

ARTICLES

CHEVRON AND HEARING RIGHTS: AN UNINTENDED COMBINATION

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INTRODUCTION

It is striking that so many smart people . . . could be so wrong for so long about the requirements of the APA.¹

—Judge Kermit V. Lipez

So wrote Judge Lipez in frustration concerning the Nuclear Regulatory Commission’s (NRC’s) dogged argument in *Citizens Awareness Network, Inc. v. United States* that the so-called formal-adjudication provisions of the Administrative Procedure Act (APA) were not triggered by the hearing requirement of § 189(a) of the Atomic Energy Act (AEA). Judge Lipez’s frustration arose from the fact that the NRC’s argument on this point was entirely unnecessary to the court’s decision. Rather, the First Circuit ultimately held that the agency’s hearing procedures fully complied with the very requirements it had sought to avoid. As Judge Lipez explained, the NRC’s compliance argument “was largely an afterthought of the NRC in the effort to justify its new rules.”² Judge Lipez ascribed the NRC’s conceptual myopia to “the power of analogy and the endurance of unexamined legal theories.”³

The same may be said of panels of the D.C. Circuit and the First Circuit, which accepted without thorough analysis the proposition that *Chevron* deference should apply to the question of whether a statutory hearing requirement triggers § 554(a) of the APA.⁴ Section 554(a) provides that

1. *Citizens Awareness Network, Inc. v. United States*, 391 F.3d 338, 355 (1st Cir. 2004) (Lipez, J., concurring).

2. *Id.*

3. *Id.*

4. See *infra* text accompanying notes 85–100 (discussing *Chemical Waste Management, Inc. v. EPA*, 873 F.2d 1477 (D.C. Cir. 1989), and *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12 (1st Cir. 2006)). Ironically, Judge Lipez was on the *Dominion Energy* panel, which overcame the problem of what to do about the First Circuit’s

the formal-adjudication provisions of the APA apply “in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing.”⁵ If a statutory hearing provision triggers § 554(a), the APA requires that the hearing be presided over by an impartial, independent administrative law judge (ALJ).⁶ For practical purposes, ALJs are independent of the agencies whose cases they hear, thereby enhancing both the real and perceived legitimacy of the agencies’ decisions.⁷ When § 554(a) is triggered, the APA also prohibits both ex parte contacts and combination of the functions of investigation, prosecution, and decision.⁸ Thus, granting judicial deference to an agency’s application of § 554(a) to a particular statutory hearing requirement essentially permits the agency to decide whether it should be governed by these provisions. Ironically, *Chevron* deference protects the legitimacy of policy decisions by assigning them to the political branches rather than the courts,⁹ but *Chevron* deference undermines the legitimacy of agency hearing decisions when it allows the agency to choose the extent of the procedural protections provided to the parties.

own earlier conflicting outcome in *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872 (1st Cir. 1978), but failed to examine the far more important question of whether an agency should be entitled to *Chevron* deference with respect to the question of whether the agency is governed by the various requirements of §§ 554, 556, and 557 of the APA.

5. 5 U.S.C. § 554(a) (2006).

6. *Id.* § 556(b)(3). This provision also allows the agency head or one or more members of a multimember agency to preside, but this is rarely done. *Id.* § 556(b)(1)–(2). This provision also permits the use of “boards or other employees specifically provided for by or designated under statute.” *Id.* § 556(b). The NRC hearings at issue in *Citizens Awareness Network* are presided over by an Atomic Safety and Licensing Board provided for by the Atomic Energy Act, so this sort of procedural protection was not at issue in that decision.

Section 3105 and related provisions of the APA provide that administrative law judges (ALJs) “may not perform duties inconsistent with their duties and responsibilities as administrative law judges,” that the compensation and advancement of ALJs are determined by the Office of Personnel Management, *id.* § 3105, and that ALJs may be dismissed or otherwise disciplined only “for good cause established and determined by the Merit Systems Protection Board,” *id.* § 7521.

7. *See, e.g.*, *Butz v. Economou*, 438 U.S. 478, 514 (1978) (describing the provisions “designed to guarantee the independence of hearing examiners”). James Moliterno insists that ALJs are impartial as a result of the APA’s provisions but that they are not independent because they are bound by agency policies. James E. Moliterno, *The Administrative Judiciary’s Independence Myth*, 41 WAKE FOREST L. REV. 1191, 1192 (2006). In administrative law parlance, however, they are generally considered to be independent, particularly because their salaries and positions are protected and because the APA requires separation of the functions of investigation and prosecution from the ALJ’s function of decision. Moliterno is correct that the agency controls policy, but the ALJ is both independent and impartial as to factual decisions.

8. 5 U.S.C. §§ 554(d), 557(d). Section 557(b) also enhances the accountability of agency decisionmaking by requiring, with limited exceptions, that the ALJ prepare either a recommended or initial decision. *Id.* § 557(b).

9. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984).

Although §§ 554, 556, and 557 of the APA are often said to require “trial-like” proceedings,¹⁰ this is the very trap of analogy to which Judge Lipez referred. As *Citizens Awareness Network* held, for example, the APA does not require agencies to provide for discovery, and it permits agencies to require a showing of necessity as a condition of engaging in cross-examination.¹¹ Only by breaking free of the longstanding practice of analogizing APA hearings to judicial trials could the *Citizens Awareness Network* court independently examine the APA’s procedural requirements and see that the agency could either dispense with or tightly control procedures so central to courtroom litigation.

Unfortunately, the D.C. Circuit and the First Circuit in *Chemical Waste Management, Inc. v. EPA*¹² and *Dominion Energy Brayton Point, LLC v. Johnson*,¹³ respectively, fell into the trap of inadequately examined analogy when they held that *Chevron* deference applies to an agency’s determination that its statutory hearing provision does not trigger the requirements of §§ 554, 556, and 557 of the APA. As to mechanical matters such as discovery and cross-examination, which were at issue in *Citizens Awareness Network*, this proposition seems insignificant. Indeed, it is consistent with the *Vermont Yankee* principle that an agency is the best judge of the procedures needed to decide issues within its purview.¹⁴ But those matters pale by comparison to the legitimizing provisions of APA formal adjudication—the assurance of an impartial decisionmaker, the prohibition on undue influence and combination of functions, and the prohibition on ex parte communications.¹⁵ The D.C. Circuit and the First Circuit have said, in effect, that they must defer to an agency’s decision not to provide an impartial decisionmaker or to hear one side without hearing the other. Under this principle, reviewing courts may consider only whether the agency’s interpretation of its statutory hearing requirement is

10. See, e.g., 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 408 (1958) (expressing a preference for the terms “trial” and “trial type of hearing”).

11. *Citizens Awareness Network, Inc. v. United States*, 391 F.3d 338, 350–51 (1st Cir. 2004).

12. 873 F.2d 1477 (D.C. Cir. 1989).

13. 443 F.3d 12 (1st Cir. 2006).

14. See *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 543 (1978) (“Absent constitutional constraints or extremely compelling circumstances the ‘administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.’” (quoting *FCC v. Schreiber*, 381 U.S. 279, 290 (1965))). In *Vermont Yankee*, the D.C. Circuit had imposed procedural requirements beyond those required by the APA for informal rulemaking. Here, by contrast, the question is how to determine what procedures are required by the APA in combination with a statutory hearing provision. In other words, the issue here is how to engage in the statutory interpretation at issue, while in *Vermont Yankee* the question was whether a court could impose procedures that clearly went beyond the statute.

15. 5 U.S.C. §§ 554(d), 556(b), 557(d) (2006).

somehow reasonable, not whether it is correct. When seen in this light, these decisions are extraordinary. If the issues had been articulated in this way, it is hard to imagine that these courts would have reached the same conclusions.

Without adequate analysis, the D.C. Circuit and the First Circuit considered the ambiguous procedural provisions of the AEA to be comparable to the ambiguous substantive provisions of the multitude of other statutes to which *Chevron* deference has been applied.¹⁶ They were wrong. Fortunately, scholars have begun to make the arguments needed to rectify this error. In particular, Professor Melissa M. Berry argues that *Chevron* deference should not apply to these decisions.¹⁷ As she explains, *Chevron* deference is premised primarily upon “implied delegation” and secondarily upon “concerns about institutional competency and separation of powers and . . . on the greater accountability and policymaking expertise of agencies over courts.”¹⁸ She then applies these principles to the context of the APA formal-adjudication trigger and finds them wanting. She finds that an implied delegation is unlikely given the procedural nature of this decision, the lack of any superior agency competence in making such a procedural decision, the obvious agency self-interest in the outcome, and concerns with fundamental fairness.¹⁹ Rejecting even *Skidmore* deference, she concludes that the interpretive question of whether a statutory hearing provision triggers § 554(a) of the APA should be subject to *de novo* review in the context of each case, with no presumption one way or the other.²⁰

This Article builds on the firm foundation provided by Professor Berry. While she argues at a relatively conceptual level that Congress would not have intended to delegate this decision in light of concerns such as agency self-interest or fundamental fairness, this Article examines in detail both the legislative history and the historical context of the APA. In light of this history, it is inconceivable that the 79th Congress would have intended to delegate to agencies the authority to determine whether they needed to use the independent decisionmakers we now know as *administrative law judges*.²¹ But that does not fully answer the question at hand because all

16. See *infra* text accompanying notes 190–208.

17. Melissa M. Berry, *Beyond Chevron's Domain: Agency Interpretations of Statutory Procedural Provisions*, 30 SEATTLE U. L. REV. 541 (2007); see also John F. Stanley, Note, *The “Magic Words” of § 554: A New Test for Formal Adjudication Under the Administrative Procedure Act*, 56 HASTINGS L.J. 1067 (2005) (arguing that the application of § 554(a) to a particular statutory hearing provision should be subject only to *Skidmore* deference).

18. Berry, *supra* note 17, at 574–75.

19. *Id.* at 584–94.

20. *Id.* at 595–601.

21. Nor is it conceivable that Congress would have intended such deference when it later amended the APA. See *infra* text accompanying notes 331–59.

such determinations involve the interplay between the APA and the substantive statute imposing the particular hearing requirement at issue. It is possible that the Congress enacting the substantive statute could have intended to delegate the procedural decision to the agency. Professor Berry cogently argues that this is highly unlikely as a general proposition. I suggest that the APA plays a hitherto unrecognized role with respect to the degree of deference, if any, to apply to this procedural decision.

To date, the discussion has focused on the meaning of the on-the-record requirement in § 554(a) and whether a particular statutory hearing provision triggers that requirement. There have been, in essence, two distinct interpretive questions, the meaning of the APA on the one hand, and the meaning of the other statute's hearing provision on the other. While it is well established that interpretations of the APA are not subject to *Chevron* deference,²² the D.C. Circuit and the First Circuit treated the *Chevron* question as if it were merely a matter of interpreting the ambiguous statutory hearing provision. This is incorrect. The statutory hearing requirement must be interpreted in the context created by the APA. The APA should be understood to create a presumption that courts are to determine de novo whether a particular hearing provision triggers the procedural rights of §§ 554, 556, and 557. Unless Congress clearly indicates the contrary, agencies are not entitled to deference, *Chevron* or otherwise, with respect to this question.

Part I of this Article briefly provides the background for this discussion. Part II addresses a question suggested by *Citizens Awareness Network* but not adequately addressed in the literature—what is at stake in deciding whether an agency must follow the APA's provisions for formal adjudication. It argues that mechanical aspects of hearing procedures, such as discovery and cross-examination, are relatively unimportant, largely because the APA permits agencies to impose tight controls on these proceedings and does not require them to be operated as minitrials. More importantly, Part II asserts that the most important provisions are the ones designed to assure the fundamental fairness and legitimacy of agency adjudicatory decisions—the requirement of an ALJ and the prohibitions on combinations of functions and ex parte contacts. Part III argues that the courts should not defer to agency interpretations of whether adjudicatory hearing requirements implicate the formal procedures of the APA. After demonstrating that *Chevron* does not support deference to agency procedural decisions, this Part shows that the Supreme Court has decided that *Chevron* deference is a question of implied delegation that is to be

22. E.g., Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 896–97 (2001).

determined in light of the likely intent of Congress. It then addresses the interplay of the APA and statutory hearing requirements and examines at length the legislative history and historical context of the APA, both of which demonstrate that Congress would not have intended courts to defer to agencies with respect to this question. It concludes by arguing that the APA should be seen as creating a presumption that courts are not to defer to agencies on this procedural question unless Congress clearly indicates the contrary.

I. A BRIEF HISTORY OF THE DISPUTE OVER THE FORMAL-ADJUDICATION TRIGGER OF APA § 554(A)

The APA is something of a constitution for the administrative state.²³ Intended to impose a degree of uniformity upon the chaotic variety of agency procedures,²⁴ it explicitly recognized the now-familiar distinction between adjudication and rulemaking, and it created the procedural frameworks within which those types of decisions are to be made.²⁵ As to adjudication, Congress provided in §§ 554, 556, and 557 for procedures that have come to be known as trial-like formal adjudications.²⁶ These procedures include the right to be heard by the agency head or an impartial ALJ,²⁷ a prohibition on the combination of prosecutorial and decisional functions,²⁸ the right to notice and the opportunity to present “oral or documentary evidence,” the right to “conduct such cross-examination as may be required for a full and true disclosure of the facts,”²⁹ prohibitions on *ex parte* communications,³⁰ and a right to have a recommended or initial decision prepared by the person who presided at the hearing, typically an independent ALJ.³¹ It is noteworthy that the original versions of §§ 554, 556, and 557—and of § 3105 providing for the appointment of hearing examiners (now

23. See Christopher M. Pietruszkiewicz, *Discarded Deference: Judicial Independence in Informal Agency Guidance*, 74 TENN. L. REV. 1, 27 n.183 (2006) (“Like a constitution, the APA establishes a set of fundamental ground rules . . . according to which many particularized governmental decisions are made.” (quoting Steven P. Croley, *The Administrative Procedure Act and Regulatory Reform: A Reconciliation*, 10 ADMIN. L.J. AM. U. 35, 35 (1996))).

24. See *Wong Yang Sung v. McGrath*, 339 U.S. 33, 41 (1950) (“One purpose was to introduce greater uniformity of procedure and standardization of administrative practice among the diverse agencies whose customs had departed widely from each other.”).

25. 5 U.S.C. §§ 551(4)–(7), 553, 554, 556, 557 (2006).

26. As originally enacted, these provisions were §§ 5, 7, and 8. The APA was recodified in its current form in 1966. Pub. L. No. 89-554, 80 Stat. 384 (1966). This Article refers to these and other provisions by their modern designations.

27. 5 U.S.C. § 556(b).

28. *Id.* § 554(d).

29. *Id.* § 556(d).

30. *Id.* §§ 554(d), 557(d).

31. *Id.* § 557(b).

ALJs)³²—constituted approximately 38% of the original text of the APA.³³

Despite the apparent importance of these provisions, the APA did not impose them on all agency adjudications. Rather, § 554(a) provides that these various procedures must be followed “in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing.”³⁴ Thus, the availability of these important procedural rights ultimately depends upon the interpretation of the hearing requirement of a distinct federal statute.

The APA establishes a similar procedural framework for rulemaking, but with a crucial difference. Section 553 requires, with various exceptions, that agencies follow a notice-and-comment process in order to promulgate rules with the force of law. Unlike § 554’s treatment of adjudications, however, this requirement applies across the board. The APA then adds a sentence under which a rulemaking proceeding must comply with §§ 556 and 557 of the APA if a particular statute requires the rule “to be made on the record after opportunity for an agency hearing.”³⁵ Thus, the APA establishes definite procedural rights with respect to the newly recognized rulemaking procedure, but it leaves adjudicatory rights (and the prospect of formal rulemaking) at the mercy of the statute imposing the particular hearing requirement. At the time, formal adjudication was the dominant paradigm for agency decisionmaking.³⁶

In 1950, the Supreme Court addressed the reach of § 554(a) in *Wong Yang Sung v. McGrath*,³⁷ which concerned the question of whether an alien subject to deportation was entitled to an APA formal adjudication. The Department of Justice regulations provided for a hearing before a “presiding inspector,” but the immigration statute did not provide for a hearing at all.³⁸ Despite the absence of a statutory hearing requirement, the Court held that the situation triggered the APA’s provisions for formal adjudication. The Court had earlier held that due process requires immigration legislation to be construed to provide for hearings in cases of

32. Congress amended the APA in 1978 to change the language from “hearing examiners” to “administrative law judges.” Pub. L. No. 95-251, 92 Stat. 183 (1978) (amending scattered sections of Title 5 of the U.S.C.).

33. This figure is derived from the text of the APA as it appears in Appendix A of the *Attorney General’s Manual*. U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT, app. A, at 111–22 (1947), *reprinted in* 15 ICC PRAC. J. 5 (1948). The statute has a total of 423 lines, of which 160 are devoted to formal adjudication.

34. 5 U.S.C. § 554(a). This requirement is subject to various exceptions, including “proceedings in which decisions rest solely on inspections, tests, or elections.” *Id.*

35. *Id.* § 553(c).

36. *See infra* text accompanying notes 252–330.

37. 339 U.S. 33 (1950).

38. *Id.* at 45.

deportation.³⁹ To this ruling, the Court added the proposition that the language “required by statute” of the APA “exempts from that section’s application only those hearings which administrative agencies may hold by regulation, rule, custom, or special dispensation; not those held by compulsion.”⁴⁰ Since deportation hearings were compelled by virtue of the Court’s earlier construction of immigration statutes, they were subject to the formal-adjudication provisions of the APA.

Wong Yang Sung has several implications with respect to the interpretation of the on-the-record threshold requirement of § 554(a).⁴¹ The issue here, however, is not how to interpret § 554(a). Rather, the issue is whether *Chevron* deference should be applied to agency interpretations related to that provision. As discussed below,⁴² the answer to this question depends upon whether Congress would have intended, implicitly or otherwise, to delegate the primary decision on this issue to the agencies. As to this point, the Court’s opinion strongly suggests otherwise. The Court’s recital of the APA’s legislative history demonstrates that “[c]oncern over administrative impartiality”⁴³ was shared by all parties to the debate. If the congressional concern was administrative impartiality, it is implausible that Congress would have delegated to the agencies themselves the question of whether they are required to have impartial ALJs preside over their internal hearings.⁴⁴

The Court’s broad reach in *Wong Yang Sung*—importing constitutionally required hearings into the APA formal-adjudication context even if not required by statute—appears to have diverted attention from the narrower question of what is meant by the on-the-record limitation of § 554(a). In 1975, an excellent student note examined the Court’s commingling of procedural due process jurisprudence with construction of the APA and argued that *Wong Yang Sung* should be rejected or

39. *Id.* at 49–50.

40. *Id.* at 50.

41. For example, the Court noted that one purpose of the APA was to introduce greater uniformity of procedure and standardization of administrative practice among the diverse agencies whose customs had departed widely from each other. . . . More fundamental, however, was the purpose to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge.

Id. at 41. Referring to the statutory goals, the Court emphasized the need, “so far as the terms of the Act warrant, to give effect to its remedial purposes where the evils it was aimed at appear.” *Id.* These statements strongly suggest that the on-the-record requirement is to be construed liberally in order to increase uniformity and to assure, as far as statutes permit, that adjudicatory decisions are made by impartial hearing officers who are not subject to inappropriate influences.

42. See *infra* text accompanying notes 211–250.

43. *Wong Yang Sung*, 339 U.S. at 37.

44. See also *infra* text accompanying notes 254–332.

significantly narrowed so that the focus is on what Congress intended with a particular hearing requirement.⁴⁵ Three decades later, Professor William Funk argued that *Wong Yang Sung* should be revived in order to recapture its “promise of establishing uniformity and predictability in the procedure through which adjudication would take place under the APA.”⁴⁶ He argued that, contrary to the purposes of the APA, federal administrative adjudication had become “either indeterminate or subject to the whim of the agency providing the adjudication.”⁴⁷

Several commentators have described how we came to this unsatisfactory situation, each offering a particular remedy.⁴⁸ The following discussion briefly describes the six decisions that have brought us where we are today. The first two are from the Supreme Court and serve primarily to frame the discussion of adjudicatory procedures as quite distinct from the discussion of rulemaking procedures. The other four decisions reveal that the courts of appeals ultimately punted to the agencies by hiding behind the doctrine of *Chevron* deference.

A. Allegheny-Ludlum and Florida East Coast Railway—*Setting the Stage*

Both *United States v. Allegheny-Ludlum Steel Corp.*⁴⁹ and *United States v. Florida East Coast Railway Co.*⁵⁰ involved challenges to rules issued by the Interstate Commerce Commission (ICC or Commission) to alleviate chronic freight-car shortages on the nation’s railroads. In both cases, the question was whether a statutory authorization to issue rules “after [a] hearing” triggered the last sentence of § 553(c) of the APA, which imposes the requirements of §§ 556 and 557 when “rules are required by statute to be made on the record

45. Robert E. Zahler, Note, *The Requirement of Formal Adjudication Under Section 5 of the Administrative Procedure Act*, 12 HARV. J. ON LEGIS. 194, 243 (1975).

46. William Funk, *The Rise and Purported Demise of Wong Yang Sung*, 58 ADMIN. L. REV. 881, 881 (2006).

47. *Id.*

48. See, e.g., Berry, *supra* note 17, at 550–51 (opposing deference to an agency’s application of § 554(a) to a statutory hearing provision); Cooley R. Howarth, Jr., *Federal Licensing and the APA: When Must Formal Adjudicative Procedures Be Used?*, 37 ADMIN. L. REV. 317, 318, 338–43 (1985) [hereinafter Howarth, *Federal Licensing and the APA*] (arguing for broader application of formal adjudicatory procedures); Cooley R. Howarth, Jr., *Restoring the Applicability of the APA’s Adjudicatory Procedures*, 56 ADMIN. L. REV. 1043, 1044 (2004) [hereinafter Howarth, *Restoring the Applicability*] (same); Gary J. Edles, *An APA-Default Presumption for Administrative Hearings: Some Thoughts on “Ossifying” the Adjudication Process*, 55 ADMIN. L. REV. 787, 821 (2003) (opposing a presumption of formal adjudication); Stanley, *supra* note 17, at 1070 (suggesting *Skidmore* deference to an agency’s application of § 554(a) to a statutory hearing provision).

49. 406 U.S. 742 (1972).

50. 410 U.S. 224 (1973).

after opportunity for agency hearing.”⁵¹ This is essentially the same language as the triggering provision of § 554(a) with respect to adjudications.

The Court in *Allegheny-Ludlum* rejected the argument that the “precise words ‘on the record’” must be used to require formal rulemaking, but it held that the mere language “after hearing” was insufficient to impose formal APA procedures upon proceedings for the purpose of issuing rules.⁵² The Court in *Florida East Coast Railway* followed suit. It also rejected the argument that the language “after hearing” in the Interstate Commerce Act (ICA) required a fully adjudicatory process by its own terms.⁵³

Although some have argued that §§ 553(c) and 554(a) should be read *in pari materia*,⁵⁴ and some courts have essentially so held,⁵⁵ close examination of both Supreme Court opinions establishes that the Court quite consciously drew a distinction between rulemaking and adjudication in holding that formal proceedings were not required in those cases. First, the Court in *Allegheny-Ludlum* emphasized that “the proceedings under review were an exercise of legislative rulemaking power rather than adjudicatory hearings” of the sort at issue in *Wong Yang Sung*.⁵⁶ The Court quoted from Professor Kenneth Culp Davis to the effect that “[a] good deal of significance lies in the fact that some statutes do expressly require determinations on the record.”⁵⁷ When read in isolation, this sentence suggests that the lack of an explicit record requirement would also be significant with respect to a statutory adjudicatory hearing. But when the statement is read in the context of Professor Davis’s treatise and in light of the rest of the *Allegheny-Ludlum* opinion, it bears no such meaning. In the treatise, Professor Davis wrote that the language of § 554(a)⁵⁸ “has been especially troublesome,” first because of confusion about when a hearing is considered to be “required by statute,” second because “[m]any statutes explicitly require hearings, but very few explicitly require determinations on the record.”⁵⁹ He then went on to explain how hearings had been held to require a record in various circumstances, including *Wong Yang Sung*. When his statement is viewed in his own context, he is simply saying that an explicit record requirement is significant because it resolves this difficult question. He is not saying that the lack of an explicit record

51. 5 U.S.C. § 553(c) (2006).

52. 406 U.S. at 757.

53. 410 U.S. at 238–46.

54. Zahler, *supra* note 45, at 242 & n.220.

55. See Funk, *supra* note 46, at 888–89 n.64 (citing decisions to that effect).

56. 406 U.S. at 757.

57. *Id.*; 2 DAVIS, *supra* note 10, at 225.

58. Writing in the late 1950s, Professor Davis referred to the provision as § 5. See *supra* note 26 (explaining the recodification).

59. 2 DAVIS, *supra* note 10, at 223, 225 (internal quotation marks omitted).

requirement is of great significance. Moreover, the Court followed Professor Davis's statement with citations to two decisions in which the rulemaking nature of the agency's decision had been determinative in establishing that an on-the-record hearing was not required.⁶⁰

When the Court reached *Florida East Coast Railway* a year after *Allegheny-Ludlum*, the Court seemed to have realized that it needed to explain further the significance of the distinction between adjudication and rulemaking. Strictly speaking, the issue in *Florida East Coast Railway* was the meaning of the term *after hearing* in the ICA as applied to a rulemaking decision. Despite the fact that the hearing provision had been enacted nearly thirty years before the APA, the Court's analysis placed great emphasis on the fact that the rulemaking proceeding arose from authority granted to the ICC in 1966, well after the APA had recognized and provided particular proceedings for rulemaking. Noting that the meaning of the term *hearing* "undoubtedly will vary, depending on whether it is used in the context of a rulemaking-type proceeding or in the context of a proceeding devoted to the adjudication of particular disputed facts,"⁶¹ the Court despaired of finding guidance as to what Congress had meant in 1917. It concluded, "What is apparent, though, is that the term was used in granting authority to the Commission to make rules and regulations of a

60. The first decision is *Siegel v. Atomic Energy Commission*, in which Siegel challenged both the issuance of a construction permit for a nuclear power plant (an adjudication) and a previously issued regulation. 400 F.2d 778 (D.C. Cir. 1968). The court rejected the first challenge on the ground that the agency had correctly decided that the issue Siegel had raised was not within the purview of the Atomic Energy Act. The discussion of adjudicatory procedures assumed, however, that the agency had complied with §§ 556 and 557 with respect to that proceeding. *Id.* at 784–85. As to the rulemaking proceeding, the court first noted that the hearing provision of the "Atomic Energy Act does not, in its reference to a hearing, distinguish in terms between adjudicatory and rule-making proceedings" and then emphasized that the Commission had consistently distinguished between the two types of proceedings. *Id.* at 785. The court then upheld the rulemaking because the statute did not "in terms or by clear implication" require the proceeding to be on the record. *Id.* The distinction between adjudication and rulemaking was clearly significant to this decision.

The second decision referred to by the Court in *Allegheny-Ludlum* is *Joseph E. Seagram & Sons, Inc. v. Dillon*, in which the court rejected an argument that a labeling rule had to be issued on the basis of a record. 344 F.2d 497, 500 (D.C. Cir. 1965). With no statutory requirement that the rule be "on the record," no record was required. Again, the Supreme Court emphasized that the rulemaking nature of a given decision is important in deciding how to apply the on-the-record language of the APA.

The Court also noted *First National Bank of McKeesport v. First Federal Savings and Loan Ass'n of Homestead*, which rejected the application of *Wong Yang Sung* to the particular facts and held, without significant explanation, that formal procedures were not triggered where the statute did not require a hearing at all. 225 F.2d 33, 36 (D.C. Cir. 1955). This citation seems merely to emphasize that there must be some statutory hearing provision. It has no bearing on the meaning of the on-the-record requirement.

61. *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 239 (1973).

prospective nature.”⁶² The Court then combined that conclusion with the APA’s intervening extensive treatment of rulemaking to hold that the after-hearing requirement did not require formal procedures for this rulemaking.⁶³ Central to the Court’s decision was the fact that “the Commission was acting under the 1966 statutory rulemaking authority that Congress had conferred upon it.”⁶⁴

In reaching this conclusion, the Court had to deal with *ICC v. Louisville & Nashville Railroad Co.*,⁶⁵ in which the Court had referred to a previous ICA after-hearing provision as involving a “quasi-judicial” proceeding, presumably one of the sort that would be required by §§ 554, 556, and 557 of the APA. The Court emphasized that the setting of rates for a single carrier, as in that decision, differed substantially from ordering “nationwide incentive payments” by all affected railroads. The difference at hand was the difference between rulemaking and adjudication. The Court went on to discuss that distinction as demonstrated by the classic decisions in *Londoner v. City & County of Denver*⁶⁶ and *Bi-Metallic Investment Co. v. State Board of Equalization*,⁶⁷ concluding that, “[w]hile the line dividing them may not always be a bright one, these decisions represent a recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other.”⁶⁸

Far from establishing that explicit language or some other clear indication of congressional intent is always required to trigger the on-the-record language in the two APA provisions, *Florida East Coast Railway* demonstrates that §§ 553(c) and 554(a) are to be interpreted distinctly in light of the profound differences between the types of decisions to which they apply. Although the boundary between rulemaking and adjudication is not always clear, rulemaking does not generally raise the due process-type concerns that are central to adjudication. As in *Londoner*, the individual target of government action needs and is entitled to procedural protection against the power of the state, while as in *Bi-Metallic* those affected by a widely applicable rulemaking proceeding can, in theory at least, try to organize those affected and use the political process to protect their interests. That is the framework perceived by the Supreme Court in both *Londoner* and *Bi-Metallic*, and in *Florida East Coast Railway*. It is

62. *Id.*

63. *Id.* at 240–41.

64. *Id.* at 241.

65. 227 U.S. 88 (1913).

66. 210 U.S. 373 (1908).

67. 239 U.S. 441 (1915).

68. *Fla. E. Coast Ry.*, 410 U.S. at 245.

also the framework adopted by Congress in the APA. As the Court in *Londoner* understood the importance of protecting the individual target of government action, so Congress has consistently understood the importance of protecting parties to agency adjudications.⁶⁹

Thus, *Allegheny-Ludlum* and *Florida East Coast Railway* set the stage for discussion of the on-the-record requirement of § 554(a) of the APA, as distinct from the nearly identical language found in § 553(c). Section 554(a) must be interpreted in light of its application to adjudications affecting individual interests, just as § 553(c) must be interpreted in light of its application to rulemaking proceedings.⁷⁰

B. The § 554(a) Decisions in the Courts of Appeals

Several commentators have described in detail the various opinions addressing the scope of § 554(a) of the APA.⁷¹ For the purpose of this

69. See *infra* text accompanying notes 254–262.

70. Professors Davis and Pierce have taken a contrary view, arguing that *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978), and *Florida East Coast Railway*, taken together, dictate a narrow reading of the on-the-record requirement such that, as with formal rulemaking, formal adjudication is required only upon a clear indication of congressional intent to impose the requirements of §§ 554, 556, and 557 of the APA. Taking these cases together with recent circuit court opinions, they argue that the *Florida East Coast Railway* reasoning, that “‘hearing’ can mean a written exchange of views, applies to adjudications as well as to rulemakings.” 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 8.2, at 381–87 (3d ed. 1994); 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 8.2, at 530–40 (4th ed. 2002).

This assertion is correct to the extent that it argues that adjudications may be handled largely through written exchanges of views. As discussed below, agencies have a great deal of flexibility to avoid the trial-like trappings of the adjudicatory process and to implement formal adjudications largely, if not entirely, as a written exchange of views. See *infra* text accompanying notes 160–85. The assertion that the *Florida East Coast Railway* reasoning applies to the interpretation of § 554(a) is incorrect, however, for the reasons stated in the text. Moreover, *Vermont Yankee* does not support the proposition that § 554(a) must be interpreted to require an explicit or clear indication of congressional intent to trigger the on-the-record requirement. While it is true, as argued by Davis and Pierce, that *Pension Benefit Guarantee Corp. v. LTV Corp.*, 496 U.S. 633 (1990), applied *Vermont Yankee* to agency adjudications, *id.* at 654–55, it did so in a context in which there was no statutory hearing requirement. In a classic formulation, the Court said, “*Vermont Yankee* stands for the general proposition that courts are not free to impose upon agencies specific procedural requirements that have no basis in the APA.” *Id.* at 654. The argument over whether a particular statutory hearing requirement triggers § 554(a) of the APA hinges on the meaning of § 554(a), not on some attempt to add requirements that are beyond the scope of that provision.

Further, the Davis–Pierce argument emphasizes that the term *hearing* “can mean a written exchange of views,” 1 DAVIS & PIERCE, *supra*, at 384, but it ignores the crucial requirements of §§ 554, 556, and 557, which assure the legitimacy and accuracy of the decision by requiring an independent ALJ and prohibiting *ex parte* contacts or combination of functions below the level of the agency head. These requirements are central to the question of whether *Chevron* deference should apply to an agency’s interpretation of a statutory hearing requirement.

71. See *supra* note 48.

discussion, the important point is that the courts initially reached diametrically opposing interpretations, one essentially adopting a presumption that all agency adjudicatory hearings must be formal unless Congress was clear to the contrary, the other requiring a clear congressional indication that formality is required—precisely the opposite presumption. In the wake of *Chevron*, however, the courts of appeals eschewed any effort to resolve or refine that conflict and decided instead to defer to agency decisions about whether they should have to provide the protections of §§ 554, 556, and 557 of the APA. The following discussion briefly describes these developments as a prelude to arguing that Congress would never have intended the courts to defer to such decisions.

1. *The Interpretive Efforts*—Seacoast Anti-Pollution League and City of West Chicago

*Seacoast Anti-Pollution League v. Costle*⁷² has become the leading case for the proposition that a statutory hearing requirement generally triggers § 554(a) of the APA unless there is a significant reason to believe Congress did not intend that result.⁷³ *Seacoast* involved the question of whether the statutory language “after opportunity for public hearing” required the Environmental Protection Agency (EPA) to comply with the formal adjudicatory requirements of the APA in issuing a permit under the Clean Water Act (CWA). Ironically, the EPA held a formal adjudicatory hearing before an ALJ, seemingly in full compliance with the APA.⁷⁴ When the case reached the Administrator, however, he had a panel of in-house technical advisors prepare a report on various issues.⁷⁵ Since the technical advisors and ultimately the Administrator relied upon information that was not in the hearing record, the court found a violation of § 556(e) of the APA.⁷⁶ This result depended, however, upon the conclusion that the

72. 572 F.2d 872 (1st Cir. 1978).

73. *Seacoast* cites two previous decisions that reached similar conclusions: *Marathon Oil Co. v. EPA*, 564 F.2d 1253 (9th Cir. 1977), and *United States Steel Corp. v. Train*, 556 F.2d 822 (7th Cir. 1977). The reasoning of these decisions differs somewhat, but the central point is that they construed hearing provisions as triggering § 554(a) of the APA despite the absence of a clear indication that the hearings were to be “on the record.”

74. *Seacoast*, 572 F.2d at 875. Since it is possible for an agency to use an ALJ but not otherwise comply fully with §§ 554, 556, and 557 of the APA, it is not certain that the ALJ aspect of the proceeding fully complied with the APA. It is clear, however, that the only challenges involved actions of the Administrator upon review of the decision that had been made by the Regional Administrator based upon the record certified by the ALJ.

75. *Id.* He also sought additional evidence from one of the parties, while allowing comment from the opposing parties. This resulted in a remand to determine whether the opponents had a right to cross-examine with respect to this information, but it seems likely that this issue alone would not have been enough to prompt a remand. *Id.* at 879–80.

76. Section 556(e) provides that “[t]he transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for

public-hearing requirement of the CWA required the EPA's decision to be made "on the record" under the terms of § 554(a).

As to that issue, the court noted that the Supreme Court in *Florida East Coast Railway* had rejected the proposition that the words *on the record* are necessary to trigger the last sentence of § 553(c) with respect to formal rulemaking. Asserting that "the resolution of this issue turns on the substantive nature of the hearing Congress intended to provide," the court emphasized that the EPA's decision involved "specific factual findings" affecting "the rights of the specific applicant."⁷⁷ According to the First Circuit, these are precisely the sorts of disputes as to which adversarial hearings are helpful, not only in reaching the decision within the agency, but also in creating the record for judicial review.⁷⁸ The court then discussed the language and legislative history of the APA to support its ultimate holding that "[w]e are willing to presume that, unless a statute otherwise specifies, an adjudicatory hearing subject to judicial review must be on the record."⁷⁹ In short, the First Circuit undertook a serious, fairly traditional analysis of the APA, its legislative history, and its relationship to the CWA.⁸⁰

Seacoast stands in sharp contrast to *City of West Chicago v. NRC*,⁸¹ which reached the opposite conclusion. In opposing a nuclear materials license amendment, the City of West Chicago argued that the language "shall grant a hearing" in § 189(a) of the AEA⁸² required the NRC to provide a hearing that complied with §§ 554, 556, and 557 of the APA. After citing *Seacoast* for the proposition that the words *on the record* are not needed to trigger § 554(a), the Seventh Circuit noted that "even the City agrees that in the absence of these magic words, Congress must clearly indicate its intent to trigger the formal, on-the-record hearing provisions of the APA."⁸³ If that is correct, the City appears to have given up its strongest weapon, the presumption of formality articulated in *Seacoast*. In any case, the court then undertook its own analysis of the issue, with particular attention to the various provisions and legislative history of the

decision in accordance with section 557 of this title." 5 U.S.C. § 556(e) (2006). As an additional irony, this section also provides that "[w]hen an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary." *Id.* It is quite possible that the Administrator could have relied upon the mechanism of official notice to consider this information and thereby would have avoided the remand.

77. *Seacoast*, 572 F.2d at 876.

78. *Id.* at 876–77.

79. *Id.*

80. *Id.* at 876–78.

81. 701 F.2d 632 (7th Cir. 1983).

82. 42 U.S.C. § 2239(a)(1)(A) (2000).

83. *City of W. Chi.*, 701 F.2d at 641 (internal citation omitted).

AEA, distinguishing in the process both *Seacoast* and the various other conflicting decisions. This left an extremely clear split among the circuits—some presuming that adjudicatory hearings are intended to be formal unless Congress is clear to the contrary, some presuming just the opposite.

Were this a college football game (these days, at least), there would be a tiebreaker, in which each team would be given the ball at its opponent's twenty-five yard line. The teams would have the same opportunities to score until one was ahead after an even number of attempts.⁸⁴ This is not football but litigation, in which there are few ties because the outcome of important disputes is determined by a nine-member body, the Supreme Court. As we will see, however, instead of allowing this issue to go to its standard tiebreaker, the two courts of appeals to rule on this issue in the wake of *Seacoast* and *City of West Chicago* decided instead to give one of the teams a distinct advantage. By applying *Chevron* deference to agency decisions on this issue, the courts have decided to let agencies referee their own games, subject to minimal oversight. Not surprisingly, the agency teams have been winning.

2. *The Chevron Punts*—Chemical Waste Management and Dominion Energy

In 1989, six years after *City of West Chicago* but five years after *Chevron*, the D.C. Circuit for the first time directly addressed the question of whether a particular statutory-hearing requirement implicates the formal-adjudication provisions of the APA. The statute in question was the Resource Conservation and Recovery Act, under which the EPA must “conduct a public hearing” with respect to certain orders that the agency issues against private parties.⁸⁵ The EPA had initially issued regulations providing formal adjudicatory procedures for the civil penalty and permit suspension or revocation proceedings to which the public-hearing requirement applied. The statute was then amended to authorize the EPA to issue corrective-action orders to clean up harmful spills of hazardous wastes. This provision included both the authority to order cleanup and the authority to seek civil penalties. The amendment subjected these orders to the same public-hearing provision under which the EPA had previously adopted formal adjudicatory procedures. The EPA then amended its regulations to bring any civil-penalty orders under the formal procedures but to establish informal procedures for the issuance of cleanup orders.

84. *College Football Gets Tie Breakers*, N.Y. TIMES, Feb. 16, 1996, at B8, available at <http://query.nytimes.com/gst/fullpage.html?res=9A02E4D81239F935A25751C0A960958260>.

85. 42 U.S.C. § 6928(b) (2000).

Among other things, the informal proceeding could be held before an agency attorney, not an ALJ, and direct- and cross-examination would not be permitted except by the Presiding Officer. In *Chemical Waste Management, Inc. v. EPA*,⁸⁶ the D.C. Circuit applied *Chevron* deference in upholding the informal-proceeding regulations as reflecting a reasonable interpretation of the underlying statute.⁸⁷

The substance of the court's application of *Chevron* is not important here.⁸⁸ The question is why the court applied *Chevron* to a procedural matter of this sort, when *Chevron* itself involved deference to an agency's substantive statute, as to which the agency was both the expert and, by virtue of that expertise, the body delegated to make the decision.⁸⁹ As to this question, the court said absolutely nothing. It simply assumed that it had to follow the "framework that the Supreme Court decreed in *Chevron* . . . for judicial review of an agency's interpretation of a statute under its administration."⁹⁰ This may well have been understandable at the time, but the Court's *Chevron* jurisprudence since that time has clearly established that an agency is not always entitled to *Chevron* deference as to every aspect of a statute "under its administration."⁹¹

Seventeen years after *Chemical Waste Management*, the First Circuit returned in *Dominion Energy Brayton Point, LLC v. Johnson* to the question of whether the public-hearing provisions of the CWA that had been at issue in *Seacoast* still trigger the formal procedures of §§ 554, 556, and 557 of the APA.⁹² The factual situation was quite similar, involving the application for a permit for a power plant along the Atlantic coast. This

86. 873 F.2d 1477 (D.C. Cir. 1989).

87. *Id.* at 1480–83.

88. The substance involved a fairly standard finding of statutory ambiguity, followed by a holding that it was reasonable for the EPA to distinguish between penalty-type proceedings as requiring formal process and corrective action proceedings as needing only informal procedures. Among other things, the informality for corrective-action proceedings was reasonable due to technical issues related to the need for clean up, as opposed to questions of whether a company has committed violations of the Act or regulations as to which penalties might be imposed. *Id.*

The D.C. Circuit also had to dispense with its own prior decision, *Union of Concerned Scientists v. NRC*, in which the court had accepted the *Seacoast* presumption in a footnote. 735 F.2d 1437, 1444 n.12 (D.C. Cir. 1984). The court first noted that this statement had been dictum, unnecessary to the decision, and then relied upon the intervening *Chevron* decision to render its own prior decision irrelevant. Candor requires the disclosure that the author was the prevailing counsel in *Union of Concerned Scientists* and is understandably distressed that the D.C. Circuit has, by a vote of the full court no less, *id.* at 1482, revoked its acceptance of his argument. *Chem. Waste Mgmt.*, 873 F.2d at 1481–82.

89. *See infra* text accompanying notes 187–208.

90. *Chem. Waste Mgmt.*, 873 F.2d at 1480.

91. Moreover, as argued below, agencies should not be considered to "administer" statutory hearing provisions as those provisions relate to § 554(a) of the APA. *See infra* text accompanying notes 187–208.

92. *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12 (1st Cir. 2006).

time, however, the agency relied upon post-*Chevron* regulations explicitly asserting that formal process was not required, and the challenger was the utility whose permit renewal request had been denied, rather than a citizen group opposing the request. Otherwise, the factual considerations and the nature of the issues were precisely those that had prompted the *Seacoast* court to hold that the hearing must meet the requirements of the APA. Indeed, the court noted that it “in no way disparage[d] the soundness of *Seacoast*’s reasoning” in holding that a contrary conclusion was required by the intervening decision in *Chevron*.⁹³

Why did the First Circuit apply *Chevron* to this highly sensitive procedural question, particularly at this much later point, when the Supreme Court had made clear that there are several threshold questions that must be answered before *Chevron* can be applied to a particular agency interpretation?⁹⁴ Noting that it had anticipated “this situation” two years earlier in *Citizens Awareness Network*,⁹⁵ and “with guidance from the Supreme Court’s last term lighting [its] path,” the court “conclude[d] that, as to the CWA’s public hearing language, the *Chevron* doctrine trumps the potential application of stare decisis principles.”⁹⁶

In reaching this conclusion, the First Circuit appropriately addressed the question of whether its own *Seacoast* precedent prevented it from reaching a contrary conclusion through *Chevron* deference. The answer to that question, quite clearly provided by the Supreme Court’s 2005 decision in *National Cable & Telecommunications Ass’n v. Brand X Internet Services*,⁹⁷ was that the First Circuit could reach a different conclusion as long as its *Seacoast* opinion had not held that Congress had clearly required that outcome. Since it had not, the *Seacoast* decision did not preclude the court from applying *Chevron* deference to the question at hand.⁹⁸

Perhaps the *Dominion Energy* court’s struggle with its own precedent distracted it from the more important question of whether *Chevron* applied at all. Just as *Chevron* intervened after *Seacoast* to suggest that deference could overcome the previous outcome, so *United States v. Mead Corp.*⁹⁹ and other decisions have since intervened to establish a threshold test for determining when *Chevron* applies to agency interpretations.¹⁰⁰ As argued below, had the court applied that threshold test, it would have rejected *Chevron* deference in this context.

93. *Id.* at 18.

94. *See infra* text accompanying notes 209–48.

95. 391 F.3d 338, 348 n.4 (1st Cir. 2004).

96. *Dominion Energy*, 443 F.3d at 16.

97. 545 U.S. 967 (2005).

98. *Dominion Energy*, 443 F.3d at 17.

99. 533 U.S. 218 (2001).

100. *See discussion infra* text accompanying notes 211–250.

II. ADMINISTRATIVE BURDEN OR FAIRNESS AND LEGITIMACY: WHAT IS AT STAKE IN THE § 554(A) TRIGGER DECISION?

Just what is it that *Chevron* deference might permit an agency to avoid in this dispute? As *Citizens Awareness Network* suggests, agencies and their counsel apparently believed that they needed to avoid APA formal adjudication altogether in order to free themselves from the cumbersome trappings of discovery, cross-examination, and other trial-like processes. This belief derived from the widely held understanding that the APA requires essentially trial-like procedures. The following discussion first examines this understanding. It then demonstrates that the understanding is largely inaccurate. Agencies have very broad discretion to dispense with or control many of the trappings of trial-like process as long as they implement the core legitimizing requirements of the use of an ALJ and the prohibition of combination of functions and improper ex parte contacts.

A. *Trapped by the Analogy—The Pervasive Understanding that APA Formal Adjudications Must Be Minitrials*

Commentators have complained for decades about the seemingly heavy reliance upon trial-type procedures in formal adjudications under the APA.¹⁰¹ In 1960, for example, Dean James M. Landis reported to the President-elect that the APA “ha[d] achieved some uniformity of procedure, some assurance of the application of fairer standards, but with its emphasis on ‘judicialization’ ha[d] made for delay in the handling of many matters before these agencies.”¹⁰² In 1975, Judge Henry J. Friendly noted the long-standing “illusion” that issues of adjudicative fact must be heard in a “full trial-type hearing.”¹⁰³ Sharing Dean Landis’s concern,

101. See, e.g., 3 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* 3 (2d ed. 1980) (“The major malady that cuts deeply into efficiency is grossly excessive use of trial procedure”); MARTIN SHAPIRO, *WHO GUARDS THE GUARDIANS?* 40–41 (1988) (characterizing formal adjudications as “trial-like”); Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219, 232 (1986) (complaining of judicialization of the process and that ALJs “sometimes flaunt their robes a bit too obtrusively for my taste”); Loren A. Smith, *Judicialization: The Twilight of Administrative Law*, 1985 DUKE L.J. 427, 462 (complaining of overreliance upon judicialized decisionmaking); Craig A. Rolfe, Comment, *The Requirement of Formal Adjudication Under the Administrative Procedure Act: When Is Section 554(a) Triggered so as to Require Application of Sections 554, 556, and 557?*, 11 ENVTL. L. 97, 98–104 (1981) (complaining of the burdens of a “laundry list” of trial-like requirements in formal adjudications under the Clean Water Act).

102. CHAIRMAN OF THE SUBCOMM. ON ADMIN. PRACTICE AND PROCEDURE, 86TH CONG., REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 16 (Comm. Print 1960) (written primarily by James M. Landis) [hereinafter REPORT ON REGULATORY AGENCIES].

103. Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1268 (1975). Judge Friendly wrote in response to the “due process explosion” following *Goldberg v. Kelly*, 397 U.S. 254 (1970), but his discussion reflects the prevailing assumptions as to

Judge Friendly argued that we could often “do with less than full trial-type hearings even on what are clearly adjudicative issues.”¹⁰⁴

In perhaps the most prominent critique, Professor Roger C. Cramton lamented Congress’s disposition to require trial-type hearings.¹⁰⁵ Although recognizing that trial-type hearings have advantages such as “special opportunities for party participation, especially those of presenting evidence and cross-examining opposing witnesses,” and “forced rationality,” he argued that these procedures were inappropriate for the complex decisions involved in the licensing of nuclear power plants. He expressed two major concerns. First, the issues in trial-type hearings “must be severely compressed and put in a bipolar form” such that the outcome was driven too much by “justice in the individual case,” and did not allow adequate consideration of broader issues such as long-term planning or alternatives to the proposed action.¹⁰⁶ Second, he noted that the specialized nature of trial procedure meant that the hearings were dominated by lawyers even on nonlegal issues and that “trial procedures are enormously expensive and often dilatory.”¹⁰⁷ He urged a turn away from trial-type procedures in order to allow attention to the underlying values of “accuracy,” “efficiency,” and “acceptability.”¹⁰⁸ In so doing, he emphasized the need to address policy concerns beyond those of the individual case, the gross inefficiency of trial-type procedures in “the polycentric administrative case,” and “the indispensable virtues of procedures that are considered fair by those whom they affect, as well as by the general public.”¹⁰⁹

In addressing the question of *Chevron*’s applicability to § 554(a) trigger decisions, for example, Professor Berry characterizes APA formal procedures as providing “protections that are generally comparable to those available in a civil judicial trial” and describes the APA as establishing “a ‘feast or famine’ paradigm for adjudicatory procedures.”¹¹⁰ The choice of feast or famine is between “a set of trial-type procedures” that “provide a

statutory as well as constitutional hearing requirements.

104. Friendly, *supra* note 103, at 1268.

105. Roger C. Cramton, *A Comment on Trial-Type Hearing in Nuclear Power Plant Siting*, 58 VA. L. REV. 585, 590 (1972).

106. *Id.*

107. *Id.*

108. *Id.* at 592–93.

109. *Id.* at 592–93. As to “acceptability,” he argued that “[u]sually this translates into meaningful participation in the decisional process.” *Id.* at 593. Verkuil similarly argued for less rigid attention to trial-type procedures and greater attention to the values of “fairness, efficiency, and satisfaction.” Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 280 (1978).

110. Berry, *supra* note 17, at 548 (citing GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 198 (3d ed. 2004)).

host of procedural protections” (including “in most situations . . . [the opportunity] to conduct cross-examination”) and the minimal procedures of § 555 of the APA.¹¹¹

But is it truly feast or famine? Must this process be trial-like, as we usually conceive of it? Must it involve extensive, sometimes dilatory discovery or cross-examination? Professor Davis reveals much in his struggle with the nature of formal adjudication under the APA. In 1951, he explained that “[a]djudication procedure includes pre-trial, trial, and post-trial procedure,”¹¹² which suggests a fairly trial-like process, with all that a trial would entail. He went on, however, to emphasize that the centerpiece of APA formal adjudication was the newly strengthened position of hearing examiner, which we now know as administrative law judge.¹¹³ And in something of a prelude to the decision in *Citizens Awareness Network*, he said,

Upon close examination even the most elementary propositions about fair hearings are often found to have unexpected exceptions. Even though the APA deals only with minimum requirements of an elementary sort, it is necessarily shot through with hortatory provisions and with provisions allowing administrative discretion to depart from its requirements in special circumstances.¹¹⁴

For the purpose of this discussion, the exceptions to formal process tell us little or nothing about the process itself. But the emphasis on “minimum requirements of an elementary sort” and on the prevalence of “hortatory provisions” strongly suggests that APA formal adjudications do not need to operate much like judicial trials.

Unfortunately, this apparent insight seems to have become lost in the struggle over the handling of issues of legislative fact in formal adjudications. As early as 1942, and still in 1958, Professor Davis had come to emphasize the difference between legislative and adjudicative fact, arguing that trial-type process was not appropriate for issues of legislative fact.¹¹⁵ As to adjudicative fact, however, he said that “[t]he true principle is that a party who has a sufficient interest or right at stake in a determination of governmental action should be entitled to an opportunity to know and to meet, with the weapons of rebuttal evidence, cross-examination, and argument, unfavorable evidence of adjudicative

111. *Id.* at 548–49.

112. KENNETH CULP DAVIS, *ADMINISTRATIVE LAW* 273 (1951).

113. *Id.* at 309.

114. *Id.* at 326.

115. Kenneth Culp Davis, *The Requirement of Opportunity to Be Heard in the Administrative Process*, 51 *YALE L.J.* 1093, 1100 (1942) [hereinafter Davis, *The Requirement of Opportunity to Be Heard*]; DAVIS, *supra* note 112, at 413–14.

facts.”¹¹⁶ In seeking a proper term to use for proceedings governed by §§ 554, 556, and 557 of the APA, he expressed a preference for “trial” and “trial type of hearing” as “simpler and more satisfactory” than “quasi-judicial hearing” or “adversary hearing.”¹¹⁷ Here we have the analogy whose power was recently so strongly criticized by Judge Lipez in *Citizens Awareness Network*.¹¹⁸ The premier commentator on administrative law viewed formal adjudications essentially as trials.

When Professor Davis published the second edition of his treatise in 1979, his work reflected several important developments. First, the Supreme Court’s decisions in *Allegheny–Ludlum* and *Florida East Coast Railway* had assured that legislative rulemaking could be conducted through “a proceeding of notice and written comments, with no trial procedure” unless Congress specifically required otherwise.¹¹⁹ Thus, Davis’s concern about procedures for the resolution of legislative facts had been largely resolved with respect to rulemaking.

Second, the First Circuit had decided *Seacoast*, with its presumption that statutorily required adjudicatory hearings are to be on the record unless Congress has clearly indicated the contrary.¹²⁰ Calling it an “atrocious result,”¹²¹ Professor Davis was highly critical of the *Seacoast* opinion for two reasons. First, he asserted that the First Circuit had failed “to take into account that the facts about effect of hot water on marine life were legislative facts,” for which trial procedure is inappropriate.¹²² Second, he argued that the First Circuit’s remand erred in holding that “the panel of EPA scientists [consulted by the Administrator] could provide extra record information ‘as witnesses, but not as deciders.’”¹²³ As he then explained, the court should have permitted the agency to consider such information through the process of official notice, under which each party must simply be given “an opportunity to show the contrary.”¹²⁴

Ironically, despite having recognized the flexibility imparted by the APA’s lenient treatment of official notice, Davis strongly asserted that “a hearing on the record is the equivalent of a trial,” that “*it is governed*

116. 1 DAVIS, *supra* note 10, at 412.

117. *Id.* at 408.

118. *Citizens Awareness Network, Inc. v. United States*, 391 F.3d 338, 355 (1st Cir. 2004) (Lipez, J., concurring).

119. 2 DAVIS, *supra* note 101, at 330–31 (1979).

120. 572 F.2d 872, 877 (1st Cir. 1978); *see also* discussion *supra* text accompanying notes 72–80.

121. 2 DAVIS, *supra* note 119, at 325.

122. *Id.* at 434.

123. *Id.* at 435.

124. *Id.* (quoting 5 U.S.C. § 556(e) (1976)).

by trial procedure,” and that “§ 556 clearly requires trial procedure.”¹²⁵ Perhaps he emphasized these procedural burdens in reaction to the third major development since the first edition of his treatise, the evolution of procedural due process from *Wong Yang Sung v. McGrath*¹²⁶ to *Goldberg v. Kelly*¹²⁷ and ultimately through *Goss v. Lopez*.¹²⁸ Recall that *Wong Yang Sung* appeared to hold that if due process required a hearing under a particular statutory regime, the statute would be interpreted as requiring a hearing on the record, thereby triggering the formal-adjudication procedures of the APA.¹²⁹ This proposition could easily be reconciled with *Goldberg v. Kelly*, which “explicitly required the ten main elements of . . . a trial.”¹³⁰ But Davis believed it could not be reconciled with *Goss v. Lopez*, which had held that due process could sometimes be satisfied by mere notice and an “opportunity to explain his version of the facts.”¹³¹ At that point, Davis saw a need to allow courts “to require hearings ‘on the record’ to the extent that a party will have a chance to rebut or explain all adverse evidence the tribunal considers, without triggering the introductory clause of § 554 so as to require the application of all the provisions of §§ 554, 556, and 557.”¹³² Thus, Davis perceived a need to break from *Wong Yang Sung*, but he also believed that the APA provisions in question did not permit substantial procedural flexibility well short of a trial.

Professor Davis’s concerns about *Seacoast* and inappropriate procedural burdens were valid, but perhaps they could have been addressed through attention to the provisions of §§ 554, 556, and 557, without regard to the analogy to actual trials. The next Part demonstrates that commentators have long perceived considerable flexibility in these provisions and that the essential requirements involve (1) assuring fairness through balance, the right to be heard, and the right to a decision on the record, (2) assuring impartiality through assigning an independent ALJ and prohibiting inappropriate influence on the ALJ, and (3) empowering the ALJ to take various actions in administering the hearing but not requiring a trial-like proceeding. As reflected in *Citizens Awareness Network*, these requirements may frequently be met through a proceeding that occurs entirely in

125. *Id.* at 332–33.

126. 339 U.S. 33 (1950).

127. 397 U.S. 254 (1970).

128. 419 U.S. 565 (1975).

129. See *supra* text accompanying notes 37–40.

130. 2 DAVIS, *supra* note 119, at 327 (1979).

131. *Id.* at 335 (quoting *Goss*, 419 U.S. at 582).

132. *Id.* at 336.

writing.¹³³ Indeed, it is possible to implement an APA formal adjudication in a way that responds to concerns that trial-type proceedings are inappropriate for decisions involving complex scientific issues or decisions heavily laden with policy considerations.¹³⁴

B. Formal Adjudications—Procedural Flexibility, but Assurances of Legitimacy

Although APA formal adjudications tended to harden into trial-like proceedings, §§ 554, 556, and 557 have never required trials. They have provided the authority necessary to implement trial-like proceedings, but a creative agency could comply with these sections of the APA through proceedings that would not seem familiar to a trial lawyer. As discussed below, the formal-adjudication provisions of the APA serve three distinct purposes. First, they assure fairness and balance by requiring appropriate notice, prohibiting *ex parte* communications, assuring that participants can respond to assertions with which they disagree, requiring that the decision be based upon the record, and requiring cross-examination “as may be necessary for a full and true disclosure of the facts.”¹³⁵ Second, they protect the actual and perceived legitimacy of the agency’s decision by assuring an independent decisionmaker (now called an ALJ) and by prohibiting participation in the decision by anyone “engaged in the performance of investigative or prosecuting functions.”¹³⁶ Third, they

133. See Howarth, *Federal Licensing and the APA*, *supra* note 48, at 341–42 (stating that “the APA’s hearing procedures do *not* mandate full-scale judicial trials in every agency adjudication” and that the APA allows agencies to report “paper hearings”).

134. See *infra* Part II.B.3 (describing the procedural flexibility available to agencies under §§ 554, 556, and 557 of the APA). See, in particular, 5 U.S.C. § 556(e) (2006), which authorizes agencies to rely upon official notice as long as they give the parties an opportunity to respond.

135. 5 U.S.C. § 556(d)–(e); see also 5 U.S.C. §§ 554(b), 554(d), 557(d); *infra* text accompanying notes 151–59.

136. 5 U.S.C. § 554(d); 5 U.S.C. § 556(b); see also *infra* text accompanying notes 160–172. Unfortunately, assuring the independence and legitimacy of the ALJ does not necessarily assure a high quality or even politically unbiased decision. That depends upon the process for selecting ALJs, which has been the subject of considerable criticism in recent years. The Section of Administrative Law and Regulatory Practice of the American Bar Association recently asserted, for example, that the Office of Personnel Management “has made changes in the ALJ selection process that raise significant concerns about the fairness of that selection process and about the potential reduction of the caliber of candidates on the resulting Register for filling ALJ vacancies.” Letter from H. Russell Frisby, Jr., Chair, ABA Section of Administrative Law and Regulatory Practice, to Sally Katzen, Obama–Biden Transition Team (Jan. 8, 2009) (on file with author); see also Letter from Eleanor D. Kinney, Chair, ABA Section of Administrative Law and Regulatory Practice, to Mark Doboga, Office of Personnel Management (Feb. 21, 2006) (on file with author) (commenting on proposed regulations for the Administrative Law Judge Program). Indeed, if the selection process injects any political bias or results in the appointment of poorly qualified ALJs, the virtual life tenure and general independence of ALJs may be

provide the ALJ and the agency with a variety of tools with which to manage the proceeding, but the availability of those tools does not require that they be used to implement a trial-like proceeding.¹³⁷

Immediately after enactment of the APA, Senator Pat McCarran, Chairman of the Senate Committee on the Judiciary, which had proposed the APA, reflected on both the strength of the trial analogy and the fundamental protections the APA was intended to achieve. Speaking at the Annual Meeting of the American Bar Association, he said, “Statutory hearings, whether in the field of rule making or adjudication, must generally conform to the accepted modes of receiving proof in non-jury cases and of testing proof.”¹³⁸ This sounds ominously like a requirement for trial-type proceedings, but Senator McCarran eschewed discussion of procedural details to emphasize what he considered to be “the real significance of these provisions”:

that the exclusive record for decision be made in open hearing,^[139] that decisions be made by, or with the recommendations of, hearings officers, and that the private parties concerned be given full opportunity to participate in the decision process. . . .

The fundamental requirement respecting statutory hearings and decisions is that administrative action must be taken “upon consideration of the whole record . . . and as supported by and in accordance with the reliable, probative and substantial evidence.”¹⁴⁰

Senator McCarran’s emphasis on these fundamentals indicates that Congress was concerned primarily with ensuring an open process in which all interested parties have the right to be heard by an impartial decisionmaker and in which the decision will be based only upon information that has been available to the parties. Within these parameters, there is much room for diversity of procedure.

The tension between an assumption of trial-like process and the reality of great statutory flexibility revealed itself at a gathering of administrative

more of a detriment than a benefit to the regulatory process.

137. 5 U.S.C. § 556(c); *see also infra* text accompanying notes 162–187.

138. Pat McCarran, *Improving “Administrative Justice”: Hearings and Evidence; Scope of Judicial Review*, 32 A.B.A. J. 827, 830 (1946).

139. In a footnote to this reference to “open hearing,” Senator McCarran cited § 7(d) of the APA as originally enacted, which today is codified at 5 U.S.C. § 556(e). McCarran, *supra* note 138, at 831 n.17. This provision requires an “open hearing” in the sense that the decision must be based exclusively upon the testimony, exhibits, and other materials that were entered into the record during the proceeding. By virtue of other provisions of the APA (e.g., § 554(d), prohibiting *ex parte* communication on a “fact in issue,” and § 557(d), prohibiting *ex parte* communications with those outside the agency), all of these materials would be available to the parties. This provision does not by its terms require an open hearing in the sense of an open hearing room where the public may enter and watch the proceedings.

140. McCarran, *supra* note 138, at 831.

law experts at New York University in 1947.¹⁴¹ Perhaps the strongest critic of the APA in this gathering was Frederick Frank Blachly, a Lecturer in Public Administration at The American University and author of an earlier study on the administrative process.¹⁴² Mr. Blachly, a nonlawyer, argued that the procedural requirements of the APA imposed undue burdens on the administrative process. He complained, in particular, of “a fixed hearing procedure instead of a flexible procedure, necessary to meet the different functions that are being carried on.”¹⁴³ In response, Robert Benjamin, a lawyer and prominent expert in administrative law, said, “I do not feel the difficulty that Mr. Blachly feels; that the provisions with regard to hearing are pretty general. Except for the section on evidence as to which I have some questions. They do not confine the agency to any particular form of hearing procedure.”¹⁴⁴ Thus, a careful student of administrative law quickly perceived a substantial degree of flexibility in the formal-adjudication provisions of the APA.

Soon thereafter, Professor Davis wrote in his 1951 treatise that “the most elementary propositions about fair hearings are often found to have unexpected exceptions,” noting that the APA’s procedural requirements are “necessarily shot through with hortatory provisions and with provisions allowing administrative discretion to depart from its requirements in special circumstances.”¹⁴⁵ Responding to concerns about overjudicialization of the APA hearing process, Professor Cooley R. Howarth in 1985 described in some detail the flexibility permitted by the APA’s formal-adjudication provisions, concluding that paper-hearing procedures could satisfy the APA’s requirements “in a particular context” with an adequate showing by the agency that such procedures would not prejudice the participants in the proceeding.¹⁴⁶ Similarly, in 1993 Professor Funk argued that APA formal

141. N.Y. UNIV. SCH. OF LAW, THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES: PROCEEDINGS OF AN INSTITUTE CONDUCTED BY THE NEW YORK UNIVERSITY SCHOOL OF LAW ON FEBRUARY 1–8, 1947 (George Warren ed., 1947) [hereinafter NYU INSTITUTE].

142. FREDERICK F. BLACHLY & MIRIAM E. OATMAN, ADMINISTRATIVE LEGISLATION AND ADJUDICATION (1934).

143. NYU INSTITUTE, *supra* note 141, at 43.

144. *Id.* at 64. The text refers only to “Mr. Benjamin” at this point, but it is clear from another reference in the text, *id.* at 9 & n.42, that this was Robert M. Benjamin, a New York lawyer who had presided over the preparation of a substantial report on administrative law in New York. ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK (1942). Mr. Benjamin is worthy of study in his own right. Case Editor of the *Harvard Law Review*, he was a secretary to Oliver Wendell Holmes and later one of the chief defense lawyers for Alger Hiss. More pertinent to this discussion, he spoke at a Harvard Law School Forum on December 13, 1946, with James N. Landis on “Bureaucracy and the Legal Order.” Harvard Law School Past Speakers, <http://www.law.harvard.edu/students/orgs/forum/40s.html> (last visited Jan. 23, 2009).

145. DAVIS, *supra* note 112, at 326.

146. Howarth, *Federal Licensing and the APA*, *supra* note 48, at 342.

adjudications need not be unduly burdensome because the agency has the flexibility to limit depositions, exclude irrelevant material, and limit cross-examination “that is not required for a full and true disclosure of the facts.”¹⁴⁷

The courts finally recognized the flexibility of the APA’s requirements in *Citizens Awareness Network*, discussed above, in which the First Circuit held that NRC hearing procedures complied with §§ 554, 556, and 557, although they did not provide for discovery and authorized cross-examination only upon a showing that it was necessary for a full and true disclosure of the facts.¹⁴⁸ It is important to understand this flexibility in considering whether *Chevron* deference should be granted to agency decisions concerning whether statutory hearing provisions trigger the formal requirements of the APA.

The following discussion examines the requirements of §§ 554, 556, and 557 in detail. First, however, it is important to establish the statutory procedural baseline that governs all agency adjudications. As the Supreme Court recognized in *Pension Benefit Guarantee Corp. v. LTV Corp.*,¹⁴⁹ § 555 of the APA sets the “minimal requirements” for informal adjudication.¹⁵⁰ Section 555 provides that any participant in an agency adjudication may appear before the agency in person or with counsel or another qualified representative, that the agency must conclude the matter “within a reasonable time,” that the agency must give “[p]rompt notice” of the denial of any written request, and that the agency must provide “a brief statement of the grounds for denial.”¹⁵¹ There is no requirement for a neutral decisionmaker, no prohibition on ex parte contacts, and no limitation on internal combinations of functions that could inappropriately influence the outcome.

So what are the provisions of §§ 554, 556, and 557? They fall into three categories: (1) assuring fairness through balance, the right to be heard, and

147. William Funk, *Close Enough for Government Work? Using Informal Procedures for Imposing Administrative Penalties*, 24 SETON HALL L. REV. 1, 64–65 (1993); see also Edles, *supra* note 48, at 809–11 (describing “the development of formal hearings [as having] involved highly pragmatic and idiosyncratic elements designed to mesh procedural requirements to programmatic needs,” and noting that Social Security Administration ALJs preside over nonadversarial hearings, all of which suggests that the APA’s requirements are quite flexible).

148. *Citizens Awareness Network, Inc. v. United States*, 391 F.3d 338, 355 (1st Cir. 2004).

149. 496 U.S. 633 (1990).

150. *Id.* at 655; Berry, *supra* note 17, at 549–50 nn.49–52. As reflected in Professor Berry’s discussion, due process may at times require a right to be heard and other forms of process, but in light of *Goss v. Lopez* and *Mathews v. Eldridge*, those rights are themselves minimal (e.g., a right to know the charges and to respond, as in *Goss*), and they are determined by a balancing process that provides little guidance to agencies in developing their procedures. Berry, *supra* note 17, at 549–50 nn.49–52.

151. 5 U.S.C. §§ 555(b), 555(e) (2006).

the right to a decision on the record, (2) assuring impartiality through assigning an independent ALJ and prohibiting inappropriate influence on the ALJ, and (3) empowering the ALJ to take various actions in administering the hearing. The net effect of these provisions is to assure the legitimacy of the decision while authorizing, but not requiring, procedures comparable to judicial trials.

1. *Assuring Fairness Through Balance and the Right to Be Heard*

As noted above, § 555 provides each party a right to appear in an agency proceeding. This right would be of little value if the party did not know of the proceeding or what it involved. It also would be of little value if the party did not know the evidence or arguments of other participants or did not have an equal right to influence the outcome. Sections 554, 556, and 557 address those concerns.

Section 554(b) takes the first step toward making the hearing right meaningful by requiring notice of the “time, place, and nature,” “legal authority and jurisdiction,” and “the matters of law and fact asserted.”¹⁵² Thus, a party to a formal adjudication has the right to know about the proceeding and what the proceeding will be about. Similarly, § 554(c)(1) gives “interested parties” the opportunity to submit facts, arguments, offers of settlement, and the like, and a hearing pursuant to §§ 556 and 557 should settlement not be possible.¹⁵³ Once the hearing begins, each party is “entitled to present his case by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.”¹⁵⁴ Thus, all parties have equal status in the hearing.

Several other provisions assure balance and transparency in the hearing process. Two achieve those goals by prohibiting *ex parte* contacts. Section 554(d)(1) prohibits the ALJ from consulting with “a person or party on a fact in issue *unless on notice and opportunity for all parties to participate.*”¹⁵⁵ Similarly, § 557(d) prohibits any “interested person outside the agency” from engaging in “an *ex parte* communication relevant to the merits of the proceeding” with the ALJ, an agency head, or an agency employee “who is or may be reasonably expected to be involved in the decisional process.”¹⁵⁶ It is important to note that these provisions do not

152. *Id.* § 554(b).

153. *Id.* § 554(c).

154. *Id.* § 556(d).

155. *Id.* § 554(d)(1) (emphasis added).

156. *Id.* § 557(d)(1)(A). The remainder of § 557(d)(1) prohibits comparable contacts by the ALJ or other agency decisionmaker and provides for notice of all such contacts and for possible penalties, including dismissal or denial of the claims of the violator.

prohibit all communications or contacts with agency personnel or others involved in the proceeding. They merely require that such contacts be taken with appropriate notice to and participation of all the parties to the proceeding.

There would be little point to the right to be heard or to the prohibition on ex parte contacts if the agency could make its decision without regard to what the parties had said in the hearing. Section 556(e) addresses this obvious but fundamental concern by providing that the transcript and evidence gathered in the hearing “constitutes the exclusive record for decision.”¹⁵⁷ Section 556(e) further provides that if a decision is to be based upon official notice of facts not appearing in the record, “a party is entitled, on timely request, to an opportunity to show the contrary.”¹⁵⁸ The APA’s formal-adjudication provisions thus assure that the parties have had the opportunity to present their own evidence and to hear and respond to any other evidence on which the agency might base its decision.

Section 557(c) takes the additional step of assuring balance and the opportunity to be heard in the ALJ’s consideration of the evidence. Each party has the right to submit proposed findings and conclusions, exceptions to ALJ decisions, and reasons for the various findings, exceptions, or conclusions.¹⁵⁹ Moreover, the ALJ’s decision must respond to all of these submissions and arguments such that the record will “show the ruling on each finding, conclusion, or exception presented.”¹⁶⁰

2. *Assuring Independence and Impartiality*

In “one of the most important provisions in the act,”¹⁶¹ § 556(b) requires that an independent ALJ preside over any formal adjudication. The APA ensures the ALJ’s independence by providing that an ALJ may be removed (or punished through reduction in pay or otherwise) only “for good cause” as determined by the Merit Systems Protection Board after an on-the-record hearing.¹⁶² Thus, ALJs are protected against pressure from the agency whose cases they hear. For practical purposes, ALJs have tenure for life and decisional independence comparable to the federal courts.¹⁶³

The APA specifically requires that formal adjudications “be conducted in an impartial manner.”¹⁶⁴ To assure this requirement is more than a

157. *Id.* § 556(e).

158. *Id.*

159. *Id.* § 557(c).

160. *Id.*

161. U.S. DEP’T OF JUSTICE, *supra* note 33, at 132. The *Attorney General’s Manual* refers to § 7(a), which is now § 556(b).

162. 5 U.S.C. § 7521.

163. *See* discussion *supra* notes 7 and 8.

164. 5 U.S.C. § 556(b).

hortatory admonition, the APA provides that an ALJ may be removed for “personal bias or other disqualification.”¹⁶⁵ Section 554(d) protects impartiality by prohibiting the combination of prosecutorial and judicial functions that would undermine both the fairness and legitimacy of the ALJ’s decision. Section 554(d)(2) both prohibits the agency from requiring the ALJ to “be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency” and prohibits any such investigating or prosecuting employee from participating or advising in the decision “except as a witness or counsel” in the hearing itself.¹⁶⁶ According to Professor James Freedman, “The creation of these sources of independence constituted a signal advance from the situation prevailing before the Administrative Procedure Act became law.”¹⁶⁷

Although the ALJ presides over receipt of the evidence, the decision is ultimately up to the agency, either on review of the ALJ or on reaching its own decision.¹⁶⁸ This could well undermine the real and perceived legitimacy of the ultimate decision, but the APA generally ensures that the agency must address the conclusions reached by the ALJ. Section 557(b) gives particular significance to the ALJ’s independence by requiring, with limited exceptions, that the ALJ render either an “initial decision,” which is subject to review by the agency, or a recommended decision where the agency itself will be making the actual decision.¹⁶⁹ Thus, in most cases the independent ALJ will not only gather the evidence but also assess and report upon the significance of the evidence, resolving disputes and reaching conclusions without regard to any political imperatives or other influences that might affect the agency itself in reaching the ultimate decision. Moreover, the agency’s ultimate decision, if there is one, “shall include a statement of—(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record.”¹⁷⁰ As the Supreme Court held in *Universal Camera Corp. v. NLRB*, the record includes the ALJ’s report for the purpose of judging

165. *Id.*

166. *Id.* § 554(d)(2).

167. JAMES O. FREEDMAN, *CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT* 163 (1978).

168. Where the ALJ issues an initial decision, the agency on review “has all the powers which it would have in making the initial decision,” and the agency may opt to make the decision itself. 5 U.S.C. § 557(b).

169. *Id.* The agency may avoid an initial decision by the ALJ where the agency requires, “either in specific cases or by general rule, the entire record to be certified to it for decision.” *Id.* It may avoid a recommended decision where the agency itself will issue a tentative decision or “timely execution of its functions imperatively and unavoidably so requires.” *Id.* § 557(b)(1)–(2).

170. *Id.* § 557(c)(3)(A).

the substantiality of the evidence.¹⁷¹ Indeed, the *Universal Camera* Court noted “indications in the legislative history that enhancement of the status and function of the trial examiner was one of the important purposes of the movement for administrative reform.”¹⁷² When an ALJ is required, the agency cannot escape the independent judgment of the ALJ in reaching its ultimate decision.

3. *Empowering the ALJ to Use Trial-Like Process, but Not Requiring It*

The formal-adjudication provisions of the APA empower the ALJ to implement the hearing through administering oaths, issuing subpoenas, ruling on offers, and otherwise regulating the course of the hearing,¹⁷³ but they do not require the agency or the ALJ to employ trial-like process. To the contrary, as Judge Bruce M. Selya recognized in *Citizens Awareness Network*, “The APA lays out only the most skeletal framework for conducting agency adjudications, leaving broad discretion to the affected agencies in formulating detailed procedural rules.”¹⁷⁴ As he characterized it, the APA requires only the balanced participation and neutral and independent decisionmaker described above, plus the right “to conduct such cross-examination as may be required for a full and true disclosure of the facts.”¹⁷⁵

In light of the skeletal nature of the APA’s requirements, the First Circuit in *Citizens Awareness Network* held that severely streamlined NRC hearing procedures complied with §§ 554, 556, and 557 of the APA despite the fact that they eliminated the opportunity for discovery,¹⁷⁶ provided that the ALJ would conduct most of the questioning,¹⁷⁷ prohibited cross-examination except as “necessary to ensure the development of an adequate

171. 340 U.S. 474, 492–96 (1951).

172. *Id.* at 494.

173. 5 U.S.C. § 556(c)(1)–(11).

174. *Citizens Awareness Network, Inc. v. United States*, 391 F.3d 338, 349 (1st Cir. 2004).

175. *Id.* (quoting 5 U.S.C. § 556(d)).

176. In place of discovery, the NRC imposed a disclosure requirement under which the parties must disclose much of their case, such as expert-witness reports and the like. Although the court noted this requirement in upholding the elimination of discovery, *id.* at 350, the disclosure requirement probably was not necessary to the court’s decision. Since the APA nowhere mentions discovery, and the court did not consider discovery to be necessary to develop a satisfactory record for judicial review, *id.*, the agency probably would have been able to eliminate discovery without substituting the disclosure requirement in its place.

177. To simplify this discussion, I will use the term *ALJ* here despite the fact that NRC hearings are held before a three-person panel known as the Atomic Safety and Licensing Board, and the NRC’s rule referred to the “presiding officer,” the Board member chairing the hearing. The new rules authorized the parties to submit suggested questions but did not require the ALJ to use them. *Id.* at 345.

record for decision,” and required the filing of cross-examination plans when cross-examination is permitted.¹⁷⁸ In so doing, the court also emphasized the *Vermont Yankee* principle that a court “may not impose procedural requirements in administrative cases above and beyond those mandated by statute (here, the APA).”¹⁷⁹

Although the NRC could not see it coming in *Citizens Awareness Network*, this proposition is hardly new. As Judge Lipez noted, “sources contemporaneous with the APA’s passage suggest that flexibility has always been a hallmark of the APA, and that agencies have always had considerable discretion to structure on-the-record hearings to suit their particular needs.”¹⁸⁰ Professors Funk and Howarth have both made this point in slightly different contexts, Professor Howarth noting that the APA’s formal-adjudication provisions “do not even require the use of any oral procedures in many cases.”¹⁸¹

This is not to say the agencies may ignore or completely dispense with trial-like process in formal adjudications. Although § 556(c) does not require the ALJ to deploy any particular trapping of a formal trial,¹⁸² § 556(d) grants the right “to conduct such cross-examination as may be required for a full and true disclosure of the facts.”¹⁸³ As generous as the First Circuit was in *Citizens Awareness Network*, it found the limits on cross-examination to be a closer question than the elimination of discovery. Noting ALJ statements that cross-examination is sometimes helpful in resolving some issues and in deterring exaggeration in written direct testimony, the court emphasized that the NRC had not completely eliminated cross-examination. Then, in upholding the NRC’s limitations on cross-examination, the court added the caveat that “cross-examination must be allowed in appropriate instances.”¹⁸⁴

In sum, the agency has a great deal of discretion to structure formal

178. *Id.* (quoting 10 C.F.R. § 2.1204).

179. *Id.* at 349. Judge Lipez’s concurring opinion notes,

Most of these provisions relate to the conduct and responsibilities of the presiding officer or the basis for agency orders (on the record). Only a few relate to the conduct of the hearing itself. These APA requirements leave agencies with a great deal of flexibility in tailoring on-the-record hearing procedures to suit their perceived needs.

Id. at 356 (Lipez, J., concurring).

180. *Id.* at 361.

181. Howarth, *Restoring the Applicability*, *supra* note 48, at 1050; *see also* Howarth, *Federal Licensing and the APA*, *supra* note 48, at 341–42, 352 (stating that the APA permits a deviation from traditional judicial techniques, and even does not guarantee an absolute right to cross-examination); Funk, *supra* note 147, at 64–65 (discussing how the APA allows ALJs to conduct hearings informally).

182. 5 U.S.C. § 556(c) (2006).

183. *Id.* § 556(d).

184. *Citizens Awareness Network*, 391 F.3d at 354.

adjudications without all the trappings of a trial, perhaps largely or entirely in writing, except in the relatively rare instances where cross-examination is “required for a full and true disclosure of the facts.”¹⁸⁵ This could be done in any number of ways, such as written filings and cross-filings, questioning by the ALJ, and cross-examination at the discretion of the ALJ. Although history suggests that there might be some difficulty in moving the litigators and ALJs away from the trial model,¹⁸⁶ an agency could adopt stringent rules, as the NRC has done. Indeed, Judge Friendly long ago suggested a very similar procedural format, and Professor Funk has argued that agencies could adopt expedited procedures in formal adjudications.¹⁸⁷

For the purpose of this discussion, it does not matter precisely how this discretion is to be implemented. The crucial point is that Congress had two overriding concerns, ensuring the independence and impartiality of the presiding officer, and ensuring balance in the presentation and consideration of the evidence and arguments. These concerns, in turn, are central to the real and perceived legitimacy of the process. They also are the reason that *Chevron* deference should not apply to the question of whether an agency must comply with §§ 554, 556, and 557 under a particular statutory hearing provision.

III. *CHEVRON* DEFERENCE SHOULD NOT APPLY TO THE § 554(A) TRIGGER DECISION

The ultimate question here is whether *Chevron* deference should apply to all to an agency’s determination that a statutory right to a hearing does not trigger § 554(a) of the APA—a determination that would avoid the neutral

185. The final sentence of § 556(d) complicates the matter somewhat by providing that “[i]n rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.” 5 U.S.C. § 556(d). This language suggests that the main body of formal adjudications could not admit even part of the evidence in written form. This would be absurd, as it would require submission of all written exhibits through oral testimony. Perhaps the term *evidence* in this provision was meant to refer to direct testimony, in which case all direct testimony would have to be provided orally in person, but this conflicts with the common practice of requiring direct testimony to be submitted in writing. It also conflicts with the very broad authority to rely upon official notice as long as the parties have been given notice and an opportunity to respond. *Id.* § 556(e).

186. See Funk, *supra* note 147, at 65 (noting that agencies often conflict with ALJs over ALJ independence); Friendly, *supra* note 103, at 1285 (questioning whether hearing officers will be able to control cross-examination effectively due to their own memories of their own dazzling performances).

187. See Funk, *supra* note 147, at 65–66 (discussing prospects for and disadvantages of expedited formal-adjudication procedures); Friendly, *supra* note 103, at 1289 (suggesting consideration of abandoning the adversary system in favor of one in which the hearing officer would assume a much more active role, including even calling his own expert witnesses).

decisionmaker, ex parte prohibitions, and other provisions of §§ 554, 556, and 557. The answer depends upon the principles that govern when *Chevron* applies. As discussed below, there are two limitations on the application of *Chevron* deference. First, *Chevron* itself supports deference only when an agency has exercised substantive authority. Second, the Supreme Court has definitively established that deference is ultimately a matter of congressional intent. Although the Court has not addressed this point, the substantive-authority limitation may simply be subsumed within the question of congressional intent. If Congress intended deference with respect to a particular procedural interpretation, such deference would be appropriate.

Some, including some of the Justices, say that the inference of intent to delegate is a convenient fiction.¹⁸⁸ That may frequently be the case, but where Congress clearly would not have intended deference to a particular agency interpretation, that discernable intent should surely govern. As demonstrated below, there is no doubt that Congress would not have intended deference to agency decisions concerning the application of the APA's formal-adjudication protections to agency hearings.

A. *Chevron Supports Deference Only When an Agency Has Exercised Substantive Expertise and Authority*

We begin with surely the most quoted judicial language of the past quarter century, perhaps longer:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.¹⁸⁹

Although commentators quickly identified this as the *Chevron* Two-Step,¹⁹⁰ even this language included an earlier step. These principles

188. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517.

189. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (footnotes omitted).

190. Panel Discussion, *Judicial Review of Administrative Action in a Conservative Era*, 39 ADMIN. L. REV. 353, 360–61 (1987) (remarks of Kenneth W. Starr).

apply only to “an agency’s construction of the statute *which it administers*.”¹⁹¹ *Chevron* clearly met this test,¹⁹² so the Court had no need to explore what it means to “administer” a statute.¹⁹³ We later learned that agencies do not administer generally applicable statutes such as the APA or the Freedom of Information Act so as to be entitled to *Chevron* deference,¹⁹⁴ but there remains the question of whether an agency may be said to administer all provisions of its own statutes so as to qualify for *Chevron* deference. The important point here is that the core language of *Chevron* strongly suggests the courts must address an initial question—whether *Chevron*-type deference applies at all to the statutory interpretation at issue. To think, had we recognized this at the time, we could have been dancing the *Chevron* Waltz all these years.

Beyond this reference to a statute that an agency “administers,” *Chevron* provides additional clues to the likely boundaries of its doctrine. Quoting *Morton v. Ruiz*,¹⁹⁵ the Court wrote that “[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.”¹⁹⁶

Morton involved the agency’s power to allocate the funds available for certain welfare services for Native Americans, a decidedly substantive question. Similarly, all of the cases cited by the Court in discussing the availability of deference involved implementation of the agencies’ substantive mandates.¹⁹⁷ For example, *FEC v. Democratic Senatorial*

191. *Chevron*, 467 U.S. at 842 (emphasis added).

192. *Chevron* involved EPA’s exercise of the legislative rulemaking process to implement § 7502(c)(5) of the Clean Air Act, under which states must submit pollution control plans that “require permits for the construction and operation of new or modified major stationary sources.” 42 U.S.C. § 7502(c)(5) (2000). In defining the term *stationary source*, EPA was administering the core substantive provisions of the Clean Air Act.

193. Others have explored this question. See, e.g., Jack M. Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856, 879 n.141 (2007) (concluding that an agency interpretation of its own statute’s hearing provision would be entitled to *Chevron* deference, while its interpretation of the APA would not be).

194. It is well established, for example, that an agency such as EPA does not “administer” the APA, the Freedom of Information Act, or other statutes applicable to a wide range of agencies. Merrill & Hickman, *supra* note 22, at 896; CHARLES H. KOCH, JR. ET AL., *ADMINISTRATIVE LAW: CASES AND MATERIALS* 727 (5th ed. 2006).

195. 415 U.S. 199, 231 (1974).

196. *Chevron*, 467 U.S. at 843.

197. The Court cited the following decisions in footnote 11 for the proposition that, “if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute”: *Fed. Elec. Comm. v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981) (upholding FEC’s interpretation of the scope of a prohibition on political expenditures); *Zenith Radio Corp. v. United States*, 437 U.S. 443, 449 (1978) (upholding Treasury’s interpretation of whether a Japanese tax constituted a “bounty or grant” triggering the imposition of a countervailing duty); *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60,

75 (1975) (upholding EPA's interpretation of the Clean Air Act as allowing a state to provide for variances from compliance by particular sources as long as the ambient standards were still to be met by the statutory deadline); *Udall v. Tallman*, 380 U.S. 1, 16 (1965) (upholding the Secretary of the Interior's interpretation of an Executive Order as prohibiting the issuance of oil and gas leases on certain lands); *Unemployment Comp. Comm'n of Alaska v. Aragon*, 329 U.S. 143, 153 (1946) (upholding the agency's determination that a "labor dispute" was in "active progress" on certain facts); *McLaren v. Fleischer*, 256 U.S. 477, 480–81 (1921) (upholding agency interpretation of statutory provision of the time period during which a homesteader could enter and claim land).

The Court cited the following decisions in footnote 13 for the proposition that "[s]ometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency": *INS v. Jong Ha Wang*, 450 U.S. 139, 144 (1981) (upholding an INS decision that respondents' prediction of economic deprivation did not constitute "extreme hardship" that would prevent them from being deported); *Train*, 421 U.S. at 75.

The Court cited the following decisions in footnote 14 for the proposition that "[w]e have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer": *Aluminum Co. of Am. v. Cent. Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 386, 389 (1984) (upholding agency's determination that a statutory requirement to offer power contracts for "an amount of power equivalent" to the amount of a previous contract did not prevent including a new provision authorizing interruption of power as needed when the previous contract required uninterruptable power); *Blum v. Bacon*, 457 U.S. 132, 141 (1982) (deferring to Secretary's interpretation of statute and regulation governing relationship between state aid programs and Aid to Families with Dependent Children in welfare recipient's dispute with state); *Union Elec. Co. v. EPA*, 427 U.S. 246, 256 (1976) (upholding on plain meaning of statute Administrator's view that EPA could not reject a state implementation plan on grounds of economic or technical infeasibility); *Inv. Co. Inst. v. Camp*, 401 U.S. 617, 626–27 (1971) (acknowledging principle of deference to the Comptroller in determining what banks may do under the banking laws, but ruling against the Comptroller on the particulars); *Aragon*, 329 U.S. at 153–54; *NLRB v. Hearst Publ'ns*, 322 U.S. 111, 131 (1944) (upholding Board's application of the term *employee* to certain "newsboys"); *McLaren*, 256 U.S. at 480–81; *Webster v. Luther*, 163 U.S. 331, 342 (1896) (acknowledging principle of deference "practical construction" by the agency in a case involving nature property rights under homestead legislation, but deciding contrary to alleged agency practice based on clarity of statute); *Brown v. United States*, 113 U.S. 568, 570–71 (1885) (upholding an agency determination that the term *officer* in a provision relating to forced retirement referred to warrant officers as well as commissioned officers); *United States v. Moore*, 95 U.S. 760, 763 (1877) (acknowledging "respectful consideration" of the view of an agency executing a statute concerning whether for pay-rate purposes "after the date of appointment" refers to original appointment to position of "assistant surgeon," or to appointment as "passed assistant surgeon" after passing exam); *Edwards' Lessee v. Darby*, 25 U.S. 206, 210 (1827) (acknowledging deference to a contemporaneous interpretation by a responsible official with respect to a statute authorizing private appropriation of some lands but excluding others from appropriation).

The Court cited the following decisions at pages 844 and 845, in footnote 41, and on page 866 to support the proposition that courts should defer to an agency's "reconciling conflicting policies," particularly where "a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations": *Nat'l Broad. Co. v. United States*, 319 U.S. 190 (1943) (accepting agency's interpretation of Communications Act as granting broad regulatory authority); *Hearst Publ'ns*, 322 U.S. 111; *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 800 (1945) (recognizing the value of the Board's "appreciation of the complexities of the subject" in upholding the Board's determination of an unfair labor practice); *SEC v. Chenery Corp.*, 332 U.S. 194 (1947) (upholding SEC's interpretation of

*Campaign Committee*¹⁹⁸ involved the interpretation of the scope of a prohibition on political expenditures, not any procedures that might be available to those affected. Similarly, *Aluminum Co. of America v. Central Lincoln Peoples' Utility District*¹⁹⁹ involved the interpretation of a statutory requirement governing the amount of power to be offered by a utility, not the procedures that might be available to affected parties.²⁰⁰

Chevron itself involved the question of whether the substantive goals of Congress could better be achieved by regulating every individual source of pollution (every smokestack, for example) as a “stationary source” or by regulating an entire facility (in effect, all of the smokestacks together under a “bubble”) as a “stationary source.” Characterizing the relevant statutory provision as “one phrase” in a “small portion” of “a lengthy, detailed, technical, complex, and comprehensive response to a major social issue,”²⁰¹ the Court examined the statutory language and legislative history, only to

requirements of securities legislation); *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344 (1953) (upholding an NLRB back-pay order, emphasizing responsibility and experience with respect to such decisions); *United States v. Shimer*, 367 U.S. 374, 382–83 (1961) (upholding Veteran’s Administration (VA) position on recovery of loan guarantee payments where VA regulations resolved relevant policy concerns differently from state law); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699–700 (1984) (deferring to the Federal Communications Commission decision to preempt all state regulation of cable television content, resolving conflict between national cable system needs and state interests including control of alcohol advertising).

In footnote 39, the Court cited *Central Lincoln*, 467 U.S. at 390, for the proposition that an agency is entitled to deference where it reconciles conflicting interests and “the regulatory scheme is technical and complex.”

In footnote 40, the Court cited the following decisions for the proposition that deference is due to an agency where it considered the matter in “a detailed and reasoned fashion”: *SEC v. Sloan*, 436 U.S. 103, 117–18 (1978) (noting deference to detailed consideration, but failing to find it on the facts and emphasizing the Court’s duty to enforce limits of statutory mandate); *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 287 n.5 (1978) (rejecting under the statute EPA’s argument that a work place practice constituted an “emissions standard” for the purpose of a criminal prosecution and rejecting *Skidmore*-style deference for lack of specific consideration or explanation); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (requiring deference to interpretation of “hours worked” expressed in Interpretive Bulletin and amicus brief based on its persuasive power).

198. 454 U.S. 27 (1981).

199. 467 U.S. at 380.

200. One can make too much of obscure citations in major cases, but it is interesting to note that the Court rejected the agency’s position in *SEC v. Sloan*, 436 U.S. 103 (1978), which arguably involved a question of procedure rather than substance. The issue was whether the SEC could impose successive ten-day suspensions on a securities trader for the same violation. Although it referred to the general possibility of *Hearst*-style deference, the Court emphasized that the courts are the final authority on matters of statutory interpretation and found that the statute precluded the agency’s position. *Id.* at 119. In the process, the Court seems at most to have applied *Skidmore* deference, noting that “without a concomitant exegesis of the statutory authority,” the agency’s reasons lacked the “power to persuade.” *Id.* at 118. The Court’s refusal to hold for the agency in order to achieve the substantive regulatory purpose of the statute suggests it is reluctant to defer to agency views as to formal adjudicatory procedures even where it would defer on the substance.

201. *Chevron*, 467 U.S. at 848–49.

find that they did not address the question of whether the “bubble” concept was a permissible construction of the statute. The Court determined from the legislative history, however, that Congress wanted to reconcile the conflict between economic growth and environmental protection.²⁰²

After discussing the twists and turns of the EPA’s treatment of the issue over the years, the Court noted the EPA’s explanation that the pre-bubble approach created disincentives to modernization, which could “actually retard progress in air pollution control.”²⁰³ As described by the Court, the EPA’s decision involved the exercise of substantive expertise concerning the best way to achieve the goal of cleaner air, but more important, to accommodate the policy conflict between economic growth and environmental protection.²⁰⁴

Having emphasized the substantive nature of the issue at hand, the Court articulated a test that should have suggested the first step of the *Chevron* Waltz: “In these cases the Administrator’s interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies.”²⁰⁵ Shortly thereafter, the Court said, “Judges are not experts in the field,” while the agency to which Congress has delegated “policy-making responsibilities” may “rely upon the incumbent administration’s views of wise policy to inform its judgments.”²⁰⁶ The “field” and the “policy-making responsibilities” to which the Court referred were the field of substance and the making of policy in a “technical and complex” arena requiring substantive expertise. Thus, the Court recognized that statutory ambiguity opens the door to the exercise of substantive policymaking by the agency to which Congress has delegated the substantive authority and responsibility.

As the preceding discussion suggests, the Court could well have read *Chevron* as requiring deference only when an agency exercises substantive authority—when it administers a statute.²⁰⁷ It could have drawn a fairly

202. *Id.* at 851.

203. *Id.* at 858 (describing the justification EPA provided in its proposed rule).

204. Similarly, the Court described EPA’s decision as consistent with one of the policies underlying the statute, “the allowance of reasonable economic growth.” *Id.* at 863. Again, the Court understood that the EPA had made a substantive policy choice in seeking to accommodate the seemingly conflicting goals of the statute.

205. *Id.* at 865 (internal footnotes omitted).

206. *Id.*

207. Peter Shane reached essentially this conclusion:

If more than one plausible reading is available, the judge should then ask whether the ambiguity in the statute signals an occasion for genuine agency policy making. In other words, the court should determine whether the function of the agency, in filling the statutory gap at issue, entails balancing expert judgment and relevant political

familiar line between substance and procedure, at least procedure that affects the rights of particular individuals—adjudicatory procedure, with its concomitant due process implications. Since *Chevron*'s facts did not force that choice, *Chevron* itself did not make it. Thus, *Chevron* provides no support for deference to agency interpretations that do not rely upon substantive expertise and authority.

As discussed below, the Court later articulated a distinct basis for determining when agency interpretations are entitled to *Chevron* deference, one also presaged by *Chevron*'s language. In *Chevron* itself, the Court discussed agency authority as a matter of congressional delegation. Congress may expressly delegate authority to fill a gap in a statutory scheme, in which case the agency's decision is subject to arbitrary-and-capricious review. Sometimes, however, "the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."²⁰⁸ Similarly, near the end of its opinion, the Court said that, in contrast to courts,

an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.²⁰⁹

The core concept embodied in these excerpts²¹⁰ is the proposition that

values in order to accommodate the competing interests that need to be taken into account to further Congress's objectives in enacting the statute.

Peter M. Shane, *Ambiguity and Policy Making: A Cognitive Approach to Synthesizing Chevron and Mead*, 16 VILL. ENVTL. L.J. 19, 33 (2005).

208. *Chevron*, 467 U.S. at 844 (citations omitted).

209. *Id.* at 865–66.

210. And elsewhere in *Chevron*:

Congress intended to accommodate both interests, but did not do so itself on the level of specificity presented by these cases. Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency.

Id. at 865. And, "it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities." *Id.* at 865–66. Thus, either

Congress delegates the policymaking responsibilities and thereby decides the range of deference due to an agency's interpretation.

B. Determining the Applicability of Chevron—A Matter of Congressional Intent

Although commentators quickly questioned the scope of *Chevron* deference,²¹¹ Justice Scalia asserted in 1989 that *Chevron* deference was a matter of congressional delegation and that *Chevron* had replaced any “statute-by-statute evaluation . . . with an across-the-board presumption that, in the case of ambiguity, agency discretion is meant.”²¹² His assertion was consistent with the Court's refusal the previous year to deny *Chevron* deference to an agency decision concerning the scope of its own jurisdiction.²¹³ Thus, perhaps we should not be terribly critical of the D.C. Circuit's *Chemical Waste Management* decision that same year, which applied *Chevron* deference without examining the question of whether Congress would have intended deference to an agency on the question of whether a statutory hearing provision triggered the formal-adjudication requirements of §§ 554, 556, and 557 of the APA.²¹⁴ By the time the First Circuit did the same thing in 2006,²¹⁵ however, there was no excuse for the

inadvertently or intentionally, congressional action creates the delegation, and congressional intent governs the extent of the deference, if any, to agency interpretations.

211. See, e.g., Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 372–73 (1986) (suggesting that deference “rests upon an agency's better knowledge of congressional intent” and “upon Congress' intent that courts give an agency legal interpretations special weight, an intent that (where Congress is silent) courts may impute on the basis of various ‘practical’ circumstances,” and asserting that a blanket application of *Chevron* deference to all agency interpretations “would be seriously overbroad, counterproductive and sometimes senseless”); Cass R. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271, 288 (1986) (arguing that *Chevron* “is an unacceptable basis for judicial review”); Eric M. Braun, Note, *Coring the Seedless Grape: A Reinterpretation of Chevron U.S.A. Inc. v. NRDC*, 87 COLUM. L. REV. 986, 1003–04, 1008 (1987) (arguing for a multifactor approach to whether Congress intended a delegation of interpretive authority, and asserting that Congress would not intend such a delegation as to “statutorily required procedures”).

212. Scalia, *supra* note 188, at 516. Justice Scalia suggested that in most cases Congress had no discernible intent, so he posited a “fictional, presumed intent” that “operates principally as a background rule of law against which Congress can legislate.” *Id.* at 517.

213. *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 380–81 (1988) (Scalia, J., concurring). The majority justified applying *Chevron* deference to a matter so seemingly in the agency's self-interest on two grounds. First, “there is no discernible line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority.” *Id.* at 381. Second, deference would be “consistent with the general rationale for deference: Congress would naturally expect that the agency would be responsible, within broad limits, for resolving ambiguities in its statutory authority or jurisdiction.” *Id.* at 381–82.

214. *Chem. Waste Mgmt., Inc. v. EPA*, 873 F.2d 1477, 1482 (1989).

215. See *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12, 16–17 (1st Cir. 2006) (holding the EPA's refusal to provide an evidentiary hearing after denying applicant's

court's failure to address what has come to be known as *Chevron* Step Zero.²¹⁶ By 2006, the Supreme Court had firmly established that the availability of *Chevron* deference is not to be presumed, but is a matter of congressional intent on the particular facts.²¹⁷

Despite Justice Scalia's 1989 assertion of a presumption that *Chevron* deference applies to agency interpretations, commentators challenged the application of *Chevron* deference to particular agency decisions either as a matter of policy or on the ground that Congress would not have intended such a delegation.²¹⁸ Following suit, the Court initially restricted *Chevron*'s reach in decisions suggesting the question was controlled by whether the agency was authorized to promulgate or actually promulgated legislative rules with respect to the issues at hand. In *EEOC v. Arabian American Oil Co.*,²¹⁹ the Court refused to apply *Chevron* deference where the statute "did not confer upon the EEOC authority to promulgate rules or regulations."²²⁰ Similarly, in *Christensen v. Harris County*, the Court denied *Chevron* deference to an opinion letter because it had not been "arrived at after, for example, a formal adjudication or notice-and-comment rulemaking," which would have the force of law.²²¹ Thus, it seemed that

request for a National Pollution Elimination System permit to be a reasonable interpretation of the Clean Water Act under *Chevron*). The First Circuit did not do exactly what the D.C. Circuit had done in *Chemical Waste Management* because the First Circuit had to struggle with whether it could overcome its own prior decision in *Seacoast*. See *supra* text accompanying notes 90–98.

216. See, e.g., Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006) (contending that some of the most important questions regarding the application of *Chevron* occur at Step Zero—the initial decision of whether to apply *Chevron* deference—and arguing that the Step Zero analysis should be simplified to broaden the application of *Chevron*).

217. See discussion *infra* accompanying notes 232–43.

218. See, e.g., Breyer, *supra* note 211, at 368–72 (arguing that superior agency knowledge and congressional intent are two distinct bases for *Chevron* deference); Braun, *supra* note 211, at 998–1004 (recognizing delegation as the theoretical basis for *Chevron* deference, arguing that "any factors that suggest a congressional delegation of interpretive authority are relevant to the deference analysis," and that Congress would not have intended to delegate interpretation of procedural provisions that "traditionally function to check abuses of agency authority"); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2076–77, 2091–101 (1990) (arguing that *Chevron* deference should apply "only in cases of congressional delegation of law-making authority," not as to issues of jurisdiction or agency self-interest); Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 CARDOZO L. REV. 989, 992–94 (1999) (emphasizing expertise as the underpinning of *Chevron* deference and arguing against deference to matters of agency self-interest, particularly issues of agency jurisdiction).

219. 499 U.S. 244 (1991).

220. *Id.* at 257 (quoting *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976)). Much to Justice Scalia's chagrin, *Arabian Am. Oil Co.*, 499 U.S. at 259–60 (Scalia, J., concurring), the Court subjected the EEOC's guidelines to *Skidmore* deference, under which the question is whether, given the agency's consideration of the matter, the agency's statement has the "power to persuade." *Id.* at 257 (quoting *Skidmore v. Swift*, 323 U.S. 134, 140 (1944)).

221. 529 U.S. 576, 587–88 (2000).

Chevron deference might be limited to agency interpretations reached through such decisionmaking procedures.

There remained, however, the question of whether *Chevron* deference might apply to informal adjudications. With *Chevron*'s EPA rule at one end of the decisionmaking spectrum (force-of-law authority and action) and both the *Arabian American Oil* and *Christensen* informal issuances at the other (mere statements that did not decide the outcome of either a legislative rule or an adjudication), it was possible that *Chevron* might apply to an interpretation stated in the course of an informal adjudication in which the agency, pursuant to statutory authority, resolved the rights of a particular party but did not have to comply with statutorily required procedures.

Chevron, *Arabian American Oil*, and *Christensen* all involved ambiguous statutes whose meaning could not be resolved at *Chevron* Step One. Thus, they focused on when an agency is entitled to deference under *Chevron* Step Two. Meanwhile, the Court issued two Step One decisions strongly indicating that the availability of *Chevron* deference depends upon the intent of Congress. In *MCI Telecommunications Corp. v. AT&T Co.*,²²² the Court reviewed a rule through which the FCC had made tariff filing optional for all nondominant long-distance carriers despite the fact that the statute required that all tariffs be filed with the agency. Although the FCC relied upon explicit statutory authority to "modify any requirement made by or under . . . this section,"²²³ the Court held that the term *modify* could not authorize the elimination of "the essential characteristic of a rate-regulated industry."²²⁴ Much of the Court's opinion is devoted to a dictionary-based explanation of the proposition that the term *modify* is not ambiguous with respect to the question of whether the FCC could make such a radical change in the regulatory scheme.²²⁵ Ultimately, however, the Court directly addressed the propriety of deference in terms that appear to apply well beyond the narrow dispute over the meaning of *modify*: "It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements."²²⁶

At the time *MCI* was decided, there appeared to be two ways for the Court to avoid granting *Chevron* deference. The first, illustrated by *MCI* itself, was to hold that the statutory term is not ambiguous. The other,

222. 512 U.S. 218 (1994).

223. 47 U.S.C. § 203(b)(2) (2000).

224. *MCI v. AT&T*, 512 U.S. at 231.

225. *Id.* at 225–29.

226. *Id.* at 231.

illustrated by *Arabian American Oil* and *Christensen*, was to hold that the nature of the procedures used to issue the interpretation do not justify deference. The Court's "highly unlikely" statement in *MCI*, however, suggests a simpler, arguably more profound reason to deny (or to accord) deference, one that was obscured by attention to arguments over statutory ambiguity or the details of agency procedure. At base, the question is whether Congress intended to assign the particular issue to the agency in a way that required judicial deference to the agency's interpretation.

The Court repeated the *MCI* pattern in *FDA v. Brown & Williamson Tobacco Corp.*,²²⁷ in which it rejected the FDA's reading of the Food, Drug, and Cosmetic Act as applied to nicotine. As in *MCI*, the majority expounded at length about why the statute was unambiguous on this question.²²⁸ In articulating the principles governing its review of a question of statutory interpretation, however, the Court explicitly stated the governing principle of congressional intent:

Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.²²⁹

Similarly, in *Gonzales v. Oregon*,²³⁰ the Court refused to recognize the Attorney General's assertion of authority over physician-assisted suicide because "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."²³¹ In all of these cases, the question is whether Congress intended to delegate the particular policy decision to the agency. In *MCI*, *Brown & Williamson*, and *Gonzales v. Oregon*, the Court majority answered that question at *Chevron* Step One, using its own power to find clarity where the dissenters found ambiguity sufficient to support deference under *Chevron* Step Two.²³²

227. 529 U.S. 120 (2000).

228. *Id.* at 132–42.

229. *Id.* at 159 (citation omitted). Earlier in its opinion, the majority reflected this principle in stating, "In addition, we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." *Id.* at 133. The Court later returned to this theme as it concluded its analysis: "As in *MCI*, we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Id.* at 160.

230. 546 U.S. 243 (2006).

231. *Id.* at 267 (quoting *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001), and citing *Brown & Williamson*, 529 U.S. at 160).

232. *MCI v. AT&T*, 512 U.S. 218, 244–45 (1994) (Stevens, J., dissenting); *Gonzales v. Oregon*, 546 U.S. at 284 n.3 (Scalia, J., dissenting). Strictly speaking, the dissenters in *Brown & Williamson* did not need to find ambiguity because they found that the literal

Taken together, these decisions may be said to establish a major-issue exception to *Chevron* deference,²³³ but when we read them together with *Mead*²³⁴ and *Barnhart v. Walton*,²³⁵ discussed below, we see an overarching question of whether Congress would have intended the agency power or deference at issue. It may be difficult to determine exactly what guides decisions about congressional intent in these disputes, but there is no single rule—“major issues” or otherwise—that provides clear guidance. The issue in each case is the likely congressional intent on the facts at hand.²³⁶

In *Mead*, the Court appeared to add two more steps to the *Chevron* dance, with an emphasis on procedure comparable to its earlier guidance from *Christensen*: “We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”²³⁷ The Court followed this seemingly simple test with an explanation that the required delegation could be discerned in a variety of ways, including from “an agency’s power to engage in adjudication or notice-and-comment rulemaking, or by some other *indication of a comparable congressional intent*.”²³⁸ It is important to note that the Court did not refer to a “*comparable indication of congressional intent*”—which would have suggested a search for procedural indicators comparable to formal adjudication or notice-and-comment rulemaking. To the contrary, the Court opened the door to any indicators of a “comparable congressional intent” as to the degree of delegation. One such indicator identified by the Court was the “personal authority” of the Comptroller of the Currency,²³⁹ but the ultimate question in each case is “whether a plausible case can be made that Congress would want such a delegation to mean that agencies enjoy primary interpretational authority.”²⁴⁰

statutory language supported the FDA. “First, tobacco products (including cigarettes) fall within the scope of this statutory definition, read literally.” *Brown & Williamson*, 529 U.S. at 162 (Breyer, J., dissenting).

233. See William N. Eskridge, Jr. & Kevin S. Schwartz, *Chevron and Agency Norm-Entrepreneurship*, 115 *YALE L.J.* 2623, 2628–29 (2006) (proposing that, in the absence of an explicit delegation, courts may refuse to defer to certain agency interpretations because they relate to major normative issues).

234. *United States v. Mead Corp.*, 533 U.S. 218 (2001).

235. 535 U.S. 212 (2002).

236. Tom Merrill and Kristin Hickman documented this proposition brilliantly. Merrill & Hickman, *supra* note 22, at 872.

237. 533 U.S. at 226–27.

238. *Id.* at 227 (emphasis added).

239. *Id.* at 231 & n.13.

240. *Id.* at 230 n.11 (quoting Merrill & Hickman, *supra* note 22, at 872).

Although *Barnhart*²⁴¹ seemed to reject the relatively clean *Chevron* Two Step in favor of the multifactor approach of a prior deference era,²⁴² its formulation is entirely consistent with a search for likely congressional intent.²⁴³ Referring to the particulars of that dispute over Social Security disability, the Court said,

In this case, the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.²⁴⁴

Each of those factors has a bearing on whether Congress would probably have intended a *Chevron* delegation. The “interstitial nature” factor is the opposite of the major-issue factors in *MCI, Brown & Williamson*, and *Oregon v. Gonzales*. The importance to the administration of the statute and the complexity of that administration reflect the facts of *Chevron* itself. The care in consideration of the issue reflects *Mead*’s reference to the likelihood of an intended delegation where an agency used formal adjudication or informal-rulemaking procedures to issue an interpretation. Crucially, however, the Court introduces the entire statement with the words, “[i]n this case,” indicating that the deference decision depends upon the facts of each particular case, rather than upon some overriding rule. Each time, the question is whether Congress would have intended a *Chevron*-type delegation.

The Court’s recent decision in *Long Island Care at Home, Ltd. v. Coke*²⁴⁵ confirms this approach to determining whether *Chevron* deference applies to a particular dispute. After reiterating that “the ultimate question is whether *Congress* would have intended, and expected, courts to treat an agency’s rule, regulation, application of a statute, or other agency action as within, or outside, its delegation to the agency of gap-filling authority,” the Court considered the particulars—“where the agency uses full notice-and-comment procedures to promulgate a rule, where the resulting rule falls

241. *Barnhart v. Walton*, 535 U.S. 212 (2002).

242. See William S. Jordan, III, *Deference Revisited: Politics as a Determinant of Deference Doctrine and the End of the Apparent Chevron Consensus*, 68 NEB. L. REV. 454, 468–69, 483–86 (1989) (describing the pre-*Chevron* multifactor approach and arguing that *Chevron* actually applied that approach).

243. Not surprisingly, because Justice Breyer wrote the majority opinion, *Barnhart v. Walton* is also entirely consistent with the deference analysis that he articulated soon after *Chevron* was decided. See Breyer, *supra* note 211, at 372 (arguing that one answer to the question of deference “rests upon Congress’ intent that courts give an agency legal interpretation[] special weight, an intent that (where Congress is silent) courts may impute on the basis of various ‘practical’ circumstances”).

244. *Barnhart*, 535 U.S. at 222.

245. 127 S. Ct. 2339 (2007).

within the statutory grant of authority, and where the rule itself is reasonable” to conclude that Congress intended deference to the agency’s position.²⁴⁶

The Court has essentially adopted the approach then-Judge Breyer recommended in 1986, a complex determination of congressional intent through consideration of “many different types of circumstances, including different statutes, different kinds of application, different substantive regulatory or administrative problems, and different legal postures in which cases arrive.”²⁴⁷ In the quarter-century since *Chevron*, commentators have offered several bases for *Chevron* deference and reasons not to apply *Chevron* deference, including arguments about when Congress would or would not have intended it to apply.²⁴⁸ As demonstrated above, the Court has wrapped all of these arguments into the single mantle of congressional intent.²⁴⁹ This intent may frequently be fictitious—the attempt to discover

246. *Id.* at 2350–51.

247. Breyer, *supra* note 211, at 373.

248. *See, e.g., id.* at 372 (emphasizing “an agency’s better knowledge of congressional intent”); Scalia, *supra* note 188, at 515–17 (emphasizing intent rather than separation of powers as the underpinning for *Chevron* deference, but asserting that a general intent to defer is a fiction, serving as a background rule against which Congress can act); Sunstein, *supra* note 216, at 2091–93 (emphasizing agency expertise and arguing against deference in cases of agency self-interest in order to maintain judicial role of constraint on agency power); Gellhorn & Verkuil, *supra* note 218, at 1007 (arguing against deference if Congress would not have intended it, particularly as to “a peripheral jurisdictional limitation” on *Chevron* deference); Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law*, 41 WM. & MARY L. REV. 1463, 1487–98, 1519 (2000) (emphasizing the need to control agencies as to jurisdiction and agency self-interest); Merrill & Hickman, *supra* note 22, at 896–97 (emphasizing congressional intent and examining the various circumstances raising the question of *Chevron* deference); Eric R. Womack, *Into the Third Era of Administrative Law: An Empirical Study of the Supreme Court’s Retreat from Chevron Principles in United States v. Mead*, 107 DICK. L. REV. 289, 291 (2002) (emphasizing underlying nondelegation principles); Torrey A. Cope, Note, *Judicial Deference to Agency Interpretations of Jurisdiction After Mead*, 78 S. CAL. L. REV. 1327, 1339–40 (2005) (discussing bases for *Chevron* deference and identifying when Congress would not have wanted to defer as to jurisdictional issues); Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL’Y 203, 205 (2004) (arguing on policy grounds against deference as to self-interested rulings); David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 201–02, 212–16 (2002) (characterizing intent as fictitious and emphasizing that deference is justified by the personal responsibility of the decisionmaker); Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 ADMIN. L. REV. 735, 737 (2002) (rejecting the “legal fiction of an implied delegation” and arguing for expertise as the basis for deference); Richard W. Murphy, A “New” *Counter-Marbury: Reconciling Skidmore Deference and Agency Interpretive Freedom*, 56 ADMIN. L. REV. 1, 22 (2004) (characterizing *Barnhart* as a search for thoughtful exercise of agency expertise); Eskridge & Schwartz, *supra* note 233, at 2629 (identifying a “major issue” exception to *Chevron* deference).

249. The Court issued two *Chevron*-related decisions early in its 2009 term. Both are consistent with the proposition that the availability of *Chevron* deference is a function of the likely congressional intent as to the particular situation.

United States v. Eurodif S.A., 129 S. Ct. 878 (2009), involved the question of

whether a U.S. company's contract to obtain low enriched uranium (LEU) constituted the purchase of "foreign merchandise" or whether it constituted the provision of services by the foreign company. If the former, the purchase was subject to antidumping duties if the goods were sold at less than fair value. If the latter, the arrangement avoided such duties.

As a factual matter, the issue arose because the U.S. company provided both cash and unenriched uranium to the foreign uranium enricher. The foreign company then returned the required amount of LEU to the U.S. company. Moreover, the companies considered their relationship to constitute the provision of enrichment services, as it appears on the surface. The Commerce Department, however, ruled that the arrangement constituted the sale of goods, essentially because the foreign enricher did not return either the actual uranium sent by the U.S. company or the same amount of uranium. Thus, the Commerce Department viewed the U.S. company's provision of cash and uranium as a means of paying for a distinct supply of LEU. The enricher did not actually provide the service of enriching the uranium that had been supplied by the U.S. company.

As described by Justice Souter, this arrangement fell in the midst of the following spectrum: "A customer who comes to a laundry with cash and dirty shirts is clearly purchasing cleaning services, not clean shirts. And a customer who provides cash and sand to a manufacturer of generic silicon processors is clearly buying computer chips rather than sand enhancement services." *Id.* at 888. According to Justice Souter, the complex decision about precisely when a comparable arrangement constitutes sales or service "is the very situation in which we look to an authoritative agency for a decision about the statute's scope, which is defined in cases at the statutory margin by the agency's application of it." *Id.*

This result arguably conflicts with *United States v. Mead*, in which the Court denied *Chevron* deference to a Customs interpretation of a certain tariff, emphasizing the lack of significant procedures such as formal adjudication or notice-and-comment rulemaking. Both *Mead* and *Eurodif* apparently involved informal adjudications in the sense that neither fit nicely into the category of formal adjudication or formal or informal rulemaking. However, the Commerce Department in *Eurodif* conducted an extensive investigation of the matter in response to a petition from affected U.S. interests, and it published a notice of its investigation and provided copies to the representatives of affected foreign governments. *See* Notice of Final Determination of Sales at Less Than Fair Value: Low Enriched Uranium from France, 66 Fed. Reg. 65,877, 65,884 (2001), *cited in Eurodif*, 129 S. Ct. at 883 n.3. Unlike *Mead*, in which the initial decision occurred in one of forty-six Customs offices around the country, and which involved only the status of personal calendars or diaries, the *Eurodif* decision was taken at the Assistant Secretary level in the Department of Commerce and involved a major issue among our trading partners, possibly also an issue with national security implications.

For these reasons, it seems likely that Congress would have intended the courts to defer to the agency's interpretation. Moreover, this is just the sort of interstitial decision as to which Congress would intend such deference. *See supra* note 245 and accompanying text.

In *Negusie v. Holder*, 129 S. Ct. 1159 (2009), the majority held that *Chevron* deference applied to a decision of the Board of Immigration Appeals (BIA) concerning the status of an alien under the Immigration and Nationality Act (INA). Under the INA, an alien who fears persecution may normally seek refugee status in the United States, but refugee status is not available to an alien "who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." The question in *Negusie v. Holder* was whether an Ethiopian who had been incarcerated, beaten, and forced to be a prison guard in Eritrea had "assisted or otherwise participated in the persecution" of prisoners whose treatment constituted persecution from the prisoner's point of view. The Ethiopian argued that one who acts involuntarily or under duress cannot be considered to have assisted or participated in persecution.

In reaching its own decision, the BIA had considered itself bound by a pre-*Chevron* Supreme Court decision concerning a closely related statute. The majority distinguished the

it cumbersome and confusing²⁵⁰—but it may well be the most respectful of congressional authority. There is, however, at least one instance in which it is possible to determine the likely congressional intent as to the particular alleged delegation. As demonstrated below, it is inconceivable that Congress intended to delegate to agencies the question of whether the agencies themselves are governed by the requirement of a neutral decisionmaker, the prohibition on ex parte contacts, or the other procedural protections of §§ 554, 556, and 557 of the APA.

C. The Significance of the APA Provisions Ensuring Impartiality and Protecting Adjudicatory Integrity

In determining the application of § 554(a) of the APA to a particular statutory hearing right, it is necessary first to determine the meaning of the § 554(a) language, “in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing.”²⁵¹ As discussed above,²⁵² *Seacoast* found in that language and the APA’s legislative history a presumption that a statutorily prescribed adjudicatory hearing is to be on the record, while *City of West Chicago* held that Congress must clearly indicate an intent to trigger § 554(a). This Article does not address that dispute, except to emphasize that the ultimate decision involves the interplay of two statutes, the APA and the statute containing the hearing provision at issue. The question here is the role of *Chevron* deference in interpreting either of those statutes.

As to the meaning of § 554(a), it is well established that the agency’s interpretation is not entitled to *Chevron* deference. The APA is an umbrella statute that Congress did not assign to any particular agency.²⁵³

two statutes and held that *Chevron* deference applied to the provision at issue because the INA itself provides that a “ruling by the Attorney General with respect to all questions of law shall be controlling.” 8 U.S.C. § 1103(a)(1) (2006). The majority considered the matter to be well settled in light of the Court’s earlier decision in *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999), and it emphasized the propriety of deferring to the executive in matters involving foreign affairs. The Court directed that the matter be remanded to the BIA so that it could exercise its own judgment independent of the previous judicial decision. The majority’s justification for *Chevron* deference reflects the principle that deference is a matter of congressional intent.

250. See Richard W. Murphy, *Judicial Deference, Agency Commitment, and Force of Law*, 66 OHIO ST. L.J. 1013, 1015–16 (2005) (characterizing the search as a confusing “mix of fiction and proceduralism” that reduces consistency and undermines the rule of law); William S. Jordan, III, *Judicial Review of Informal Statutory Interpretations: The Answer Is Chevron Step Two, Not Christensen or Mead*, 54 ADMIN. L. REV. 719, 719 (2002) (arguing that *Christensen* and *Mead* “created a cumbersome, unworkable regime under which courts must draw increasingly fine distinctions using impossibly vague standards”).

251. 5 U.S.C. § 554(a) (2006).

252. See *supra* text accompanying notes 72–84.

253. Merrill & Hickman, *supra* note 22, at 896–97.

The question, then, is whether *Chevron* deference applies to the agency's interpretation of a hearing provision in the statute the agency has been assigned to administer. As established in the previous section, the answer depends upon whether Congress would have intended deference to the particular interpretation. In a typical case involving a substantive delegation, such as *Chevron* itself, the court needs to examine only that particular statutory language and other indicators of congressional intent as to that provision. Here, however, the APA establishes the baseline for the interpretation of statutory provisions that might trigger its procedural protections. Thus, the threshold question is whether the Congress that enacted the APA or any of its relevant amendments would have intended the courts to defer to agencies as to later judgments about the applicability of the Act's protections. The answer is no.

1. The APA Congress Would Not Have Intended Deference to the § 554(a) Trigger Decision

The on-the-record provision of § 554(a) and the various procedural protections in formal adjudications, including the use of independent ALJs, represented a compromise after some fifteen years of intense effort by regulated interests to impose severe procedural restraints on agency decisionmaking. What began as an attempt to place virtually all agency decisions in the hands of independent administrative courts ultimately produced the rather modest APA, which embodied two innovative and fundamental concepts of interest to us here. First, the APA sought to separate policymaking (to be done through the newly developed legislative rulemaking process) from adjudication of the rights and interests of particular individuals or companies.²⁵⁴ Second, the APA adopted an independent decisionmaker, now known as the ALJ.²⁵⁵ Throughout the political struggle, both sides may well have agreed on only one thing—the need for an impartial, independent tribunal when an agency decides a dispute about individual rights or interests.

Concern about bias and inappropriate influence in government decisionmaking about individuals was nothing new. It had been central to the Magna Charta²⁵⁶ and had prompted the Framers to protect the writ of habeas corpus²⁵⁷ and to adopt several provisions of the Bill of Rights.²⁵⁸

254. Compare 5 U.S.C. §§ 551(4)–(5), 553, with 5 U.S.C. §§ 551(6)–(7), 554–557.

255. 5 U.S.C. §§ 556(b), 3104, 7521.

256. See the statutes at large from Magna Charta to the end of the last parliament, 1768, 25 Edw. 273–77 (Eng.) (providing various provisions prohibiting the unbridled use of power by the King).

257. U.S. CONST. art. I, § 9. Although the habeas corpus clause appears as a limitation on congressional power to suspend the writ, it functions to assure that the writ is available

Thirty years before the APA, Elihu Root, a distinguished former Secretary of War, Secretary of State, U.S. Senator, and recipient of the 1912 Nobel Peace Prize,²⁵⁹ extolled the virtues but warned of the dangers of the then-nascent federal bureaucracy. Referring to the new machinery of administrative regulation, he said,

We shall go on; we shall expand them, whether we approve theoretically or not, because such agencies furnish protection to rights and obstacles to wrong doing which under our new social and industrial conditions cannot be practically accomplished by the old and simple procedure of legislatures and courts in the last generation. Yet the powers that are committed to these regulating agencies, and which they must have to do their work, carry with them great and dangerous opportunities of oppression and wrong. If we are to continue a government of limited powers these agencies of regulation must themselves be regulated. The limits of their power over the citizen must be fixed and determined. The rights of the citizen against them must be made plain.²⁶⁰

Along similar lines, then-Professor Felix Frankfurter, lecturing at Yale in May 1930, spoke of the need for regulation,²⁶¹ but he also warned that “the power which must more and more be lodged in administrative experts, like all power, is prone to abuse unless its exercise is properly circumscribed and zealously scrutinized. For we have greatly widened the field of administrative discretion and thus opened the doors to arbitrariness.”²⁶²

These men were not the antigovernment curmudgeons of their day. Quite the contrary, Root was a former head of two different Cabinet agencies who believed that agencies were needed to protect individual rights and address wrongdoing. Frankfurter was a future New Dealer. But both understood that the hydraulic pressures of power need to be resisted with appropriate checks on its exercise.

In 1929, even before Frankfurter spoke, Senator George W. Norris, a liberal Republican, had introduced a bill to create a consolidated administrative court, which would have made it easier to challenge agency actions. At the time, his target was presumably the agencies of a

and that the independent judiciary has the power to intercede on behalf of individuals imprisoned by executive authority. *E.g.*, *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

258. U.S. CONST. amend. IV (warrant requirement); U.S. CONST. amend. V (grand jury and due process provisions); U.S. CONST. amend. VI (requiring “a speedy and public trial, by an impartial jury”).

259. Nobelprize.org, Elihu Root: Nobel Peace Prize 1912, http://nobelprize.org/nobel_prizes/peace/laureates/1912/root-bio.html (last visited Jan. 22, 2009).

260. Elihu Root, *Public Service by the Bar*, 39 REP. OF THE A.B.A. 355, 368–69 (1916), quoted in JOSEPH P. CHAMBERLAIN ET AL., *THE JUDICIAL FUNCTION IN FEDERAL ADMINISTRATIVE AGENCIES* 2 (1942).

261. See FELIX FRANKFURTER, *THE PUBLIC & ITS GOVERNMENT* 81–122 (1930) (discussing the need for regulation of public utilities).

262. *Id.* at 157–58.

conservative Republican administration.²⁶³ For most of the next decade, however, the antigovernment curmudgeons of the American Bar Association (ABA) took the lead in proposing reforms that would tightly control agency decisionmaking. Walter Gellhorn placed the beginning of this story in 1933, when the ABA created the Special Committee on Administrative Law, which quickly proposed that the “judicial function” of administrative agencies be transferred to an independent tribunal.²⁶⁴ The same year, Senator Marvel Mills Logan, a Democrat apparently motivated by fairness concerns rather than substantive opposition to regulation, introduced a bill that “sought both to impose strict court-like procedures on agencies and to permit the judiciary to conduct sweeping appellate review of agency decisions.”²⁶⁵

In 1934, the ABA Committee’s first formal report proposed a federal administrative court with branches or independent tribunals unencumbered by legislative and executive functions.²⁶⁶ Also in 1934, Professors Frederick Blachley and Miriam Oatman of the Brookings Institution issued a balanced critique of administrative decisionmaking, recognizing the value of the administrative model, but strongly criticizing the combination of functions in adjudicatory decisions.²⁶⁷ Summarizing their concerns about administrative adjudication, they said that administrative adjudicators,

because of being too strongly impregnated with the view of general public interest, . . . may lose sight of individual rights; . . . they are thinking too exclusively in terms of administration rather than in terms of adjudication; . . . the administrative authority may be at one and the same time a fact-finding, a prosecuting, and an adjudicating authority, and a party in the case.²⁶⁸

Professors Blachley and Oatman ultimately recommended a system of administrative courts that appears comparable to the modern state central-panel systems,²⁶⁹ with the proviso that policy should be controlled by

263. George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1567 (1996).

264. Gellhorn, *supra* note 101, at 219.

265. Shepherd, *supra* note 263, at 1569.

266. *Id.* at 1574. These tribunals would not have been limited to the adjudication of particular facts of concern to us here, but would have reached all types of administrative decisions.

267. See FREDERICK F. BLACHLY & MIRIAM E. OATMAN, *ADMINISTRATIVE LEGISLATION AND ADJUDICATION* 220–23, 237–39 (1934) (praising reliance on administrative experts rather than courts because “[t]hey begin to see cases in relationship to social and economic situations, rather than merely in relationship to fixed and more or less arbitrary private rights,” but arguing for a strict separation of functions and decisional independence in administrative adjudications).

268. *Id.* at 255.

269. See *id.* at 280–83 (“[Various administrative courts] should be composed of persons of great ability who are placed in as independent a position as possible. These persons should have a long or permanent tenure of office, should not be removable except for cause,

political methods at the same time that “[j]udicial determinations must be controlled by judicial methods.”²⁷⁰ In light of the policy proviso, this can be seen as an early version of the independent-hearing-office scheme ultimately adopted in the APA—policy control by the agency but an independent consideration of the facts.

For the next several years, the ABA continued to press for some form of independent judicial or quasi-judicial control over agency decisionmaking, including a 1937 proposal for internal departmental review boards that would create a record as the basis for judicial review.²⁷¹ The ABA’s effort came to an unfortunately strident head in 1938 with Dean Roscoe Pound as Chair of the ABA Committee. Charging that the “case for administrative absolutism . . . has made great headway,”²⁷² Pound famously identified ten allegedly dangerous tendencies in administrative law, including the tendency “to decide without a hearing.”²⁷³

Meanwhile, the President had appointed a Committee on Administrative Management in 1937 to study the federal bureaucracy and make recommendations for improvement. The Committee’s report made several useful suggestions concerning management of the federal bureaucracy, including expanding the White House staff in order to keep track of administrative activity, strengthening the management and budgetary agencies, and expanding the merit-based civil service system to virtually all positions not responsible for making policy.²⁷⁴ In large part, however, the report was an assault on the independent regulatory agencies, which Roosevelt could not control and characterized as “a headless ‘fourth branch’ of the Government,” responsible to no one.²⁷⁵ Professor Louis

and should have adequate salaries.”).

270. *Id.* at 240.

271. Professor Louis Jaffe described these efforts in his contemporaneous critique, Louis L. Jaffe, *Invective and Investigation in Administrative Law*, 52 HARV. L. REV. 1201, 1221–36 (1939); see also Gellhorn, *supra* note 101, at 219–22; Shepherd, *supra* note 263, at 1573–83.

272. Jaffe, *supra* note 271, at 1232 (quoting the ABA Committee Report for 1938).

273. Gellhorn, *supra* note 101, at 221–23.

274. THE PRESIDENT’S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, REPORT OF THE COMMITTEE WITH STUDIES OF ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT, at iv (1937) [hereinafter REORGANIZATION OF THE EXECUTIVE DEPARTMENTS].

275. MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, REORGANIZATION OF THE EXECUTIVE DEPARTMENTS, S. Doc. No. 8, at 67 (1st Sess. 1937); see JOHN A. ROHR, TO RUN A CONSTITUTION: THE LEGITIMACY OF THE ADMINISTRATIVE STATE 152–53 (1986) (criticizing Roosevelt’s overblown “fourth branch” rhetoric, which has come to taint the entire administrative state, although “[t]he committee had no intention of undercutting the legitimacy of the activities of the independent regulatory commissions. Their independence was the committee’s target.”). The committee wanted merely to bring the independent commissions under presidential control, but it lost that fight, and “the offensive ‘fourth branch’ language has survived and flourished as an unsettling monument to the law of unintended consequences.” *Id.* at 153.

Jaffe soon thereafter criticized the report's "indiscriminate condemnation" of independent agencies, arguing that the report had provided no proof of the serious charges levied against them.²⁷⁶

For our purposes, the question is how all of this history bears on whether the APA Congress in 1946 would have intended the courts to defer to an agency's decision that the agency was not bound by the independent decisionmaker, separation of functions, and other protections of §§ 554, 556, and 557 of the APA. The conservative-ABA side of the argument, reflecting a near mania about independent control of all agency decisions, both rulemaking and adjudication, would never have intended to authorize such deference. While rejecting most of the conservative critique, moderates and even New Deal proponents opposed the combination of functions in adjudications and sought independent decisionmakers. As noted, the Brookings Institution took that position in 1934. Representative Emanuel Celler, a leading New Deal Democrat, supported APA proposals in 1936 out of concern for procedural fairness.²⁷⁷ Even the President's Committee, in its critique of independent agencies, emphasized the need for neutral decisionmaking in adjudications: "The most important work done by the independent commissions is either judicial or quasi-judicial. Such work calls for the highest measure of impartiality in order that justice may be done and public confidence may be maintained."²⁷⁸ Concerned about the policy independence of independent commissions, the President's Committee recommended that the commissions be incorporated into regular executive departments.²⁷⁹ Once incorporated into an executive department, a commission would be broken down into two sections. One of these would be the Judicial Section, which "would be 'in' the department for the purposes of 'administrative housekeeping,'" but otherwise completely independent.²⁸⁰

Its members would be removable by the President only for incompetence or misconduct, and neither the Cabinet Secretary nor the President could review its decisions. This section would handle the judicial and quasi-judicial aspects of regulation.²⁸¹

276. Jaffe, *supra* note 271, at 1238–42.

277. Shepherd, *supra* note 263, at 1578. Celler changed course, however, by 1940, when it had become clear that "administrative reform" efforts were actually attacks on the New Deal. He then voted against the conservative proposals. *Id.*

278. REORGANIZATION OF THE EXECUTIVE DEPARTMENTS, *supra* note 274, at 68.

279. *Id.* at 229.

280. *Id.* at 69.

281. *Id.* A 1938 review of the President's Committee Report noted that "the *Report* realizes, *of course*, that a commission engaged in quasi-judicial work should not be treated as a mere administrative adjunct to a government department," and praises the two-section proposal as "most ingenious." R. MacGregor Dawson, *Review of Books*, 4 CAN. J. OF ECON. & POL. SCI./REVUE CANADIENNE D'ECONOMIQUE ET DE SCIENCE POLITIQUE 279, 280 (1938)

In 1938, the year of Pound's diatribe, James Landis published *The Administrative Process*,²⁸² recently characterized as "promoting the concentration of power in administrative agencies" and "[t]he boldest call for judicial passivity in the face of administrative expertise."²⁸³ This New Deal icon wanted to limit judicial review, resisted agency independence of executive authority, and urged that "[t]he ultimate test of the administrative is the policy that it formulates; not the fairness as between the parties of the disposition of a controversy on a record of their own making."²⁸⁴ Still, he recognized the value of separated functions and independent decisionmakers in administrative adjudication:

Some gain against the consequences of so combining functions has been achieved by providing for the separation of those functions in the administrative agency's staff. Adjudication, as distinguished from the presentation of claims, is generally centered in trial examiners who, as a matter of internal organization, are not subordinated to any official other than to the Commission itself. The adequate development of these staffs would provide judges who have, as they should have, an understanding of the general policy of the administrative, indeed a proper bias toward its point of view, and yet, by having been entirely disassociated with the earlier phases of the proceeding, have no personal interest in its outcome.²⁸⁵

Thus, as the 1930s drew to a close, all sides in the debate essentially assumed that the adjudication of the facts concerning particular or individual circumstances should be conducted by an independent party who was not subject to the control or direction of political officials with respect to those factual judgments.²⁸⁶

(emphasis added). The emphasized language suggests a very strong general assumption that quasi-judicial decisions should be made by independent decisionmakers. In 1986, Professor Rohr, referring to the popular name of the President's Committee Report, argued that "[t]he Brownlow Report is vulnerable in its treatment of individual rights." ROHR, *supra* note 275, at 149. This might suggest that the President's Committee was prepared to sacrifice the individual on the altar of efficient, agency-controlled adjudication. As the quotation from the President's Report demonstrates, this is not so. Read in context, Rohr's concern appears to derive from the Report's emphasis on centralized government administration as a means of achieving social goals, which Rohr saw as in tension with the Founders' primary emphasis on the protection of individual rights through separated powers. *Id.* at 146–49.

282. JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938).

283. Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 418, 420 (2007).

284. LANDIS, *supra* note 282, at 39.

285. *Id.* at 103–04.

286. Freedman noted that, prior to the APA,

[s]uspicious were prevalent that hearing officers were chosen casually and for the wrong reasons, and that they did not discharge their duties with an impartiality of the character routinely assumed in federal judges. Moreover, these suspicions were accompanied by the conviction that administrative hearing officers could not be expected to preside impartially so long as they remained no more than staff members employed by their respective agencies, subservient to the direction and discipline of their superiors in making their proposed findings of fact and recommendations for

As the ABA's restrictive position was gaining momentum in the form of the Walter–Logan Bill,²⁸⁷ President Roosevelt directed the Attorney General to appoint a committee to study the administrative process. FDR's directive did not slow down Walter–Logan, which Congress enacted in December 1940. Roosevelt promptly vetoed Walter–Logan, however, arguing that any general administrative law statute should await the report of the Attorney General's Committee.²⁸⁸ Of particular interest to this discussion, Paul Verkuil has suggested that the passage of Walter–Logan depended upon a coalition of New Deal opponents and New Deal supporters who nonetheless supported a judicial model of agency decisionmaking.²⁸⁹ If that is true, both sides of the substantive New Deal

judgment.

FREEDMAN, *supra* note 167, at 162.

John Dickinson noted an early emphasis on the need for separation of functions in administrative adjudications:

The problem of confining administrative action within the bounds of fair procedure and the limits set by law was from the outset felt to be pressing in cases of so-called administrative adjudication or quasi-judicial action—that is to say, cases where an administrative order is brought directly home to a particular applicant or defendant, and where it operates immediately to forbid or require someone to act. Here one of the abuses which it was thought should be corrected was the combination of the functions of prosecutor and judge in the same hands. There was also the problem of insuring to the parties adequate opportunity to present their case and a disinterested appraisal of the facts free from political interference or bureaucratic bias.

John Dickinson, *Administrative Procedure Act: Scope and Ground of Broadened Judicial Review*, 33 A.B.A. J. 434, 435 (1947).

287. As Walter Gellhorn described it, “[p]roposals put forward by the American Bar Association were, with slight alterations, embodied in a bill sponsored by Senator Logan and Representative Walter.” Gellhorn, *supra* note 101, at 224. As described by Paul Verkuil, Walter–Logan would have “judicialized administrative law by forcing all agency decisions into a trial type hearing mode.” Kenneth C. Davis & Walter Gellhorn, *Present at the Creation: Regulatory Reform Before 1946*, 38 ADMIN. L. REV. 511, 512 (1986).

288. Gellhorn, *supra* note 101, at 226. Gellhorn reports that Dean Pound attacked the veto message as “in keeping with the Marxian idea of the disappearance of law.” *Id.* at 226 n.22.

289. Paul Verkuil wrote,

What makes [the Walter–Logan] episode relevant today is an understanding of the motivations of members of Congress and the bar who did not hold substantive objections to the New Deal programs, but nonetheless shared procedural objections. There must have existed a group who felt this way or else the vast body of New Deal legislation would not have become law in the first place. These legislators saw not the twin tyrannies, but only the procedural tyranny. . . . They were supportive of substantive intervention into the economy, but not supportive, if the analogy holds, of procedural intervention into the judicial system through development of a non-adversary system of administrative procedure.

Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 274 (1978) (footnote omitted). *But see* McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180, 213 (1999) (arguing that Walter–Logan represented a victory for New Deal opponents who “sought to impose strict administrative procedures, granting courts significant powers to protect economic rights, as a way of fighting the New Deal”).

disputes saw a need for judicial or judicial-like protections such as those later provided by §§ 554, 556, and 557 of the APA.

The staff of the Attorney General's Committee, directed by Walter Gellhorn, examined the administrative state in great detail, producing twenty-seven monographs thoroughly describing the operations of several agencies.²⁹⁰ According to Gellhorn, those studies largely revealed that separation of functions was already considered to be good agency practice, such that the APA provisions "were not reforms in the sense that great masses of agencies had different procedures."²⁹¹ Despite that generalization, the monographs revealed and criticized many instances of combined functions.²⁹² Interestingly the monographs' level of concern about combination of functions waxed and waned in ways that parallel the APA's later exceptions to formal adjudication.²⁹³ For example, the monograph concerning the administration of the Grain Standards Act by the Department of Agriculture reflected little concern about a clear combination of functions in misrepresentation proceedings because the proof in such cases involved simply comparing a Federal Grain Inspection Certificate to an invoice,²⁹⁴ a situation comparable to the APA's exemption for "inspections." These discussions again suggest a strongly shared view that administrative adjudications should be subject to the sorts of procedures required by §§ 554, 556, and 557 of the APA.

With war on the horizon, the Attorney General's Committee issued its Final Report in January 1941.²⁹⁵ Transmitting the Report to the Attorney General, Chairman Dean Acheson emphasized that issues related to the trial examiner—salary, qualifications, and the "relationship of the trial

290. Davis & Gellhorn, *supra* note 287, at 512.

291. *Id.* at 521. Thus, according to Gellhorn, "[t]he real reason the Administrative Procedure Act did not cause a great turmoil when it was enacted was that to a considerable extent it is declaratory." *Id.*; see also SHAPIRO, *supra* note 101, at 39 (describing the Attorney General's Report (and later the APA) as developing rules that "had to be derived pragmatically from existing agency practice," and asserting that the "new administrative law was to legitim[ize] what the New Deal was doing, not dictate rules to it that would hinder its activities").

292. See, e.g., ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES: MONOGRAPH OF THE ATTORNEY GENERAL'S COMM. ON ADMIN. PROCEDURE, S. DOC. NO. 186, pt. 1, at 3, 12, 16–18 (3d Sess. 1940) [hereinafter MONOGRAPHS] (noting the Department of Labor's reliance upon "an impartial representative" in Walsh–Healey Act disputes, but noting and criticizing posthearing communications and editing); *id.* pt. 3, at 32–35 (describing the examining system at the FCC, criticizing combination of functions), *id.* pt. 5, at 19–20 (describing attempts at separating functions at the Federal Alcohol Administration), *id.* pt. 10, at 11–12, 21 (criticizing combination of functions at the Department of Commerce—Bureau of Marine Inspection and Navigation).

293. For the APA exceptions in question, see 5 U.S.C. § 554(a)(3) (2006) (exempting "proceedings in which decisions rest solely on inspections, tests, or elections").

294. MONOGRAPHS, *supra* note 292, pt. 7, at 18.

295. FINAL REPORT OF THE ATTORNEY GENERAL'S COMM. ON ADMIN. PROCEDURE (1941) [hereinafter FINAL REPORT].

examiner to the case which he has heard and to the agency which he has served . . . go to the very heart of the adjudicative process.”²⁹⁶ The majority proposed a system of independent hearing officers with real decisional authority to hear formal adjudications, emphasizing the need for impartiality and separation of functions in the hearing process.²⁹⁷ The majority emphasized, however, that the best approach was for its Report to guide administrators with respect to appropriate practices, rather than to enact a comprehensive procedural code.²⁹⁸ The Committee minority—Messrs. McFarland, Stason, and Vanderbilt—sought, in particular, to strengthen the separation of prosecuting and judicial functions and proposed a detailed code of fair procedure.²⁹⁹ Note that both the procedurally lenient majority and the more demanding minority emphasized the value of both impartiality and separation of functions. As Professor Brown wrote in 1947, “the most significant feature of [the majority’s proposal] was a provision for independent ‘hearing commissioners.’”³⁰⁰ Professor Rohr has argued that the Attorney General’s Report returned to an emphasis on procedures to protect individual rights after the management emphasis of the President’s Committee Report of 1937. He argued that the emphasis on rights and procedures “helped to integrate the public argument over the administrative state into the perennial American public argument.”³⁰¹ On all sides there was a very high expectation that administrative adjudications of any significance would be handled by an independent, impartial presiding officer, consistent with the prevailing understanding of how best to protect individual rights.

The interplay of two aspects of the Final Report is central to the continuing dispute over when a statutory hearing right triggers § 554(a) of the APA. First, the Attorney General’s Committee envisioned administrative adjudication as having two distinct phases. The first, informal adjudication, would involve decisions made through inspections, conferences, or negotiations. This would resolve “all but a surprisingly small percentage of cases.” The second phase, should informal methods fail, would be “formal adjudication . . . marked by hearings in which the testimony is taken, subject to cross-examination, and embodied into a

296. *Id.* at 258.

297. *Id.* at 6, 43–49, 55.

298. *Id.* at 191.

299. *See id.* at 203 (providing the additional views and recommendations of Messrs. McFarland, Stason, and Vanderbilt). Justice Groner urged an even stronger emphasis on separation of functions and impartiality. *Id.* at 248–50 (providing the views of Justice Groner). For a general description of the competing positions, see also Gellhorn, *supra* note 101, at 226–27.

300. Ray A. Brown, *The Federal “Administrative Procedure Act,”* 1947 WIS. L. REV. 66, 67 n.6 (1947).

301. ROHR, *supra* note 275, at 157.

record.”³⁰² We no longer understand the term *informal adjudication* in this way—essentially as a prehearing effort at settlement. The fact that the Committee did understand it this way again strongly suggests an expectation that most adjudicative disputes, if they could not be settled through the informal process, would proceed to a hearing with the protections that we now have in §§ 554, 556, and 557 of the APA.

Second, both the majority and the dissent proposed triggering language comparable to what we now have in § 554(a) of the APA. The majority’s proposal would have applied its formal-adjudication requirements (particularly the use of independent hearing commissioners) to “proceedings wherein rights, duties, or other legal relations are required by law to be determined after opportunity for hearing, and, if a hearing be held, only upon the basis of a record made in the course of such hearing.”³⁰³ The minority used essentially the same language.³⁰⁴ Thus, all members of the Attorney General’s Committee agreed on two points: (1) the need to assign adjudications to independent, impartial hearing commissioners protected from agency pressure, and (2) the statutory language that would eventually govern the determination of whether those protections are available to parties appearing before administrative agencies. It is highly unlikely that either side on the Attorney General’s Committee would have intended the courts to defer to agency decisions interpreting statutory hearing rights so as to avoid those protections.

For the next several years, reform of administrative law took a back seat to winning World War II, although the experience with massive government programs during the war may well have smoothed the way for eventual passage of the APA.³⁰⁵ Even so, commentary from 1942 strongly

302. FINAL REPORT, *supra* note 295, at 5 (internal quotation marks omitted); *see also id.* at 43–44 (explaining that formal procedures would be employed in two situations: (1) when the matter was of “such far reaching importance to so many interests that sound and wise government” dictate a formal hearing, and (2) when “the differences between private interests or between private interests and public officials have not been capable of solution by informal methods but have proved sufficiently irreconcilable to require settlement through formal public proceedings in which the parties have an opportunity to present their own and attack the others’ evidence and arguments before an official body with authority to decide the controversy”); Verkuil, *supra* note 289, at 275–76 (recognizing that “informal adjudication”—including settlement conferences, stipulations, inspections, and tests—is essential to the administrative process, while “formal adjudication” enhances the protections of independent hearing commissioners).

303. FINAL REPORT, *supra* note 295, at 195.

304. *See id.* at 232–33 (“[T]he provisions of this title shall apply to all proceedings in which statutory rights, duties, or other legal relations of any person are required by law to be determined only after opportunity for hearing and, if a hearing be held, only upon the basis of a record made in the course of such hearing . . .”).

305. Walter Gellhorn has suggested that the heavy reliance on “civilian administration of massive dimensions” during the war had been reasonably successful and had changed perceptions such that administrative decisionmaking was no longer seen as tyrannical. He

suggests the widespread perception of the need for independent decisionmakers in agency adjudications and a suspicion that agencies would not provide appropriate procedures unless pressed to do so. Examining the adjudicative function in administrative agencies, Professors Joseph P. Chamberlain, Noel T. Dowling, and Paul R. Hays wrote that “[i]ts kernel is a hearing and order based on findings supported by evidence in the record.”³⁰⁶ They described both legislative decisionmaking and adjudications such as licensing as requiring “a formal order preceded by formal hearings” if previous informal dealings could not settle the matter. The APA later explicitly shuttled most legislative decisionmaking onto the informal-rulemaking track, but their understanding as to adjudications remained telling. They urged that the trial examiner be “independent of the legal staff[,] . . . separating as far as possible the prosecuting and the judicial functions of the agency,” and that he “should have no other relation with the counsel for the government than with the counsel for private parties.”³⁰⁷ Along similar lines, F. Trowbridge vom Baur’s 1942 treatise described administrative adjudications as essentially judicial in nature, emphasizing the need for an unbiased tribunal and prohibition on *ex parte* contacts.³⁰⁸

Also in 1942, Kenneth Culp Davis examined at length the question of when a hearing should be required during an agency’s decisionmaking process.³⁰⁹ As he used the term, a “hearing” involved “the trial method” with “[t]he essential characteristics of . . . (1) requiring the findings to be based upon evidence in a formal record of the proceedings . . . , and (2) giving each party, within wide limits, full rights of cross-examination and rebuttal, as well as the right to offer affirmative proof.”³¹⁰ For the most part, Davis argued for flexibility based upon his now-familiar distinction between legislative fact and adjudicative fact. He saw two primary decisionmaking models, the “public meeting” or “speech-making method” and the trial method.³¹¹ He argued that the speech-making model is appropriate when a hearing is required with respect to legislative-type decisions but that the trial method should be employed “[w]hen

also suggested a perception that Walter–Logan would have severely hampered the war effort, which helped open the door to the less restrictive APA. Gellhorn, *supra* note 101, at 229–30.

306. JOSEPH P. CHAMBERLAIN ET AL., *THE JUDICIAL FUNCTION IN FEDERAL ADMINISTRATIVE AGENCIES* 2 (1942).

307. *Id.* at 39; *id.* at 209–10.

308. 1 F. TROWBRIDGE VOM BAUR, *FEDERAL ADMINISTRATIVE LAW* 77, 142–53, 315, 322 (1942).

309. Davis, *The Requirement of Opportunity to Be Heard*, *supra* note 115, at 1093.

310. *Id.* at 1094.

311. *Id.* at 1093–94.

adjudicative facts are disputed.”³¹² He also expressed concern about the “tendency . . . especially pronounced among some state agencies” to provide the constitutionally minimum level of procedures whenever possible.³¹³ Here, then, is one of the godfathers of modern administrative law, an advocate of procedural flexibility, advocating trial-type methods in adjudicatory decisions and expressing concern that agencies will do the bare minimum if they can get away with it. Davis would not have advocated deferring to agencies on the question of whether they should be governed by the procedural protections of §§ 554, 556, and 557 of the APA.

In 1945, Dean Blythe Stason of the University of Michigan Law School reviewed the administrative law developments of the previous half decade. Writing from the conservative perspective as one of the three minority members of the Attorney General’s Committee, he emphasized “certain powerful contemporary movements toward statutory reform of administrative procedure” that were seeking to achieve “the wise assimilation of modern administrative methods into a constitutional system in which bureaucratic absolutism finds itself a most unwelcome guest.”³¹⁴ Describing a draft Model State Administrative Procedure Act, he referred to “[g]uaranties of fundamental fairness in administrative hearings, particularly in regard to rules of evidence and the taking of official notice in quasi-judicial proceedings” as embodying “certain basic principles of common sense, justice, and fair play that are deemed to be an irreducible minimum.”³¹⁵

His minority colleague on the Attorney General’s Committee, Carl McFarland, now Chairman of the ABA Committee, in 1943 drafted the McCarran–Sumners Bill, which would, with some adjustments, become the APA.³¹⁶ That version distinguished rulemaking from adjudication and made room for what we now refer to as “informal adjudication” by requiring formal process only “if another statute independently required a hearing on the matter.”³¹⁷ Thus, McFarland’s understanding—having also

312. See *id.* at 1140–41 (“A trial is appropriate when a dispute arises about adjudicative facts, that is, facts which peculiarly relate to particular parties, their past conduct, or their circumstances, business or property.”).

313. *Id.* at 1093 n.1. Professor Davis said, in full,

I wonder how much weight should be given to an agency’s natural tendency to interpret a court’s refusal to find a denial of due process as judicial approval of what the agency has done, with the practical result that the agency’s practice coincides with the constitutional minimum. There are many signs that this tendency is especially pronounced among some state agencies.

Id.

314. E. Blythe Stason, Comment, *Administrative Law—Developments: 1940–1945 (A Service for Returning Veterans)*, 44 MICH. L. REV. 797, 799 (1946).

315. *Id.* at 801 n.12.

316. Shepherd, *supra* note 263, at 1649.

317. *Id.* at 1651. The bill, S. 2030, 78th Cong., 2d Sess. (1944), included the following

endorsed the formal process trigger language of the Attorney General's Committee proposals—was that the central question was whether another statute required the hearing. If it did, formal process was required. If it did not, no hearing was required.

As Gellhorn described it, McFarland was “the central figure” after completion of the Final Report of the Attorney General's Committee. “The final APA was essentially what the minority of the committee brought in, and Carl is responsible for the success of that report.”³¹⁸ Thus, the APA, including the trigger language of § 554(a), was largely the product of the conservative minority of the Attorney General's Committee, which had been particularly concerned about assuring procedures adequate to protect against administrative abuse.

Although Gellhorn later reported that the APA was enacted “in an atmosphere of happy accord,”³¹⁹ Shepherd characterized it as a “Fierce Compromise” that was, not a happy agreement, but a political battle that extended beyond enactment of the APA to the writing and characterization of the legislative history. The *Attorney General's Manual* pressed the Administration's line, while the congressional committees sought more conservative interpretations.³²⁰ The crucial point here is both sides agreed on the importance of impartial decisionmakers and other protections in adjudication of individual rights and circumstances.

Thus, Martin Shapiro described the APA as a “grand compromise” between the conservative view that all such disputes should be resolved in the “regular courts” and the New Deal view that agency employees should be able to make these decisions. That compromise permitted decisions by hearing officers employed by agencies, but only if they previously had nothing to do with the decision, they wrote a decision, the decision was based on substantial evidence in the record as a whole, and their decision was subject to judicial review. To Shapiro, the APA “legitimizes agency adjudications” by imposing these trial-like requirements and subjecting the decisions to judicial review.³²¹ According to Shapiro, the New Deal lawyers of the Executive Branch essentially prevailed in molding the APA to serve the needs of the New Deal, but in the process the conservatives

triggering language in § 4:

In every administrative adjudication in which the rights, duties, obligations, privileges, benefits, or other legal relations of any person are required by statute to be determined only after opportunity for administrative hearing except to the extent that there is directly involved . . . any matter subject to a subsequent trial of the law and the facts de novo in any court

S. 2030, 78th Cong., § 4 (1944).

318. Davis & Gellhorn, *supra* note 287, at 514 (emphasis omitted).

319. Gellhorn, *supra* note 101, at 232.

320. Shepherd, *supra* note 263, at 1661–76.

321. SHAPIRO, *supra* note 101, at 40–41.

essentially won the day with respect to adjudication—assuring “adjudicative-style procedures, presided over by a relatively independent hearing officer, and freely subject to relatively strict judicial review.”³²²

Similarly, James Freedman characterized the hearing requirements of the APA as “central to its design and to the legitimacy of the federal administrative process.”³²³ Freedman noted that pre-APA hearing officers were viewed with suspicion,

accompanied by the conviction that administrative hearing officers could not be expected to preside impartially so long as they remained no more than staff members employed by their respective agencies, subservient to the direction and discipline of their superiors in making their proposed findings of fact and recommendations for judgment. . . .

[Thus.] as Justice Frankfurter wrote in *Universal Camera*, . . . “enhancement of the status and function of the trial examiner was one of the important purposes of the movement for administrative reform that culminated in enactment of the Administrative Procedure Act.”³²⁴

According to Freedman, § 554(d) in particular was Congress’s attempt to seek the proper balance, preventing ex parte contacts with the hearing officer and prohibiting combination of the functions of investigation, prosecution, and decision.³²⁵

322. Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 453 (1986).

323. FREEDMAN, *supra* note 167, at 150. Paul Verkuil saw the matter somewhat differently:

On the face of it, it looked like a victory for the old Walter–Logan forces who had earlier sought unsuccessfully to judicialize administrative procedure. Certainly some of the members of Congress who voted for the bill thought they were striking a blow against the old nemesis, administrative tyranny. But there were significant differences in the atmosphere surrounding the enactment of the APA, as well as in the substance of the legislation. In the first place, the sides were not clearly drawn; both the President and the ABA supported the 1946 legislation. Thus the APA was passed in a period of reconciliation and relative agreement about its goals and techniques. Moreover, the substance of the bill owed relatively little to Walter–Logan. It did not impose a procrustean procedural system on administrative agencies; rather it provided that the formal hearing provisions would be triggered by organic agency legislation. . . .

On balance, the APA probably disappointed both the friends and the critics of the administrative process. It was not, because of limitations in scope, “comparable in many respects to the Judiciary Act of 1789,” as Senator McCarran later stated; neither was it Walter–Logan reincarnate.

Verkuil, *supra* note 289, at 277–78 (footnotes omitted); see also REGINALD PARKER, *ADMINISTRATIVE LAW: A TEXT* 69–70, 81 (1952) (praising the “establishment of independent trial examiners,” but lamenting the fact that such examiners are “required only where the law demands a formal hearing”). Still, nothing Verkuil or Parker says undermines the perceived importance of the independent, impartial hearing officer, the prohibition on ex parte contacts, or the prohibition on combination of functions. Their statements simply reflect the fact that the APA had a mechanism by which later statutes would govern the question of when such protections would be provided.

324. FREEDMAN, *supra* note 167, at 162–63 (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 494 (1951)).

325. *Id.* at 172–73. Landis explained that procedural issues had been uppermost twenty

The legislative history of the APA reflects the concerns discussed above. The Senate report referred, for example, to “the fundamental problem of the inconsistent union of prosecuting and deciding functions exercised by many executive agencies.”³²⁶ Presenting the bill for Senate debate, Senator McCarran, the APA’s primary sponsor, said that it was “a bill of rights for the hundreds of thousands of Americans whose affairs are controlled or regulated in one way or another by agencies of the Federal Government. It is designed to provide guarantees of due process in administrative procedure.”³²⁷

The legislative history has been mined at length, particularly by the First Circuit in *Seacoast Anti-Pollution League v. Costle* and by several commentators, with respect to the question of whether particular statutory-hearing-right language triggers § 554(a) of the APA.³²⁸ Perhaps the most prominent language from the pre-enactment legislative history is the Senate Committee’s explanation that the limitation to hearings required to be on the record “excluded the great mass of administrative routine as well as pensions, claims, and a variety of similar matters in which Congress has usually intentionally or traditionally refrained from requiring an administrative hearing.”³²⁹ The Senate report also referred to “the separation of [hearing] examiners from the agencies they serve” as one of the “subjects long regarded as of the highest importance.”³³⁰

While *Seacoast* and other commentators used statements of this sort to argue for a presumption of formal adjudications, I make no such argument. These statements are significant to this discussion because they demonstrate that the Senate Committee thought that the availability of independent hearing examiners was an important protection for cases other than “the great mass of administrative routine.” Thus, the Senate Committee would not have intended to have the courts defer to agencies on

years earlier:

The prime emphasis then was placed on the combination of prosecuting and adjudicatory functions within the same agency. It was the concern with this problem that led eventually to the passage of the Administrative Procedure Act of 1946 with its emphasis upon the internal separation of these functions within the agency and the granting of some degree of independence to the hearing examiners.

REPORT ON REGULATORY AGENCIES, *supra* note 102, at 4.

326. COMM. ON THE JUDICIARY, ADMINISTRATIVE PROCEDURE ACT, S. REP. NO. 79-752 (1945), *reprinted in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, 1944-46, at 189 (William S. Hein & Co. 1997).

327. 92 CONG. REC. 2149 (1946) (statement of Sen. McCarran), *reprinted in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, *supra* note 326, at 298.

328. *See* authorities cited *supra* note 48.

329. ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 248, at 22 (1946), *reprinted in* ADMINISTRATIVE PROCEDURE ACT, *supra* note 326, at 22.

330. S. Rep. No. 79-752, at 30 (1945), *reprinted in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, *supra* note 326, at 216.

the question of whether such independent examiners should be provided.

These statements all indirectly suggest that Congress would not have intended judicial deference to agency decisions under § 554(a) of the APA. Senator McCarran, presenting the bill on the floor of the Senate, was quite explicit on this point:

Except in a few respects, this is not a measure conferring administrative powers, but is one laying down definitions and stating limitations. These definitions and limitations must, to be sure, be interpreted and applied by agencies affected by them, in the first instance. But the enforcement of the bill by the independent judicial interpretation and application of its terms is a function which, in the final analysis, is clearly conferred upon the courts.

Therefore, it will be the duty of any reviewing courts to prevent avoidance of the requirements of the bill by any manner or form of indirection, and to determine the meaning of the words and phrases used, insofar as they have not been defined in the bill itself.³³¹

As Justice Scalia has said, the proposition that Congress intends *Chevron*-style deference in particular circumstances is a convenient fiction.³³² In reality, it is a reasonable supposition given that Congress sometimes purposefully enacts ambiguous language or addresses issues beyond its own expertise. Nowhere, however, in *Chevron* or any other decision, does the Court cite specific congressional statements with respect to the degree of judicial deference owed to agency interpretations. By contrast, here we have the prime congressional mover of the APA emphasizing that the “definitions and limitations” of the APA must be established “by the independent judicial interpretation and application of its terms.” Wherever *Chevron* deference may be appropriate, it is not appropriate here.

2. *Post-APA Developments Confirm that Congress Would Not Intend Deference to the § 554(a) Trigger Decision*

Developments in the wake of the APA strongly tend to confirm that Congress would not intend the courts to defer to agency decisions concerning whether a statutory hearing provision triggers § 554(a) of the APA and its attendant adjudicatory protections. As with all of the pre-APA discussions other than Senator McCarran’s specific reference, the post-APA materials do not specifically address the question of deference. Rather, they emphasize the importance of the adjudicatory protections, particularly the newly independent hearing officer and the separation of functions. The only amendments to the APA relevant to this discussion

331. 92 CONG. REC. 2159 (1946), reprinted in ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, *supra* note 326, at 326.

332. See *supra* text accompanying note 187.

further emphasize the importance of these protections. No Congress that considered these protections important would have intended deference to an agency's decision to avoid them.

Speaking to the ABA at its Annual Meeting in October 1946, some four months after the APA became law, Senator McCarran emphasized that, while discretion must play an important role in administration, it must be subject to the rule of law.³³³ As to adjudicatory hearings, he emphasized the separation of functions, noting that “the premise is that the exercise of judicial functions by administrative agencies must be truly judicial in essential form and actual substance.”³³⁴ Referring to adjudicatory decisions as “the crux of administrative justice,”³³⁵ Senator McCarran spoke as if any statutory hearing requirement would trigger the APA's formal-adjudication protections and emphasized the requirements for a hearing officer, full party participation, and a decision on the whole record based upon substantial evidence.³³⁶

In February 1947, an impressive group of administrative law experts, including representatives of several federal agencies, participated in an Institute on the APA and administrative agencies held at New York University.³³⁷ Unlike the post-*Seacoast* debate's attention to the meaning of “on the record” in § 554(a), the NYU discussion focused on whether the APA's formal-adjudication provisions were limited to statutorily required hearings or applied also to hearings held at the agency's discretion.³³⁸ There appears to have been a general understanding that statutorily required hearings triggered the APA's requirements.³³⁹ In the same conference, Professor Blachly complained of the APA's “fixed hearing

333. McCarran, *supra* note 138, at 829.

334. *Id.* at 830.

335. *Id.* at 831. Senator McCarran used the term *administrative decisions*, but in context it is clear he is referring to administrative decisions that are adjudicatory in nature.

336. *Id.*

337. NYU INSTITUTE, *supra* note 141, at v.

338. See, e.g., *id.* at 114 (statement of John H. Wanner, Civil Aeronautics Board) (discussing the likelihood that APA-like protections would be provided even where there is no statutory hearing requirement); *id.* at 181–82 (statement of Bradford Ross) (noting that the APA provisions apply to statutorily required hearings, but that it is unclear whether they apply to hearings that might impliedly be required by statute).

339. See, e.g., *id.* at 205–06 (statement of Frank J. Delaney, Solicitor of the Post Office Department) (describing two statutory hearing requirements as triggering the APA: (1) a requirement that “a hearing shall have been granted to the parties interested,” and (2) a requirement for “a full and fair hearing”—neither requirement referred to the hearing being “on the record”); *id.* at 236 (statement of Roger S. Foster, Solicitor of the Securities and Exchange Commission) (explaining that the Securities Act does not require a hearing for certain decisions, so the APA's requirements would not apply to those decisions); *id.* at 156–58 (statement of Ralph H. Dwan, Assistant Chief Counsel of the Bureau of Internal Revenue) (explaining that certain statutory hearing requirements (which make no reference to “on the record”) were subject to the formal adjudicatory provisions of the APA).

procedure instead of a flexible procedure, necessary to meet the different functions that are being carried on.”³⁴⁰ Mr. Benjamin disagreed, characterizing the hearing provisions as “pretty general” and “not confin[ing] the agency to any particular form of hearing procedure.”³⁴¹ To the extent that this discussion bears on the question of deference to an agency’s interpretation of a hearing requirement, it suggests that no one expected that an agency could avoid the APA’s formal-adjudication provision through its own powers of interpretation. Given the perceived importance of these protections, no one at the time could have imagined that a court would defer to an agency on this question.

In August 1947, Attorney General Tom Clark issued the *Attorney General’s Manual on the Administrative Procedure Act (Manual)*,³⁴² to which the Court has accorded great weight in interpreting the APA.³⁴³ Again, there is no direct reference to the prospect of judicial deference, but the *Manual*’s assertion that the APA “sets a pattern designed to achieve relative uniformity in the administrative machinery of the Federal Government”³⁴⁴ suggests that agencies may not depart through their own interpretations from the uniform application of the APA. More significant, perhaps, is the *Manual*’s explanation of the difference between rulemaking and adjudication, with its emphasis that adjudications involve the “determination of past and present rights and liabilities” and that “[i]n such proceedings, the issues of fact are often sharply controverted.”³⁴⁵ The *Manual* reflects the understanding that a statutory hearing requirement generally triggers the APA’s formal-adjudication requirements, concluding that “[i]t is believed that with respect to adjudication the specific statutory requirement of a hearing, without anything more, carries with it the further requirement of decision on the basis of the evidence adduced at the hearing.”³⁴⁶ Advocates have used this language to support a presumption that the formal-adjudication requirements apply unless Congress is clear to the contrary,³⁴⁷ but it is significant here as an indication that no one at the time—not even the Attorney General speaking for the administration—could have imagined agencies effectively controlling whether they had to provide adjudicative protections. Quite the contrary, there was a widespread understanding these requirements would apply at least to

340. *Id.* at 43.

341. *Id.* at 63–64.

342. U.S. DEP’T OF JUSTICE, *supra* note 33, at 7.

343. *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 546 (1978).

344. U.S. DEP’T OF JUSTICE, *supra* note 33, at 5.

345. *Id.* at 14–15.

346. *Id.* at 42.

347. *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872, 877 (1st Cir. 1978).

significant adjudications and that they represented a significant enhancement of agency legitimacy.³⁴⁸

In 1950, the Supreme Court issued its only pronouncement on the application of § 554(a) of the APA in *Wong Yang Sung v. McGrath*, which involved a Chinese citizen ordered deported after a hearing before an “immigration inspector.”³⁴⁹ Although the immigration statute at issue in *Wong Yang Sung* did not require a hearing, Wong argued that the INS had failed to comply with the adjudicatory requirements of the APA. After reviewing the long history of the APA, the Court identified two relevant “evils” that were to be addressed by the statute: (1) the need for “greater uniformity of procedure and standardization of administrative practice” and (2) “the practice of embodying in one person or agency the duties of prosecutor and judge.”³⁵⁰ Giving primary attention to the latter, the Court concluded that “[i]t is the plain duty of the courts, regardless of their views of the wisdom or policy of the Act, to construe this remedial legislation to eliminate, so far as its text permits, the practices it condemns.”³⁵¹ The Court then held, in effect, that such a statute must provide for a hearing because the Constitution requires a hearing for the action at issue.³⁵² This allowed the Court to conclude that the hearing was “required by statute” under § 554(a), thereby triggering the APA’s formal-adjudication requirements.³⁵³

Congress promptly overturned the APA’s application to deportation proceedings,³⁵⁴ and *Wong Yang Sung* sank into relative obscurity. Professor Funk has recently argued that the case should be revived in order to improve uniformity and predictability in adjudicatory procedure and to remove the determination of proper procedure from “the whim of the agency providing the adjudication.”³⁵⁵ He particularly expressed concern

348. Brown argued that the APA generally continued agency practice, but that [i]ts accomplishment, it is believed, is the establishment of the trial examiner, before whom a hearing is ordinarily held, as the person primarily responsible for the decision of the administrative agency. Thus administrative justice like judicial justice is personalized. The parties are not required to have their disputes disposed of by anonymous persons in the agency’s organization, before whom they have never appeared. The writer believes that this is a distinct gain and in the long run will contribute not only to the protection of the individual, but to administrative efficiency as well. Responsibility is best exercised when it can be identified.

Brown, *supra* note 300, at 87; *see also, e.g.*, Dickinson, *supra* note 286, at 435 (emphasizing the problem of combination of functions and the need for “a disinterested appraisal of the facts free from political interference or bureaucratic bias” prior to the APA).

349. 339 U.S. 33, 35 (1950).

350. *Id.* at 41.

351. *Id.* at 41–45.

352. *Id.* at 49–50.

353. *Id.* at 50.

354. Funk, *supra* note 46, at 885–86.

355. *Id.* at 881.

that “[a]gencies never choose to have adjudication under the APA. They opposed the adjudicatory requirements of the APA while Congress was considering it. Agencies continued to ignore the APA’s requirements until courts enforced it, and they have been quick to avoid adjudicatory requirements where courts have allowed it.”³⁵⁶ Referring to agency concerns about the burdens of formal APA proceedings, Professor Funk cited a study indicating that agencies often are not aware of the considerable flexibility afforded by the APA and asserted “that agencies really were more concerned with the fact that ALJs, over whom the agency has no supervisory control, controlled the proceedings.”³⁵⁷

The congressional reaction to *Wong Yang Sung*—the only legislative act specifically addressed to the application of § 554(a) since the APA’s enactment in 1946—raises a question about the likely congressional intent concerning that provision. If Congress considered §§ 554, 556, and 557 so insignificant that they should be summarily rejected in particular cases, it would not have been greatly concerned about who should reject those provisions: the agency, the courts, or Congress itself. But context is extremely important here. First, Congress decided those provisions should not apply to deportation. It did not in any way relegate that decision to the agency. Second, the congressional action related only to hearings for illegal aliens who traditionally have far fewer rights and even less political status than citizens or legal residents. By contrast, at the time of the APA and since, most relevant statutory hearing rights have undoubtedly related to business interests or to legal residents, usually citizens. This is true, for example, of the hearing rights at issue in *Seacoast, City of West Chicago*, and *Chemical Waste Management*.³⁵⁸ Whatever Congress’s attitude toward deportable aliens, the history of the APA demonstrates that Congress was quite concerned about the hearing rights of American business and American citizens. Nothing about the reaction to *Wong Yang Sung* indicates that Congress would have intended to turn those rights over to the agency subject to only deferential review.

Finally, Congress has twice amended the formal-adjudication provisions of the APA. In 1976, Congress added § 557(d), which expanded the ex parte prohibitions beyond the narrow confines of § 554(d).³⁵⁹ As described in the House report, this provision was needed in addition to § 554(d) because on-the-record “proceedings cannot be fair or soundly decided . . . when persons outside the agency are allowed to communicate

356. *Id.* at 892 (footnotes omitted).

357. *Id.* at 892–93.

358. *See supra* text accompanying notes 72–84.

359. Pub. L. No. 94-409, § 4, 90 Stat. 1246, 1246–47 (1976) (codified at 5 U.S.C. § 557(d) (2006)).

with the decision-maker in private and others are denied the opportunity to respond.”³⁶⁰ Two years later, Congress replaced the term *hearing examiners* with the term *administrative law judges*, noting in the Senate report that, “[i]n essence, individuals appointed as ALJs hold a position with tenure very similar to that provided for Federal judges under the Constitution.”³⁶¹ It is quite striking that Congress has thought it important to enhance both the stringency of the APA’s legitimacy protections and the status of its formal adjudicators. No Congress with those concerns would relegate to administrative agencies the question of whether those and related protections should be provided to parties appearing before the agencies.

3. *The APA Creates a Presumption Against Applying Chevron Deference to Later Statutory Provisions Requiring Hearings for Adjudicatory Decisions*

The previous discussion establishes that the Congress that enacted the APA would not have intended the courts to defer to an agency’s determination that it was not governed by the protections of §§ 554, 556, and 557.³⁶² As in *Seacoast*, *City of West Chicago*, and *Chemical Waste Management*, however, there is the additional question of whether Congress would have intended such deference when it enacted an adjudicatory hearing provision years after enactment of the APA. It is possible that a later Congress would have had a view quite different from that of the 79th Congress in 1946.

In light of the interaction between the APA and any later hearing provision, the latter must be read in light of the former. When Senator McCarran emphasized the need for “independent judicial interpretation” of the APA’s limitations and warned against agency “avoidance of the requirements of the bill by any manner or form of indirection,”³⁶³ he must have been referring not only to interpretations of the APA itself but also to agency interpretations of other statutes in a manner that would avoid the APA’s protections. Otherwise, agencies could avoid the APA with relative ease simply by interpreting other statutes to avoid the APA’s requirements.

360. H.R. REP. NO. 94-880, pt. 2, at 17–18 (1976), as reprinted in 1976 U.S.C.C.A.N. 2212, 2227.

361. S. REP. NO. 95-697, at 2 (1978), as reprinted in 1978 U.S.C.C.A.N. 496, 497; Pub. L. No. 95-251, 92 Stat. 183 (1978) (amending scattered sections of 5 U.S.C. and referring to hearing examiners from the enactment of the Act onward as ALJs).

362. The same is presumably also true of the Congresses that enacted the amendments to the formal-adjudication provisions of the APA. See *supra* text accompanying notes 331–59.

363. 92 CONG. REC. 2159 (1946) (statement of Sen. McCarran), reprinted in ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, *supra* note 326, at 326.

Thus, judicial examination of an agency's application of § 554(a) to a particular statutory hearing provision must begin with a presumption that Congress did not intend the courts to defer to the agency's interpretation.

The Court has given us two models that support this approach. First, in *Florida East Coast Railway*,³⁶⁴ the Court addressed the question of whether a statutory hearing right triggered formal process with respect to a rulemaking decision. Carefully distinguishing between rulemaking and adjudication, the Court established, in effect, a presumption that a statutory right to a hearing in connection with a rulemaking authorized after enactment of the APA did not trigger a formal process. In so doing, the Court said that reference to the previously enacted APA "in which Congress devoted itself exclusively to questions such as the nature and scope of hearings, is a satisfactory basis for determining what is meant by the term 'hearing' used in another statute."³⁶⁵ Indeed, *Seacoast* relied upon *Florida East Coast Railway* in adopting a comparable presumption for statutory hearing provisions with respect to adjudications. My proposal is much more modest, simply that *Florida East Coast Railway* demonstrates that it is appropriate to look to the APA in construing hearing provisions and that the APA establishes a baseline under which courts are not to defer to agencies with respect to the § 554(a) trigger decision unless Congress has clearly indicated that it intended such deference.

The Court's second model appears in the Court's *Chevron* jurisprudence. As a general proposition, the availability of *Chevron* deference is a function of the perceived intent of Congress in enacting the statutory provision at issue. Thus, in *Chevron* itself, Congress presumably intended to delegate substantive regulatory authority to the EPA when it enacted the term *stationary source* in the larger context of the Clean Air Act. The larger statutory context could well give clarity to an otherwise ambiguous term, as was arguably the case, for example, in *MCI*.³⁶⁶ In both *Chevron* and *MCI*, the contextual analysis of the statutory terms considered the larger regulatory scheme of the substantive statute at issue.

By contrast, in *Brown & Williamson*,³⁶⁷ the Court drew upon congressional action outside the context of the Food, Drug, and Cosmetic Act in determining that the Act did not authorize the FDA to regulate nicotine as a drug and in rejecting deference to the FDA's interpretation.³⁶⁸

364. 410 U.S. 224 (1973).

365. *Id.* at 240.

366. The majority held that the term *modify* was not ambiguous as applied to an attempt to eliminate tariff-filing requirements in certain circumstances. The majority relied in part on dictionary definitions but also on the fact that tariff filings were a linchpin of the statutory scheme. 512 U.S. 218, 225–33 (1994).

367. 529 U.S. 120 (2000).

368. The Court considered, for example, Congress's enactment of the Federal Cigarette

Similarly, courts should draw upon the principles established by Congress in enacting the APA. Just as the Court inferred a lack of authority to regulate nicotine from the various congressional enactments discussed in *Brown & Williamson*, the Court should infer a presumption against *Chevron* deference from the history of the APA and the congressional intent at the time of its enactment and later amendment.

CONCLUSION

In enacting the APA, Congress sought to achieve a balance between the antiregulatory forces—represented by the ABA—and New Deal proponents who trusted agency expertise and sought efficient procedures through which to implement government programs. The result was “a formula upon which opposing social and political forces have come to rest[,] . . . contain[ing] many compromises and generalities and, no doubt, some ambiguities.”³⁶⁹ Section 554(a) was one of the compromises. It required the legitimizing protections of an independent, impartial hearing officer, a prohibition on combining the functions of investigation, prosecution, and decision, and a prohibition on *ex parte* contacts. But it imposed those protections only when another statute required an adjudication “to be determined on the record after opportunity to an agency hearing.” Although these protections were central to the APA—to the point that Dean Acheson considered issues related to the trial examiner to be at the “very heart of the adjudicative process”³⁷⁰—the difficult decision, precisely when to require these protections, was left to a later Congress.

The result has been much uncertainty, with decisions ranging from a presumption of formal process for adjudications, to a requirement for a clear statement from Congress to impose formal process, and ultimately to the proposition that the courts should defer to an agency’s judgment about whether its statutory hearing provisions impose these protections. Whatever the validity of the first two positions, the argument for deference is flatly contrary to the history of the APA and to the intent of Congress in enacting the APA. The APA and its later amendments create a presumption that courts should not defer to agency decisions that would

Labeling and Advertising Act (FCLAA), Pub. L. No. 89-92, 79 Stat. 282 (1965), the Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (1970), the Alcohol and Drug Abuse Amendments of 1983, Pub. L. No. 98-24, 97 Stat. 175 (1983), the Comprehensive Smoking Education Act, Pub. L. No. 98-474, 98 Stat. 2200 (1984), the Comprehensive Smokeless Tobacco Health Education Act of 1986, Pub. L. No. 99-252, 100 Stat. 30 (1986), and the Alcohol, Drug Abuse, and Mental Health Administration Reorganization Act, Pub. L. No. 102-321, § 202, 106 Stat. 394 (1992). *See also Brown & Williamson*, 529 U.S. at 137–38, 159–60.

369. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 40–41 (1950).

370. FINAL REPORT, *supra* note 295, at 258.

avoid these protections in adjudicatory decisions. Unless Congress has clearly indicated that the courts are to defer to an agency's interpretation of a statutory hearing requirement as it related to § 554(a) of the APA, that interpretive question is for the courts alone.