not cite the "symbiotic relationship" test or the specific challenged action in determining that Amtrak was a governmental entity for the purposes of reviewing claims at issue in that case. *Dep't of Transp.*, 135 S. Ct. at 1233.

[32] *Dep't of Transp.*, 135 S. Ct. at 1231-32.

> President at will. Amtrak was created by the Government, is controlled by the Government, and operates for the Government's benefit.[33]

In applying this multifactor test, the Court concluded that, "in its joint issuance of the metrics and standards with 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."[34] Of note, the Court did not explain the relative importance of the various factors in the test announced in *Association of American Railroads*, and the Court provided little guidance on how the test might apply beyond the specific circumstances respecting Amtrak. The Supreme Court remanded the case to the D.C. Circuit to reconsider the nondelegation, due process, and other constitutional claims raised by the plaintiffs in light of the determination that Amtrak is a governmental entity.[35]

Because case law on the threshold question of whether an entity is a private or governmental entity is undeveloped and fact-dependent, it is difficult to conclude with any certainty how a court will apply the *Association of American Railroads* test with respect to other government-created corporations or other entities performing government functions.[36] In general, when applying this multifactor test, courts have examined these entities in a holistic manner instead of focusing on the specific challenged action of the entity. For example, in 2016, then-Judge Gorsuch, writing on behalf of a panel of the U.S. Court of Appeals for the Tenth Circuit, examined the factors considered in *Association of American Railroads* to determine that the National Center for Missing and Exploited Children (NCMEC) was a government entity to which the Fourth Amendment applied.[37] The court looked at NCMEC as a whole, reviewing the participation of law enforcement in its daily operations, "sizable" presence of government officials on its board, and government funding in determining NCMEC's governmental status.[38] Once the court determined that NCMEC was a governmental entity, it then addressed whether NCMEC violated the Fourth Amendment when it searched an individual's email without a warrant.[39]

Applying Constitutional Principles to Privatization

Congress's authority to delegate and privatize governmental functions and services is potentially limited by constitutional principles, including the nondelegation doctrine, the Due Process Clause, and the Appointments Clause. Courts have applied these principles in legal challenges to (1) the scope of Congress's authority to delegate its legislative power;[40] (2) the manner in which Congress delegates these powers;[41] (3) the types of entities that exercise delegations of

[33] *Id.* at 1232-33.

[34] *Id.* at 1233.

[35] *Id*. On remand, the D.C. Circuit court invalidated the PRIIA's provision that granted regulatory authority to Amtrak on due process grounds. *See infra* "Government-Created Corporations."

[36] *See generally id*. at 1233.

[37] United States v. Ackerman, 831 F.3d 1292, 1297-98 (10th Cir. 2016) (Gorsuch, J.).

[38] *Id.* at 1298.

[39] *Id.* at 1294-95.

[40] *See infra* "Nondelegation Doctrine."

[41] *See infra* "Delegation to Official Governmental Entities" and "Delegations to Private Entities" sections.

authority;[42] (4) the nature and scope of the delegated powers or functions;[43] and (5) the authority to appoint the individuals that exercise certain powers.[44]

Nondelegation Doctrine

Under Article I of the Constitution, "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States."[45] The Supreme Court has broadly defined "legislative power" as "the power to make laws."[46] Although the Court has interpreted the Constitution to prohibit Congress from delegating its legislative authority, the Court has explained that Congress may "delegate to others at least some authority that it could exercise itself."[47]

The "nondelegation doctrine" has traditionally been applied to limit Congress's authority to delegate "legislative power" to the other governmental entities.[48] This doctrine is based on the larger doctrine of separation of powers and exists primarily to prevent Congress from abdicating its core legislative function as established under Article I of the Constitution.[49] How courts apply the nondelegation doctrine depends on whether an entity is considered a private or governmental entity.

Delegation to Official Governmental Entities

The Supreme Court has upheld delegations of authority to governmental entities, including the President, executive officials, judicial bodies, and federal agencies when Congress provides an "intelligible principle" to govern its delegation.[50] In allowing limited delegation of legislative authority, the Court acknowledged in *Mistretta v. United States* that "no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it."[51] The "intelligible principle" test requires that Congress, not the delegatee, be the entity that delineates a legal framework to

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[42] *Id.*

[43] *See infra* "Delegations to Private Entities" and "The Due Process Clause and Delegations to Governmental Entities" sections.

[44] *See infra* "Appointments Clause" section.

[45] U.S. CONST. art. I, § 1.

[46] Loving v. United States, 517 U.S. 748, 771 (1996).

[47] *Id*. at 758.

[48] *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) ("Article I, § 1, of the Constitution vests 'all legislative Powers herein granted . . . in a Congress of the United States.' This text permits no delegation of those powers. . . . ") (internal citations omitted).

[49] Mistretta v. United States, 488 U.S. 361, 371 (1989) ("The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government. The Constitution provides that '[a]ll legislative Powers herein granted shall be vested in a Congress of the United States,' and we long have insisted that 'the integrity and maintenance of the system of government ordained by the Constitution' mandate that Congress generally cannot delegate its legislative power to another Branch.") (internal citations omitted).

[50] J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized [] is directed to conform, such legislative action is not a forbidden delegation of legislative power."). *See also Whitman*, 531 U.S. at 472 ("[W]e repeatedly have said that when Congress confers decisionmaking authority upon agencies Congress must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" (quoting *J.W. Hampton, Jr. & Co.*, 276 U.S. at 409)); *Loving*, 517 U.S. at 771 ("The intelligible-principle rule seeks to enforce the understanding that Congress may not delegate the power to make laws and so may delegate no more than the authority to make policies and rules that implement its statutes.").

[51] *Mistretta*, 488 U.S. at 415.

guide and constrain the authority of the delegatee, such as a federal executive agency.[52] Congressional delegation of regulatory power to a federal agency is often accompanied by the authority to implement the delegation through rulemaking.[53]

The Supreme Court has upheld very broad congressional delegations of authority to federal agencies as satisfying the "intelligible principle" test,[54] having invalidated federal laws only twice under the test.[55] For example, the Court has previously held that broad delegations to regulate in the "public interest" or a "fair and equitable" manner satisfy the "intelligible principle" test.[56]

Delegations to Private Entities

In contrast to the relative latitude given to delegations to official governmental entities under the "intelligible principle" test, the Supreme Court has limited the types of authority and functions that Congress can delegate to a purely private entity.[57] The seminal case addressing delegations to a private entity is *Carter v. Carter Coal Co.*[58] In *Carter Coal*, the Supreme Court invalidated the Bituminous Coal Conservation Act of 1935, a law that granted a majority of coal producers and miners in a given region the authority to impose maximum hour and minimum wage standards on all other miners and producers in that region.[59] The Court reasoned that by conferring on a

[52] *See, e.g.*, Panama Refining v. Ryan, 293 U.S. 388, 421 (1935) ("The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply.").

[53] *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."); *see, e.g.*, 26 U.S.C. § 7805 (providing the Secretary of the Treasury with the authority to "prescribe all needful rules and regulations . . . "); 33 U.S.C. § 1607 (authorizing the promulgation of "such reasonable rules and regulations as are necessary to implement the provisions of this Act"); 42 U.S.C. § 3614a (authorizing the Secretary of Housing and Urban Development to "make rules . . . to carry out this subchapter").

[54] *See, e.g.*, *Whitman*, 531 U.S. at 476 (2001) (upholding delegation to the Environmental Protection Agency to set "ambient air quality standards" based on certain criteria); Am. Power & Light Co. v. SEC, 329 U.S. 90, 104 (1946) (upholding delegation to the Securities and Exchange Commission to modify the structure of holding company systems); Nat'l Broad. Co. v. United States, 319 U.S. 190, 216-17 (1943) (upholding delegation to the Federal Communications Commission to regulate radio broadcasting according to "public interest, convenience, or necessity"); N.Y. Cent. Sec. Corp. v. United States, 287 U.S. 12, 24-25 (1932) (upholding delegation to Interstate Commerce Commission to regulate railroad consolidation).

[55] *See Panama Refining*, 293 U.S. at 340 (invalidating a statutory provision that authorized the President to prohibit the transportation of petroleum as an unconstitutional delegation because "Congress has declared no policy, has established no standard, has laid down no rule"); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 542 (1935) (invalidating a statutory provision that allowed the President "virtually unfettered" authority to approve detailed codes to govern all business as an "unconstitutional delegation of legislative power").

[56] *Nat'l Broad. Co.*, 319 U.S. at 216; Yakus v. United States, 321 U.S. 414, 420 (1944).

[57] *See* Dep't of Transp. v. Ass'n of Am. R.R., 135 S. Ct. 1225, 1238 (2015) (Alito, J., concurring) ("By any measure, handing off regulatory power to a private entity is 'legislative delegation in its most obnoxious form.'") (quoting *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936)); *id*. at 1254 (Thomas, J., concurring) ("Because a private entity is neither Congress, nor the President or one of his agents, nor the Supreme Court . . . the Vesting Clauses would categorically preclude it from exercising the legislative, executive, or judicial powers of the Federal Government. . . . 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."). *See also* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1957 (2015) (Roberts, C.J., dissenting) ("It is a fundamental principle that no branch of government can delegate its constitutional functions to an actor who lacks authority to exercise those functions.").

[58] 298 U.S. 238 (1936) [hereinafter *Carter Coal*].

[59] *Id*. at 311-12.

majority of private individuals the authority to regulate "the affairs of an unwilling minority," the law was "legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business."[60]

Carter Coal has not been interpreted by courts as a comprehensive ban on private involvement in regulation. In the context of private parties aiding in regulatory functions and decisions, the Court has indicated that Congress may empower a private party to play a more limited role in the regulatory process. For example, in *Currin v. Wallace*,[61] the Court upheld a law that authorized the Secretary of Agriculture to issue a regulation respecting the tobacco market, but only if two-thirds of the growers in that market voted for the Secretary to do so.[62] Distinguishing *Carter Coal*, the Court stated that "this is not a case where a group of producers may make the law and force it upon a minority."[63] Rather, it was Congress that had exercised its "legislative authority in making the regulation and in prescribing the conditions of its application."[64]

Similarly, in *Sunshine Anthracite Coal Co. v. Adkins*,[65] the Supreme Court upheld a provision of the Bituminous Coal Act of 1937,[66] which authorized private coal producers to propose standards for the regulation of coal prices.[67] Those proposals were provided to a governmental entity, which was then authorized to approve, disapprove, or modify the proposal.[68] The Court approved this framework, relying heavily on the fact that the private coal producers did not have the authority to set coal prices, but rather acted "subordinately" to the governmental entity (the National Bituminous Coal Commission).[69] In particular, the *Sunshine Anthracite* Court relied on the fact that the commission and not the private industry entity determined the final industry prices to conclude that the "statutory scheme" was "unquestionably valid."[70]

In *Currin* and *Adkins*, the Supreme Court did not evaluate whether Congress laid out an "intelligible principle" guiding these private entities. Rather than applying the "intelligible principle" test,[71] the Court reviewed whether the responsibilities given to the private entities were acts of legislative or regulatory authority.[72] In both statutes challenged in *Currin* and *Adkins*, the private entities did not impose or enforce binding legal requirements.[73] Because the private

[60] *Id*. at 311. The Court appeared to characterize the wage and hour provisions as an unlawful "delegation" to a private entity, but also held that the provision in question was "clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, *id.* at 311-12, leading some to question whether *Carter* should be considered a nondelegation case, at all. *See infra* "The Due Process Clause and Delegations to Governmental Entities."

[61] 306 U.S. 1 (1939) [hereinafter *Currin*].

[62] *Id*. at 6.

[63] *Id*. at 15.

[64] *Id*. at 16.

[65] 310 U.S. 381 (1940) [hereinafter *Adkins*].

[66] Pub. L. No. 75-48, 50 Stat. 72 (1937).

[67] *Adkins*, 310 U.S. at 388-89.

[68] *Id*. at 388.

[69] *Id*. at 399.

[70] *Id.*

[71] Some commentators have asserted that a judicial review of congressional delegation should be treated the same whether it empowers a *private* or *governmental* entity. *See, e.g.*, Volokh, *supra* note 17, at 955 ("Nor is there any difference between public and private delegations.").

[72] *Adkins*, 310 U.S. at 388-89; *Currin*, 306 U.S. 1,15-16 (1939).

[73] *Id.*

entity's responsibilities were primarily administrative or advisory, the Court determined that the statute did not violate the nondelegation doctrine.

Other courts have relied on the Supreme Court's holdings in *Currin* and *Adkins* to uphold limited delegation of authority to private entities so long as the government retained "pervasive surveillance and authority" over the entity in question.[74] For example, in *Pittston Co. v. United States*, the U.S. Court of Appeals for the Fourth Circuit concluded that the delegation of authority to a private entity to collect premiums to be paid by market participants was permissible because such a power was "administrative or advisory in nature."[75] Other courts have held that the private entities were not exercising regulatory authority but rather performed limited administrative or advisory functions subject to considerable governmental oversight.[76]

The Due Process Clause and Delegations to Governmental Entities

As discussed above, the nondelegation doctrine exists primarily to prevent Congress from ceding its legislative power to other entities not vested with legislative authority under the Constitution.[77] As interpreted by the courts and legal scholars, the doctrine helps to ensure that legislative decisions are made by the elected Members of Congress or governmental officials subject to "democratic responsibility and accountability."[78] However, delegations of authority to

[74] *See, e.g.*, United States v. Frame, 885 F.2d 1119, 1128-29 (3d Cir. 1989).

[75] Pittston Co. v. United States, 368 F.3d 385 (4th Cir. 2004) [hereinafter *Pittston*]. In *Pittston*, the court examined the question of whether a statute that created a private entity called the Combined Fund that collected annual assessments on any coal operators that had signed an agreement with the United Mine Workers of America to pay health and death benefits for retired miners. *Id.* at 391. The Combined Fund, in turn, administered the funds collected, enrolled beneficiaries in health plans, negotiated payment rates with the health plan, and was given the authority to sue signatories for nonpayment. *Id.*at 392. Because Congress defined and limited the ability of the Combined Fund to collect and assess fees that were the source of the private entity's operations, the Fourth Circuit concluded that the Combined Fund's role was fundamentally "administrative or advisory nature, and [the] delegation . . . does not . . . violate the nondelegation doctrine." *Id.* at 396.

[76] *See, e.g.*, United States v. Frame, 885 F.2d 1119, 1129 (3d Cir. 1989), 885 F.2d at 1129 (holding that Congress lawfully delegated authority to Cattleman's Beef Promotion and Research Board, a private entity comprised of cattle producers and importers created under the Beef Promotion and Research Act of 1985, to collect a statutorily established assessment from the beef industry and that that "no law-making authority" had been entrusted to private body that is "subject to the [Secretary of Agriculture's] pervasive surveillance and authority."); Todd & Co. v. SEC, 557 F.2d 1008, 1014 (3d Cir. 1977) ("The independent review function entrusted to the SEC is a significant factor in meeting serious constitutional challenges to this self-regulatory mechanism.").

[77] Mistretta v. United States, 488 U.S. 361, 371 (1989) ("The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government. The Constitution provides that '[a]ll legislative Powers herein granted shall be vested in a Congress of the United States,' and we long have insisted that 'the integrity and maintenance of the system of government ordained by the Constitution' mandate that Congress generally cannot delegate its legislative power to another Branch.") (internal citations omitted).

[78] Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S.CAL. L.R. 405, 436 (2008). *See also* Martin Edwards, *Who's Exercising What Power: Toward a Judicially Manageable Nondelegation Doctrine*, 68 ADMIN. L. REV. 61, 66 (2016) ("[A]ccountability for legislative judgments properly lies with Congress, consisting of the people's elected representatives, and accountability for executive judgments properly lies with the President, who also serves at the pleasure of the electorate."). *See generally Dep't of Transp.*, 135 S. Ct. at 1237 (Alito, J., concurring) ("The principle that Congress cannot delegate away its vested powers exists to protect liberty. Our Constitution, by careful design, prescribes a process for making law, and within that process there are many accountability checkpoints. It would dash the whole scheme if Congress could give its power away to an entity that is not constrained by those checkpoints. The Constitution's deliberative process was viewed by the Framers as a valuable feature, not something to be lamented and evaded.") (internal citations omitted); Yakus v. United States, 321 U.S. 414, 424 (1944) ("The function of formulating the codes was delegated, not to a public official responsible to Congress or the Executive, but to private individuals engaged in the industries to be regulated."); Planned Parenthood of Wis., Inc. v. Van Hollen, 23 F. Supp. 3d 956, 962 (W.D. Wis. 2014) (citations omitted)

governmental entities may raise additional constitutional concerns if those delegations deny due process to those subject to those delegated powers.

The Due Process Clause of the Fifth Amendment prohibits the federal government[79] from depriving any person of "life, liberty, or property without due process of law."[80] The Supreme Court has interpreted the Due Process Clause to, in part, ensure principles of fundamental fairness, including the notion that decisionmakers must be disinterested and unbiased.[81] Issues of potential unfairness and denial of rights can arise when self-interested entities such as profit-seeking corporations are delegated "coercive" regulatory power. The potential Due Process issues related to delegations of authority to certain types of governmental entities have their roots in the same case as the origin of the private nondelegation doctrine, *Carter Coal*.[82]

Due Process Concerns in Carter Coal

Although *Carter Coal* concerned the delegation of authority to private entities and not governmental bodies, some commentators have suggested that it may more accurately be viewed as a due process case.[83] In striking down the delegation to coal producers and miners to impose standards on other producers and miners, the Supreme Court focused on the coercive power that the majority could exercise over the "unwilling minority."[84] The opinion articulated the due process problems involved with providing regulatory authority to private entities:

> The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a governmental function, since, in the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question.[85]

The Court's reasoning in *Carter Coal* suggests that delegating authority to coal producers and miners to impose standards on other miners violates both the nondelegation doctrine and the

("[While] *Carter Coal* involved situations in which private citizens were delegated regulatory powers over others with adverse interests in their same neighborhood or marketplace, the doctrine has not been limited to those situations, but applied more broadly to situations where the government placed discretion in the hands of an entity that is not bound by any public duty or set of standards.").

[79] The Due Process Clause, by its very nature, only applies to the actions of the federal government. *See* Farrington v. Tokushige, 273 U.S. 284, 299 (1927) ("[T]he inhibition of the Fifth Amendment—'No person shall . . . be deprived of life, liberty or property without due process of law'—applies to the federal government and agencies set up by Congress for the government of the Territory.").

[80] U.S. CONST. amend. V. *See also* Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) ("The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases."); *Carter Coal*, 298 U.S. at 311; Eubank v. City of Richmond, 226 U.S. 137, 143-44 (1912) (invalidating a city ordinance on the grounds that it established "no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest, or even capriciously. . . . ").

[81] *See, e.g.*, *Marshall*, 446 U.S. at 242.

[82] *See supra* "Delegations to Private Entities."

[83] Academics and some courts have disagreed on whether *Carter Coal* is a nondelegation or due process decision. *See, e.g.*, Volokh, *supra* note 17, at 973-80.

[84] *Carter Coal*, 298 U.S. at 311.

[85] *Id*. at 311-12.

constitutional protections of the Due Process Clause. As the D.C. Circuit pointed out, it is unclear what aspect of the "delegation [in *Carter Coal*] offended the Court. By one reading, it was the Act's delegation to 'private persons rather than official bodies. By another, it was the delegation to persons 'whose interests may be and often are adverse to the interests of others in the same business' rather than persons who are 'presumptively disinterested,' as official bodies tend to be. Of course, the Court also may have been offended on both fronts. But as the opinion continues, it becomes clear that what primarily drives the Court to strike down this provision is the self-interested character of the delegatees'. . . ."[86] Courts have applied these due process principles in cases challenging the authority delegated to government-created corporations that have both private and governmental aspects.

Government-Created Corporations

Congress has created different types of corporations to support its legislative objectives and provide certain government services or functions.[87] As one court stated, "Congress may use any appropriate vehicle to promote constitutionally permissible ends. If it chooses to make use of a 'corporation,' Congress is not limited by traditional notions of corporate powers and organization but may mold its vehicle in any way which appears useful to the accomplishment of the legislative purpose."[88] Congress has established for- and nonprofit "private corporations" that are managed by boards of directors and not (as declared in the enabling legislation) "agencies" or "instrumentalities" of the Government.[89] For example, Congress created Amtrak in 1970 as a for-profit corporation to provide railroad passenger service, requiring by law for Amtrak to "maximize its revenues."[90]

The increased use of corporations that have both public and private aspects has complicated how courts have analyzed challenges to the authority delegated to these entities.[91] The potential self-interested nature of these government-created corporations can raise concerns beyond violations of the nondelegation doctrine. These concerns include whether the self-interested nature of a corporation combined with its coercive power over its competitors violates the Due Process Clause.

The D.C. Circuit has applied a higher level of scrutiny to these types of government-created corporate entities to address these due process concerns. In *Association of American Railroads v.*

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[86] *American Railroads II*, 821 F.3d 19, 31 (D.C. Cir. 2016).

[87] *See* Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 386-391 (1995) (discussing examples of corporations created by Congress).

[88] United States v. Nowak, 448 F.2d 134, 137-38 (7th Cir. 1971).

[89] *See, e.g.*, *id*. at 390-91. *See also* 47 U.S.C. § 396(b)-(c) (establishing "a nonprofit corporation, to be known as the 'Corporation for Public Broadcasting,' which will not be an agency or establishment of the United States Government," with a nine-member board of directors "appointed by the President, by and with the advice and consent of the Senate"); 42 U.S.C. § 2996b (establishing "a private nonmembership nonprofit corporation, which shall be known as the Legal Services Corporation, for the purpose of providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance"). For more information regarding government-created corporations, see CRS Report RL30533, *The Quasi Government: Hybrid Organizations with Both Government and Private Sector Legal Characteristics*, and CRS Report RS22230, *Congressional or Federal Charters: Overview and Enduring Issues*, by Henry B. Hogue.

[90] Rail Passenger Service Act of 1970 (RPSA), Pub. L. No. 91-518, § 101, 84 Stat. 1328 (1970). Congress established Amtrak in 1970 as a for-profit corporation to take over the passenger rail service that had been operated by private railroads because "the public convenience and necessity require the continuance and improvement" of railroad passenger service. *Id. See also* 49 U.S.C. §§ 24301(a)(2), 24101(d)).

[91] O'Connell, *supra* note ***, at 894.

Department of Transportation (*American Railroads II*),[92] the D.C. Circuit reviewed whether the delegating of authority to Amtrak, a government-created for-profit corporation, violates the Due Process Clause. *American Railroad II* was decided on remand after the Supreme Court held that Amtrak is a governmental entity in *Department of Transportation v. Association of American Railroads*.[93] First, the D.C. Circuit determined that the "Supreme Court's conclusion that Amtrak is a governmental entity resolved the nondelegation issue that was the primary focus" of its decision in *American Railroads I*.[94] The court then focused its review on whether the delegation of authority to Amtrak as a "public-private enterprise" violates the Due Process Clause.[95] The court explained that:

> the government's increasing reliance on public-private partnerships portends an even more ill-fitting accommodation between the exercise of regulatory power and concerns about fairness and accountability. Curbing the misuse of public power was the aim of the Magna Carta, and the Supreme Court has consistently concluded the delegation of coercive power to private parties can raise similar due process concerns. . . . Make no mistake; our decision today does not foreclose Congress from tapping into whatever creative spark spawned the Amtrak experiment in public-private enterprise. But the Due Process Clause of the Fifth Amendment puts Congress to a choice: its chartered entities may *either* compete, as market participants, *or* regulate, as official bodies. After all, "[t]he difference between producing . . . and regulating . . . production is, of course, *fundamental*." To do both is an affront to "the very nature of things," especially due process.[96]

The court determined that due process of law is violated if the entity is "(1) a self-interested entity (2) with regulatory authority over its competitors."[97] The court held that "giving a self-interested entity rulemaking authority over its competitors" violated the Due Process Clause.[98] It reasoned that "what primarily dr[ove] the [Supreme] Court" in *Carter Coal* was not the delegation of authority to "private persons," but rather the "self-interested character" of the empowered coal producers.[99]

In applying this due process test, the D.C. Circuit first concluded that Amtrak, though governmental, is similarly "self-interested" in that it is operated as a "for-profit corporation" and is required by law to "maximize its revenues."[100] Importantly, the court suggested that even if a

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[92] *American Railroads II*, 821 F.3d at 36.

[93] *Dep't of Transp.*, 135 S. Ct. at 1233. *See also* Lebron v. National Railroad Passenger Corp., 513 U.S. 374, 394 (1995) (holding that Amtrak "is an agency or instrumentality of the United States for the purpose of individual [First Amendment] rights guaranteed against the Government by the Constitution").

[94] *Id*. Notably, the D.C. Circuit, in *American Railroads I*, stated that if Amtrak is "just one more government agency—then the regulatory power it wields . . . is of no constitutional moment." *American Railroads I*, 721 F.3d at 674. The court appears to conclude, with little explanation, that the regulatory authority delegated to Amtrak in PRIIA would not violate the nondelegation doctrine because Amtrak is a governmental entity. *See supra* "Delegation to Official Governmental Entities."

[95] *American Railroads II*, 821 F.3d at 36 (citing *Carter Coal*, 298 U.S. at 311).

[96] *Id.* (internal citations omitted).

[97] *Id.* at 31.

[98] *Id*. at 27-28.

[99] *See id*. at 27-28 ("At first blush, it's not clear precisely which aspect of the delegation offended the Court. By one reading, it was the Act's delegation to 'private persons rather than official bodies. By another, it was the delegation to persons 'whose interests may be and often are adverse to the interests of others in the same business' rather than persons who are 'presumptively disinterested,' as official bodies tend to be. Of course, the Court also may have been offended on both fronts. But as the opinion continues, it becomes clear that what primarily drives the Court to strike down this provision is the self-interested character of the delegatees'. . . . ").

[100] *Id*. at 31-32 (citing 49 U.S.C. §§ 24301(a)(2), 24101(d)).

corporation is deemed a "governmental entity," a court may not necessarily conclude that it is a "disinterested" official body.[101] "Delegating legislative authority to official bodies is inoffensive because we presume those bodies are disinterested, that their loyalties lie with the public good, not their private gain."[102] However, delegating regulatory authority to a self-interested entity with power over its competitors would constitute an "unconstitutional interference with personal liberty and private property."[103] This distinction between a self-interested governmental entity and an official governmental body such as a federal agency indicates that a court may view a "boundary agency" such as Amtrak as a separate type of government entity that is subject to a different type of scrutiny under the Due Process Clause.[104]

In applying the second part of the test, the court determined that Amtrak has regulatory power over its competitors.[105] The court explained that the failure of an Amtrak competitor to incorporate the metrics and standards developed by Amtrak and "constrained very partially" by the Federal Railroad Administration (FRA),[106] could increase the risk of enforcement.[107] "Because obedience to the metrics and standards materially reduces the risk of liability, railroads face powerful incentives to obey. That is regulatory power."[108] As such, the court invalidated the PRIIA's provision of joint regulatory authority to Amtrak, holding that the fundamental principle of "fairness" that emanates from the Due Process Clause does not permit Congress to delegate to Amtrak the "coercive power to impose a disadvantageous regulatory regime on its market competitors."[109]

It is unclear how courts will apply the *American Railroads II* due process test with respect to the other types of government-created corporations.[110] Future judicial decisions will likely further define the *American Railroads II* due process test as courts will apply the test to different types of corporations with unique governing structures and specific delegated authorities.

Appointments Clause

Privatization of government services and functions may also implicate the Constitution's requirements regarding the appointment of certain federal officials under the Appointments Clause. As suggested earlier, given the wide variety of privatization forms that can be utilized by Congress, clear rules concerning the applicability of constitutional principles to "private" entities can be difficult in the abstract. A threshold question when considering the nature of any particular entity created by Congress thus might be whether it exercises the sovereign authority of the United States at all. In other words, no matter the form chosen by Congress when creating an entity to carry out specific functions, private or otherwise, an essential issue for constitutional

[101] *Id*. at 35.

[102] *Id*. at 29.

[103] *Id*.

[104] *See id*. ("[T]he Due Process Clause of the Fifth Amendment puts Congress to a choice: its chartered entities may *either* compete, as market participants, *or* regulate, as official bodies.").

[105] *Id*. at 31-32.

[106] Under the PRIIA, if Amtrak and FRA could not agree on standards, either could petition the Surface Transportation Board to appoint an arbitrator to settle the dispute through binding arbitration. 49 U.S.C. § 24101.

[107] *Id*.

[108] *Id*. at 33 (quoting Dep't of Transp. v. Ass'n of Am. R.R., 135 S. Ct. 1225, 1236 (2015) (Alito, J., concurring)).

[109] *Id.* at 31.

[110] *See generally Dep't of Transp.*, 135 S. Ct. at 1233.

purposes is whether that entity is charged with carrying out the sovereign power of the government.

For instance, in the Sarbanes-Oxley Act of 2002, Congress created the Public Company Accounting Oversight Board (PCAOB or Board) to oversee aspects of the accounting industry.[111] The Board is modeled after "private self-regulatory organizations in the securities industry . . . that investigate and discipline their own members subject to Commission oversight."[112] Congress established the PCAOB as a private, nonprofit corporation whose employees and Board members are not, at least for statutory purposes, considered government employees or officers.[113] Nonetheless, because of the various governmental duties delegated to the Board by Congress, in a challenge to the constitutional structure of the Board in *Free Enterprise v. Public Company Accounting Oversight Board*, the parties agreed that the PCAOB was a governmental entity and that the Board's members are officers of the United States subject to the requirements of the Appointments Clause.[114] Similarly, in *Association of American Railroads*, Justice Alito, in a concurring opinion, raised concerns that the method of appointment for the president of Amtrak violated the Appointments Clause.[115] At the time, Amtrak's president, a voting member of the Board, was appointed by the Amtrak Board, rather than the President of the United States.[116] Subsequently, Congress passed legislation to remove the voting powers of Amtrak's president, apparently alleviating these concerns by reducing the position's authority.[117]

The Appointments Clause of Article II of the Constitution requires "Officers of the United States" to be appointed by the President "with the Advice and Consent of the Senate," although Congress may vest the appointment of "inferior" officers "in the President alone, in the Courts of Law, or in the Heads of Departments."[118] In contrast, non-officers are not subject to any constitutionally required method of appointment.[119] The Appointments Clause has been viewed as one of the Constitution's key features that preserve a separation of powers among the executive, legislative, and judicial branches.[120] The Appointments Clause and the concomitant power of removal of executive branch officials ensure a measure of accountability for executive branch actions by vesting decisionmaking in individuals accountable to the President who, in turn, is accountable to the voters.[121] Congress may not aggrandize its own power at the expense of the executive branch

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[111] *See* Free Enterprise Fund v. Public Co. Accounting Oversight Bd., 561 U.S. 477, 484 (2010); 15 U.S.C. §§ 7211-20.

[112] *Free Enterprise*, 561 U.S. at 484.

[113] *Id.*; 15 U.S.C. §§ 7211(a), (b).

[114] *Free Enterprise*, 561 U.S. at 486, 510 ("Given that the Commission is properly viewed, under the Constitution, as possessing the power to remove Board members at will, and given the Commission's other oversight authority, we have no hesitation in concluding that under *Edmond* the Board members are inferior officers whose appointment Congress may permissibly vest in a 'Hea[d] of Departmen[t].'").

[115] *Dep't of Transp.*, 135 S. Ct. at 1239-40 (Alito, J., concurring).

[116] *Id.*

[117] P.L. 114-94 div. A, title XI § 11205 (amending 49 U.S.C. § 24305).

[118] U.S. CONST. art. II, § 2, cl. 2; Edmond v. United States, 520 U.S. 651, 662 (1997) ("The President's power to select principal officers of the United States was not left unguarded, however, as Article II further requires the 'Advice and Consent of the Senate.'").

[119] *Cf.* Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam) ("We think its fair import is that any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of . . . Article [I].").

[120] Freytag v. Comm'r of IRS, 501 U.S. 868, 882 (1991) ("The principle of separation of powers is embedded in the Appointments Clause.").

[121] Dep't of Transp. v. Ass'n of Am. R.R., 135 S. Ct. 1225, 1239 (2015) (Alito, J., concurring) (noting that the Appointments Clause "ensures that those who exercise the power of the United States are accountable to the President,

by arrogating to itself authority to appoint officers.[122] Moreover, the Constitution bars the "diffusion" of the appointment power by, for example, placing the power to appoint a principal officer in the hands of someone other than the President.[123] Accordingly, a crucial threshold question respecting the Appointments Clause is thus who constitutes an "officer" of the United States.

A position's degree of authority generally determines whether it reaches officer status under the Appointments Clause.[124] In the seminal case explaining who qualifies as an officer, *Buckley v. Valeo*, the Supreme Court established that "Officers of the United States" are those positions "exercising *significant authority* pursuant to the laws of the United States."[125] In that case, the Court examined the appointment of certain members of the Federal Election Commission (FEC) charged with regulating federal elections by enforcing the Federal Election Campaign Act.[126] In examining whether the FEC members wielded significant authority, the *Buckley* Court distinguished among three types of powers the members exercised—functions concerning (1) the flow of information—"receipt, dissemination, and investigation"; (2) the implementation of the statute—"rulemaking and advisory opinions"; and (3) the enforcement of the statute—"informal procedures, administrative determinations and hearings, and civil suits."[127]

The *Buckley* Court held that the first category of FEC duties was not executive in nature because they were "investigative and informative," essentially "in aid of the legislative function of Congress."[128] Therefore, such functions could be exercised by individuals not appointed in conformity with the Appointments Clause.[129] The latter two categories of functions, however, were executive in nature and constituted "significant authority." The duties regarding implementation of the statute—including rulemaking, disbursal of funds, and decisions about who may run for a federal office—constituted significant authority that could be executed only by

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who himself is accountable to the people."); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 497-498 (2010) ("The people do not vote for the 'Officers of the United States.' Art. II, § 2, cl. 2. They instead look to the President to guide the 'assistants or deputies . . . subject to his superintendence.'") (quoting THE FEDERALIST No. 72, p. 487 (J. Cooke ed. 1961) (A. Hamilton)); *Freytag*, 501 U.S. at 884 ("The Framers understood, however, that by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people . . . Even with respect to 'inferior Officers,' the Clause allows Congress only limited authority to devolve appointment power on the President, his heads of departments, and the courts of law.").

[122] *Buckley*, 424 U.S. at 126.

[123] *Freytag*, 501 U.S. at 883-84; Weiss v. United States, 510 U.S. 163, 188 (1994) (Souter, J., concurring) ("And if Congress, with the President's approval, authorizes a lower level Executive Branch official to appoint a principal officer, it again has adopted a more diffuse and less accountable mode of appointment than the Constitution requires; this time it has violated the bar on abdication.").

[124] *See, e.g.*, Edmond v. United States, 520 U.S. 651, 662 (1997) (acknowledging that military appellate judges exercise "significant authority"); *Freytag*, 501 U.S. at 881-82 (holding that special trial judges of Article I tax courts are "Officers of the United States" based on the degree of authority they exercise); *Buckley*, 424 U.S. at 138 (concluding that members of the Federal Election Commission exercised "significant authority" because they performed quasi-legislative, executive, and judicial duties); *see also* United States v. Germaine, 99 U.S. 508, 511-12 (1878) (noting that that an office "embraces the ideas of tenure, duration, emolument, and duties, and that the latter [are] continuing and permanent, not occasional or temporary") (citing United States v. Hartwell, 73 U.S. (6 Wall.) 385, 393-94 (1867)).

[125] *Buckley*, 424 U.S. at 126 (emphasis added).

[126] *Id.* Congress had provided that the FEC be composed of eight members, which included six voting members and two nonvoting ex officio members. Of the six voting members, all were required to be confirmed by a majority of both houses of Congress, with two selected by the President, two by the President pro tempore of the Senate, and two by the Speaker of the House. *Id.* at 113.

[127] *Id.* at 137.

[128] *Id.* at 138.

[129] *Id.* at 138.

"Officers of the United States."[130] Likewise, the power to enforce the underlying statute, "exemplified by [the Commissioner's] discretionary power to seek judicial relief" by instituting civil litigation to vindicate public rights, amounted to authority that, according to the Court, must be exercised by an officer appointed pursuant to the Appointments Clause.[131]

Nearly 15 years after *Buckley*, the Supreme Court's opinion in *Freytag v. Commissioner of Internal Revenue* again examined what responsibilities qualify an individual as an officer of the United States, concluding that a special trial judge of the U.S. Tax Court qualifies as such an officer.[132] The Court ruled that the special trial judges were officers because of the significance of the duties they held. In contrast with the position of special masters, who temporarily assist Article III judges on an "episodic" basis, and whose positions, "duties[,] and functions are not delineated in a statute,"[133] the Court noted that the special trial judges are "established by Law" and their "duties, salary, and means of appointment" are specified in statute.[134] Further, special trial judges are entrusted with duties beyond "ministerial tasks," exercising significant discretion in taking testimony, conducting trials, ruling on evidence, and enforcing compliance with discovery orders.[135] In addition, the Court noted that even leaving aside these duties, special trial judges qualified as officers because the underlying statute authorized the Chief Judge of the Tax Court to assign authority to special trial judges to render binding independent decisions in certain cases.[136]

While the Supreme Court has articulated "significant authority" as the standard for weighing whether a position is subject to the Appointments Clause, precisely what duties are encapsulated in this metric is disputed. Accordingly, predicting exactly what type of functions would render the head of a government-created corporation an officer for constitutional purposes is difficult. A circuit split among the federal courts of appeals concerning the constitutional status of Administrative Law Judges (ALJs) at the Securities and Exchange Commission (SEC) illustrates the uncertainty of the question. The SEC is charged with bringing enforcement actions for violations of the federal securities laws both in internal administrative proceedings and federal

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[130] *Id*. at 140-41. The Court also noted with approval that prior decisions had found a postmaster first class and the clerk of a district court qualified as officers. *Id*. at 126 (citing Myers v. United States, 272 U.S. 52 (1926) (postmaster) and *Ex parte* Hennen, 38 U.S. 225 (1839) (clerk)).

[131] *Id*.

[132] The Court held that the special trial judge was an inferior officer, rather than an employee. Freytag v. Comm'r of IRS, 501 U.S. 868, 881-82 (1991). However, the Court subsequently made clear that the exercise of significant authority establishes the line not between inferior and principal officers, but between "officer and non-officer." Edmond v. United States, 520 U.S. 651, 662 (1997). In other words, whether a position qualifies as an "inferior officer" under *Freytag* concerns the difference between employees and officers and is conceptually distinct from whether an officer is properly viewed as a principal or inferior officer.

[133] *Freytag*, 501 U.S. at 881.

[134] *Id*.

[135] *Id*. at 881-82.

[136] *Id*. at 882. While the Supreme Court has not established a conclusive test for what constitutes significant authority, a Department of Justice's Office of Legal Counsel (OLC) opinion argues that two characteristics define an office of the United States. *See* Officers of the United States Within the Meaning of the Appointments Clause, 2007 OLC LEXIS 3, *1 (OLC) (April 16, 2007). According to the OLC, the position must first be endowed with delegated sovereign authority, such as the power to "bind third parties, or the Government itself, for the public benefit." *Id*. at 37. In addition, the position must be "continuing." *Id*. at 74. The OLC opinion offers two indicia of a continuing position. A position is continuing if it is "permanent, meaning that it is not limited by time or by being of such a nature that it will terminate by the very act of performance." *Id*. at 101 (internal quotations omitted). Alternatively, even if a position is temporary, the presence of three factors can indicate a continuing position: (1) the existence of the position is not personal; (2) it is not a "transient" position; and (3) the duties of the position are more than "incidental" to the government's operations. *Id*. at 102-05.

court.[137] ALJs are selected by an agency employee from an available pool—not in accordance with the Appointments Clause—and preside over administrative actions in adjudications that share similarities with a trial.[138] The ALJ's decision is appealable to the Commissioners and then to federal court.[139]

The U.S. Court of Appeals for the Tenth Circuit, in a challenge to the constitutional status of ALJs at the SEC, focused on the range of discretionary duties exercised by the ALJs and found that they qualified as officers who must be appointed pursuant to the Appointments Clause.[140] The court noted that the ALJs' positions are established by law and their duties, salaries, and method of appointment were set by statute.[141] The ALJs also exercise similar discretion to the officers in *Freytag*, including taking testimony, overseeing the production of documents and depositions, ruling on the admissibility of evidence and motions, issuing subpoenas, and making credibility determinations that are afforded "considerable weight" at the agency review stage.[142] In addition, ALJs can render initial decisions and issue sanctions, which become final absent appeal.[143] And even when an appeal occurs, the agency can decline to review certain cases.[144] Finally, ALJs can enter default judgments, control the outcome of proceedings by requiring attendance at settlement conferences, and modify temporary sanctions imposed by the agency.[145]

In a parallel challenge, the D.C. Circuit has taken the opposite view.[146] Under its analysis, whether a position exercises significant authority depends on (1) "the significance of the matters resolved"; (2) the discretion exercised; and (3) the finality of their decision.[147] That court determined that SEC ALJs do not satisfy the final requirement—finality—because the Commission retains power to review their decisions *de novo*.[148] And even when the Commission decides not to review a decision, it must issue an order saying so and specifying the date that any applicable sanctions will take effect.[149] The ALJ's decision, therefore, is not truly final until affirmative action is taken by the Commission.[150] For the D.C. Circuit, because ALJs do not render final decisions on behalf of the government, they do not qualify as officers under the Appointments Clause and their current method of selection is, therefore, appropriate.

Although it is well established that "significant authority" is the test that demarks officers and employees, the test that distinguishes between principal officers and inferior officers is less clear.

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[137] 15 U.S.C. §§ 77h-1, 78d, 78o, 78u-3.

[138] 17 C.F.R. § 200.14 ("Office of Administrative Law Judges"); 5 C.F.R. pt. 930, subpt. B ("Administrative Law Judge Program").

[139] 15 U.S.C. §§ 77i(a); 78d-1(b); 78y(a)(1).

[140] Bandimere v. Sec. & Exch. Comm'n, 844 F.3d 1168, 1170 (10th Cir. 2016).

[141] *Id*. at 1179. *See* 5 U.S.C. § 556.

[142] *Id*. at 1179-80. *See* 17 C.F.R. § 200.14 ("Office of Administrative Law Judges").

[143] *Id*. at 1180-81.

[144] *Id*.

[145] *Id*.

[146] Raymond J. Lucia Companies, Inc. v. Sec. & Exch. Comm'n, 832 F.3d 277, 284 (D.C. Cir. 2016), *reh'g en banc granted, judgment vacated*, 2017 U.S. App. LEXIS 2732 (D.C. Cir. Feb. 16, 2017), on *reh'g en banc*, 2017 U.S. App. LEXIS 11298 (D.C. Cir., June 26, 2017) (per curiam) (denying the petition for review by an equally divided court).

[147] The court also noted that it must address the question of significant authority following the threshold issue of whether a position is established by law and its "duties, salary, and means of appointment" are specified by statute. *Id*. at 284.

[148] *Id*. at 285-86.

[149] *Id*. at 286.

[150] *Id*.

As mentioned above, principal officers of the United States must be appointed by the President and confirmed by the Senate, but Congress may vest the appointment of inferior officers in the President alone, the courts of law, or the heads of departments.[151] At times, the Court has employed a multifactor, holistic balancing test that would suggest that the principal/inferior distinction is governed by an evaluation of the degree of authority exercised.[152] More recently, however, in *Edmond v. United States*, the Court adopted a different analysis, suggesting that the distinction between a principal and inferior officer hinges on whether the officer is subject to some measure of supervision and control by a principal officer, not on the amount of overall authority exercised by the officer.[153] Under this approach, principal officers are generally subject only to supervision by the President, whereas inferior officers are generally subject to supervision and control by a higher ranking Senate-confirmed official.[154]

The Removal Power

Vesting governmental power in an ostensibly private entity may also implicate the President's constitutional power to remove executive officers. Assuming a position established by Congress qualifies as an officer under the Appointments Clause, Article II's vestment of executive power in the President requires that the President retain some measure of control over the office. The Supreme Court has established that the Constitution's grant of the appointment power to the President includes discretion to remove officers.[155] The Court has outlined the scope of this authority in a series of cases. In the 1926 case of *Myers v. United States*, the Court invalidated a statutory provision that prohibited the President from removing Postmasters General without first obtaining the advice and consent of the Senate.[156] In striking down the limitation, the Court held that Article II grants the President "the general administrative control of those executing the laws, including the power of appointment and removal of executive officers. . . ."[157]

The otherwise broad holding in *Myers* was curtailed shortly thereafter in the case of *Humphrey's Executor v. United States.*[158] In that case, the Court held that Congress had the authority to limit the President's ability to remove members of the Federal Trade Commission (FTC) by providing commissioners with "for cause" removal protections.[159] The Court noted a difference between purely executive departments, such as the one at issue in *Myers*, whose heads the President generally must be able to remove at will, and other agencies engaged in quasi-legislative or quasi-judicial functions that are intended to function with decreased presidential control.[160] The Court

[151] U.S. CONST. art. II, § 2, cl. 2.

[152] *See* Morrison v. Olson, 487 U.S. 654, 671-72 (1988) (noting that "[s]everal factors lead to th[e] conclusion" that the independent counsel is an inferior officer).

[153] *Edmond*, 520 U.S. at 663; Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 510 (2010) (affirming this reasoning in determining that members of an oversight board were inferior officers because the SEC oversaw the Board's conduct).

[154] *Edmond*, 520 U.S. at 663.

[155] Myers v. United States, 272 U.S. 52, 164 (1926).

[156] 272 U.S. 52 (1926).

[157] *Id*. at 164.

[158] 295 U.S. 602 (1935). *See* Wiener v. United States, 357 U.S. 349, 352 (1958) ("The assumption was short-lived that the *Myers* case recognized the President's inherent constitutional power to remove officials no matter what the relation of the executive to the discharge of their duties and no matter what restrictions Congress may have imposed regarding the nature of their tenure.").

[159] *Humphrey's Ex'r*, 295 U.S. at 619-20.

[160] *Id*. at 627. The Court later reaffirmed the principles of *Humphrey's Executor* in *Wiener v. United States*. 357 U.S. 349 (1958). In that case, the Court held that the President had no authority to remove a member of the War Claims

has also upheld restrictions on the removal of certain inferior officers.[161] In *Morrison v. Olson*, the Court altered its analysis of removal restrictions and upheld a statute that provided for the appointment of an independent counsel who could be removed by the Attorney General only "for cause."[162] The Court acknowledged that its opinion in *Humphrey's Executor* had relied on a distinction between executive officers and those exercising quasi-legislative or quasi-judicial functions.[163] Nonetheless, the Court asserted that the crucial question in examining restrictions on the removal of executive officers is whether Congress has "interfere[d] with the President's" executive power and his "duty to 'take care that the laws be faithfully executed.'"[164] The Court recognized that the independent counsel operated with a measure of independence from the President, but concluded that the statute gave "the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties."[165]

More recently, the Court announced an important outer limit on Congress's ability to shield executive branch officers from removal. In *Free Enterprise Fund v. Public Company Accounting Oversight Board* (*PCAOB*), the Court invalidated statutory structural provisions providing that members of the PCAOB could be removed only "for cause" by the Securities and Exchange Commission, whose members were, in turn, also protected from removal by for-cause removal protections.[166] The Court concluded that while *Humphrey*'s approved such protections for independent agencies, and *Morrison* did the same for inferior officers, the combination of dual "for cause" removal protections "impaired" the President's "ability to execute the laws."[167]

Accordingly, in addition to boundaries set by the nondelegation doctrine and the Due Process Clause, efforts to privatize governmental functions must respect the limits set forth by the Appointments Clause. The appointment of positions vested with significant authority of the United States must comply with the requirements of the Appointments Clause, and any restrictions on the President's power to remove such officers may not impair his duty to execute the laws of the United States.

Commission at will, despite the fact that Congress had not expressly provided such members with "for cause" removal protections. *Id*. at 353-56. In reaching that determination, the Court relied on the adjudicatory "nature of the function that Congress vested in the War Claims Commission." *Id*. at 353.

[161] United States v. Perkins, 116 U.S. 483, 485 (1886) ("We have no doubt that when Congress, by law, vests the appointment of inferior officers in the heads of departments, it may limit and restrict the power of removal as it deems best for the public interest.").

[162] 487 U.S. 654, 693-96 (1988).The independent counsel was removable by the Attorney General "only for good cause, physical or mental disability (if not prohibited by law protecting persons from discrimination on the basis of such a disability) or any other condition that substantially impairs the performance of such independent counsel's duties." 28 U.S.C. § 596. The independent counsel provisions have since expired. 28 U.S.C. § 599. For more information on *Morrison* and independent prosecutors, see CRS Report R44857, *Special Counsels, Independent Counsels, and Special Prosecutors: Options for Independent Executive Investigations*, by Cynthia Brown.

[163] *Morrison*, 487 U.S. at 689.

[164] *Id*. at 690 (quoting U.S. CONST. art. II, § 3, cl. 5).

[165] *Morrison*, 487 U.S. at 693-96.

[166] 561 U.S. 477, 491 (2010).

[167] *Id*. at 496.

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