Hastings Law Journal

Volume 56 | Issue 5 Article 5

1-2005

The "Magic Words" of 554: A New Test for Formal Adjudication under the Administative Procedure Act

John F. Stanley

Notes

The "Magic Words" of § 554: A New Test for Formal Adjudication Under the Administrative Procedure Act

JOHN F. STANLEY*

INTRODUCTION

Imagine that you want to participate in a pending decision by a federal agency. You might be applying for a permit necessary to run your business, such as a wastewater discharge permit[1] or seeking authorization to start a new business in a regulated industry, such as banking.[2] You might be challenging a penalty assessed against you for failing to adequately maintain a nursing home[3] or contesting the denial of favorable loan conditions to your family farm.[4] Alternatively, you might be part of a citizen's group seeking to challenge the authorization of a permit or license, such as a license to operate a nuclear power plant in your neighborhood.[5]

Imagine that in each of these situations, the relevant statute required the agency to hold a hearing before making its decision, but the statute doesn't define any procedures to be used at that hearing. What procedures should apply? As the one challenging an agency decision, you would want a formal, trial-like hearing where you can present your case

* J.D., University of California, Hastings College of the Law, 2005; B.S., University of California, Santa Cruz. I would like to thank Adriana Dydell, Rachael Keast, and Christopher Tarbell for their helpful comments. Special thanks as well to Dana Goldstein and Suzanne Roberts.

1. U.S. Steel Corp. v. Train, 556 F.2d 822 (7th Cir. 1977) (evaluating proceedings for a National Pollutant Discharge Elimination System permit).

2. Indep. Bankers Ass'n of Ga. v. Bd. of Governors of the Fed. Reserve Sys., 516 F.2d 1206 (D.C. Cir. 1975) (reviewing an order by the Board of Governors of the Federal Reserve authorizing a new mortgage banking subsidiary).

3. Crestview Parke Care Ctr. v. Thompson, 373 F.3d 743 (6th Cir. 2004).

4. Lane v. U.S. Dep't of Agric., 120 F.3d 106 (8th Cir. 1997).

5. Union of Concerned Scientists v. U.S. Nuclear Regulatory Comm'n, 735 F.2d 1437 (D.C. Cir. 1984) (evaluating challenge by citizen's group to licensing of a nuclear power plant).

before an impartial decisionmaker. You would want the opportunity to present evidence favoring your position, call your own witnesses, and cross-examine any opposing witnesses.

While those formal procedures could be part of the hearing, the agency's interpretation is that none of those procedures are required. The agency's interpretation is that the hearing required by the statute can be satisfied by written submissions to an agency employee who will make the decision. The procedures for the hearing need only satisfy constitutional due process,[6] and in this particular case, those written submissions are sufficient.

Imagine further that you sue the agency, not over the substance of the agency's decision, but instead challenging the procedures used to arrive at that decision. Your argument is that formal, trial-like procedures should have applied to the hearing. How should a court rule?

Whether or not a party to a federal agency adjudication has the opportunity to a formal, trial-like hearing depends upon whether or not § 554 of the Administrative Procedure Act (APA)[7] applies to that adjudication. When § 554 applies, the agency hearing must follow formal, trial-like procedures. When § 554 does not apply, then the hearing is informal, and must only satisfy constitutional due process, as well as any procedures required by the relevant statute. While the hypothetical statute above did not define any procedures to be used at the hearing, many statutes do include some procedural requirements.

The language of § 554 states that it applies to adjudications "to be determined on the record after opportunity for an agency hearing."[8] When this "hearing on the record" requirement is present, formal procedures are required.[9] But when these "magic words"[10] are not in the authorizing statute, and instead the statute calls only for a hearing, without any "on the record" language, § 554 may still apply.

Whether or not a hearing alone can trigger § 554 has been addressed by several of the United States courts of appeals, with differing results. These results have further changed over the years as jurisprudential approaches to statutory interpretation have evolved. The longstanding,

6. Constitutional due process is generally analyzed through the Supreme Court's three-part balancing test articulated in *Mathews v. Eldridge*, 424 U.S. 319 (1976).

7. 5 U.S.C. §§ 500–596 (2000).

8. 5 U.S.C. § 554(a) (2000).

9. Section 554 includes several formal, trial-like procedures, and also triggers the application of §§ 556 and 557, which include additional formal requirements. 5 U.S.C. §§ 554, 556–557.

10. Various courts have referred to the "on the record" language as magical or talismanic language that triggers the application of formal procedures. *See* Union of Concerned Scientists v. U.S. Nuclear Regulatory Comm'n, 735 F.2d 1437, 1444 n.12 (D.C. Cir. 1984) ("magic words"); City of W. Chicago v. U.S. Nuclear Regulatory Comm'n, 701 F.2d 632, 641 (7th Cir. 1983) ("magic words"); Marathon Oil Co. v. EPA, 564 F.2d 1253, 1263 (9th Cir. 1977) ("the magical phrase 'on the record'"); *id.* at 1264 ("talismanic language").

but still applicable, case law can be divided into two approaches. The majority approach, taken by the First, Seventh, and Ninth Circuits,[11] is for the courts to make a *de novo* evaluation of whether congressional intent indicates that the adjudicatory hearing should be held using formal procedures.[12] At times, these courts have indicated a presumption for formal proceedings, but it is unclear whether that presumption is still applied. The other approach, taken by the D.C. Circuit in *Chemical Waste Management, Inc. v. EPA*,[13] applied the *Chevron*[14] analysis, with its preference for deferential review of agency interpretations. In that case, the EPA interpreted hearing in one part of the statute as requiring formal proceedings, while hearing in another part did not.[15] After finding that the statutory language was ambiguous, the court upheld the Agency's interpretations of the statute as reasonable.[16] The conflict in approaches, between the majority *de novo* approach, and the D.C. Circuit's deferential approach, has remained in place for fifteen years, and neither approach has been explicitly overruled.

In 2001, after a series of cases touching on the subject of when *Chevron* deference is appropriate,[17] the Supreme Court decided *United States v. Mead Corp.*[18] In *Mead*, the Court laid out a framework to determine whether an agency decision should be given *Chevron* deference, *Skidmore*[19] deference (a lesser degree of deference), or no deference at all.[20] *Chevron* deference is only appropriate where Congress delegated the power to interpret the statute with the force of law to the agency.[21] The principal factor used to find this delegation of power is the level of formality required for the agency action; the more formal, the more likely *Chevron* deference is appropriate.[22] The *Mead* Court noted that *Chevron* deference was frequently appropriate when the agency interpretation was arrived at through formal adjudication.[23] Where *Chevron* deference is not appropriate, the agency may still receive *Skidmore* deference. *Skidmore* deference is based on a number of

11. Cases from other circuits have also taken this approach, but examples from the First, Seventh, and Ninth Circuits are discussed at length.

12. *See infra* Part I.B.

13. 873 F.2d 1477 (D.C. Cir. 1989).

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

15. *Chem. Waste Mgmt.*, 873 F.2d at 1479.

16. *Id.* at 1478.

17. Christensen v. Harris County, 529 U.S. 576 (2000); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000); INS v. Aguirre-Aguirre, 526 U.S. 415 (1999); United States v. Haggar Apparel Co., 526 U.S. 380 (1999).

18. 533 U.S. 218 (2001).

19. Skidmore v. Swift & Co., 323 U.S. 134 (1944).

20. *Mead*, 533 U.S. at 227–30.

21. *See id.*

22. *See id.* at 230.

23. *Id.*

factors,[24] which look to the overall persuasiveness of the agency's interpretation.

Mead overrules the D.C. Circuit's *Chemical Waste Management* decision. *Chemical Waste Management* gave the agency *Chevron* deference in order to determine whether it uses formal or informal adjudication procedures.[25] *Mead* indicates that the agency should receive *Chevron* deference where it used formal adjudication procedures to make its decision.[26] While procedurally impossible, the implication of following both of these decisions would be to give the agency deference to decide whether it should get deference.[27]

However, *Mead* does more than just overrule the *Chemical Waste Management* approach. It establishes a new test to apply when a court is analyzing whether formal or informal adjudication is required. When a statute calls for a hearing on the record, it is obvious that formal adjudication is required. But where the statute calls only for a hearing, *Mead* charts a course between the *Chevron* deference approach of the D.C. Circuit and the *de novo* analysis used by most circuits. The court should apply *Skidmore* deference, and analyze the agency's interpretation of whether formal adjudication is required. If the agency's interpretation is persuasive under *Skidmore*, then the court should give that interpretation appropriate deference. If the agency's interpretation fails to receive deference under *Skidmore*, only then should the court engage in a *de novo* analysis of congressional intent. The conclusion of this Note is that *Mead* supercedes both current approaches, instead requiring this intermediate approach under which *Skidmore* deference is appropriate.

Part I of this Note reviews the background of this issue, divided into three parts. Part I.A summarizes the case law addressing when formal procedures are required in rulemaking under the APA. Formal rulemaking, like formal adjudication, is triggered by the "on the record" language, and provides for most of the same formal procedures. But in the rulemaking context, the Supreme Court has clearly spoken as to when formal or informal procedures are required. Part I.B reviews the cases addressing whether the requirement of a hearing alone may trigger formal adjudication. This Part includes a discussion of both the majority *de novo* approach, and the D.C. Circuit's deferential approach. Part I.C looks at *Mead*, and lays out the Supreme Court's current test for determining what level of deference to afford an agency interpretation.

Part II.A applies the *Mead* analysis to the issue of whether an agency

24. *See infra* text accompanying notes 188–91.

25. 873 F.2d 1477, 1480–81 (D.C. Cir. 1989).

26. *See id.*

27. It was this circularity or inconsistency that initially led to my interest in this topic.

should be given *Chevron* deference to decide whether a hearing triggers formal adjudication. This Note concludes that *Chevron* deference is not appropriate in this context. However, the agency should still receive *Skidmore* deference, a lesser degree of deference which is subject to a number of factors. This Part also lays out the appropriate test for a court to apply in evaluating whether a hearing may require formal adjudication. Part II.B applies that test, and the *Skidmore* factors, to the facts of *Chemical Waste Management*, and *Union of Concerned Scientists v. U.S. Nuclear Regulatory Commission*,[28] an earlier decision by the D.C. Circuit on this same issue, but which followed the majority approach and did not afford the agency any deference. In both of these cases, this Note concludes that the results reached were correct. In *Chemical Waste Management*, the agency's interpretation should have been afforded substantial deference under *Skidmore*. The court was correct to defer to the agency's interpretation because of the reasonableness and persuasiveness of the agency's procedural regulations at issue in that case. However, in *Union of Concerned Scientists*, the *Skidmore* factors indicate that the agency's interpretation should not have received any deference, and the court was correct to engage in a *de novo* analysis of whether formal adjudication was required. Courts facing the question of whether a hearing requires formal or informal adjudication should look to *Skidmore* to determine whether or not the agency's interpretation should be given deference, and only if the court finds that deference is inappropriate should it engage in a *de novo* analysis.

I. BACKGROUND

The APA[29] governs the procedural steps required when an administrative agency acts. The APA itself does not authorize agency action. Instead, when another statute grants a federal agency the power to take some action, the APA provides the procedural requirements that an agency must meet in taking that action. For example, the EPA is authorized under the Clean Water Act to issue wastewater discharge permits[30] and to promulgate various regulations governing pollutants.[31] While the Clean Water Act describes the substantive legal and factual considerations that should go into those actions, the APA provides the minimum procedural requirements that must be met before the permits can be issued or the regulations finalized.

Agency actions are classified as either rulemaking or adjudication.

28. 735 F.2d 1437 (D.C. Cir. 1984).

29. 5 U.S.C. §§ 500–596 (2000).

30. 33 U.S.C. § 1342(a) (2000) (authorizing the Administrator to issue a National Pollutant Discharge Elimination System permit allowing discharges of wastewater into navigable waterways).

31. § 1342(f)–(g) (authorizing promulgation of regulations governing point source discharges and "[o]ther regulations for safe transportation, handling, carriage, storage, and stowage of pollutants").

"Rule making" is the "process for formulating, amending, or repealing a rule,"[32] and a "rule" is "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency."[33] Rules are generally prospective, focused on policy, and more legislative than judicial in nature. Regulations issued by an agency are a typical example of rulemaking.

An "adjudication" is the process by which an agency formulates an order.[34] An order is defined in the negative, as any part of a final decision by an agency "in a matter other than rule making."[35] Any agency action that involves a final decision, other than rulemaking, therefore falls within the definition of an adjudication. Decisions by agencies to grant or deny a permit or license, to assess penalties for noncompliance with statutes or regulations, or even to hire or fire personnel are all adjudications.

Each type of action can then be categorized as formal or informal, depending on the procedures required by the APA. Rulemaking is either formal or informal depending upon whether the statute authorizing agency action requires that the rule "be made on the record after opportunity for an agency hearing."[36] If a hearing on the record is required, then §§ 556 and 557 of the APA apply. These two sections provide for a number of trial-like formal procedures, such as requiring that the presiding decisionmaker be impartial, entitling the parties to present evidence to that decisionmaker, to rebut evidence by the opposing side, and to conduct cross-examination if necessary.[37] If §§ 556 and 557 do not apply, then the rulemaking falls under the informal (or at least less formal) procedural requirements of § 553, also known as "notice-and-comment" rulemaking. Section 553 requires that the agency issue notice of the proposed rulemaking and "give interested persons an opportunity to participate in the rulemaking" through comments.[38] The agency must consider any relevant comments, and address them in a

32. § 551(5). While the APA uses the term "rule making," courts and commentators generally eliminate the space and write "rulemaking." I have followed the latter convention here, except where quoting language that includes the space.

33. § 551(4).

34. § 551(7).

35. § 551(6).

36. § 553(c) ("When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.").

37. *See* § 556(b) (requiring presiding employees to conduct their functions "in an impartial manner"); § 556(d) (allowing for receipt of evidence, entitling parties to present their 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"); § 557(c) (requiring that the agency decision be supported by evidence in the record).

38. § 553(b)–(c).

"concise general statement" included with the rule.[39]

The distinction between formal and informal adjudication is also dependant upon whether the statute requires that the hearing be on the record.[40] When the action taken is an adjudication, and a hearing on the record is required by statute, § 554, as well as §§ 556 and 557, apply to the adjudication.[41] Sections 556 and 557 require the same procedural requirements discussed above,[42] and § 554 also requires that the parties be given notice, an opportunity to submit facts and arguments in their favor, and other trial-like procedures.[43]

In addition to the benefit of these formal, trial-like procedures, if § 554 of the APA does apply to the adjudication, parties successfully challenging an agency decision may be able to recover attorney's fees. Under the Equal Access to Justice Act, a prevailing party (other than the United States) in an adversarial adjudication before an agency can recover attorney's fees and costs, unless the agency's position was substantially justified.[44] An adversarial adjudication is defined as, *inter alia*, an adjudication under § 554.[45]

However, where formal adjudication is not required, the APA is largely silent.[46] This is unlike informal rulemaking, where there are APA-imposed procedural requirements. As a result, unless specific procedures are required by the relevant statute, informal adjudication is generally only subject to the minimum procedures required to meet the due process limitations imposed by the Fifth Amendment.[47]

In conclusion, where a statute authorizes agency action, either rulemaking or adjudication, and that action must be "on the record after opportunity for an agency hearing," it is clear that the APA's formal, trial-like procedures apply. But where the statute only requires a hearing, can formal procedures still be required?

A. Formal or Informal Rulemaking

In the context of rulemaking, the Supreme Court addressed this question, and concluded that unless the statute includes the express language "on the record," or "other statutory language having the same

39. § 553(c).

40. § 554(a) ("This section applies . . . in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing . . . .").

41. *See id.*; *see also* § 553(c). The applicability of § 554 is subject to several exceptions, which are not relevant to this discussion. *See* § 554(a).

42. *See supra* note 37 and accompanying text.

43. 5 U.S.C. § 554.

44. 5 U.S.C. § 504(a) (2000).

45. 5 U.S.C. § 504(b)(1)(C); *see also* Lane v. U.S. Dep't of Agric., 120 F.3d 106 (8th Cir. 1997).

46. Section 555 of the APA does impose some requirements on informal agency adjudication, but these requirements are minimal and not relevant to the issue discussed in this Note.

47. *See generally* Mathews v. Eldridge, 424 U.S. 319 (1976).

meaning," formal rulemaking is not required.[48] This rule was formulated in two cases in succeeding terms, both of which involved regulations addressing chronic shortages of railroad freight cars under the Interstate Commerce Act (ICA).[49] Both cases were also written by then-Justice Rehnquist: *United States v. Allegheny-Ludlum Steel Corp.*,[50] decided in 1972, and *United States v. Florida East Coast Railway Co.*,[51] decided in 1973.

Allegheny-Ludlum involved a challenge to the rules promulgated by the Interstate Commerce Commission (ICC) that essentially required railroads to send empty railroad cars back towards their origin, in order to prevent freight-car shortages.[52] The railroads and shipping companies bringing the challenge argued that the ICC should have used the formal rulemaking procedures of §§ 556 and 557.[53] The Court observed that the language of the ICA[54] did not call for a hearing on the record, and found this to be "determinative for this case."[55] The Court held that "[s]ections 556 and 557 need be applied 'only where the agency statute, in addition to providing a hearing, prescribes explicitly that it be 'on the record,'"'[56] but also stated that "[w]e do not suggest that only the precise words 'on the record' in the applicable statute will suffice."[57] Justice Rehnquist concluded his analysis by noting that "[b]ecause the proceedings under review were an exercise of legislative rulemaking power rather than adjudicatory hearings . . . and because [the applicable statute] did not require a determination 'on the record,'" formal rulemaking was not required.[58]

The following year, in *Florida East Coast Railway*, the Court applied *Allegheny-Ludlum* to reverse the district court's determination that the ICA required formal procedures.[59] Justice Rehnquist again noted that "other statutory language having the same meaning could trigger the provisions of §§ 556 and 557 in rulemaking proceedings."[60] However, the

48. United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 238 (1973); *see also* United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 757 (1972).

49. 49 U.S.C. § 1(14)(a) (1970) (current version at 49 U.S.C. § 11,122 (2000)). The Court refers to this Act by a different name in each case. In *Allegheny-Ludlum*, 406 U.S. at 744, it is called the Esch Car Service Act of 1917. In *Florida East Coast Railway*, 410 U.S. at 238, it is called the Interstate Commerce Act. For consistency, I will refer to it as the Interstate Commerce Act (ICA).

50. 406 U.S. at 742.

51. 410 U.S. at 224.

52. *Allegheny-Ludlum*, 406 U.S. at 742–43.

53. *Id.* at 756.

54. 49 U.S.C. § 1(14)(a).

55. *Allegheny-Ludlum*, 406 U.S. at 757.

56. *Id.* (quoting Siegel v. Atomic Energy Comm'n, 400 F.2d 778, 785 (D.C. Cir. 1968)).

57. *Id.*

58. *Id.*

59. United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 225–29 (1973).

60. *Id.* at 238.

agency action at issue in *Florida East Coast Railway* was the establishment of a schedule of charges for incentive per diem rates, which effectively charged the railroads daily rates until they returned empty cars to their origin.[61] The challengers argued that Congress intended the word hearing in the ICA to require more formalized procedures, such as oral testimony, cross examination, or oral argument; in other words, procedures that were required under §§ 556 and 557, but not under § 553.[62] In its initial notice of proposed rulemaking, the ICC stated that the formal rulemaking procedures of the APA applied in this case,[63] and the government did not contest that argument in the lower court decision.[64] But the Court disagreed, finding that the hearing given by the ICC was satisfactory in this case,[65] and dismissing the argument that the ICC's interpretation of whether the APA formal procedures applied should be given greater weight.[66] The Court noted that the ICC's interpretation of what hearing requirements Congress intended were an interpretation of the APA, not the ICA, and, therefore, the ICC's interpretation did not carry the same weight that it would if it were "an interpretation by an agency 'charged with the responsibility' of administering a particular statute."[67]

In effect, the Supreme Court's decisions in *Allegheny-Ludlum* and *Florida East Coast Railroad* create a presumption of informality in rulemaking proceedings under the APA, with the default requirement being the notice-and-comment requirements of § 553. Sections 556 and 557 only apply where the explicit language on the record, or similar statutory language is present.

B. Formal or Informal Adjudication

While the Supreme Court has created a presumption of informality in rulemaking proceedings, the result is not clear in the context of adjudication. The Supreme Court has not directly addressed this issue,[68] although several cases have touched on it. This section discusses those Supreme Court cases, as well as the different approaches taken by lower courts.

1. *The Supreme Court's Comments in* Overton Park

In *Citizens to Preserve Overton Park, Inc. v. Volpe*, the Supreme Court commented on when formal APA procedures might be required

61. *Id.* at 233.
62. *Id.* at 239–40.
63. *Id.* at 255 (Douglas, J., dissenting).
64. *Id.* at 236 n.6.
65. *Id.* at 243.
66. *Id.* at 236 n.6.
67. *Id.* (internal citations omitted).
68. Peter L. Strauss et al., Gellhorn & Byse's Administrative Law 333 (10th ed. 2003).

despite the lack of a statutory requirement that the decision be on the record.[69] The action at issue in *Overton Park* was the authorization of federal funding for construction of a highway through a public park.[70] The relevant statute provided that the Secretary of the Department of Transportation should not authorize funding for projects that would affect public parks, unless there were no "feasible and prudent" alternatives.[71] After finding that this agency action was not rulemaking, nor a formal adjudication, the Court addressed whether the Secretary failed to meet any procedural requirements in authorizing the funding.[72] The Court stated:

> [T]he Administrative Procedure Act requirements that there be formal findings in certain rulemaking and adjudicatory proceedings do not apply to the Secretary's action here. And, although formal findings may be required in some cases in the absence of statutory directives when the nature of the agency action is ambiguous, those situations are rare.[73]

Although neither the relevant statute nor the APA required any findings or record to be made in this case, the Court determined that adequate judicial review of the Secretary's decision, which was under the arbitrary, capricious, or abuse of discretion standard,[74] depended upon that judicial review being "based on the full administrative record that was before the Secretary at the time he made his decision."[75] The *Overton Park* decision effectively requires that any agency decision subject to judicial review be made with an adequately developed record, despite the lack of any statutory or APA requirement of such.[76] But the language used by the Court strongly suggests that situations where this record requirement triggers the on the record language of the APA would be "rare."[77] An agency could be required to develop a record for an adjudication, but that should not trigger formal adjudication.

2. *Majority Approach*—De Novo *Analysis of Congressional Intent*

Between 1977 and 1978, three circuit courts[78] addressed the issue of whether the language "opportunity for public hearing" in § 402 of the Federal Water Pollution Control Act (FWPCA),[79] required formal

69. 401 U.S. 402, 417 (1971).
70. *Id.* at 406–07.
71. *Id.* at 405 (quoting 23 U.S.C. § 138 (1964)).
72. *Id.* at 414–15, 417.
73. *Id.* at 417 (citations omitted).
74. *Id.* at 416 (citing 5 U.S.C. § 706(2)(A) (Supp. V 1964)).
75. *Id.* at 420 (footnote omitted).
76. This is the holding from *Overton Park* that is most frequently cited.
77. *Id.* at 420.
78. Seacoast Anti-Pollution League v. Costle, 572 F.2d 872 (1st Cir. 1978); Marathon Oil Co. v. EPA, 564 F.2d 1253 (9th Cir. 1977); U.S. Steel Corp. v. Train, 556 F.2d 822 (7th Cir. 1977).
79. 33 U.S.C. § 1342 (Supp. 1977).

adjudication. Section 402 governs the issuance of National Pollutant Discharge Elimination System (NPDES) permits, and allows issuance of a permit after an application and an opportunity for public hearing.[80] NPDES permits are required before discharging pollutants into waterways, and through the permitting process, the EPA could impose limits and conditions on the discharges.[81] All three circuit courts came to the same result, finding that the "opportunity for a public hearing" language triggered the formal APA procedures, despite the lack of "on the record" language in § 402. But each court had slightly different reasoning, and the latter two courts commented on the reasoning used in the preceding cases.

a. *Seventh Circuit:* U.S. Steel Corp. v. Train

The Seventh Circuit was the first to address this, in *U.S. Steel Corp. v. Train.*[82] The EPA argued that the APA did not apply to this hearing, and that the only procedural constraint was the due process clause.[83] The court held, however, that the formal adjudication procedures of the APA did apply, focusing its reasoning on the requirement of judicial review under the FWPCA.[84] Under § 509 of the FWPCA, specified sections of the Act are subject to judicial review.[85] However, only one of those sections contained the words "on the record."[86] The court noted that "[t]he absence of the words 'on the record' [was] not conclusive"[87] and that the presence of those words in one portion of the statute, but not in the remainder, was outweighed by other factors.[88] "It seems improbable that Congress would have contemplated that judicial review of proceedings under all the other sections . . . would be conducted without a written record."[89] In essence, the court decided that the statute made more sense by reading an "on the record" requirement into the hearings.

b. *Ninth Circuit:* Marathon Oil Co. v. EPA

Six months after *Train*, the Ninth Circuit decided *Marathon Oil Co. v. EPA*,[90] addressing the same issue. The *Marathon Oil* court agreed that the formal APA provisions applied, but disagreed with the Seventh

80. *Id.*
81. *See Train*, 556 F.2d at 829–30.
82. *Id.* at 822. The Seventh Circuit noted that a prior Seventh Circuit case had "assumed, without deciding, that the APA applies" to § 402 proceedings. *Id.* at 833 n.9. (citing Porter County Chapter of the Izaak Walton League of Am., Inc. v. Train, 548 F.2d 1298 (7th Cir. 1977)).
83. *Id.* at 833.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. 564 F.2d 1253 (9th Cir. 1977).

Circuit's reasoning.[91] Rather than resting on the requirement of judicial review, the Ninth Circuit's reasons for finding that the formal procedures of the APA applied rested on the fundamental similarity between administrative adjudications and judicial decisions, and on the legislative intent behind the APA.[92] "Congress recognized that certain administrative decisions closely resemble judicial determinations and, in the interest of fairness, require similar procedural protections."[93] Quoting extensively from the Attorney General's Manual on the Administrative Procedure Act,[94] the Ninth Circuit contrasted these quasi-judicial proceedings with rulemaking. Rulemaking is more legislative in character and focused on policy considerations, and should therefore be "guided by more informal procedures."[95] Adjudications are quasi-judicial proceedings that "determine the specific rights of individuals" and turn on "sharply disputed" facts.[96] Therefore, more formal, trial-like procedures such as cross-examination are needed, and § 554, with its additional procedural requirements, should apply to the adjudication.

Turning to the specific contention that § 402 lacked the required "on the record" language, the Ninth Circuit identified two rationales for finding that § 554 applied here. First, the Attorney General's Manual suggested that a provision for judicial review could "clearly impl[y]" that formal "on the record" proceedings were required.[97] While the Attorney General's Manual was issued shortly after the passing of the APA, and reflects an understanding of the legislative intent behind the APA, this view is in conflict with the Supreme Court's language in *Overton Park*.[98] There, the Court stated that while judicial review may require that a decision be justified by an adequate record, that record requirement should only rarely trigger the APA's formal procedures.[99]

Second, the Ninth Circuit looked at the congressional intent behind the on the record requirement and the overall structure of how the APA governed agency action. The court found Congress intended this language to limit the application of §§ 554, 556 and 557 "to those types of adjudications . . . needing special procedural safeguards."[100] While the

91. *Id.* at 1260–61 n.25.

92. *See id.* at 1261.

93. *Id.*

94. U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947). The Department of Justice participated in the drafting of the APA, and the Manual was published shortly after passage of the APA. It is widely viewed as offering guidance on the legislative intent underlying the APA.

95. *Marathon Oil*, 564 F.2d at 1261 (citing Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915)).

96. *Id.* at 1261.

97. *Id.* at 1263 (quoting ATTORNEY GENERAL'S MANUAL, *supra* note 94, at 41).

98. *See supra* note 73 and accompanying text.

99. *See supra* notes 73–77 and accompanying text.

100. *Marathon Oil*, 564 F.2d at 1263.

APA defines adjudication as any final disposition that is not a rulemaking,[101] Congress could not have intended for all non-rulemaking action to fall under the procedural requirements of the APA. Instead, the Ninth Circuit found that "Congress inserted section 554's prefatory language . . . to exclude from the residual definition of adjudication 'governmental functions, such as the administration of loan programs, which traditionally have never been regarded as adjudicative in nature and as a rule have never been exercised through other than business procedures.'"[102]

Under the Ninth Circuit's test, where Congress failed to provide a hearing in a given statute, it suggests that "Congress either did not feel that it was providing for an adjudication in the traditional sense of the word or did not intend the APA procedures to apply."[103] But, if Congress did provide for a hearing, "similar weight should not typically be accorded to" the lack of on the record language.[104] This test creates a presumption that when Congress required a hearing, it intended for formal adjudication. The court backed up its logic with language from the Attorney General's Manual, stating that unless there is congressional intent to the contrary, "it should be 'assumed that where a statute specifically provides for administrative adjudication . . . after opportunity for an agency hearing, such specific requirement for a hearing ordinarily implies the further requirement of decision in accordance with evidence adduced at the hearing.'"[105]

Returning to the specific contentions at issue, the Ninth Circuit noted that "the crucial question is . . . whether the proceedings under review fall within that category of quasi-judicial proceedings deserving of special procedural protections."[106] Because the nature of § 402 proceedings involve factual controversies, which "will frequently be sharply disputed,"[107] the formal procedures required by §§ 554, 556 and 557 would be "helpful . . . in guaranteeing both reasoned decision making and meaningful judicial review."[108]

The approach taken by the Ninth Circuit in *Marathon Oil* looks at the administrative decision at issue, and evaluates whether that decision

---

101. 5 U.S.C. § 551(7) (2000) states that "'adjudication' means agency process for the formulation of an order." Section 551(6) defines an order as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency, in a matter other than rulemaking but including licensing." Any agency action that involves a final decision other than rulemaking, therefore, falls within the definition of an adjudication.

102. *Marathon Oil*, 564 F.2d at 1263 (quoting ATTORNEY GENERAL'S MANUAL, *supra* note 94, at 40).

103. *Id.*

104. *Id.*

105. *Id.* at 1263 n.31 (quoting ATTORNEY GENERAL'S MANUAL, *supra* note 94, at 43).

106. *Id.* at 1264.

107. *Id.* at 1262.

108. *Id.*

involves factual questions that will be disputed or broader policy decisions. If the decision involves the former, then it is the type of proceeding that Congress intended the APA to apply to, and formal procedures are required. However, the Ninth Circuit's approach conflates the distinction between formal and informal with the distinction between adjudication and rulemaking. The focus of the Ninth Circuit's approach is on whether the action is more like a judicial proceeding or more like legislation, and it appears to use that result to determine whether formal or informal procedures are required. Under this approach, so long as a statute calls for a hearing where there will be disputed facts, formal adjudication is required. This leaves little room for a hearing that does not trigger the formal procedures of the APA.

c. *First Circuit:* Seacoast Anti-Pollution League v. Costle

The First Circuit took the Ninth Circuit's presumption of formality even further in *Seacoast Anti-Pollution League v. Costle.*[109] But while the *Seacoast* court found the provision for judicial review to be significant, it noted that it was "clear that in some cases review of agency action can be had though the action was not on the record."[110] This statement is in accord with the Supreme Court's language from *Overton Park*,[111] but the *Seacoast* court's holding is not.

The First Circuit began its own analysis by looking at "the nature of the decision at issue."[112] The court described § 402 proceedings as requiring "specific factual findings," and only affecting "the rights of the specific applicant."[113] The court quoted language from *Marathon Oil* addressing how these proceedings were adjudicative in nature rather than legislative.[114] "This is exactly the kind of quasi-judicial proceeding for which the adjudicatory procedures of the APA were intended."[115] The First Circuit went on to follow logic very similar to that used by the Ninth Circuit, including numerous references to the Attorney General's Manual.[116] The court noted the difficulty of judicial review if the decision were not made on the record,[117] and evaluated the purpose behind the prefatory language of § 554.

> Without some kind of limiting language, the broad sweep of the definition of "adjudication," . . . would include such ordinary procedures that do not require any kind of hearing at all. In short, we view the crucial part of the limiting language to be the requirement of

109. 572 F.2d 872 (1st Cir. 1978).
110. *Id.*
111. *See supra* note 73.
112. *Seacoast*, 572 F.2d at 876.
113. *Id.*
114. *Id.*
115. *Id.*
116. *See id.* at 877 & n.7, 878.
117. *Id.* at 877.

> a statutorily imposed hearing. *We are willing to presume that, unless a statute otherwise specifies, an adjudicatory hearing subject to judicial review must be on the record.*[118]

Supporting this presumption, the court cited the legislative history of the APA,[119] as well as *Overton Park* for the proposition that a hearing can require production of a record.[120] Finding that the statute did "not indicate that the determination need *not* be on the record," and that there was no congressional intent to the contrary, the First Circuit held that §§ 554, 556, and 557 of the APA applied to § 402 proceedings.[121]

In 1980, the Supreme Court cited *Seacoast* approvingly, albeit in a footnote. In *Steadman v. SEC*,[122] the Securities and Exchange Commission (SEC) brought disciplinary proceedings to permanently bar the manager of several mutual funds from certain securities-related activities.[123] These proceedings were an agency adjudication. The manager challenged the standard of proof used by the SEC in the administrative proceeding, arguing that it should have been a "clear and convincing" standard rather than a "preponderance of evidence" standard.[124] Because the applicable statutes did not prescribe the standard of proof, the Court looked to § 556 of the APA, and determined that preponderance of the evidence was the correct standard.[125]

But the SEC had brought proceedings against the manager under two statutes, one of which required hearing on the record while the other did not. It was arguable that § 556 of the APA did not apply to the claim based on the latter statute, because formal adjudication was not triggered. The Court stated that "the absence of the specific phrase from [the latter statute] does not make the instant proceeding not subject to § 554," and cited *Florida East Coast Railway*, *Allegheny-Ludlum*, and *Seacoast*.[126] The Court found that the on the record requirement could be "satisfied by the substantive content of the adjudication," such as where the agency decision is judicially reviewed for substantial evidence, and cited *Overton Park* and *Seacoast Anti-Pollution League*.[127] The Court also

---

118. *Id.* (emphasis added).
119. *Id.* at 877 n.7, 877–78.
120. *Id.* at 877 n.8.
121. *Id.* at 878 (emphasis in original).
122. 450 U.S. 91 (1981).
123. *Id.* at 94.
124. *Id.* at 95.
125. *Id.* at 96.
126. *Id.* at 96 n.13.
127. *Id.* The relevant text of the footnote reads:

> The phrase "on the record" appears in [15 U.S.C.] § 80b-3(f), and while it does not appear in § 80a-9(b), the absence of the specific phrase from § 80a-9(b) does not make the instant proceeding not subject to § 554. Rather, the "on the record" requirement for § 80a-9(b) is satisfied by the substantive content of the adjudication. Title 15 U.S.C. § 80a-42 provides for

noted that the violations required to be proven under both statutes were "virtually identical," and that these were "precisely the type of proceeding for which the APA's adjudicatory procedures were intended."[128]

d. *Trends in the Majority Approach after* Seacoast

The Supreme Court's limited approval of the *Seacoast* approach represents something of a high-water mark in terms of reading the on the record requirement into a statute. Later courts addressing this issue have generally adopted an approach that performs a *de novo* analysis of congressional intent, without any presumption of formality. Some commentators have characterized these later decisions as a second distinct line of cases.[129]

An example of this approach is shown by *City of West Chicago v. Nuclear Regulatory Commission*,[130] where the Seventh Circuit re-addressed the issue of whether a hearing requirement alone might trigger formal adjudication, but in the context of the Atomic Energy Act (AEA). The AEA calls for a hearing in certain licensing proceedings, and the plaintiffs argued that this hearing requirement triggered § 554 and the APA's formal adjudication.[131] The Seventh Circuit distinguished *Train*,[132] and acknowledged the decisions in *Seacoast* and *Marathon Oil*,[133] but adopted a somewhat more restrictive approach than that taken by the *Seacoast* court. Instead of applying a presumption of formality, the court found 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."[134] The *West Chicago* court analyzed the legislative history of the AEA, and found that it did not support finding that formal hearings were required. Because the AEA's legislative history did not define what was intended by a hearing,[135] the court concluded that "there is no evidence that Congress intended to require

---

judicial review of Commission orders issued pursuant to § 80a-9(b). Substantial-evidence review by the Court of Appeals here required a hearing on the record. Otherwise effective review by the Court of Appeals would have been frustrated.

Id. (internal citations omitted).

128. *Id.*

129. Cooley R. Howarth, *Restoring the Applicability of the APA's Adjudicatory Procedures*, 56 Admin. L. Rev. 1043 (2004); Randolph J. May, *Recommendations to Amend the APA—Adjudication*, 2005 A.B.A. SEC. ADMIN. L. & REG. PRAC. 12 n.53, *available at* http://www.abanet.org/adminlaw/apa/114report.doc.

130. 701 F.2d 632 (7th Cir. 1983).

131. Atomic Energy Act of 1954, 42 U.S.C. § 2239(a) (1976) (stating that "the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding").

132. *W. Chicago*, 701 F.2d at 644.

133. *Id.* at 643. The Seventh Circuit noted that both *Marathon Oil* and *Seacoast* had rejected the *Train* court's analysis of § 558 and agreed that those courts were correct.

134. *Id.* at 641.

135. *Id.* at 642–43.

formal hearings."[136]

3. *The D.C. Circuit's Approach*—Chevron *Deference to Agency Interpretations of Whether Formal Adjudication is Required*

Early cases from the D.C. Circuit applied an approach fairly similar to that taken by the Seventh Circuit in *West Chicago*, although it is possible to read these opinions as requiring a higher showing of congressional intent to trigger formal adjudication.[137] But in *Union of Concerned Scientists v. U.S. Nuclear Regulatory Commission*, the D.C. Circuit appeared to adopt the *Seacoast* presumption-of-formality approach.[138] In addressing whether a hearing requirement triggered formal adjudication, the court provided several reasons why formal APA procedures should apply, although it analyzed them all in a footnote.[139]

First, the court cited *Seacoast*, and stated that "when a statute calls for a hearing in an adjudication the hearing is presumptively governed by 'on the record' procedures."[140] Additionally, the Atomic Energy Commission had applied formal procedures for many years to these hearings, and had requested that Congress excuse the agency from the formal procedures, which was not done.[141] Other legislative history suggested that Congress assumed that the hearings were to be held on the record.[142] The court found it clear, at least in this case, that formal procedures were required.[143]

But five years later, in *Chemical Waste Management, Inc. v. EPA*,[144] the D.C. Circuit "declined to adhere any longer to the presumption [of formality] raised in" *Union of Concerned Scientists*.[145] The court noted that the statement was dicta, and that there were ample other reasons to find formal procedures were required in that case. But most importantly, *Union of Concerned Scientists*, as well as *Seacoast* and *Marathon Oil*, "all predate the Supreme Court's decision in *Chevron*."[146] In *Chevron*,[147] the Supreme Court created a two-part test for analyzing when courts should

136. *Id.* at 645.

137. Izaak Walton League of Am., Inc. v. Marsh, 655 F.2d 346, 361 (D.C. Cir. 1981); U.S. Lines, Inc. v. Fed. Mar. Comm'n, 584 F.2d 519, 526 (D.C. Cir. 1978).

138. 735 F.2d 1437, 1444–45 n.12 (D.C. Cir. 1984).

139. *Id.*

140. *Id.*

141. *Id.*; *see also id.* at 1446–47.

142. *Id.* at 1446–47.

143. *Id.* at 1445 n.12.

144. 873 F.2d 1477 (D.C. Cir. 1989).

145. *Id.* at 1481. As an unusual means of overruling the prior decision without holding an *en banc* session, the *Chemical Waste Management* panel separately circulated the portion of the opinion rejecting the *Union of Concerned Scientists* presumption to the entire circuit, receiving approval to overrule that portion of the decision. *Id.* at 1482 n.*. Also interestingly, Judge Wald, the author of the *Union of Concerned Scientists* opinion, was on the panel in *Chemical Waste Management*.

146. *Id.* at 1482.

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

defer to agency interpretations of statutes that the agency administers. If a statute is ambiguous, such that the congressional intent is unclear, and if the agency's interpretation of that ambiguous statute is permissible, the agency's interpretation should be given deference by courts.[148]

Applying *Chevron*, the D.C. Circuit evaluated the language and requirements of the sections of the Resource Conservation and Recovery Act (RCRA) that were at issue in this case.[149] There were two provisions of RCRA that the court discussed. The first was § 6928(b), which required a "public hearing," if requested, prior to assessment of civil penalties.[150] With regard to this hearing, the EPA had adopted procedural regulations[151] that conformed to the formal adjudication requirements of the APA.[152] The second provision, § 6928(h), required a hearing, if requested, prior to issuance of "an order requiring corrective action."[153] Corrective action orders could be issued in response to releases of hazardous waste, and required corrective action to be taken by the parties identified in the order. These orders could "include suspension or revocation of the facility's authorization to operate as an interim facility."[154] For these hearings, the EPA adopted procedural regulations that only required formal adjudication procedures if the proposed order includes suspension or revocation of authorization or civil penalties. Otherwise, a set of informal procedures would apply.[155]

First, the D.C. Circuit noted that "the statutory language, taken alone, does not show that Congress 'has directly spoken to the precise question at issue.'"[156] Because the language was silent or ambiguous, the first part of the *Chevron* test was satisfied, and the court went on to evaluate the agency's interpretation for reasonableness. The EPA justified the difference in procedural requirements between the two types of hearings on the grounds that the factual issues that would arise in a corrective action order hearing were "technical" issues. These technical issues had "little need" for witness credibility determinations, and could "easily . . . be resolved through analysis of the administrative record and the written submissions and oral statements of the parties."[157] Finding the petitioner's arguments to the contrary unpersuasive, the

148. *Id.* at 842–43.

149. 42 U.S.C. § 6928(h) (1988).

150. § 6928(b).

151. Procedural regulations are exempted from the informal rulemaking procedural requirements of the APA. 5 U.S.C. § 553(b)(A) (2000).

152. Chem. Waste Mgmt., Inc. v. EPA, 873 F.2d 1477, 1479 (D.C. Cir. 1989).

153. *Id.* (quoting 42 U.S.C. § 6928(h)).

154. *Id.* at 1479.

155. These informal procedures had also been adopted by the EPA through procedural rulemaking. *Id.*

156. *Id.* at 1480.

157. *Id.* at 1482.

court upheld the EPA's interpretation of the hearing requirements of the statute.

> While an agency might not be able reasonably to read a requirement that it conduct a "hearing on the record" to permit informal procedures in the converse situation to that presented here, an agency that *reasonably* reads a simple requirement that it hold a "hearing" to allow for informal hearing procedures must prevail under the second step of *Chevron*.[158]

While few courts have expressly mentioned the reasoning of *Chemical Waste Management*, the application of *Chevron* deference to agency determinations of law has been widely followed, leading to many cases finding that no formal hearing is required.[159] However, the *Seacoast* and *Marathon Oil* approaches, which read a presumption of formality into the analysis, have never been explicitly overruled.

4. *ABA Proposal to Amend the APA's Adjudication Provisions*

The American Bar Association (ABA) has weighed in on this split in authority over when formal adjudication applies. In 2000, at the behest of the ABA's Judicial Division, the ABA House of Delegates adopted Resolution 113, which included two specific proposals.[160] First, the Resolution proposed that in enacting new legislation, Congress should explicitly consider whether formal or informal adjudication was required. Second, for new legislation that does not include an explicit intent for formal or informal adjudication, the APA's default presumption should be in favor of formal adjudication. This second aspect of the Resolution, which adopts the *Seacoast* presumption of formality approach, has been advanced as restoring the original intent of the APA, and has also been criticized as being needlessly doctrinal, and hindering agency flexibility.[161]

The ABA's Section on Administrative Law and Regulatory Practice continues to advocate these changes.[162] In February 2005, the Section submitted a revised proposal to the ABA House of Delegates, which was approved.[163] This revised proposal included the changes advocated in the 2000 Resolution, and also addressed informal adjudication. As discussed

158. *Id.*

159. *See* 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 8.2 (4th ed. 2002) (citing cases in which courts have found that formal procedures are not required).

160. *See* Gary J. Edles, *An APA-Default Presumption for Administrative Hearings: Some Thoughts on "Ossifying" the Adjudication Process*, 55 ADMIN. L. REV. 787, 788 (2003).

161. *See id.* (criticizing the proposal as being overly doctrinal and formalistic, and hindering agency flexibility); Howarth, *supra* note 129 (advocating the proposal as restoring the original intent of the APA).

162. Randolph J. May, *Recommendations to Amend the APA—Adjudication*, 2005 A.B.A. SEC. ADMIN. L. & REG. PRAC. 12 n.53, *available at* http://www.abanet.org/adminlaw/apa/114report.doc.

163. *See* Daily Journal, ABA House of Delegates, 2005 Midyear Meeting (Feb. 14, 2005) (Report No. 114), *available at* http://www.abanet.org/leadership/2005/midyear/daily/journal.doc.

above,[164] where formal adjudication is not required, the APA imposes no procedural requirements on an agency adjudication. This current proposal calls for certain procedural protections to also apply to informal adjudication, such as an impartial decisionmaker, a prohibition on *ex parte* contacts, and a written or oral decision of findings, which is currently only required for formal adjudication.

Commentators discussing these proposals, or the circuit split over when formal adjudication applies, generally advocate one of the approaches discussed above.[165] These commentators have noted that the Supreme Court has not yet "found it necessary to resolve the issue."[166] While the Court has not yet explicitly resolved this issue, this Note argues that the Court's decision in *Mead,* where the Court clarified the limits of *Chevron* deference, is controlling, and creates a new approach different from the ones above.

C. Deference to Agency Interpretations Under *Mead*

The Supreme Court's decision in *Chevron* created a doctrine that has become "as ubiquitous as if Congress had written it into the APA."[167] The application of *Chevron* deference to agency determinations has expanded throughout the years following the decision, leading to its wide application in almost all substantive areas of law where agencies played a role.[168] However, in recent years the Court began clarifying and limiting when *Chevron* deference is applicable. In *Chevron*'s *Domain*, published shortly before the *Mead* decision,[169] Professor Thomas Merrill and Kristin Hickman explored a series of the Court's decisions, and analyzed the various explanations of the jurisprudential basis for *Chevron* deference. In their article, the authors identified a series of unanswered questions about *Chevron*, and attempted to answer these questions through an analysis of the legal foundation for the *Chevron* doctrine.[170] The authors concluded that *Chevron* deference could be supported by an implied delegation of power by Congress to the agencies, but only "when [the agencies] act with the force of law in promulgating rules or adjudicating a dispute that falls within their legislative mandate, and not otherwise."[171]

---

164. *Supra* text accompanying notes 46–47.

165. Edles, *supra* note 160, at 804 (suggesting that courts should look to statutory language, legislative history, and regulatory context, without any presumption of formality, and without any deference to the agency in evaluating whether formal adjudication is required); Howarth, *supra* note 129 (advocating a presumption of formality approach).

166. Edles, *supra* note 160, at 804; *see also* Richard J. Pierce, Jr., Administrative Law and Process 43 n.7 (3d ed. 1997).

167. Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 Geo. L.J. 833, 839 (2001).

168. *See id.*

169. *See generally id.*

170. *Id.* at 849–52.

171. *Id.* at 921.

Applying this reasoning to the *Chemical Waste Management* decision, the authors disagreed that the EPA was entitled to *Chevron* deference, as the agency was not "entitled to *Chevron* deference with respect to the separate and distinct issue whether such a hearing falls within the definition of a hearing on the record within the meaning of the APA. EPA has not been delegated any authority to interpret the APA with binding authority."[172]

Shortly after Merrill and Hickman's article, the Supreme Court decided *United States v. Mead Corp,* and cited their article.[173] The Court stated that it "granted certiorari, in order to consider the limits of *Chevron* deference owed to administrative practice in applying a statute."[174] The Court held that:

> administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appear 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. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.[175]

The Court noted that the statutory authority for rulemaking or formal adjudication, and the procedures required by the applicable APA provisions, would "foster the fairness and deliberation that should underlie a pronouncement of such force."[176] As such, it made sense that most cases where *Chevron* was applied dealt with rules promulgated under § 553, or formal adjudication under § 554.[177] These situations were ones where it was clear that Congress delegated authority to the agency to interpret the statute with the force of law.[178]

However, where Congress did not delegate the authority to act with the force of law, an agency may still receive some deference to its interpretation, known as *Skidmore* deference.[179] In *Skidmore v. Swift & Co.*, the Supreme Court found that even when an agency was not authorized to speak with force of law, its "rulings, interpretations and

172. *Id.* at 896.

173. 533 U.S. 218 (2001). *Chevron's Domain* was published in May 2001 and *Mead* was decided on June 18, 2001.

174. *Id.* at 226.

175. *Id.* at 226–27.

176. *Id.* at 230 (citing Merrill & Hickman, *supra* note 167).

177. *See id.* The Court consistently refers to notice-and-comment rulemaking as deserving of deference, but does not mention formal rulemaking, which presumably would be an even stronger candidate for *Chevron* deference.

178. But the Court also recognized that *Chevron* deference could be called for where such formal procedures were not required, citing a case where the Comptroller of the Currency was given special deference under longstanding precedent. *Id.* at 231 & n.13.

179. *Id.* at 234 (citing Skidmore v. Swift & Co., 323 U.S. 134, 139 (1944)).

opinions . . . constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[180] The amount of deference given to the agency's interpretation under *Skidmore* depends "upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[181] The *Mead* Court noted some additional factors that have been considered when evaluating *Skidmore* deference. "[C]ourts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position."[182] The more careful, consistent, and formal the agency's interpretation, and the more expertise that the agency has in the matter, the more deference that should be given to the agency's interpretation.

II. Deference to Agency Interpretations of Whether Formal Adjudication is Required

A. What Degree of Deference is Due?

When a statute calls for an agency to grant a hearing, did Congress delegate authority to the agency to speak with the force of law as to whether that hearing is formal or informal under the APA? There are two ways that this question can be presented. First, the question can be presented as whether Congress delegated authority to interpret the term hearing in the particular statute. The answer to this question may depend on the particular statute at issue. Congress may have authorized the agency to issue procedural regulations governing such a hearing, or there may be clear legislative intent to let the agency define the scope of that hearing. In that case, it is probable that Congress did intend to delegate authority to speak with the force of law as to what procedures were required by that hearing.

However, this presentation of the question is inaccurate. The question is not whether Congress delegated the authority to interpret the particular statute, but whether Congress delegated the authority to interpret the APA. The issue of whether or not formal adjudication is required for a particular adjudication is an interpretation of the APA, not the statute authorizing the hearing. It is not a question of whether, by hearing, Congress meant formal adjudication, but instead whether Congress, by "decision on the record after opportunity for an agency hearing," meant for § 554 to still apply when the statute says something

180. 323 U.S. at 140.
181. *Id.*
182. *Id.*

less than those magic words.[183] The answer to this question is no, because Congress has not delegated the authority to any agency to interpret the APA with the force of law.

The goals and purposes of the APA show that Congress did not delegate that power to any agency. "One purpose [of the APA] was to introduce greater uniformity of procedure and standardization of administrative practice among" federal agencies.[184] Since Congress required every agency to apply similar procedures in administrative adjudications, it certainly did not delegate the decision making authority to any given agency to determine whether the APA applies.

What about where a statute calls for the agency to promulgate procedures to be used for hearings? In that situation, the language of § 559 of the APA indicates that any such procedures are in addition to, and not instead of, the APA requirements.[185] That section states that the administrative procedure requirements of the APA "do not limit or repeal additional requirements imposed by statute or otherwise recognized by law," and that subsequent statutes "may not be held to supersede or modify" the APA requirements, unless the later statute "does so expressly."[186] Any procedural regulations adopted by an agency are only supplementary to the APA, and do not eliminate the APA's underlying procedural requirements.

And the Supreme Court has commented, albeit prior to *Chevron*, that the APA is not a statute that any particular agency has the authority to interpret. In *Florida East Coast Railway*,[187] Justice Rehnquist wrote that

> [the APA] is not legislation that the Interstate Commerce Commission, or any other single agency, has primary responsibility for administering. An agency interpretation involving, at least in part, the provisions of [the APA] does not carry the weight, in ascertaining the intent of Congress, that an interpretation by an agency "charged with the responsibility" of administering a particular statute does.[188]

Because Congress did not delegate the authority to any agency to interpret the APA, *Chevron* deference to an agency's interpretation of

183. Merrill & Hickman, *supra* note 167, at 896 (reviewing the *Chemical Waste Management* decision and stating that there the EPA was not "entitled to *Chevron* deference with respect to the separate and distinct issue whether such a hearing [in the statute] falls within the definition of a hearing on the record within the meaning of the APA"). *But see* Howarth, *supra* note 129, at 1053 (stating that where something in the agency's authorizing statute indicates that formal procedures are not required, "the court is no longer interpreting the APA but the agency's organic statute and, with respect to irresolvable ambiguities in that statute, *Chevron* deference is surely due").

184. Wong Yang Sung v. McGrath, 339 U.S. 33, 41 (1950).

185. 5 U.S.C. § 559 (2000).

186. *Id.*

187. Discussed *supra* text accompanying notes 59–67.

188. United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 236 n.6 (1973).

whether formal adjudication is required is not appropriate.

However, as discussed above, where *Chevron* deference is not appropriate, the agency's interpretation "may influence courts facing questions the agencies have already answered."[189] This is *Skidmore* deference, and the level of influence given to the agency's interpretation is determined using the *Skidmore* factors.[190] These factors include the level of care exercised by the agency in making that interpretation, the "consistency, formality, and relative expertness" of the interpretation, and the overall persuasiveness of the agency's position.[191] As the Court in *Skidmore* wrote, such factors comprise "all those factors which give it power to persuade, if lacking power to control."[192]

Therefore, the appropriate test for whether or not formal adjudication is required when a statute calls for a hearing is to first evaluate the agency's interpretation of that hearing requirement using the *Skidmore* factors. Depending on how reasoned, careful, and formal that interpretation, the court should afford it the level of deference that is appropriate. If that interpretation does not warrant *Skidmore* deference, then the court should engage in an independent, *de novo* analysis of the congressional intent of the statute. If the court finds that Congress intended for the statutory hearing to be a formal adjudication, then formal adjudication should be required.

B. APPLICATION OF *SKIDMORE* DEFERENCE

To illustrate the application of *Skidmore* deference to agency interpretations of whether formal adjudication is required, this approach is applied to two cases from the D.C. Circuit, both of which were discussed above. The analyses used in these two cases, *Union of Concerned Scientists* and *Chemical Waste Management*, reflect the two existing approaches discussed in this article. In *Union of Concerned Scientists*, the D.C. Circuit cited the *Seacoast* decision, and engaged in a *de novo* analysis of congressional intent, with a presumption of formality, and found that formal procedures were required, despite the agency's argument otherwise. But in *Chemical Waste Management*, the D.C. Circuit rejected that approach in order to give the agency *Chevron* deference, and upheld the agency's interpretation that formal adjudication was not required. The application of *Skidmore* deference to these two cases reaches the same results, but based on facts showing the level of care, reasoning, and formality of the agency's interpretation in each case.

189. United States v. Mead, 533 U.S. 218, 227 (2001).
190. *Id.* at 228.
191. *Id.*
192. Skidmore v. Swift & Co., 323 U.S. 134, 139 (1944).

First is *Union of Concerned Scientists.* In this case, prior to *Chemical Waste Management*, the D.C. Circuit rejected the agency's interpretation that formal adjudication was not required, and suggested that there is a presumption of formality for adjudications. The agency's interpretation of the statute at issue in this case provides an excellent example of a situation where that interpretation should not be given substantial deference under *Skidmore.*

In *Union of Concerned Scientists*, a citizen's group challenged the licensing of a nuclear power plant. The principal issue contested was whether an assessment of "emergency preparedness exercises" must be considered at the licensing hearing. The agency, after years of including such an assessment in licensing hearings, took procedural steps to remove the consideration of those exercises from the public hearing.[193] The agency issued new procedural regulations defining what issues would be considered at the public formal hearings, and which ones would be considered by the agency without a formal hearing. The agency's interpretation of the statute was that even though the assessment of the emergency exercises was material to the licensing, the agency had discretion to evaluate such issues without a formal hearing.[194]

Looking to the *Skidmore* factor of consistency, the agency's new interpretation was inconsistent with its prior interpretations. The elimination of consideration of emergency exercises from a formal hearing was inconsistent with prior agency procedure, as well as the ample legislative history on the topic of what kind of hearing Congress intended. The agency's interpretation was also inconsistent with regards to other portions of the statute and regulation. The D.C. Circuit noted that the language used in the amended procedural rules conflicted with, or was at least "odd" with respect to, other portions of the regulations and part of the agency's position taken before the court.[195]

Regarding expertise, another *Skidmore* factor, one of the agency commissioners had dissented from the amended procedural rules on the grounds that the public had greater expertise than the agency in regards to this issue. The commissioner stated that emergency preparedness plans are an area that "happens to be one in which the nuclear plant's neighbors have special competence, greater in some respects than that of" the agency.[196] Eliminating the consideration of emergency preparedness from the public hearings would reduce the overall expertise brought to bear on the decision of licensing.

193. Union of Concerned Scientists v. U.S. Nuclear Regulatory Comm'n, 735 F.2d 1437, 1440 (D.C. Cir. 1984).

194. *Id.* at 1446.

195. *Id.* at 1440–41.

196. *Id.* at 1441 n.6.

Because the agency's interpretation was inconsistent with its prior interpretations, other regulations, and clear legislative history, and because the agency had significantly less expertise on this issue than the public, the court was correct to be skeptical of the agency's interpretation. The court should not have given the agency much deference under *Skidmore*, and was correct to perform a *de novo* review of the hearing requirements under that statute.

In contrast is the *Chemical Waste Management* decision, which provides an example of a situation where the agency's interpretation should receive deference under *Skidmore*.[197] As described above,[198] this was the case where the D.C. Circuit first applied *Chevron* deference to the EPA's interpretation of whether formal adjudication was required. Looking at the *Skidmore* factors in *Chemical Waste Management*, the agency should have received substantial deference under *Skidmore*. The EPA had promulgated procedural regulations, which interpreted the hearing requirement in two portions of a statute. The interpretations were different, in that one hearing received formal adjudication, and the other did not. However, the different interpretations were designed to give different levels of formality depending upon the potential deprivation at issue in the hearing. When the agency sought civil penalties or the revocation or suspension of authorization to operate, greater deprivations were at issue. In these situations, formal procedures were required, which conformed to the requirements of formal adjudication under the APA.[199] Informal procedures were only permissible when the agency was seeking a corrective action order, and even those allowed significant trial-like procedures.[200]

This two-tiered approach indicated that the agency put some thought and care into its interpretation of hearing under the statute. These procedural regulations, although exempted from notice-and-comment rulemaking, do indicate that the agency was being consistent in its application of this interpretation. The EPA's expertise in these hearings is evidenced by the arguments made before the court. The EPA noted that typical hearings for corrective action orders would have far fewer factual issues than an order seeking penalties, and the factual issues that would arise would be highly technical and not particularly conducive to oral presentation and cross-examination.[201] The agency's knowledge and expertise in dealing with the types of issues that arise during such hearings lends support for deferring to its interpretation. In

197. Chem. Waste Mgmt., Inc. v. EPA, 873 F.2d 1477, 1479 (D.C. Cir. 1989).

198. *Supra* text accompanying notes 144–58.

199. *Chem. Waste Mgmt.*, 873 F.2d at 1479.

200. *Id.* The EPA informal procedures allowed for an oral presentation, an impartial adjudicator, and the opportunity to submit information for inclusion in the record. *Id.*

201. *Id.*

light of these factors, the EPA's position in *Chemical Waste Management* is persuasive, and would likely be upheld by a court giving the agency *Skidmore* deference. However, as this discussion has shown, that result is supported by the circumstances of that case, and the same result may not be correct in other situations.

CONCLUSION

The APA's formal adjudication procedures give parties to an agency adjudication significant trial-like opportunities, through which they can present evidence, challenge opposing arguments, and appear in front of an impartial decisionmaker. However, the APA's language states these protection apply only if Congress has required a hearing on the record. Where Congress has only required a hearing, two tests have been developed to determine whether formal adjudication may still apply. The majority of circuits perform a *de novo* analysis of congressional intent, sometimes with a presumption in favor of formal procedures. The D.C. Circuit applies *Chevron* deference, and if the statutory language is ambiguous, the agency's interpretation, if reasonable, is given deference.

The Supreme Court's decision in *Mead* limits the application of *Chevron* deference. While this will require a re-evaluation of many decisions in which *Chevron* deference was given to agency interpretations, in this particular context, *Mead* creates a new test to apply when evaluating whether a hearing requires formal adjudication. If a statute calls for a hearing, without an on the record requirement, a court should evaluate the agency's interpretation under *Skidmore*. If the agency's reasoning, consistency, expertise, and overall persuasiveness indicates that *Skidmore* deference is appropriate, then the court should defer to the agency interpretation. If not, only then should the court engage in a *de novo* analysis of congressional intent. This test is neither as deferential as the D.C. Circuit's approach, nor as independent as the majority *de novo* approach, but instead, treads the middle ground established by the Supreme Court in *Mead*.

***