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RICHARD J. PIERCE, JR.

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Administrative Law Treatise

Fifth Edition

by Richard J. Pierce, Jr.

From regulating telecommunications and energy to granting Social Security and veterans benefits, from funding education and public housing to establishing standards for clean water and safe drugs, the principles of administrative law control how government interacts with citizens. When your clients confront government administrative action, turn to Administrative Law Treatise for a comprehensive analysis of procedural law and practical, expert advice on getting the results your clients need.

Highlights of the 2011 Supplement

The 2011 Supplement provides the latest developments in a number of important topics, including:

- Separation of powers and independent agencies
- Problem of subdelegation
- Statutory construction and administrative law, including the scope of Chevron
- Enforceability of agency subpoenas
- Freedom of Information Act
- Privacy Act
- Agency power to issue rules and agency interpretations of rules

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- Distinctions between rules and policy statements; between legislative rules and interpretative rules; and between substantive rules and procedural rules
- Retroactive rules
- When are agencies required to act by rule
- Rulemaking procedure, including adequacy of notice and exemptions from rulemaking procedures
- Statutes of limitation for judicial review
- When must an agency provide an oral evidentiary hearing
- Due Process requirements and administrative law
- Judicial review of adjudications, including substantial evidence test; arbitrary and capricious test; and record rule
- Legal remedies for agency delay
- Equitable estoppel, res judicata, and collateral estoppel
- Jurisdiction
- Exhaustion, finality, and ripeness
- Pre-enforcement review of rules
- Presumption of reviewability and standing to obtain review of agency actions
- Remedies, including statutory review of federal agency actions; injunctive relief, and private rights of action
- Federal court review of state agency actions
- Sovereign immunity and actions for money damages against the United States
- Tort liability of governments and their employees, including Bivens actions; Section 1983 actions; and Federal Tort Claims Act.

The Table of Cases has been completely updated for this supplement.

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Preface to the 2011 Supplement

This Supplement reports on opinions issued since the publication of the Fifth Edition and through the end of the Supreme Court's 2009–2010 Term. It includes circuit court opinions reported through 603 F.3d. There were three particularly noteworthy developments during the period. The first was the Supreme Court's opinion in Free Enterprise Fund v. Public Company Accounting Oversight Board (PCAOB) holding unconstitutional the statutory limits on the SEC's power to remove members of PCAOB. The second was the Supreme Court's opinion in New Process Steel v. NLRB holding that the two member NLRB that existed between 2006 and 2010 had no power to act and that the over 500 orders it issued during that period were invalid. The third noteworthy development was the dog that did not bite. There was a remarkable dearth of references to *Chevron*, *Skidmore*, or any other deference doctrine in the opinions the Supreme Court issued this Term. It remains to be seen whether this was simply an accidental consequence of the particular mix of cases the Court decided this Term or whether it is indicative of a trend away from judicial deference to agency actions.

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Volume III

1 The Administrative Process

§1.2 What Is an Agency?

In Citizens for Responsibility & Ethics in Washington v. Office of Administration, 566 F.3d 219 (D.C. Cir. 2009), the D.C. Circuit held that the Office of Administration (OA) in the Executive Office of the President (EOP) is not an agency for FOIA purposes. The court began by noting that, even though Congress amended the FOIA to include the EOP, the Supreme Court had relied on legislative history, separation of powers and the avoidance canon to interpret the definition to exclude units of the EOP whose sole function is to assist and advise the President. Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136 (1980). The D.C. Circuit then reaffirmed and applied the test it had used in prior cases involving units of the EOP—whether the unit "wielded substantial authority independent of the President." It concluded that the OA's only responsibilities are to provide operational and administrative support for the President. Since it has no substantial authority independent of the President it is not an agency.

In New Process Steel v. NLRB, 130 S. Ct. 2635 (2010), discussed in detail in §2.7, a five-Justice majority held that the NLRB could not issue valid orders once it had only two members even though a four-member quorum of the Board had permissibly delegated the Board's powers to three Board members and the statute provides that two members constitute a quorum of a three-member Board to which the Board has delegated its powers.

2 Philosophical and Constitutional Foundations

§2.4 Separation of Powers as Shorthand for Checks and Balances

In Free Enterprise Fund v. Public Company Accounting Oversight Board, 130 S. Ct. 3138 (2010), the Court held that the members of the Board are "inferior officers" who can be appointed by the SEC. The Justices differed with respect to the reasoning they used to support that holding, however. The five-Justice majority conditioned its holding that the Board members are inferior officers on its holding that the statutory limits on the SEC's power to remove Board members are unconstitutional. In other words, the majority linked its holding that Board members are inferior officers to the new legal regime it created in another part of its opinion. That new legal regime gives the SEC the power to remove Board members at will. The four dissenting Justices expressed the view that the Board members are inferior officers even as the statute was written, including the severe statutory restrictions on the SEC's power to remove Board members that the majority held invalid. To the dissenting Justices, the existence of "virtually comprehensive [SEC] control over all of the Board's functions" was enough to make the Board members inferior officers, rather than officers, even if the SEC had limited power to remove Board members.

The rest of the reasoning with respect to the Appointment Clause issue is in the majority opinion, but the dissenting Justices expressed no disagreement with that reasoning. SEC is a "Department" for Appointment Clause purposes because it "is a freestanding component of the Executive Branch, not subordinate to or contained within any other such component, ..." The five Commissioners are the "Head" of the Department for Appointment Clause purposes because "The Commission's powers . . . are generally vested in the Commissioners jointly, not the Chairman alone." As discussed in detail in §2.5, a five-Justice majority held that the double for cause limit on the President's power to remove the members of the PCAOB violated the Vesting Clause and the Take Care Clause of Article II.

In Intercollegiate Broadcast System v. Copyright Royalty Board, 574 F.3d 748 (D.C. Cir. 2009), a petitioner argued that the three Copyright Royalty Judges who, inter alia, set rates applicable to webcasting of copyrighted songs, had no power to act because they were unconstitutionally appointed. Congress authorized the Librarian of Congress to appoint the Judges. The petitioner argued that Congress could not confer that power on the Librarian because he is not the "Head of [a] Department." The court refused to consider that argument because the petitioner did not raise the argument in its opening brief. The court interpreted a Supreme Court opinion as conferring on it discretion to consider or not to consider untimely arguments made under the Appointments Clause.

§2.5 Separation of Powers and Independent Agencies

As discussed in §2.4, in Free Enterprise Fund v. Public Company Accounting Oversight Board, 130 S. Ct. 3138 (2010), the Court upheld the provision of the Sarbanes-Oxley Act that empowers the SEC to appoint Board members. A five-Justice majority also held, however, that the provision of the Act that severely limited the SEC's power to remove Board members violated both the Vesting Clause and the Take Care Clause of Article II. The Act empowers

the Board to "regulate every detail of an accounting firm's practice, . . ." The Act "places the Board under the SEC's oversight." The Act severely limits, however, the SEC's power to remove Board members in three ways: (1) it imposes an explicit, narrow, and high standard on such a removal decision; (2) it requires the agency to conduct a hearing to determine whether a Board member has engaged in conduct that would satisfy the statutory standard; and, (3) it subjects any removal decision to judicial review. Each of those features distinguishes the removal provision from the removal provisions the Court has upheld in prior cases.

The majority mentioned each of the unusual features of the removal provision and suggested that each raised serious constitutional concerns, but it based its holding on another feature of the statute that the majority assumed to exist for purposes of deciding the case. In the words of the majority: "The parties agree that the [SEC] Commissioners cannot themselves be removed by the President except under the *Humphrey's Executor* standard of 'inefficiency, neglect of duty, or malfeasance in office, . . . and we decide the case on that basis.' The majority then proceeded to explain why such "dual for cause limits on the removal of Board members contravene the Constitution's separation of powers."

The Court began by noting that the parties had not asked the Court to reconsider any of its precedents, and that it had not done so. It characterized as unprecedented, however, the dual for cause limit on the President's removal power that the parties and the majority assumed to exist. The majority held that feature of the statute unconstitutional because it interferes with President's ability to take care that the laws be faithfully executed:

> A second level of tenure protection changes the nature of the President's review. Now the Commission cannot remove a Board member at will. The President therefore cannot hold the Commission fully accountable for the Board's conduct, to the same extent that he may hold the Commission accountable for everything else it does.
>
> * * *

> Neither the President nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control over the Board. The President is stripped of the powers our precedents have preserved, and his ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired.

Moreover, "if allowed to stand, this dispersion of responsibility could be multiplied" by adding more and more layers of insulation between the President and his subordinates.

The majority recognized that the statute gives the SEC power to supervise the Board's exercise of its regulatory powers, but the majority concluded that SEC power over the Board is not enough: "Broad powers over Board functions is not equivalent to the power to remove members."

The majority held that the unconstitutional limits on the removal power were severable from the rest of the statute. Thus, after the Court's decision, the SEC can appoint Board members who then are subject to potential at will removal by the SEC.

Justice Breyer wrote a dissenting opinion for four Justices. He expressed the view that the SEC's "virtually comprehensive control over all of the Board's functions" was adequate to allow the President to exercise his responsibilities to enforce the laws. He also expressed the view that adding a second layer of insulation from potential removal did not interfere with the President's ability to execute the laws, and he referred to two functional justifications for the congressional decision to provide Board members some degree of insulation from potential removal. In the view of the dissenting Justices, that degree of insulation was justified both by the need to insure that Board adjudications are undertaken free of political influence and the need to insure that the Board will make decisions based on its expertise rather than based on political considerations.

Justice Breyer devoted a large part of his opinion and a lengthy appendix to documentation of his concern that the reasoning of the majority could jeopardize the job security of thousands of government employees who perform roles that are

arguably analogous to those performed by the Board members and who are now subject to dual sources of insulation from potential removal. The categories he discussed include Administrative Law Judges, many senior civil servants, and many military officers.

Finally, Justice Breyer noted that the entire debate between the Justices, as well as the reasoning in the majority opinion, was based on a patently inaccurate reading of the statute that governs the SEC. Contrary to the basis for the arguments made by the parties, and contrary to the majority's stated assumption, the SEC statute does not contain any limit on the President's power to remove a Commissioner. Thus, the dual for cause limits that the majority found to be a fatal defect in the Sarbanes-Oxley Act simply do not exist.

This revelation raises an important question: How far should a court go in indulging the tradition of the adversary system to confer on the parties to a dispute the power to define the issues? The Court would have been better advised to reverse and remand the circuit court decision in a brief opinion in which it noted that both the parties and the circuit court had acted on the basis of an erroneous understanding of the most important feature of the SEC statute. The parties and the circuit court then could have grappled with the difficult issues presented by the unique features of the removal provision in the statute that did exist, rather than debating a non-existent issue.

In SEC v. FLRA, 568 F.3d 990 (D.C. Cir. 2009), the D.C. Circuit resolved a dispute between two federal agencies. A concurring judge wrote a separate opinion in which he noted the oddity and questionable constitutionality of a court resolving an intra-branch dispute. He expressed the view that such an exercise of judicial power was defensible because of the Supreme Court's opinion in Humphrey's Executor v. United States, 296 U.S. 869 (1935). Since the Court limited the power of the President to control "independent agencies" courts have the power to resolve disputes between independent agencies and executive branch agencies or between two independent agencies like SEC and FLRA.