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The Administrative Procedure Act at 75: Observations and Reflections

Paul R. Verkuil^{1*}

Introduction

It is a matter of both shock and satisfaction that thirty-five years ago I helped convene, as Chair of the American Bar Association (“ABA”) Administrative Law and Regulatory Practice Section, a commemorative session on the 40th Anniversary of the Administrative Procedure Act (“APA”).² The event was held in Williamsburg, Virginia, on the occasion of the Section’s spring meeting. The event’s stars were two administrative law scholars, Walter Gellhorn and Kenneth Culp Davis—the “founding fathers” present at the APA’s creation. I had the pleasure—honor, really—of interviewing these giants of our field and they performed admirably, offering vivid details about the APA’s formation and the main players in the decades’ long drama that it produced. One must read the article in its entirety to get the full effect—especially the banter between Walter and Ken—but I will try to share some of the highlights, keeping in mind the relevance of 1946 and 1986 to the present. It is remarkable, and even reassuring, how much disputes from the earlier periods resonate with current controversies over the Act and the regulatory process.

This essay offers the following conclusions: (1) we overlooked important APA founding fathers; (2) the APA is venerated but may be overrated; and (3) the infamous 1930s administrative law denigrator, Roscoe Pound, has returned with a new following. To remind everyone about the pre-APA situation, several events need to be briefly noted. Largely authored by Dean Roscoe Pound, the 1939 ABA Report decried “administrative absolutism” and sought to judicialize the administrative process.³ This prompted Congress to pass the Walter–Logan bill in 1940,⁴ which transferred jurisdiction over much of the administrative process to the courts. President Franklin D. Roosevelt saw the statute’s impracticability. In his veto message,⁵ President Roosevelt said he wanted the more balanced approach contained in the then-impending 1941 Report of the Attorney General’s

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² See Paul R. Verkuil, Walter Gellhorn & Kenneth Culp Davis, *Present at the Creation: Regulatory Reform Before 1946*, 38 ADMIN. L. REV. 511, 511 (1986).

³ *Report of the Special Committee on Administrative Law*, 64 ANN. REP. A.B.A. 575, 579 (1939); see also John D. O’Reilly, Jr., *Administrative Absolutism*, 7 FORD. L. REV. 310, 310–11 (1938); George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 NW. U. L. REV. 1557, 1590–91 (1996); Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 269, 276–79 (1978).

⁴ See *Logan-Walter Bill Fails*, 27 A.B.A. J. 52, 53–54 (1941).

⁵ See *id.* at 52–53.

Committee on Administrative Procedure.⁶ Then, after Pearl Harbor, World War II took center stage, putting administrative law reform on the legislative shelf. After the war, in 1946, Senator Patrick McCarran conducted committee hearings⁷ with the 1941 Report—including both majority and minority views—as the discussion’s centerpiece.⁸ Ultimately, the APA Bill emerged from the minority position, unanimously passed both chambers without a floor discussion, and President Harry S. Truman signed it into law.⁹

I. Who Were the APA’s Founding Fathers, and Why Does it matter?

At the 40th Anniversary proceedings, the ABA’s Administrative Law and Regulatory Practice Section instinctively designated Walter and Ken founding fathers” because they were the essential drafters of the 1941 Report and produced the most influential scholarship on administrative law and the APA. Their casebooks are still being published today under different authors.¹⁰ In 1986, Walter and Ken were the giants of the field, and it was natural to call them APA founders. But was it accurate to do so? After rereading both authors’ remarks, I am not sure we got it right. Remember that the 1941 Report expressed two views: (1) the majority (led by Walter and supported by Attorney General Dean Acheson) which did not favor a generalized APA statute; and (2) the minority (led by Carl McFarland for the ABA) which not only favored such a statute, but produced one for the Congress to vote on unanimously in 1946.¹¹ The majority view was that agency practices were too varied to make an APA-like statute useful or even workable.¹² Walter’s staff conducted studies of forty agencies to prove how different their processes were.¹³ When asked in 1986 whether he still stood by what was now the minority view—that we would be better off without the

⁶ See FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 77-8, at 251 (1941) (hereinafter ATTORNEY GENERAL’S REPORT).

⁷ See ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 79-248, 79th Cong., 2d Sess. 297 (1946).

⁸ See *id.*

⁹ Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946); see also J. Lyn Entrikin Goering, *Tailoring Deference to Variety with a Wink and a Nod to Chevron: The Roberts Court and the Amorphous Doctrine of Judicial Review of Agency Interpretations of Law*, 36 J. LEGIS. 18, 32 (2010).

¹⁰ The Davis Treatise has been taken over and largely rewritten by Professor Richard J. Pierce and Professor Kristin E. Hickman. KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE (6th ed. 2020). The Gellhorn & Byse Casebook now has numerous coauthors, led by Professor Peter Strauss. See PETER L. STRAUSS, TODD D. RAKOFF, GILLIAN E. METZGER, DAVID J. BARRON & ANNE JOSEPH O’CONNELL, GELLHORN AND BYSE’S ADMINISTRATIVE LAW, CASES AND COMMENTS (12th ed. 2018).

¹¹ See ATTORNEY GENERAL’S REPORT, *supra* note 6 at 191; see also Goering, *supra* note 9, at 32.

¹² See *id.* at 192.

¹³ See *id.* at 4. These studies resulted in twenty-seven monographs that formed the empirical basis for the majority’s views in the 1941 Report. Senate Document No. 186, 76th Cong., 2d sess.

APA today—Walter did not equivocate: “I do persist in the minority view.”¹⁴ Although Ken seemingly valued the APA more (especially the notice-and-comment rulemaking provisions), it is fair to say that these great figures were not the APA’s founders, but were rather among its chief detractors.

Who is the real founder then? Aside from the politicians like Senator McCarren, there is only one plausible candidate: Carl McFarland. McFarland was a complicated figure of the New Deal period. He studied law at the University of Montana and ultimately received his Doctor of Judicial Science from Harvard Law School, becoming one of the New Deal acolytes that Felix Frankfurter nurtured. But practicing law in the District of Columbia and serving as President of the University of Montana moderated his fervor.¹⁵ Taking over for Dean Pound, he led the ABA Committee that would finally propose the APA for enactment.¹⁶ In doing so, he became the catalytic figure who moved the ABA from archly conservative positions against regulatory administration to support for the procedural compromises that the APA contained. By turning the Attorney General’s Report’s minority position into law, McFarland effectively found a third way.¹⁷ He navigated between broad judicial control over the administrative process favored by the Walter–Logan ABA backed coalition and the position advocating for no need of any new oversight favored by the Gellhorn–Davis majority on the Attorney General’s Report. While they viewed him as conservative, Walter and Ken admired McFarland’s work on the APA and his ability to convince Congress to get it passed.¹⁸ Ken also gave McFarland credit for the drafting, as well as political achievements, noting “[a]lthough I can’t prove it, I think he was probably the originator of notice and comment rulemaking.”¹⁹ Coming from Ken that is no small compliment. When one measures the APA’s true importance, section 553’s informal rulemaking provision may be its most impressive contribution. As commonly understood today, the real action in administrative law lies in rulemaking rather than adjudication, the 1930s’ *bête noire* of the conservatives.²⁰

¹⁴ Verkuil et al., *supra* note 2, at 522.

¹⁵ See Obituary, *Carl McFarland, U-Va. Law Professor, Former President of Montana State U.*, WASH. POST (May 18, 1979), <https://perma.cc/2RYC-NJVX>.

¹⁶ In his later years, McFarland taught Administrative Law at the Virginia Law School, where I missed the chance to take his class, opting for a brash newcomer, Roy Schotland, who later became a famous member of the Georgetown Law faculty. Roy was a great teacher who motivated me to pursue administrative law, but I often wonder how much I missed by not getting Carl’s personal take on the APA’s formation.

¹⁷ McFarland’s approach was to avoid “any thoughtless aping of judicial forms” and create a new administrative adjudicative process. See Carl McFarland, *The False Standard in Administrative Organization and Procedure*, 27 CORNELL L. Q. 433, 442 (1942).

¹⁸ For today’s legislative drafters, this achievement—a unanimous bicameral outcome—must seem like an impossible dream.

¹⁹ Verkuil et al., *supra* note 2, at 523.

²⁰ See David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 922 (1965).

In 1946, the ABA awarded McFarland the American Bar Association Medal, honoring his accomplishments in enacting the APA.²¹ But in 1986, the ABA's Administrative Law and Regulatory Practice Section missed the opportunity to recognize Carl.²² Perhaps it should acknowledge him now as the one who did the most to establish the APA. It should also be recognized as a politically deft achievement. Whether the APA would receive similar support in the contested legislative world of today is an intriguing question.

II. Is the Administrative Procedure Act Overrated?

Walter and Ken's interviews are replete with observations that question the APA's importance. First, they opposed the APA as part of majority view of the 1941 Attorney General's Report.²³ Walter led the research team, while Ken served on it. Walter still dissented from the APA's necessity or importance, while admitting that he did not think it has been "hurtful" because of its many "escape hatches" and savings clauses.²⁴ While he called the APA an accomplishment, Ken thought it was only marginally significant since it covered about ten percent of administrative law, with the rest consisting of constitutional, statutory, or common law.²⁵

Why hold the APA in such high esteem then? Many experts anoint the APA with a kind of "constitutional" status in administrative law.²⁶ On its passage, Senator McCarren called it a "Bill of Rights" for the administrative state.²⁷ Even Walter admitted that "Justice Frankfurter in the *Universal Camera* case said that Congress had expressed a mood in the Administrative Procedure Act" which gave it "an impact beyond [its] terms."²⁸

But how much does the APA really matter to everyday administrative law practice? Its biggest emphasis at the time of enactment—sections 554, 556, and 557—involved setting out formal adjudication requirements,²⁹ which organic agency legislation conditioned.³⁰ This is one of the escape hatches that Walter mentioned and on which Congress

²¹ See Biography, *Carl McFarland – 1951-1958*, U. OF MONT., <https://perma.cc/H8TT-YJYA>.

²² See, e.g., *Award for Scholarship in Administrative Law*, ABA,

²³ See Verkuil et al., *supra* note 2, at 519–22.

²⁴ *Id.* at 522.

²⁵ See *id.* at 526; see also John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 115 (1998) (citing Professor Davis's statement that 90% of administrative law is judge-made common law).

²⁶ See HICKMAN & PIERCE, *supra* note 10, at 18. Then-Professor Scalia viewed the "APA as a sub-constitution." Antonin Scalia, Vermont Yankee: *The APA, The D.C. Circuit, and the Supreme Court*, 1978 S. CT. REV. 345, 363.

²⁷ See David H. Rosenbloom, *1946: Framing a Lasting Congressional Response to the Administrative State*, 50 ADMIN. L. REV. 173, 179 (1998).

²⁸ Verkuil et al., *supra* note 2, at 526.

²⁹ See, e.g., William Funk, *Slip Slidin' Away: The Erosion of APA Adjudication*, J. NAT'L ASS'N ADMIN. L. JUDICIARY 101, 103–04 (2018).

³⁰ See *id.* at 104.

insisted.³¹ When the Supreme Court sought to expand APA formal adjudication as a due process necessity in deportation cases, Congress rejected the effort.³² While formal adjudication procedures are valued in situations where agencies require them, the APA largely failed to address informal adjudication—perhaps, the biggest procedural empty box.³³

In 1946, the need for informal procedures may not have been as clear since later statutes creating benefits programs (social security disability, food stamps, Medicare, etc.) produced much of the caseload.³⁴ But today there are millions of adjudications that occur outside the ambit of APA formal adjudication.³⁵ After the deregulation movement of the 1970s and 1980s, which ended cases brought by agencies like the Civil Aeronautics Board and the Interstate Commerce Commission, there are even fewer formal adjudications.³⁶ Today, section 553's informal rulemaking procedures make the APA most relevant, but much of that is federal common law.

So if the measurement of the APA's impact is counting the number of cases and article pages that are devoted to it, it may not look so powerful. But that misses the point. The APA is always there, even if it is not always written about. The APA set a "mood"³⁷ and "enact[ed] a formula upon which opposing social and political forces have come to rest."³⁸ This is what scholars and judges mean when they refer to the APA as an administrative constitution or a super-statute.³⁹ In this sense, it has symbolic value far exceeding its terms. Even those old skeptics Walter and Ken might agree. The question now is whether those opposing social and political forces are tired of resting and have become restive.

III. Has the Ghost of Roscoe Pound Arisen to Disrupt the APA's Mood?

³¹ *See id.*

³² *See, e.g.,* *Marcello v. Bonds*, 349 U.S. 302, 304, 314 (1955) (upholding Congress's statutory limitations); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 35, 53 (1950) (extending formal adjudication to INS deportation cases).

³³ *See* Paul R. Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739, 744 (1976). 5 U.S.C. § 555 provides some barebones procedures (notice, comment, and reasons), which can be significant but are far less formal.

³⁴ *See, e.g.,* Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 95 TEX. L. REV. 1097, 1098–99 (2018).

³⁵ Nearly ninety percent of all agency adjudication occurs outside of APA-established processes. *See* Verkuil, *supra* note 33, at 741.

³⁶ It is hard to accurately measure the number of formal adjudications over time; perhaps the Administrative Conference of the United States (ACUS) will help us out.

³⁷ *See* *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951); *see also* Duffy, *supra* note 25, at 194 n.408.

³⁸ *Wong Yang Sung*, 339 U.S. at 40.

³⁹ *See* Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207, 1209 (2015).

Professor Gellhorn and Professor Davis were emphatic about the destructive role Dean Pound had played in the effort to improve the administrative process. Dean Pound's key writings had come earlier, but still cast a cloud over the 1941 Attorney General's Committee and its work.⁴⁰ Walter referred to Dean Pound's "hysterical stirrings,"⁴¹ while Ken showed how his influence had turned the ABA against the project until Carl McFarland took over as the ABA representative. In fact, the major Attorney General's Committee studies directly responded to Dean Pound's assertions against the agencies.⁴² Dean Pound listed seven tendencies of agencies, which Walter set about to rebut. Walter said that Dean Pound "would generalize from an episode of naughtiness" to say that agencies do these things all the time.⁴³ The monographs were careful to show how different agencies were and how their performances varied dramatically.⁴⁴ While Dean Pound was unlikely to have these facts deter him from his philosophical declamations, the monographs impressed the minority side of the Attorney General's Committee and the ABA members behind it, which helped create an APA that was much more understanding of what agencies actually do. An interesting question that I wish I could pose to Walter and Ken is:—what would they think about the current rehabilitation of Pound's views?

Roscoe Pound was one of the great figures in American law and jurisprudence.⁴⁵ He had an amazing career, stepping down as Dean of the Harvard Law School in 1936 after twenty years.⁴⁶ He lived to the age of ninety-three, becoming one of the most cited scholars of the last century.⁴⁷ After leading progressives in challenging the nature of judicial decision-making and creating the field of sociological jurisprudence, Dean Pound broke away from President Roosevelt and the New Deal in the 1930s and

⁴⁰ See Verkuil et al., *supra* note 2, at 514–15.

⁴¹ *Id.* at 514.

⁴² See *id.* at 515.

⁴³ *Id.*

⁴⁴ See *id.* at 521. By describing what agencies actually did, these studies offered the Attorney General's Committee a database from which to draw conclusions and helped to limit exaggerated fears of administrative absolutism. See Verkuil et al., *supra* note 2, at 512–13. Harvard Law School awarded Walter Gellhorn its coveted Henderson Memorial Prize for the studies. See Peter L. Strauss, *Changing Times: The APA at Fifty*, 63 U. CHI. L. REV. 1389, 1390 (1996).

Professor Gellhorn gave me a set of these monographs early in my career, which I have passed on to the Administrative Conference of the United States library.

⁴⁵ See Fred R. Shapiro, *The Most Cited Legal Scholars*, 29 J. LEGIS. STUDIES 409, 411, 424 (2000) (naming Pound as one of the most cited legal scholars in history). Dean Pound's work continues at the Pound Civil Justice Institute, established by trial attorneys in 1956 to carry on his legacy by ensuring access to justice for ordinary citizens. See *About the Institute*, POUND CIV. JUST. INST., <https://perma.cc/T63A-TWB6>.

⁴⁶ James Landis succeeded Dean Pound as dean. Landis—the ultimate New Deal warrior—left his position as Chair of the Securities and Exchange Commission to become Dean. See *Appointment of James M. Landis as Dean Of Law School Is Confirmed by Overseers*, HARV. CRIMSON, (Jan. 12, 1937), <https://perma.cc/FW6E-TF3L>. This transition is not without its ironies given Dean Pound's view of administrative agencies and Landis's support of them.

⁴⁷ See Shapiro, *supra* note 45, at 411, 424.

ultimately led the ABA's opposition to the formation of the administrative state.⁴⁸ He would be of largely historical interest today, except for the fact that organizations like the Liberty Fund have embraced him and are reviving his anti-New Deal diatribes.⁴⁹ Leading conservative scholars like Professor Phillip Hamburger—author of *Is Administrative Law Unlawful?*⁵⁰—have also absorbed and expanded on Dean Pound's ideas.⁵¹

In turn, their organizations are winning approval for Dean Pound's ideas before the Supreme Court. In *Gundy v. United States*,⁵² for example, the majority upheld the Government's authority under the Sex Offender Registration & Notification Act⁵³ over Justice Neil Gorsuch's dissent.⁵⁴ Justice Gorsuch echoed the New Civil Liberties Alliance's amicus brief in arguing for a stronger nondelegation doctrine.⁵⁵ Professor Catherine M. Sharkey has noted the “uncannily similar attitude” between Dean Pound, his antagonistic views of the New Deal, and the Supreme Court's conservative minority.⁵⁶ If Chief Justice John G. Roberts, Jr. joins the four dissenters to make a “fateful five,”⁵⁷ there would then be a majority prepared to roll back the administrative state. And this was before Justice Amy Coney Barrett assumed Justice Ruth Bader Ginsburg's seat.

It is doubtful that Walter and Ken would have seen this move coming. They thought progressives had tamed the Four Horsemen in the

⁴⁸ I have earlier tried to understand Pound's conflicted position on the New Deal by seeing him as a procedural liberal but a substantive conservative. See Verkuil, *supra* note 3, at 268–70. Professor Sharkey has deepened this Pound dichotomy by emphasizing his devotion to the common law tort system as the procedural alternative to administrative adjudication. See Catherine M. Sharkey, *The Administrative State and The Common Law: Regulatory Substitutes or Complements?*, 65 EMORY L.J. 1705, 1712 (2016).

⁴⁹ See Joseph Postell, *Reforming the Administrative State with Roscoe Pound*, L. & LIBERTY (May 23, 2012), <https://perma.cc/N2WN-UBCV> (discussing how Peter Goodrich, the founder of the Liberty Fund, was inspired by Pound's ideas); see also Joseph Postell, *The Anti-New Deal Progressive: Roscoe Pound's Alternative Administrative State*, 74 REV. OF POLITICS 53, 61 n.33 (2012) (citing the Liberty Fund's re-print of Roscoe Pound's lectures).

⁵⁰ See PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014). Professor Hamburger founded the New Civil Liberties Alliance (“NCLA”), which engages in pro bono advocacy to “protect constitutional freedoms from violations by the Administrative state.” See Press Release, New Civil Liberties Alliance, Supreme Court's *Gundy* Decision Leaves Door Ajar as to Limits on Congress' Ability to Delegate Lawmaking to the Executive Branch (June 20, 2019), <https://perma.cc/4USV-R649>; see also Philip Hamburger & Paul R. Verkuil, *Hamburger v. Verkuil*, REAL CLEAR POLICY (Oct. 24, 2016), <https://perma.cc/7G3N-4QK4>.

⁵¹ See HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 414–415 (2014) (discussing Dean Pound's early recognition “that administrative law was reviving prerogative power”).

⁵² 139 S. Ct. 2116 (2019).

⁵³ Pub. L. No. 109-248, 120 Stat. 594 (codified at 34 U.S.C. §§ 20911 et seq.).

⁵⁴ See *Gundy*, 139 S. Ct. at 2122–23 (upholding delegation of authority to the Attorney General under SORNA); *id.* at 2131 (Gorsuch, J., dissenting) (finding the SORNA delegation unconstitutional).

⁵⁵ See Press Release, *supra* note 51.

⁵⁶ See Sharkey, *supra* note 49, at 1705.

⁵⁷ See Paul R. Verkuil, *The Supreme Court's Doublethink on Arbitration and Administration*, REGULATORY REV. (Apr. 27, 2020), <https://perma.cc/9K42-N3ZE> (discussing the 5–4 decision in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2017)).

1930s.⁵⁸ And with the demise of Walter–Logan, they would have thought the APA settled things per Justice Robert Jackson in *Wong Yang Sung*.⁵⁹ Moreover, in 1986, *Chevron, Inc. v. National Resources Defense Council*⁶⁰ was just getting started, and *Vermont Yankee Nuclear Power Corp. v. Resources Def. Council, Inc.*⁶¹ was telling courts to follow the APA and let the agencies be. Both cases sought to manage agencies while respecting their role in the constitutional framework: *Chevron* by deferring to reasonable agency statutory interpretations and *Vermont Yankee* by enforcing the APA informal rulemaking requirements as both a floor and ceiling.⁶² If these cases gave agencies some deference, *Motor Vehicle Manufacturers Ass’n v. State Farm Automobile Ins. Co.*⁶³—which was just emphatically applied in the Court’s DACA decision⁶⁴—showed a court that keeps the agencies honest. The recent conservative attacks on the administrative state make these scholars a breed of Neo-Antifederalists, whose enemy is not the original Constitution, which they love, but Professor Bruce Ackerman’s New Deal “constitution,”⁶⁵ which they hate. The original Antifederalists were distinguished patriots—George Mason among them—who feared the centralizing power of the new national government and its President; even the promise of a Bill of Rights did not satisfy them.⁶⁶ The Neo-Antifederalists fear agencies’ power over the individual and reject the idea that judicial review contains them.⁶⁷ Professor Gellhorn and Professor Davis might have understood the Neo-Antifederalist motivation in all this, but mentioning Dean Pound as their inspiration would mystify them. Maybe they would say

⁵⁸ Justices Pierce Butler, James McReynolds, George Sutherland, and Willis Van Devanter were pejoratively referred to as “the Four Horsemen” during their 1930s’ clashes with the Roosevelt Administration over the size and scope of the Administrative State. See Richard Brust, *1935-1944: A New Deal*, ABA J. (Jan. 1, 2015), <https://perma.cc/UL95-WDDE>. The era of the Four Horseman came to an abrupt end after Justice Owen Roberts, a swing vote who often allied with the conservative Justices, began to uphold New Deal programs with FDR’s threat of court-packing looming. See *id.* Thereafter, Justice Van Devanter retired, and as the Court’s composition continued to change the nondelegation doctrine faded into obscurity. See *id.*; see also *Yakus v. United States*, 321 U.S. 414, 421, 425 (1944) (upholding broad delegation of power to set price controls).

⁵⁹ See *Wong Yang Sung*, 339 U.S. at 40–41.

⁶⁰ 467 U.S. 837 (1984).

⁶¹ 435 U.S. 519 (1978); see also Paul R. Verkuil, *Judicial Review of Informal Rulemaking: Waiting for Vermont Yankee II*, 55 TUL. L. REV. 418, 421 (1981); Richard J. Pierce, *Waiting for Vermont Yankee II*, 57 ADMIN. L. REV. 669, 671 (2005).

⁶² See CASS R. SUNSTEIN & ADRIAN VERMUELE, *LAW & LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE* 7–8 (2020) (noting *Vermont Yankee*’s connection to *Wong Yang Sung*, through Justice Rehnquist’s opinion.)

⁶³ See *Motor Vehicle Manufacturers Ass’n v. State Farm Automobile Ins. Co.*, 463 U.S. 29, 34 (1983).

⁶⁴ See *Dep’t of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891, 1912–13 (2020).

⁶⁵ See generally BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 34–57 (1991).

⁶⁶ Nils Gilberston, Note, *Return of the Skeptics: The Growing Role of the Anti-Federalists in Modern Constitutional Jurisprudence*, 16 GEO. J.L. & PUB. POL’Y 255, 266, 281 n.157 (2018).

⁶⁷ See, e.g., Jason Willick, *The Founders Who Opposed the Constitution*, WALL ST. J. (July 3, 2019), <https://perma.cc/CC79-L7MR>.

it's "a riddle wrapped in a mystery inside an enigma," as Winston Churchill said about the Soviet Union.⁶⁸

Let's unwrap it starting with the weakness of judicial review, which stems from an ambivalent conservative attack on *Chevron*.⁶⁹ While the case is sometimes viewed as thwarting the Constitution's separation-of-powers doctrine,⁷⁰ *Chevron* did not start out that way. Its purpose was to respect the roles and limitations of the branches: "Judges are not experts in the field, and are not part of either political branch of Government."⁷¹ When it comes to the wisdom of agency policymaking, agency views should be respected—" [w]hile agencies are not directly accountable to the public, the Chief Executive is, and it is entirely appropriate for this political branch of the government to make such policy choices."⁷² According to *Chevron*, Congress—the other political branch—is assumed to have consented to this arrangement by passing statutes that tell agencies what to do and leaving them some room to carry out these instructions.⁷³ Admittedly, this consent is fictional, but it is not improbable. Nor is the point that agencies share the Executive Branch's power. After all, the Executive appoints and removes agency policy officials, notwithstanding *Humphrey's Executor v. United States and its "for cause" removal restrictions*.⁷⁴ The agencies are therefore part of the Executive Branch, unavoidably connected to the President. As *Chevron* states, they share the Executive's political power and legitimacy.⁷⁵

In something of an intellectual conundrum, the Court's conservative members still honor Executive power, as they did in *Trump v. Hawaii*,⁷⁶ known as the Muslim-ban case, while disconnecting it from the administrative agencies over which the President has expansive, if not plenary, control. This cord-cutting effort has serious consequences. Once agencies have been cast to sea as the unmoored "headless fourth branch"⁷⁷ they lose constitutional legitimacy. *Chevron* had connected agencies to the Executive, while *Vermont Yankee* had connected them to the APA thereby keeping them in port.⁷⁸ President Donald Trump, like President Roosevelt

⁶⁸ Winston Churchill's First Wartime Broadcast, BBC, <https://perma.cc/SQ86-A24E>.

⁶⁹ See, e.g., Christopher J. Walker, *The Federalist Society's Chevron Deference Dilemma*, L. & LIBERTY, (Apr. 3, 2018), <https://perma.cc/B9YU-WDNX> (collecting academic and judicial views).

⁷⁰ See PETER J. WALLISON, JUDICIAL FORTITUDE: THE LAST CHANCE TO REIN IN THE ADMINISTRATIVE STATE 36 (2018).

⁷¹ *Chevron*, 467 U.S. at 865.

⁷² *Id.* at 865–66.

⁷³ See *id.* at 865.

⁷⁴ 295 U.S. 602 (1935). A product of the Four Horsemen, *Humphrey's Executor* was decided the same day as *Schechter Poultry*. According to Justice Jackson's memoir of President Roosevelt, it was the case "that Roosevelt resented most". ROBERT H. JACKSON, THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT 18–19 (John Q. Barrett ed., 2003).

⁷⁵ See *Chevron*, 467 U.S. at 866.

⁷⁶ 138 S. Ct. 2392 (2018).

⁷⁷ *City of Arlington v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting).

⁷⁸ See *Chevron*, 467 U.S. at 865–66; see also *Vermont Yankee*, 435 U.S. at 525.

before him (who, after all inspired the term “fourth branch”), prefers to run against the administrative state even as he does much to control it.⁷⁹ This is a hard proposition to justify. Yet the Court is on the cusp of accepting it. If *Gundy* and its next wave succeed in bringing back the nondelegation doctrine, Congress will not thank them. It does not do much legislating now and would surely implode if forced to rewrite a set of new statutes more precisely. Even Professor Hamburger—a nondelegation hawk—admits that Congress might not be up to the task.⁸⁰ He has suggested laying some agency rules before Congress under the Congressional Review Act⁸¹ and, “if the sky doesn’t fall,” give them some more.⁸² The sky will indeed fall if the Court starts sending statutes back to Congress on a regular basis.

Sometimes, however, the nondelegation result settles the matter without needing further congressional action. This seems to have been the situation with *A.L.A. Schechter Poultry Corp. v. United States*,⁸³ where the Court may have done President Roosevelt a favor by ending the National Industrial Recovery Act (“NIRA”).⁸⁴ NIRA had created industrial monopolies that the President was having second thoughts about. In Justice Jackson’s memoir, he said he told President Roosevelt that “perhaps he had been relieved by the [*Schechter*] Court of a serious problem.”⁸⁵ It was not long thereafter that administration policy shifted to an anti-monopoly direction when Thurman Arnold—a fiery trustbuster—joined Attorney General Robert H. Jackson’s Department of Justice (“DOJ”) as head of the Antitrust Division. But *Schechter* is a unique case; building a nondelegation policy around it, while tempting to the new conservative *Gundy* justices, would require a dramatic shift from where even the conservatives have taken the Court in recent years.⁸⁶

A better course might be to reconnect the Executive to the agencies as to minimize their independence. *Lucia v. SEC*⁸⁷ serves as a prime example of such a course. In *Lucia*, the Court held that the Security Exchange Commission (“SEC”) administrative law judges (“ALJs”) were “inferior”

⁷⁹ President Trump’s control is fitful and arbitrary on occasion. Think of the number of acting officials whose appointment violates the Vacancies Reform Act, for example. See Becca Damante, *At Least 15 Trump Officials Do Not Hold Their Positions Lawfully*, JUST SECURITY (Sept. 17, 2020), <https://perma.cc/FKR4-GM84>.

⁸⁰ See *Retrospective Regulatory Review*, BALLOTPEDIA (2017), <https://perma.cc/Z2PU-EPX3> (citing *The Future of the Administrative State*, REAL CLEAR POLICY, at 27:28–31:23 (Jul. 6, 2017)).

⁸¹ The Congressional Review Act is a Congressional oversight tool that requires federal agencies to submit a report on final agency rules to each House of Congress before they can take effect. See 5 U.S.C. § 801 (2020).

⁸² See Hamburger & Verkuil, *supra* note 51.

⁸³ 295 U.S. 495 (1935).

⁸⁴ See *id.* at 541–42.

⁸⁵ JACKSON, *supra* note 75, at 66.

⁸⁶ See *Whitman v. American Trucking Ass’n, Inc.*, 531 U.S. 457, 486 (2001) (rejecting application of the nondelegation doctrine in an opinion by Justice Scalia).

⁸⁷ 138 S. Ct. 2044 (2018).

officers of the United States and must be appointed by the Commission itself, not SEC staff.⁸⁸ By connecting the ALJs' appointment directly to those officials whom the President appoints, the Court shored up the agency-executive relationship. In doing so, it also highlighted the APA's continued importance.

The APA had required that the selection of "hearing officers" be made more objectively through Civil Service Commission ("CSC") administered selection lists.⁸⁹ Seizing on the *Lucia* holding, the Trump Administration has taken the selection function from the Office of Personnel Management (the CSC's successor) and given it directly to the agencies.⁹⁰ This is not an uncontroversial move, but one that, if properly managed, can improve agency adjudicative performance.⁹¹ It seems far more productive to reconnect the agencies to the executive in this way than to isolate the agencies in some netherworld of "fourth branch" status. The APA adds stability through its requirements of procedural regularity and statutory control. With similar requirements, the civil service system offers the same reassurances.⁹²

Conclusion: At 75, The APA Has Aged Well

The APA is as symbolically important as it ever has been, even if its status as a "super-statute" is hyperbolic. It was created to assure the public, politicians, and the judges that agencies would submit to regular order. By doing so, it served a legitimating function and, if called on, it can do so again. James Freedman's thoughtful book about the administrative process, *Crisis and Legitimacy*,⁹³ perfectly frames the current situation. Freedman sought a comprehensive theory that would explain and ultimately settle our uneasy relationship with agency administration.⁹⁴ But maybe that is an impossible assignment, and we must undergo periods of crisis and legitimacy in administration, much like we do with our founding documents themselves. If so, the administrative process will continue to exist thanks in no small measure to the APA.

⁸⁸ *Id.* at 2058.

⁸⁹ See generally 5 U.S.C. §§ 554–56. Hearing officers did not become "judges" until designation in 1972, a development Walter Gellhorn objected to as the "magnification of the significance of the hearing officer." Verkuil et al., *supra* note 2, at 528.

⁹⁰ See Paul R. Verkuil, *Presidential Administration, The Appointment of ALJs and the Future of For Cause Protection*, 72 ADMIN L. REV. 461, 465 (2020).

⁹¹ See *id.* at 466 (outlining the pitfalls and benefits of this move).

⁹² See *id.* at 475.

⁹³ JAMES O. FREEDMAN, *CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT* (1978).

⁹⁴ See Paul R. Verkuil, *Book Review*, 127 PENN. L. REV. 1666, 1667 (1979) (reviewing FREEDMAN, *supra* note 94).

This is not to say that the statute cannot be improved. The ABA continues to consolidate good ideas for amending and improving the APA.⁹⁵ The DOJ held a summit in December 2019 with a series of panel discussions by administrative law scholars and practitioners on modernizing the APA.⁹⁶ That summit culminated in a 129-page report that the DOJ issued summarizing the discussions and laying out various proposals for how the statute should change and adapt to modern challenges.⁹⁷ Some of these ideas have been around for years and fall into Professor Gellhorn's category of "hardy perennials."⁹⁸ They need not be detailed here, except to observe that Congress has been unable to implement them with all the legislative goodwill that can be imagined.⁹⁹ It may be that congressional inaction is a form of endorsement for the original APA. For sure, such inaction demonstrates that Congress cannot be easily called on to fix agency statutes that fail some standard of excessive delegation.

There is much more to say about the APA that the other participants will take up. I will leave it here with kudos to the APA for reaching this milestone and for all those who got it here, including judges, academics, legislators, and especially the two skeptics, Walter and Ken (with a hidden hand from Carl) who framed the questions that still inspire and challenge us.

⁹⁵ See Christopher J. Walker, *Modernizing the Administrative Procedure Act*, 69 ADMIN. L. REV. 626, 638 (2017).

⁹⁶ Adam White, *Doing Justice to APA Modernization*, YALE J. ON REG.: NOTICE & COMMENT (Dec. 16, 2019), <https://perma.cc/74QL-U3KA>.

⁹⁷ See U.S. DEP'T OF JUST., MODERNIZING THE ADMINISTRATIVE PROCEDURE ACT 2, <https://perma.cc/Z7RK-5DRM>.

⁹⁸ See Walter Gellhorn, *Administrative Procedure Reform: Hardy Perennial*, 48 A.B.A. J. 243, 246 (1962).

⁹⁹ See S. 951 (115th): *Regulatory Accountability Act of 2017*, GOVTRACK, <https://perma.cc/W4FL-7AY2>.