# SUPREME COURT OF THE UNITED STATES

Nos. 01–705 and 01–715

JO ANNE B. BARNHART, COMMISSIONER OF SOCIAL SECURITY, PETITIONER
01–705 *v.*
PEABODY COAL COMPANY ET AL.

JO ANNE B. BARNHART, COMMISSIONER OF SOCIAL SECURITY, PETITIONER *v.* BELLAIRE CORPORATION ET AL.

MICHAEL H. HOLLAND, ET AL., PETITIONERS
01–715 *v.*
BELLAIRE CORPORATION ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[January 15, 2003]

JUSTICE SCALIA, with whom JUSTICE O'CONNOR AND JUSTICE THOMAS join, dissenting.

The Court's holding today confers upon the Commissioner of Social Security an unexpiring power to assign retired coal miners to signatory operators under 26 U. S. C. §9706(a). In my view, this disposition is irreconcilable with the text and structure of the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act or Act), and finds no support in our precedents. I respectfully dissent.

## I

The respondents contend that the Commissioner improperly assigned them responsibility for 600 coal miners under §9706(a). Section 9706(a) provides, in pertinent part:

> "[T]he Commissioner of Social Security shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business in the following order:
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> "(1) First, to the signatory operator which—
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> "(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and
> "(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years.
>
> "(2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which—
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> "(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and
> "(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry.
>
> "(3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement."

The Commissioner failed to complete the task of assigning each eligible beneficiary to a signatory operator before October 1, 1993. As a result, many eligible beneficiaries were "unassigned," and their benefits were financed, for a time, by the United Mine Workers of America 1950 Pension Plan (UMWA Pension Plan) and the Abandoned Mine Land Reclamation Fund. See §§9705(a)(3)(B), 9705(b)(2).

The Commissioner blames her failure to meet the statutory deadline on the "magnitude of the task" and the lack of appropriated funds. Brief for Petitioners Trustees of the UMWA Combined Benefit Fund 15. It should not be thought, however, that these cases are about letting the Commissioner complete a little unfinished business that barely missed the deadline. They concern some 600 post-October 1, 1993, assignments to these respondents, the vast majority of which were made between 1995 and 1997, *years* after the statutory deadline had passed. App. 98–121. Respondents contend that these assignments are unlawful, and unless Congress has conferred upon the Commissioner the power that she claims—an *unexpiring* authority to assign eligible beneficiaries to signatory operators—the respondents must prevail. Section 9706(a) of the Coal Act does not provide such an expansive power, and the other provisions of the Act confirm this.

II

It is well established that an agency's power to regulate private entities must be grounded in a statutory grant of authority from Congress. See *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 161 (2000); *Bowen* v. *Georgetown Univ. Hospital*, 488 U. S. 204, 208 (1988); *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U. S. 355, 374 (1986). This principle has special importance with respect to the extraordinary power the Commissioner asserts here: to compel coal companies to pay miners (and their families) health benefits that they never contracted to pay. We have held that the Commissioner's use of this power under §9706(a), even when exercised before October 1, 1993, violates the Constitution to the extent it imposes severe retroactive liability on certain coal companies. See *Eastern Enterprises* v. *Apfel*, 524 U. S. 498 (1998). When an agency exercises a power that so tests constitutional limits, we have all the more obligation to assure that it is rooted in the text of a statute.

The Court holds that the Commissioner retains the power to act after October 1, 1993, because Congress did not "'specify a consequence for noncompliance'" with the statutory deadline. *Ante*, at 8. This makes no sense. When a power is conferred for a limited time, the *automatic* consequence of the expiration of that time is the expiration of the power. If a landowner authorizes someone to cut Christmas trees "before December 15," there is no doubt what happens when December 15 passes: The authority to cut terminates. And the situation is not changed when the authorization is combined with a mandate—as when the landowner enters a contract which says that the other party "shall cut all Christmas trees on the property before December 15." Even if time were not of the essence of that contract (as it *is* of the essence of §9706(a), for reasons I shall discuss in Part III, *infra*) no one would think that the contractor had continuing authority—not just for a few more days or weeks—but perpetually, to harvest trees.[1]

[1] This interpretation of §9706(a) does not "assum[e] away the very question to be decided," as the Court accuses, *ante*, at 8, n. 6. It is no assumption at all, but rather the consequence of the proposition that the scope of an agency's power is determined by the text of the statutory grant of authority. Because §9706(a)'s power to "assign . . . eligible beneficiar[ies]" is *prefaced by* the phrase "before October 1, 1993," the statutory date is intertwined with the grant of authority; it is part of the very definition of the Commissioner's power. If the statute provided that the Commissioner "shall, on or after October 1, 1993," assign each eligible beneficiary to a signatory operator, it would surely be beyond dispute that pre-October 1, 1993, assignments were ineffective. No different conclusion should obtain here, where the temporal scope of

The Court points out, *ante*, at 10–11, that three other provisions of the Coal Act combine the word "shall" with a statutory deadline that in its view *is* extendible:

> (1) Section 9705(a)(1)(A) states that the UMWA Pension Plan "shall transfer to the Combined Fund . . . $70,000,000 on February 1, 1993";
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> (2) §9704(h) says the trustees for the Combined Fund "shall, not later than 60 days" after the enactment date, furnish certain information regarding benefits to the Commissioner; and
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> (3) §9702(a)(1) provides that certain individuals described in §9702(b)(1) "shall designate" the trustees for the Combined Fund "not later than 60 days . . . after the enactment date."

I agree that the actions mandated by the first two of these deadlines can be taken after the deadlines have expired (though perhaps not *forever* after, which is what the Court claims for the deadline of §9706(a)). The reason that is so, however, does not at all apply to §9706(a). In those provisions, *the power to do what is mandated does not stem from the mere implication of the mandate itself.* The private entities involved have the power to do what is prescribed, quite apart from the statutory command that they do it by a certain date: The UMWA Pension Plan has the power to transfer funds,[2] and the trustees of the Com-

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the Commissioner's authority is likewise defined according to a clear and unambiguous date. If this is (as the Court charges) "formalism," *ante*, at 8–9, n. 6, it is only because language *is* a matter of form. Here the form that Congress chose presumptively represents the political compromise that Congress arrived at.

[2] Private entities, unlike administrative agencies, do not need authorization from Congress in order to act—they have the power to take all action within the scope of their charter, unless and until the

bined Fund have the power to provide the specified information, whether the statute commands that they do so or not. The only question is whether the *late* exercise of an unquestionably authorized act will produce the consequences that the statute says will follow from a *timely* exercise of that act. It is as though, to pursue the tree-harvesting analogy, a contract provided that the *landowner* will harvest and deliver trees by December 15; even after December 15 passes, he can surely harvest and deliver trees, and the only issue is whether the December 15 date is so central to the contract that late delivery does not have the contractual consequence of requiring the other side's counterperformance. The Commissioner of Social Security, by contrast, being not a private entity but a creature of Congress, has *no authority* to assign beneficiaries to operators except insofar as such authority is implicit in the mandate; but the mandate (and hence the implicit authority) expired on October 1, 1993.

The last of these three provisions *does* confer a power that is not otherwise available to the private entities involved: the power to appoint initial trustees to the board

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law forbids it. The Court suggests that the Employee Retirement Income Security Act of 1974 (ERISA) may actually forbid the UMWA Pension Plan from transferring its pension surplus to the benefit fund. *Ante*, at 11, n. 8. But if this is true, that does not convert §9705(a)(1) into a power-conferring statutory provision in the mold of §9706(a). It instead means that the UMWA Pension Plan is subject to contradictory statutory mandates, and the relevant question becomes whether, and to what extent, §9705(a)(1) implicitly repealed the provisions of ERISA as applied to the UMWA Pension Plan. Resolving that question would be no small task, given our disinclination to find implied repeals, see *Morton* v. *Mancari*, 417 U. S. 535, 551 (1974), and I will not speculate on it. Instead, I am content to go along with the Court's assumption that nothing in §9705(a)(1), or in the rest of the Coal Act, prevents the UMWA Pension Plan from transferring money to the Combined Fund after the statutory deadline, and to emphasize that nothing in this concession lends support to the Court's interpretation of §9706(a).

of the Combined Fund. I do not, however, think it as clear as the Court does—indeed, I think it quite debatable—whether that power survives the deadline. If it be thought utterly essential that all the trustees be in place, it seems to me just as reasonable to interpret the provision for appointment of successor trustees (§9702(b)(2)) to include the power to fill vacancies arising from initial failure to appoint, as to interpret the initial appointment power to extend beyond its specified termination date. The provision surely does not establish the Court's proposition that time-limited mandates include continuing authority.

III

None of the cases on which the Court relies is even remotely in point. In *Brock* v. *Pierce County*, 476 U. S. 253 (1986), the agency action in question was authorized by an explicit statutory grant of authority, separate and apart from the provision that contained the time-limited mandate. Title 29 U. S. C. §816(d)(1) (1976 ed., Supp. V) (now repealed), gave the Secretary of Labor "authority to . . . order such sanctions or corrective actions as are appropriate." *Another* provision of the statute, former §816(b), required the Secretary, when investigating a complaint that a recipient is misusing funds, to "make the final determination . . . regarding the truth of the allegation . . . not later than 120 days after receiving the complaint." We held that the Secretary's failure to meet the 120-day deadline did not prevent him from ordering repayment of misspent funds. Respondent had not, we said, shown anything that caused the Secretary to "*lose* its power to act," 476 U. S., at 260 (emphasis added). Here, by contrast, the Commissioner *never had* power to act apart from the mandate, which expired after October 1, 1993.

In *United States* v. *James Daniel Good Real Property*, 510 U. S. 43 (1993), federal statutes authorized the Government to bring a forfeiture action within a 5-year limitation period. 21 U. S. C. §881(a)(7); 19 U. S. C. §1621. We held that that power was not revoked by the Government's failure to comply with some of the separate "internal timing requirements" set forth in §§1602–1604. Because those provisions failed to specify a consequence for noncompliance, we refused to "impose [our] own coercive sanction" of terminating the Government's authority to bring a forfeiture action. *James Daniel Good*, *supra*, at 63. The authorization *separate from the defaulted obligation* was not affected. There is no authorization separate from the defaulted obligation here.

In *United States* v. *Montalvo-Murillo*, 495 U. S. 711 (1990), the statute at issue, 18 U. S. C. §3142(e), gave courts power to order pretrial detention "after a hearing pursuant to the provisions of subsection (f) of this section." One of those provisions was that the hearing "shall be held immediately upon the person's first appearance before the judicial officer . . . ." §3142(f). The court had failed to hold a hearing immediately upon the respondent's first appearance, yet we held that the authority to order pretrial detention was unaffected. As we explained: "It is conceivable that some combination of procedural irregularities *could* render a detention hearing so flawed that it would *not* constitute 'a hearing pursuant to the provisions of subsection (f)' for purposes of §3142(e)," 495 U. S., at 717 (emphasis added), but the mere failure to comply with the first-appearance requirement did not alone have that effect. Once again, the case holds that an authorization *separate from the defaulted obligation* is not affected; and there is no authorization separate from the defaulted obligation here.

The contrast between these cases and the present ones demonstrates why the Court's extended discussion of whether Congress specified consequences for the Commissioner's failure to comply with the October 1 deadline, *ante*, at 12–14, is quite beside the point. A specification of termination of authority may be needed where there is a separate authorization to be canceled; it is utterly superfluous where the only authorization is contained in the time-limited mandate that has expired.

## IV

That the Commissioner lacks authority to assign eligible beneficiaries after the statutory deadline is confirmed by other provisions of the Coal Act that are otherwise rendered incoherent.

### A

The calculation of "death benefit premiums" and "unassigned beneficiaries premiums" owed by coal operators is based on an assigned operator's "applicable percentage," which is defined in §9704(f) as "the percentage determined by dividing the number of eligible beneficiaries assigned under section 9706 to such operator by the total number of eligible beneficiaries assigned under section 9706 to all such operators (*determined on the basis of assignments as of October 1, 1993*)." (Emphasis added.) The statute specifies only two circumstances in which adjustments may be made to an assigned operator's "applicable percentage": (1) when changes to the assignments "as of October 1, 1993," result from the appeals process set out in §9706(f), see §9704(f)(2)(A); and (2) when an assigned operator goes out of business, see §9704(f)(2)(B). *No* provision allows adjustments to account for post-October 1, 1993, initial assignments. This is perfectly consistent with the view that the §9706(a) power to assign does not extend beyond October 1, 1993; it is incompatible with the Court's holding to the contrary.

The Court's response to this structural dilemma is nothing short of astonishing. The Court concludes that the applicable percentage based on assignments as of October 1, 1993, *may* be adjusted to account for the subsequent initial assignments, notwithstanding the statutory *command* that the applicable percentage be determined "on the basis of assignments as of October 1, 1993," and notwithstanding the statute's provision of two, and only two, exceptions to this command that do not include post-October 1, 1993, initial assignments. "The enunciation of two exceptions," the Court says, "does not imply an exclusion of a third unless there is reason to think the third was at least considered." *Ante*, at 20. Here, "[s]ince Congress apparently never thought that initial assignments would be late, . . .the better inference is that what we face . . . is nothing more than a case unprovided for." *Id*., at 18–19 (referred to *id*., at 20). This is an unheard-of limitation upon the accepted principle of construction *inclusio unius, exclusio alterius*. See, *e.g.*, *O'Melveny & Myers* v. *FDIC*, 512 U. S. 79, 86 (1994); *Leatherman* v. *Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U. S. 163, 168 (1993). It is also an absurd limitation, since it means that the more *unimaginable* an unlisted item is, the more *likely* it is *not* to be excluded. Does this new maxim mean, for example, that exceptions to the hearsay rule beyond those set forth in the Federal Rules of Evidence must be recognized if it is unlikely that Congress (or perhaps the Rules committee) "considered" those unnamed exceptions? Our cases do not support such a proposition. See, *e.g.*, *Williamson* v. *United States*, 512 U. S. 594 (1994); *United States* v. *Salerno*, 505 U. S. 317 (1992).[3]

[3] The most enduring consequence of today's opinion may well be its gutting of the ancient canon of construction. It speaks volumes about the dearth of precedent for the Court's position that the principal case it relies upon, *ante*, at 18, is *Chevron U. S. A. Inc.* v. *Echazabal*, 536 U. S. 73 (2002). The express language of the statute interpreted in that

There is no more reason to make a "case unprovided for" exception to the clear import of an exclusive listing than there is to make such an exception to any other clear textual disposition. In a way, therefore, the Court's treatment of this issue has *ample* precedent—in those many wrongly decided cases that replace what the legislature said, with what courts thinks the legislature *would have said* (*i.e.*, in the judges' estimation *should have said*) if it had only "considered" unanticipated consequences of what it *did* say (of which the courts disapprove). In any event, the relevant question here is not whether §9704(f)(2) *excludes* other grounds for adjustments to the applicable percentage, but rather whether anything in the statute affirmatively *authorizes* them. The answer to that question is no—an answer that should not surprise the Court, given its acknowledgment that Congress "did not foresee a failure to make timely assignments." *Ante*, at 20.

B

Post-October 1, 1993, initial assignments can also not be reconciled with the Coal Act's provisions regarding appointments to the board of trustees. Section 9702(b)(1)(B) establishes for the Combined Fund a board of seven members, one of whom is to be "designated by the three employers . . . who have been assigned the greatest number of

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case demonstrated that the single enumerated example of a "qualification standard" was illustrative rather than exhaustive: "The term 'qualification standards' *may include* a requirement that an individual shall not pose any direct threat to the health or safety of other individuals in the workplace." 42 U. S. C. §12113(b) (emphasis added). Little wonder that the Court did not find in that text "an omission [that] bespeaks a negative implication," 536 U. S., at 81. And of course the opinion said nothing about the requirement (central to the Court's analysis today) that it be "fair to suppose that Congress considered the unnamed possibility," *ante*, at 18.

eligible beneficiaries under section 9706." The Act provides for an "initial trustee" to fill this position pending completion of the assignment process, but §9702(b)(3)(B) permits this initial trustee to serve only "until November 1, 1993." It is evident, therefore, that the "three employers . . . who have been assigned the greatest number of eligible beneficiaries under section 9706" *must* be known by November 1, 1993. It is simply inconceivable that the three appointing employers were to be unknown (and the post left unfilled) until the Commissioner completes an open-ended assignment process—whenever that might be; or that the designated trustee is constantly to change, as the identity of the "three employers . . . who have been assigned the greatest number of eligible beneficiaries under section 9706" constantly changes.

## V

At bottom, the Court's reading of the Coal Act—its confident filling in of provisions to cover "cases not provided for"—rests upon its perception that the statute's overriding goal is accuracy in assignments. That is a foundation of sand. The Coal Act is demonstrably *not* a scheme that requires, or even attempts to require, a perfect match between each beneficiary and the coal operator most responsible for that beneficiary's health care. It provides, at best, rough justice; seemingly unfair and inequitable provisions abound.

When, for example, an operator goes out of business, §9704(f)(2)(B) provides that beneficiaries previously assigned to that operator must go into the unassigned pool for purposes of calculating the "applicable percentage." It makes no provision for them to be reassigned to another operator, *even if* another operator might qualify under §§9706(a)(1)–(3). That is hardly compatible with a scheme that is keen on "accuracy of assignments," and that envisions perpetual assignment authority in the Commissioner.

To account for the existence of §9704(f)(2)(B), the Court retreats to the more nuanced position that the Coal Act prefers accuracy over finality only "in the first assignment," *ante*, at 19, n. 12. Why it should have this strange preference for perfection in virgin assignments is a mystery. One might understand insisting upon as perfect a match-up as possible *up to October 1, 1993*, and then prohibiting future changes, both by way of initial assignment or otherwise; that would assure an initial system that is as near perfect as possible, but abstain from future adjustments that upset expectations and render sales of companies more difficult. But what is the conceivable reason for insistence upon perfection in *initial* assignments, whether made *before* the deadline *or afterward*?[4] As it is, however, the Act does *not* insist upon accuracy in initial assignments, not even in those made *before* the deadline. For each assigned beneficiary, only one signatory operator is held responsible for health benefits, *even if* that miner had worked for other signatory operators that should in perfect fairness share the responsibility.

The reality is that the Coal Act reflects a *compromise* between the goals of perfection in assignments and finality. It provides *some* accuracy in initial assignments along

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[4] The Court points to §9706(f)'s review process in support of its view that the Coal Act envisions "accuracy 'in inital assignments, whether made before the deadline or afterward.'" *Ante*, at 19, n. 12 (emphasis deleted). In fact it shows the opposite—reflecting the statute's *tradeoffs* between the competing objectives of accuracy in assignments and finality. Sections 9706(f)(1) and (f)(2) provide time limits for coal operators to request reconsideration by the Commissioner; errors discovered after these time limits have passed are forever closed from correction. (Unless, of course, the Court chooses, in the interest of accuracy in assignments, to ignore those time limits, just as it has ignored the time limit of §9706(a).)

with *some* repose to signatory operators, who are given full notice of their obligations by October 1, 1993, and can plan their business accordingly without the surprise of new (and retroactive) liabilities imposed by the Commissioner. It is naive for the Court to rely on guesses as to what Congress would have wanted in legislation as complicated as this, the culmination of a long, drawn-out legislative battle in which, as we put it in *Barnhart* v. *Sigmon Coal Co.*, 534 U. S. 438, 461 (2002), "highly interested parties attempt[ed] to pull the provisions in different directions." The best way to be faithful to the resulting compromise is to follow the statute's text, as I have done above—not to impute to Congress one statutory objective favored by the majority of this Court at the expense of other, equally plausible, statutory objectives.

* * *

I think it clear from the text of §9706(a) and other provisions of the Coal Act that the Commissioner lacks authority to assign eligible beneficiaries to signatory operators on or after October 1, 1993. I respectfully dissent from the Court's judgment to the contrary.