

**Sec Vs. Sloan**

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**Court :** US Supreme Court

**Decided On :** May-15-1978

**Appeal No. :** 436 U.S. 103

**Appellant :** Sec

**Respondent :** Sloan

**Judgement :**

SEC v. Sloan - 436 U.S. 103 (1978)

U.S. Supreme Court SEC v. Sloan, 436 U.S. 103 (1978)

**Securities and Exchange Commission v. Sloan**

**No. 76-1607**

**Argued March 27-28, 1978**

**Decided May 15, 1978**

**436 U.S. 103**

*CERTIORARI TO THE UNITED STATES COURT OF APPEALS*

*FOR THE SECOND CIRCUIT*

## SYLLABUS

The Securities and Exchange Commission (Commission) has the authority under 12(k) of the Securities Exchange Act of 1934 (Act) "summarily to suspend trading in any security . . . for a period not exceeding ten days" if "in its opinion the public interest and the protection of investors so require." Acting pursuant to 12(k) and its predecessor, the Commission issued a series of summary 10-day orders continuously suspending trading in the common stock of a certain corporation for over a year. Respondent, who owned 13 shares of the stock and who had engaged in substantial purchases and short sales of shares of the stock, filed a petition pursuant to the Act in the Court of Appeals for a review of the orders, contending, *inter alia*, that the "tacking" of the 10-day summary suspension orders exceeded the Commission's authority under 12(k). Because shortly after the suit was brought no suspension order remained in effect and the Commission asserted that it had no plans to issue such orders in the foreseeable future, the Commission claimed that the case was moot. The court rejected that claim and upheld respondent's position on the merits. In this Court, the Commission contends that the facts on the record are inadequate to allow a proper resolution of the mootness issue, and that, in any event, it has the authority to issue consecutive 10-day summary suspension orders.

## HELD

1. The case is not moot, since it is "capable of repetition, yet evading review," *Southern Pacific Terminal Co. v. ICC*, [219 U. S. 498](#) , [219 U. S. 515](#) . Effective judicial review is precluded during the life of the orders because a series of consecutive suspension orders may last no more than 20 days. In view of the numerous violations ascribed to the corporation involved, there is a reasonable probability that its stock will again be subjected to consecutive summary suspension orders; thus, there is a "reasonable expectation that the same complaining party" will be subjected to the same action again. *Cf. Weinstein v. Bradford*, [423 U. S. 147](#) . Pp. 108-110.

2. The Commission does not have the authority under 12(k), based upon a single set of circumstances, to issue a series of summary orders that would suspend trading in a stock beyond the initial 10-day period,

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even though the Commission periodically redetermines that such action is required by "the public interest" and for "the protection of investors." Pp. [436 U. S. 110](#) - 123.

(a) The language of the statute establishes the 10-day period as the maximum time during which stock trading can be suspended for any single set of circumstances. Pp. [436 U. S. 111](#) -112.

(b) In view of congressional recognition in other sections of the Act that any long-term sanctions or continuation of summary restrictions must be accompanied by notice and an opportunity for a hearing, the absence of any provision in 12(k) for extending summary suspensions beyond the initial 10-day period must be taken as a clear indication that extended summary restrictions are not authorized under 12(k). Pp. [436 U. S. 112](#) -114.

(c) The statutory pattern leaves little doubt that 12(k) is designed to empower the Commission to prepare to deploy such other remedies as injunctive relief or a suspension or revocation of security registration, not to empower the Commission to reissue a summary order absent the discovery of a new manipulative scheme. Pp. [436 U. S. 114](#) -115.

(d) Those other remedies are not as unavailable as the Commission claims, as is evidenced by this very case, where the Commission during the first series of suspension orders actually sought an injunction against the corporation involved and certain of its principals, and, during the second series of suspensions, approved the filing of an injunction action against its management. Moreover, though the Commission contends that the suspension of trading is necessary for the dissemination in the marketplace of information about manipulative schemes, the Commission is at liberty to reveal such information at the end of the 10-day

period and let investors make their own judgments. And in any event, the mere claim that a broad summary suspension power is necessary cannot persuade the Court to read 12(k) more broadly than its language and the statutory scheme reasonably permit. Pp. [436 U. S. 115](#) -117.

(e) Though the Commission's view that the Act authorizes successive suspension orders may be entitled to deference, that consideration cannot overcome the clear contrary indications of the statute itself, especially when the Commission has not accompanied its administrative construction with a contemporaneous well reasoned explanation of its action. *Adamo Wrecking Co. v. United States*, [434 U. S. 275](#) , [434 U. S. 287](#) -288, n. 5. Pp. [436 U. S. 117](#) -119.

(f) There is no convincing indication that Congress has approved the Commission's construction of the Act. Pp. 436 U. S. 119 -123.

547 F.2d 152, affirmed.

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REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C.J., and STEWART, WHITE, POWELL, and STEVENS, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment, in which MARSHALL, J., joined, *post*, p. [436 U. S. 123](#) . BLACKMUN, J., filed an opinion concurring in the judgment, *post*, p. [436 U. S. 126](#) .

MR JUSTICE REHNQUIST delivered the opinion of the Court.

Under the Securities Exchange Act of 1934, ch. 404, 48 Stat. 881, the Securities and Exchange Commission has the authority "summarily to suspend trading in any security . . . for a period not exceeding ten days" if "in its opinion the public interest and the protection of investors so require." [ [Footnote 1](#) ] Acting

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pursuant to this authority, the Commission issued a series of consecutive orders suspending trading in the common stock of Canadian Javelin, Ltd. (CJL), for over a year. The Court of Appeals for the Second Circuit held that such a series of suspensions was beyond the scope of the Commission's statutory authority. 547 F.2d 152, 157-158 (1976). We granted certiorari to consider this important question, 434 U.S. 901 (1977), and, finding ourselves in basic agreement with the Court of Appeals, we affirm. We hold that, even though there be a periodic redetermination of whether such action is required by "the public interest" and for "the protection of investors," the Commission is not empowered to issue, based upon a single set of circumstances, a series of summary orders which would suspend trading beyond the initial 10-day period.

I

On November 29, 1973, apparently because CJL had disseminated allegedly false and misleading press releases concerning certain of its business activities, the Commission issued the first of what was to become a series of summary 10-day suspension orders continuously suspending trading in CJL common stock from that date until January 26, 1975. App. 109. During this series of suspensions, respondent Sloan, who owned 13 shares of CJL stock and had engaged in substantial purchases and short sales of shares of that stock, filed a petition in the United States Court of Appeals for the Second Circuit challenging the orders on a variety of grounds. On October 15, 1975, the court dismissed as frivolous all respondent's claims, except his allegation that the "tacking" of 10-day summary suspension orders for an indefinite period was an abuse of the agency's authority and a deprivation of due process. It further concluded, however, that, in light of two events which had occurred prior to argument, it could not address this question at that time. The first event of significance was the resumption of trading on January 26, 1975.

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The second was the commencement of a second series of summary 10-day suspension orders, which was still in effect on October 15. This series had begun

on April 29, 1975, when the Commission issued a 10-day order based on the fact that the Royal Canadian Mounted Police had launched an extensive investigation into alleged manipulation of CJL common stock on the American Stock Exchange and several Canadian stock exchanges. App. 11-12. This time, 37 separate orders were issued, suspending trading continuously from April 29, 1975, to May 2, 1976. The court thought the record before it on October 15 inadequate in light of these events, and dismissed respondent's appeal "without prejudice to his repleading after an administrative hearing before the SEC . . . ," which hearing, though apparently not required by statute or regulation, had been offered by the Commission at oral argument. 527 F.2d 11, 12 (1975), *cert. denied*, 426 U.S. 935 (1976).

Thereafter, respondent immediately petitioned the Commission for the promised hearing. The hearing was not forthcoming, however, so, on April 23, 1976, during the period when the second series of orders was still in effect, respondent brought the present action pursuant to 25(a)(1) of the Act, 15 U.S.C. 78y(a)(1) (1976 ed.), challenging the second series of suspension orders. He argued, among other things, that there was no rational basis for the suspension orders, that they were not supported by substantial evidence in any event, and that the "tacking" of 10-day summary suspension orders was beyond the Commission's authority because the statute specifically authorized suspension "for a period not exceeding ten days." [ [Footnote 2](#) ] The court held in respondent's favor on this latter point. It first concluded that, despite the fact that there had been no 10-day suspension order in effect since May 2,

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1976, and the Commission had asserted that it had no plans to consider or issue an order against CJL in the foreseeable future, the case was not moot because it was " *capable of repetition, yet evading review.*" 547 F.2d at 158, quoting from *Southern Pacific Terminal Co. v. ICC*, [219 U. S. 498](#) , 515 (1911).

The court then decided that the statutes which authorized summary suspensions -- 12(k) and its predecessors -- did not empower the Commission to issue

successive orders to curtail trading in a security for a period beyond the initial 10-day period. 547 F.2d at 157-158. We granted certiorari, specifically directing the attention of the parties to the question of mootness, 434 U.S. 901 (1977), to which we now turn.

## II

Respondent argues that this case is not moot because, as the Court of Appeals observed, it is "capable of repetition, yet evading review." [ [Footnote 3](#) ] The Commission, on the other hand, does not urge that the case is demonstrably moot, but rather that there simply are not enough facts on the record to allow a proper determination of mootness. It argues that there is no "reasonable expectation" that respondent will be harmed by further suspensions because,

"the investing public now ha[ving] been apprised of the relevant facts, the concealment of which had threatened to disrupt the market in CJL stock, there is no reason to believe that it will be necessary to suspend trading again."

Brief for Petitioner 15, quoting from Pet. for Cert. 12 n. 7. *Cf. Weinstein v. Bradford*, [423 U. S. 147](#) , [423 U. S. 149](#) (1975). The Commission concedes, however, that respondent, in his capacity as a diversified investor, might be harmed in the future by the suspension of some other

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security which he owns. But it further contends that respondent has not provided enough data about the number or type of securities in his portfolio to enable the Court to determine whether there is a "reasonable" likelihood that any of those securities will be subjected to consecutive summary suspension orders. [ [Footnote 4](#) ]

Contrary to the Commission's contention, we think even on the record presently before us this case falls squarely within the general principle first enunciated in *Southern Pacific Terminal Co. v. ICC*, *supra*, and further clarified in *Weinstein v. Bradford*, *supra*, that, even in the absence of a class action, a case is not moot

when

"(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the *same complaining party* would be subjected to the same action again."

*Weinstein v. Bradford, supra*, at [423 U. S. 147](#) (emphasis added). That the first prong of this test is satisfied is not in dispute. A series of consecutive suspension orders may last no more than 20 days, making effective judicial review impossible during the life of the orders. We likewise have no doubt that the second part of the test also has been met here. CJL has, to put it mildly, a history of sailing close to the wind. [ [Footnote 5](#) ] Thus,

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the Commission's protestations to the contrary notwithstanding, there is a reasonable expectation, within the meaning of *Weinstein v. Bradford, supra*, that CJL stock will again be subjected to consecutive summary suspension orders and that respondent, who apparently still owns CJL stock, will suffer the same type of injury he suffered before. This is sufficient, in and of itself, to satisfy this part of the test. But in addition, respondent owns other securities the trading of which may also be summarily suspended. As even the Commission admits, this fact can only increase the probability that respondent will again suffer the type of harm of which he is presently complaining. It thus can only buttress our conclusion that there is a reasonable expectation of recurring injury to the same complaining party.

III

A

Turning to the merits, we note that this is not a case where the Commission, discovering the existence of a manipulative scheme affecting CJL stock, suspended trading for 10 days and then, upon the discovery of a second manipulative scheme or other improper activity unrelated to the first scheme, ordered a second 10-day suspension. [ [Footnote 6](#) ] Instead, it is a case in which

the

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Commission issued a series of summary suspension orders lasting over a year on the basis of evidence revealing a single, though likely sizable, manipulative scheme. [ [Footnote 7](#) ] Thus, the only question confronting us is whether, even upon a periodic redetermination of "necessity," the Commission is statutorily authorized to issue a series of summary suspension orders based upon a single set of events or circumstances which threaten an orderly market. This question must, in our opinion, be answered in the negative.

The first and most salient point leading us to this conclusion is the language of the statute. Section 12(k) authorizes the Commission "summarily to suspend trading in any security . . . *for a period not exceeding ten days.* . . ." 15 U.S.C. 78 / (k) (1976 ed.) (emphasis added). The Commission would have us read the underscored phrase as a limitation only upon the duration of a single suspension order. So read, the Commission could indefinitely suspend trading in a security without any hearing or other procedural safeguards as long as it redetermined every 10 days that suspension was required by

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the public interest and for the protection of investors. While perhaps not an impossible reading of the statute, we are persuaded it is not the most natural or logical one. The duration limitation rather appears on its face to be just that -- a maximum time period for which trading can be suspended for any single set of circumstances.

Apart from the language of the statute, which we find persuasive in and of itself, there are other reasons to adopt this construction of the statute. In the first place, the power to summarily suspend trading in a security even for 10 days, without any notice, opportunity to be heard, or findings based upon a record, is an awesome power with a potentially devastating impact on the issuer, its shareholders, and other investors. A clear mandate from Congress, such as that

found in 12(k), is necessary to confer this power. No less clear a mandate can be expected from Congress to authorize the Commission to extend, virtually without limit, these periods of suspension. But we find no such unmistakable mandate in 12(k). Indeed, if anything, that section points in the opposite direction.

Other sections of the statute reinforce the conclusion that, in this area, Congress considered summary restrictions to be somewhat drastic, and properly used only for very brief periods of time. When explicitly longer term, though perhaps temporary, measures are to be taken against some person, company, or security, Congress invariably requires the Commission to give some sort of notice and opportunity to be heard. For example 12(j) of the Act authorizes the Commission, as it deems necessary for the protection of investors, to suspend the registration of a security for a period not exceeding 12 months if it makes certain findings " *on the record after notice and opportunity for hearing. . . .*" 15 U.S.C. 78 I (j) (1976 ed.) (emphasis added). Another section of the Act empowers the Commission to suspend broker-dealer registration for a period not exceeding 12 months upon certain findings made

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only " *on the record after notice and opportunity for hearing.* " 78 o (b)(4) (1976 ed.) (emphasis added). Still another section allows the Commission, pending final determination whether a broker-dealer's registration should be revoked, to temporarily suspend that registration, but only " *after notice and opportunity for hearing.* " 78 o (b)(5) (1976 ed.) (emphasis added). Former 15(b)(6), which dealt with the registration of broker-dealers, also lends support to the notion that, as a general matter, Congress meant to allow the Commission to take summary action only for the period specified in the statute when that action is based upon any single set of circumstances. That section allowed the Commission to summarily postpone the effective date of registration for 15 days, and then, *after appropriate notice and opportunity for hearing*, to continue that postponement pending final resolution of the matter. [ [Footnote 8](#) ] The section which replaced 15(b)(6) even further underscores this general pattern. It requires the Commission to take some action -- either granting the registration or instituting proceedings to determine

whether registration should be denied -- within 45 days. 15 U.S.C. 78 o (b)(1) (1976 ed.). In light of the explicit congressional recognition in other sections of the Act, both past and present, that any long-term sanctions or any continuation of summary

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restrictions must be accompanied by notice and an opportunity for a hearing, it is difficult to read the silence in 12(k) as an authorization for an extension of summary restrictions without such a hearing, as the Commission contends. The more plausible interpretation is that Congress did not intend the Commission to have the power to extend the length of suspensions under 12(k) at all, much less to repeatedly extend such suspensions without any hearing.

*B*

The Commission advances four arguments in support of its position, none of which we find persuasive. It first argues that only its interpretation makes sense out of the statute. That is, if the Commission discovers a manipulative scheme and suspends trading for 10 days, surely it can suspend trading 30 days later upon the discovery of a second manipulative scheme. But if trading may be suspended a second time 30 days later upon the discovery of another manipulative scheme, it surely could be suspended only 10 days later if the discovery of the second scheme were made on the eve of the expiration of the first order. And, continues the Commission, since nothing on the face of the statute requires it to consider only evidence of new manipulative schemes when evaluating the public interest and the needs of investors, it must have the power to issue consecutive suspension orders even in the absence of a new or different manipulative scheme, as long as the public interest requires it.

This argument is unpersuasive, however, because the conclusion simply does not follow from the various premises. Even assuming the Commission can again suspend trading upon learning of another event which threatens the stability of the market, it simply does not follow that the Commission therefore must necessarily

have the power to do so even in the absence of such a discovery. On its face and in the context of this statutory pattern, 12(k) is more properly viewed as a

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device to allow the Commission to take emergency action for 10 days while it prepares to deploy its other remedies, such as a temporary restraining order, a preliminary or permanent injunction, or a suspension or revocation of the registration of a security. The Commission's argument would render unnecessary to a greater or lesser extent all of these other admittedly more cumbersome remedies which Congress has given to it.

Closely related to the Commission's first argument is its second -- its construction furthers the statute's remedial purposes. Here, the Commission merely asserts that it

"has found that the remedial purposes of the statute require successive suspension of trading in particular securities, in order to maintain orderly and fair capital markets."

Brief for Petitioner 37. Other powers granted the Commission are, in its opinion, simply insufficient to accomplish its purposes.

We likewise reject this argument. In the first place, the Commission has not made a very persuasive showing that other remedies are ineffective. It argues that injunctions and temporary restraining orders are insufficient because they take time and evidence to obtain and because they can be obtained only against wrongdoers, and not necessarily as a stopgap measure in order to suspend trading simply until more information can be disseminated into the marketplace. The first of these alleged insufficiencies is no more than a reiteration of the familiar claim of many Government agencies that any semblance of an adversary proceeding will delay the imposition of the result which they believe desirable. It seems to us that Congress, in weighing the public interest against the burden imposed upon private parties, has concluded that 10 days is sufficient for gathering necessary evidence.

This very case belies the Commission's argument that injunctions cannot be sought in appropriate cases. At exactly the same time the Commission commenced the first series of suspension orders, it also sought a civil injunction against CJL and certain of its principals, alleging violations of the registration

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and antifraud provisions of the Securities Act of 1933, violations of the antifraud and reporting provisions of the Securities Exchange Act of 1934, and various other improper practices, including the filing of false reports with the Commission and the dissemination of a series of press releases containing false and misleading information. App. 109. And during the second series of suspension orders, the Commission approved the filing of an action seeking an injunction against those in the management of CJL to prohibit them from engaging in further violations of the Acts. *Id.* at 101.

The second of these alleged insufficiencies is likewise less than overwhelming. Even assuming that it is proper to suspend trading simply in order to enhance the information in the marketplace, there is nothing to indicate that the Commission cannot simply reveal to the investing public at the end of 10 days the reasons which it thought justified the initial summary suspension and then let the investors make their own judgments.

Even assuming, however, that a totally satisfactory remedy -- at least from the Commission's viewpoint -- is not available in every instance in which the Commission would like such a remedy, we would not be inclined to read 12(k) more broadly than its language and the statutory scheme reasonably permit. Indeed, the Commission's argument amounts to little more than the notion that 12(k) *ought* to be a panacea for every type of problem which may beset the marketplace. This does not appear to be the first time the Commission has adopted this construction of the statute. As early as 1961, a recognized authority in this area of the law called attention to the fact that the Commission was gradually carrying over the summary suspension power granted in the predecessors of 12(k) into other areas of its statutory authority and using it as a

*pendente lite* power to keep in effect a suspension of trading pending final disposition of delisting proceedings. 2 L. Loss, *Securities Regulation* 854-855 (2d ed.1961).

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The author then questioned the propriety of extending the summary suspension power in that manner, *id.* at 854, and we think those same questions arise when the Commission argues that the summary suspension power should be available not only for the purposes clearly contemplated by 12(k), but also as a solution to virtually any other problem which might occur in the marketplace. We do not think 12(k) was meant to be such a cure-all. It provides the Commission with a powerful weapon for dealing with certain problems. But its time limit is clearly and precisely defined. It cannot be judicially or administratively extended simply by doubtful arguments as to the need for a greater duration of suspension orders than it allows. If extension of the summary suspension power is desirable, the proper source of that power is Congress. *Cf. FMC v. Seatrain Lines, Inc.*, [411 U. S. 726](#) , [411 U. S. 744](#) -745 (1973).

The Commission next argues that its interpretation of the statute -- that the statute authorizes successive suspension orders -- has been both consistent and longstanding, dating from 1944. It is thus entitled to great deference. *See United States v. National Assn. of Securities Dealers*, [422 U. S. 694](#) , [422 U. S. 719](#) (1975); *Saxbe v. Bustos*, [419 U. S. 65](#) , [419 U. S. 74](#) (1974).

While this undoubtedly is true as a general principle of law, it is not an argument of sufficient force in this case to overcome the clear contrary indications of the statute itself. In the first place, it is not apparent from the record that, on any of the occasions when a series of consecutive summary suspension orders was issued, the Commission actually addressed in any detail the statutory authorization under which it took that action. As we said just this Term in *Adamo Wrecking Co. v. United States*, [434 U. S. 275](#) , [434 U. S. 287](#) n. 5 (1978):

"This lack of specific attention to the statutory authorization is especially important in light of this Court's pronouncement in *Skidmore v. Swift & Co.*, [323 U. S. 134](#) , [323 U. S. 140](#) (1944), that one factor to be considered in giving

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weight to an administrative ruling is 'the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'"

To further paraphrase that opinion, since this Court can only speculate as to the Commission's reasons for reaching the conclusion that it did, the mere issuance of consecutive summary suspension orders, without a concomitant exegesis of the statutory authority for doing so, obviously lacks "power to persuade" as to the existence of such authority. *Ibid.* Nor does the existence of a prior administrative practice, even a well explained one, relieve us of our responsibility to determine whether that practice is consistent with the agency's statutory authority.

"The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a 'reasonable basis in law.' *NLRB v. Hearst Publications*, [322 U. S. 111](#) , [322 U. S. 131](#) ; *Unemployment Commission v. Aragon*, [329 U. S. 143](#) , [329 U. S. 153](#) -154. But the courts are the final authorities on issues of statutory construction, *FTC v. Colgate-Palmolive Co.*, [380 U. S. 374](#) , [380 U. S. 385](#) , and 'are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.' *NLRB v. Brown*, [380 U. S. 278](#) , [380 U. S. 291](#) ."

*Volkswagenwerk v. FMC*, [390 U. S. 261](#) , [390 U. S. 272](#) (1968). And this is just such a case -- the construction placed on the statute by the Commission, though of long standing, is, for the reasons given in [436 U. S.](#) inconsistent with the statutory mandate. We explicitly contemplated just this

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situation in *FMC v. Seatrains Lines, Inc.*, *supra*, at [411 U. S. 745](#) , where we said:

"But the Commission contends that, since it is charged with administration of the statutory scheme, its construction of the statute over an extended period should be given great weight. . . . This proposition may, as a general matter, be conceded, although it must be tempered with the caveat that an agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate."

And our clear duty in such a situation is to reject the administrative interpretation of the statute.

Finally, the Commission argues that, for a variety of reasons, Congress should be considered to have approved the Commission's construction of the statute as correct. Not only has Congress reenacted the summary suspension power without disapproving the Commission's construction, but the Commission participated in the drafting of much of this legislation and, on at least one occasion, made its views known to Congress in Committee hearings. [ [Footnote 9](#) ] Furthermore, at least one Committee

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indicated on one occasion that it understood and approved of the Commission's practice. [ [Footnote 10](#) ] See *Zuber v. Allen*, [396 U. S. 168](#) , [396 U. S. 192](#) (1969); *United States v. Correll*, [389 U. S. 299](#) , [389 U. S. 305](#) -306 (1967); *Fribourg Navigation Co. v. Commissioner*, [383 U. S. 272](#) , [383 U. S. 283](#) (1966).

While we, of course, recognize the validity of the general principle illustrated by the cases upon which the Commission relies, we do not believe it to be applicable here. In *Zuber v. Allen*, *supra* at [396 U. S. 192](#) , the Court stated that a contemporaneous administrative construction of an agency's own enabling legislation

"is only one input in the interpretational equation. Its impact carries most weight when the administrators participated in drafting and directly made known their

views to Congress in committee hearings."

Here, the administrators, so far as we are advised, made no reference at all to their present construction of 12(k) to the Congress which drafted the "enabling legislation" here in question -- the Securities Exchange Act of 1934. They made known to at least one Committee their subsequent construction of that section 29 years later, at a time when the attention of the Committee and of the Congress was focused on issues not directly related to

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the one presently before the Court. [ [Footnote 11](#) ] Although the section in question was reenacted in 1964, and while it appears that the Committee Report did recognize and approve of the Commission's practice, this is scarcely the sort of congressional approval referred to in *Zuber, supra*.

We are extremely hesitant to presume general congressional awareness of the Commission's construction based only upon a few isolated statements in the thousands of pages of legislative documents. That language in a Committee Report, without additional indication of more widespread congressional awareness, is simply not sufficient to invoke the presumption in a case such as this. For here its invocation would result in a construction of the statute which not only is at odds with the language of the section in question and the pattern of the statute taken as a whole, but also is extremely far reaching in terms of the virtually untrammelled and unreviewable power it would vest in a regulatory agency.

Even if we were willing to presume such general awareness on the part of Congress, we are not at all sure that such awareness at the time of reenactment would be tantamount to amendment of what we conceive to be the rather plain meaning of the language of 12(k). On this point, the present case differs significantly from *United States v. Correll, supra*, at [389 U. S. 304](#), where the Court took pains to point out in relying on a construction of a tax statute by the Commissioner of Internal Revenue that, "to the extent that the words chosen by Congress cut in either direction, they tend to support, rather than defeat, the

Commissioner's position. . . ."

Subsequent congressional pronouncements also cast doubt on whether the prior statements called to our attention can be

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taken at face value. When consolidating the former 15(c)(5) and 19(a)(4) in 1975, see [n](#) 1, *supra*, Congress also enacted 12(j), which allows the Commission

"to suspend for a period not exceeding twelve months, or to revoke the registration of a security, if the Commission finds, on the record after notice and opportunity for hearing, that the issuer of such security has failed to comply with any provision of this chapter or the rules and regulations thereunder."

15 U.S.C. 78 / (j) (1976 ed.). While this particular power is not new, see 15 U.S.C. 78s(a)(2), the effect of its exercise was expanded to include a suspension of trading. [ [Footnote 12](#) ] "With this change," stated the Senate Committee on Banking, Housing and Urban Affairs, " *the Commission is expected to use this section, rather than its ten-day suspension power, in cases of extended duration.* " S.Rep. No. 975, p. 106 (1975) (emphasis added). Thus, even assuming, *arguendo*, that the 1963 statements have more force than we are willing to attribute to them, and that, as the Commission argues, 12(j) does not cover quite as broad a range of situations as 12(k), the 1975 congressional statements would still have to be read as seriously undermining the continued validity of the 1963 statements as a basis upon which to adopt the Commission's construction of the statute.

In sum, had Congress intended the Commission to have the power to summarily suspend trading virtually indefinitely, we expect that it could and would have authorized it more clearly than it did in 12(k). The sweeping nature of that power supports this expectation. The absence of any truly persuasive legislative history to support the Commission's view,

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and the entire statutory scheme suggesting that, in fact, the Commission is not so empowered, reinforce our conclusion that the Court of Appeals was correct in concluding no such power exists. Accordingly, its judgment is

*Affirmed.*

[ [Footnote 1](#) ]

This authority is presently found in 12(k) of the Act, which was added by amendment in 1975 by Pub.L. 94-299, 89 Stat. 118. It provides in pertinent part:

"If in its opinion the public interest and the protection of investors so require, the Commission is authorized summarily to suspend trading in any security (other than an exempted security) for a period not exceeding ten days. . . . No member of a national securities exchange, broker, or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security in which trading is so suspended."

15 U.S.C. 78j(k) (1976 ed.). This power was previously found in 15(c)(5) and 19(a)(4) of the Act, which, for all purposes relevant to this case, were substantially identical to the current statute, 12(k), except that 15(c)(5) authorized summary suspension of trading in securities which were traded in the over-the-counter market, while 19(a)(4) permitted summary suspension of trading in securities which were traded on the national exchanges. 15 U.S.C. 78j(c)(5) and 78s(a)(4). Congress consolidated those powers in 12(k).

[ [Footnote 2](#) ]

Respondent also argued that the orders violated his due process rights because he was never given notice and an opportunity for a hearing and that 12(k) was an unconstitutional delegation of legislative power. The court found it unnecessary to address these issues.

[ [Footnote 3](#) ]

Respondent also contends that he has suffered collateral legal consequences from the series of suspension orders, and thus the case is not moot. *Cf. Sibron v. New York*, [392 U. S. 40](#) , [392 U. S. 57](#) (1968). We find it unnecessary to address this further contention.

[ [Footnote 4](#) ]

The Commission contends that, to determine the mathematical probability that at least one of the securities held by respondent will be subjected to consecutive suspension orders, it is necessary to know, in addition to other information admittedly available in the Commission's own records, the number of publicly traded corporations of which respondent is a shareholder. This datum cannot be ascertained with any accuracy on this record, however, claims the Commission, because respondent has made various representations regarding that number at various stages of the litigation. *Compare* App. 153 *with* Brief in Response 18. The Commission adds that the probability could be determined with even greater accuracy if respondent revealed the nature of his portfolio because certain securities -- those listed on the New York Stock Exchange, for example -- are seldom summarily suspended.

[ [Footnote 5](#) ]

Within the last five years, the Commission has twice issued a series of orders, each of which suspended trading in CJL stock for over a year. In the various staff reports given to the Commission in connection with and attached to the second series of orders, the Division of Enforcement indicates in no less than six separate reports that either the Commission or the various stock exchanges view CJL as a "chronic violator." App. 20, 22, 24, 26, 28, 31. And reference is made to "the continuous [CJL] problems." *Id.* at 61. Furthermore, counsel for the Commission represented at oral argument that there were, in fact, three separate bases for the second series of suspensions -- alleged market manipulation, a change in management of the company, and a failure to file current reports. Tr. of Oral Arg. 17-18.

[ [Footnote 6](#) ]

Neither does the first series of orders appear to be of this type. Rather, like the second series, it appears to be predicated mainly on one major impropriety on the part of CJL and its personnel, which impropriety required the Commission, in its opinion, to issue a year-long series of summary suspension orders to protect investors and for the public interest.

[ [Footnote 7](#) ]

As previously indicated, see [n](#) 5, *supra*, the Commission advances three separate reasons for the suspensions, thus implicitly suggesting that perhaps this is a case where the Commission discovered independent reasons to suspend trading after the initial suspension. We note first that there are doubts whether these "reasons" independently would have justified suspension. For example, we doubt the Commission regularly suspends trading because of a "change in management." A suspension might be justified if management steps down under suspicious circumstances, but the suspicious circumstance here is the initial reason advanced for suspension -- the manipulative scheme -- and thus the change in management can hardly be considered an independent justification for suspension. More importantly, however, even assuming the existence of three independent reasons for suspension, that leaves 34 suspension orders that were not based on independent reasons, and thus the question still remains. Does the statute empower the Commission to continue to "roll over" suspension orders for the same allegedly improper activity simply upon a redetermination that the continued suspension is "required" by the public interest and for the protection of investors?

[ [Footnote 8](#) ]

The former 15(b)(6) provided in pertinent part:

"Pending final determination whether any registration under this subsection shall be denied, the Commission may by order postpone the effective date of such registration for a period not to exceed fifteen days, but if, after appropriate notice

and opportunity for hearing (which may consist solely of affidavits and oral arguments), it shall appear to the Commission to be necessary or appropriate in the public interest or for the protection of investors to postpone the effective date of such registration until final determination, the Commission shall so order. Pending final determination whether any such registration shall be revoked, the Commission shall by order suspend such registration if, after appropriate notice and opportunity for hearing, such suspension shall appear to the Commission to be necessary or appropriate in the public interest or for the protection of investors. . . ."

15 U.S.C. 78 o (b)(6).

[ [Footnote 9](#) ]

In 1963, when Congress was considering the former 15(c)(5), which extended the Commission's summary suspension power to securities traded in the over-the-counter market, the Commission informed a Subcommittee of the House Committee on Interstate and Foreign Commerce of its current administrative practice. One paragraph in the Commission's 30-page report to the Subcommittee reads as follows:

"Under section 19(a)(4), the Commission has issued more than one suspension when, upon reexamination at the end of the 10-day period, it has determined that another suspension is necessary. At the same time, the Commission has recognized that suspension of trading in a security is a serious step, and therefore has exercised the power with restraint, and has proceeded with diligence to develop the necessary facts in order that any suspension can be terminated as soon as possible. The Commission would follow that policy in administering the proposed new section 15(c)(5)."

Hearings on H.R. 6789, H.R. 6793, S. 1642 before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 88th Cong., 1st Sess., 219 (1963).

[ [Footnote 10](#) ]

The Senate Committee on Banking and Currency, when it reported on the proposed 1964 amendments to the Act, indicated that it understood and did not disapprove of the Commission's practice. It stated:

"The Commission has consistently construed section 19(a)(4) as permitting it to issue more than one suspension if, upon reexamination at the end of the 10-day period, it determines that another suspension is necessary. The committee accepts this interpretation. At the same time, the committee recognizes that suspension of trading in a security is a drastic step, and that prolonged suspension of trading may impose considerable hardship on stockholders. The committee therefore expects that the Commission will exercise this power with restraint, and will proceed with all diligence to develop the necessary facts in order that any suspension can be terminated as soon as possible."

S.Rep. No. 379, 88th Cong., 1st Sess., 66-67 (1963).

[ [Footnote 11](#) ]

The purpose of the 1964 amendments was merely to grant the Commission the same power to summarily deal with securities traded in the over-the-counter market as it already had to deal with securities traded on national exchanges. The purpose of the 1975 amendments was simply to consolidate into one section the power formerly contained in two.

[ [Footnote 12](#) ]

Under the new provision, when the Commission suspends or revokes the registration of a security,

"[n]o . . . broker, or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security the registration of which has been and is suspended or revoked pursuant to the preceding sentence."

15 U.S.C. 78 / (j) (1976 ed.).

MR. JUSTICE BRENNAN, with whom MR JUSTICE MARSHALL joins, concurring in the judgment.

Although I concur in much of the Court's reasoning and in its holding that "the Commission is not empowered to issue, based upon a single set of circumstances, a series of summary orders which would suspend trading beyond the initial 10-day period," *ante* at [436 U. S. 106](#) , I cannot join the Court's opinion because of its omissions and unfortunate dicta.

I

The Court's opinion does not reveal how flagrantly abusive the Security and Exchange Commission's use of its 12(k) authority has been. That section authorizes the Commission "summarily to suspend trading in any security . . . for a period not exceeding ten days. . . ." 15 U.S.C. 78 / (k) (1976 ed.). As the Court says, this language "is persuasive in and of itself" that 10 days is the "maximum time period for which trading can be suspended for any single set of circumstances." *Ante* at [436 U. S. 112](#) . But the Commission has used 12(k), or its predecessor statutes, *see ante* at [436 U. S. 105](#) n. 1, to suspend trading in a security for up to 13 years. *See* App. to Brief for Canadian Javelin, Ltd., as *Amicus Curiae* 1a. And, although the 13-year suspension is an extreme example, the record is replete with suspensions lasting the better part of a year. *See* App. 18211. I agree that 12(k) is clear on its face, and that it prohibits this administrative practice. But even if 12(k) were unclear, a 13-year suspension, or even a 1-year suspension as here, without notice or hearing so obviously violates fundamentals of due process and fair play that no

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reasonable individual could suppose that Congress intended to authorize such a thing. *See also* 15 U.S.C. 78 / (j) (1976 ed.) (requiring notice and a hearing before a registration statement can be suspended), discussed *ante* at [436 U. S. 121](#) -122.

Moreover, the SEC's procedural implementation of its 12(k) power mocks any conclusion other than that the SEC simply could not care whether its 12(k) orders are justified. So far as this record shows, the SEC never reveals the reasons for its suspension orders. [ [Footnote 2/1](#) ] To be sure, here respondent was able long after the fact to obtain some explanation through a Freedom of Information Act request, but even the information tendered was heavily excised, and none of it even purports to state the reasoning of the Commissioners under whose authority 12(k) orders issue. [ [Footnote 2/2](#) ] Nonetheless, when the SEC finally

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agreed to give respondent a hearing on the suspension of Canadian Javelin stock, it required respondent to state, in a verified petition (that is, under oath) why he thought the unrevealed conclusions of the SEC to be wrong. [ [Footnote 2/3](#) ] This is obscurantism run riot.

Accordingly, while we today leave open the question whether the SEC could tack successive 10-day suspensions if this were necessary to meet first one and then a different emergent situation, I for one would look with great disfavor on any effort to tack suspension periods unless the SEC concurrently adopted a policy of stating its reasons for each suspension. Without such a statement of reasons, I fear our holding today will have no force since the SEC's administration of its suspension power will be reviewable, if at all, only by the circuitous and time-consuming path followed by respondent here.

II

In addition, I cannot join the Court's reaffirmance of *Adamo Wrecking's* increasingly scholastic approach to the use of administrative practice in interpreting federal statutes. See *ante* at [436 U. S. 117](#) -118. This reaffirmance is totally unnecessary in this case, for, as the Court notes, whatever that administrative construction might be in this case, it is "inconsistent with the statutory mandate," *ante* at [436 U. S. 118](#) , which is clear on the face of the statute. *Ante* at [436 U. S. 112](#) .

Worse, however, is the Court's insistence that, to be credited, an administrative practice must pay " *specific attention to the statutory authorization*" under which an agency purports to operate. Ante at [436 U. S. 117](#) , quoting *Adamo Wrecking Co. v. United States*, [434 U. S. 275](#) , [434 U. S. 287](#) n. 5 (1978). As my Brother STEVENS

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noted in dissent in *Adamo*, see *id.* at [434 U. S. 302](#) , *Norwegian Nitrogen Co. v. United States*, [288 U. S. 294](#) (1933) -- perhaps our leading case on the use of administrative practice as a guide to statutory interpretation -- says not a word about attention to statutory authority. Nor does it reduce the value of administrative practice to its "persuasive effect," as the Court would apparently do here. Instead, as I understand the case, *Norwegian Nitrogen* focuses on the "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion," *id.* at [288 U. S. 315](#) , precisely because their action is itself evidence of assumptions -- perhaps unspoken by either the administrators or Congress -- brought to a regulatory problem by all involved in its solution. Indeed, common experience tells us that it is assumptions which everyone shares which often go unspoken because their very obviousness negates the need to set them out.

Therefore, while I do not dispute that well reasoned administrative opinions which pay scrupulous attention to every jot and tittle of statutory language are more persuasive than unexplained actions -- and certainly more in keeping with a norm of administrative action that ought to be encouraged -- I cannot dismiss, as the Court apparently does, less well reasoned, or even unexplained, administrative actions as irrelevant to the meaning of a statute.

[ [Footnote 2/1](#) ]

The only document made public by the SEC at the time it suspends trading in a security is a "Notice of Suspension of Trading." Numerous copies of this notice are included in the Appendix, and each contains only the boilerplate explanation:

"It appearing to the Securities and Exchange Commission that the summary suspension of trading in such securities on such exchange and otherwise than on a national securities exchange is required in the public interest and for the protection of investors; [therefore, trading is suspended]."

See App. 11, 13, 16, 19, 21, 23, 25, 27, 30, 33, 36, 39, 41, 44, 47, 50, 53, 56, 59, 62, 65, 67, 69, 71, 73, 76, 79, 82, 85, 88, 91, 94, 97, 100, 103, 106. The sole exception to this monotonous pattern is the notice which issued after respondent lodged his verified petition with the SEC. That notice recounted the allegations of the petition and stated in some detail why it was necessary to continue the suspension of Canadian Javelin stock. See *id.* at 109-110.

[ [Footnote 2/2](#) ]

In each instance, the explanation consists only of memoranda from the SEC's Division of Enforcement to the Commission. See, e.g., *id.* at 12, 14, 15. In at least one instance, the memorandum postdates the public notice of suspension. Compare *id.* at 11 with *id.* at 12. In no case is there a memorandum from the Commission explaining its action. The Court apparently assumes that the memoranda of the Division of Enforcement adequately explain the Commission's action, although the basis for any such assumption is not apparent. Moreover, since the recommendations portion of each memoranda is excised, presumably as permitted (but not required) by Exemption 5 of the Freedom of Information Act, see *EPA v. Mink*, [410 U. S. 73](#) , [410 U. S. 89](#) (1973), there is no statement of reasons in any traditional sense in any of the memoranda.

[ [Footnote 2/3](#) ]

See Brief for Respondent 19; App. to Brief for Respondent 20a-21a.

MR. JUSTICE BLACKMUN, concurring in the judgment.

I join the Court in its judgment, but I am less sure than the Court is that the Congress has not granted the Securities and Exchange Commission at least some power to suspend trading in a nonexempt security for successive 10-day periods

despite the absence of a new set of circumstances. The Congress' awareness, recognition, and acceptance of the Commission's practice, *see ante* at 436 U. S. 119 -120, nn. 9 and 10, at the time of the 1964 amendments, blunts, it seems to me, the original literal language of the statute. The 1975 Report of the Senate

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Banking Committee, stating that the Commission was "expected to use" 12(j)'s amended suspension of registration provision "in cases of extended duration," *ante* at [436 U. S. 122](#) , certainly demands new circumspection of the Commission, but I do not believe it wholly extinguished Congress' acceptance of restrained use of successive 10-day suspensions when an emergency situation is presented, as for instance, where the Commission is unable adequately to inform the public of the existence of a suspected market manipulation within a single 10-day period. Section 12(j)'s suspension remedy provides no aid when a nonissuer has violated the securities law, or where the security involved is not registered, or in the interim period before notice and an opportunity for a hearing can be provided and a formal finding of misconduct made on the record.

Here, the Commission indulged in 37 suspension orders, all but the last issued "quite bare of any emergency findings," to borrow Professor Loss' phrase. Beyond the opaque suggestion in an April, 1975, Release, No. 11,383, that the Commission was awaiting the "dissemination of information concerning regulatory action by Canadian authorities," shareholders of CJL were given no hint why their securities were to be made nonnegotiable for over a year. Until April 22, 1976, *see* Release No. 12,361, the SEC provided no opportunity to shareholders to dispute the factual premises of a suspension, and, in the absence of any explanation by the Commission of the basis for its suspension orders, such a right to comment would be useless. As such, I conclude that the use of suspension orders in this case exceeded the limits of the Commission's discretion. Given the 1975 amendments, a year-long blockade of trading without reasoned explanation of the supposed emergency or opportunity for an interim hearing clearly exceeds Congress' intention.

