

Changing Times: The APA at Fifty

Peter L. Strauss†

DEDICATION

In early October 1995, Walter Gellhorn helped to open a National Archives display commemorating the fiftieth birthday of the Administrative Procedure Act (“APA”). That Act had begun to take shape just prior to World War II, when Gellhorn had directed the Attorney General’s Committee on Administrative Procedure. Created in response to a political spasm of legislative activity that produced a “reform” bill President Roosevelt vetoed,¹ Gellhorn’s committee engaged in a thorough and careful survey of administrative agencies and their procedures. In the end, the committee produced twenty-seven monographs describing the variety of decision-making processes employed by the agencies²

† Betts Professor of Law, Columbia University Law School. The reader should note that in 1970, when the Supreme Court decided *Association of Data Processing Service Organizations, Inc. v Camp*, 397 US 150 (1970), I was an attorney in the Office of the Solicitor General of the United States; my name appears on the government’s brief. Similarly, from 1975 to 1977, I was General Counsel of the United States Nuclear Regulatory Commission, and my name appears on the government’s brief in *Vermont Yankee Nuclear Power Corp v NRDC*, 435 US 519 (1978).

I owe a debt of thanks to John Manning for his thoughtful reading of an early draft.

¹ The Walter-Logan Bill, HR 6324, 76th Cong, 1st Sess (1939), was vetoed in part on the basis of then-Attorney General Jackson’s advice that its “blanket requirements for the . . . conduct of hearings . . . amends literally hundreds of [unnamed] statutes.” HR Doc No 986, 76th Cong, 3d Sess 8 (1940), quoted in Brief for the Respondent at 19, *Wong Yang Sung v McGrath*, 339 US 33 (1950) (Docket No 154). An excellent contemporary source of the history of the times and the legislation is Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 Stan L Rev 1189, 1262-72 (1986).

² Administrative Procedure in Government Agencies, S Doc No 186, 76th Cong, 3d Sess (1940). The staff that Gellhorn directed

went after the facts. Its staff interviewed administrative officers, subordinates in the agencies, and practitioners who had had cases before the agencies. A detailed monograph was written on each agency, submitted in tentative form to the agency, and the committee and the agency then discussed the problems raised. Thereafter the committee held public hearings to receive opinions concerning the descriptions of procedures and the criticisms in the monographs. An elaborate report was finally prepared, which, with its appendices, fills 474 printed pages. This report, together with the monographs on which it is based, is still a primary source of information

and a summary report,³ that stand as classics of administrative law scholarship. Works of close observation, not theoretical speculation, these reports won Gellhorn Harvard's coveted Henderson Prize and underlay the APA's eventual shape and adoption. His presence at the commemoration of the APA, then, was a fitting honor.

Only a few weeks earlier, a House-Senate Conference Committee had refused to renew the \$1.8 million annual appropriation for the Administrative Conference of the United States ("ACUS"). For twenty-seven years, this tiny and unusual agency had studied agency procedures with an eye toward promoting interstitial improvement. With the help of a small continuing staff and outside consultants, ACUS produced studies, usually of an empirical character, that annually prepared the ground for five to ten recommendations for action by particular agencies, Congress, or the courts. These recommendations were shaped by the work of committees, a presidentially appointed Council of twelve, and a constituent Assembly of about one hundred—each group was composed of agency representatives and members drawn from private practice and law schools. Professor Gellhorn served continuously on the ACUS Council during the terms of seven presidents, from its founding through its defunding.

Gellhorn's preference for balanced, descriptive, and individualized observation, for field biology as it were, is out of fashion. Generalizing theory reigns. In early August of 1995, the Senate failed by a narrow margin to adopt proposals for "regulatory reform" having their genesis in the Republican Contract with America. While responding to widely acknowledged problems, the particular solutions these proposals offered were not grounded in careful study of agency proceedings and seemed to promise significant added expense and delay for the regulatory efforts that would be affected. A few months earlier, the House had passed a different "regulatory reform" bill implementing the Contract with America that promised an even more dramatic impact.

On December 9, 1995, at age 89, Walter Gellhorn died. It appears that we need him still, that we particularly need the

about the federal administrative process; even though it is out of date, no new comprehensive study has penetrated so far.

Kenneth Culp Davis, *Administrative Law Text* § 1.04 at 8-9 (West 3d ed 1972).

³ *Administrative Procedure in Government Agencies*, S Doc No 8, 77th Cong, 1st Sess (1941).

non-partisan attention to facts on the ground, to the realities of procedural operation that so characterized his long life in administrative law. This essay is dedicated to his memory.

INTRODUCTION

The invitation to write about the APA's golden jubilee offers a wide range of possible targets. Although the APA has not been significantly amended in the fifty years since its passage, some noteworthy changes have occurred.⁴ The face of regulation, moreover, has dramatically changed: high consequence rule making in health, safety, and environmental matters has displaced large-scale economic regulation as the regulatory paradigm we enact and think about;⁵ and the predominant use of administrative adjudication has become the resolution of individual welfare claims against the state. Where once we imagined agencies as apolitical experts, we now see their actions as openly political; where once we thought wisdom lay in specifying in detail the actions government desired, now we prefer standards or incentives that permit regulated entities greater freedom to choose how they will comply. How government sets its priorities has acquired prominence as an issue, as both our technical capacity to appreciate hazards and our awareness of the limited resources we have available to address them have grown; we can no longer pretend that all evils that government *might* address can in fact be pursued. And with issues of priority emerging as central, the political dynamics of congressional and executive relations with the administrative agencies have changed significantly.⁶ Through

⁴ Examples include the Freedom of Information Act, the Government in the Sunshine Act, the Federal Advisory Committee Act, and the Paperwork Reduction Act—all animated by suppositions about government openness (and distrust of bureaucracy). Their implementation has contributed significantly to changes in rule-making procedures that were not directly required.

⁵ The Interstate Commerce Commission, the Civil Aeronautics Board, the Federal Maritime Commission, and much federal rate regulation (telephones, gas pipelines, etc.) have passed into history; today's debates are over environmental protection.

⁶ In the last few presidencies, as the regulatory stakes have risen and the resources dwindled, Congress and the White House have tended to be at war over regulatory priorities (among other issues). Where Congress once enacted broad and "trusting" delegations, it now passes lengthy and detailed instructions, often providing for deadlines and citizen enforcement should agencies prove recalcitrant. In addition, the size of the typical congressional staff has grown by orders of magnitude, focussing their work on legislative oversight and casework for constituents rather than legislation as such. See Peter L. Strauss, et al, *Gellhorn & Byse's Administrative Law: Cases and Comments* 195-205 (Foundation 9th ed 1995). Presidential oversight and its institutions have also multiplied, in response both to congressional initiatives and to the economic and political pressures

all these changes, the APA has continued to provide the general statutory framework against which the procedural aspects of agency action are assessed.

Rather than address the APA's future, however, this Essay will explore its durability, in terms of its judicial history. It will focus, in particular, on the Supreme Court's treatment of the APA as embodying statutory resolutions of procedural issues the courts might otherwise have to resolve unguided. Against the backdrop of change briefly sketched above, one could think it astounding that the APA's procedural specifications, universals across government, have survived almost unaltered. This statute, like our four-times-older Constitution, thus raises a general question about interpretation in a particularly powerful form: To what extent has this 1946 statute been read to embody a frozen ("static") set of instructions about procedure, modifiable only by congressional action? And to what extent have courts interpreting it grounded their readings in current necessities, or in intervening developments that seem to have been generally accepted by the concerned communities? For a statute of such duration and generality, as for a constitution, flexible interpretation responsive to changing circumstances may be the very essence. And, as for a constitution, one might also expect such a practice to raise significant issues of legitimacy. The story is also one of lawyers' conventions—of what, reading the traces of their arguments, one can understand to have been the legal community's expectations about how a statute of this character should be understood.

Finally, this is a story of change, albeit one mostly led, rather than followed, by the Court. It falls roughly into three phases. This statute was produced against a backdrop of empirical study and political contention; it used broad strokes, in the language of those who had participated in the studies and struggles, to address practical problems. In its first years, the lawyers and judges who litigated and decided issues about its meaning had been, to a greater or lesser extent, witnesses to its creation, and they evidently expected their experiences to contribute to the statute's interpretation; in the decade after the decision in *United States v American Trucking Associations, Inc.*,⁷ the habits of using legislative materials to illuminate statutory text were firmly in place.

generated by the emergence of rule making as an activity with high consequences for the economy.

⁷ 310 US 534, 543 (1940).

In the middle period, represented here by the procedural ferment and paradigm shifts of the seventies, lawyers' arguments were less likely to draw upon the debates of the forties, and the Court proved willing to reinterpret the text to fit contemporary developments. The apparent exception to that trend, *Vermont Yankee Nuclear Power Corp v NRDC*,⁸ might be thought to have involved a lower court's effort to give the statute meaning outside any reasonable possibility offered by the text, rather than a more general refusal to accommodate that text to contemporary understandings.

Most recently, in the third phase, the Court has turned to formalism in matters of textual interpretation. Rejecting partnership assumptions about its relation with Congress that have characterized thinking about statutes since early in this century, it takes text as both time-bound and limiting. For the APA, that makes decisions turn on what its words would have been understood to mean as a matter of standard usage in 1946—usage independent of the political context and debates. This development is recent enough that how lawyers frame their arguments has lagged behind, and as a result, the Court's opinions are centrally concerned with materials that are at best marginal in their briefs. The Court's new interpretive approach suggests that statutory joints, like human ones, will inevitably lose useful flexibility with increasing age; for the APA, it may make imperative the thorough statutory reconsideration of administrative procedures that the last half-century has failed to produce.

I. FIRST ENCOUNTER

In 1950, *Wong Yang Sung v McGrath*⁹ gave the Court its first real opportunity to examine the intellectual underpinnings of the Administrative Procedure Act. The Act had previously been mentioned in twelve cases,¹⁰ but provided important grounds for decision in none. Now a somewhat diminished Court would set

⁸ 435 US 519 (1978).

⁹ 339 US 33 (1950).

¹⁰ *Regents of the University System of Georgia v Carroll*, 338 US 586, 598 n 13 (1950); *United States v Morton Salt Co.*, 338 US 632, 638, 644-47, 654 (1950); *United States v ICC*, 337 US 426, 434 n 4 (1949); *NLRB v Pittsburgh Steamship Co.*, 337 US 656, 661 (1949); *Johnson v Shaughnessy*, 336 US 806, 815 (1949); *United States v Jones*, 336 US 641, 672 (1949); *Ludecke v Watkins*, 335 US 160, 163 (1948); *Eccles v Peoples Bank of Lakewood Village, California*, 333 US 426, 429 n 1 (1948); *Maggio v Zeitz*, 333 US 56, 68 n 3 (1948); *Fahey v Mallonee*, 332 US 245, 256 (1947); *Land v Dollar*, 330 US 731, 742-43 (1947); *Oklahoma v United States Civil Service Commission*, 330 US 127, 138 n 13 (1947).

the interpretive tone. Strikingly, the author of its opinion was Justice Robert Jackson, who had been Attorney General in 1940-41 when Walter Gellhorn's committee was doing its work and preparing its final report. And even from a Justice generally resistant to the use of legislative history in interpretation, that opinion reflected the attitudes toward legislation later apotheosized in Hart and Sacks's *The Legal Process*.¹¹ It treated the legislature as a body of reasonable actors seeking practical outcomes, attempting to understand its work in the context of the debates that had generated it.

Mr. Sung was a Chinese citizen who had been arrested on a charge of unlawfully overstaying the visa he had obtained on shore leave from his boat. By the time of his arrest, Mr. Sung had potentially persuasive reasons for wishing not to return: his native Shanghai had fallen to the advancing Communist army. Whether this reason provided adequate grounds to permit him to remain was a decision within the Attorney General's discretion; the factual and legal bases for deportation do not seem to have been in dispute. As Department of Justice regulations provided, the question of his deportation was decided by the Acting Commissioner of the Immigration and Naturalization Service ("INS"), on the basis of a record compiled during a hearing before an "immigration inspector" of the Service.

Two arguably separable features of the immigration inspector's role provided the basis for Sung's claim that departmental procedures violated the APA's requirements. The first concerned inspectors' working relations with other inspectors and supervisors. The several hundred immigration inspectors scattered throughout the country were multipurpose employees. An inspector might interview people seeking to enter the country at a border crossing; or he might search out for possible arrest aliens whose residence here had become illegal; or, as in Sung's case, he might preside over deportation proceedings, develop the record, and make a recommendation for the Commissioner's action. The regulations prohibited an inspector from combining these functions in any one case, but that did not prevent a certain blurring of roles. Since all inspectors in a region worked out of a common office under common supervision, an inspector might today hear a case that his colleague had investigated,

¹¹ Henry M. Hart and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Cambridge 1958).

while just yesterday he served as investigator in a case on which his colleague had presided.

Second, the proceedings were inquisitorial in character, despite the seriousness of deportation as an outcome. Although sometimes a different inspector would act as “prosecutor,” the presiding inspector was often expected, as in Sung’s case, to conduct the proceedings unaided. The inspector was responsible for presenting the government’s case and for cross-examining its subject and any witnesses he might call, as well as for ruling on evidentiary matters and for certifying the record thus developed, with a recommendation, for the Commissioner’s decision. Though in fact such arrangements are familiar in American administrative procedure,¹² American judicial traditions, unlike those of the Continent, leave little room for the *juge d’instruction*.

The immigration inspectors’ working relations were inconsistent with the APA’s explicit provisions regarding “hearing examiners”;¹³ these statutory officers were to preside over “every adjudication required *by statute* to be determined on the record after an opportunity for an agency hearing.”¹⁴ Hearing examiners had to be hired and supervised following special procedures and bureaucratic arrangements that would separate them and their functions from persons concerned with inspection and prosecution—requirements that could not be met by the Service’s arrangements. But no “statute” required the hearings the INS provided in deportation cases; these had been established in response to holdings concerning the requirements of the Constitution’s Due Process Clause.¹⁵ One obvious question, then, was whether the APA’s provisions for hearing examiners, today known as administrative law judges, governed the working conditions of immigration inspectors.

The APA might also have been taken to address the second question, the permissibility of inquisitorial procedures. Could hearing examiners be made responsible both for affirmatively shaping a record and for presiding over its creation and recommending an eventual decision? Section 5(c)’s requirements for on-the-record adjudication preclude an “employee[] or agent engaged in the performance of . . . prosecuting functions for any

¹² The vast majority of federal administrative law judges today hear disability and like matters, in which no separate attorney presents the government’s case.

¹³ 5 USC § 1004 (1952).

¹⁴ *Id* (emphasis added).

¹⁵ *Japanese Immigrant Case*, 189 US 86, 100-01 (1903).

agency" from participating or advising in the decision of "that or a factually related case."¹⁶ This language *could* be understood to forbid the use of a presider responsible for protecting governmental interests as well as for serving in an umpireal role. Yet the diction of the provision suggests that it might be contemplating the mixed responsibilities of someone other than the hearing examiner, and thus may *not* be addressing the permissibility of an inquisitorial model of procedure. That is, it seems to have in view the impermissibility of someone who is primarily a partisan helping out the hearing examiner who must be there in any event, rather than a prohibition on asking hearing examiners themselves, who know they are to be neutrals, to serve in the *juge d'instruction* role. Where the question regarding working conditions for inspectors was rather technical, this second one reaches to central Anglo-American presuppositions about the judiciary.¹⁷

Reading the briefs filed in *Wong Yang Sung* one is struck by the methodological agreement among them. The lawyers appear to have agreed that, in determining the meaning of the APA's provisions, the Court's points of reference should be the choices the legislators thought they had in enacting them, and the general policies or considerations those legislators decided to take into account. While the parties disagreed about the implications to be drawn from the course of legislation, they had no disagreement about the materials that the Court ought to consider—including the Attorney General's Committee reports (majority and minority), the resulting congressional deliberations of 1940-41, the legislative consideration of the APA in the mid-forties, the text of the statute, and the probable understanding of that text by its enactors. Reports, hearing testimony, committee deliberations, and debates were unselfconsciously referred to on all sides, the

¹⁶ 5 USC § 1004(c) (1952), subsequently renumbered as 5 USC § 554(d) (1994).

¹⁷ A third provision and associated argument, not important for our purposes, concerned § 7(a). It stated that the APA did not "supersede the conduct of specified classes of proceedings . . . by . . . officers specially provided for by or designated pursuant to statute." The Administrative Procedure Act, ch 324, 60 Stat 237 (1946), codified as amended at 5 USC § 556(b) (1994). While no statute specified that deportations should occur after hearings, the Immigration Act did create the position of immigrant inspector and gave these officers responsibility for examining questions concerning aliens' presence in this country. The government argued in the alternative that *if* the APA otherwise applied, this statute satisfied § 7(a); immigration inspectors therefore could proceed as prosecutors and judges. But, neither that statute nor any other made any provision for deportation hearings. Ultimately, this gap proved to be this argument's fatal weakness.

only issues being how they were to be understood. No participant exhibited the slightest doubt that they warranted consultation.

Both sides, in this respect, treated the history of initial consideration in 1940-41 as a natural and important part of the story. The Attorney General's Committee had delivered both a majority and a minority report. While these differed on some issues, both reports recommended adjudicatory procedures that would apply in all cases of "hearings required by law"; and this language concededly referred to *both* constitutional *and* statutory hearing requirements. Although the head of the Immigration Service and the Acting Attorney General openly acknowledged that deportation hearings warranted full procedural rigor,¹⁸ both asked the relevant congressional committees at hearing to change this language from "law" to "constitution or statute."¹⁹ Without this amendment, they asserted, the formality of the *other* functions of immigration inspectors would be increased.²⁰ World War II then intervened. By the time attention returned to the subject, the legislative drafts referred without explanation only to "hearings required by statute." This was, of course, a reference to all governmental adjudications, and little suggested a weakening of the understanding that the gravity of deportation warranted procedural protections that might not be required in other situations. While the government was able to point to some general expressions in the later history consistent with understanding "required by statute" as exclusive,²¹ not one of those expressions acknowledged the possibility of a constitutional hearing requirement or suggested reasons why Congress might have

¹⁸ The staff studying the Immigration Service for the Committee, which included Professors Marshall Dimmock (Chicago), Henry Hart (Harvard), and John MacIntyre (George Washington), had "strongly" recommended "encouraging independence and detachment in presiding inspectors. . . . [They should] be relieved of their present duties of presenting the case against aliens and be confined entirely to the duties customary for a judge." The Secretary of Labor's Committee on Administrative Procedure, *The Immigration and Naturalization Service* 81 (1940).

¹⁹ Administrative Procedure in Government Agencies, Hearings before the Senate Subcommittee on Administrative Procedure, 77th Cong, 1st Sess 577 (May 2, 1941) (testimony of Major Schofield); Administrative Procedure in Government Agencies, Hearings before the Senate Subcommittee on Administrative Procedure, 77th Cong, 1st Sess 1456 (July 2, 1941) (statement of Acting Attorney General Biddle).

²⁰ The government's brief developed the testimony on this point at some length, taking the characteristics of the matters the testifiers were seeking to defend from formality (as seems at best arguable) to undercut their concessions that formality would be appropriate in deportation proceedings. See Brief for Respondent at 19-25, *Wong Yang Sung v McGrath* (cited in note 1).

²¹ Id at 25-30.

wished to distinguish between statutory and constitutional hearing requirements.

The parties also sought to impress the Court with the practical consequences of a decision one way or the other. For petitioners, the principal concern was fairness. The government invoked "the practical importance of a literal interpretation" in securing procedural certainty but, strikingly, offered only two contexts that would be affected by an expansive reading: the deportation proceedings under consideration and Post Office proceedings concerned with "mail fraud."²² One would not leave the government's brief with the impression that a ruling against it would roil important procedural waters, or impose unwarranted expense on a wide range of government activities. Moreover, from a fairness perspective, the government's two examples must have seemed rather suspect. And an *amicus* brief filed on behalf of private parties involved in rate regulation before the Interstate Commerce Commission pointed out a variety of regulatory proceedings in which formal procedures had habitually been followed pursuant to constitutional requirements, despite a lack of express statutory provisions; if followed to its logical end, the government's argument would create procedural uncertainty and reduce the procedural rights of participants in these proceedings, a result hard to square with the general purpose of the new Act.²³ The Court found for Mr. Sung.

As remarked above, Justice Jackson's opinion gave credence to the use of legislative background as an interpretive tool. Generally a skeptic about legislative materials,²⁴ he pronounced "[t]he legislative history [of the change from "law" to "statute"] . . . more conflicting than the text is ambiguous."²⁵ Yet the form of Jackson's argument reflected historically and politically grounded concern for what this new statute might reasonably have been about, and a purpose to be the legislature's faithful servant. Although he may have been unwilling to use legislative history to resolve the precise question what "statute" meant, he had no such hesitations about broader issues of purpose or contemporary understanding. The opinion gave a full and sympa-

²² *Id.* at 30-31.

²³ Brief of Riss & Co., *Amicus Curiae* at 17-20, *Wong Yang Sung v McGrath*, 339 US 33 (1950) (No 154).

²⁴ See *Schwegmann Brothers v Calvert Distillers Corp*, 341 US 384, 395-97 (1951) (Jackson concurring); *United States v Public Utilities Commission*, 345 US 295, 319-21 (1953) (Jackson concurring).

²⁵ *Wong Yang Sung*, 339 US at 49.

thetic account of the statute's intellectual development (in which he had directly participated) as a basis for understanding its larger contours.

Jackson devoted the first two sections of his opinion, almost nine pages of its eighteen, to an account of the formative studies and debates. The principal theme of these pages, drawing particularly on the Committee studies of the deportation issue, was to put in doubt the combination of responsibility for presenting and judging the government's case, the inquisitional model. Truly "fundamental . . . was the purpose to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge."²⁶ The Court thus was more disturbed by the second aspect of the question put to it—the prospect of a presider taking on what it saw as incompatible duties—than by the technical question whether in their employment relations immigration judges worked under the conditions required of APA "hearing examiners." The political struggles and careful studies of the late thirties and early forties, more than Section 5's precise language or its particular unfolding, appear to have controlled how the statute was to be understood.

The Court doubtless understood that it was setting a broader context for the reception of this important new statute, as Supreme Court opinions inevitably do, even if it seemed likely that its particular resolution of Sung's case would soon be overruled by Congress.²⁷ The government had argued that Congress was on the verge of enacting an explicit exclusion of immigration matters from Section 5, when lower court decisions in the government's favor removed the apparent need for that step. But Congress had not yet done so, and, for the Court, that settled the matter:

The Act . . . represents a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest. It contains many compromises and generalities and, no doubt, some ambiguities. Experience may reveal defects. But it would be a disservice to our form of government and to the administrative process itself if the courts should fail, so far as the terms of the Act warrant, to

²⁶ *Id.* at 41.

²⁷ As it was. 8 USC § 1252(b) (1952). See also *Marcello v Bonds*, 349 US 302, 303 (1955).

give effect to its remedial purposes where the evils it was aimed at appear.²⁸

Thus, the agencies were to understand that Congress *had* adopted a uniform set of procedural specifications and that the burden would be on them to justify the legality of any variation from those uniform procedures. And the Court was mindful how best to allocate the risk of error—"agencies, unlike the aliens, have ready and persuasive access to the legislative ear and if error is made by including them, relief from Congress is a simple matter."²⁹ That in this case the agency promptly succeeded in securing legislative relief, as it did, could be taken to illustrate, not undercut, the general proposition.

If we credit Justice Jackson's method, and the summary of interpretive responsibility just quoted, we find a picture of the judicial role that should prove familiar to any reader of Hart and Sacks's *The Legal Process*. Congress is taken to have addressed a particular problem in its historic context and on the basis of studies and debates that illuminate its dimensions and purposes. The terms of the statute, consequently, are a reflection of Congress's purposes. The primary judicial task is not to find the meaning of the terms Congress used as such, but "so far as the terms of the Act *warrant*"—that is, within the possibilities of meaning they reasonably permit—to implement Congress's determinable aims, "to give effect to its *remedial purposes* where *the evils it was aimed at* appear."³⁰

II. PUBLIC INTEREST LITIGATION AND THE DISCOVERY OF RULE MAKING

Should we look for subsequent developments approaching the magnitude of those that culminated in the APA, the first obvious candidates appear roughly a quarter century later. These were the twin developments underlying what Richard Stewart described as *The Reformation of American Administrative Law*:³¹ the development of "public interest representation," with its concomitant drive to make judicial review more widely available; and the major expansion in the scope and role of rule making, in the wake of the dramatic increase in the regulation of safety,

²⁸ *Wong Yang Sung*, 339 US at 40-41.

²⁹ *Id* at 47.

³⁰ See text accompanying note 28 (emphasis added).

³¹ 88 Harv L Rev 1667 (1975).

health, and environmental issues.³² During the late sixties and early seventies, both developments generated understandable pressure for new readings of parts of the APA that bore on them; both reflected circumstances that, it is fair to say, were at best imperfectly anticipated a quarter century earlier when that act was passed. These pressures inevitably reached the Court, which would have to decide—consciously or unconsciously—how time-bound a statute the APA was to be. By then, the Court was no longer acting in the shadow of the immediate understandings and participatory influences of the 1940s; its membership had changed, the bar had changed, and society had changed with them. The Court was free to turn—and without hesitation did turn—to readings that were the most sensible in light of contemporary developments and understandings, without particular regard to the issues and understandings of the 1940s.

A. Standing

The first of these developments to reach the Court concerned litigant standing to secure review of administrative action. Section 10(a) of the APA provided that any “person suffering legal wrong because of agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.”³³ At the time of its enactment, litigators and judges would have known that courts *generally* required a person to demonstrate “legal wrong” to establish standing to sue—that is, he would have had to demonstrate that he enjoyed some substantive, private, legally protected interest, which had been so affected by public action that if the public actor were a private individual, a cause of action to redress the resulting injury could be imagined.

³² We are accustomed to regarding the New Deal as a regulatory frontier, one that produced, *inter alia*, the APA. However, the sixties also wrought fundamental changes. In 1977, Charles Schultze observed that nearly 41 percent of federal agencies then engaged in regulating private conduct had been created *since* 1960. Charles L. Schultze, *The Public Use of Private Interest 7* (Brookings 1977). “The single most important characteristic of the newer forms of social intervention,” according to Schultze, lay in their effort to modify the behavior of private producers and consumers. *Id.* at 12. “The boundaries of the ‘public administration’ problem have leapt far beyond the question of how to effectively organize and run a public institution and now encompass the far more vexing question of how to change some aspect of the behavior of a whole society.” *Id.* *This* change, one may believe, continues to reverberate through today’s debates.

³³ The Administrative Procedure Act, ch 324, 60 Stat 243 (1946), codified as amended at 5 USC § 702 (1994).

Thus, when the ICC lowered rates for some shippers, their competitors could not challenge that action; while the ICC's action benefitting others might in fact work to their economic disadvantage, they had no legal right to protection from competition and the order did not affect their legal entitlement to have the ICC set reasonable rates for their own shipments.³⁴

Knowledgeable observers in 1946 would also have been aware that Congress had occasionally provided in prominent regulatory statutes for rights of review on behalf of persons adversely affected or aggrieved by agency actions, and that the courts had sustained these grants of standing as "within the power of Congress to confer,"³⁵ although perhaps limited to the task of serving "only as representatives of the public interest."³⁶ Perhaps the most straightforward reading of § 10(a)'s language, then, was to see it as capturing this existing state of law; alternatively, however, its words might be understood to generalize the judgments Congress had to this point made on a situation-by-situation basis. That is, either § 10(a) could be taken to point to existing (and future) "relevant statute[s]" containing "adversely affected or aggrieved" provisions; or it could be understood as making a universal judgment that persons "adversely affected or aggrieved" in relevant statutory terms should have standing to invoke judicial review to redress those harms.

The latter meaning would have been a change in the general framework of litigation, and little in the foundational materials suggests such a result. No established root values of the justice system were in play, and nothing appears to suggest dissatisfaction with the state of law existing when the APA was considered and adopted. The 1941 Report did not address standing; the individual "person aggrieved" standard had just begun to reach the courts at that time. And for a quarter century after the APA's passage the courts, including the Supreme Court,³⁷ continued to treat competitor injury as insufficient to confer standing absent a specific "person aggrieved" statute. The usual auguries, thus, favored the first of the two possible readings.

The possibility of a broader reading had been noticed, however, and was vigorously argued in the literature about a decade

³⁴ *Alexander Sprunt & Son, Inc. v United States*, 281 US 249, 254-58 (1930).

³⁵ *FCC v Sanders Brothers Radio Station*, 309 US 470, 477 (1940).

³⁶ *Scripps-Howard Radio Inc. v FCC*, 316 US 4, 14 (1942). See also *Associated Industries of New York State v Ickes*, 134 F2d 694 (2d Cir) vacated as moot, 320 US 707 (1943).

³⁷ See *Hardin v Kentucky Utilities Co.*, 390 US 1, 5-6 (1968) ("[E]conomic injury . . . cannot, in and of itself, confer standing on the injured business.").

after the Act's passage. Professor Kenneth C. Davis, arguing for the expansive reading, relied on (unexplained, unflagged) language in the House and Senate reports stating that the section "confers a right of review upon any person adversely affected *in fact* by agency action or aggrieved within the meaning of any statute,"³⁸ as well as the sound policy sense of broader access to judicial review of administrative action. Professor Louis Jaffe, in response, pointed to the Attorney General's contemporaneous expression of understanding that the APA "reflects existing law,"³⁹ and to ways in which § 10(a)'s text varied from the report language on which Davis relied. The words "in fact", he pointed out, were not in the enacted statute; the statute refers not to "any statute" but to "any *relevant* statute"; and the phrase "by agency action" is placed differently in § 10(a) than in the Report language. The combined effect of these differences, had they been reflected in the statute, would have been much more strongly to suggest a purpose to change. Jaffe concluded that § 10(a) was "no more than declaratory of existing law."⁴⁰

The question came before the Court in 1970, in *Association of Data Processing Service Organizations, Inc. v Camp* ("ADAPSO").⁴¹ In that case, the Comptroller General had interpreted a governing statute to permit national banks to offer data processing services to their customers and other banks. This ruling significantly impacted ADAPSO's members' commercial ability to sell data processing, but no statute conferred on them a legal interest in freedom from competition. A statute did, however, require Comptroller approval of "incidental banking services" offered by national banks. These approvals were considered in informal proceedings, very different in character from the prominent and formal regulatory settings for which Congress had sometimes provided "persons aggrieved" standing. Moreover, the statute principally protected the stability of the banking system by keeping banks in the banking business, although its inevitable effect might suggest at least a constructive purpose of protecting

³⁸ Kenneth Culp Davis, 3 *Administrative Law Treatise* § 22.02 at 212 (West 1958), quoting The Administrative Procedure Act, S Doc No 248, 79th Cong, 2d Sess 212, 276 (1946) (emphasis added).

³⁹ Louis L. Jaffe, *Judicial Control of Administrative Action* 529 (Little, Brown 1965), quoting The Administrative Procedure Act, S Doc No 248, 79th Cong, 2d Sess 310 (1946).

⁴⁰ Jaffe, *Judicial Control of Administrative Action* at 528 (cited in note 39).

⁴¹ 397 US 150 (1970). While serving as an attorney in the Office of the Solicitor General, I helped to brief this case for the United States and briefed and argued a companion case, *Barlow v Collins*, 397 US 159 (1970).

those in other businesses on whose competitive position unrestricted banks might encroach. The statute did not contain a provision authorizing review at the behest of a "person aggrieved or adversely affected" by Comptroller action.

Strikingly, the lawyers in *ADAPSO* seem to have been little concerned with what § 10(a) would have been understood to mean on its enactment in 1946. The dominating impulse of their arguments was the Supreme Court's 1968 decision in *Flast v Cohen*.⁴² That case had opened up the constitutional side of standing law, relaxing the idea of "injury in fact" in a way that clearly enough would encompass competitor injury; then there would no longer be any need to show specific congressional judgments such as had underlain judicial acceptance of the earlier, specific "person aggrieved" statutes. The briefs begin with this relaxation, and then move directly to "issues of policy" the litigants more or less assumed would resolve the issues of meaning within the possibilities that the statutory language offered.⁴³ Policy then, not any particular 1946 understanding, would determine whether the Court would choose that possible meaning of § 10(a) that would confer standing on *ADAPSO*.

More importantly, that policy would be forged in relation to the contemporary realities of the administrative state, not the circumstances, diction, or expectations of the 1946 Congress. The Jaffe-Davis dispute concerning legislative history was hardly noticed, confined to an indirect discussion in the final, "clean-up" pages of the petitioner's forty-two-page brief⁴⁴ and a single paragraph in the government's thirty-three-page brief in response. The government characterized that argument as having been made "in this Court for the first time."⁴⁵

The Court, easily finding standing to be present, was equally insouciant about the particular statutory question the APA might be thought to present. Its argument virtually began and ended with *Flast* and the implications that case had for the constitutional side of the standing issue. The Court gave § 10(a) the broader of its possible meanings, reading it independently to

⁴² 392 US 83 (1968).

⁴³ See, for example, Brief for the Petitioners at 10, *Association of Data Processing Service Organizations, Inc. v Camp*, 397 US 150 (1970) (Docket No 85); Brief for the Sierra Club, Amicus Curiae at 8, *Association of Data Processing Service Organizations, Inc. v Camp*, 397 US 150 (1970) (Docket No 85).

⁴⁴ Brief for the Petitioners at 39, *ADAPSO* (cited in note 43).

⁴⁵ Brief for the Respondent at 24, *Association of Data Processing Service Organizations, Inc. v Camp*, 397 US 150 (1970) (Docket No 85).

confer standing; but there is no real discussion of the point. The Court quoted the provision's language *only* to show that there was a "relevant statute" within the meaning of which ADAPSO could have been said to be aggrieved. The possibility that that language might have been referring to specific legislative "person aggrieved" judgments rather than making such a judgment itself (that is, the reading that had prevailed in the lower courts for a quarter century) was not directly discussed. Justice Douglas's opinion for the Court suggested how free the Court felt to adjust the APA's meaning to the current day, a freedom evidently expected by the parties: "Where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action. The whole drive for enlarging the category of aggrieved 'persons' is symptomatic of that trend."⁴⁶ For this Court, *contemporary* trends, teased out of recent statutes and developments and perhaps the courts' own preferences, shaped choice within the range that, as *Wong Yang Sung* had put it, the "terms of the Act warrant."⁴⁷

B. Rule Making

During the eight years following *ADAPSO*, the judicially creative process of adaptation was even more in evidence in lower court treatment of agency rule-making procedures. The provision of a uniform procedure for the exercise of statutorily delegated authority to make rules had been one of the prouder achievements of the APA's drafters. The procedure they created in the Act's § 4, now codified as 5 USC § 553, is extremely permissive; its language prescribes little more than a consultative process for public presentation of information and views, loosely comparable to what might be employed by a congressional committee. An agency's initial step is to provide notice of a proposal for rule making, which might indicate "*either* the terms *or* substance of the proposed rule *or* a description of the subjects and issues involved."⁴⁸ The agency is then to afford "interested persons"—that is to say, anyone who cares to—an "opportunity to participate" described as a chance for "submission of written data, views, or arguments with or without opportunity for oral presentation."⁴⁹ No time period is stated, and no indication is

⁴⁶ *ADAPSO*, 397 US at 154.

⁴⁷ See text accompanying notes 28, 30, 103 and 109.

⁴⁸ 5 USC § 553(b)(3) (1994) (emphasis added).

⁴⁹ 5 USC § 553(c) (1994).

given that the participants have any more right than would participants in a legislative committee hearing to know what data the agency possesses and might be planning to act upon. In the end, "after consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a *concise general* statement of their basis and purpose."⁵⁰ The legislative materials and practice in the years immediately following the APA's adoption were wholly consistent with the informal, undemanding framework these few words limn.

During the 1970s, led by the D.C. Circuit and aided by the practical results of the Freedom of Information Act ("FOIA"), the courts of appeals built the ideas of notice, right to comment, and obligation to explain into the much more elaborate form of a paper hearing. Agencies learned that in order for their actions to withstand judicial scrutiny, they had to make proposals in considerable detail and provide a second round of notice and comment whenever a rule was significantly altered in response to the first. In addition, the courts forced agencies to expose to the public, for comment or rebuttal, the data on which they expected to rely. The requirement of "concise general" disclosure notwithstanding, courts required agencies to state the basis and purpose of their actions in detail sufficient to establish that they had considered and reasonably responded to all important comments, and to permit the courts to follow and assess their reasoning processes in general.

However surprising from the perspective of 1946, these developments could be tied in some way to the language of § 553, and they were easy to explain in relation to the increasing importance and changing character of rule making. For rules having consequences measured in the tens if not hundreds of millions of dollars, and ostensibly premised on technical rather than political judgments, procedural steps to ensure rational and deliberate decision making seemed almost inevitable. Moreover, these developments can also be understood to reflect the influence of then-recent legislation, such as FOIA, that reflected contemporary procedural values bearing on § 553, even though the language of that section had not been amended. Congress had provided in FOIA that any person had the right to obtain on demand a wide range of hitherto unavailable agency information. The Act thus invited requests for "all data being considered by the agency in connection with its rule-making proposal in

⁵⁰ *Id.* (emphasis added).

_____.” From the right to make such requests, agencies (and courts) quickly learned how to construct records fuller than had previously been known; and it became easier to think that the universe of commenters now had a claim to be more intimately involved in the agencies’ consideration of data issues.

In a further step, however, the courts began to require trial-like procedures in some rule makings—opportunities for oral hearings, presentation and confrontation of witnesses, observation of *ex parte* constraints by decision makers, and so forth. Again, statutory changes outside the APA framework may have contributed to these developments. Thus, both the detailed and fact-oriented inquiries required by the National Environmental Policy Act of 1969 (“NEPA”)⁵¹ and the hybrid rule-making procedures Congress established for particular contemporary statutory regimes may have seemed to express a more general judgment. These new requirements, however, reflected more than contemporary statutory developments; they also reflected a fundamental disagreement about appropriate judicial function that was then informing the argument and decision of cases in the D.C. Circuit, the federal court most likely to be involved in review of the burgeoning number of highly technical, scientific rule makings.

This disagreement about judicial function seems itself to have been the product of another recent “contemporary values” reading of the APA’s language. In 1971, the Supreme Court’s opinion in *Citizens to Preserve Overton Park, Inc. v Volpe*⁵² had built on the “public interest representation” paradigm already suggested by standing developments, in defining a quite aggressive judicial role in reviewing agency actions under 5 USC § 706(2)(A), for arbitrariness, capriciousness, or abuse of discretion.⁵³ For one group of D.C. Circuit judges, led by Judge Harold Leventhal, *Overton Park* required judges to educate themselves about even the most complex matters in order to achieve the “substantial inquiry” that would be “searching and careful” even though “highly deferential”;⁵⁴ as Judge Leventhal saw it, “[o]ur

⁵¹ 42 USC §§ 4321 et seq (1988).

⁵² 401 US 402 (1971). The decision could have made another example for this text, but I have already discussed it extensively in Peter L. Strauss, *Revisiting Overton Park: Political and Judicial Controls Over Administrative Actions Affecting the Community*, 39 UCLA L Rev 1251 (1992).

⁵³ 5 USC § 706(2)(A) (1994). This is the catchall judicial review provision of the APA, the principal standard applicable to rule makings and informal adjudications (as *Overton Park* was). A 1946 observer would have thought it specified a very light hand indeed. Compare *Pacific States Box & Basket Co. v White*, 296 US 176, 185-86 (1935).

⁵⁴ *Ethyl Corp v EPA*, 541 F2d 1, 69 (DC Cir 1976) (Leventhal concurring), cert denied

present system of review assumes judges will acquire whatever technical knowledge is necessary as background for decision of the legal questions.⁵⁵ For a smaller group, led by Chief Judge David Bazelon, judges could not themselves be expected to achieve technical competence, but ought instead to try to arm others who might have that competence to sound the alarms of error; "in cases of great technological complexity, the best way for courts to guard against unreasonable or erroneous administrative decisions is not for the judges themselves to scrutinize the technical merits . . . [but] to establish a decision-making process that assures a reasoned decision that can be held up to the scrutiny of the scientific community and the public."⁵⁶ Judge Bazelon seemed to prevail in the D.C. Circuit's decision in *NRDC v United States Nuclear Regulatory Comm'n*,⁵⁷ but that merely set the stage for *Vermont Yankee Nuclear Power Corp v NRDC*⁵⁸—a decision sharply repudiating his view while appearing to invoke traditional APA values.

Vermont Yankee involved rule making by the United States Nuclear Regulatory Commission ("NRC") that, if valid, would have answered in general terms certain questions that would otherwise have had to be resolved in individual licensing proceedings for each nuclear power plant. The questions concerned the off-site environmental impacts of supplying and disposing of nuclear fuel for the plants. These impacts were independent of any particular power plan or its site; they were a function of the amount of power to be generated and so, the Commission believed, they could be determined once in a general rule making, and then the values found could simply be added to the impacts specific to a particular site. For example, it could assess the expected adverse health effects on uranium miners for each megawatt of electricity generated using the fuel made from the uranium they were mining; these assessments would take the form of technical or scientific projections expressed in numerical terms, and depend upon propositions about fuel characteristics,

426 US 941 (1976).

⁵⁵ *Ethyl Corp*, 541 F2d at 68.

⁵⁶ *Ethyl Corp*, 541 F2d at 66 (Bazelon concurring) (citation omitted).

⁵⁷ 547 F2d 633, 644 (DC Cir 1976), rev'd as *Vermont Yankee Nuclear Power Corp v NRDC*, 435 US 519 (1978). Once again, I should remind the reader that I had a significant role in this case. I was General Counsel of the United States Nuclear Regulatory Commission ("NRC") at the time of the D.C. Circuit's decision and helped write the government's brief to the Supreme Court.

⁵⁸ 435 US 519 (1978).

scientific judgments about radiation and its effects, and other real-world (if somewhat esoteric) issues, often involving very substantial elements of scientific judgment. The licensing proceedings to which these rule-determined values would be supplied were on-the-record adjudications, however, and the NRC's plan had the consequence that some issues, ostensibly factual in character, would be resolved prior to those formal proceedings. This gave impetus to the argument that the NRC's rule making should have hearing-like qualities—that the participants should know what data the agency proposed to rely on, should have a chance to question the data, should have an opportunity to present their own witnesses, and so forth. The NRC in fact had gone fairly far down this road, perhaps in the hope of securing public acceptance of its work, or perhaps in response to the trends already observable in the courts. Its gestures toward hearings were not enough for Judge Bazelon, however, who appeared to conclude that the NRC had not gone far enough to create a record that would “assure[] a reasoned decision that can be held up to the scrutiny of the scientific community and the public.”⁵⁹

The intensity of the *Vermont Yankee* argument in the Supreme Court underscores, in its way, the extent to which both lawyers and judges expected to approach questions about the APA's meaning in contemporary terms. The case was far more extensively briefed than any other case here discussed.⁶⁰ Although, as might have been expected from the disputes below, argument centered on the issues of procedural innovation, virtually all of the five hundred or so pages of briefs were pitched in the present day. The parties paid little, if any, attention to the precise expectations of the enacting Congress. While the language of the statute obviously figured in the arguments made, and passing reference was given in a few of the briefs to the 1946 House and Senate reports, the parties assumed an evolving statute and concerned themselves with the proper limits of that evolution. Three foci of argument were important in this respect: the requirements of § 553 as such; the possible procedural implications of judicial review to determine whether agency action had been arbitrary, capricious, or an abuse of discretion; and the question whether NEPA (or perhaps other post-APA statutes) changed the APA's procedural requirements. Most prominent in

⁵⁹ *Ethyl Corp.*, 541 F.2d at 66, 68 (Bazelon concurring).

⁶⁰ Six parties filed merits briefs, averaging fifty-five pages in length; four significant amicus briefs were also filed, two on each side.

each line of argumentation were the Court's relevant recent decisions; missing were any suggestions that only the 1946 meaning was possible, that Congress could not effect an amendment implicitly through changes in other statutes, or that contemporary understandings of, for example, the requirements of judicial review were irrelevant.

For example, no party appeared to find it strange that arguments about the APA's requirements could be made on the basis of NEPA, a much more recent statute. And even the argument from NEPA paid most attention to the Court's decisions in such cases as *Kleppe v Sierra Club*, which had stressed NEPA's limits as a statute requiring a "hard look" at environmental issues rather than imposing particular resolutions.⁶¹ For one side, those limits permitted a court to modify what might otherwise be the view of § 553 by appreciation of what was required to "look hard" at the kinds of technological and scientific judgments NEPA analyses called for. For the other, the statute *should* not be so read. But the form of the argument appears to have been wholly unexceptional.

Argument about the APA's meaning in *Vermont Yankee* was equally contemporary. Recent Court precedent suggested that it was very unlikely to sustain a direct importation of trial-like procedures into informal rule making.⁶² The litigants thus focused their arguments on what was required to build an appropriate record in a proceeding like this one, turning as it did on controversial and difficult propositions of general fact. One side argued for judicial determination, building in part on the more demanding standards of judicial review that had grown up in the public interest representation context,⁶³ and the other for agency discretion. Interesting for our purposes is that the arguments were predominantly made at the level of policy—what the Court *ought* to say the statute meant within the possibilities the APA's rather general terms offered—rather than as more technical issues of linguistic interpretation.

A fair reading of the briefs, indeed of the Court's contemporaneous certiorari judgments, suggests that all the players accepted what had become of § 553 under the hard look, paper hearing approach supported by Judge Leventhal. Indeed, as indi-

⁶¹ 427 US 390, 410 n 21 (1976).

⁶² *United States v Allegheny-Ludlum Steel Corp*, 406 US 742, 757 (1972); *United States v Florida East Coast Railway Co.*, 410 US 224, 235 (1973).

⁶³ Notably, *Overton Park*, 401 US at 413-21.

cated, contemporary understandings of the requirements of judicial review dominated his opposition to Judge Bazelon's preference for creating agency-level procedures to facilitate scientific and public scrutiny. They underlay as well the developments regarding the interpretation of § 553's requirements of notice, opportunity to comment, and a statement of basis and purpose—developments that were not directly at issue in *Vermont Yankee*. Those seeking reversal of the D.C. Circuit in *Vermont Yankee* generally withheld any assault on these developments; in one instance, they rather explicitly sought to show the Court how those developments could be distinguished and preserved by their possible links to the language, if not the 1946 expectations, of § 553.⁶⁴ And while the Court had granted certiorari here, and left little doubt of its impatience with Chief Judge Bazelon's procedural views, it contemporaneously denied certiorari in other D.C. Circuit cases raising paper hearing issues, but in which his views about judicial function in the face of technical complexity had not prevailed.⁶⁵

Reactions to *Vermont Yankee* have not always appreciated this limiting context. Justice Rehnquist's opinion, reversing for a unanimous although reduced Court, dramatically invoked Justice Jackson's description of the APA as a "formula upon which opposing social and political forces have come to rest"⁶⁶ and emphasized that "[a]bsent constitutional constraints or extremely compelling circumstances" a court lacked power to compel the use of rule-making procedures beyond the § 553 minima.⁶⁷ In support, the Court invoked the materials of 1946 to a considerably greater degree than had the parties. Even so, one finds a quite contemporary, policy-grounded explanation of the reasons for reversal, and, perhaps more to the point, the Court invited review under the *Overton Park* standard and said nothing about the interpretations of § 553's undoubted requirements that had been emerging in its wake. That is, the Court went no further than to reject new procedural requirements that could not be tied to the lan-

⁶⁴ Brief for Respondents Baltimore Gas and Electric Co. at 25-28, *Vermont Yankee Nuclear Power Corp v NRDC*, 435 US 519 (1978) (Docket No 76-419) (supporting reversal); compare Brief for 24 Named States as Amicus Curiae, in support of Respondents NRDC at 12-13, *Vermont Yankee*, 435 US 519 (Docket No 76-419) (discussing § 706).

⁶⁵ *Ethyl Corp*, 541 F2d 1; *Home Box Office, Inc. v FCC*, 567 F2d 9 (DC Cir), cert denied 434 US 829 (1977). The usual convention is that the denial of certiorari is meaningless, but it is striking that two such prominent, high-consequence actions were left undisturbed—not even "vacated for reconsideration in light of . . ."

⁶⁶ *Vermont Yankee*, 435 US at 523, citing *Wong Yang Sung*, 339 US at 40.

⁶⁷ *Vermont Yankee*, 435 US at 543.

guage of the statute; while insisting that procedural changes be grounded in the language of § 553, it did not confine that language to its 1946 meaning. The wording of § 553 made evident to the Court that oral (hearing) procedures could not be required, but "notice" had been required, as had "opportunity to comment" and a "statement of basis and purpose."

While we see that the statute, in consequence, is becoming something other than it once was, it does not follow that Justice Jackson and his colleagues would have disapproved. *Wong Yang Sung*, recall, had identified the interpretive task as securing congressional purposes in relation to the evils to be remedied, within what "the terms of the Act warrant." Emphatic as the *Vermont Yankee* Court was about the impropriety of judicial improvisation of procedures outside the Act, it did not speak to evolving interpretation within it—indeed, given decisions like *ADAPSO* and *Overton Park*, and the presuppositions of the arguments before it, it would have been astonishing had it done so. In the end, Judge Leventhal could (and did⁶⁸) understand that although the Court had resolved his debate with Chief Judge Bazelon, it did *not* return the understanding of rule-making procedure to its 1946 form.

The literature following *Vermont Yankee*, which was quickly understood to have been a defining case, reflected as well a *contemporary* understanding of the APA. Particularly notable was the analysis in *The Supreme Court Review* of that year by Antonin Scalia, then a professor of law at the University of Chicago.⁶⁹ Given contemporary developments and political disputes, he argued, the APA, then barely thirty years old, could be expected to survive only if its repertoire were expanded to contain "not merely three but ten or fifteen basic procedural formats—an inventory large enough to provide the basis for a whole spectrum of legislative compromises without the necessity for shopping elsewhere."⁷⁰ A fortiori, freezing the procedures for which it did provide to their precise 1946 contours would heighten the insufficiency, the unreality in contemporary terms, of its dispositions.

⁶⁸ A Columbia Law School alumnus, Judge Leventhal often visited the school during the years following the Court's decision. He often remarked on the irony that the author of the Court's opinion, who once was Judge Bazelon's law clerk, had helped see to it that Leventhal prevailed in their debate.

⁶⁹ *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 S Ct Rev 345.

⁷⁰ *Id* at 408.

As a result, for Scalia and others,⁷¹ the paper hearing requirement would continue to be enforced.⁷²

III. BURDEN OF PROOF

During the two decades since *Vermont Yankee*, Antonin Scalia became a Justice of the Supreme Court, part of a conservative turn in the Court that has given fresh prominence to originalism and textualism in the interpretation of authoritative texts. The story of the third phase of the APA's history in the Court owes more to these changes than to further evolution in the context or practice of administrative law. These twenty years have witnessed no developments comparable to the growth in public interest representation and in high-consequence rule making on technically complex subjects. Instead, they have been marked by a turn away from regulation, by a heightening of *political* controls over administration (notably, presidential oversight of rule making), and by some retrenchment in judicial openness to public interest representation.⁷³ The turn to a more restrictive and distant attitude toward statutes in general became manifest in the Court's interpretation of the APA in 1994, and these striking changes in interpretive technique⁷⁴ seem capable of transforming the APA into a much more time-bound statute than it has thus far been.

*Director, Office of Workers' Compensation Programs v Greenwich Collieries, Inc.*⁷⁵ required interpretation of § 7(c) of the APA, which provides in part that "[e]xcept as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof."⁷⁶ In two cases arising out of related statutes administered by the Department of Labor's Office of Worker Compensation Programs, the Court had to say both what "burden of proof" meant in the usual case and whether the introductory proviso

⁷¹ See, for example, Richard B. Stewart, *Vermont Yankee and the Evolution of Administrative Procedure*, 91 Harv L Rev 1805, 1816-19 (1978).

⁷² The Supreme Court's formal ratification of the paper hearing development occurred five years after *Vermont Yankee*, in *Motor Vehicle Mfrs. Ass'n v State Farm Mutual Auto. Ins. Co.*, 463 US 29, 40-44 (1983).

⁷³ Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 Mich L Rev 163, 193-94 (1992).

⁷⁴ I have explored these changes more fully, placing the case about to be discussed in text in that context, in Peter L. Strauss, *On Resegregating the Worlds of Common Law and Statute*, 1994 S Ct Rev 429.

⁷⁵ 114 S Ct 2251 (1994).

⁷⁶ The Administrative Procedure Act, ch 324, 60 Stat 241 (1946), codified as amended at 5 USC § 556(d) (1994).

had been satisfied. Respecting the first question, the Court had to choose between taking the phrase to refer simply to the burden of going forward with evidence, of establishing a prima facie case, or finding in it a more precise and demanding reference to the burden of actual persuasion—that a claimant must demonstrate her claim by a preponderance of the evidence. The Court had held over a decade earlier that “burden of proof” meant simply the burden of going forward.⁷⁷ Respecting the second question (about which the lawyers’ argument in fact principally turned), decades of consistent agency practice—well established, programmatic, and in place before one program’s late inclusion in the APA—would have supported the idea of an exception to which the statute was explicitly open. Instead, the Court read the provision to impose a burden of persuasion on the proponent and to require express statutory exemption from that burden in order to preserve the uniformity of the APA. The paragraphs following fill in some of the details.

Greenwich Collieries concerned two of the statutes the Department of Labor is responsible for administering that provide benefits to persons disabled in the workplace. Since 1927, one of these statutes, the Longshoreman and Harborworkers Compensation Act (“LHWCA”),⁷⁸ has provided typical worker compensation remedies for land-based employees working on the navigable waters of the United States. Disputes under that statute were long resolved outside the APA, and its administrators developed a variety of rules and presumptions favoring recovery; one was a rule that awarded recovery if the evidence supporting and opposing recovery was in equipoise—the “true doubt” rule. Employees, that is, had the burden of going forward but *not* the burden of persuasion under this statute. In 1972, amendments to the LHWCA included a measure placing its administration in the care of the Department’s administrative law judges and Benefits Review Board, subject to the APA; those officials continued this recovery-favoring interpretation of evidentiary responsibilities, apparently without incident or overt indications of consciousness that this was unusual.

At about the same time, Congress created and placed in the same administrative hands, also under the APA, the Black Lung Benefit Act (“BLBA”);⁷⁹ this is a benefits program for miners

⁷⁷ *NLRB v Transportation Management Corp.*, 462 US 393, 404 n 7 (1983).

⁷⁸ 33 USC §§ 901 et seq (1994).

⁷⁹ 30 USC §§ 901 et seq (1994).

who suffer from "black lung disease," a common pulmonary affliction coal miners incur from breathing coal dust. Whether a miner has black lung disease, qualifying him for benefits, is an often controversial fact question; from the outset of this program, again, departmental fact-finders consistently applied the "true doubt" rule favoring employee claims.⁸⁰ As LHWCA and BLBA hearings have been "on the record" within the meaning of the APA since the seventies, they are subject to § 7(c). The question, then, for the Court was what "burden of proof" meant for the workers who sought compensation, and how it should be understood in relation to the Department's longstanding and consistent employment of the "true doubt" standard.

In both cases before the Court, it might seem to have been truly doubtful on the facts whether even "true doubt"—that is, a claim that the proof for and against liability was in equipoise—could be established. Thus, in the LHWCA case, the claiming longshoreman's heirs relied on medical testimony that a work-related neck-and-back injury, from which he seemed to have recovered, catalyzed the virulent emergence of a pre-existing, but dormant, cancer tumor that shortly killed him; the tumor, it was claimed, would not otherwise have erupted at this time. The opposing testimony more conventionally challenged the credibility of this asserted but unusual causal link. In the black lung case, only one of five experts reading a significant number of X-rays found evidence of the disease, and only one of several examining physicians (the claimant's long-time treating physician) found any resulting disability; the ALJ regarded these showings as sufficient to raise a "true doubt." That the Benefits Review Board had found the evidence to be in equipoise on facts like these doubtless armed resistance to the "true doubt" rule, and the ardor of the insurance and industry critics who sought to challenge its legitimacy.

The lawyers in the case, as one might have expected from the prior decades of experience, treated the statute and its language in largely contemporary terms. The briefs evoked the language of the statute, and, in some cases, its most immediate legislative history (committee reports, for example), but—perhaps recognizing the disfavor into which use of legislative history had by now fallen—attempted no larger exegesis of historical understandings. To the extent the choice between "burden of going forward" and "burden of persuasion" was seen as central to what

⁸⁰ *Greenwich Collieries*, 114 S Ct at 2267 (Souter dissenting).

"burden of proof" means in § 7(c), the sources brought to bear were as likely to be contemporary as historical. These included, of course, the prior holding of the Court that "burden of proof" meant the burden of going forward.⁸¹ Those facing this obstacle could claim that the matter had been resolved off-handedly, without extensive development, in a footnote; in that footnote, the Court had relied upon a court of appeals interpretation,⁸² itself somewhat impressionistic, and upon relatively desultory consultation of the legislative materials and the needs of the pending case. And it had not mentioned another opinion written two years earlier, where the question was whether the preponderance standard or "clear and convincing evidence" was the proper burden of proof in an action to impose a sanction for regulatory violation; there, § 7(c) was referred to as a statutory basis for rejecting the claimed alternative standard, although the case did not directly involve the meaning of "burden of proof."⁸³

The turn to formalist, originalist approaches to textual interpretation dominated the Supreme Court's handling of the central statutory question, with striking implications both for the APA and for lawyers' arguments. What "burden of proof" meant, said the Court, was to be determined by finding "the ordinary meaning of 'burden of proof' in 1946, the year the APA was enacted."⁸⁴ In an elaborate and lengthy argument, employing cases and commentaries from the late nineteenth century through the APA's adoption, the Court "showed" that "burden of persuasion" was the proper answer to this question.⁸⁵ This was not, however, an argument reflected in the case's development below or in the briefs. While the Court's opinion did not conform *fully* to the lawyers' arguments or to their apparent expectations about probable decision points and strategies in any of the cases we have been examining, in none was the skew as pronounced as here. Drawing perhaps on the luxury of underemployed law clerks⁸⁶

⁸¹ *Transportation Management Corp.*, 462 US at 404 n 7.

⁸² *Environmental Defense Fund, Inc. v EPA*, 548 F2d 998, 1004, 1013-15 (DC Cir 1976).

⁸³ *Steadman v SEC*, 450 US 91, 100 (1981).

⁸⁴ *Greenwich Collieries*, 114 S Ct at 2255.

⁸⁵ *Id* at 2255-57.

⁸⁶ Each Justice's four law clerks share among themselves responsibility for the ten or so opinions that fall to their Justice's lot under the Court's present caseload. In the past, when the Court had a full docket and each Justice had only two clerks, the caseload per clerk was three to four times heavier. Thus, present day clerks have a comparatively large amount of time in which to conduct research. The additional time, combined with the increasing importance to the ambitious law clerk of each opinion-writing opportunity,

and the proximity of the Library of Congress, the Court invoked (and frequently explained at some length) twenty-nine different sources in its pursuit of that 1946 "ordinary meaning"; many were legal commentators of the times, long out of print. Of the sources it invoked, only nine (mostly cases) had found mention in any brief—generally, just in an amicus brief filed by the American Insurance Association; none had been developed in the briefs as the Court developed them in its argument.⁸⁷ The majority characterized the legislative history of § 7(c) as "imprecise and only marginally relevant"⁸⁸—insufficient to carry the day against the (arguable) "ordinary meaning" interpretation it had constructed nearly half a century after the fact and in the face of invariant intervening practice by the responsible administrators.

The other question to be resolved, of course, was whether either or both uses of the "true doubt" rule could be defended under § 7(c)'s explicit exception for situations "otherwise provided by statute." The APA's flexibility stems not only from the some-time elasticity of its terms, but also from the possibility that, by legislation or permitted regulation, its terms can be varied. In the rule-making context, many would argue that we have seen an excess of elasticity, that legislative variations and the paper hearing requirements developed by the courts (particularly with the accompaniment of "hard look" review) have undercut the utility of informal rule making. But in the more placid arena of burden of proof, the statute's text explicitly invites variation, and systematically doleful consequences of using it are difficult to identify.⁸⁹

The "true doubt" test had been employed under the LHWCA for four decades or so *before* that statute was brought under the

contribute to the phenomenon described in the text.

⁸⁷ Justice Souter's dissent seemed less the product of independent research. Of the fifteen sources he cited on the question whether the "ordinary meaning" of "burden of proof" in 1946 meant "burden of persuasion," only four were original to his efforts; the remainder appear in either the briefs or in the majority opinion (though often for other purposes). And one can imagine even that effort, though unaided by parties made aware what the lines of battle had become, as essentially defensive in character.

⁸⁸ *Greenwich Collieries*, 114 S Ct at 2259.

⁸⁹ One such consequence might be that the "true doubt" approach results in excessive findings of employer liability. Here it may be useful to recall one aspect of the Court's reasoning in *Wong Yang Sung*, that it was appropriate to place the burden of seeking legislative revision on those who have the most "ready and persuasive access to the legislative ear." See text accompanying note 29. The burdens of securing legislative revision seem much more likely to be carried by insurer than worker interests. In a context in which one approach to the issue has been consistently taken throughout a program's life, the failure of Congress to revise that approach gives some basis for continuing it.

umbrella of the APA in 1972;⁹⁰ the LHWCA provided that those deciding claims “shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure,”⁹¹ and this provision remained in effect after the 1972 amendments. Nothing in the political circumstances of those amendments suggested Congress intended to disapprove of using the “true doubt” standard, and those who had been entrusted with the administration of the statute showed no sign of awareness of any change; they continued in their accustomed paths—behavior long taken as a persuasive signal of statutory meaning.⁹²

The Black Lung Benefit Act arguably provided a similar statutory exception. Black lung disease benefits were first provided for in 1969; the program was modeled on the LHWCA, and used the “true doubt” approach from the start. Statutory language in the Act akin to that in the LHWCA lent credence to the claim to fit within the exception of § 7(c). Here, the government argued, Congress was well informed that the Department knew it was administering a beneficiary statute and would resolve evidentiary conflicts in claimants’ favor.⁹³ Furthermore, this Act explicitly permits the Secretary to establish exceptions to the APA’s application by regulation;⁹⁴ a departmental regulation asserted the understanding that “Congress intended that claimants be given the benefit of all reasonable doubt as to the existence of . . . disability.”⁹⁵ In accord with that understanding, the Secretary directed construction and application of the Department’s procedural rules “in that spirit,” while requiring that “the record considered as a whole, in light of any applicable presumptions, provides a reasonable basis for determining . . . eligibility”⁹⁶ The Department’s claim, then, was that even if “burden of proof” ordinarily meant burden of persuasion, here it had established an exception to the APA by regulation—a second form of exceptionalism explicitly permitted by statute. As the government reminded the Court in its brief,⁹⁷ the Court has ordinarily

⁹⁰ *Fidelity & Casualty Co. v Burris*, 59 F2d 1042, 1044 (DC Cir 1932).

⁹¹ 33 USC § 923(a) (1994).

⁹² See, for example, *Norwegian Nitrogen Products Co. v United States*, 288 US 294, 303 (1933).

⁹³ Brief for the Petitioner at 28, *Director, Office of Workers’ Compensation Programs v Greenwich Collieries, Inc.*, 114 S Ct 2251 (1994) (Docket No 93-744), citing S Rep No 743, 92d Cong, 2d Sess 11 (1972), and S Rep No 209, 95th Cong, 1st Sess 13 (1977).

⁹⁴ 30 USC § 932(a) (1994).

⁹⁵ 20 CFR § 718.3(c).

⁹⁶ *Id.*

⁹⁷ Brief for Petitioner at 22, *Greenwich Collieries*, (cited in note 93).

accorded “controlling weight” to an administrator’s interpretation of its own rules, if that interpretation is not plainly erroneous or inconsistent with regulatory language.⁹⁸

The invariant and settled practice of the administrators of the LHWCA and the BLBA meant little to the *Greenwich Collieries* Court. The Court stated instead that the original meaning of the APA governed and that it should not “lightly presume exemptions to the APA.”⁹⁹ To fit § 7(c)’s exemption, a statute must be explicit. The BLBA regulations, in turn, were too “ambiguous” to “overcome the presumption” of APA application;¹⁰⁰ “we do not think this regulation can fairly be read as authorizing the true doubt rule and rejecting the APA’s burden of proof provision.”¹⁰¹ In the end, not only did the Court refuse to read flexibility into § 7(c)’s burden of proof provision, but it also refused to take subsequent legislative events as signalling an implicit modification of the APA’s terms.

It should be apparent how sharp a contrast this presents to the practice of the 1970s—and, for that matter, how differently the Court approaches the interpretation of the APA than did the *Wong Yang Sung* Court. The Court’s proposition that the 1946 “ordinary meaning” governed its interpretation of the APA was remarkable—an interpretation not presaged in the cases and, if seriously intended, one promising havoc for APA interpretation more generally. To take only the examples thus far developed, what is to happen to generalized public interest (including competitor) standing? To the paper hearing interpretations of § 553? To “arbitrary and capricious” review as understood since *Overton Park*? None of these developments seems likely to survive an honest test of 1946 “ordinary meaning,”¹⁰² although all are firm-

⁹⁸ *Stinson v United States*, 113 S Ct 1913, 1919 (1993). My colleague John Manning persuasively argues in a forthcoming article, *Constitutional Structure and Agency Interpretation of Agency Rules*, 96 Colum L Rev 612 (1996), that for separation of powers reasons deference would be more appropriate than “controlling weight.” Still, such readings would be entitled to significant respect—one would think particularly so where Congress had repeatedly signalled its willingness to entertain exceptions to its provisions.

⁹⁹ *Greenwich Collieries*, 114 S Ct at 2254.

¹⁰⁰ *Id* at 2255.

¹⁰¹ *Id* at 2254 (emphasis added). The Court neither cited its usual deference practice nor explained why its reading rather than the Secretary’s was the important one in this case.

¹⁰² Questions can also be raised how effectively lawyers at a distance from the Library of Congress, or its close equivalent, will be able to determine what “ordinary meaning” might have been for a contested phrase. While one understands the problems with the materials of legislative history, those materials seem likely to be much more widely available to lawyers than the out-of-print commentators on legal issues, on whose judg-

ly embedded in contemporary understandings and practice and can, without too much stretching, be accommodated to the APA's text.

If the Court seriously intended to return the APA to its 1946 meanings, we will have been left with a far less flexible instrument of government than we had previously thought we possessed. Recall that in *Wong Yang Sung*, Justice Jackson characterized the Court's role as being "so far as the terms of the Act warrant, to give effect to its remedial purposes where the evils it was aimed at appear."¹⁰³ Effecting "remedial purposes" within a range that "terms . . . warrant," appropriately to the interpretive conventions of the time, reflects a far more fluid approach to meaning over the years than the effort to find "ordinary meaning . . . in 1946."¹⁰⁴ And the intervening cases, as we have seen, unselfconsciously assumed an evolving statute—one whose evolution, to be sure, was limited by the possibilities of its text,¹⁰⁵ but that nonetheless accommodated the shifting currents of administrative law development across the years. The APA's endurance for fifty years as a central reference point for the manifold activities of the federal government, like the Constitution's endurance for more than two hundred, can be understood only as a product of that flexibility. An interpretive theory that makes of statutes such static events undercuts the very project of having an APA.

CONCLUSION

Recall another aspect of Justice Jackson's peroration in *Wong Yang Sung*,¹⁰⁶ his reminder (repeated in *Vermont Yankee*)¹⁰⁷ that:

The Act . . . represents a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest.

ment the Court's opinions principally drew. In this respect, denying the force of contemporary understandings not only diminishes statutory flexibility; it also makes the important secondary sources useful for understanding law notably more obscure—and in this way makes law itself less accessible.

¹⁰³ *Wong Yang Sung*, 339 US at 41.

¹⁰⁴ *Greenwich Collieries*, 114 S Ct at 2255.

¹⁰⁵ See, for example, *Vermont Yankee*, 435 US at 523-25.

¹⁰⁶ See text accompanying note 28.

¹⁰⁷ *Vermont Yankee*, 435 US at 523, quoting *Wong Yang Sung*, 339 US at 40.

One way in which we might understand the *Greenwich Collieries* majority and its insistence both on 1946 understandings and on requiring clear signals before departing from them, would be that it embodies Judge Frank Easterbrook's view of statutes as "deals" and the judge's role as limited to enforcement of their precise terms.¹⁰⁸ That is, the Court appears to be saying that the APA's social and political compromise can never be extended beyond its time-bound terms of reference.

For Justice Jackson, the fact that the Act may have "contain[ed] many compromises and generalities and, no doubt, some ambiguities"¹⁰⁹ was an invitation to an activist, constructive judicial role. "[I]t would be a disservice to our form of government and to the administrative process itself if the courts should fail, so far as the terms of the Act warrant, to give effect to its remedial purposes where the evils it was aimed at appear."¹¹⁰ For the *Greenwich Collieries* Court, however, if the ground has shifted under our feet, the proper judicial response is not to reinterpret the text to suit that change, "so far as the terms of the Act warrant"; nor should it accommodate the Act to intervening statutory or other developments that appear to have become stable elements of the contemporary legal order. Rather, by denying the old statute flexibility, the Court should encourage Congress to adopt new legislation that captures the new social and political realities. This end appears to be so important that existing precedent may be lightly disregarded and half a century's development of understanding on a wide variety of matters casually undercut.

We are of course seeing similar views unfold on constitutional issues, where the stakes are two hundred years of evolution, not a mere fifty. One might think that in the realm of administrative regulation, where Congress can in fact correct any judicial "mistake," the matter is less important. Yet, in my judgment, it is not; the Court's current turning from a stance of cooperation with the work of Congress to one of distant detachment is, as I have written elsewhere (at some length),¹¹¹ itself profoundly destabilizing to the legal order. Legislatures act in response to apparent problems under statutes as they are being implemented today. If statutes' terms can be made to dance to the present music, legislatures need not be concerned—will not, indeed,

¹⁰⁸ Frank H. Easterbrook, *Statutes' Domains*, 50 U Chi L Rev 533, 538-39 (1983).

¹⁰⁹ *Wong Yang Sung*, 339 US at 40-41.

¹¹⁰ *Id* at 41.

¹¹¹ See generally Strauss, 1994 S Ct Rev 429 (cited in note 74).

know—whether statutes are being interpreted in light of their “ordinary meaning” as of the years of their enactment. The Court’s new and static approach denies the possibilities of accepted accommodation and of adjustment that are such central elements of the common law. And it requires Congress, hard enough pressed to keep up with the problems of the present day, constantly to revisit its work; the courts are no longer its reliable partners in the continuing work of accommodating the law to changing realities.

Of course statutes age past the point of ready accommodation. That problem has often been noted,¹¹² and one can see too that required periodic review of agency regulations is a common element in today’s calls for regulatory reform. In expressing the view that the Court’s new approach is deeply troubling, I do not mean to suggest that the APA requires no alterations as it approaches its golden jubilee. The reforms under discussion in Congress, particularly the proposals for peer review of judgments about regulatory priorities, could be thought to build upon Chief Judge Bazelon’s belief that an informed scientific community (and public) would be more capable of controlling administrative foolishness than the technically illiterate judiciary. If the motives of those seeking reform may be mixed, that is nothing new; the deliberative and political processes surrounding the proposals for reform may lead us to another noteworthy formula on which opposing forces can “come to rest.” And if we could once again secure the careful study and clean procedural focus¹¹³ that marked the APA, we might be served very well indeed by that effort. Nonetheless, the signal sent by *Greenwich Collieries* is a profoundly disturbing one, and for reasons larger than its particular threat of a sudden freezing in the APA’s joints.

¹¹² See, for example, Guido Calabresi, *A Common Law for the Age of Statutes* (Harvard 1982).

¹¹³ Like the Constitution, the APA is a laconic enactment, generally lacking in special interest provisions and embodying genuinely procedural judgments. That statement is harder to make about the extended provisions on the rule-making process and control of that process that emerged from last spring’s legislative committees.