Connecticut Yankee in King Rehnquist's Court: An Alternative History of Hybrid Rulemaking

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Abstract. Coming out of the New Deal expansion and early agitation with agency overreach, the Administrative Procedure Act ("APA") was intended to provide a stable foundation for the emerging area of administrative law. Instead, the rather meager baseline requirements of the Act became a springboard for increasingly "efficient" agency action. Judges, attempting to provide effective oversight, began developing a body of administrative common law and imposing a variety of "hybrid" requirements above and beyond the APA's textual bounds.

As the Court of Appeals for the D.C. Circuit morphed into the headquarters of administrative law in the 1970s, its members split on the proper form such hybrid requirements should take. Judge Harold Leventhal championed a substantive approach, believing that the APA occupied the field of procedural strictures. Chief Judge David Bazelon, believing judges were rarely equipped to grapple with the technical substance of agency rules, preferred familiar procedural tools such as evidentiary hearings.

In 1978, a unanimous Supreme Court handed the Circuit a cease-and-desist in the form of Justice Rehnquist's unusually harsh Vermont Yankee *opinion. But the hammer dropped on appeal from a Chief Judge Bazelon opinion, opening the door for supporters of the Leventhal approach to claim that the Court's ire was reserved for procedural hybrid requirements alone. In the decades since, our administrative common law has retained numerous substantive hybrid review doctrines, to less than ideal effect.*

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This Comment imagines an alternate timeline in which Justice Rehnquist gives the Vermont Yankee *treatment to a Leventhal opinion instead. It asks whether an administrative common law open to Chief Judge Bazelon's procedural approach would be an improvement on the substantive world we live in, and how we might get there from here.*

Introduction

"The ungentle law and customs touched upon in this tale are historical . . . ."[1]

Upon its passage in 1946, the Administrative Procedure Act ("APA") ushered in a new era of administrative law.[2] In the decades since, the APA has come to be regarded as "a sort of superstatute, or subconstitution, in the field of administrative process: a basic framework that was not lightly to be supplanted or embellished."[3] Like any other constitution, however, the APA simply does not say that much, leaving a multitude of questions unanswered. And while the APA sets the "mood"[4] of administrative law, specific questions in specific cases need specific answers. Accordingly, the APA's barebones framework has been "embellished" countless times: by Congress,[5] by the executive,[6] by agencies themselves,[7] and by the courts.[8]

However, the Supreme Court shut down the judiciary's ability to embellish or innovate above the APA floor in its 1978 landmark decision *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*[9] At least, that is what a surface reading of the Court's holding might lead you to believe. In slapping down the D.C. Circuit, the de facto headquarters of administrative law,[10] the Court emphasized that "*nothing* . . . permitted

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1 MARK TWAIN, A CONNECTICUT YANKEE IN KING ARTHUR'S COURT 7 (Henry B. Wonham ed., W. W. Norton & Co. 2018) (1889).

2 5 U.S.C. §§ 551–559.

3 Antonin Scalia, Vermont Yankee: *The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 363.

4 *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1951).

5 The APA itself affords this option. *See* 5 U.S.C. § 559 ("Subsequent statute[s] may not be held to supersede or modify [the APA], except to the extent that it does so expressly."); *see also* Christopher J. Walker, *The Lost World of the Administrative Procedure Act: A Literature Review*, 28 GEO. MASON L. REV. 733, 734 & n.6 (2021) (discussing legislative reforms of the APA itself as well as related congressional action); Aaron L. Nielson, *Visualizing Change in Administrative Law*, 49 GA. L. REV. 757, 784–85 (2015) (similar).

6 *See* Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 OHIO ST. L.J. 237, 256 (2014) (detailing executive orders which impose procedural restraints above and beyond those required by the APA).

7 *See* Emily S. Bremer, *Designing the Decider*, 16 GEO. J.L. & PUB. POL'Y 67, 73 (2018) (discussing the broad sweep of agency discretion, and how some agencies choose formal procedures not required by the APA); *see generally* Emily S. Bremer & Sharon B. Jacobs, *Agency Innovation in* Vermont Yankee's *White Space*, 32 J. LAND USE & ENVT'L L. 523 (2017).

8 *See* Walker, *supra* note 5, at 742–44; *see generally* Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293 (2012).

9 435 U.S. 519 (1978).

10 *See* Gillian E. Metzger, *The Story of* Vermont Yankee*: A Cautionary Tale of Judicial Review and Nuclear Waste*, *in* ADMINISTRATIVE LAW STORIES 124, 143 (Peter L. Strauss ed., 2006) (summarizing the D.C. Circuit's path to becoming the nation's administrative law court in the 1960s and 1970s).

the court to review and overturn the rulemaking proceeding on the basis of the procedural devices employed . . . so long as [the agency] employed at least the statutory *minima* . . . ."[11] Such an admonition would seem to foreclose any further judicial tinkering with "hybrid" rulemaking requirements—judge-imposed hurdles for agencies to clear which lie between the APA's rarely invoked formal rulemaking requirements and the ubiquitous notice-and-comment process of informal rulemaking.[12]

The D.C. Circuit responded to the Court's all-encompassing ukase by . . . continuing to tinker with hybrid rulemaking requirements. For while the *Vermont Yankee* holding was (arguably) broad, the D.C. Circuit of the era had perfected the art of narrowing administrative law rulings, thereby safeguarding its own ability to continue judicial innovations in the area.[13] In this case, the path to a narrow reading lay through the long-simmering debate between Judge Harold Leventhal and Chief Judge David Bazelon.[14] For years, these rivals argued over the proper forms of hybrid rulemaking and judicial review.[15] Judge Leventhal advocated involved technical review, wherein judges would overturn agency action only for substantive reasons.[16] Chief Judge Bazelon championed a procedural approach, wherein judges would impose participatory processes like cross-examinations and evidentiary hearings.[17]

When the *Vermont Yankee* hammer fell, it fell on a Chief Judge Bazelon opinion.[18] Capitalizing on the opportunity, Judge Leventhal and his followers declared victory, attributing the Court's vitriol to a specific repudiation of procedural hybrid rulemaking, and reading in an implicit endorsement of the substantive approach.[19] Thus armed, the circuit set about strengthening and expanding its substantive review doctrines over the decades that followed.[20] Remarkably, despite these doctrines' disconnect from the text of the APA, and the practical distortions they cause, the Supreme Court has largely acquiesced in this arrangement.[21] Those administrative lawyers who have

11 *Vermont Yankee*, 435 U.S. at 548 (emphasis added).

12 *See* Scalia, *supra* note 3, at 348, 357–58.

13 *See id.* at 359–68.

14 *See* Ronald J. Krotoszynski, Jr., "*History Belongs to the Winners*"*: The Bazelon-Leventhal Debate and the Continuing Relevance of the Process/Substance Dichotomy in Judicial Review of Agency Action*, 58 ADMIN. L. REV. 995, 996 (2006).

15 *See id.* at 999.

16 *See id.* at 1002–04.

17 *See id.* at 999.

18 *See* Nat. Res. Def. Council, Inc. v. NRC, 547 F.2d 633, 657 (D.C. Cir. 1976), *rev'd*, 435 U.S. 519 (1978).

19 *See* Metzger, *supra* note 10, at 160.

20 *See* Krotoszynski, *supra* note 14, at 996.

21 While then-Judge Kavanaugh recognized the tension between established D.C. Circuit precedent and *Vermont Yankee* during his time on that bench, he has not yet disrupted this uneasy status quo. *See*

waited for *Vermont Yankee II* since shortly after *Vermont Yankee I* have thus far waited in vain.[22]

While the details of the Leventhal-Bazelon debate have largely faded from memory, the Leventhalite reading of *Vermont Yankee* lives on as legal canon.[23] The hybrid rulemaking we know has therefore been profoundly shaped, flaws and all, by this four-decade-old act of interpretation. This Comment argues that, viewed in context, *Vermont Yankee* is properly read as a broader denunciation of hybrid rulemaking, rejecting outright the substance-process dichotomy of the Leventhal-Bazelon debates. This conclusion is reached via a brief trek to a hypothetical world of hybrid rulemaking, wherein the Supreme Court instead takes up, and slaps down, a Judge Leventhal-led opinion in *Connecticut Yankee*.[24]

Part I of this Comment recounts the history of the hybrid rulemaking world we know. It begins with a brief APA primer before moving on to the jurisprudential battles leading up to *Vermont Yankee*. Part II describes the decision itself and surveys hybrid rulemaking's survival in the decades that followed. Part III imagines a hybrid rulemaking world that might have been. After a brief thought experiment in the realm of *Connecticut Yankee*, it explores advantages such rulemaking might offer. Part IV ponders how far apart the worlds of *Vermont Yankee* and *Connecticut Yankee* really are, and considers how this new perspective could improve rulemaking.

I. Evolving Administrative Procedure: The World We Knew

"[I]t only required a chapter or so to bring it down to date."[25]

Before venturing into the unknown, we review the familiar. A rehearsal of the APA's history and text lays the foundation, from which this Part explores the D.C. Circuit's hybrid rulemaking jurisprudence through the 1960s and 1970s.

Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 246 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part, concurring in the judgment in part, and dissenting in part) (explaining that the *Portland Cement* doctrine "stands on a shaky legal foundation").

22 *See* Paul R. Verkuil, *Judicial Review of Informal Rulemaking: Waiting for* Vermont Yankee II, 55 TUL. L. REV. 418, 419 (1981); Jack M. Beermann & Gary Lawson, *Reprocessing* Vermont Yankee, 75 GEO. WASH. L. REV. 856, 858–59 (2007). *But see* Perez v. Mortgage Bankers Ass'n, 575 U.S. 92, 100–01 (2015) (invalidating a D.C. Circuit doctrine which required agencies to proceed by notice-and-comment to reverse longstanding interpretive positions); Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2015 SUP. CT. REV. 41, 45 (describing *Perez* as "*Vermont Yankee II*").

23 *See* Krotoszynski, *supra* note 14, at 996.

24 There was a real Connecticut Yankee Power Corporation, which built and operated the Connecticut Yankee Nuclear Power Plant along the Connecticut River. The plant operated from 1968 to 1996. *Connecticut Yankee Nuclear Power Plant*, WIKIPEDIA, https://perma.cc/S6UJ-NKKY (Dec. 20, 2022).

25 TWAIN, *supra* note 1, at 363.

A. *Yet Another APA Primer*

"There is a profound monotonousness about its facts that baffles and defeats one's sincerest efforts to make them sparkle and enthuse."[26]

In many ways, administrative law has long outgrown the relatively limited ground marked out by the text of the APA. Nevertheless, the document remains a vital foundation, supporting and informing the development of administrative law even when doctrine is disconnected from the APA's text. Accordingly, it pays to review some of the APA's history as well as the principles it eventually instantiated. With the mood set, this Section then proceeds to the text: the statutory *minima* of formal and informal rulemaking and the guarantee and process for judicial review.

1. A Foundational Formula

"So they took it, handling it as cautiously and devoutly as if it had been some holy thing come from some supernatural region . . . ."[27]

The APA's path from passage to semiconstitutional status was relatively short, but the actual battle to craft and pass the bill was arduous. Coming out of the New Deal expansion of the administrative state, conservatives primarily focused on formalizing agency adjudication procedures.[28] Dean Roscoe Pound was emblematic of this minority view, harshly criticizing agencies and "administrative absolutism" and advocating for more judicial control of such procedures.[29] The majority view, championed by Professor Walter Gellhorn, saw agencies as generally well-behaved and certainly a far cry from Pound's "hysterical stirrings."[30] Regardless of the quality of agency action, the Gellhorn view held, agency processes were simply too varied to be captured and controlled by a generalized statute such as the APA.[31]

But if the majority view of the APA "founding fathers" was to have no APA at all, where did it come from? As Professor Paul Verkuil recounts it, the pugnacious Pound was eventually sidelined and replaced with the more accommodationist Carl McFarland.[32] McFarland managed to move the American Bar Association's administrative law committee away from

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[26] *Id.* at 225.

[27] *Id.* at 227.

[28] *See* Paul R. Verkuil, *The Administrative Procedure Act at 75: Observations and Reflections*, 28 GEO. MASON L. REV. 533, 536 (2021).

[29] *Id.* at 533, 539.

[30] Paul R. Verkuil, Walter Gellhorn & Kenneth Culp Davis, *Present at the Creation: Regulatory Reform Before 1946*, 38 ADMIN. L. REV. 511, 514 (1986).

[31] *See* Verkuil, *supra* note 28, at 534–35, 538.

[32] *Id.* at 538.

Pound's outright rejection of regulatory administration and towards procedural compromise.[33] With both Congress and the Roosevelt administration spurred to study the issue, the Gellhorn "majority" position to maintain the status quo was untenable.[34] McFarland's committee managed to get a statute drafted and put before Congress, instantly becoming the only real candidate for administrative change.[35] After the brief interlude of World War II, both houses unanimously passed the APA, which was signed into law in 1946.[36]

The APA's stature as a constitution for administrative law was enshrined shortly after its passage.[37] Just four years later, Justice Robert H. Jackson famously summarized the APA's settlement: "The [APA] thus represents a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest. It contains many compromises and generalities and, no doubt, some ambiguities."[38] Justice Felix Frankfurter described the APA as "express[ing] a mood" which "must be respected, even though it can only serve as a standard for judgment and not as a body of rigid rules assuring sameness of applications."[39] These statements are reminiscent of the Gellhorn position, leaving room for agencies and judges to maneuver with limited respect for the text.[40] This understanding has informed administrative law ever since, with some scholars estimating that ninety percent of administrative law is judge-made common law.[41]

But while Gellhorn's majority position won early victories in the constitutional treatment of the APA, there was no rout, as the existence of the document itself testifies to: the text is there, and it has meaning.[42] And while lip service to the APA may be the norm, the Supreme Court

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33 *Id.* at 535–38.

34 *See* George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1580–88 (1996).

35 *See* Verkuil, *supra* note 28, at 535–36.

36 Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946); *see* Verkuil, *supra* note 28, at 534.

37 *See* Wong Yang Sung v. McGrath, 339 U.S. 33, 40 (1950).

38 *Id.* at 40–41.

39 Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1951).

40 *See* Verkuil, *supra* note 28, at 535.

41 *See* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 115 (1998); *see generally* Metzger, *supra* note 8.

42 *See* Evan D. Bernick, *Envisioning Administrative Procedure Act Originalism*, 70 ADMIN. L. REV. 807, 834 (2018) (examining the APA's history and how much meaning the text can bear); *see generally* Walker, *supra* note 5.

occasionally reminds its colleagues that the text truly is foundational, as it did in *Vermont Yankee*.[43]

2. Statutory *Minima*: Formal and Informal, Rulemaking and Adjudication

"Indeed, there was too lightsome a tone of flippancy all through the paper."[44]

The APA's text, and the statutory *minima* to which Justice Rehnquist referred in *Vermont Yankee*,[45] are not especially lengthy.[46] Within its limited space, the Act draws distinctions along two axes: on the types of administrative procedures, rulemaking is distinct from adjudication, and on the rigor of those procedures, formal is distinct from informal (though the Act does not use that terminology).[47] The APA also has many "escape hatches," exceptions which allow an agency to avoid these quarters altogether.[48] While this Comment is concerned primarily with rulemaking, a brief discussion of adjudication and "regulatory dark matter" will prove useful later.[49]

The APA defines "rule" in terms similar to how one might describe legislation: "[T]he whole or a part of an agency statement of general or particular applicability and future effect . . . ."[50] Rules are the result of agency "rule making," defined as any "agency process for formulating, amending, or repealing a rule."[51] Adjudications are defined in contradistinction to rulemakings, consisting in "final disposition[s], whether affirmative, negative, injunctive, or declaratory in form" as expressed in orders.[52]

Section 553 contains the procedures for "informal" or "notice-and-comment" rulemaking.[53] To engage in such rulemaking, an agency must perform three tasks. The process starts with a "[g]eneral notice of proposed rule making" which must include "(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority

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43 *See* Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 523–27 (1978).

44 TWAIN, *supra* note 1, at 224.

45 *See Vermont Yankee*, 435 U.S. at 523–25.

46 *See* 5 U.S.C. §§ 551–559.

47 *See* 5 U.S.C. §§ 553, 554, 556, 557.

48 *See* 5 U.S.C. § 553(b); Verkuil et al., *supra* note 30, at 522.

49 *See* CLYDE WAYNE CREWS JR., COMPETITIVE ENTER. INST., MAPPING WASHINGTON'S LAWLESSNESS 2016: A PRELIMINARY INVENTORY OF "REGULATORY DARK MATTER" 1 (2015).

50 5 U.S.C. § 551(4).

51 *Id.* § 551(5).

52 *Id.* § 551(6).

53 *Id.* § 553.

under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved."[54] Next, the agency must allow "interested persons an opportunity to participate in the rule making" by accepting public comments "with or without opportunity for oral presentation."[55] Finally, when issuing its final rules, the agency must include within them a "concise general statement of their basis and purpose."[56]

The statutory provisions for informal adjudication are even more minimal, which is to say that they largely do not exist. Section 554 discusses the procedures for "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing," which denotes formal proceedings.[57] Those adjudications falling outside of § 554 must minimally meet the procedural protections described in § 555's "[a]ncillary matters" and § 558's discussion of licensing, a form of adjudication.[58] Beyond these guidelines, informal adjudication is largely defined (if at all) by agency-specific statutes.[59]

Formal procedures, be they rulemaking or adjudication, are subject to the more rigorous requirements of §§ 556 and 557. When these sections apply, they impose trial-like requirements such as evidentiary hearings[60] and cross-examinations,[61] limit ex parte communications with the agency,[62] and require more detailed legal findings in the final rule or order.[63] However, the caveat of "when these sections apply" is larger than it may appear, since they usually do not. The Supreme Court effectively sentenced formal APA proceedings to exile in its 1973 decision *United States v. Florida East Coast Railway*,[64] where it held that only statutory language mirroring the APA's "on the record after opportunity for an agency hearing" verbiage invokes formal procedures.[65] Almost no statutes, enacted either before *Florida East Coast*

54 *Id.* § 553(b).

55 5 U.S.C. § 553(c).

56 *Id.*

57 *Id.* § 554(a).

58 *See id.* §§ 555, 558; *see also* Walker, *supra* note 5, at 747–48, 747 n.78.

59 *See* Walker, *supra* note 5, at 747–51; Richard J. Pierce, Jr., *Agency Adjudication: It Is Time to Hit the Reset Button*, 28 GEO. MASON L. REV. 643, 646–47 (2021).

60 5 U.S.C. § 556(b).

61 *Id.* § 556(d).

62 *Id.* §§ 554(d), 557(d)(1).

63 *Id.* § 557(c)(3)(A).

64 410 U.S. 224 (1973); *see* Nielson, *supra* note 6, at 239–40.

65 *See* 5 U.S.C. § 553(c); United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 237–38 (1973).

Railway or in the decades since, include the requisite words; as a result, formal rulemaking is largely forgotten.[66]

The APA contains exceptions which allow for neither formal nor informal proceedings, one of which is the nebulous category of "interpretative" rules.[67] This exception has been used, and abused, to form a growing body of "regulatory dark matter."[68] Taking many forms, including "agency and presidential memoranda, guidance documents . . . directives, news releases, letters, and even blog posts," such regulations manage a lot of governing with minimal process.[69] Executive efforts to formalize dark matter use have failed, so this shadowy corner of the law is likely here to stay.[70]

3. Judicial Review: Why Hybrid Rulemaking, Anyway?

"Everywhere, these black-robed, soft-sandaled, tallow-visaged specters appeared, flitted about and disappeared, noiseless as the creatures of a troubled dream, and as uncanny."[71]

Administrative agencies wield vast powers—at times executive, legislative, or judicial, depending on the circumstance.[72] To guard against abuse of this power, the APA grants judicial review as a right to anyone "aggrieved by agency action."[73] This right is waived only by statute, expressly or impliedly.[74] While this review is relatively deferential—agency action is set aside only for listed defects such as "abuse of discretion"[75] or actions "in excess of statutory jurisdiction"[76]—the courts have endeavored to make it

66 *See* Nielson, *supra* note 6, at 239–40 (explaining the death of formal rulemaking and arguing for its continuing relevance); MICHAEL ASIMOW, ADMIN. CONF. OF U.S., FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 59–87 (2019) (setting forth best practices for informal adjudication).

67 *Id.* § 553(b).

68 *See* CREWS, *supra* note 49, at 3–4.

69 *Id.* at 3; *see id.* at 17–21.

70 *See* Exec. Order No. 13,891, 84 Fed. Reg. 55,235 (Oct. 15, 2019) (providing some procedural controls and executive oversight for agency use of guidance documents); Exec. Order No. 13,992, 86 Fed. Reg. 7,049 (Jan. 25, 2021) (revoking E.O. 13,891).

71 TWAIN, *supra* note 1, at 175.

72 *See, e.g.*, KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., FEDERAL ADMINISTRATIVE LAW 15–17 (3d ed. 2020).

73 5 U.S.C. § 702.

74 *Id.* § 701(a).

75 *Id.* § 706(2)(A).

76 *Id.* § 706(2)(C).

effective.[77] Generally, this review is limited to the administrative record,[78] though some circumstances may permit a court to supplement that record.[79]

Regulatory dark matter largely avoids both agency procedural requirements on the front end and judicial review on the back end.[80] Informal rulemaking, at least the bare statutory *minima* described above, produces little for a judge to review at all.[81] With formal rulemaking largely extinct, judicial imposition of hybrid requirements to effectuate judicial review becomes, if not inevitable, at least understandable.[82]

B. *Hybrid Rulemaking Before* Vermont Yankee

"Begin here—I've already told you what goes before."[83]

The settlement of New Deal administrative agitation brought about by the APA was short-lived. Adjudication, almost the exclusive mode of agency action before the expansion of the administrative state and the primary target of conservative ire in the push for the APA,[84] began losing ground to agency rulemaking.[85] Even before *Florida East Coast Railway* undercut formal rulemaking, agencies moved towards the notice-and-comment process to take advantage of the efficiency of these "more expeditious administrative methods."[86] The Supreme Court paved the way for this transformation in several judicially modest decisions which left the form of agency action almost completely within agency discretion.[87] Lower court judges began adapting familiar administrative common-law doctrines and adjudicatory procedures for this new rulemaking world.[88] The D.C. Circuit, as it developed into the hub of administrative law in the mid-1960s, led the way

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77 *See, e.g.*, McCarthy v. Madigan, 503 U.S. 140, 146–49 (1992).

78 *See* 5 U.S.C. § 706 ("In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.").

79 *See* Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 415–18 (1971).

80 *See* CREWS, *supra* note 49, at 3.

81 *See* Metzger, *supra* note 8, at 1348–52.

82 *See id.* at 1320–22.

83 TWAIN, *supra* note 1, at 13.

84 *See* Verkuil, *supra* note 28, at 536.

85 *See* Scalia, *supra* note 3, at 376–77.

86 Permian Basin Area Rate Cases, 390 U.S. 747, 777 (1968); *see* Scalia, *supra* note 3, at 376.

87 *See, e.g.*, SEC v. Chenery Corp., 332 U.S. 194, 202 (1947) ("In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.").

88 *See* Scalia, *supra* note 3, at 348–56.

in this hybrid development.[89] The battles between two members of that court, Chief Judge David Bazelon and Judge Harold Leventhal, would shape administrative law doctrine for decades to come.[90]

1. The Hybrid Process "Shadow Doctrine"

"[A]nd not a solitary word of it all could these catfish make head or tail of, you understand . . . ."[91]

While a lower court openly defying a dictate of the Supreme Court might seem to be headline grabbing in most contexts, it appears to have been the norm for the D.C. Circuit in the 1960s and 1970s.[92] As agencies relied more heavily on informal procedures, the judges of the circuit seemed determined to have a role in prescribing additional requirements as they deemed necessary.[93] Often, these attempts at evolving an administrative common law purported to effectuate the APA's judicial review provisions,[94] though appeals to broader principles such as "considerations of fairness"[95] and "the very concept of fair hearing"[96] were also common.

The variety and scope of these extra-APA requirements were impressive. The court was happy to make rulemaking's comment process look more like adjudication in cases like *International Harvester Co. v. Ruckelshaus*[97] and *Mobil Oil Corp. v. FPC*,[98] but hybrid requirements reached the rest of § 553 as well.[99] The court beefed up notice requirements to force the disclosure of all data available to the agency.[100] Ex parte

89 *Id.*

90 *See* Metzger, *supra* note 10, at 126.

91 TWAIN, *supra* note 1, at 211.

92 *See* Scalia, *supra* note 3, at 359–68.

93 *See id.*

94 *See, e.g.*, Kennecott Copper Corp. v. EPA, 462 F.2d 846, 850 (D.C. Cir. 1972) ("There are contexts, however, contexts of fact, statutory framework and nature of action, in which the minimum requirements of the Administrative Procedure Act may not be sufficient. In the interest of justice, *cf.* 28 U.S.C. § 2106, and in aid of the judicial function, centralized in this court, of expeditious disposition of challenges to standards, the record is remanded for the Administrator to supply an implementing statement that will enlighten the court as to the basis on which he reached the 60 standard from the material in the Criteria.").

95 O'Donnell v. Shaffer, 491 F.2d 59, 62 (D.C. Cir. 1974).

96 Am. Airlines, Inc., v. CAB, 359 F.2d 624, 632 (D.C. Cir. 1966).

97 478 F.2d 615 (D.C. Cir. 1973).

98 483 F.2d 1238 (D.C. Cir. 1973).

99 Both *International Harvester* and *Mobil Oil* held (in roundabout ways) that adjudicatory-style hearings and cross-examination were required in certain types of rulemaking proceedings. *See* 478 F.2d at 629–31; 483 F.2d at 1257–60.

100 *See, e.g.*, Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 392–93 (D.C. Cir. 1973).

communications, which the APA's text forbids only in formal proceedings,[101] received a general prohibition.[102] Cementing the disconnect from the text of the APA, "concise statement" requirements ballooned to include comprehensive responses to important points raised during the comment process, including all relevant technical details.[103]

Almost all of these "evolutions" beyond the APA minimums occurred squarely in the shadow of Supreme Court cases that had held the opposite. The D.C. Circuit managed to persist in these innovations by writing opinions in "tantalizingly ambiguous" fashion[104]: "[t]he pattern of dicta, alternate holdings, and confused holdings out of which the D.C. Circuit's principle of APA hybrid rulemaking so clearly and authoritatively emerged had the effect, if not the purpose, of assuring compliance below while avoiding accountability above."[105] While then-professor Antonin Scalia provided many pages of examples of these forays away from (very recent) Supreme Court precedent,[106] perhaps one will suffice here. In June 1972, the Supreme Court found that formal rulemaking was not required for "car service rules," and "therefore, [the proceeding] was governed by the provisions of 5 U.S.C. § 553."[107] Since the agency "fully compl[ied] with [informal rulemaking] requirements . . . nothing more was required by the [APA]."[108] Just over a year later, in July 1973, the D.C. Circuit flatly rejected that informal rulemaking was the only judicially enforceable alternative if formal rulemaking was not implicated:

> The Commission's position assumes that there are only two permissible forms of procedures cognizable under the APA, that the two are mutually exclusive, and that their existence precludes the use of any other procedures that lie between them. This rigid interpretation of what is permitted and required under the APA is inaccurate . . . .[109]

The D.C. Circuit during this period proved to be "a remarkably ineffective instrument for implementing the underlying principles of interpretation which the Supreme Court opinions quite clearly expressed."[110]

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101 5 U.S.C. § 557(d).

102 *See, e.g.*, HBO, Inc. v. FCC, 567 F.2d 9, 51–59 (D.C. Cir. 1977).

103 *See, e.g.*, Auto. Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968) ("[I]t is appropriate for us . . . to caution against an overly literal reading of the statutory terms 'concise' and 'general.' These adjectives must be accommodated to the realities of judicial scrutiny, which do not contemplate that the court itself will, by a laborious examination of the record, formulate in the first instance the significant issues faced by the agency and articulate the rationale of their resolution.").

104 Scalia, *supra* note 3, at 350.

105 *Id.* at 372.

106 *See id.* at 359–67.

107 United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 742, 757–58 (1972).

108 *Id.* at 758.

109 Mobil Oil Corp. v. FPC, 483 F.2d 1238, 1251 (D.C. Cir. 1973).

110 Scalia, *supra* note 3, at 363.

Nonetheless, for more than a decade such decisions were standard fare for the circuit, regardless of the judges involved.[111] Debates about hybrid rulemaking filled not just opinions, which interacted in complex and confusing ways given the often impenetrable holdings,[112] but journal articles as well.[113] The debate, however, was not over the propriety of hybrid requirements, but rather what form such requirements should take.

2. Substance versus Process: The Leventhal-Bazelon Debates

"Here was trouble again—a conflict of authority."[114]

The D.C. Circuit was a truly remarkable court throughout the 1960s and 1970s. Not only was it host to a collection of "'judicial all-stars' who individually would have dominated other courts," but that stable of all-star judges remained relatively constant.[115] As a result, an immense array of writings, both judicial and extrajudicial, illustrate the clashes of judicial philosophy between the court's members.[116] Two primary theories of hybrid rulemaking and the relationship between judges and agencies emerged from these endless disputes.[117] At the head of one camp: Judge Harold Leventhal, former administrator extraordinaire.[118] Leading the other camp, perhaps just a camp of one, given his difficult personality and "poisonous" relationships with his colleagues: Chief Judge David Bazelon, legal realist par excellence.[119]

Judge Leventhal came to the bench following an impressive career in government, bouncing between agencies through the New Deal and war years and eventually leading a presidential task force on independent agencies.[120] Accordingly, his perspective on the relationship between judge and agency—that the two parties were to cooperate as partners to advance congressional interests—is understandable.[121] When it came time to review

111 *Id.* at 348 n.13.

112 *Id.* at 373 n.128.

113 *Id.* at 365 n.97.

114 TWAIN, *supra* note 1, at 202.

115 Matthew Warren, Note, *Active Judging: Judicial Philosophy and the Development of the Hard Look Doctrine in the D.C. Circuit*, 90 GEO. L.J. 2599, 2607 (2002).

116 *See id.* at 2607 & n.58.

117 *See generally* Krotoszynski, *supra* note 14. For an interesting analysis of Judge Skelly Wright's jurisprudence at the time, positing that his focus on congressional intent and democratic accountability constituted a third approach to judicial review of agency action, see Warren, *supra* note 115, at 2626–31.

118 *See* Warren, *supra* note 115, at 2607–09.

119 *Id.* at 2617–21.

120 *See id.* at 2608.

121 *See id.* at 2611–13; *see, e.g.*, Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 851–52 (D.C. Cir. 1970) ("[A]gencies and courts together constitute a 'partnership' in furtherance of the public interest,

agency action, Judge Leventhal envisioned a limited scope for judges and expressed his "utmost diffidence" when that review required him to remand a decision to an agency.[122]

Paradoxically, however, when it came to *how* judges should approach this limited review, Judge Leventhal insisted on the daunting task of fully understanding the technical matters at issue.[123] Even with his extensive agency experience, Judge Leventhal himself openly struggled to meet this standard,[124] leading him to propose specialized judicial assistants.[125] While his proposals never came to fruition, Judge Leventhal maintained that generalist judges could rise to the challenge using traditional judicial principles and tools to obtain outside expertise, such as special masters.[126] Indeed, judges must grapple with the substance of the problems before them because, as Judge Leventhal believed, that is what Congress, via the APA, demanded.[127]

Chief Judge Bazelon, by contrast, did not care overmuch what statute and precedent demanded.[128] Described by one fellow judge as "the quintessential legal realist," he focused first and foremost on the practical results of law and doctrine.[129] Accordingly, "[h]e was willing, indeed even eager, to question accepted judicial truths and doctrines."[130] In areas beyond administrative law, such as Chief Judge Bazelon's attempted reforms to

and are 'collaborative instrumentalities of justice.'") (quoting United States v. Morgan, 313 U.S. 409, 422 (1941)); *see also* Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 554 (1974) ("Another objective [of judicial review] is to combine supervision with restraint, making the courts a genuine kind of partner with the agency in the overall administrative process.").

122 Int'l Harvester Co. v. Ruckelshaus, 478 F.2d 615, 641 (D.C. Cir. 1973); *see* Krotoszynski, *supra* note 14, at 1003–04.

123 *See* Warren, *supra* note 115, at 2615–16.

124 *See* Harold Leventhal, *Remarks*, 7 NAT. RES. LAW. 351, 355–57 (1974) ("If there is going to be a real monitoring of the question of whether there has been a hard look in recent decision-making, you have to get into the technicalities in order to understand the problem. And that is something that is very hard to do.").

125 *See* Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139, 1163 (2001).

126 *See id.*; *see also* Env't Def. Fund, Inc. v. EPA, 465 F.2d 528, 541 (D.C. Cir. 1972) ("[T]here is a will in the courts to study and understand what the agency puts before us.").

127 *See* Ethyl Corp. v. EPA, 541 F.2d 1, 68 (1976) (Leventhal, J., concurring) ("[I]t is my view that while giving up is the easier course, it is not legitimately open to us at present. . . . Our present system of review assumes judges will acquire whatever technical knowledge is necessary as background for decision of the legal questions."); *see also* Krotoszynski, *supra* note 14, at 1004.

128 *See* Warren, *supra* note 115, at 2617–21.

129 *See id.* at 2617–18, 2618 n.163, 2621 n.191.

130 *Id.* at 2618.

mental illness doctrine,[131] his more active judicial style partook of the legal-realism movement's "faith in empiricism and in the liberating, progressive potential of a properly harnessed social science."[132] A generalist judge, armed with a properly questioning attitude and a fully disclosed record, could reach determinations both just and socially beneficial.[133]

As legal realists of the day thrilled to the possibility that properly harnessed social science could turn judges into philosopher-kings, Judge Leventhal's faith that judges could master the mundane technical details of agency action would seem a natural fit.[134] At least for Chief Judge Bazelon, nothing could be further from the truth.[135] While he may have been the quintessential legal realist, Chief Judge Bazelon was the ultimate skeptic of generalist judges' ability to master highly scientific material to effectively review agency action.[136] From Chief Judge Bazelon's perspective, judges were "technically illiterate."[137] Any attempt by judges to review agency decisions founded on complex scientific or mathematical data was bound to be "dangerously unreliable."[138]

While Judge Leventhal saw such an approach as laziness at best, or an abdication of judicial duty at worst,[139] Chief Judge Bazelon viewed it as a sort of comparative advantage.[140] Regulated parties, not generalist judges, were best able to meet and contest an agency's scientific arguments.[141] What judges could do, and should do, was ensure that agencies provided enough of a forum for such a contest.[142] Ordering hearings and overseeing cross-

131 *See id.* at 2619–20; *see also* J. Skelly Wright, *A Colleague's Tribute to Judge David L. Bazelon, on the Twenty-Fifth Anniversary of His Appointment*, 123 U. PA. L. REV. 250, 252 (1974); *see generally* Martha Minow, *Questioning Our Policies: Judge David L. Bazelon's Legacy for Mental Health Law*, 82 GEO. L.J. 7 (1993).

132 *See* Warren, *supra* note 115, at 2617 n.150.

133 *See id.* at 2621.

134 *See id.* at 2617–20.

135 *See id.*

136 *See* Krotoszynski, *supra* note 15, at 999–1000.

137 Ethyl Corp. v. EPA, 541 F.2d 1, 67 (D.C. Cir. 1976) (Bazelon, C.J., concurring).

138 *Id.*; *see also* David L. Bazelon, *The Impact of the Courts on Public Administration*, 52 IND. L.J. 101, 107 (1976) ("Significant or not, decisions involving scientific or technical expertise present peculiar challenges for reviewing courts. The problem is not so much that judges will impose their own views on the merits. The question is whether they will even know what is happening.").

139 *See supra* note 127 and accompanying text.

140 *See* Krotoszynski, *supra* note 15, at 999–1000.

141 *See* Int'l Harvester Co. v. Ruckelshaus, 478 F.2d 615, 652 (D.C. Cir. 1973) (Bazelon, C.J., concurring) ("[I]n cases of great technological complexity, the best way for courts to guard against unreasonable or erroneous administrative decisions is not for the judges themselves to scrutinize the technical merits of each decision.").

142 *See id.; see also* Nat. Res. Def. Council, Inc. v. NRC, 547 F.2d 633, 657 (D.C. Cir. 1976) (Bazelon, C.J., concurring) ("I am convinced that in highly technical areas, where judges are institutionally incompetent

examination were well within the judicial wheelhouse, and the thoroughly ventilated issues[143] that resulted from such procedures would be amenable to effective judicial review.[144]

These, then, were the two primary philosophies of judicial review of agency action during the years the D.C. Circuit began embellishing beyond the APA's text—Judge Leventhal's insistence on substance and Chief Judge Bazelon's focus on process.[145] But while the sides of this war were relatively clear when battle was joined in the law reviews,[146] things were rarely so pellucid in the murk that characterized D.C. Circuit opinions of the era.[147] Judge Leventhal was occasionally willing to impose those "procedural requirements deemed inherent in the very concept of fair hearing for certain classes of cases, even though no such requirements had been specified by Congress."[148] Chief Judge Bazelon, meanwhile, "conceded that consideration of the adequacy of the procedures that an agency followed related back to the substantive questions before the agency."[149] Indeed, Chief Judge Bazelon viewed the substance-process dichotomy as a mostly meaningless distinction in the first place.[150] The difficulty of drawing the distinction is evident throughout the opinions of the time, and at least one of Chief Judge Bazelon's colleagues shared this view: Judge Edward Tamm acknowledged

to weigh evidence for themselves, a focus on agency procedures will prove less intrusive, and more likely to improve the quality of decisionmaking, than judges 'steeping' themselves 'in technical matters to determine whether the agency has exercised a reasoned discretion.'" (quoting *Ethyl Corp.*, 541 F.2d at 66 & n.5)).

143 Despite (or perhaps because of) the difficulty in defining what was meant by "ventilation of the issues," it was a favorite phrase of the D.C. Circuit during this time. *See* Scalia, *supra* note 3, at 355 n.55.

144 *See* Krotoszynski, *supra* note 15, at 999–1000.

145 *See generally id.*

146 *See, e.g.*, Leventhal, *supra* note 121; Bazelon, *supra* note 138; David L. Bazelon, *Coping with Technology Through the Legal Process*, 62 CORNELL L. REV. 817 (1977).

147 *See supra* note 112 and accompanying text. Since this Comment is already premised on a switcheroo of sorts, I have refrained from the old trick of misattributing quotes between the two sides of an apparently irreconcilable divide before—hey presto!—revealing that the two positions are actually indistinguishable. But rest assured, Dear Reader, that if I *had* done so, you would have been fooled.

148 Am. Airlines, Inc. v. CAB, 359 F.2d 624, 632 (D.C. Cir. 1966).

149 Krotoszynski, *supra* note 15, at 1000 n.19.

150 *See* Nat. Res. Def. Council, Inc. v. NRC, 547 F.2d 633, 657 n.8 (D.C. Cir. 1976) (Bazelon, C.J., concurring) (writing that "[t]he logic of [the] position that the 'deficiency' here is not with the procedures used to make a record, just with the 'record generated,' totally escapes me") (citations omitted). Citing to Judge Henry Friendly, Chief Judge Bazelon noted that, practically speaking: "it does not really matter much whether a court says the record is remanded because the procedures used did not develop sufficient evidence, or because the procedures were inadequate. From the standpoint of the administrator, the point is the same: [informal rulemaking procedures] will not automatically produce an adequate record." *Id.* at 657 (citing Henry J. Friendly, "*Some Kind of Hearing*," 123 U. PA. L. REV. 1267, 1313–14 (1975)); *cf.* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989) (noting in the context of NEPA that "these procedures are almost certain to affect the agency's substantive decision").

that "arguments about whether our focus here is 'procedural' or 'substantive' may be more semantic than determinative."[151]

3. *Portland Cement*: A Foundation for the Future

"To be vested with enormous authority is a fine thing; but to have the on-looking world consent to it is a finer."[152]

Portland Cement Ass'n v. Ruckelshaus,[153] a 1973 Judge Leventhal opinion, bears special mention here. While far from the first hybrid requirements case,[154] it earned a prominent place in the D.C. Circuit's administrative law jurisprudence, which it retained even after *Vermont Yankee*. The basic setting of *Portland Cement* should ring a few bells to anyone familiar with administrative law: William Ruckelshaus, the Administrator of the Environmental Protection Agency, determined that portland cement plants[155] were a stationary source of air pollution within the purview of the Clean Air Act.[156] Accordingly, he published a proposed regulation setting a "standard of performance," air pollutant emission requirements, which such plants would have to meet.[157] Notice of the regulation went out, accompanied by a separate document with the data justifying the new standard.[158] A proper comment process followed, with more than two hundred interested parties participating.[159] Finally, the agency promulgated a standard with a statement of its basis and purpose, later supplemented to comply with a preexisting hybrid requirement.[160]

The agency complied with the statutory *minima* of § 553, even going above and beyond to try to appease the court, to no avail. While interested parties received, and took advantage of, the opportunity of a public comment process, Judge Leventhal found the agency action insufficient.[161]

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151 *Nat. Res. Def. Council*, 547 F.2d at 660 n.8 (Tamm, J., concurring).

152 TWAIN, *supra* note 1, at 59.

153 486 F.2d 375 (D.C. Cir. 1973).

154 *See, e.g.*, Am. Airlines, Inc. v. CAB, 359 F.2d 624, 632 (D.C. Cir. 1966); Marine Space Enclosures, Inc. v. FMC, 420 F.2d 577 (D.C. Cir. 1969); Walter Holm & Co. v. Hardin, 449 F.2d 1009 (D.C. Cir. 1971).

155 For those curious, "portland cement" is simply a common type of cement, named for its resemblance to stone found on the Isle of Portland in Dorset, England. *Portland Cement*, WIKIPEDIA, https://perma.cc/72XM-2QAY (Jan. 4, 2023).

156 42 U.S.C. § 1857c-6; *Portland Cement*, 486 F.2d at 378.

157 *Portland Cement*, 486 F.2d at 378.

158 *See id.*

159 *See id.*

160 *See id.* at 378–79. The prior decision was Kennecott Copper Corp. v. EPA, 462 F.2d 846 (D.C. Cir. 1972), which required the agency to provide the bases for critical decisions along with its proposed regulation.

161 *Portland Cement*, 486 F.2d at 402.

The "critical defect" was the agency's failure to make available "in timely fashion—the test results and procedures used on existing plants which formed a partial basis for [the rule]."[162] In addition, the agency failed to properly respond to "what seem[ed] to be legitimate problems" raised by public comments.[163]

Couched in substantive terms, Judge Leventhal's justifications for these findings nevertheless impose rather clear procedural requirements on the part of agencies. Regarding the inadequate disclosure of data, the judge held that "[i]t is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, [to a] critical degree, is known only to the agency."[164] As for responding to comments, Judge Leventhal asserted that he was "not establishing any broad principle that EPA must respond to every comment made by manufacturers," only those which the court deemed "significan[t], or at least potential[ly] significan[t]."[165] How an agency is to intuit which comments may be significant going forward is unclear.

Portland Cement also provided Judge Leventhal a chance to reiterate his conception of the roles of judges and agencies.[166] Tucked into the discussion of his remand decision was his understanding that, "[in] matter[s] involving the public interest . . . the court and agency are in a kind of partnership relationship for the purpose of effectuating the legislative mandate."[167] Five years later, the Supreme Court would rudely interrupt this "partnership relationship."[168] At least, it would try.

II. *Vermont Yankee*: The World We Know

"These people were no easier to please than other nines."[169]

This Part recounts *Vermont Yankee*'s journey from the court of appeals to Justice Rehnquist's monumental response. It then traces the administrative law aftershocks that followed.

162 *Id.* at 392.

163 *Id.*

164 *Id.* at 393.

165 *Id.*

166 *See id.* at 394.

167 *Portland Cement*, 486 F.2d at 394.

168 *Id.; see generally* Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519 (1978).

169 TWAIN, *supra* note 1, at 343.

A. Vermont Yankee

"I had promised myself an easy and zenith-scouring triumph, and this was the outcome!"[170]

Things were looking good for commercial nuclear power in America in 1966. The SL-1 meltdown was five years in the rearview mirror,[171] and Three Mile Island was over a decade away.[172] The Atomic Energy Commission ("AEC" or "Commission"), which had wielded near-plenary regulatory control over nuclear power via the Atomic Energy Act of 1954,[173] had more or less figured out the safety requirements for new power plant projects.[174] The burgeoning commercial nuclear power industry rose to meet those requirements, and together agency and industry ushered in a new age of American energy independence.[175] There was little reason, then, to remark on yet another AEC construction permit, this one for a new reactor on the banks of the Connecticut River to be operated by the Vermont Yankee Nuclear Power Corporation.

When Vermont Yankee applied for the operating license necessary to run the plant three years later, the situation had changed only slightly. Congress passed the National Environmental Policy Act of 1969[176] ("NEPA"), requiring the government to consider the environmental impacts of major federal action, though it was yet unclear how NEPA would apply to previously approved projects, if at all.[177] The growing number of nuclear plants had also raised public concerns with how to handle the resulting radioactive waste products.[178] Despite these shifts, Vermont Yankee had little reason to suspect that its application was at any particular risk.

The first sign of trouble was the D.C. Circuit's opinion in *Calvert Cliffs' Coordinating Committee, Inc. v. AEC*.[179] *Calvert Cliffs* took the AEC to task for incorporating NEPA into its procedures too slowly.[180] End result: the court

170 *Id.* at 215.

171 *See SL-1*, WIKIPEDIA, https://perma.cc/Q9YB-LHDN (Jan. 14, 2023).

172 Indeed, construction would not begin on either Three Mile Island operating plant until 1968. *See Three Mile Island Nuclear Generating Station*, WIKIPEDIA, https://perma.cc/TQA7-9B7E (Jan. 13, 2023).

173 Atomic Energy Act of 1954, Pub. L. No. 83-703, § 3d, 68 Stat. 919, 922 (codified at 42 U.S.C. § 2013(d)).

174 Of the ninety-two presently active American nuclear plants, about a third were granted their operating licenses in the late 1960s or early 1970s. *U.S. Nuclear Plant License Information*, NUCLEAR ENERGY INST. (Aug. 2022), https://perma.cc/SD5U-RAZM.

175 *See* Metzger, *supra* note 10, at 127.

176 Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified at 42 U.S.C. §§ 4331–4335).

177 *See* Metzger, *supra* note 10, at 128–29.

178 *See id.* at 128 & n.6.

179 449 F.2d 1109 (D.C. Cir. 1971).

180 *Id.* at 1117, 1119–20.

required the Commission to perform environmental impact analyses for plants undergoing licensing proceedings at the time of NEPA's passage.[181] The always-cautious AEC did not press the issue.[182] The impact of *Calvert Cliffs* was felt when Vermont Yankee's adjudicatory hearings finally took place in late 1971 and early 1972, as a bevy of public intervenors pressed environmental challenges under NEPA, many concerning radioactive waste storage.[183]

The AEC's safety and license board that conducted the hearings, however, concluded that longer-term environmental concerns with waste products were inappropriate for individual licensing proceedings.[184] The appeal board that reviewed the decision to grant Vermont Yankee's operating license agreed.[185] The environmental effects of waste produced by the plant, which could be reprocessed or stored in any number of future facilities, were too far removed from the operation of the plant at issue to warrant consideration.[186] The AEC declined to review or overturn this decision, apparently clearing the way for Vermont Yankee to finally get to work.[187] Shortly thereafter, the AEC proposed a new rulemaking addressing the precise issue deemed inapplicable to Vermont Yankee: "whether—and how—environmental effects of the nuclear fuel cycle should be considered in individual reactor proceedings."[188]

With no statutory hearing requirement, the AEC was free to proceed under the informal rulemaking requirements of § 553.[189] However, prompted by its careful nature and desire to win public trust in nuclear power, the Commission voluntarily adopted additional procedural strictures.[190] The Commission held a public hearing, solicited both oral and written testimony,[191] and created a three-member hearing board empowered to question witnesses.[192] An extra thirty-day period for supplemental comments followed the hearings.[193] The resulting record weighed in at over five hundred pages.[194]

181 *Id.* at 1128–29.

182 *See* Metzger, *supra* note 10, at 129–30.

183 *See* Vt. Yankee Nuclear Power Corp., 4 A.E.C. 776, 777, 783–86 (Mar. 14, 1972).

184 *See id.* at 785–86.

185 *See* Vt. Yankee Nuclear Power Corp., 4 A.E.C. 930, 933–34 (June 6, 1972).

186 *Id.*

187 *See* Metzger, *supra* note 10, at 131.

188 *Id.*

189 *See id.* at 132–33.

190 *Id.* at 134.

191 *Id.*

192 *See id.*

193 Metzger, *supra* note 10, at 134.

194 *Id.* at 136.

In the end, the AEC adopted a final rule establishing predetermined reactor waste harm values that could slot into environmental impact statements for future reactor licensing proceedings.[195] In so doing, it explicitly rejected the alternative of not considering future waste as a factor for individual plant licensing adjudications (i.e. the approach that prevailed for Vermont Yankee).[196] Nevertheless, the AEC determined that the new rule should not apply retroactively given the "relatively insignificant" impact it would have.[197] Vermont Yankee's operating license had become permanent in February 1973, and with the fuel cycle rule finished and inapplicable, it seemed that the plant was finally in the clear.[198] Shortly thereafter, both Vermont Yankee's operating license and the AEC's final rule were dragged before the D.C. Circuit.[199]

1. The D.C. Circuit Versus the NRC

"[T]here was sure to be some skeptic on hand to turn up the gas at the crucial moment and spoil everything."[200]

In defending its final rule, the Nuclear Regulatory Commission ("NRC"), which replaced the AEC following the Energy Reorganization Act of 1974,[201] found itself before Chief Judge Bazelon, Judge Tamm, and the Sixth Circuit's Judge George Edwards, sitting by appointment.[202] With Chief Judge Bazelon writing not one but two opinions in the case (the majority plus a separate concurrence), the result is perhaps unsurprising. Through a gleeful mix of alternative justifications and principles—in other words, a true classic of the D.C. Circuit administrative law genre—the court revoked Vermont Yankee's operating license and remanded the fuel cycle rule to the NRC.[203]

Woven throughout the opinion were two separate "bases of decision": "(1) the inadequacy of the agency's procedures; and (2) the inadequacy of the record to support the agency decision."[204] Chief Judge Bazelon's desire for adjudicatory procedures shines through relatively clearly in a few places. He characterized the petitioners' "primary argument" as "rely[ing] . . . on the line of cases indicating that in particular circumstances procedures in

195 *See Environmental Effects of the Uranium Fuel Cycle*, 39 Fed. Reg. 14,188, 14,189 (Apr. 22, 1974).

196 *See* Metzger, *supra* note 10, at 141.

197 *Environmental Effects of the Uranium Fuel Cycle*, *supra* note 195, at 14,190.

198 *See* Vt. Yankee Nuclear Power Corp., 6 A.E.C. 358, 358 (May 23, 1973).

199 *See* Metzger, *supra* note 10, at 143.

200 TWAIN, *supra* note 1, at 177.

201 Pub. L. No. 93-438, 88 Stat. 1233 (1974) (codified at 42 U.S.C. §§ 5801–5891).

202 Nat. Res. Def. Council, Inc. v. NRC, 547 F.2d 633, 636 (D.C. Cir. 1976).

203 *See id.* at 641, 655.

204 Scalia, *supra* note 3, at 354.

excess of the bare minima prescribed by [§ 553] may be required," followed by a hit parade of the circuit's hybrid requirement precedents.[205] Some circumstances, "by their very nature, might require particular procedures, including cross-examination."[206] The circuit's favorite turn of phrase also makes an appearance, as the agency failed to produce a "thorough ventilation of the issues."[207]

Judge Tamm's concurrence attempted to make the procedural nature of the court's concern clear, or at least clearer. He noted that "[t]he majority appears to require the Commission to institute further procedures of a more adversarial nature than those customarily required [by § 553]."[208] Instead, Judge Tamm would have grounded a remand explicitly in *Overton Park*–type substantive concerns: "the deficiency is not with the *type* of proceeding below, but with the completeness of the record generated."[209] This prompted Chief Judge Bazelon's unusual separate concurrence, where he outright "reject[s] the implication that any techniques beyond rudimentary notice and comment are needless 'over-formalization' of informal rulemaking."[210] Subsequent paragraphs lament the expansion of rulemaking into traditionally adjudicative areas and declare the difference between substance and procedure illusory in most circumstances: "[I]t does not really matter much whether a court says the record is remanded because the procedures used did not develop sufficient evidence, or because the procedures were inadequate."[211]

Far outstripping the procedural § 553 discussion, however, is an avalanche of substantive analysis. Indeed, when read in isolation, the majority opinion is remarkably Leventhal-esque. Chief Judge Bazelon not only engaged with the technical material, chiefly the testimony of Dr. Frank Pittman on behalf of the AEC, but grounded his critiques in the substance of the agency's reasoning process.[212] A reviewing court, looking to the rule's statement of basis and purpose, must find "reasoned response[s]" to meaningful comments.[213] If the agency "has adduced no reasoned answers," a judge could remand the rule as an abuse of agency discretion.[214] Here, the fuel cycle rule's "extremely vague assurances" represented just such an

205 *Nat. Res. Def. Council*, 547 F.2d at 643 & n.23.

206 *Id.* at 644.

207 *Id.*; *see* Scalia, *supra* note 3, at 355, n.55.

208 *Nat. Res. Def. Council*, 547 F.2d at 658 (Tamm, J., concurring).

209 *Id.* at 659.

210 *Id.* at 655 (Bazelon, C.J., concurring).

211 *See id.* at 657 (citing Henry J. Friendly, "*Some Kind of Hearing*," 123 U. PA. L. REV. 1267, 1313–14 (1975)).

212 *See id.* at 645–47 (majority opinion).

213 *Id.* at 646.

214 *Nat. Res. Def. Council*, 547 F.2d at 646.

"insufficient record."[215] Judge-ordered imposition of new procedures is explicitly forsworn, as the court "do[es] not presume to intrude on the agency's province by dictating . . . devices it must adopt to flesh out the record."[216] Indeed, the gamut from completely new procedures to the same procedures already used, "administered in a more sensitive, deliberate manner," could apparently pass muster.[217] Intimations that NEPA, rather than just the APA, prompted these conclusions further muddle the actual foundation of the holding.[218] Ultimately, however, Chief Judge Bazelon concluded that the Commission's decision to promulgate the final rule was arbitrary and capricious.[219] In a surprise to many, the remand wound up not back at the NRC, but in a grant of certiorari at the Supreme Court.[220]

2. The Supreme Court Strikes Back

"*Well, when I make up my mind to hit a man, I don't plan out a love-tap; no, that isn't my way; as long as I'm going to hit him at all, I'm going to hit him a lifter.*"[221]

That the Court "spoke loudly and carried a huge club"[222] when it decided, yet again, to weigh in on judicial review of agency action is perhaps unsurprising, given the D.C. Circuit's years of rather creative compliance with previous rulings.[223] That the Court would grant certiorari at all was surprising, given the circumstances.[224] First, the government was ambivalent about pursuing the matter further, as reflected in its "Janus-like" brief.[225] The Solicitor General read the D.C. Circuit's opinion as a simple, if erroneous, substantive critique of the agency's reasoning.[226] The NRC, desperate to resume licensing new plants, pushed for certiorari in the hopes of a definitive answer on the minimum hurdles—be they substantive or procedural—required to garner judicial approval.[227] In parallel with litigation,

215 *Id.* at 653.

216 *Id.*

217 *Id.* at 653–54.

218 *See id.* at 654.

219 *See id.* at 655.

220 *See* Metzger, *supra* note 10, at 151–53.

221 TWAIN, *supra* note 1, at 282.

222 Beermann & Lawson, *supra* note 22, at 858.

223 *See supra* note 110 and accompanying text.

224 *See* Metzger, *supra* note 10, at 151–53; *see also* Scalia, *supra* note 3, at 356–57.

225 Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 540 n.15 (1978). This confusion was shared by the Natural Resources Defense Council, which alternately argued for a substantive or procedural reading of the D.C. Circuit opinion. *Id.*

226 *See id.*; Metzger, *supra* note 10, at 152.

227 *See* Metzger, *supra* note 10, at 152–53.

however, the NRC had also begun a supplemental rulemaking to fix the fuel cycle rule in compliance with the D.C. Circuit's ruling.[228] That the rule at issue in the case below was, in all likelihood, about to be rendered obsolete raised clear mootness concerns, yet another reason for the Court to reject certiorari.[229]

Despite these concerns, the Court ultimately agreed to hear the case.[230] A desire to finally provide oversight of the D.C. Circuit through its maddening fog of dicta and alternate holdings suggests one possible motivation.[231] Interestingly, the Court granted a similarly dubious certiorari petition *also* involving an appellate ruling that could hold up nuclear licensing in the same term.[232] This trend suggests another possible motivation: a Court interested in cutting red tape around the nation's booming nuclear industry.[233] Indeed, in pushing for certiorari, Justice Rehnquist "stress[ed] the continuing impact of the D.C. Circuit's decision on the licenses of the two plants involved and reactor licensing generally."[234]

With the case before it, the Court was immediately confronted by the problem which had vexed the government and the NRDC: what exactly did the D.C. Circuit opinion *mean*?[235] Was the court's problem with the fuel cycle rulemaking substantive, as most of the language in the majority opinion seemed to suggest? Or was it procedural, coming as it did from Chief Judge Bazelon, who defended his usual process-focused approach in his separate concurrence? Writing for a unanimous, Court,[236] Justice Rehnquist lamented that solving this puzzle was "no mean feat."[237]

While initially allowing that the "matter [was] not entirely free from doubt," Justice Rehnquist ultimately decided that the procedural reading was the better one.[238] Chief Judge Bazelon's framing of the issue for the decision below—that the court was "called upon to decide whether the procedures provided by the agency were sufficient to ventilate the issues"—weighed heavily in Justice Rehnquist's conclusion.[239] The largely substantive nature of the lower decision left few other textual hooks for the procedural reading, which might, Justice Rehnquist warned, "initially lead one to

228 *See id.*

229 *See id.*

230 *See id.*

231 *See* Scalia, *supra* note 3, at 356–57.

232 *See* Duke Power Co. v. Carolina Env't Study Grp., Inc., 438 U.S. 59, 68–82 (1978).

233 *See* Metzger, *supra* note 10, at 153.

234 *Id.* at 159.

235 Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 539–41 (1978).

236 Justices Powell and Blackmun did not participate in the case. *Id.* at 558.

237 *Id.* at 539.

238 *Id.* at 541–42.

239 *Id.* (quoting Nat. Res. Def. Council, Inc. v. NRC, 547 F.2d 633, 643 (D.C. Cir. 1976)).

conclude that the court was only examining the sufficiency of the evidence."[240] Looking beyond the substantive language to the practical effect of the ruling, however, revealed that "the ineluctable mandate of the court's decision is that the procedures afforded during the hearings were inadequate."[241] Indeed, despite his initial claim that the matter was not free from doubt, Justice Rehnquist concluded his discussion by noting that "the remaining [non-substantive] portions of the opinion," which the Justice did not see fit to identify in any specificity, "dispel any doubt" that procedural concerns were in play.[242]

Having decided on the procedural reading of the D.C. Circuit opinion, Justice Rehnquist was utterly unsparing in tearing it apart.[243] That judges should leave procedural choices to agencies was "absolutely clear," and the Court's precedents "could hardly be more explicit in this regard."[244] This view was fully supported by the APA's legislative history, which demonstrated that Congress meant the informal rulemaking requirements to be a minimum that agencies, not courts, had discretion to build upon.[245] And this approach was practical: if judges could second-guess agency proceedings, "judicial review would be totally unpredictable."[246] Faced with such uncertainty, agencies "would undoubtedly adopt full adjudicatory procedures in every instance," eliminating the efficiency that informal rulemaking promised.[247]

"[P]erhaps most importantly," Justice Rehnquist concluded, the D.C. Circuit had "fundamentally misconceive[d] the nature of the standard for judicial review of an agency rule."[248] Adequacy of record and formality of process are not coextensive, and a reviewing court should determine whether the administrative record was adequate solely in relation to the procedures required by the APA or another statute.[249] Requiring an agency to do more "can do nothing but seriously interfere with that process prescribed by Congress."[250] So long as an agency "employed at least the [§ 553] statutory *minima*," a reviewing court had no power to "overturn [a]

240 *Id.* at 542.

241 *Id.*

242 *Id.*

243 *See id.* at 543–49; *see, e.g.*, Metzger, *supra* note 10, at 160 (noting the Court's "unqualified and stern language"); Beermann & Lawson, *supra* note 22, at 858 (characterizing the Court's opinion as "stridently chastis[ing]" the D.C. Circuit).

244 *Vermont Yankee*, 435 U.S. at 543–44.

245 *Id.* at 545–46.

246 *Id.* at 546–47.

247 *Id.*

248 *Id.* at 547.

249 *Id.*

250 *Id.* at 548.

rulemaking proceeding on the basis of the procedural devices employed."[251] Despite his fidelity to the text of the APA, Justice Rehnquist did identify two possible exceptions: cases with concentrated impacts, raising due process concerns, and cases involving "a totally unjustified departure from well-settled agency procedures of long standing."[252] Explaining why these "extremely compelling circumstances" would justify procedures beyond the statutory *minima* is an exercise Justice Rehnquist left to the reader.[253]

Finally, the Court turned to the D.C. Circuit's substantive critiques of the fuel cycle rule.[254] While primarily crediting Judge Tamm's concurrence, Justice Rehnquist grudgingly recognized "intimations" of a substantive problem with the NRC's actions in Chief Judge Bazelon's majority opinion.[255] Since the sufficiency of the record to support the rule was indeterminate, the Court remanded the case for a proper substantive review.[256]

B. *The Aftermath: Hybrid Rulemaking Post*-Vermont Yankee

"The victory is perfect—no other will venture against me . . . ."[257]

The Court's unusually blunt language, and the potentially sweeping effect of its opinion on administrative law, assured that the case would become an instant classic.[258] Judge Leventhal saw the opinion as a final settlement, in his favor, of his debate with Chief Judge Bazelon.[259] Indeed, this understanding would become the canonical reading of the case.[260] Supporters of substantive review did not have long to wait for another victory; the Court officially blessed the hard look doctrine, which requires

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251 *Id.*

252 *Id.* at 542.

253 *Id.* at 542–43.

254 *Id.* at 549.

255 *Id.*

256 *Id.* On remand, the D.C. Circuit once again concluded, in an opinion written by Chief Judge Bazelon, that the fuel cycle rule was invalid because it was inadequately supported by the record. *See* Nat. Res. Def. Council, Inc. v. NRC, 685 F.2d 459, 481, 485 (D.C. Cir. 1982). The Supreme Court once again disagreed, concluding that judges should be at their most deferential when reviewing an agency's technical predictions in its area of expertise. *See* Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 103–04 (1983).

257 TWAIN, *supra* note 1, at 332.

258 *See* Metzger, *supra* note 10, at 160.

259 *See* Peter L. Strauss, *Changing Times: The APA at Fifty*, 63 U. CHI. L. REV. 1389, 1412 & n.68 (1996).

260 *See, e.g.*, Beermann & Lawson, *supra* note 22, at 858; Scott A. Keller, *Depoliticizing Judicial Review of Agency Rulemaking*, 84 WASH. L. REV. 419, 442 (2009); Krotoszynski, *supra* note 14, at 996 (stating that *Vermont Yankee* "definitively rejected process-based review of agency action in favor of substantive 'hard look' review"); Warren, *supra* note 115, at 2631.

judges to carefully scrutinize the reasoning behind agency action, just five years later.[261]

The death of procedural hybrid rulemaking led courts to clear the field in regards to the most apparently "procedural" piece of informal rulemaking, § 553(c)'s public comment process.[262] Meanwhile, the various substantive hybrid requirements which the D.C. Circuit had engrafted onto the notice process and the statement of basis and purpose survived and thrived, with *Portland Cement* as a prime example.[263] Many administrative-law scholars, wishing to recapture the revolutionary efficiency of the informal-rulemaking process, have pined for a *Vermont Yankee II*, wherein the Supreme Court would presumably bring down the hammer on these substantive APA embellishments.[264] But other than a rather weak attempt to distinguish procedural and substantive hybrid requirements, the Court has largely let the subject alone.[265]

In the absence of new guidance from the Supreme Court, the substantive doctrines chronicled above[266] have entrenched and strengthened.[267] Over the decades, the conglomeration of substantive judicial review doctrines has sapped much of the efficiency and flexibility out of informal rulemaking, a process known in the literature as "ossification."[268] Signs of this process include interminably long notices of proposed rulemaking and "concise" statements of basis and purpose—OSHA's initial attempt at a COVID-19 vaccine mandate ran a whopping 154 pages, and that was just an interim final rule[269]—and endless delays which

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261 *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43–44 (1983).

262 *See* Beermann & Lawson, *supra* note 22, at 858 ("[F]ederal courts today do not feel free to require agencies to use oral hearings and cross-examination in informal rulemakings of adjudications without grounding in positive law.").

263 *See* Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 246–47 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part, concurring in the judgment in part, and dissenting in part) (criticizing *Portland Cement* and related cases as inconsistent with the APA but concurring that they are settled circuit precedent); Beermann & Lawson, *supra* note 22, at 857–60 (listing some of the substantive doctrines which survived *Vermont Yankee*).

264 *See* Beermann & Lawson, *supra* note 22, at 858–59 (discussing articles by Paul Verkuil and Richard Pierce).

265 *See* Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 654–55 (1990).

266 *See supra* Part I.B.1.

267 *See, e.g.*, Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1385–86 (1992).

268 *See id.*

269 *See* COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61,402 (Nov. 5, 2021) (the Supreme Court later granted a stay of the rule, leading OSHA to withdraw it. *See* NFIB v. Dep't of Lab., 142 S. Ct. 661 (2022); COVID-19 Vaccination and Testing; Emergency Temporary Standard, 87 Fed. Reg. 3928 (Jan. 26, 2022).

slow, or sometimes outright kill, rulemaking attempts.[270] In combination with the logical outgrowth doctrine—which requires final rules to be a logical outgrowth of the information contained in the notice of proposed rulemaking—ossified notice requirements have further neutered the public comment process.[271] Agencies are often unable or unwilling to modify a final rule in response to comments, meaningful or otherwise.[272] The ossification debates rage on,[273] and further examination is (fortunately) beyond the scope of this Comment.

Judges and agencies are not the only actors with a hand in shaping rulemaking in the decades since *Vermont Yankee*.[274] Congress has tinkered with new broadly applicable statutes such as the Freedom of Information Act,[275] which have a semi-constitutional character similar to the APA and NEPA.[276] On a more granular level, Congress has also imposed hybrid processes in some agency-specific organic statutes.[277] The executive branch has also gotten into the game by overseeing agency action through situationally mandatory reviews by the Office of Management and Budget and the Office of Information and Regulatory Affairs.[278] Even agencies themselves have, on occasion, voluntarily adopted additional rulemaking procedures above the § 553 floor,[279] as indeed the AEC had in *Vermont Yankee*.[280] Despite these attempted reforms, our present world of informal rulemaking is certainly not ideal.[281] What could be the harm in imagining a different, perhaps better, rulemaking world?

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270 For another OSHA example, see OSHA's and EPA's nine-year struggle to promulgate a standard for a single chemical. McGarity, *supra* note 267, at 1388.

271 *See* Aaron L. Nielson, *Optimal Ossification*, 86 GEO. WASH. L. REV. 1209, 1216 (2018); Aaron L. Nielson, *Sticky Regulations*, 85 U. CHI. L. REV. 85, 97–98 (2018).

272 *See* McGarity, *supra* note 267, at 1390–92; *see generally* Phillip M. Kannan, *The Logical Outgrowth Doctrine in Rulemaking*, 48 ADMIN. L. REV. 213 (1996).

273 *See generally* Stuart Shapiro, *Embracing Ossification: With Donald Trump in the White House, Pro-Regulation Forces are Changing Their View on Regulatory Procedure*, REGULATION, Winter 2018–2019, at 8.

274 *See generally* Nielson, *supra* note 5.

275 5 U.S.C. § 552.

276 *See, e.g.*, Strauss, *supra* note 259, at 1392, 1406–07, 1420, 1422 n.113.

277 *See, e.g.*, Nielson, *supra* note 6, at 245, 256.

278 *See id.* at 256, 269 & n.213.

279 *See generally*, Bremer & Jacobs, *supra* note 7.

280 Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 528–29 (1978).

281 *See, e.g.*, McGarity, *supra* note 267, at 1385–87.

III. *Connecticut Yankee*: The World That Might Have Been

"You know about transmigration of souls; do you know about transposition of epochs—and bodies?"[282]

To test the plausibility of the Leventhalite reading and to judge its effects on the rulemaking process, we journey to the hypothetical world of *Connecticut Yankee*. For want of Mr. Twain's wit and imagination, and to retain some semblance of objective legal analysis, our look at that world will be brief, but hopefully fruitful. The basic conceit: Judge Leventhal leads the D.C. Circuit panel reviewing the fuel cycle rule and accompanying operating license determination. Justice Rehnquist pens a fiery response. What result?

A. *Leventhal Leads Off*

"THE TALE OF THE LOST LAND"[283]

As the Connecticut Yankee Nuclear Power Corporation entered the regulatory process in 1966, it could not have imagined what was to come. Work began along the banks of the Connecticut River following the AEC's grant of the construction license in 1967, a relatively painless process. The subsequent request for an operating license would not prove as painless. New environmentalist intervenors, emboldened by the D.C. Circuit's decision in *Calvert Cliffs*,[284] challenged the license on the basis of the unresolved problem of storing and processing spent fuel. The AEC dismissed the concerns as inapplicable to individual licensing applications, then turned around and began a rulemaking to address the problem for all future licensing proceedings. Shortly thereafter, both the adjudication and the rulemaking were hailed into the D.C. Circuit.

Arguments were heard before Judges Leventhal, Tamm, and Skelly Wright. Writing for the majority, Judge Leventhal conducted a thorough evaluation of the substance of the fuel cycle rule. In scrutinizing the positions of one AEC expert, Dr. Frank Pittman, Judge Leventhal concluded that the agency had failed to provide the proper basis for his technical conclusions, which formed a crucial piece of the rule. Citing to the Supreme Court's 1971 decision in *Citizens to Preserve Overton Park v. Volpe*,[285] Judge Leventhal found it to be his duty "to consider whether 'the decision was

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282 TWAIN, *supra* note 1, at 8.

283 *Id.* at 14.

284 Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971).

285 401 U.S. 402 (1971).

based on a consideration of the relevant factors and whether there has been a clear error of judgment.'"[286]

In this case, the agency's failure to provide all relevant information constituted a "critical defect in the decision-making process in arriving at" the fuel cycle rule.[287] The Judge reiterated his longstanding views that "the court and agency are in a kind of partnership relationship for the purpose of effectuating the legislative mandate," and that judges should "remain diffident in approaching problems of this technical complexity."[288] Nevertheless, it was simply "not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, [to a] critical degree, is known only to the agency."[289] Judge Leventhal concluded by announcing a general principle: agency "information should generally be disclosed as to the basis of a proposed rule at the time of issuance."[290] Since the AEC failed to meet this requirement, the court remanded both the fuel cycle rule and Connecticut Yankee's operating license back to the agency.

B. *Rehnquist Responds*

"It was pretty severe, but I was nettled."[291]

Connecticut Yankee appealed, and surprisingly, the Supreme Court granted certiorari. Justice Rehnquist, writing for the majority, took the D.C. Circuit to task. He began by recounting the history of the APA, describing its semiconstitutional status as "enact[ing] a formula upon which opposing social and political forces have come to rest."[292] Next, he delved into the APA's text, noting that the Court had generally held that § 553 "established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures."[293] While the Justice conceded that there may be times when additional impositions by courts were appropriate, such circumstances were necessarily rare.[294]

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286 Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 402 (D.C. Cir. 1973) (quoting *Overton Park*, 401 U.S. at 416). To avoid unnecessary confusion, quotations from the world of *Connecticut Yankee* are cited to their source in the real world, rather than a facsimile.

287 *Id.* at 392.

288 *Id.* at 393–94, 402.

289 *Id.* at 393.

290 *Id.* at 394.

291 TWAIN, *supra* note 1, at 20.

292 Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 523 (1978) (quoting Wong Yang Sung v. McGrath, 339 U.S. 33, 40 (1950)).

293 *Id.* at 524.

294 *See id.*

Turning to the particulars of the lower court decision, Justice Rehnquist began by rejecting Judge Leventhal's alleged reliance on *Overton Park*. That case contemplated a fact-specific inquiry into whether the reasoned decisions of the agency were to be found in the record.[295] Ordering additional procedures to fill out the record, beyond those required by § 553, was a step "usually to be avoided;"[296] a stricture which could not support Judge Leventhal's generalized disclosure requirement. Justice Rehnquist preempted the objection that Judge Leventhal had merely engaged in his trademark substantive review, noting that "the ineluctable mandate of the court's decision is that the procedures" which created the notice of proposed rulemaking "were inadequate."[297]

The Court's precedents supporting this conclusion "could hardly be more explicit."[298] *United States v. Allegheny-Ludlum Steel Corp.*,[299] a 1972 Justice Rehnquist opinion, upheld an agency's findings in the statement of basis and purpose against a substantive attack.[300] It did so by again returning to the text of the informal rulemaking provisions, the statutory *minima*.[301] *Florida East Coast Railway*, another Justice Rehnquist opinion, reaffirmed a strict reading of the APA's text by holding that formal rulemaking was triggered only by the magic phrase "on the record after opportunity for an agency hearing."[302] Less famously, the case resisted a substantive challenge to a notice of proposed rulemaking, even though "the initial notice of the proceeding by no means set out in detail what the [agency] proposed to do."[303] Twisting the knife, Justice Rehnquist quoted Judge Leventhal's friend and colleague, Judge Skelly Wright, for the proposition that the Supreme Court's "ringing message" of APA textualism had been heard by the D.C. Circuit and then ignored.[304] As Judge Leventhal's disclosure requirement found no support in either § 553 or Supreme Court precedent, the judgment was reversed. The NRC walked away with its fuel cycle rule intact, and the Connecticut Yankee plant could finally operate without a legal storm cloud overhead.

295 Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 419–20 (1971).

296 *Id.* at 420.

297 *Vermont Yankee*, 435 U.S. at 542.

298 *Id.* at 544.

299 406 U.S. 742 (1972).

300 *See id.* at 758.

301 *See id.*

302 United States v. Fla. E. Coast Ry., 410 U.S. 224, 237 (1973) (referencing APA § 553(c)).

303 *Id.* at 243.

304 J. Skelly Wright, *Court of Appeals Review of Federal Regulatory Agency Rulemaking*, 26 ADMIN. L. REV. 199, 206–07 (1974).

C. *Hybrid Rulemaking After* Connecticut Yankee

"When the spirit of prophecy comes upon you, you merely cake your intellect and lay it off in a cool place for a rest, and unship your jaw and leave it alone; it will work itself: the result is prophecy."[305]

The harsh language and potentially sweeping impact of the *Connecticut Yankee* opinion guaranteed it a place in administrative law textbooks for decades to come, though the actual impact of the decision appeared slight. Chief Judge Bazelon took it as a vindication of his doubts about the substance-process dichotomy, but his D.C. Circuit colleagues did not admit defeat. Instead, they read the case mostly as a reminder, a *strong* reminder to be sure, that substantive review of agency actions should be a narrow inquiry.[306] The D.C. Circuit continued its APA embellishments, though more circumspectly, and none were bold enough to try to resurrect Judge Leventhal's disclosure requirement. Chief Judge Bazelon went on ordering hearings and cross-examinations, though only in those rare circumstances where it was appropriate.

The crystal ball gets hazy here. Without the *Portland Cement*-style disclosure requirement beefing up judicial review of the notice process, the march of ossification was mitigated somewhat. With agencies permitted, more or less, to get by with just the § 553 required "description of the subjects and issues involved" in a notice of proposed rulemaking,[307] the process retained some of its vaunted flexibility. The comment process was occasionally interrupted by a judicially imposed hearing or cross-examination, but, like all common-law innovations, this eventually became routine and (relatively) predictable. The relaxation of notice requirements brought a concomitant loosening up of the statement of basis and purpose, as a larger universe of possible final rules logically outgrow from more general beginnings. And they all lived happily ever after.

IV. I-91, or: The Road From *Vermont* to *Connecticut*

"Wit ye not the law?"[308]

As we return to the real world, what can we take away from our sojourn? Is it possible to reconcile *Connecticut Yankee* with *Vermont Yankee*, the law we actually have? How so, and how much? What effects would embracing such a reading have, and how would those changes interact with other rulemaking reforms?

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305 TWAIN, *supra* note 1, at 234.

306 *See* Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 416 (1971).

307 5 U.S.C. § 553(b)(3).

308 TWAIN, *supra* note 1, at 314.

A. *A Hybrid Reading of* Vermont Yankee

"Intellectual 'work' is misnamed; it is a pleasure, a dissipation, and is its own highest reward."[309]

A threshold question before we even consider a new reading of *Vermont Yankee* is: why bother? Why not simply join the chorus of scholars crying out for a *Vermont Yankee II*? After all, we are all good textualists now.[310] Surely the bare text of the APA should govern, and the various judicial embellishments should be swept aside. Pursuing a new reading of a decades-old precedent to allow more intermeddling with agencies seems counterproductive when judges should get out of the game entirely, no?

While the prospect of a solidly textualist *Vermont Yankee II* is certainly attractive, it is also a pipe dream. As Professor Gillian Metzger has demonstrated, administrative common law is inevitable.[311] Administrative common law "plays too important a role in enabling the courts to navigate the challenges of modern administrative government" to ever be completely discarded.[312] The APA requires judicial review in § 702, and judges have a duty to make that review effective.[313] If the APA and applicable organic statutes do not provide the tools necessary to do so, judges will, and should, create them. As a prime example, recall the D.C. Circuit's practice through the 1960s and 1970s of essentially ignoring Supreme Court rulings.[314] There, despite "occasional stern rhetoric condemning administrative common law and no express judicial defense," the court continued to innovate ways to effectuate judicial review largely uninterrupted.[315] Recall also the survival of *Portland Cement*-related doctrines beyond *Vermont Yankee*.[316]

If we accept some amount of judicial input into the rulemaking process, we must then determine the form and scope of that input. The potential bounds of that determination, in turn, will be circumscribed by our understanding of *Vermont Yankee*, the undisputed king of "stern rhetoric condemning administrative common law."[317] As a jumping off point,

309 *Id.* at 242.

310 *See* Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), https://perma.cc/NHH9-4R3A.

311 *See* Metzger, *supra* note 8, at 1320–42, 1325 n.162. Professor Metzger continues on to show that administrative common law is also legitimate, which is a plus, though not particularly relevant here.

312 *Id.* at 1320.

313 5 U.S.C. § 702.

314 *See* Scalia, *supra* note 3, at 359–68.

315 Metzger, *supra* note 8, at 1320.

316 *See* Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 245–47 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part, concurring in the judgment in part, and dissenting in part).

317 Metzger, *supra* note 8, at 1320.

Professors Beermann and Lawson have identified three plausible readings of the opinion.[318] The broad reading resembles the wished-for *Vermont Yankee II*, essentially calling for an originalist understanding of the APA and administrative law circa 1946.[319] The "natural" reading would call for an originalist understanding of the APA "specifically with respect to agency procedures," effectively proscribing judicially imposed procedures throughout the APA, including in both rulemaking and adjudication.[320] The narrow reading would hew to the facts of the case and proscribe only judicially imposed procedures in the course of a rulemaking after the notice phase.[321] This narrow reading is closest to the canonical understanding.[322]

What are the features of a *Connecticut Yankee*–esque reading of *Vermont Yankee*? For starters, it is broader than the "natural" or narrow reading, since it rejects a strict substance-process dichotomy. Substantive judicial requirements can impose procedures on agencies just as readily as explicit procedural impositions, so a reading confined to proscribing specific procedures cannot be right. At the same time, the *Connecticut Yankee* reading is not coextensive with Beermann and Lawson's broad reading, since it envisions a continued, albeit limited, role for administrative common law innovations throughout the informal rulemaking process and the APA generally. The *Connecticut Yankee* reading, then, can perhaps best be described as the broad reading as it would have been interpreted and implemented by the D.C. Circuit of the 1960s and 1970s. Overt announcements of general, judicially imposed requirements beyond the text of § 553 are proscribed, but case-by-case evolutions of similar requirements over time continue: a hybrid reading for hybrid rulemaking.

While Beermann and Lawson list the broad reading of *Vermont Yankee* as plausible, they certainly do not consider it the best reading, noting inconsistencies with the Court's general trend towards substantive review.[323] Nevertheless, the broad reading is—to coin a phrase—a logical outgrowth of the opinion. Getting there begins with rejecting the substance-process dichotomy, which Justice Rehnquist does. Recall that Chief Judge Bazelon's lower court opinion explicitly imposed no specific procedures on the agency.[324] Accordingly, Justice Rehnquist had to look behind the curtain of the substantive requirements to reveal the procedural impositions within: "the ineluctable mandate of the court's decision is that the procedures

318 *See* Beermann & Lawson, *supra* note 22, at 868–73.

319 *Id.*

320 *Id*. at 871.

321 *Id.* at 868–73.

322 *Id.*

323 *Id.* at 870.

324 Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 541 (1978).

afforded . . . were inadequate."[325] As then-professor Scalia stated in his review of the case, "it is not possible to maintain a complete dichotomy between the procedures used and the adequacy of evidentiary support."[326] Indeed, the latter half of the opinion, concerning a companion case[327] and employing even more fiery language,[328] effectively drew no distinction, emphasizing that "administrative decisions should be set aside . . . only for substantial procedural or substantive reasons."[329]

The canonical reading holds that the Court not only appreciated the substance-process dichotomy, but that its harsh language represented a definitive end of the Leventhal-Bazelon debate on the subject. Some additional context may point away from this background assumption, making the broader reading more likely. First, the clearest source of the Court's harsh language was the D.C. Circuit's years of dodging administrative law rulings. It is "the exasperated tone of one not explaining a new point of law but unnecessarily reiterating an old one," rather than a particular ire towards Chief Judge Bazelon's procedural philosophy.[330] These common-law-style innovations had appeared in the shadows of Supreme Court rulings both substantive and procedural.[331] Second, the Court's unusual interest in the case, and therefore some of the strength of the holding, may have stemmed from a particular interest in nuclear power, as evidenced by other cases around the same time and Justice Rehnquist's own memos recounting his push for certiorari.[332] Finally, Justice Rehnquist's jurisprudence reveals a general diffidence towards powerful substantive review doctrines like those advanced by Judge Leventhal. While he did join the *State Farm* majority, Justice Rehnquist penned the partial dissent which embraced a very narrow view of what an agency needs to do to satisfy the "hard look" doctrine.[333]

With the benefit of hindsight, many of the Justice's dire predictions of what would follow from muscular procedural requirements have proven applicable to the various "substantive" doctrines that survived *Vermont*

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325 *Id.* at 542.

326 Scalia, *supra* note 3, at 391. One could imagine nearly pure procedural requirements—"the agency head shall sign his name at the bottom of each notice of proposed rulemaking"—just as one could imagine nearly pure substantive requirements—"the agency shall make good rules." Just about everything else, including the provisions of the APA, fall somewhere in the middle. *See also* Bremer & Jacobs, *supra* note 7, at 526–27.

327 *Vermont Yankee*, 435 U.S. at 527 (citing Aeschliman v. NRC, 547 F.2d 622 (D.C. Cir. 1976)).

328 *See* Scalia, *supra* note 3, at 370.

329 *Vermont Yankee*, 435 U.S. at 558.

330 Scalia, *supra* note 3, at 369.

331 *See id.* at 359–66.

332 *See* Metzger, *supra* note 10, at 159.

333 *See* Motor Vehicle Mfg. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 57–59 (1983) (Rehnquist, J., concurring in part).

Yankee. Unpredictability is, at least in some degree, a feature of any common-law system.[334] Were judicial expectations of what agency actions satisfied "hard look" review immediately predictable following *State Farm*? The answer must be no.[335] It is hard to see why a similar evolution into regularity would be impossible for "procedural" impositions like hearings and cross-examinations.[336] How about the possibility that agencies, in the face of such unpredictability, would be forced to expend maximal resources to insulate every agency action from a remand?[337] One can sift through the reams of ossification articles to see how that turned out under the various "substantive" doctrines.[338]

Another piece of Judge Leventhal's philosophy, the supposed agency-court partnership, has fared little better. At the time, Judge Henry Friendly could joke that courts had no problem declaring such a partnership because they, not the agencies, would be the superior partners.[339] Today, with the development of various deference doctrines, that dominance is far from

334 *See Vermont Yankee*, 435 U.S. at 546 (stating that judicial review would be "totally unpredictable" if judges were permitted to second-guess agency procedures).

335 *See, e.g.*, Jerry L. Mashaw, *The Story of* Motor Vehicle Manufacturers Association of the U.S. v. State Farm Mutual Automobile Insurance Co.*: Law, Science and Politics in the Administrative State*, *in* ADMINISTRATIVE LAW STORIES 334, 374–81, 386–89 (Peter L. Strauss ed., 2006) (discussing philosophical difficulties with the doctrine and recounting inconsistent applications to NHTSA rules in the years following *State Farm*).

336 Then-professor Scalia suggested that judges would bring institutional competencies to bear on such a project. Scalia, *supra* note 3, at 386–87 (noting that trying to force every administrative action into the APA framework "eliminates the justification (not to mention the purpose) . . . for restraining the courts from returning to their pre-APA ways of developing an administrative common law—a task they are at least as well equipped, and probably better motivated, to perform than are the substantive committees of Congress which consider procedural issues *en passant*").

337 *See Vermont Yankee*, 435 U.S. at 546–47.

338 If you insist, see generally McGarity, *supra* note 267; Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950-1990*, 80 GEO. WASH. L. REV. 1414 (2012); Richard J. Pierce, Jr., *Rulemaking Ossification is Real: A Response to* Testing the Ossification Thesis, 80 GEO. WASH. L. REV. 1493 (2012); William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393 (2000); Nielson, *Optimal Ossification*, *supra* note 271.

339 *See* Henry J. Friendly, "*Some Kind of Hearing*," 123 U. PA. L. REV. 1267, 1311 n.221 (1975).

clear.[340] Even the detailed and rigorous technical "steeping" that Judge Leventhal prescribed has atrophied, if it ever really existed at all.[341]

A continually evolving administrative common law does not necessarily mean a continually increasing share of judicial power.[342] The expansion of hearing and cross-examination requirements, even when judicially imposed, would not render agencies powerless to shape the process.[343] Chief Judge Bazelon predicted that a judicial focus on agency process might prove less intrusive than rigorous substantive review in the long run.[344] Would any agency today accept the possibility of holding a hearing in exchange for jettisoning the *Portland Cement* disclosure requirement? Could an administrative common law able to tinker with both agency "substance" and "procedure" effectuate the same level of judicial review in a more efficient way than the processes we live with now? Would agencies be less inclined to escape into regulatory dark matter if informal rulemaking *were* more efficient? At the very least, these are questions worth asking.[345]

B. *Waiting for* Connecticut Yankee

"Ah, please you sir, it hath no direction from here; by reason that the road lieth not straight, but turneth evermore . . . ."[346]

Even if we were inclined to embrace the *Connecticut Yankee* reading, what good would it do to do so today? We cannot wish into existence an alternative forty years of administrative common law development. The development that occurred, under the narrow Leventhalite reading, appears as unshakeable now as if it were set in portland cement. The Supreme Court seems loathe to revisit the issue, and a congressional overhaul of the APA, such as then-professor Scalia's fanciful proposal of fifteen-plus different statutory rulemaking procedures,[347] is not visible on the horizon.

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340 *See generally* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511; Richard J. Pierce, Jr., *The Future of Deference*, 84 GEO WASH. L. REV. 1293 (2016); Nicholas R. Bednar & Barbara Marchevsky, *Deferring to the Rule of Law: A Comparative Look at United States Deference Doctrines*, 47 U. MEM. L. REV. 1047 (2017).

341 *See* Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733, 756–64 (2011) (recounting the development of judicial deference on technical matters).

342 *See* Metzger, *supra* note 8, at 1346–47.

343 *See* Bremer, *supra* note 7, at 76–80 (describing agency tools for shaping hearing processes).

344 *See* Krotoszynski, *supra* note 14, at 999–1000; *supra* note 136 and accompanying text.

345 *See* William J. Brennan, Jr., *Introduction*, 63 GEO. L.J. 2, 4 (1974) (admiring "Judge Bazelon's firm conviction that asking the right questions is often a great deal more important than getting the right answers").

346 TWAIN, *supra* note 1, at 82.

347 *See* Scalia, *supra* note 3, at 408.

Change is difficult in the world of administrative law, as it should be.[348] Sometimes, the best we can do is create the proper atmosphere for change. A questioning attitude and a push for transparency are two tools for creating such an atmosphere. Just as judges should be more transparent about their use of administrative common law,[349] it may be time to more openly question the canonical reading of the case that has largely circumscribed that common law development for four decades. Ongoing reform efforts, whether they be in the realm of adjudication[350] or rulemaking,[351] can only be strengthened by such inquiries.

For the crowd waiting for *Vermont Yankee II*, *Connecticut Yankee* provides another arrow in the quiver. Delving beyond ongoing issues of law and policy, an appreciation of the Bazelon-Leventhal debates highlights the historical weakness of the canonical *Vermont Yankee* world we know—a world effectively created by coinflip when Justice Rehnquist attempted to lower the boom on hybrid rulemaking as a whole. And should *Vermont Yankee II* ever come to pass, fans of *Connecticut Yankee* and Chief Judge Bazelon's procedural hybrid rulemaking can rest safe in the knowledge that a fresh growth of administrative common law would be close behind.

Conclusion

"Let the record end here."[352]

For four decades the tale of *Vermont Yankee* has recounted Judge Leventhal's glorious victory over Chief Judge Bazelon, and the consignment of procedural hybrid rulemaking to the dustbin of history. Looking back now, it is unclear that this reading of the case was right, and even less clear that it was desirable. The alternate history of *Connecticut Yankee* suggests that a hybrid rulemaking system, carefully circumscribed but with more tools for judicial tinkering, could more efficiently and effectually empower judicial review of agency action. Whether such a system is an option now available to us is an open question. At the very least, however, the thought experiment forces us to consider that Chief Judge Bazelon's process-based approach may be more than an interesting, perhaps even illuminating, historical artifact. He may have been *right*.

348 *See* Nielson, *supra* note 5, at 758–61, 818.

349 *See* Metzger, *supra* note 8, at 1356–58.

350 *See, e.g.*, Michael S. Greve, *Why We Need Federal Administrative Courts*, 28 GEO. MASON L. REV. 765, 808–13 (2021).

351 *See, e.g.*, Nielson, *supra* note 6, at 242.

352 TWAIN, *supra* note 1, at 375.