

The Administrative Procedure Act, Its Legislative History, and Courts' Deference to Agencies' Legal Interpretations

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INTRODUCTION

In the *Chevron*¹ decision and cases following it, the U.S. Supreme Court and courts of appeal held that reviewing courts must give great deference to an agency's interpretation of the statute that it administers, even on issues of pure law. However, in *Chevron* and subsequent cases, courts have ignored the fact that the Administrative Procedure Act (APA), the fundamental bill of rights for the administrative state,² includes provisions that specify how judicial review should occur, including specifically the scope of review.³ Since being signed into law by President Truman in 1946, the provisions have remained in force without substantive amendment.

The provisions' clear language, their legislative history, and court decisions following 1946 make clear that the provisions were intended to codify the existing common law concerning judicial review of agency decisions as it existed in 1946. That law required courts to give some deference to agency decisions of fact or mixed questions of law and fact. However, it instructed courts to give no deference to agency decisions of law.

Accordingly, *Chevron* and the later decisions that interpreted it broadly are wrongly decided, in the following sense: the system of deference that the decisions establish even for agency's decisions of pure law conflicts with the commands of the APA.

I proceed as follows. In Part I, I discuss the language of the APA's provisions on judicial review, especially its clear language that courts should give agencies' decisions of law no deference. Part II then describes the history of judicial review of agency decisions leading up to the APA.

In Part III, I address the APA's history. I show that the APA was a compromise between supporters of the New Deal and the administrative state that administered it, on one hand, and opponents of the New Deal, on the other. Likewise, the common-law rules for judicial review of agency decisions that had developed by the early 1940s reflected this compromise. Courts in earlier decades had given little deference to agency decisions, tightly controlling and constraining agencies, especially during the first years of the New Deal. In the early 1940s, as Roosevelt appointed more judges, the courts began to give agencies some deference on questions of fact and mixed questions, but not on questions of pure law.

¹ *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

² George Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NORTHWESTERN LAW REVIEW 1557, 1558 (1996).

³ 5 U.S.C. 706.

In Part IV, I describe how most participants in the legislative process that led to the APA, as well as contemporary commentators and the courts, believed that the APA simply declared existing law on judicial review. Specifically, they indicated that the APA incorporated courts' existing system of deference to agencies' decisions on questions of fact and mixed questions, but no deference on questions of law.

Part V concludes that both the APA's clear language and its legislative history demonstrate that the *Chevron* system of deference to agency decisions on issues of law is inconsistent with a proper understanding of the APA.

In this paper, I do not address whether the *Chevron* system is good policy. Instead, I only examine the APA's provisions on judicial review and their legislative history. I am in a position to do this because I have published one of the leading studies on the APA's history.⁴ Instead of addressing whether *Chevron* is good policy, I show here only that it was inappropriate for the courts, beginning in 1984, to ignore the APA, and to change the law that the APA established. If the *Chevron* system is a better approach than the approach under the APA, then the new system should have been established not by the courts, but by legislation. That is, the system should have been changed, not by a court's decision, but only after hearings and other legislative proceedings such as the present one.

I. THE APA'S CLEAR LANGUAGE SUGGESTS NO DEFERENCE ON QUESTIONS OF LAW

The Supreme Court's *Chevron* decision, which is the foundation of the court's current system of deferring to an agency's interpretations of its governing statute, does not refer to the APA. It should have. The APA includes extensive provisions that govern judicial review of agencies' legal interpretations. The APA currently provides:

Scope of Review. [T]he reviewing court *shall decide all relevant questions of law, interpret constitutional and statutory provisions* and determine the meaning or applicability of the terms of an agency action. The reviewing court *shall ... hold unlawful and set aside agency action, findings, and conclusions found to be—(A) not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right ...*⁵

These provisions have not changed since 1946. They are, except for a renumbering, identical to the provisions of Section 10(e) of the APA as the provisions existed when the APA became law in 1946.⁶

A normal reading of the provisions would suggest that they command courts to decide questions of law themselves, giving no deference to agencies' interpretations. The provisions require that reviewing court "shall decide all relevant questions of law, interpret constitutional

⁴ See, *supra*, Shepherd at note 2.

⁵ 5. U.S.C. 706.

⁶ Sec. 10 (e). Scope of Review. ... [T]he reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall ... hold unlawful and set aside agency action, findings, and conclusions found to be ... (1) ... not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right ..."

provisions...” The provisions say nothing about giving deference to the agencies’ interpretations. The courts are simply required to “decide all relevant questions of law.”

If the APA’s drafters had desired to require deference, they knew how to express this desire. Where the drafters desired courts to defer to agencies’ findings, they expressed that clearly. For example, the provisions on review of agencies’ conclusions of fact indicate clearly that, in a proceeding involving a hearing, courts are to defer to the the agencies’ factual conclusions, if the conclusions are supported by substantial evidence. The original and current versions of the APA provide: “[The court] shall ... hold unlawful and set aside agency action, findings, and conclusions found to be ... unsupported by substantial evidence in any case [requiring a formal hearing] or otherwise reviewed on the record of an agency hearing provided by statute.”⁷

That is, the provisions on judicial review of agencies’ decisions of fact specifically require deference. The provisions on agencies’ decisions of law include no such requirement. The APA could hardly be clearer that no deference is required to agencies’ decisions of law.

After *Chevron*, some commentators have noted the APA’s conflict with *Chevron*. For example, Thomas Merrill notes:

“The one general statute on point, the Administrative Procedure Act, directs reviewing courts to ‘decide *all* relevant questions of law.’ If anything, this suggests that Congress contemplated courts would always apply independent judgment on questions of law, reserving deference for administrative findings of fact or determinations of policy.”⁸

To understand why the APA would establish this system of deference on questions of fact, but no deference on questions of law, we turn first to the history of how courts reviewed agency decisions before the APA.

II. THE LAW ON JUDICIAL REVIEW OF AGENCY DECISIONS BEFORE THE APA

Before the New Deal and in its early years, the courts were a major weapon that conservative business interests used to defend against actions by agencies. Sometimes, conservative courts, staffed by conservative judges from previous conservative administrations, would strike down whole New-Deal administrative systems.⁹

However, more frequently, conservative courts would constrain New Deal agencies’ exercise of their regulatory powers not by challenging the agencies’ existence, but by imposing close judicial review on the agencies’ individual decisions. As a leading text on administrative law notes,

“[J]udges used review of agency factfinding and legal determinations in order to exercise close and often exacting control over the agency’s regulatory powers. ... [T]he basic impact of hearing procedures and judicial review was to constrain the

⁷ APA Section 10 (e)(B)(5); 7 U.S.C. 706 (2) (E).

⁸ Thomas Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992):

⁹ See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (National Industrial Recovery Act); *United States v. Butler*, 297 U.S. 1 (1936) (Agricultural Adjustment Act). See also Shepherd, *supra* note 2, at 1562-63.

effective power of the new regulatory bodies to control private business conduct. . . . The courts rarely struck down the legislatures' creation of new administrative bodies on constitutional grounds; instead they exercised close review over particular agency decisions and procedures to hedge the exercise of administrative power."¹⁰

As Roosevelt continued to appoint liberal judges to the Supreme Court and lower courts, the judicial tide then turned. In contrast to the earlier conservative courts' hostility to New Deal programs, the newly liberal courts began to support the agencies.¹¹ An important way that the courts did this was to give agencies' decisions greater deference.

In a relatively short time, the Supreme Court (and with it, much of the lower federal judiciary) swung from almost undisguised hostility toward the new programs of administration to conspicuous deference. The availability of judicial review of administrative action was curtailed, and particular agency decisions were frequently sustained with judicial obeisance to the mysteries of administrative expertise. The defenders of the administrative process appeared to have substantially succeeded in insulating agency decisions from judicial check.¹²

In the early 1940s, a liberal Supreme Court issued several important decisions that established a new deferential approach for judicial review of agency decisions. Under the new approach, established in decisions such as *Dobson v. Commissioner*,¹³ *Gray v. Powell*,¹⁴ and *NLRB v. Hearst*,¹⁵ courts would as before give agency decisions of purely legal questions no deference. However, agency's decisions of both issue of fact and mixed issues of law and fact would receive deference.

In effect, the courts' approach was a compromise. It allowed New-Deal programs to breathe, while also giving business interests some recourse to the courts if agencies misinterpreted the law or if their fact-finding was egregiously faulty.

I now turn to a similar compromise: the provisions for judicial review in the APA.

III. THE LEGISLATIVE HISTORY OF THE APA'S PROVISIONS ON JUDICIAL REVIEW

The APA's provisions on judicial review, like the entire APA, were a compromise. To understand the history of the APA's provisions on judicial review, it is necessary first to understand the history of the APA as a whole.

A. A SUMMARY OF THE APA'S HISTORY

The APA was a compromise between liberal New Dealers, including President Roosevelt, and conservative opponents of the New Deal.¹⁶ The balance that the APA struck

¹⁰ Richard Stewart *et al.*, ADMINISTRATIVE LAW AND REGULATORY POLICY 19-20 (2nd ed. 1992).

¹¹ See Shepherd, *supra* note 2, at 1562-63.

¹² Richard Stewart *et al.*, *supra* note 10, at 21.

¹³ 320 U.S. 489 (1943)

¹⁴ 314 U.S. 402 (1941)

¹⁵ 322 U.S. 111 (1944)

¹⁶ For a thorough exploration of the APA's history, see Shepherd, *supra* note 2.

between promoting individuals' rights and maintaining agencies' policy-making flexibility has continued in force, with only minor modifications, until the present.¹⁷ The APA's impact has been large. It has provided agencies with broad freedom, limited only by relatively weak procedural requirements and modest judicial review, to create and implement policies in the many areas that agencies touch: from aviation to the environment, from labor relations to the securities markets. The APA permitted the growth of the modern regulatory state.

The APA and its history are central to the United States' economic and political development. In the 1930s and 1940s when the APA was debated, much in the United States was uncertain. Many believed that communism was a real possibility, as were fascism and dictatorship. Many supporters of the New Deal favored a form of government in which expert bureaucrats would influence even the details of the economy, with little recourse for the people and businesses that felt the impacts of the bureaucrats' commands. To New Dealers, this was efficiency. To the New Deal's opponents, this was dictatorial central planning. The battle over the APA helped to resolve the conflict between bureaucratic efficiency and the rule of law, and permitted the continued growth of government regulation. The APA expressed the nation's decision to permit extensive government, but to avoid dictatorship and central planning. The decision has shaped the nation for seventy years.

However, the APA's development was not primarily a search for administrative truth and efficiency. Nor was it a theoretically centered debate on appropriate roles for government and governed. Instead, the fight over the APA was a pitched political battle for the life of the New Deal. The more than a decade of political combat that preceded the adoption of the APA was one of the major political struggles in the war between supporters and opponents of the New Deal. Republicans and Southern Democrats sought to crush New Deal programs by means of administrative and judicial controls on agencies. Every legislator, both Roosevelt Democrats and conservatives, recognized that a central purpose of the proponents of administrative reform was to constrain liberal New Deal agencies, especially the National Labor Relations Board and Securities and Exchange Commission. They understood, and stated repeatedly, that the shape of the administrative law statute that emerged would determine the shape of the policies that the New Deal administrative agencies would implement.

Some of the most important events leading up to the APA's becoming law were as follows. After more than a decade of halting attempts to pass legislation to govern administrative agencies, the U.S. House and Senate in 1940 passed the conservative Walter-Logan Bill, which would have constrained administrative agencies strictly.¹⁸ President Roosevelt then vetoed the bill, and the House failed to override the veto.¹⁹ The veto preserved New-Deal agencies' ability to function freely.

In early 1941, the Attorney General's Committee on Administrative Procedure (the Attorney General's Committee) issued its report.²⁰ The Roosevelt administration had established the committee to investigate administrative agencies and propose legislation. The committee's report contained two reports and two proposed bills, the first from the committee's liberal

¹⁷ See William H. Allen, *The Durability of the Administrative Procedure Act*, 72 VA. L. REV. 235, 235-52 (1986).

¹⁸ Shepherd, *supra*, note 2, at 1598-1625.

¹⁹ *Id.* at 1625-1632.

²⁰ FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE (ATTORNEY GENERAL'S COMMITTEE'S REPORT) (1941).

majority and the other from its conservative minority. As might be expected, the majority bill placed few limits on agencies. In contrast, the minority bill imposed many restrictions.²¹

When World War II began, efforts on administrative-law reform did not cease. Instead, the efforts receded behind the scenes, to a continuing process of quiet negotiations. The process concluded with enactment of the APA.

Central to the process's success was the appointment in 1941 of Carl McFarland as chairman of the American Bar Association's Special Committee on Administrative Law. McFarland was trusted by both the Roosevelt administration and by conservatives; although the Roosevelt administration respected him, he had been a part of the conservative minority in the Attorney General's Committee.²² McFarland then led the process of negotiation, proposal, and counter-proposal that led to the APA.²³

The APA that finally emerged in 1946--after more than a decade of legislative activity that saw scores of bills, many days of hearings, many committee reports, and a presidential veto--did not represent a unanimous social consensus about the proper balance between individual rights and agency powers. The APA was a hard-fought compromise that left many legislators and interest groups far from completely satisfied. Compared to the status quo, liberals gained much. But conservatives also gained—especially on judicial review, as we will see below. Congressional support for the bill was unanimous only because many legislators recognized that, although the bill was imperfect, it was better than no bill. The APA passed only with much grumbling. The APA was a cease-fire armistice agreement that ended the New Deal war on terms that favored New Deal proponents.²⁴

B. THE SPECIFIC HISTORY OF THE APA'S JUDICIAL-REVIEW PROVISIONS.

Like the APA itself, the APA's section 10 on judicial review was also a compromise. The path to the compromise was as follows.

The Walter-Logan bill, which the House and Senate passed in 1940, including broad standing for judicial review of most any agency decision.²⁵ Critics of the bill argued that this would paralyze agencies. "This would simply mean that United States judges would substitute their views for those of the administrative officer. ... This would involve endless litigation. Anyone aggrieved could bring an action and tie into knots the activities of the agency for months and months."²⁶ For this and other reasons, President Roosevelt vetoed the bill.

The majority and minority reports of the the Attorney General's Committee, mentioned above, discussed in detail the scope of judicial review of agency actions. The majority report, as might be expected of a group that supported the New Deal and its agencies, urged that judicial review should balance protecting private interests from unjust agency action with protecting agencies' freedom to conduct their business:

[W]e expect judicial review to *check*—not to *supplant*—administrative action. Review must not be so extensive as to destroy the values—expertness,

²¹ Shepherd, *supra*, note 2, at 1632-1636.

²² *Id.* at 1645-1647.

²³ *Id.*

²⁴ *Id.* at 1675-1678.

²⁵ *Id.* at 1600.

²⁶ Representative Emanuel Celler, H.R. Rep. No. 1149, 76th Cong., 3d Sess. (1940). *See also* Shepherd, *supra* note 2, at 1605.

specialization, and the like—which, as we have seen, were sought in the establishment of administrative agencies.²⁷ (emphasis original)

The majority report then indicated that the current common law provided for no judicial deference for issues of law, but for deference for issues of fact:

“In the language of judicial review sharp differentiation is made between questions of law and questions of fact. The former, is is uniformly said, are subject to full review, but the latter, in the absence of statutory direction to the contrary, are not, except to the extent of ascertaining whether the administrative finding is supported by substantial evidence.”²⁸

However, it was hard to predict when courts would decide that an issue was of law or of fact: “In numerous decisions courts have held that the specific issues involved were questions of fact or questions of law. But definite criteria for ascertaining confidently which is which prior to court decision have not yet developed.”²⁹ This was the issue that the Supreme Court would attempt to resolve in the next few years by establishing the distinction between issues of law and issues of fact or mixed issues of law and fact.³⁰

The majority report then proposed that courts should consider altering existing law to adopt the equivalent of the *Chevron* doctrine, with courts giving deference even to agencies’ decisions of law:

We may expect judicial review, in the performance of this function of control, to speak the final word on interpretation of law, both constitutional and statutory. This is not to say that the courts must always substitute their own interpretations for those of the administrative agencies. Their review may, in some instances at least, be limited to the inquiry whether the administrative construction is a permissible one.³¹

Likewise, the majority report hoped that:

Even on questions of law judgment seems not to be compelled. The question of statutory interpretation might be approached by the court *de novo* and given the answer which the court thinks to be the “right interpretation.” Or the court might approach it, somewhat as a question of fact, to ascertain, not the “right interpretation,” but only whether the administrative interpretation has substantial support.³²

If adopted, such an approach would have furthered the Roosevelt administration’s goal of further insulating New Deal agencies from judicial disruption. The majority report could, of course, cite

²⁷ ATTORNEY GENERAL’S COMMITTEE’S REPORT, *supra* note 20, at 77.

²⁸ *Id.* at 88.

²⁹ *Id.*

³⁰ See cases cited *supra* at notes 13-15.

³¹ ATTORNEY GENERAL’S COMMITTEE’S REPORT, *supra* note 20, at 78.

³² *Id.* at 90.

no Supreme Court decision to support its proposal; the majority report had already confirmed that existing Supreme Court precedent required courts to grant no deference to agency decisions of law. However, the majority report cited one lower-court decision from three years earlier that endorsed this novel approach.³³

The majority's proposed bill contained no provision that specified the scope of review.³⁴ The report suggested that, instead of imposing comprehensive rules for judicial review for all agencies, Congress should address specific legislation to specific agencies as problems arose in them:

When and if the Congress is dissatisfied with the existing review of particular types of administrative determinations, it then may and should, by specific and purposive legislation, provide for such change as it desires. Only by addressing itself to particular situation, and not by general legislation for all agencies and all types of determination alike, can Congress make effective and desirable change.³⁵

Of course, an additional unexpressed reason may have been that the absence of a statutory specification of the scope of judicial review would permit a liberal Supreme Court to continue to provide ever greater deference to agency decisions. Indeed, in the absence of statutory standards, the Supreme Court might even adopt the majority report's proposal of providing deference to agencies even on issues of law.

The minority report, offered by the committee's more-conservative members, including Carl McFarland, was different. It proposed a bill that included a section that imposed specific standards for judicial review.³⁶ The section was the forerunner to the provisions that eventually appeared in the APA.

The minority explained that the legislation would prevent courts from further changing standards of review: "We believe, however, that Congress should prescribe the scope of judicial review rather than leave it to the courts to venture into this controversial field upon their own initiative and without needed statutory direction."³⁷ Implicit is the minority's recognition that specific standards would prevent the liberal Supreme Court from accepting the majority report's suggestion of providing deference even on agencies' decisions of law.

As the war intervened, negotiations over the APA proceeded behind the scenes, moderated by Carl McFarland.³⁸ The bill that emerged from the process in 1945 and became the APA was a compromise. It offered much to liberals.³⁹ But it also offered important concessions to conservatives. One of the important concessions to conservatives was the APA's Section 10 on judicial review.

Section 10 of the APA includes specific standards for judicial review. This approach accepts the recommendation of the conservative minority report from the Attorney General's Committee, and rejects the recommendation of the liberal majority's report. This is not entirely surprising because McFarland was a member of the Attorney General's Committee's minority.

³³ S.E.C. v. Associated Gas & Election, 99 F. 2d 795, 798 (C.C.A. 2d 1938).

³⁴ *Id.* at 191-202

³⁵ *Id.* at 92.

³⁶ *A Code of Standards of Fair Administrative Procedure, Section 211, Judicial Review, in id.* at 230.

³⁷ *Id.* at 209.

³⁸ See *supra* text at notes 22-23.

³⁹ Shepherd, *supra* note 2, at 1765-1678.

Moreover, the standards reject the proposal from the majority report that courts provide *Chevron*-like deference to agencies' decisions of law: I have already discussed how the provisions' clear language requires deference for agencies' decisions of fact, but indicates no deference for decisions of law.⁴⁰

IV. CONTEMPORARY UNDERSTANDING OF APA SECTION 10'S MEANING

At the time of the APA's adoption, no legislative participants, commentators, or judges understood the APA's provisions on judicial review to require deference to agencies' decisions on issues of law. That is, none understood the APA to endorse *Chevron*-style deference.

Instead, most understood the APA to confirm the Supreme Court's contemporary standards for judicial review. Recall that the contemporary standards were no deference on agencies' decisions of law, but deference on questions of fact and mixed questions of law and fact.⁴¹

A small minority indicated that the APA required *less* deference than under contemporary common law, the opposite of *Chevron*-style deference.

A. UNDERSTANDING OF LEGISLATIVE PARTICIPANTS

People and committees that were most central to the APA's creation and adoption understood its provisions on judicial review to codify existing Supreme Court doctrine.

In a document that accompanied the bill, the Senate Judiciary Committee, which had been responsible for the bill, noted:

A restatement of the scope of review, as set forth in subsection (e), is obviously necessary lest the proposed statute be taken as limiting or unduly expanding judicial review. ... Subsection (e), therefore, seeks merely to restate the several categories of questions of law subject to judicial review. ... The several categories, constantly repeated by courts in the course of judicial decisions or opinions, were first established by the Supreme Court as the minimum requisite under the Constitution and have also been carried into State practice, in part at least, as the result of the identical due process clauses of the Fourteenth Amendment, applicable to the States, and the Fifth Amendment, applicable to the Federal Government.⁴² (citations omitted)

The separate report of the Senate Judiciary Committee notes about section 10 (e), "This subsection provides that questions of law are for courts rather than agencies to decide in the last analysis and it also lists the several categories of questions of law."⁴³ The House Committee report says exactly the same thing.⁴⁴

⁴⁰ See *supra* text at note 5-8.

⁴¹ See *supra* text at notes 13-15.

⁴² SENATE JUDICIARY COMMITTEE PRINT (June 1945), in ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, 1944-46 [LEGISLATIVE HISTORY] 39(1946).

⁴³ SENATE, REPORT ON THE COMMITTEE ON THE JUDICIARY ON S.7 (November 19, 1945), in LEGISLATIVE HISTORY, *supra* note 42, at 185, 214.

⁴⁴ REPORT OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES ON S.7. (May 3, 1946), in LEGISLATIVE HISTORY, *supra* note 42, at 278.

Likewise, in written testimony to the House Judiciary Committee in 1945, Tom Clark, the attorney general noted of section 10 generally, “This section, in general, declares the existing law concerning judicial review.”⁴⁵ Specifically, as to the provisions on judicial review, Clark noted, “Section 10 (e): This declares the existing law concerning the scope of judicial review.”⁴⁶

Individual representatives also confirmed this interpretation during debate in the House.⁴⁷

In addition, Carl McFarland, who led the APA’s creation, indicated repeatedly that the APA confirmed existing rules for the scope of review. For example, in hearings on the APA before the House Judiciary Committee in 1945, McFarland noted:

[W]e do not believe the principle of review or the extent of review can or should be greatly altered. . . . We believe that about all the statute should or could do would be to state the form of action, the type of acts that are reviewable in accordance with the present law, the authority of the courts to grant temporary relief so that review may be useful, but that the scope of review should be as it now is.⁴⁸

Rep. Walter’s follow-up question makes clear that “as it now is” refers to the Supreme Court’s existing approach.⁴⁹

Similarly, at a panel in 1947, McFarland was asked whether the APA changed the *Dobson* rule. *Dobson* was one of the Supreme Court’s decisions that provided for deference on fact questions and mixed question, but no deference on questions of law.⁵⁰

Question: I wonder if Mr. McFarland would care to comment on the effect of the use of the word “substantial” in the statute in connection with the evidence upon which judicial review is based—as to whether he thinks the *Dobson* rule is affected by the state?

Mr. McFarland: I can answer your question very simply by saying no.⁵¹

Likewise, shortly after the APA became law, the attorney general produced a manual for understanding the statute. It notes, “The provisions of section 10 constitute a general restatement

⁴⁵ *Appendix to Statement by Attorney General Tom Clark, in Id.* at 229

⁴⁶ *Id.* at 230.

⁴⁷ Rep. Walters: “Subsection (e) of section 10 requires courts to **determine independently** all relevant questions of law, including the interpretation of constitutional or statutory provisions . . .” (emphasis added). LEGISLATIVE HISTORY, *supra* note 42, at 370. Rep. Springer: “In those cases where these decisions are found to be . . . not in accordance with the law, the decision can be set aside.” *Id.* at 377. Rep. Doliver: “Not only does it promote uniformity but it codifies the procedures in a court review.” *Id.* at 380.

⁴⁸ ADMINISTRATIVE PROCEDURE, HEARINGS BEFORE THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES, 79TH CONGRESS, 1ST SESSION, JUNE 21, 25, 26, 1945, *in* LEGISLATIVE HISTORY, *supra* note 42, at 84.

⁴⁹ “Mr. Walter. You say ‘as it now is.’ Frankly, I do not know what it now is; and I do not know whether the rule as laid down in the Consolidated Edison case is the law, or what the law is. I am not saying that because the Supreme Court apparently changes its mind daily, but what is the rule?” LEGISLATIVE HISTORY, *supra* note 42, at 84.

⁵⁰ *See* text at notes 13-15.

⁵¹ Carl McFarland, *Response to Mr. Blachly’s Critique, Discussion, in THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES* 69 (1947).

of the principles of judicial review embodied in many statutes and judicial decisions.”⁵² Specifically, discussing section 10(e), the section on judicial review’s scope, the manual indicated, “This restates the present law as to the scope of judicial review.”⁵³

The manual also discusses section 10(e)(B), which includes provisions that require the agency to “hold unlawful and set aside agency action, findings, and conclusions found to be (1) ... otherwise not in accordance with law ... (2) contrary to constitutional right ... (3) in excess of statutory jurisdiction ... or short of statutory right.” The manual concludes, “The numbered clauses of section 10(e)(B) restate the scope of the judicial function in reviewing final agency action.”⁵⁴

B. UNDERSTANDING OF CONTEMPORARY COMMENTATORS

Most contemporary commentators indicated that the APA codified existing Supreme-Court precedent on judicial review. For example, Alfred Scanlon wrote in 1948 that “the Administrative Procedure Act was not intended to upset the existing rules or principles of judicial review of administrative action [because] congress was aware of the existing principles of judicial review when it passed the Act, and ... congress merely restated them.”⁵⁵

Specifically, Scanlon addressed the first sentence of section 10(e), the section that directs courts to “decide all relevant questions of law, interpret constitutional and statutory provisions...”. He noted: “The first sentence [of section 10(e)] would appear to be quite simply a restatement of the present powers which reviewing courts possess, and frequently exercise, of reviewing relevant questions of constitutional and statutory law ...”⁵⁶

Likewise, Reginald Parker wrote in 1951: “The new law does no more than restate the wide and vague grounds upon which judicial review may be sought.”⁵⁷ In addition, Parker noted specifically that “there is no change in law of judicial review even in the hotly contested field of ‘mixed’ questions.”⁵⁸

Another commentator noted, in an article entered into the Congressional Record during debate on the bill:

Subsection (a) provides that any party adversely affect by any administrative action, rule, or order within the purview of the act or otherwise presenting any

⁵² Tom Clark, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 93 (1947)

⁵³ *Id.* at 108.

⁵⁴ *Id.*

⁵⁵ Alfred Scanlon, *Judicial Review Under the Administrative Procedure Act—In which Judicial Offspring Receive a Congressional Confirmation*, 23 NOTRE DAME LAWYER 501, 502 (1948). “This writer’s personal view is that no fundamental change was intended as to the scope of judicial review.” *Id.* at 528. Likewise,

At the risk of repetition, it can be concluded that the legislative intent behind the provisions of Section 10, taken individually or collectively, was to restate the existing principles governing judicial review of administrative actions. ... Congress has merely restated the home-made principles which the judicial process already had fashioned.

Id. at 544-545.

⁵⁶ *Id.* at 529.

⁵⁷ Reginald Parker, *The Administrative Procedure Act: A Study in Overestimation*, 60 YALE LAW JOURNAL 581, 590 (1951)

⁵⁸ *Id.* at 590, n. 85.

issue of law shall be entitled to judicial review thereof in accordance with this section, and reviewing courts are given plenary power with respect thereto. I shall not attempt here to make crystal clear what “an issue of law” is as distinguished from “an issue of fact” or a “mixed issue of law and fact.” I suspect the courts will wrestle with that problem a long, long time.⁵⁹

Some modern commentators have confirmed that the APA codifies pre-existing common-law rules. For example, Richard Stewart notes that the APA’s provisions on judicial review “essentially codify preexisting judge-made principles of administrative law.”⁶⁰

A small minority of commentators suggested that the APA changed existing rules to require court to give agencies *less* deference than before.⁶¹ None suggested that the APA did the opposite, and required *Chevron*-style deference.

C. UNDERSTANDING OF CONTEMPORARY COURTS

The courts also understood that the APA confirmed existing law on deference to agencies’ decisions of law. The approach that the Supreme court took before the APA (deference on fact questions and mixed questions but no deference on issues of law) was the same approach that the court used directly after the APA became law, and then for many years.⁶² If the Court had understood the APA to change the scope of judicial review, then the APA’s adoption would have caused the court to change its approach. Contemporary commentators made this same point.⁶³

V. THE APA IS INCONSISTENT WITH *CHEVRON*

The APA’s provisions on judicial review are inconsistent with the *Chevron* doctrine. The *Chevron* doctrine requires courts to give deference to an agency’s interpretation of its governing statute. The APA’s provisions on judicial review, which have remained unchanged since 1945, clearly require courts to give no deference to agencies’ decisions of law. The APA’s legislative history confirms this.

Instead, the legislative history reveals that the APA codifies the system for judicial review that the Supreme Court had created in the early 1940s. Reviewing courts would give no deference on issues of law, but would offer some deference on issues of fact and mixed issues of law and fact.

This analysis provides a possible explanation for why the *Chevron* doctrine appeared 38 years after the APA’s adoption, and not sooner. For many years, memories of the APA’s true meaning were fresh. Only when memories started to fade, or to die out, did it become possible for the courts to adopt an approach that ignored administrative law’s fundamental statute.

⁵⁹ Allen Moore, *The Proposed Administrative Procedure Act*, DICTA (1945), including in Congressional Record in LEGISLATIVE HISTORY, *supra* note 42, at 327.

⁶⁰ Stewart, *supra* note 10, at 25.

⁶¹ See, e.g., John Dickinson, *The Judicial Review Provisions of the Federal Administrative Act (Section 10) Background and Effect*, in THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES 546 (1947);

⁶² See, e.g., O’Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504 (1951).

⁶³ See Scanlon, *supra* note 55, at 532-33. Cf. Moore, *supra* note 57, at 334-335 (section 10 (e) may be misinterpreted to require less deference than before).