Nos. 01-705 & 01-715

IN THE
Supreme Court of the United States

JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY,
Petitioner,

v.

PEABODY COAL COMPANY, *et al.*,
Respondents.

MICHAEL H. HOLLAND, *et al.*,
Petitioners,

v.

BELLAIRE CORPORATION, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENTS PEABODY COAL COMPANY AND EASTERN ASSOCIATED COAL CORP.

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QUESTION PRESENTED

Whether the Sixth Circuit correctly held that the Commissioner of Social Security lacks the authority to make initial assignments of beneficiaries under the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701 *et seq.*, on or after October 1, 1993, when the statute explicitly provides that the Commissioner "*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," 26 U.S.C. § 9706(a) (emphasis added), and further provides a detailed mechanism for financing benefits for unassigned beneficiaries.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Peabody Coal Company ("Peabody") and Eastern Associated Coal Corp. ("EACC") are respondents in No. 01-705. Peabody and EACC are wholly-owned subsidiaries of Peabody Energy Corporation, a publicly held corporation.

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STATUTORY PROVISION INVOLVED

Section 9706(a) of the Coal Industry Retiree Health Benefit Act of 1992 ("Coal Act"), 26 U.S.C. §§ 9701 *et seq.*, 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 * * *." 26 U.S.C. § 9706(a). Other pertinent provisions of the Act are set forth in the statutory addendum.

INTRODUCTION

Congress enacted the Coal Act in 1992 to ensure the continued provision of health benefits to retired miners who had been promised lifetime benefits by their former employers, many of whom were no longer in business. To do so, the Coal Act established a fund financed in part by premiums assessed against coal operators that formerly employed the miners, as well as against certain "related persons." Those coal operators and related persons would be responsible for the costs of providing benefits to beneficiaries of the fund "assigned" to them under certain criteria set out in the Coal Act. Benefits for "unassigned" beneficiaries would be financed by alternative means, including transfers of interest from a government fund also financed by assessments against coal operators and, if necessary, a pro rata assessment on operators and related persons responsible for assigned beneficiaries. Thus, no matter whether beneficiaries were assigned or unassigned under the Act, *all* beneficiaries would be entitled to the same benefits, and the fund would not stand to lose a single dollar in revenue.

The Commissioner of the Social Security Administration ("SSA") was delegated the responsibility of assigning beneficiaries to coal operators and related persons. Their premiums were to be initially assessed on the basis of all assignments as of October 1, 1993, the date on which the fund's first full plan year commenced. To ensure that this financing scheme was in place by then, Congress directed that the Commissioner "shall, before October 1, 1993," make assignments to coal operators and related persons. Pursuant to that statutory mandate, SSA made the assignments, and later represented to Congress that the agency had "completed the process of making the initial assignment decisions by October 1, 1993, as required by law." *Coal Industry Retiree Health Benefit Act of 1992: Hearing Before the Subcomm. on Oversight of the House Ways and Means Comm.*, 104th

Cong. 23 (1995) (*"1995 Coal Act Hearing"*) (Principal Deputy Commissioner Lawrence H. Thompson).

Nearly two years after SSA had completed the assignment process—and just shortly after it had represented that much to Congress—the agency suddenly began to assign to operators and related persons beneficiaries it had previously not assigned. Years later, the agency was still making such initial assignments. Whereas the agency had previously understood the Act's October 1, 1993 deadline to be mandatory, it now believed it could continue to make initial assignments of beneficiaries in perpetuity. But Congress did not tell the Commissioner to assign beneficiaries "when you get around to it." Congress said "before October 1, 1993." Congress also explained how to handle beneficiaries who were not assigned, ascribed significance to the October 1, 1993 date in other provisions of the Act, and specified only one situation in which new assignments could be made after October 1, 1993, which does not apply in this case. The Commissioner nonetheless reads "shall, before October 1, 1993," to mean "may, before or after October 1, 1993, and for as long as she likes, but at least through September 1997." *See* J.A. 47, 110, 112, 117.

With such a claim what is at stake in this case moves beyond whether an operator may reduce exposure for assigned beneficiaries while increasing exposure for unassigned beneficiaries, or the extent to which a different fund also financed by coal operators may be used to pay benefits. What is at stake becomes nothing less than whether the Federal Government must abide by the rule of law.

We learn early on that "[m]en must turn square corners when they deal with the Government." *Rock Island, A. & L. R.R.* v. *United States*, 254 U.S. 141, 143 (1920). Certainly none of us would expect a sympathetic hearing from the Federal Government if we failed to meet a statutory deadline—especially one in Title 26 of the United States Code. By the same token, we are entitled to expect that the

Government itself will abide by the rules established by Congress. Congress said, in words with no inherent ambiguity, that the Commissioner "shall, before October 1, 1993," make assignments pursuant to the criteria in the Act. 26 U.S.C. § 9706(a). The principle that the Commissioner urges this Court to accept—that even such plain statutory provisions are simply, as far as the Government is concerned, hortatory admonitions that it can disregard according to its convenience—is one that ought to give pause. The Federal Government is, to be sure, very big, and its agents are assuredly very busy. Those are two of the best reasons to insist that the Government abide by the law.

STATEMENT OF THE CASE

Historical Background. Congress enacted the Coal Act in response to a crisis that threatened the stability of the Nation's coal industry.[1] For years, health benefits for retired miners had been provided through multi-employer health plans established pursuant to collective bargaining agreements. Over time, however, the plans began to experience serious financial difficulties. By the time Congress stepped in to address the problem, the continued viability of the plans was in jeopardy, and the coal industry faced the prospect of a calamitous strike.

The plans themselves had their genesis in one of the most disruptive strikes in our Nation's history. In 1946, a breakdown in negotiations between coal operators and the United Mine Workers of America ("UMWA") over health benefits for miners led to a nationwide strike, prompting President Truman to declare a national emergency and issue an Executive Order directing the seizure of the Nation's coal mines. Negotiations between the Federal Government and the UMWA produced the historic Krug-Lewis Agreement,

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[1] The history of the Coal Act is reviewed in this Court's decisions in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998) and *Barnhart* v. *Sigmon Coal Co.*, 122 S. Ct. 941 (2002).

which ended the strike and led to the creation of health and retirement benefit funds for miners. From then on, retiree health benefits were provided through multi-employer health plans established pursuant to a series of National Bituminous Coal Wage Agreements ("NBCWAs") negotiated by the UMWA and the coal industry.[2]

The plans were funded by contributions from coal operators, and continued to provide benefits to eligible retirees even after their former employers stopped contributing to the plans. Such benefits were financed by the remaining participating coal operators, even though those operators and the retirees whose benefits they financed might never have had an employment relationship. By the late 1980s, the plans had run into serious financial trouble as health care costs increased and coal operators stopped contributing to the plans because they no longer employed union workers or had left the coal business altogether.

In 1989, the UMWA led a ten-month strike against Pittston Coal Company, a major coal operator, after it refused to sign the 1988 NBCWA. The dispute prompted the intervention of the Secretary of Labor, who announced as part of its settlement the creation of the Advisory Commission on UMWA Retiree Health Benefits (the "Coal Commission") to "review and make recommendations concerning the financial crisis confronting the 1950 and 1974 [UMWA Benefit Plans]." Secretary of Labor's Advisory Commission on UMWA Retiree Health Benefits, *Coal Commission Report:*

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[2] The first NBCWA to establish a benefit plan was the 1947 NBCWA. The 1950 NBCWA created a new benefit plan, which remained in effect until 1974. The 1974 NBCWA established two new health benefit plans—the 1950 UMWA Benefit Plan, which provided health benefits to miners who retired before January 1, 1976, and the 1974 UMWA Benefit Plan, which provided health benefits to active miners and those who retired on or after January 1, 1976. When the Coal Act was passed in 1992 those two plans were still in effect pursuant to the 1988 NBCWA, which was due to expire on February 1, 1993.

A Report to the Secretary of Labor and the American People (*"Coal Comm'n Report"*) 1 (1990). After months of study, the Commission concluded that "a statutory obligation to contribute to the plans should be imposed on current and former signatories to the [NBCWAs]." *Id*. at vii-viii. The Commission warned that a "crisis could come as early as 1993" when the 1988 NBCWA was due to expire, and that "[t]he time to deal with the problem is now." *Id*. at 3-4.

Congress heeded the call. In March 1992, as part of a larger tax bill, Congress passed an earlier version of the Coal Act which would have provided for the financing of benefits through premiums assessed against signatories to the 1978 or any subsequent NBCWA and an industry-wide tax on future coal production. The entire bill, however, was vetoed by President Bush. By this time, the expiration of the 1988 NBCWA on February 1, 1993 loomed on the horizon. Congress continued to seek a legislative solution, well aware that the failure to achieve one could result in the interruption of benefits to miners and another massive strike.[3] Finally, on October 24, 1992, "amidst a maelstrom of contract negotiations, litigation, strike threats, * * * and high pressure lobbying, not to mention wide disagreements among [its] Members," Congress enacted the Coal Act. *Sigmon Coal*, 122 S. Ct. at 947-948 (footnotes omitted).

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[3] *See, e.g.*, 138 Cong. Rec. 34,005 (Oct. 8, 1992) (submission of Sen. Wallop, Congressional Research Service, *Coal Industry: Use of Abandoned Mine Reclamation Fund Monies for UMWA "Orphan Retiree" Health Benefits* (1992) (*"CRS Report"*) (noting that failure to find a solution before the expiration of the 1988 NBCWA "could lead to a strike by the miners and/or a refusal by [signatory] employers to continue to support health benefits previously promised to retired miners and dependents"); 138 Cong. Rec. 34,033 (Oct. 8, 1992) (Sen. Rockefeller) (legislation necessary to "avert disruption in the coalfields and the consequent threat to commerce and the national interest"); 138 Cong. Rec. 20,120 (July 29, 1992) (Sen. Ford) (proposed legislation ensures "a stable coal industry that will not face the heartache and trauma of a nationwide coal strike next February").

The Coal Act. Congress enacted the Coal Act "to secure the stability of interstate commerce" by "stabiliz[ing] plan funding and allow[ing] for the provision of health care benefits to [coal industry] retirees." Pub. L. No. 102-486, § 19142(a)(2), 106 Stat. 2776, 3037 (1992). To accomplish those objectives, the Coal Act merged the existing multi-employer plans (the 1950 and 1974 UMWA Benefit Plans) into a new private multi-employer plan known as the UMWA Combined Benefit Fund (the "Combined Fund"). *See* 26 U.S.C. §§ 9702(a)(1), (2).

The Combined Fund provides "substantially the same" health benefits that retirees and their dependents received under the 1950 and 1974 UMWA Benefit Plans to each "eligible beneficiary." *Id*. § 9703(b)(1).[4] An "eligible beneficiary" is defined as a coal industry retiree who, on July 20, 1992, was receiving benefits under the 1950 or 1974 UMWA Benefit Plan, or an individual who, on that date, was receiving such benefits by reason of a relationship to such a retiree. *Id*. §§ 9703(f)(1), (2). Coal industry workers retiring after July 20, 1992 are not eligible for benefits under the Fund. Thus, at its inception, the Combined Fund had a fixed number of beneficiaries, which would steadily decline over the years.[5]

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[4] Because the vast majority of beneficiaries are also eligible for the federal Medicare program, the Combined Fund essentially functions as a "Medigap" policy, providing prescription drugs and other benefits not available under Medicare. *See* 138 Cong. Rec. 34,005 (1992) (*CRS Report*).

[5] At its inception, the Combined Fund had approximately 114,000 beneficiaries. Fed. Pet. 25 & n.17. As of October 2001, the Fund had approximately 54,000 beneficiaries—less than half the number it had about ten years ago. *See* Peabody Opp. 8 n.5; *see also* 146 Cong. Rec. S3835 (May 10, 2000) (Sen. Rockefeller) ("There are now only about 65,000 miners and retirees remaining in the [Combined] Fund * * *. Their average age is 78 years old, and more than 45% of the population is over 80 years.").

The Combined Fund is financed in part by annual premiums assessed against "assigned operators," *i.e.*, coal operators that signed a coal wage agreement requiring the provision of health benefits to retirees or contributions to the 1950 or 1974 UMWA Benefit Plans, and that "conduct[] or derive[] revenue from any business activity, whether or not in the coal industry." *Id.* §§ 9701(b)(1), (c)(1), (5), (7), 9704(a), 9706(a). If an assigned operator is no longer involved in any business activity, premiums may be assessed against "related persons," including businesses or corporations under common control, or successors in interest to such entities. *Id.* §§ 9701(c)(2)(A), 9706(a). Assigned operators (and related persons) are assessed annual premiums for each retiree (and dependents) assigned to them by the Commissioner of Social Security under a three-tier allocation system set out in Section 9706(a) of the Act. *Id.* §§ 9704(a)(1), 9706(a)(1)-(3).

Under the Act's allocation system, the Commissioner was first to attempt to assign a beneficiary to a coal operator that was in business, had signed a coal wage agreement in 1978 or thereafter, and was the most recent signatory operator to have employed the miner in the coal industry for at least two years (or to a "related person" of such an operator). If an assignment could not be made under those criteria, the Commissioner was to attempt to assign the beneficiary to a coal operator that was in business, had signed a coal wage agreement in 1978 or thereafter, and was the most recent signatory operator to have employed the miner in the coal industry (or to a related person). Finally, if an assignment could not be made under those criteria, the Commissioner was to attempt to assign the beneficiary to a coal operator that was in business and had employed the miner in the coal industry longer than any other coal operator prior to the effective date of the 1978 NBCWA (or to a related person). *See id.* §§ 9706(a)(1)-(3).[6]

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[6] An operator or related person assigned a beneficiary under the Act has 30 days to request "detailed information as to the work

Assigned operators were to be initially assessed premiums based on assignments as of October 1, 1993, the date on which the Fund's first full year was scheduled to commence. *See id.* § 9702(c). To ensure that assignments were completed by that date, Congress specifically directed that "the 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," pursuant to the Act's allocation system. *Id.* § 9706(a) (emphasis added).[7]

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history of the beneficiary and the basis of the assignment." 26 U.S.C. § 9706(f)(1). Within 30 days of the receipt of such information, the assigned operator may request review of the assignment by the Commissioner. *Id.* § 9706(f)(2). If the Commissioner determines that the assignment was in error, the assigned operator is entitled to a credit or refund of all premiums paid with respect to such assignment, and the beneficiary's record is reviewed for reassignment under the Act's allocation system. *Id.* § 9706(f)(3)(A).

In *Eastern Enterprises*, this Court declared unconstitutional assignments made under the third tier to operators that had not signed the 1974 or any subsequent NBCWA, on the ground that those operators had not made a commitment to provide lifetime benefits to retired miners and their dependents. *See* 524 U.S. at 529-537 (plurality); *id.* at 550 (Kennedy, J., concurring in the judgment and dissenting in part).

[7] The Combined Fund's first plan "year" began on February 1, 1993—the expiration date of the 1988 NBCWA—and ran until September 30, 1993. *See* 26 U.S.C. §§ 9702(a)(2), (c). Benefits provided by the Fund during this interim period were to be initially financed by a $70 million transfer from the overfunded 1950 UMWA Pension Plan, as well as by contributions from signatories to the 1988 NBCWA or an agreement providing similar benefits. *See id.* §§ 9701(c)(3), 9704(i)(1)(A), 9705(a). Once the assignment process under Section 9706(a) was completed, assigned operators would be assessed premiums for the Combined Fund's interim period and first full year, and the 1988 agreement operators would be entitled to a credit against their premiums in the amount of contributions made during the interim period. *See id.* §§ 9704(a), (i)(1)(D)(i). Premiums for the interim period and

Congress went to some length to facilitate the assignment process, directing the 1950 and 1974 UMWA Benefit Plans to provide to SSA, within 20 days of the statute's enactment, a list of the names and social security numbers of each eligible beneficiary (including each deceased beneficiary if any other individual was a beneficiary by reason of a relationship to such deceased beneficiary) and, to the extent possible, the names of their former employers. *See id.* § 9706(c). In addition, Congress directed the Plans to provide to SSA, where ascertainable from plan records, the names of all parties to be assigned beneficiaries under Section 9706(a). Congress further directed all other agencies, as well as the trustees of the Combined Fund and all of the UMWA Plans, to cooperate fully with SSA in providing information that would enable SSA to complete the assignment process. *See id.* § 9706(d).[8]

Congress also made provisions for financing the benefits of those beneficiaries not assigned under Section 9706(a). The Coal Act requires the calculation of an "unassigned beneficiaries premium" that may be assessed annually against assigned operators. *See id.* §§ 9704(a)(3), (d). An assigned operator's unassigned beneficiaries premium is equal to the operator's "applicable percentage"—defined as its percentage

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first full plan year were to be assessed and paid during the first full plan year beginning October 1, 1993. *See id.* § 9704(g)(1).

[8] The 1950 and 1974 UMWA Benefit Plans possessed substantial information concerning the employment history of the Fund's beneficiaries. The Plans had conducted a census in 1990 of the status of the last employer of each retiree, and had broken down those employers into categories of pre- and post-1978 NBCWA signatory operators, much like the Coal Act. *See* General Accounting Office, *Employee Benefits: Financing Health Benefits of Retired Coal Miners* 8-9 (July 22, 1992). That census also identified certain companies related to coal operators that had gone out of business. *See id.* In addition, members of the Bituminous Coal Operators' Association ("BCOA")—including respondents Peabody and EACC—facilitated the assignment process by acknowledging responsibility for some 15,000 retirees.

of total assigned beneficiaries "determined on the basis of assignments as of October 1, 1993," *id.* § 9704(f)(1)—of the per beneficiary premium for the plan year multiplied by "the number of eligible beneficiaries who are not assigned under section 9706" for the plan year. *Id.* § 9704(d). In other words, an assigned operator's unassigned beneficiaries premium is based on its proportionate share of all beneficiaries assigned "as of October 1, 1993." *Id.* § 9704(f)(1).[9]

The Act also designates two other sources of financing for the health benefits of unassigned beneficiaries. For each of the Fund's first three years, Congress directed that $70 million be transferred from the overfunded 1950 UMWA Pension Plan,[10] and that a portion of those transfers be used to "proportionately reduce the unassigned beneficiary premium" of each assigned operator. *See id.* §§ 9705(a)(1), (3). For each plan year thereafter, Congress authorized the annual transfer of interest earned by the Department of the Interior's Abandoned Mine Reclamation Fund (the "AML

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[9] The Act provides that an assigned operator's "applicable percentage" may be annually adjusted by making "changes to the assignments as of October 1, 1993" in two specified circumstances. *Id.* § 9704(f)(2). First, "such assignments" may be modified to reflect any changes as a result of the appeals process set out in Section 9706(f). *Id.* § 9704(f)(2)(A). Second, an assigned operator's "applicable percentage" may be reduced to reflect a change in the total number of assigned eligible beneficiaries because an assigned operator (or related person) has ceased to do business, which results in that operator's assignees being placed in the unassigned pool. *Id.* § 9704(f)(2)(B). There is no other provision for "changes to the assignments as of October 1, 1993."

[10] The Coal Commission reported in 1990 that the 1950 UMWA Pension Plan (established pursuant to the 1974 NBCWA) was overfunded by $237 million. *See Coal Comm'n Report* at 2. Like the UMWA Benefit Plans, the 1950 UMWA Pension Plan was funded by contributions from coal operators, including respondents Peabody and EACC.

Fund")[11] to likewise be used to "proportionately reduce the unassigned beneficiary premium" of each assigned operator. *See id.* §§ 9705(b)(1), (2); 30 U.S.C. § 1232(h).[12] Thus, as a practical matter, operators may be assessed an unassigned beneficiaries premium only if such transfers prove insufficient to cover the costs of providing health benefits to unassigned beneficiaries. To date, such transfers have been sufficient, and assigned operators have never been assessed an unassigned beneficiaries premium.

Post-Enactment Developments. Although Congress gave SSA nearly a year to make assignments under the Coal Act, SSA delayed the commencement of that process because the agency concluded that it did not have the appropriate funds to carry out the responsibilities delegated by Congress.[13] On July 2, 1993, Congress provided a supplemental appropriation of $10 million for SSA to make initial assignments, review assignments under the Act's administrative review process, and calculate the per beneficiary premium for each plan year. *See* Supplemental

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[11] The AML Fund is financed by assessments against coal operators for each ton of coal produced. *See* 30 U.S.C. § 1232(a). Respondents Peabody and EACC both contribute to the AML Fund.

[12] Such transfers may not exceed actual expenditures on behalf of unassigned beneficiaries. *See* 30 U.S.C. § 1232(h)(3)(A). In the event interest earned by the AML Fund in any fiscal year is less than $70 million, Congress has authorized the transfer of interest earned by the Fund between September 30, 1992, and October 1, 1995, to make up the difference. *See id.* §§ 1232(h)(2)(A), (B), (3)(B).

[13] As originally enacted, the Coal Act directed the Secretary of Health and Human Services to make the required assignments. *See* Pub. L. No. 102-486, § 9706(a), 106 Stat. 2776, 3047. Upon the establishment of SSA as an independent agency in 1994, the Coal Act was amended with the substitution of "Commissioner of Social Security" for "Secretary of Health and Human Services." *See* Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, § 108(h)(9)(B), 108 Stat. 1464, 1487.

Appropriations Act of 1993, Pub. L. No. 103-50, ch. V, 107 Stat. 241, 254 (appropriating funds "to carry out sections 9704 and 9706").

On September 9, 1993—only weeks before the statutory deadline—the then-Acting Commissioner of SSA informed a congressional committee that SSA "[is] making excellent progress with the assignment process" and "fully expect[s] [to] meet [its] statutory responsibility to * * * complete the assignment process by October 1, 1993." *Provisions Relating to the Health Benefits of Retired Coal Miners: Hearing Before the House Ways and Means Comm.*, 103d Cong. 26 (1993) (Lawrence H. Thompson) ("*1993 Coal Act Hearing*"). *See also id.* at 23 (SSA "making good progress and fully expect[s] to meet the statutory due date for carrying out [its] assigned tasks under the Act").

Testifying before Congress in June 1995, the Principal Deputy (and former Acting) Commissioner reported that "SSA *completed* the process of making the initial assignment decisions *by October 1, 1993, as required by law*." *1995 Coal Act Hearing* at 23 (Lawrence H. Thompson) (emphases added). *See also id.* at 19 ("We have also completed the process of making the initial assignments. As was required by law, we completed that by October, 1993."); *id.* at 20 (SSA had "carried out [its] responsibilities of calculating the premiums and the initial assignment to the mine operators in the timeframe contemplated by the statute"). At the end of that process, 20,036 miners who had not been assigned under the Act's criteria were deemed "unassigned." *1993 Coal Act Hearing* at 41.

Yet no sooner had SSA reported to Congress that it had "completed" the initial assignment process "by October 1, 1993, as required by law," when the agency suddenly—and retroactively—began to make assignments of beneficiaries it had previously not assigned. Indeed, as late as September 1997—four years after the statutory deadline—SSA was still

making assignments from the unassigned pool, retroactive to October 1, 1993. *See, e.g.*, J.A. 47, 110, 112, 117.

The *Dixie Fuel* Decision. In *Dixie Fuel Co.* v. *Commissioner of Social Security*, 171 F.3d 1052 (6th Cir. 1999) (Pet. App. 27a), a coal operator that received more than 50 initial assignments of beneficiaries after October 1, 1993 brought suit challenging SSA's authority to make initial assignments after the statutory deadline. After examining the Coal Act's "entire statutory scheme," the Sixth Circuit concluded that the Commissioner had no authority to make initial assignments on or after October 1, 1993, and held that the assignments were invalid. Pet. App. 45a.

The Sixth Circuit noted that the language of the Coal Act "is plain on its face." *Id*. at 43a. Congress directed that the Commissioner "*shall, before October 1, 1993*, assign each coal industry retiree * * * to a signatory operator which (or any related person with respect to which) remains in business." *Id*. (emphasis in original). This Court, the Sixth Circuit observed, "has held in any number of contexts that 'shall' is 'explicitly mandatory' language." *Id*. (citing cases).

The Sixth Circuit noted that in *Brock* v. *Pierce County*, 476 U.S. 253 (1986), this Court held that "'the mere use of the word "shall" * * * standing alone' was not sufficient to terminate the power of the Secretary of Labor to recover misused funds after the expiration of the statutory period within which the Secretary was to act." *Id*. at 44a (quoting *Pierce County*, 476 U.S. at 262) (alteration in original). The Sixth Circuit concluded, however, that the use of "shall" in Section 9706(a) "is not a 'mere use * * * standing alone.' " *Id*. at 45a. "No provision of the Coal Act so much as hints that the October 1, 1993 date is not a deadline." *Id*.

To the contrary, the court held, "the entire statutory scheme" of the Coal Act "reflects Congress's intent that all assignments be completed by October 1, 1993." *Id*. For example, "the calculation of the obligation of every assigned operator for payment of unassigned beneficiary premiums is

dependent upon the completion of the assignment of beneficiaries by October 1, 1993." *Id.* at 47a. The statute "expressly provides for making adjustments beyond that date"—where an assigned operator successfully challenges an assignment pursuant to the appeals process set out in Section 9706(f) or where an assigned operator goes out of business, *see* 26 U.S.C. §§ 9704(f)(2)(A), (B)—but "those adjustments are all premised on the assignments' having been completed before October 1, 1993." Pet. App. 47a. Thus, the court held, the Coal Act's "statutory scheme simply is not comparable to that addressed by the Court in *Brock* v. *Pierce County*." *Id.*

Moreover, the court observed, the Coal Act does not "present the kind of situation that concerned the Court in *Pierce County*, namely a lack of consequences resulting from the agency's failure to act within the timeframe of the statute." *Id.* Here, "the consequence flowing from the failure of the Commissioner to make [initial] assignments before October 1, 1993, is clear from the plain language of the statute: the eligible beneficiaries who were not assigned [by October 1, 1993] are the *unassigned beneficiaries*." *Id.* (emphasis in original).

Proceedings Below. Respondents Peabody and EACC were assigned 330 beneficiaries after October 1, 1993 whom "SSA initially determined * * * would have to be deemed unassigned." Fed. Pet. 12. *See, e.g.*, J.A. 34, 36-47. Respondents accordingly brought suit against the Commissioner, seeking invalidation of the assignments under the Sixth Circuit's decision in *Dixie Fuel*. The District Court granted summary judgment in their favor, voiding the assignments and enjoining the Commissioner from making further initial assignments to them. *See* Pet. App. 7a-8a. The Commissioner appealed to the Sixth Circuit and petitioned for initial hearing en banc for the purpose of reconsidering *Dixie Fuel*. The Sixth Circuit denied the petition and subsequently affirmed, explaining that the court had "already

held that the Commissioner lacks [the] authority" to make initial assignments after October 1, 1993. *Id*. at 2a.

In *Holland* v. *Pardee Coal Co.*, 269 F.3d 424 (2001), *pet. for cert. pending*, No. 01-1366, a divided panel of the Fourth Circuit reached the opposite conclusion. This Court subsequently granted certiorari in this case. 122 S. Ct. 918 (2002).

SUMMARY OF ARGUMENT

A. The Coal Act provides that "the 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." 26 U.S.C. § 9706(a) (emphasis added). In choosing that language, Congress could not have made its intent clearer. Congress said the Commissioner "shall" make assignments "before October 1, 1993"—not after. As this Court reiterated just months ago in construing the same statute, "[w]e have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Sigmon Coal*, 122 S. Ct. at 956 (quotation omitted).

B. Congress should be taken at its word. As the Sixth Circuit recognized in *Dixie Fuel*, "[n]o provision of the Coal Act so much as hints that the October 1, 1993, date is not a deadline." Pet. App. 45a. Indeed, the "entire statutory scheme" hinges on that date. *Id*. As of that date, the Act's interim financing scheme would come to an end, and the Combined Fund would look to assigned operators (and related persons) to finance the costs of providing benefits to the Fund's beneficiaries. Benefits for assigned beneficiaries would be financed by premiums paid by the assigned operators for each beneficiary assigned to them. In the event that transfers from the AML Fund proved insufficient to provide benefits to unassigned beneficiaries, assigned operators (and related persons) would be allocated a portion of the remaining costs based on their pro rata share of all

beneficiaries assigned "as of October 1, 1993." 26 U.S.C. § 9704(f)(1).

Thus, as of October 1, 1993, a funding mechanism would be in place to ensure the continued provision of benefits to *all* beneficiaries. Placing a deadline on the initial assignment process, and then treating beneficiaries not assigned by that deadline pursuant to the express provisions for unassigned beneficiaries, makes sense and is consistent with Congress's general approach under the Act. The Coal Act does not require a perfect match between each beneficiary and the coal operator most responsible for that beneficiary. Given that approach, it is not surprising that Congress would not have wanted the Commissioner to engage in an interminable and costly effort to track down a responsible party for every last beneficiary. At some point, the effort to match up parties is not worth the candle, and responsible parties need to move on with some certainty concerning their exposure under the Act. That point, Congress decided, was October 1, 1993.

Limiting the quest to match beneficiaries and operators makes particular sense since an unassigned beneficiary loses no coverage due to that fact, and the costs for such beneficiaries are covered by another fund also established through assessments on operators, or by pro rata assessments on assigned operators (and related persons). Coal operators end up paying one way or another, and Congress could reasonably have decided that the Commissioner should devote only so much time and energy to determining which way it should be in the case of each particular beneficiary.

Several key provisions confirm that this was Congress's intent. In Section 9706(f), Congress specified only one circumstance in which it intended the Commissioner to make assignments on or after October 1, 1993—where an assignment is voided pursuant to the Act's administrative review process. The absence of a similar provision granting the Commissioner the authority to make initial assignments after that date strongly suggests that Congress meant what it

said in Section 9706(a)—that the Commissioner "shall" make those assignments "before October 1, 1993."

Similarly, in Section 9704(f), Congress specified only two circumstances in which annual adjustments are to be made to an assigned operator's "applicable percentage"—that is, an assigned operator's percentage of total assigned beneficiaries, "determined on the basis of assignments as of October 1, 1993." 26 U.S.C. § 9704(f)(1). Those circumstances are when adjustments are necessary: (1) to reflect changes to the assignments "as of October 1, 1993" resulting from the appeals process set out in Section 9706(f), *id.* § 9704(f)(2)(A), and (2) to reflect changes to the assignments "as of October 1, 1993" resulting from an assigned operator's (or related person's) cessation of business. *Id.* § 9704(f)(2)(B). If Congress had intended the Commissioner to continue to make initial assignments on or after October 1, 1993, Congress surely would have provided for annual adjustments to an assigned operator's "applicable percentage" because of those assignments. Again, the lack of any such provision strongly suggests that Congress meant what it said in Section 9706(a).

Moreover, as Section 9704(f)(2)(B) makes clear, when an assigned operator (or related person) ceases to do business, its beneficiaries go into the "unassigned" pool. The fact that Congress did not provide for reassignment to another operator (or related person)—no matter how easy it might be to identify the most responsible party next in line under the Act's criteria—amply demonstrates that, subject to the appeals process to correct assignments made in error, Congress envisioned a one-time assignment process and did not intend to pursue its objective of assigning beneficiaries to responsible parties after October 1, 1993.

C. Petitioners' reliance on the *Brock* v. *Pierce County* line of authority is misplaced. Unlike the statutes involved in those cases, the Coal Act plainly specifies a consequence for the failure to act by its statutory deadline—all beneficiaries

not assigned by that date are treated pursuant to the Act's express provisions for unassigned beneficiaries. Moreover, in the *Pierce County* line of decisions, strict adherence to the statutory deadline would have prevented an agency or government official from protecting or vindicating important public rights. Not so here. As the Commissioner herself recognizes, the initial assignment process "take[s] place under a statutory framework that is designed to establish relationships among *private* parties." Br. 21 (emphasis in original). Further, none of the decisions in the *Pierce County* line involved specific dates critical to the implementation and operation of the statutory scheme. Finally, no alternative remedy was available for the Commissioner's failure to adhere to the statutory deadline, as there was with respect to the failures to observe time limits in *Pierce County* and its progeny.

D. The Commissioner argues that Congress's subsequent appropriation to SSA of funds to remain available "until expended" somehow demonstrates that the Congress that enacted the Coal Act intended the Commissioner to make initial assignments on or after October 1, 1993. Nothing about that appropriation suggests anything of the kind. As the Commissioner herself concedes, that appropriation was intended for SSA not only to make initial assignments, but also to conduct the appeals process and calculate the per beneficiary premium for each plan year—responsibilities that SSA would continue to carry out *after* the deadline. In this case, the most telling thing Congress has done since enacting the Coal Act is what it has not done—enact a bill introduced to amend the Act to overturn the result in *Dixie Fuel*.

E. Finally, petitioners briefly argue that the Court should defer to the Commissioner's current view that she is not bound by the October 1, 1993 deadline for initial assignments. Even if Section 9706(a) were ambiguous, the Commissioner's "interpretation" of her authority to act beyond that deadline would deserve no deference. Congress

conferred no law-making authority on the Commissioner in the Coal Act, and her current position that she may make initial assignments beyond the deadline is not the product of any exercise of such authority. Moreover, the Commissioner is attempting to evade a statutory provision that constrains her authority; deference to her view of such a provision is particularly inappropriate. The Commissioner's current interpretation of the Coal Act's assignment deadline also flatly contradicts SSA's earlier views, as represented to Congress. The agency's shifting position on its authority under the Coal Act blunts any persuasive force its current litigating position might otherwise carry.

ARGUMENT

THE COMMISSIONER LACKS AUTHORITY UNDER THE COAL ACT TO MAKE INITIAL ASSIGNMENTS ON OR AFTER OCTOBER 1, 1993.

After having previously represented to Congress that SSA had "completed the process of making the initial assignment decisions by October 1, 1993, as required by law," *1995 Coal Act Hearing* at 23, the Commissioner now maintains that the agency failed to complete all assignments by the deadline, Br. 10 n.8, and that, notwithstanding the Coal Act's unambiguous command that the Commissioner "shall" assign beneficiaries "before October 1, 1993," the agency retains the authority to continue making initial assignments beyond that date. But regardless of whether the agency in fact failed to complete the assignment process by the statutory deadline or instead simply decided to revisit the "unassigned" pool after that date, the Commissioner simply has no authority under the Coal Act to make initial assignments to coal operators and related persons on or after October 1, 1993. To the contrary, as the Sixth Circuit correctly held in *Dixie Fuel*, "the entire statutory scheme" of the Coal Act "reflects Congress's intent that all assignments be completed by October 1, 1993." Pet. App. 45a.

A. The Plain Language Of The Coal Act Demonstrates That Congress Intended That The Commissioner "Shall" Make Initial Assignments "Before October 1, 1993"—Not After.

As with any statute, the starting point for interpreting the Coal Act is the language of the statute itself. *See Sigmon Coal*, 122 S. Ct. at 950 ("As in all statutory construction cases, we begin with the language of the statute."). As the Sixth Circuit observed in *Dixie Fuel*, the language of the Coal Act is "plain on its face." Pet. App. 43a. The Act clearly and unambiguously provides that the Commissioner "*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." 26 U.S.C. § 9706(a) (emphasis added).

This Court has long and recently held that " '[t]he word "shall" is ordinarily "[t]he language of command." ' " *Alabama* v. *Bozeman*, 533 U.S. 146, 153 (2001) (quoting *Anderson* v. *Yungkau*, 329 U.S. 482, 485 (1947) (quoting *Escoe* v. *Zerbst*, 295 U.S. 490, 493 (1935))). *See, e.g.*, *Miller* v. *French*, 530 U.S. 327, 337 (2000) ("statutory command that such a motion 'shall operate as a stay during the [specified time] period' indicates that the stay is *mandatory*") (alteration and emphasis in original); *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("the mandatory 'shall' * * * normally creates an obligation impervious to judicial discretion"); *United States* v. *Monsanto*, 491 U.S. 600, 607 (1989) ("Congress could not have chosen stronger words" than " 'shall order' " to "express its intent that forfeiture be mandatory"). *See also* Black's Law Dictionary 1375 (6th ed. 1990) ("As used in statutes * * * [the] word ["shall"] is generally imperative or mandatory"); Pet. App. 43a-44a (citing cases). Read in that light, the statutory language could not be more straightforward. Congress intended the Commissioner to complete initial assignments "before October 1, 1993." And

if Congress intended the Commissioner to do so "before" that date, it necessarily follows that Congress did not intend the Commissioner to make initial assignments *after* that date. *See Bozeman*, 533 U.S. at 153 ("the language of the [statute] militates against an implicit exception, for it is absolute").

B. The Statutory Scheme Confirms That Congress Meant What It Said In Section 9706(a).

Petitioners claim they have no "quarrel" with the notion that Congress intended that all assignments be completed by October 1, 1993. Tr. Br. 24. *See also* Tr. Br. 30; Fed. Br. 18-19, 23 n.12. In their view, however, the Act's command that the Commissioner "shall" assign beneficiaries "before October 1, 1993" was merely a hortatory spur to action, not an absolute deadline, because the Act does not explicitly state that the Commissioner lacks the authority to make initial assignments beyond that date. *See* Fed. Br. 20; Tr. Br. 26. The Commissioner asserts, for instance, that "Congress could have expressly provided that, if assignments were not completed by October 1, 1993, the Commissioner would have no further authority to assign a Coal Act beneficiary to a signatory operator or related person." Br. 20. By the same token, however, Congress could just as easily have instructed the Commissioner to continue to make initial assignments until all beneficiaries were assigned—if that had been what Congress intended. But Congress need not resort to tautologies to make its intent clear. As the Sixth Circuit recognized in *Dixie Fuel*, "[n]o provision of the Coal Act so much as hints that the October 1, 1993, date is not a deadline." Pet. App. 45a. Rather, the "entire statutory scheme" demonstrates that Congress never intended the Commissioner to make initial assignments on or after October 1, 1993. *Id*.

1. The October 1, 1993 Date Has Significance Throughout The Act.

The October 1, 1993 date is the linchpin of the Coal Act's entire statutory scheme. The Combined Fund's first full year

was scheduled to begin on October 1, 1993. As of that date, the Fund's interim financing scheme would come to an end, and assigned operators (and related persons) would be responsible for premiums to cover the costs of providing benefits to beneficiaries assigned to them. Of course, no premiums could be collected until beneficiaries were actually assigned. Thus, beneficiaries had to be assigned by October 1, 1993 to ensure adequate financing for their benefits. That financing was also necessary "to ensure that a definite end was placed to payments by 1988 signatories that had no individual retirees in the Combined Fund beneficiary pool and thus no long-term obligations against which [their] interim contributions could be credited." Fed. Br. 35-36.

As the Sixth Circuit noted in *Dixie Fuel*, "the calculation of the obligation of every assigned operator for payment of unassigned beneficiaries premiums is [also] dependent upon the completion of the assignment of beneficiaries by October 1, 1993." Pet. App. 47a. An assigned operator's unassigned beneficiaries premium is equal to its "applicable percentage" of the per beneficiary premium for the plan year multiplied by the number of unassigned beneficiaries. *See* 26 U.S.C. § 9704(d). An operator's "applicable percentage" is its percentage of total assigned beneficiaries, "determined on the basis of assignments *as of October 1, 1993*." *Id.* § 9704(f)(1) (emphasis added).

The unassigned beneficiaries premium is the central component of the funding mechanism for unassigned beneficiaries. Although the Act provides for transfers of interest from the AML Fund to finance benefits for the unassigned beneficiaries—and to date assigned operators have never been assessed an unassigned beneficiaries premium—such transfers are intended to "be used to proportionately reduce the unassigned beneficiaries premium * * * of each assigned operator for the plan year in which transferred." *Id.* § 9705(b)(2). Thus, the Act specifically contemplates the calculation of unassigned beneficiaries

premiums each year. And that calculation is predicated "on the basis of assignments as of October 1, 1993." *Id.* § 9704(f)(1).

The October 1, 1993 date also plays a key role in the administration of the Combined Fund. The Coal Act provides for the appointment of a board of trustees "as soon as practicable" after its enactment. *Id.* § 9702(b). One of those trustees was to be selected "by the three employers, other than the 1988 agreement operators, who have been assigned the greatest number of eligible beneficiaries." *Id.* § 9702(b)(1)(B). Those employers, of course, could not be known until October 1, 1993, when assignments were completed. Recognizing as much, Congress provided for an interim trustee to serve as a substitute until November 1, 1993. *Id.* § 9702(b)(3)(B). Congress necessarily assumed that the three employers with the most employees would be known by then—given the October 1, 1993 deadline for assignments—and that they could select a trustee in the intervening month.

In short, the October 1, 1993 date was critical to the implementation and operation of Coal Act's statutory scheme. Viewed in context, Congress's use of the word "shall" can only mean that Congress did not intend the Commissioner to make initial assignments beyond that statutory deadline.

2. Congress Specified How To Handle Beneficiaries Who Were Not Assigned Pursuant To Section 9706(a).

This conclusion applies with even more force when the Act's provisions for unassigned beneficiaries are considered. Congress recognized that not all beneficiaries would be assigned under the statute's criteria by October 1, 1993, and designated sources for financing benefits for those unassigned. *See* 26 U.S.C. §§ 9704(a), (d), 9705(b)(2). Thus, at the end of the assignment process and the termination of SSA's initial assignment authority, a

mechanism was in place to ensure the continued provision of benefits to all the Fund's beneficiaries.

Placing a deadline on how long the Commissioner may take to match up beneficiaries and operators under the Coal Act's criteria, and then treating beneficiaries not assigned by the statutory deadline pursuant to the provisions for "unassigned" beneficiaries, makes sense and is consistent with Congress's "rough justice" approach under the Act. The Coal Act does not create a scheme of perfect symmetry in which companies are required to finance the costs of providing benefits only to those beneficiaries with whom they had a former employment relationship or for whose benefits they are most responsible. Instead, Congress established a scheme where a coal operator that only briefly employed a retiree who worked much longer for another coal operator might be responsible for that retiree (and dependents), *see* § 9706(a); where companies that never employed a retiree or even engaged in the coal mining business might be responsible for retirees, *see* §§ 9701(c)(2)(A), 9706(a); and where companies might be responsible for a portion of the costs of providing benefits to retirees not assigned to anyone else. *See* §§ 9704(a)(3), (d).[14]

Given this approach, it is not surprising that Congress would have wanted to place a time limit on the assignment process, rather than have SSA exhaust resources and spend unlimited tax dollars in an interminable effort to assign every last beneficiary to an operator (or related person). At some

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[14] The Commissioner erroneously asserts that we have previously argued that "the fact that a particular beneficiary might be allocated to the wrong signatory * * * is of little significance." Br. 25 n.15. To the contrary, we have never suggested that it would be appropriate to assign a beneficiary to the wrong operator. Moreover, contrary to the Commissioner's suggestion (*id.*), beneficiaries are not "incorrectly" deemed unassigned when, as contemplated by Congress, they are treated as unassigned because they were not assigned to a signatory operator (or related person) under the Act's criteria by October 1, 1993.

point, the effort to track down further matches is not worth the candle, and must come to an end so that all involved can move forward with some certainty concerning their liability. Putting a limit on the assignment process made sense since doing so did not mean that any beneficiary would be left out in the cold or that the Fund would lose one dollar. Funding for unassigned beneficiaries would still come, initially from transfers from the overfunded 1950 UMWA Pension Plan financed by coal operators, *see supra* n.10, and, subsequently, from transfers of interest from the AML Fund (also financed by coal operators) and, if necessary, on a pro rata basis from those operators assigned beneficiaries. In other words, operators were footing the bill one way or another, and Congress could reasonably decide that at some point it made no sense for the Commissioner to continue to devote time and energy to parsing which way it should be. That point was October 1, 1993.

The Commissioner argues that construing the Act to terminate her authority to make initial assignments as of October 1, 1993 would frustrate Congress's goal of assigning as many beneficiaries as possible to the persons deemed most responsible for their benefits. *See* Br. 22-25.[15] But as this Court held just last Term in *Sigmon Coal*, Congress's objectives in enacting the Coal Act cannot be invoked to override the plain language of the statute. *See* 122 S. Ct. at 955-956; *see also Holmes Group, Inc.* v. *Vornado Air Circulation Sys., Inc.*, No. 01-408, slip op. at 7 (U.S. June 3, 2002) ("Our task here is not to determine what would further Congress's goal * * * but to determine what the words of the statute must fairly be understood to mean.").

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[15] The Commissioner relies on a statement submitted for the record by Senator Wallop as evidence of this goal, *see* Br. 22-23, but neglects to point out that the very same statement also noted that "[i]n the first plan year the Secretary of HHS will review the work history of each beneficiary and will prepare the assigned operator allocations *which are required to be made by October 1, 1993*." 138 Cong. Rec. 34,003 (Oct. 8, 1992) (emphasis added).

At issue in *Sigmon Coal* was whether the Commissioner could make assignments to successors in interest of signatory operators when the statute by its terms only permitted assignments to successors in interest of "related persons." There, too, the Commissioner argued that construing the statute as written "would be contrary to Congress' stated purpose of ensuring that each Combined Fund beneficiary's health care costs is borne (if possible) by the person with the most direct responsibility for the beneficiary," as well as "Congress' 'overriding purpose' of avoiding a recurrence of the orphan retiree catastrophe." 122 S. Ct. at 954. Adhering to the plain language of the statute, this Court refused to "alter the text in order to satisfy the policy preferences of the Commissioner." *Id*. at 956.[16]

The same result should follow here, where the Commissioner relies on the same "purpose" arguments to override the plain language of Section 9706(a). Seeing to it that the costs of providing health benefits to beneficiaries would be borne by the operators that had employed them was indeed one of the purposes of the Coal Act. "But no legislation pursues its purpose at all costs," and "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (emphasis in original). Section 9704(f)(2)(B), for instance, confirms that Congress did not intend to pursue the purpose of assigning beneficiaries to responsible operators at all costs. That provision makes clear that when an assigned operator (or related person) ceases to do business, that operator's beneficiaries are not reassigned pursuant to the criteria set forth in Section 9706(a), no matter

[16] The dissenters in *Sigmon Coal* concluded that the majority's plain language reading led to absurd results. *See id*. at 956-958. Here, there is nothing absurd about treating beneficiaries not assigned by the statutory deadline pursuant to the provisions for unassigned beneficiaries.

how easy it may be to identify the responsible operator next in line. Instead, those beneficiaries join the unassigned pool.

Here, Congress could readily decide that the perfect would be the enemy of the good—that the Commissioner should do as good a job as she could within the limited timeframe, and that it would be a waste of resources to attempt to align every last beneficiary with an operator or related person, no matter how long it took. *See*, *e.g.*, *Gray-Bey* v. *United States*, 201 F.3d 866, 872 (7th Cir. 2000) ("how to reconcile the quest for accuracy with other competing objectives is a legislative task, traditionally implemented through devices such as statutes of limitations and outer periods for action") (Easterbrook, J., dissenting).

In any event, the overriding purpose of the Coal Act was not to assign particular beneficiaries to particular operators, but to ensure the continued provision of benefits to miners and their dependents. § 19142(a)(2), 106 Stat. at 3037 (Coal Act enacted "to secure the stability of interstate commerce" by "stabiliz[ing] plan funding and allow[ing] for the provision of health care benefits to [coal industry] retirees"). Adhering to the plain language of Section 9706(a) in no way undermines that overriding purpose, because doing so results in no miner or dependent being denied benefits, and results in no adverse impact on the Combined Fund. Indeed, by ensuring the prompt determination of assignments and liabilities, the Act's deadline only furthers that objective.[17]

"Dissatisfied with the text of the statute," the Commissioner "seeks to amend [it] by appeal to the Judicial

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[17] Even the Act's appeals process reflects Congress's intent to determine assignments and financial obligations once and for all, providing assigned operators (and related persons) only 30 days to request information concerning the basis of an assignment, and only another 30 days to request review. *See* 26 U.S.C. § 9706(f). By continuing to assign beneficiaries after the statutory deadline, the Commissioner has turned what was meant to be a short and speedy review process into an endless cycle of appeals.

Branch." *Sigmon Coal*, 122 S. Ct. at 955-956. But as this Court explained in *Sigmon Coal*, "[d]issatisfaction * * * is often the cost of legislative compromise." *Id*. at 955. And that is particularly true with respect to the Coal Act. The statute's "delicate crafting" reflects a compromise among "highly interested parties attempting to pull the provisions in different directions." *Id*. at 956. "[A] change in any individual provision could have unraveled the whole." *Id*.

Parties to be held responsible for beneficiaries would want to know their liability under the Act sooner rather than later. A scheme that allowed SSA to make initial assignments in perpetuity would deny companies the opportunity to prepare adequately for Coal Act liabilities or engage in future business planning in light of such liabilities. Under such a scheme, companies could be—as they have been—completely blindsided by assignments made to them long after they had assumed that the initial assignment process was over. In "delicate[ly] crafting" the Coal Act, it would make sense for Congress to take such interests into account. *See, e.g.*, *1993 Coal Act Hearing* at 42 (Rep. Johnson) (noting obligation to "make sure that companies, particularly small companies, have time to figure out their liability and prepare to deal with it").

Petitioners argue that treating all beneficiaries not assigned by October 1, 1993 as "unassigned" would inappropriately shift costs to the public and other assigned operators. *See* Fed. Br. 23-24; Tr. Br. 45. Benefits for unassigned beneficiaries, however, are not financed by general tax revenues, but by transfers of *interest* from the AML Fund, which is financed by assessments on coal operators. *See* 30 U.S.C. § 1232(a).[18] To date, those transfers have proved

[18] The Commissioner suggests (Br. 24) that it would be inappropriate to use transfers from the AML Fund to finance the provision of health benefits to beneficiaries who could not be assigned by October 1, 1993 because that fund was established for other purposes. The transfers from the AML Fund, however, are transfers of *interest* earned by the Fund. In fact, prior to fiscal year

sufficient to cover the costs of providing benefits to unassigned beneficiaries.[19]

Contrary to the Commissioner's suggestion (Br. 25 n.15), the allocation of a portion of the costs of providing benefits to unassigned beneficiaries among assigned operators (and related persons) would not lead to the "downward spiral" that occurred under the Combined Fund's predecessor plans. In the event that transfers from the AML Fund ever prove insufficient to cover the costs of providing benefits to unassigned beneficiaries, assigned operators would only be responsible for the shortfall, not the *entire* cost of financing those benefits. *See* 26 U.S.C. §9705(b)(2). Moreover, as noted in *Sigmon Coal*, the Coal Act "broadly expanded the group of persons responsible for beneficiaries." 122 S. Ct. at 955 n.17. The Coal Act not only "reached back" to former signatories of the NBCWAs, but "reached out" to "related persons" of signatories and former signatories (including successors in interest of "related persons"). Thus, the costs of providing benefits to unassigned beneficiaries would be

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1992, the Fund did not even earn interest. *See* Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 6002(e), 104 Stat. 1388, 1388-290; 138 Cong. Rec. 34,006 (*CRS Report*). In any event, Congress has determined that transfers of interest from the AML Fund are an appropriate source of financing for the Combined Fund. The fact that the Commissioner believes such funds might be better spent elsewhere is of no moment.

[19] There is no suggestion in petitioners' briefs that transfers from the AML Fund will not continue to be sufficient to finance the provision of benefits to unassigned beneficiaries. Indeed, those transfers are likely to prove sufficient as the overall beneficiary population continues to decline. The Commissioner contends (Br. 24 n.14) that the invalidation of assignments could require the Combined Fund to issue refunds for premiums collected in prior years. Even if that were true, the Coal Act's financing provisions ensure that the amount of any such refunds would be recovered from interest on the AML Fund or, if necessary, from pro rata unassigned beneficiary premiums. *See* 30 U.S.C. § 1232(h)(4) (authorizing adjustments to transfers to reflect underpayment in prior years).

spread over a far greater number of responsible parties than under the predecessor plans. Under such circumstances, requiring assigned operators (and related persons) to bear a portion of the costs of providing benefits to beneficiaries who could not be assigned by October 1, 1993 is entirely consistent with Congress's general approach under the Act. *See Pardee*, 269 F.3d at 439 (Niemeyer, J., dissenting) (criticizing majority for "seek[ing] to adjust the financial equities of the Coal Act by judicial mandate").

It is no answer that the Act does not explicitly state that beneficiaries not assigned by October 1, 1993 are deemed "unassigned." The Act does not explicitly state that beneficiaries who could not be assigned under the three-tier allocation system for any other reason would be deemed "unassigned," either, yet no one would argue otherwise. In fact, the Act nowhere defines "unassigned beneficiary," but Congress clearly anticipated that there would be unassigned beneficiaries and made elaborate provisions for them. When those provisions are considered together with the Act's directive that the Commissioner "shall" assign beneficiaries "before October 1, 1993," the most natural reading of the statute is that Congress intended that beneficiaries not assigned under the Act's allocation system by October 1, 1993 would be treated pursuant to the provisions for the "unassigned."

The Trustees claim that "[r]ead as a whole," the Coal Act uses the term "unassigned" to refer "only to beneficiaries who are *unassignable* because SSA was unable to identify an existing employer that satisfies Section 9706's criteria." Br. 31 (emphasis in original). *See also* Fed. Cert. Reply at 8 (arguing that Coal Act "provides only that a beneficiary shall be deemed unassigned if the Commissioner is unable to assign the beneficiary to a signatory operator *at all*") (emphasis in original). Congress could have used the term "unassignable" if that is what it meant. It did not. In any event, even if the October 1, 1993 deadline is put aside, a

reading of the statute "as a whole" belies the Trustees' position. As noted, Section 9704(f)(2)(B) makes clear that when an assigned operator ceases to do business, its beneficiaries are not reassigned pursuant to the criteria set forth in Section 9706(a), no matter how "assignable" they may be. Thus, contrary to the Trustees' assertion, not all of the Act's "unassigned" beneficiaries are "unassignable."

3. Other Provisions Of The Act Confirm That Congress Intended The Process Of Making Initial Assignments To End By October 1, 1993.

Other provisions of the Coal Act confirm that Congress never intended the Commissioner to make initial assignments on or after October 1, 1993. In Section 9706(f), for instance, Congress established an administrative review process for challenging assignments. If the Commissioner determines that an assignment was made in error, the Act explicitly provides that "the Commissioner shall review the beneficiary's record for reassignment under [Section 9706(a)]." 26 U.S.C. § 9706(f)(3)(A)(ii). Thus, when Congress wanted to give the Commissioner continuing authority to make assignments after October 1, 1993, it knew how to do so. The absence of a similar provision granting the Commissioner the authority to make initial assignments after the statutory deadline is compelling evidence that Congress never intended the Commissioner to do so. Where " 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion' " *Sigmon Coal*, 122 S. Ct. at 951 (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)). *See also id.* ("Where Congress wanted to provide for successor liability in the Coal Act, it did so explicitly, as demonstrated by other sections in the Act * * *.").

The Commissioner nevertheless asserts that the Act "is not drafted in a way that suggests the authority to make new

assignments after an appeal is an 'exception' to a general rule that assignments would otherwise be barred on or after October 1, 1993." Br. 29. But if the Commissioner in fact had authority to make assignments on or after October 1, 1993, there would have been no need for Congress expressly to provide for such authority in the case of assignments made in error in Section 9706(f).

The Commissioner also argues that, if Congress had intended reassignment under Section 9706(f) to be the only situation in which the Commissioner has authority to make assignments on or after October 1, 1993, it could have demonstrated that intent by stating, for instance, that "the Commissioner must make all assignments by October 1, 1993, 'except as provided' in the appeal provisions," or that "the Commissioner may make new assignments after an administrative appeal, 'notwithstanding' the [statutory] deadline." Br. 29-30. But there was no reason for Congress to insert excess verbiage into unambiguous statutory text. Congress unequivocally directed that the Commissioner "*shall*" make assignments "before October 1, 1993." Once those assignments were made, assigned operators were given the opportunity to challenge assignments under the appeals process set out in Section 9706(f). In any case involving error, Congress specifically directed the Commissioner to review the beneficiary's record for reassignment. Nothing about any of those provisions suggests that the Commissioner has continuing authority to make assignments on or after October 1, 1993 for any reason other than the one specified in Section 9706(f).

Further evidence of Congress's intent is found in Section 9704(f), which defines the term "applicable percentage." As discussed, an assigned operator's "applicable percentage" is determined on the basis of assignments *"as of October 1, 1993*." 26 U.S.C. § 9704(f)(1) (emphasis added). The Act provides for annual adjustments beyond that date, but only in *two* circumstances: (1) to reflect changes to the assignments

resulting from the appeals process, *id.* § 9704(f)(2)(A), and (2) to reflect changes to the assignments because an assigned operator (or related person) has ceased to do business. *Id.* § 9704(f)(2)(B). There is no subsection (f)(2)(C), providing for an adjustment to reflect initial assignments made on or after October 1, 1993. That, too, strongly suggests that Congress never intended the Commissioner to continue to make such assignments after that date. *See Sigmon Coal*, 122 S. Ct. at 951 (quoting *Russello*, 464 U.S. at 23). *See also TRW Inc.* v. *Andrews*, 122 S. Ct. 441, 447 (2001) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied * * *.") (quotation omitted). It would be very strange indeed for Congress to intend for the Commissioner to continue to make initial assignments after October 1, 1993, yet fail to provide for annual adjustments to assigned operators' "applicable percentage" based on resulting changes to assignments "as of October 1, 1993." 26 U.S.C. § 9704(f)(1).

Petitioners' answers to Section 9704(f) do not withstand scrutiny. The Commissioner argues that, because Section 9704(f) "does not address [her] assignment responsibilities," it "affords no basis for inferring any limitations on [her] authority to make assignments." Br. 31. But, as just explained, the fact that Congress failed expressly to provide for an annual adjustment to reflect initial assignments on or after October 1, 1993—while it did provide for annual adjustments in other circumstances—is a good indication that Congress did not contemplate such assignments after the statutory deadline. The Commissioner nevertheless insists that, even if the lack of such a provision "might preclude an adjustment after October 1, 1993, * * * it would not follow that the Act barred the Commissioner from" making further assignments. *Id.* at 32. What a tangled web the Commissioner would weave just to prevail here. She would suppose Congress intended consequences to flow from assignments "as of October 1, 1993," and accordingly

directed that she "shall" make assignments before that date. Yet she would also suppose Congress intended her to make assignments *after* that date, even if that meant that an operator's applicable percentage based on the assignments she got around to before October 1, 1993 could not be adjusted, and even though Congress provided for such an adjustment in other circumstances. Occam's razor suggests it is far more reasonable to conclude that Congress did not provide for adjustments to assignments "as of October 1, 1993" to reflect initial assignments after that date because Congress expected the Commissioner to make assignments "before October 1, 1993," as the law provided.

The Commissioner maintains that "[t]he fact that Congress required such adjustments to be made in at least two circumstances" does not suggest that adjustments cannot "be made in any other circumstances." Br. 33. As noted, however, the correct presumption is just the opposite. *See also Bozeman*, 533 U.S. at 156 (rejecting Federal Government's similar suggestion that existence of one inapplicable exception supported implication of other exceptions to statute mandating that charges "shall" be dismissed if statute violated). Congress's deliberate enumeration of two circumstances in which adjustments must be made suggests that those were the *only* circumstances in which Congress intended adjustments to be made. If there were others, Congress presumably would have so provided. This is how the Solicitor General typically reads statutes, *see, e.g.*, *Christensen* v. *Harris County*, 529 U.S. 576, 583 n.4 (2000), and how this Court reads the Coal Act in particular. *See Sigmon Coal*, 122 S. Ct. at 951.[20]

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[20] The Commissioner argues that there is no reason the Act should be read to prohibit adjustments in other circumstances, such as where assignments are invalidated on judicial review. Br. 33. Congress no doubt did not address that situation because it did not expect that some assignments under the Act would be declared unconstitutional or that the Commissioner would make assignments that violated the statute. By contrast, if Congress had

Both the Commissioner and the Trustees argue that "the practicalities of administering the statute do not require that the number of assigned and unassigned beneficiaries be fixed in concrete as of October 1, 1993." Fed. Br. 35. *See also* Tr. Br. 37-39. According to the Commissioner, for instance, "[i]f beneficiaries are shifted between the assigned and unassigned beneficiary pools," it is easy enough for the Combined Fund to "recalculate the unassigned-beneficiary obligations for any particular plan year and make appropriate arrangements for refunds, credits, or requests for additional payments." *Id*. at 34-35.

But the feasibility of administering such a scheme is neither here nor there, because that is not the one Congress enacted. With the exception of the appeals process to correct assignments made in error, Congress envisioned a one-time assignment process that would conclude by October 1, 1993. Congress anticipated that more beneficiaries would join the unassigned pool after October 1, 1993, *see*, *e.g.*, 26 U.S.C. § 9704(f)(2)(B), but it never intended for the Commissioner to attempt to assign beneficiaries deemed "unassigned" after that date.

4. Congress Gave The Agency Sufficient Time To Do The Job Congress Envisioned.

In a similar vein, the Commissioner argues that "a short, inflexible jurisdictional deadline" for making initial assignments is inconsistent with Congress's decision to impose liability on "related persons." Br. 26. The inclusion of "related persons" among responsible parties, the Commissioner claims, made it necessary in some cases "to trace winding connections and chains of transition in

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expected SSA to continue to make initial assignments on or after October 1, 1993, it surely would have provided for adjustments on that basis. In any event, the fact that the Commissioner may be required to take steps after October 1, 1993 to remedy unlawful assignments does not mean that the statute itself contemplates such action pursuant to its own provisions.

business ownership and control." *Id.* Thus, the Commissioner sug-gests, Congress could not have intended for her to stop making initial assignments as of October 1, 1993.

Congress, however, did not impose a "short, inflexible" deadline upon the agency. Rather, Congress gave the agency nearly a year to complete the assignment process. *See* note following 26 U.S.C. §9701 (Coal Act enacted on October 24, 1992). Considering that, even under the Commissioner's current view of events, the agency nearly completed the task in less than three months, a year was more than enough time to make the required assignments.

Moreover, Congress provided the agency with a good head start. Congress directed the 1950 and 1974 UMWA Benefit Plans to provide to SSA, within 20 days of the statute's enactment, a list of the names and social security numbers of each eligible beneficiary (including each deceased beneficiary if any other individual was a beneficiary by reason of a relationship to such deceased beneficiary) and, to the extent possible, the names of their former employers. *See* 26 U.S.C. § 9706(c). In addition, Congress directed the plans to identify, where possible, the parties who would be responsible for beneficiaries under the Act. *See id.* Congress also directed all other agencies to cooperate fully with SSA in providing information that would enable SSA to make assignments. *See id.* § 9706(d). Thus, when it enacted the Coal Act, Congress had every reason to believe that SSA would complete the assignment process by October 1, 1993.[21]

Petitioners' reasons for SSA's failure to assign more beneficiaries by the statutory deadline are not persuasive. Petitioners assert, for instance, that SSA could not begin the

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[21] As noted, the 1950 and 1974 UMWA Benefit Plans possessed substantial information concerning the employment history of the Fund's beneficiaries. *See supra* n.8.

assignment process until Congress appropriated funds for that purpose in July 1993. *See* Fed. Br. 8-9; Tr. Br. 15-16.[22] But SSA had in fact laid extensive groundwork for making assignments prior to receiving those funds. As the then-Acting Commissioner informed a congressional subcommittee considering SSA's request for that appropriation, SSA had already worked on "procedures, notices, cost estimates, and systems requirements." *Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations for 1994: Hearings Before a Subcomm. of the House Comm. on Appropriations* ("*1993 Appropriations Hearing*"), 103d Cong. 158 (1993) (Louis D. Enoff). Thus, by the time SSA began making actual assignments, it not only had much of the information it needed, but the system in place to handle that information.

Moreover, if making assignments to some "related persons" was as difficult and time-consuming as the Commissioner claims, it is all the more likely that Congress did not intend the Commissioner to continue making such assignments after the statutory deadline. As discussed, Congress did not intend for the Commissioner to go to the ends of the earth in an effort to track down a responsible party for every last beneficiary. Indeed, many beneficiaries assigned to "related persons" were "orphans" under the 1950 and 1974 UMWA Benefit Plans whose benefits were covered

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[22] According to the Commissioner, SSA determined that it was not legally authorized to use Social Security trust funds to carry out the assignment process under the Coal Act. *See* Br. 8. Congress, however, initially delegated the responsibility of making assignments to the Secretary of Health and Human Services. *See supra* n.13. It would certainly be odd for Congress to do so without appropriating funds if it did not intend for the Secretary to simply use existing departmental funds for that purpose. The Solicitor General's brief rather coyly notes the *Commissioner's* view that she was disabled from carrying out the duties assigned by Congress, without agreeing with that circumscribed view of the law.

by coal operators that had never employed them. *See Sigmon Coal*, 122 S. Ct. at 947 n.4 (" 'true orphans' " were those "whose former employers were no longer in business"). It would make eminent sense for Congress to decide that if such beneficiaries could not be easily assigned by the statutory deadline, they would continue to be treated as "orphans" and dealt with under the Act's express provisions for unassigned beneficiaries.[23]

C. The *Brock* v. *Pierce County* Line Of Decisions Does Not Compel A Different Reading Of The Coal Act.

Petitioners' argument that Section 9706(a) is merely hortatory is based on a line of decisions in which this Court held that the failure of an agency or government official to act within a statutorily-prescribed period did not bar further government action. *See Brock* v. *Pierce County*, 476 U.S. 253 (1986); *United States* v. *Montalvo-Murillo*, 495 U.S. 711 (1990); *United States* v. *James Daniel Good Real Property*, 510 U.S. 43 (1993).[24] Those decisions, however, are inapposite. As the Sixth Circuit recognized in *Dixie Fuel*, the Coal Act's statutory scheme "simply is not comparable to

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[23] To the extent the Commissioner suggests that she was unable to assign more beneficiaries by the statutory deadline because of the administrative review process, that is incorrect. *See* Br. 11. Operators and related persons were not even notified of assignments until September 1993. Thus, the appeals process did not even begin until *after* the deadline for making assignments had passed.

[24] The Trustees erroneously include *General Motors Corp.* v. *United States*, 496 U.S. 530 (1990), in this line of authority. *See* Br. 25, 37. Contrary to the Trustees' assertion, the agency in *General Motors* did not fail to "comply with all of the timing provisions" of a statute. *Id.* at 37. Indeed, the Court concluded that the agency action at issue was not subject to a four-month time limit in the statute. *See* 496 U.S. at 536-539. Having so concluded, the Court went on to hold that, because the statute did not reveal any congressional intent to create an enforcement bar if the agency unreasonably delayed action, the Court would not infer one. *See id.* at 539-542.

that addressed by the Court in *Brock* v. *Pierce County*." Pet. App. 47a.[25]

1. Unlike the statutes in *Pierce County* and its progeny, the Coal Act plainly spells out a consequence for the failure to act by its statutory deadline. *See Bozeman*, 533 U.S. at 153 (distinguishing *Montalvo-Murillo* on this ground). As we have explained, all beneficiaries not assigned by October 1, 1993 are dealt with according to the Act's express provisions for unassigned beneficiaries. *See supra* at 25-32. That is "[t]he consequence flowing from the failure of [SSA] to make [the required] assignments before October 1, 1993." Pet. App. 47a.

It does not matter that the statute does not explicitly state that beneficiaries not assigned by the deadline are to be considered "unassigned." That is in fact what they are. In any event, as this Court made clear in *Pierce County*, the consequence of an agency's noncompliance with a statutory deadline need not be "stated explicitly in the statute." 476 U.S. at 262 n.9. *See*, *e.g.*, 14 U.S. Op. Off. Legal Counsel 57, 60 (1990) (concluding that deadline likely mandatory even though statute did not specify consequence of delinquency on its face). To determine whether Congress intended to terminate an agency's authority to act, this Court looks to "normal indicia of congressional intent." *Pierce County*, 476 U.S. at 262 n.9. *See also James Daniel Good*, 510 U.S. at 65 (examining structure of timing provisions in statute); *Montalvo-Murillo*, 495 U.S. at 717, 719 (examining design and function of statute). Here, the "entire statutory scheme" of the Coal Act demonstrates Congress's intent to

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[25] Indeed, to the extent SSA in fact "completed the process of making the initial assignment decisions by October 1, 1993," *1995 Coal Act Hearing* at 23, as the agency represented to Congress, this case does not even involve the failure of an agency to act by a statutory deadline. It involves the quite different question whether an agency, having completed a congressional task by the statutory deadline and so advised Congress, is free to revisit and redo its work after the deadline has passed.

terminate the Commissioner's authority to make initial assignments as of October 1, 1993. Pet. App. 45a.

The Commissioner argues that the Coal Act does not specify a consequence because "no meaningful sanction could be imposed on the Commissioner, who does not 'enforce' the Coal Act against other parties." Br. 21. But this Court has never held that the statutory consequence of an agency's failure to abide by a deadline must be a "sanction" against the agency for that consequence to dictate that the deadline should be given effect according to its terms. *See, e.g.*, *Pierce County*, 476 U.S. at 262 n.9 ("We need not, and do not, hold that a statutory deadline for agency action can never bar later action unless *that* consequence is stated explicitly in the statute.") (emphasis added). Indeed, it would be absurd if the only way Congress could demonstrate its intent to terminate an agency's authority would be by imposing some sort of punishment upon the agency.

2. The Commissioner's argument, however, aptly points up the difference between the Coal Act and the statutes involved in the *Pierce County* line of authority. In those cases, strict adherence to statutory deadlines would have stripped the agency or government official of the authority to "enforce" the law, thereby preventing the agency or official from protecting or vindicating "important public rights * * * at stake." *Pierce County*, 476 U.S. at 260. In *Pierce County*, for instance, the Secretary of Labor would have lost jurisdiction to proceed with an action to recover misspent federal funds. *See id.* at 258. In *Montalvo-Murillo*, the Government would have been required to release a criminal defendant found to pose a flight risk and a danger to the community. *See* 495 U.S. at 717. And in *James Daniel Good*, the Government would have been required to dismiss a forfeiture action. *See* 510 U.S. at 62-63. This Court declined to con-clude that Congress in fact countenanced such "incongruous result[s]." *Pierce County*, 476 U.S. at 258.

Adhering to the Coal Act's deadline, by contrast, does not lead to "incongruous result[s]." The termination of the Commissioner's authority to make initial assignments means only that benefits for beneficiaries not assigned by the deadline are financed pursuant to the Act's express and detailed provisions for unassigned beneficiaries—which assure unassigned beneficiaries the *same* benefits as assigned beneficiaries, and which are also funded through assessments on operators. *See supra* at 25-32. Congress obviously contemplated that there would be unassigned beneficiaries, and explained how they should be handled. Enforcing the deadline hardly leads to a result unanticipated by Congress. The Commissioner is not stripped of any enforcement authority—indeed, as she concedes (Br. 21), she does not "enforce" the Coal Act at all. Nor are any "important public rights" jeopardized by the termination of the Commissioner's initial assignment authority. As even she recognizes, the initial assignment process "take[s] place under a statutory framework that is designed to establish relationships among *private* parties." *Id.* (emphasis in original).

3. Moreover, none of the decisions in the *Pierce County* line involved statutes directing an agency or government official to complete a one-time activity by a specific date critical to the implementation and operation of the statutory scheme.[26] Rather, each of the decisions involved statutes directing agencies or government officials to act within a prescribed period of time across a broad range of cases. In *Pierce County*, for instance, the Secretary of Labor was required to act on complaints within 120 days. *See* 476 U.S. at 254-255. In *Montalvo-Murillo* and *James Daniel Good*,

[26] Although *Regions Hospital* v. *Shalala*, 522 U.S. 448 (1998), did not involve an agency's failure to act within statutorily-prescribed time limits, the Court noted in *dicta* that the failure of the Secretary of Health and Human Services to report to Congress by a statutorily specified date did not mean that the Secretary lacked authority to act beyond it. *See id.* at 459 n.3. That sort of deadline is of course far different from the one involved here.

government officials were directed to act "immediately" or "promptly." *See* 495 U.S. at 714; 510 U.S. at 63. Those statutes were all intended to move the Government along in hundreds of cases. *See, e.g., James Daniel Good*, 510 U.S. at 65 (statute's directive was "to ensure the expeditious collection of revenue"). Unlike here, strict adherence to those time limits was not essential to the operation of an entire statutory scheme. *See, e.g., Montalvo-Murillo*, 495 U.S. at 717 (failure to comply with timing provision did not "subvert the [statutory] scheme").

4. Finally, the *Pierce County* line of cases is premised on the Court's reluctance to "assume that Congress intended [an] agency to lose its power to act" when "there are less drastic remedies available for failure to meet a statutory deadline." 476 U.S. at 260. In *Pierce County*, for example, the Court concluded that a party aggrieved by the Secretary's failure to act on a complaint within 120 days could pursue the "less drastic remedy" of an action under the Administrative Procedure Act to " 'compel agency action unlawfully withheld or unreasonably delayed.' " *Id*. at 260 & n.7 (quoting 5 U.S.C. § 706(1)). Here, by contrast, no alternative remedy is available for SSA's failure to meet the Coal Act's deadline. Coal operators and related persons cannot bring suit to compel agency action "unreasonably delayed." Until SSA actually makes an untimely initial assignment, no one has any idea that the agency has "unreasonably delayed."

D. The Subsequent Enactment Of A Supplemental Appropriations Measure Does Not Demonstrate That Congress Intended The Commissioner To Make Initial Assignments In Perpetuity, Contrary To The Language Of Section 9706(a).

The Commissioner argues that Congress's appropriation of funds to SSA the year following the Coal Act's enactment somehow demonstrates that the Congress that enacted the Coal Act intended to allow the Commissioner to make initial

assignments on or after of October 1, 1993. According to the Commissioner, SSA informed a congressional subcommittee considering SSA's request for funds that it was "unlikely" that the agency would assign all beneficiaries by the statutory deadline. Br. 37.[27] In subsequently appropriating funds to remain available "until expended," the Commissioner contends, Congress "expressed its understanding" that the Commissioner could make initial assignments beyond the statutory deadline. *Id*. at 39.

To the contrary, nothing about Congress's subsequent enactment of a supplemental appropriation for SSA even remotely suggests that the Congress that enacted the Coal Act intended the Commissioner to make initial assignments in perpetuity. As this Court has often opined, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 355 (1998) (quotation omitted). *See also Monsanto*, 491 U.S. at 610 ("postenactment views form a hazardous basis for inferring the intent behind a statute") (quotation omitted). Rather, Congress's intent is "best determined by [looking to] the statutory language that it chooses." *Id*. at 610 (quotation omitted) (alteration in original). As we have explained, the text of the Coal Act itself unambiguously expresses Congress's intent that the Commissioner make initial assignments "before October 1, 1993," not after. 26 U.S.C. § 9706(a).

Moreover, as the Commissioner herself acknowledges (Br. 39 n.22), the supplemental appropriation was intended for SSA not only to make initial assignments, but also to conduct

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[27] Of course, SSA *later* reported to Congress that the agency "fully expect[s] [to] meet [its] statutory responsibility to * * * complete the assignment process by October 1, 1993," *1993 Coal Act Hearing* at 26, and later advised Congress that it had in fact "completed the process of making the initial assignment decisions by October 1, 1993, as required by law." *1995 Coal Act Hearing* at 23.

the administrative review process and calculate the per beneficiary premium for each plan year. *See* 107 Stat. at 254 (appropriating funds "to carry out sections 9704 and 9706"). Because SSA would continue to carry out *those* responsibilities after October 1, 1993, Congress not surprisingly provided that the appropriation would remain available "until expended." *Id*.

Further, if anything can be gleaned from the legislative history of that supplemental appropriation at all, it is that even the Congress that enacted that measure understood the Commissioner's authority to make initial assignments to terminate as of October 1, 1993. The legislative history contains numerous references to the statutory deadline, but no suggestion by any member of Congress that SSA could continue to make initial assignments beyond that date. *See, e.g., 1993 Appropriations Hearing* at 125-126, 158-159.

In the end, the most telling thing Congress has done since it enacted the Coal Act is what it has not done—amend the Act to overturn the result in *Dixie Fuel*. In fact, in May 2000 Senator Rockefeller proposed legislation which, among other things, would have amended the Act to provide the Commissioner with continuing authority to make initial assignments on or after October 1, 1993. *See* Coal Miners and Widows Health Protection Act of 2000, S. 2538, 106th Cong. § 3 (2000). That proposal went nowhere.

E. The Commissioner's Construction Of Her Authority To Make Initial Assignments On Or After October 1, 1993 Is Not Entitled To Deference.

The Commissioner spends a page (Br. 39-40) and the Trustees two (Br. 47-49) arguing that the Commissioner's current view that she is not bound by the October 1, 1993 statutory deadline is entitled to deference. The Commissioner begins with the startling assertion that her current position "is certainly not contradicted by anything in the statutory text." Br. 40. Nothing, of course, except the

statutory text that states the Commissioner "shall" make assignments "before October 1, 1993." 26 U.S.C. § 9706(a).

Even if this Court concludes that Section 9706(a) is ambiguous, the Commissioner's "interpretation" of the statutory deadline deserves no deference. Congress did not delegate to the Commissioner the authority to promulgate interpretations of "shall, before October 1, 1993," that carry the force of law, and deference to an agency is singularly inappropriate in construing a provision specifically directed to constraining the manner in which the agency itself does its work. The Commissioner's latest interpretation is also not entitled to any weight under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944).

1. In *United States* v. *Mead Corporation*, 533 U.S. 218, 226-227 (2001), this Court clarified that *Chevron* deference is only available "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." Congress conferred no law-making authority on the Commissioner in the Coal Act. *Contrast* 30 U.S.C. § 932(h) ("The Secretary [of Labor] may also, by regulation, establish standards for apportioning liability for benefits * * * among more than one operator") (Black Lung Benefits Act). The most that the Commissioner can claim is that her particular assignments carry the force of law, Br. 40, which—for purported assignments after October 1, 1993—completely begs the question.

It is no surprise that Congress did not delegate law-making authority to the Commissioner in this area. The Commissioner's duties under the Act are discrete and precisely defined.[28] Aside from the mechanical calculation

[28] As the then-Acting Commissioner acknowledged in September 1993 to a congressional oversight committee, "[t]he Coal Act is very precise as to the way we assign miners to coal operators, and *SSA has no discretion as to the way we apply the*

of the annual per beneficiary premium, the only role the Commissioner maintains in the administration of the statute after October 1, 1993 is to conduct the appeals process to correct assignments made in error.

Moreover, the Coal Act was the product of a carefully negotiated legislative compromise balancing numerous competing interests. "Its delicate crafting reflected a compromise amidst highly interested parties attempting to pull the provisions in different directions." *Sigmon Coal*, 122 S. Ct. at 956. Congress did not extend and, given the realities, could not have extended any authority to SSA that would have allowed it to upset the statute's carefully negotiated provisions. *See id.* ("We will not alter the text in order to satisfy the policy preferences of the Commissioner. These are battles that should be fought among the political branches and the industry."). *Contrast Barnhart* v. *Walton*, 122 S. Ct. 1265, 1267 (2002) (deferring to agency interpretation after concluding that agency was delegated "considerable authority to fill in matters of detail related to [the statute's] administration").

In any event, an agency may not evade statutory limitations simply by purporting to interpret a statute. *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638, 650 (1990) ("Although agency determinations within the scope of delegated authority are entitled to deference, it is fundamental 'that an agency may not bootstrap itself into an area in which it has no jurisdiction.' ") (quoting *Federal Maritime Comm'n* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973)). In this case,

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criteria." *1993 Coal Act Hearing* at 24 (Lawrence H. Thompson) (emphasis added). As another top SSA official reiterated five years later, "[SSA] has played a role almost as a contractor, in that SSA simply assigns the miners to the companies." *Agency Management of the Implementation of the Coal Act: Hearing Before the Senate Subcomm. on Oversight of Government Management, Restructuring and the District of Columbia of the Comm. on Governmental Affairs*, 105th Cong. 19 (1998) (Associate Commissioner Marilyn O'Connell).

the Commissioner is seeking not simply to exercise authority that Congress did not grant, but to evade a statutory provision that constrains her authority. No deference is owed to such efforts. An agency may not construe a statute "in a way that completely nullifies textually applicable provisions meant to limit its discretion." *Whitman* v. *American Trucking Ass'n*, 531 U.S. 457, 485 (2001). As the Court recently explained in rejecting a similar plea for deference under the Coal Act, Congress "did not delegate authority to the Commissioner * * * to assign liability in a manner inconsistent with the statute." *Sigmon Coal*, 122 S. Ct. at 956.

2. Examination of "the degree of the agency's care, its consistency, formality, and relative expertness" demonstrates that the Commissioner's interpretation of the Coal Act does not merit deference under *Skidmore*. *Mead*, 533 U.S. at 228 (footnotes omitted). The Commissioner's current interpretation of the Coal Act's timing provision is not the product of a rulemaking or any similar process. Nor does the straightforward question of statutory interpretation before this Court implicate SSA's relative expertise.

Moreover, SSA's current interpretation of the Coal Act's deadline flatly contradicts its earlier pronouncements. The agency originally described its duty under the Act as a "one-time assignment activity which *must* be completed *before October 1, 1993*." 58 Fed. Reg. 52,914 (Oct. 13, 1993) (emphases added); *see also* 58 Fed. Reg. 50,950 (Sept. 29, 1993). Testifying before Congress on September 9, 1993, the then-Acting Commissioner of SSA expressed the agency's view that it had a "*statutory responsibility* to * * * complete the assignment process by October 1, 1993." *1993 Coal Act Hearing* at 26 (Lawrence H. Thompson) (emphasis added). Later, he acknowledged that "*complet[ing]* the process of making the initial assignment decisions by October 1, 1993" was "required by law." *1995 Coal Act Hearing* at 23 (emphasis added).

The agency's shifting position on its authority under the Coal Act blunts any persuasive force its current litigating position might otherwise carry. *See EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244, 257 (1991); *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) ("An agency interpretation * * * which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view.") (quoting *Watt* v. *Alaska*, 451 U.S. 259, 273 (1981)). Even if this Court views Section 9706(a) as ambiguous, it should not accord any weight to the Commissioner's views.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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STATUTORY ADDENDUM

The Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701 *et seq.*, provides in pertinent part:

§ 9702. Establishment of the United Mine Workers of America Combined Benefit Fund.

(a) Establishment. (1) In general. As soon as practicable (but not later than 60 days) after the enactment date, the persons described in subsection (b) shall designate the individuals to serve as trustees. Such trustees shall create a new private plan to be known as the United Mine Workers of America Combined Benefit Fund.

(2) Merger of retiree benefit plans. As of February 1, 1993, the settlors of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall cause such plans to be merged into the Combined Fund, and such merger shall not be treated as an employer withdrawal for purposes of any 1988 coal wage agreement.

* * *

(b) Board of trustees. (1) In general. For purposes of subsection (a), the board of trustees for the Combined Fund shall be appointed as follows:

* * *

(B) one individual shall be designated by the three employers, other than 1988 agreement operators, who have been assigned the greatest number of eligible beneficiaries under section 9706;

* * *

(c) Plan year. The first plan year of the Combined Fund shall begin February 1, 1993, and end September 30, 1993. Each succeeding plan year shall begin on October 1 of each calendar year.

* * *

§ 9704. Liability of assigned operators.

(a) Annual premiums. Each assigned operator shall pay to the Combined Fund for each plan year beginning on or after February 1, 1993, an annual premium equal to the sum of the following three premiums—

(1) the health benefit premium determined under subsection (b) for such plan year, plus

(2) the death benefit premium determined under subsection (c) for such plan year, plus

(3) the unassigned beneficiaries premium determined under subsection (d) for such plan year.

Any related person with respect to an assigned operator shall be jointly and severally liable for any premium required to be paid by such operator.

(b) Health benefit premium. For purposes of this chapter—

(1) In general. The health benefit premium for any plan year for any assigned operator shall be an amount equal to the product of the per beneficiary premium for the plan year multiplied by the number of eligible beneficiaries assigned to such operator under section 9706.

(2) Per beneficiary premium. The Commissioner of Social Security shall calculate a per beneficiary premium for each plan year beginning on or after February 1, 1993 * * *

* * *

(d) Unassigned beneficiaries premium. The unassigned beneficiaries premium for any plan year for any assigned operator shall be equal to the applicable percentage of the

product of the per beneficiary premium for the plan year multiplied by the number of eligible beneficiaries who are not assigned under section 9706 to any person for such plan year.

* * *

(f) Applicable percentage. For purposes of this section—

(1) In general. The term "applicable percentage" means, with respect to any assigned operator, the percentage determined by dividing the number of 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).

(2) Annual adjustments. In the case of any plan year beginning on or after October 1, 1994, the applicable percentage for any assigned operator shall be redetermined under paragraph (1) by making the following changes to the assignments as of October 1, 1993:

(A) Such assignments shall be modified to reflect any changes during the period beginning October 1, 1993, and ending on the last day of the preceding plan year pursuant to the appeals process under section 9706(f).

(B) The total number of assigned eligible beneficiaries shall be reduced by the eligible beneficiaries of assigned operators which (and all related persons with respect to which) had ceased business (within the meaning of section 9701(c)(6)) during the period described in subparagraph (A).

(g) Payment of premiums. (1) In general. The annual premium under subsection (a) for any plan year shall be

payable in 12 equal monthly installments, due on the twenty-fifth day of each calendar month in the plan year. In the case of the plan year beginning February 1, 1993, the annual premium under subsection (a) shall be added to such premium for the plan year beginning October 1, 1993.

* * *

§ 9705. Transfers.

(a) Transfer of assets from 1950 UMWA Pension Plan.

(1) In general. From the funds reserved under paragraph (2), the board of trustees of the 1950 UMWA Pension Plan shall transfer to the Combined Fund—

(A) $70,000,000 on February 1, 1993,

(B) $70,000,000 on October 1, 1993, and

(C) $70,000,000 on October 1, 1994.

* * *

(3) Use of funds. Amounts transferred to the Combined Fund under paragraph (1) shall—

(A) in the case of the transfer on February 1, 1993, be used to proportionately reduce the premium of each assigned operator under section 9704(a) for the plan year of the Fund beginning February 1, 1993, and

(B) in the case of any other such transfer, be used to proportionately reduce the unassigned beneficiary premium under section 9704(a)(3) and the death benefit premium under section 9704(a)(2) of each assigned operator for the plan year in which transferred and for any subsequent plan year in which such funds remain available.

Such funds may not be used to pay any amounts required to be paid by the 1988 agreement operators under section 9704(i)(1)(B).

* * *

(b) Transfers from abandoned mine reclamation fund.

* * *

(2) Use of funds. Any amount transferred under paragraph (1) for any fiscal year shall be used to proportionately reduce the unassigned beneficiary premium under section 9704(a)(3) of each assigned operator for the plan year in which transferred.

* * *

§ 9706. Assignment of eligible beneficiaries.

(a) In general. For purposes of this chapter, the 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:

(1) First, to the signatory operator which—

(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—

(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.

* * *

(c) Identification of eligible beneficiaries. The 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall, by the later of October 1, 1992, or the twentieth day after the enactment date, provide to the Commissioner of Social Security a list of the names and social security account numbers of each eligible beneficiary, including each deceased eligible beneficiary if any other individual is an eligible beneficiary by reason of a relationship to such deceased eligible beneficiary. In addition, the plans shall provide, where ascertainable from plan records, the names of all persons described in subsection (a) with respect to any eligible beneficiary or deceased eligible beneficiary.

(d) Cooperation by other agencies and persons. (1) Cooperation. The head of any department, agency, or instrumentality of the United States shall cooperate fully and promptly with the Commissioner of Social Security in providing information which will enable the Commissioner to carry out his responsibilities under this section.

* * *

(3) Trustees. The trustees of the Combined Fund, the 1950 UMWA Benefit Plan, the 1974 UMWA Benefit Plan, the 1950 UMWA Pension Plan, and the 1974 UMWA Pension Plan shall fully and promptly

cooperate with the Commissioner in furnishing, or assisting the Commissioner to obtain, any information the Commissioner needs to carry out the Commissioner's responsibilities under this section.

* * *

(f) Reconsideration by Commissioner. (1) In general. Any assigned operator receiving a notice under subsection (e)(2) with respect to an eligible beneficiary may, within 30 days of receipt of such notice, request from the Commissioner of Social Security detailed information as to the work history of the beneficiary and the basis of the assignment.

(2) Review. An assigned operator may, within 30 days of receipt of the information under paragraph (1), request review of the assignment. The Commissioner of Social Security shall conduct such review if the Commissioner finds the operator provided evidence with the request constituting a prima facie case of error.

(3) Results of review. (A) Error. If the Commissioner of Social Security determines under a review under paragraph (2) that an assignment was in error—

(i) the Commissioner shall notify the assigned operator and the trustees of the Combined Fund and the trustees shall reduce the premiums of the operator under section 9704 by (or if there are no such premiums, repay) all premiums paid under section 9704 with respect to the eligible beneficiary, and

(ii) the Commissioner shall review the beneficiary's record for reassignment under subsection (a).

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