U.S. Department of Labor Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

IN THE MATTER OF:

ADMINISTRATOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

PROSECUTING PARTY,

v.

MORTON CONCESSIONS, INC.,

RESPONDENT.

ARB CASE NO. 2024-0043

ALJ CASE NO. 2020-TNE-00056
ALJ PATRICK M. ROSENOW

DATE: April 9, 2026

Appearances:

For the Administrator, Wage and Hour Division:
Seema Nanda, Esq.; Jennifer S. Brand, Esq.; Sarah Kay Marcus, Esq.; Sara A. Conrath, Esq.; and Joseph E. Abboud, Esq.; *U.S. Department of Labor, Office of the Solicitor*; Washington, District of Columbia

For the Respondent:
R. Wayne Pierce, Esq.; *The Pierce Law Firm, LLC*; Annapolis, Maryland

Before JOHNSON, Chief Administrative Appeals Judge, and BURRELL and KIKO, Administrative Appeals Judges; BURRELL, concurring

DECISION AND ORDER

This case arises under the Equal Access to Justice Act (EAJA or the Act), and its implementing regulations.[1] The case before us today presents the narrow question of whether EAJA allows an eligible employer to recover attorney's fees and costs under that Act when prevailing against the government in an enforcement action brought under the H-2B provisions of the Immigration and Nationality Act

[1] 5 U.S.C. § 504; 29 C.F.R. Part 16 (2025).

(H-2B and INA, respectively), as amended, and its implementing regulations.[2] The prior Acting Secretary of Labor, Julie Su (Acting Secretary), previously determined in *Administrator, Wage and Hour Division, U.S. Department of Labor v. Graham & Rollins, Inc. (Graham & Rollins)* that EAJA does not apply to such proceedings. In reaching this result, the Acting Secretary reversed a contrary decision by the ARB, which had upheld a decision by the Administrative Law Judge (ALJ) below on the precise same issue.[3] In essence, the disagreements of interpretation in these opinions, as much discussed below, turn on whether the fact that the H-2B statute does not expressly say "on the record" forecloses application of EAJA.

Relying on the Acting Secretary's *Graham & Rollins* decision, the ALJ in this case denied Respondent Morton Concessions, Inc.'s, request for attorney's fees under EAJA. Because we are bound by the decision in *Graham & Rollins*, we affirm the ALJ. However, we take this opportunity to highlight our concerns with that decision and encourage the current Secretary of Labor to revisit the issue.

We of course do not make a recommendation to revisit or overturn a prior Secretary's decision lightly and therefore provide detailed supporting analysis. We divide this decision into several sections.

In our Background section, we begin with a short discussion of EAJA and the Administrative Procedure Act (APA),[4] providing an overview of the legal standards and definitions that will guide our discussion. This includes articulating what must be shown to establish that EAJA applies to these H-2B proceedings—namely, that

---

[2] 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1184(c)(14). The statute's implementing regulations are found at 20 C.F.R. Part 655, subpart A (2025), with additional enforcement regulations at 29 C.F.R. Part 503 (2025). The original INA was enacted in 1952 and has been amended numerous times. Congress enacted the H-2B provision at issue in Section 404 of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Div. B, The Real ID Act of 2005, § 404, Pub. L. No. 109-13, 119 Stat 231 (codified at 8 U.S.C. § 1184(c)(14)).

[3] *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Graham & Rollins, Inc. (Graham & Rollins (Acting Secretary))*, ARB No. 2021-0047, ALJ No. 2018-TNE-00022 (Sec'y Aug. 9, 2023) (Final Agency Decision and Order), *rev'g Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Graham & Rollins, Inc. (Graham & Rollins (ARB))*, ARB No. 2021-0047, ALJ No. 2018-TNE-00022 (ARB Dec. 22, 2022) (Decision and Order Affirming in Part and Reversing in Part).

[4] 5 U.S.C. §§ 551-559.

Congress intended for these proceedings to be conducted "on the record" under the procedures of the APA.

Second, we provide background regarding the purposes of EAJA and the societal forces that led to its enactment—a discussion that is absent from the Acting Secretary's decision in *Graham & Rollins*. We highlight legislative history showing that EAJA arose out of a concern over the growing power of federal agencies and the inability of small businesses to protect themselves against baseless, heavy-handed agency enforcement actions. EAJA, passed in 1980 and reauthorized in 1985 on a largely bipartisan basis, sought to level this sharply unfair playing field.

Third, we provide a brief description of the H-2B program along with an overview of the Board's and the Acting Secretary's decision in *Graham & Rollins*. In that case, after the ALJ and ARB dismissed the enforcement action of the Administrator of the Wage and Hour Division (Administrator) under the applicable statute of limitations, the employer sought attorney's fees against the Department under EAJA, arguing that the Administrator's position was not substantially justified. The Administrator opposed the action, arguing that EAJA did not apply to the proceedings. A two-Member majority of the Board (Majority) conducted a detailed and thorough review of the H-2B enforcement provisions, their legislative history, the APA and its legislative history, caselaw from the Supreme Court and courts of appeals, and other factors. The Majority concluded that although the H-2B enforcement statute does not explicitly state that the proceedings must be determined "on the record," Congress clearly intended these quasi-judicial proceedings to be determined on the record and subject to the APA. However, the Acting Secretary, largely guided by a narrow view of waivers of sovereign immunity, overturned the ARB's decision and concluded that the H-2B proceedings were not required to be determined "on the record," and, thus, were not subject to EAJA.

Finally, we give a brief background on the present case. As in *Graham & Rollins*, the ALJ dismissed an untimely enforcement action brought by the Administrator under the applicable statute of limitations. Morton Concessions moved for attorney's fees under EAJA. Based on the Acting Secretary's decision in *Graham & Rollins*, the ALJ here ruled that EAJA did not apply and did not reach a conclusion on whether the Administrator's position was substantially justified.

Following this Background, we offer our Discussion. In the first section of our Discussion, we recognize that *Graham & Rollins* compels us to affirm the ALJ in

this instance. As a delegee of the Secretary of Labor, we are bound to follow the Secretary's decisions. The Acting Secretary's conclusion in *Graham & Rollins* was clear: EAJA does not apply to H-2B enforcement proceedings. That is the precise issue presented in this case and dictates this case's outcome.

In the second section of our Discussion, though, we explain why we believe the Acting Secretary reached the wrong conclusion in *Graham & Rollins*. There are five primary reasons for our opinion.

First, we believe the decision did not give due consideration to the purposes of EAJA. The Acting Secretary's decision in *Graham & Rollins* was essentially silent as to the very important purposes of EAJA. Instead, the decision featured what we consider to be a hyper-technical statutory analysis without discussion of the important context of the purposes of the statute. As we emphasize below, examining the purpose of a statute is a staple of statutory interpretation and the decision's failure to explore the purposes of EAJA was, in our view, error.

Second, and in contrast, we believe the decision gave excessive weight to sovereign immunity. It is clear from the decision that principles of sovereign immunity essentially dictated the result in *Graham & Rollins*—it featured in essentially every point of analysis and effectively created what amounted to an insurmountable presumption that EAJA did not apply. We disagree with how stringently and forcefully the decision applied sovereign immunity. The decision did not appropriately recognize that EAJA offers a clear waiver of sovereign immunity and the well-settled law that states that, once Congress evinces its intent to waive sovereign immunity, tribunals should be careful not to narrow the waiver that Congress intended. This principle is especially important and true in the context of EAJA, which already provides guardrails protecting the public fisc. Restrictively applying principles of sovereign immunity is superfluous and contrary to congressional intent.

Third, we explain why we believe that Congress intended H-2B enforcement proceedings to be decided on the record. We reiterate the ARB Majority's view from *Graham & Rollins* that courts of appeals have consistently stated that talismanic "on the record" language is not necessary for Congress to have intended for the APA to apply to these proceedings; rather, what counts is whether we or the Secretary can otherwise conclude that Congress intended for the agency to adhere to the requirements of the APA and thus that a proceeding be "on the record." We then explore nearly 80 years of legal precedent, dating back to the publication of the

United States Department of Justice's Attorney General's Manual on the Administrative Procedure Act (APA Manual) in 1947,[5] explaining that courts generally presume, absent evidence to the contrary, that Congress intends for the APA to apply to traditional, quasi-judicial adjudications like these H-2B enforcement proceedings. We identify numerous courts of appeals cases confirming this principle—including some that the Acting Secretary cited in *Graham & Rollins*. Also highlighted are the hallmarks and characteristics of the proceedings in those cases that led the courts to conclude that Congress intended the APA to apply, that match the proceedings here under the H-2B statute. Likewise explained is why the cases the Acting Secretary cited to the contrary are distinguishable or otherwise do not undermine this well-established presumption.

Fourth, we believe the Acting Secretary gave undue weight to language contained in other provisions of the INA. In concluding that Congress must not have intended to apply the APA to H-2B enforcement proceedings, the decision emphasized that other provisions of the INA refer specifically to the APA or explicitly state that the proceedings must be determined "on the record," while the H-2B statute does not. The comparison of the H-2B enforcement statute to other provisions in the INA presumes that Congress made the deliberate choice to use other language in the H-2B statute to eliminate an "on the record" requirement. Based solely on a canon of interpretation, we believe that argument begs too much in this situation. The provisions to which the Acting Secretary compared the H-2B enforcement statute were drafted at different times by different Congresses and deal with different issues in different contexts. It is not reasonable to conclude that Congress intended the differing language to mean the H-2B provisions were excluded from the APA.

Finally, we close with some common sense. The Acting Secretary's conclusion—that H-2B enforcement proceedings need not be determined "on the record" or be subject to the APA—leads to the negative result that these fact-intensive and hotly contested cases might be decided on evidence that was never introduced to the decisionmaker or, worse, that a court could never be sure existed. This plainly cannot be Congress's intent. Instead, we think it is imminently reasonable to conclude, in line with nearly 80 years of precedent and legal presumptions, that Congress intended to apply the APA to these quasi-judicial adjudications and thus that H-2B enforcement proceedings be "on the record."

---

[5] U.S. Dep't of Justice, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947).

BACKGROUND

1. EAJA and the Administrative Procedure Act

EAJA allows prevailing parties that are not the United States to recover attorney's fees and costs from the federal government in cases involving an "adversary adjudication," in which the government's position is not "substantially justified."[6] The question in this appeal is whether H-2B enforcement proceedings are "adversary adjudications" under EAJA.[7]

EAJA defines an "adversary adjudication" as "an adjudication under section 554 of [the APA] in which the position of the United States is represented by counsel or otherwise."[8] Section 554 and subsequent provisions, in turn, prescribe the APA's formal adjudication procedures.[9]

A proceeding is considered "under" Section 554 of the APA if it is "subject to" or "governed by" that section.[10] Section 554 applies "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing . . . ."[11] Thus, for an adjudication to be considered "under" APA Section 554, three conditions must be met. First, there must be an "adjudication." Second, the

---

[6] The statute, in relevant part, provides: "An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust." 5 U.S.C. § 504(a).

[7] We need not and do not reach the issue of whether the Agency's position was "substantially justified" or whether other "special circumstances" exist to make an award unjust. If the Secretary agrees with us that these proceedings are subject to EAJA, those are issues that must be addressed in the first instance by the ALJ.

[8] 5 U.S.C. § 504(b)(1)(C)(i); *see also* 29 C.F.R. § 16.102(b) (defining "adversary adjudication" as "an adjudication under 5 U.S.C. 554 or other proceeding required by statute to be determined on the record after an opportunity for an agency hearing . . . ."). The Agency was and is represented by counsel from the Office of the Solicitor of Labor in this case.

[9] 5 U.S.C. §§ 554, 556, 557.

[10] *Aageson Grain & Cattle v. U.S. Dep't of Agric.*, 500 F.3d 1038, 1042 (9th Cir. 2007) (quoting *Ardestani v. Immigr. & Naturalization Serv.*, 502 U.S. 129, 135 (1991)).

[11] 5 U.S.C. § 554(a).

adjudication must be required by statute to be determined "on the record." Third, the statute must provide an "opportunity for an agency hearing."

The H-2B statute at issue here provides, in relevant part, that if the Secretary of Labor "finds, after notice and an opportunity for a hearing, a substantial failure to meet any of the conditions of the petition to admit or otherwise provide status to a nonimmigrant worker under [the H-2B program] or a willful misrepresentation of a material fact in such petition," the Secretary may take appropriate remedial action.[12] Thus, EAJA prongs one (adjudication)[13] and three (opportunity for a hearing)[14] are clearly satisfied. The only question is whether the adjudication is "determined on the record" (prong two).

2. Legislative History and Purpose of EAJA

In setting the stage for our discussion, we provide some useful background regarding the purposes of EAJA, the overarching statute in play here, and the societal forces which led to its enactment.[15]

The basic parameters of EAJA, which has been described as "one of the broadest reaching, yet most obscure federal laws in existence,"[16] can be summarized

---

[12] 8 U.S.C. § 1184(c)(14). The statute gives power over enforcement proceedings to the Secretary of Homeland Security who, in 2009, delegated the Department of Labor its investigative and enforcement authority. Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes, 73 Fed. Reg. 78020, 78046 (Dec. 19, 2008) (effective Jan. 18, 2009).

[13] The APA defines an "adjudication" as an "agency process for the formulation of an order." 5 U.S.C. § 551(7). An "order" under the APA is "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." *Id.* § 551(6). H-2B enforcement proceedings involve an "adjudication." *Graham & Rollins (ARB)*, ARB No. 2021-0047, slip op. at 8.

[14] *See* 8 U.S.C. § 1184(c)(14)(A) (providing for "an opportunity for a hearing").

[15] Indeed, we think exploring the legislative history and purpose of EAJA is particularly important in this case, given the lack of any such meaningful discussion in the Acting Secretary's prior decision in *Graham & Rollins*, as discussed in more detail below, *infra* Discussion Section 2.A.

[16] For an in-depth review of the development and passage of the Act, see Lowell E. Baier, *Reforming the Equal Access to Justice Act*, 38 J. LEGIS. 1, 2 (2012) ("The Equal Access to Justice Act (EAJA) is one of the broadest reaching, yet most obscure federal laws in existence. Its basic function is simple: in any case, be it in court or in an administrative

quickly. The Act provides that certain covered small entities may recover their attorney's fees and costs when prevailing against the government in an enforcement action unless the government can show that its case was "substantially justified" or "special circumstances" would make an award unjust.[17] However, this basic summary, while accurate, belies the intensity of the debate which led to enactment of the Act in 1980, its reenactment in 1985, and the extensive litigation underpinning many of the words used in the Act.

Current debates over the size of government and whether agencies have become too powerful as compared to average citizens are hardly a recent phenomenon. The APA was enacted in part because of the rise of the administrative state under the New Deal and to set certain structures and procedures to govern the seemingly ever-expanding number of agencies. However, the APA did not waive sovereign immunity and therefore the regulated community remained subject to the so-called "American rule" under which an entity, regardless of its size and no matter how "outgunned" it might have been in comparison to agency resources, would have to bear its own costs in litigation even where successfully challenging an agency enforcement action.

In the late 1970s, there arose growing concern about the power of federal agencies and the inability of small businesses to protect themselves against baseless agency enforcement actions—simply because they could not afford the costs, principally attorney's fees, to defend themselves.[18] As Justice Jackson had opined earlier:

> The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions

---

agency proceeding, where the federal government's position is not substantially justified, a prevailing party is entitled to receive attorneys' fees, provided that there is no other applicable fee-shifting statute. It is a safety net, designed to make sure that a party cannot be harassed by unjustifiable government activity solely because of the prohibitive expense of attorney's fees, and it was originally passed to protect the small business community from governmental overreach, just as earlier fee-shifting statutes were designed to promote specific causes such as civil rights legislation.").

17 5 U.S.C. § 504(a).

18 *See generally* Baier, *supra* note 16, at 4-20.

> apart. They also have begun to have important consequences on personal rights. They have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking.[19]

Senator Pete Domenici (R-NM), in describing the need for a precursor to EAJA in December 15, 1977 Floor debates, noted:

> The purpose of that amendment was to compensate the average American and the small businessman for legal costs in litigation to protect his rights. . . . **Individuals and small businessmen would no longer be forced to knuckle under to arbitrary or capricious interpretations and regulations, because they could not afford to take the matter to court, or to challenge the administrative action**.[20]

The Senator also cited a Wall Street Journal article, stating:

> The need for this legislation highlights a basic dilemma which the United States faces along with the other industrial democracies. Can we have a powerful national Government to enforce the laws which protect public health and safety and preserve competition in the marketplace, **while avoiding a Government which is so powerful, intrusive, and arbitrary that it poses a menace to individual and economic freedom**.[21]

---

19 *Fed. Trade Comm'n v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) (citation omitted).

20 123 CONG. REC. 39116 (Dec. 15, 1977) (emphasis added).

21 124 CONG. REC. 6999 (Mar. 15, 1978) (emphasis added).

Senator Gaylord Nelson (D-WI) similarly noted:

> As Chairman of the Small Business Committee, I have long been aware of the deep frustrations and resentment that small business proprietors feel toward the Federal bureaucracy and its regulatory apparatus. . . . **The horror stories coming out of our regulatory efforts are becoming all too common. In case after case, a Federal bureaucratic blitzkrieg has rolled over innocent victims, causing unjustified damage to large numbers of business enterprises and individuals**. . . . A small businessman facing what he believes to be an unjust agency order will frequently find that, given the protracted nature of agency proceedings and the skyrocketing costs of legal counsel, it would cost him more money even to win against the Government than to accept the penalty. Inevitably in this situation, the businessman is forced to pay the penalty, rather than fight it, **no matter how unjust the agency's action might have been. Such a result mocks our principles of equal justice and due process.** . . . Without legislation like this, the possibility that the bureaucracy may enforce its will in more and more questionable cases cannot be discounted. . . . **This idea of justice is also mocked by the current situation when small businessmen facing a fine or other penalty decide that compliance is a preferable course to litigation, regardless of the merits of the case, because of the costs involved.**[22]

Senator Domenici again noted on January 31, 1979:

> Individuals and small businesses are in far too many cases forced to **knuckle under to regulations** even though they have a direct and substantial impact because they cannot afford the adjudication process. . . . The purpose of the bill is to redress the balance between the Government acting in its discretionary capacity and the individual. . . .

---

22 123 CONG. REC. 39117-18 (emphasis added).

> **It is to insure against capricious and arbitrary Federal regulation.**[23]

Senator Dennis DeConcini (D-AZ) stated:

> Mr. President, in closing I would like to emphasize again that the **imbalance between the power of the bureaucracy and the power of the American citizen must be redressed**. Congressional oversight alone will never be a sufficient safeguard against regulatory abuse. **Individual citizens and small businesses, the persons who bear the brunt of administrative regulation, must be able to check arbitrary agency actions by contesting them.** Through the device of fee shifting, this legislation will improve our citizens' access to courts and administrative proceedings. It will **encourage them to vindicate their rights** and not to acquiesce in a ruling or sanction which they believe arbitrary, misguided or unfair.[24]

Similar feelings were expressed during the reauthorization of the Act in 1985, with Senator Domenici noting:

> We have entered the age of Federal regulation and there are very few elements of life, commercial or otherwise, where the Federal Government does not play some role. Often, this government action is arbitrary and capricious. . . . They say that "You can't fight city hall," and the prevailing attitude of many today is that even if you do fight the Federal Government and win in court you still lose because of the cost. We must eliminate the possibility of such Pyrrhic victories. **The average American must be made to feel that he or she can question the exercise of the Government's discretionary power as**

---

23 125 CONG. REC. 1437 (Jan. 31, 1979) (emphasis added).

24 *Id.* at 1439 (emphasis added).

> **to its reasonableness** without incurring large costs if he or she prevails.[25]

A key House Report noted:

> In many cases, particularly in litigation with the government, the [A]merican rule is in fact having the opposite effect. For many citizens, the costs of securing vindication of their rights and the inability to recover attorney fees preclude resort to the adjudicatory process. When the cost of contesting a government order, for example, exceeds the amount at stake, a party has no realistic choice and no effective remedy. In these cases, it is more practical to endure an injustice than to contest it.
>
> The deterrent effect created by this inability to recover fees against the government is particularly disturbing in light of the rapid growth in government regulations in recent years. While the influence of the bureaucracy over all aspects of life has increased, **the ability of most citizens to contest any unreasonable exercise of authority has decreased. Thus, at the present time, the government with its greater resources and expertise can in effect coerce compliance with its position**. Where compliance is coerced, precedent may be established on the basis of an uncontested order rather than the thoughtful presentation and consideration of opposing views. **In fact, there is evidence that small businesses are the target of agency action precisely because they do not have the resources to fully litigate the issue. This kind of truncated justice** undermines the integrity of the decisionmaking process.[26]

---

25 131 CONG. REC. 20353-54 (July 24, 1985) (emphasis added).

26 H.R. REP. NO. 96-1418, at 9-10 (1980) (House Committee on the Judiciary) (emphasis added).

A subsequent 2015 Report by the House Committee on the Judiciary, looking back on the history and purpose of EAJA, noted:

> Civil litigation can become a war of attrition as parties strategically try to deplete one another's resources to force a settlement. Fundamentally, EAJA recognizes the enormous "disparity of resources between individuals, small businesses and other organizations with limited resources and the Federal Government." This imbalance could discourage a citizen from hiring counsel to challenge **abusive government policy or could induce a citizen to settle a capricious civil or administrative enforcement action on unfavorable terms**. EAJA "is meant to discourage the Federal Government from using its superior litigating resources unreasonably—**it is in this respect an 'anti-bully' law." Consequently, EAJA is "probably is the most important"** and also "among the most litigated" of the Federal fee-shifting statutes.[27]

In sum, concerned with apparent abusive government overreach against small entities ill-equipped to defend their rights, simply because of a lack of resources, Congress then, on a bipartisan basis, enacted EAJA in 1980 (Pub. L. No. 96-481), thereby waiving sovereign immunity and requiring that an agency pay the costs and other fees of a small entity when that entity prevails against the government in an enforcement action, unless the government can show that its position was substantially justified or that "special circumstances" would make an award unjust. Because the Act contained a "sunset" expiration date, Congress reauthorized the law in 1985 (Pub. L. No. 99-80), with some modest expansions, again on a broad bipartisan basis.[28]

---

[27] H.R. REP. NO. 114-351, at 2-3 (2015) (citations omitted) (emphasis added). The bill was eventually incorporated into the Bipartisan Sportsman Act of 2015, S.405, 114th Cong. § 108 (2015), reinstating required reports on EAJA's utilization by the U.S. Administrative Conference.

[28] Many cases discuss EAJA's purposes and goals (but overlook the intensity of the debate), but for two particularly good overviews, see *Ibrahim v. U.S. Department of Homeland Security*, 912 F.3d 1147, 1166-67 (9th Cir. 2019), *rev'g en banc* 835 F.3d 1048 (9th Cir. 2016), and *Metropolitan Van & Storage, Inc. v. United States*, 101 Fed. Cl. 173, 182-84 (Fed. Cl. 2011). The lengthy court decision in *Ibrahim* paints a particularly

3. The H-2B Program and *Graham & Rollins*

The H-2B visa program allows employers to recruit and hire alien nonimmigrants to perform temporary, nonagricultural labor or services in the United States.[29] Employers who wish to employ H-2B workers must submit an Application for Temporary Employment Certification and, if approved, an I-129 Petition that will allow the workers to enter and work in the United States.[30] The Administrator has been delegated enforcement responsibility for ensuring that employers comply with the statutory and regulatory labor certification requirements.[31] This includes the power to impose administrative remedies, including civil money penalties and debarment, for program violations.[32]

In 2011 and 2012, Graham and Rollins, Inc., applied to the Department of Labor to recruit and hire employees under the H-2B program.[33] In 2018—more than a half of a decade later—the Administrator issued a Determination Letter finding that Graham and Rollins failed to pay outbound transportation costs to H-2B workers whose employment was terminated prior the end of their contract.[34] The Administrator assessed $16,560 against Graham and Rollins for the alleged violations.[35]

Graham and Rollins challenged the assessment, asserting that the Administrator's enforcement effort was untimely under the applicable statute of limitations.[36] The Administrator countered that no statute of limitations applied to

---

Kafkaesque journey through one individual's efforts to recover costs under EAJA "[a]fter the government engaged in years of scorched earth litigation." *Ibrahim*, 912 F.3d at 1171.

29 8 U.S.C. § 1101(a)(15)(H)(ii)(b).

30 *Id.* § 1184(c)(1); 20 C.F.R. §§ 655.5, .15.

31 8 U.S.C. §§ 1184(c)(14)(A)-(B), 1103(a)(6); 20 C.F.R. § 655.2(b).

32 8 U.S.C. § 1184(c)(14)(A)(i), (B); 29 C.F.R. §§ 503.20, .23, .24.

33 *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Graham & Rollins, Inc. (Graham & Rollins (ALJ))*, ALJ No. 2018-TNE-00022, slip op. at 2-3 (ALJ June 26, 2018) (Decision and Order Granting Employer's Motion to Dismiss and Order Cancelling Hearing and Order Dismissing Case).

34 *Id.* at 3-4.

35 *Id.* at 2.

36 *Id.*

its enforcement action.[37] The ALJ and the ARB agreed with Graham and Rollins, applied the five-year statute of limitations of 28 U.S.C. § 2462, and dismissed the case.[38]

Graham and Rollins subsequently moved for attorney's fees under EAJA.[39] The Administrator opposed the request for fees, arguing that EAJA did not apply to the H-2B proceedings and that, even if it did, the Department's position was substantially justified. The ALJ again agreed with Graham and Rollins, concluded that EAJA applied to the H-2B proceedings, and determined that the Administrator had not carried her burden to show that the Agency's enforcement position was substantially justified.[40] The Administrator appealed the ALJ's decision to the ARB.

As set forth above, for EAJA to apply, three conditions must be satisfied: (1) there must be an adjudication, (2) the adjudication must be required by statute to be determined "on the record," and (3) the statute must provide an "opportunity for an agency hearing." The H-2B statutory enforcement provision applicable both in this case and in *Graham & Rollins* provides that if the Secretary "finds, **after notice and an opportunity for a hearing**, a substantial failure to meet" a program obligation, the Secretary may bring an enforcement action for specified remedies.[41] There was no dispute in *Graham & Rollins* that the H-2B enforcement proceedings constituted an adjudication (prong one) and provided an opportunity for an agency hearing (prong three). As in the present case, the only question was whether the adjudication was required to be determined "on the record."[42]

In a divided decision, a two-Member Majority concluded that the H-2B proceedings were required to be determined "on the record," and, therefore, were subject to EAJA.[43] The Majority conducted an extensive and well-reasoned analysis.

---

37 *Id.*

38 *Id.* at 11; *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Graham & Rollins, Inc.*, ARB No. 2019-0009, ALJ No. 2018-TNE-00022, slip op. at 2 (ARB Nov. 16, 2020) (Decision and Order). See also *infra* note 74 for further explanation of the statute of limitations issues in play here.

39 *Graham & Rollins (ARB)*, ARB No. 2021-0047, slip op. at 3.

40 *Id.*

41 8 U.S.C. § 1184(c)(14)(A) (emphasis added).

42 *Graham & Rollins (ARB)*, ARB No. 2021-0047, slip op. at 8.

43 *Id.* at 8-15.

First, the Majority emphasized that it has been the consistent position of courts of appeals that no "magic words" are necessary to conclude that an adjudication is required to be determined on the record.[44] Rather than focusing on the specific language used in the statute, the inquiry instead focuses more broadly on whether Congress intended for the agency to adhere to the requirements of the APA.[45] Thus, the absence of the words "on the record" from the statute was not determinative.

Turning to other indicia of congressional intent, the Majority explained that Congress enacted the H-2B enforcement provisions in the backdrop of the APA's governing framework on agency adjudication.[46] The Majority then provided a thorough review of the history and purposes of the APA, with special reference to the authoritative APA Manual.[47] The Majority explained that under the APA, quasi-judicial adjudications like these H-2B enforcement proceedings are presumed to follow the formal procedures set out in APA Sections 554, 556, and 557 and are presumed to be conducted "on the record."[48] With this fundamental backdrop, the Majority concluded that there was no indication that Congress intended to go against this weighty and longstanding presumption with the H-2B proceedings at issue in the case.[49]

The Majority also explained that H-2B proceedings are consistent with the type of quasi-judicial proceedings to which this fundamental presumption applies.[50] The Majority observed that these proceedings are steeped in traditional adjudicatory fact-finding and authorize the imposition of administrative remedies against the violator, including civil money penalties and debarment.[51] The Majority cited courts of appeals cases that determined that these types of rights and remedies were precisely the type of quasi-judicial proceeding for which the adjudicatory procedures of the APA were intended.[52]

---

44 *Id.* at 9-10.

45 *Id.* at 10 (citations omitted).

46 *Id.* at 11.

47 *Id.* at 11-15.

48 *Id.* at 15.

49 *Id.*

50 *Id.* at 15-18.

51 *Id.* at 16, 18.

52 *Id.* at 17-18 (citations omitted).

One Member disagreed with the Majority (Concurrence).[53] In concluding that the H-2B proceedings did not need to be conducted "on the record," the Concurrence relied heavily on the principle of sovereign immunity, arguing that any waiver thereof must be "strictly construed in favor of the United States."[54] This premise influenced the remainder of the Concurrence's opinion, leading her to conclude that with the principle of sovereign immunity in mind, she could not decipher from the language, context, or history of the H-2B enforcement provisions that Congress clearly intended to require the proceedings to be determined on the record.[55] In particular, the Concurrence noted the absence of "on the record" language in the statute (despite agreeing with the Majority that magic words were not necessary)[56] and compared the H-2B enforcement statute to other provisions of the INA that expressly invoked APA section 554.[57]

On January 9, 2026, the Acting Secretary determined to undertake further review of the Majority's decision pursuant to sections 6(b)(2) and 6(c)(1) of Secretary's Order 01-2020.[58] On August 9, 2023, the Acting Secretary issued a Final Agency Decision and Order (FAD) reversing in part the Majority decision and concluding that EAJA does not apply to the H-2B enforcement proceedings because they are not required to be determined "on the record."[59]

Like the Concurrence, the FAD led by leaning heavily into sovereign immunity, calling it a "high threshold to clear" and stating that "any statutory ambiguities are construed in favor of the government and against a waiver—both as to whether Congress has waived immunity at all and as to the scope of any

---

53 The Concurrence disagreed with the Majority that EAJA applied to the proceedings, but agreed with the Majority that, if it applied, the Administrator's position was "substantially justified," so an award of fees was not warranted. *Id.* at 36 n.149.

54 *Id.* at 37-38 (citations omitted).

55 *Id.* at 38.

56 *Id.* at 38-39.

57 *Id.* at 39-42.

58 Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13186 (Mar. 6, 2020).

59 *Graham & Rollins (Acting Secretary)*, ARB No. 2021-0047, slip op. at 6-17. The Acting Secretary, like the Concurrence, agreed that if EAJA applied, the Administrator's position was substantially justified. Thus, the Acting Secretary affirmed the ARB in that regard. *Id.* at 17-18.

waiver."[60] The Acting Secretary agreed with the Concurrence's conclusion that there was no clear indication that Congress intended to waive sovereign immunity and apply the APA (or by extension EAJA) to these H-2B proceedings.[61] Specifically, the FAD stated that the text of the H-2B enforcement provision itself did not explicitly require the proceedings to be conducted on the record (despite, like the Concurrence, recognizing that no such magic words are necessary)[62] and that there was no other "textual evidence of Congressional intent," including no other statutory "procedural requirements" beyond the opportunity for a hearing.[63] Like the Concurrence, the FAD also gave weight to the fact that other INA provisions expressly invoked APA Section 554[64] and rejected the Majority's analysis regarding the backdrop of the APA and the presumption that traditional quasi-judicial hearings are presumed to be on the record.[65]

4. Morton Concessions and the Present Case

In 2014 and 2015, Morton Concessions applied to the United States Department of Labor to recruit and hire employees under the H-2B program.[66] The Administrator opened an investigation into Morton Concessions' H-2B practices in November 2014.[67]

Reminiscent of the Administrator's severely delayed approach in *Graham & Rollins*, more than five and a half years after opening the investigation, the Administrator finally issued a determination letter on July 17, 2020, finding that Morton Concessions failed to pay the required wage rate to six H-2B employees.[68] The Administrator assessed $21,390.40 in back wages and $633.11 in

---

60 *Id.* at 4-5 (citations omitted).

61 *Id.* at 16-17.

62 *Id.* at 6-8.

63 *Id.* at 8-10.

64 *Id.* at 8-9 (citations omitted).

65 *Id.* at 10-15.

66 Ruling on Respondent's Motion to Dismiss at 1-2.

67 Administrator's Opposition to Respondent's Motion to Dismiss at 2.

68 Ruling on Respondent's Motion to Dismiss at 2.

civil money penalties for the alleged violations.[69] Morton Concessions challenged the assessment and requested a hearing with an ALJ.[70]

On December 22, 2020, Morton Concessions filed a Motion to Dismiss, arguing that the Administrator's enforcement action was untimely because the alleged violations occurred more than five years prior.[71] Taking the same position it took in *Graham & Rollins*, the Administrator argued that no statute of limitations applied to its enforcement action.[72] Alternatively, the Administrator argued that even if a five-year statute of limitations applied, some of the cited violations occurred within the five-year period.[73]

Like the ALJ in *Graham & Rollins*, the ALJ in this case determined that the five-year statute of limitations in 28 U.S.C. § 2462 applied to the Administrator's assessments for back wages and civil money penalties.[74] Thus, the ALJ granted

---

69 *Id.*

70 *Id.*

71 *Id.*

72 *Id.*

73 *Id.* at 2-3.

74 *Id.* at 4-7. One issue that pervades both *Graham & Rollins* and this case is the question of what statute of limitations, if any, governs the Administrator in bringing an enforcement action under the H-2B statute. All parties agree that the statute does not contain any express limitation and thus the question revolves around 28 U.S.C. § 2462's five-year statute of limitations, which is typically applied if a specific enabling statute does not contain its own statute of limitations. Section 2462 is not a model of clarity, and its scope has been much litigated. The Administrator has consistently argued that Section 2462 has limited reach in H-2B enforcement cases and certainly does not govern an action against an employer claiming "back pay" as a remedy—a phrase itself which has been litigated as to its meaning. *See* Administrator's Response in Opposition to Morton Concessions' Application for the Award of Fees and Expenses under EAJA at 20-24; *see also Graham & Rollins (ALJ)*, ALJ No. 2018-TNE-00022, slip op. at 5; *Graham & Rollins (ARB)*, ARB No. 2021-0047, slip op. 29-30, 32-36. This issue is not before us, but we bring it to the Secretary's attention as one which may arise in future litigation and arguably is in need of close attention given the many well-established purposes of a statute of limitations to "avoid stale claims, lost evidence, or faded memories, and the importance to the welfare of society by promoting timely justice and stability in human affairs." Carl S. Rauh & Olivia A. Rauh, *The Five-Year Statute of Limitations for Government Enforcement Actions for Civil Penalties: Recently Settled and Still Unsettled Issues Regarding 28 U.S.C. Section 2462*, BUSINESS LAW TODAY (May 27, 2021), https://www.businesslawtoday.org/2021/05/the-five-year-statute-of-limitations-for-government-enforcement-actions-for-civil-penalties-recently-settled-and-still-unsettled-issues-regarding-28-u-s-c-section-2462/; *see also 3M Co. (Minn. Mining & Mfg.) v. Browner*, 17 F.3d 1453, 1457 (D.C. Cir. 1994)

Morton Concessions' Motion to Dismiss in part, concluding that all claims for violations that occurred more than five years prior to the issuance of the determination letter were untimely.[75]

After the ALJ's ruling on the Motion to Dismiss, the Administrator filed a Motion for Summary Decision as to the remaining violations. According to the Administrator, Morton Concessions still owed $1,843.51, plus interest, in back wages to five H-2B employees and $633.11 in civil money penalties for the remining violations.[76] Morton Concessions responded by agreeing to pay the back wages assessment and $569.80 in civil money penalties and asked to withdraw its request for a hearing.[77] The ALJ granted Morton Concession's request for withdrawal and dismissed the case on August 26, 2011.[78]

On October 27, 2021, Morton Concessions applied to the ALJ for an award of attorney's fees and expenses under EAJA. The Administrator opposed the application.

On January 18, 2022, the ALJ issued an Order Staying Proceedings. At the time, *Graham & Rollins* was pending with the Board and the ALJ stayed these proceedings pending the ARB's decision.[79] The ALJ briefly lifted the stay on January 19, 2023, after the ARB issued its decision, before staying the case again on March 7, 2023, after the Acting Secretary elected to review the ARB's *Graham & Rollins* decision.

After the Acting Secretary issued the FAD in *Graham & Rollins*, the ALJ again lifted the stay in this case and invited supplemental briefing from the parties. On April 1, 2024, the ALJ issued a Recommended Decision and Order (D. & O.),

---

("The concern that after the passage of time evidence has been lost, memories have faded, and witnesses have disappeared pertains equally to factfinding by a court and factfinding by an agency.") (internal quotations and citations omitted).

75 Ruling on Respondent's Motion to Dismiss at 8.

76 Ruling on Respondent's Motion to Withdraw Request for Hearing and Order Dismissing Case at 2.

77 *Id.*

78 *Id.*

79 Order Staying Proceedings at 1-2.

concluding that the Acting Secretary's FAD in *Graham & Rollins* precluded the application of EAJA or the award of attorney's fees in this case.[80]

Morton Concessions filed a Petition for Review with the Board on May 14, 2014.

JURISDICTION AND STANDARD OF REVIEW

The Secretary has delegated the authority to review this matter to the Board.[81] The Board acts with "all the powers [the Secretary] would have in making the initial decision."[82]

DISCUSSION

As the delegee of the Secretary of Labor, we are bound by the Secretary's decisions and precedent. Thus, the prior Acting Secretary's decision in *Graham & Rollins* compels us to affirm the ALJ's decision that EAJA does not apply to these H-2B enforcement proceedings.

However, the Secretary has the power and authority to revisit past precedent. We strongly urge the Secretary to revisit the prior Acting Secretary's decision in *Graham & Rollins*. As explained in detail below, we believe the decision improperly overemphasized sovereign immunity, failed to properly weigh and consider evidence of Congressional intent and longstanding presumptions about the applicability of the APA, and reached the wrong conclusion.

1. *Graham & Rollins* Compels Us to Affirm the ALJ

The Secretary of Labor created the Board and delegated it authority to act for the Secretary in review of matters arising under specifically enumerated statutes, including EAJA.[83] The Board's decisions are subject to review and reversal by the

---

80 D. & O. at 3-4.

81 Secretary's Order No. 01-2020, 85 Fed. Reg. at 13186; 29 C.F.R. § 16.306.

82 5 U.S.C. § 557(b); *Graham & Rollins (ARB)*, ARB No. 2021-0047, slip op. at 3 (citations omitted).

83 Secretary's Order No. 02-1996 (Authority and Responsibilities of the Administrative Review Board), 61 Fed. Reg. 19978 (May 3, 1996).

Secretary, who is ultimately responsible for issuing final agency decisions under each of the enumerated statutes.[84] In the delegations of authority to the Board, the Secretary has made clear that the Board must "adhere to the rules of decision and precedent applicable under each of the [enumerated] laws."[85] Likewise, when the Secretary undertakes review of a Board decision and issues a final agency decision, as in *Graham & Rollins*, "[t]he Secretary's decision shall constitute final action by the Department and shall serve as binding precedent on all Department employees and in all Department proceedings involving the same issue or issues."[86] Simply stated, we are bound by the Secretary's decisions, even if we might disagree with them.

In reversing in part the Majority's decision in *Graham & Rollins*, the Acting Secretary provided a clear holding: H-2B enforcement proceedings are not required to be decided "on the record" and, therefore, are not subject to EAJA.[87] This is the exact issue presented in the present case and we are bound by the decision.

In an attempt to navigate around the FAD in *Graham & Rollins*, Morton Concessions argues that the Acting Secretary was bound to follow, but never properly analyzed or applied, controlling law of the Ninth Circuit Court of Appeals.[88] According to Morton Concessions, Ninth Circuit case law, including specifically *Marathon Oil Company v. Environmental Protection Agency*,[89] dictates a different result and the Acting Secretary erred by failing to follow this precedent.[90]

Even if we agreed with Morton Concessions, we would nevertheless still be bound by the Acting Secretary's decision in *Graham & Rollins*. The holding that H-2B enforcement proceedings are not subject to EAJA was clear and was not

---

84 Secretary's Order No. 01-2020, 85 Fed. Reg. at 13187-88.

85 *Id.* at 13187; Secretary's Order No. 02-1996, 61 Fed. Reg. at 19979.

86 Secretary's Order No. 01-2020, 85 Fed. Reg. at 13188.

87 *Graham & Rollins (Acting Secretary)*, ARB No. 2021-0047, slip op. at 17-18.

88 Amended Brief of Employer-Respondent (Resp. Br.) at 6-10.

89 564 F.2d 1253 (9th Cir. 1977).

90 Resp. Br. at 7; Reply Brief of Employer-Respondent at 1.

limited to the Circuit in which that case arose.[91] Because this case involves "the same issue or issues," we are bound by the decision.[92]

2. The Secretary Should Revisit *Graham & Rollins*

Although we are bound by the FAD in *Graham & Rollins*, we have serious misgivings about that decision. Among other things, the decision did not review the purposes of EAJA, gave extreme weight to sovereign immunity, rejected decades-long presumptions surrounding quasi-judicial proceedings, and passed over what we consider to be clear indicia in the nature of the H-2B enforcement proceedings that indicate they were intended to be determined on the record.

The Secretary has the power and authority to revisit past precedent.[93] We urge the Secretary to do so in this case. As stated above, we do not make this recommendation lightly. Therefore, we provide a detailed analysis discussing our views on the issue and the concerns we have with the Acting Secretary's decision.

A. The Decision Did Not Give Due Consideration to the Purposes of EAJA

As an initial and fundamental matter, the Acting Secretary did not give due (or any) weight to the purposes of EAJA in reversing the Majority in *Graham & Rollins*. Above, we detailed the essential principles and purposes underlying EAJA. Briefly restated, EAJA grew out of a growing concern over the unequal positions of private litigants vis-à-vis an ever-expanding bureaucracy. Private litigants—even those with meritorious defenses—found themselves

---

[91] In its Petition for Review, Morton Concessions also argued that "[t]he Secretary correctly concluded that the Ninth Circuit will award EAJA fees in H-2B enforcement actions," citing footnote 10 of the FAD. Petition at 2. We disagree with Morton Concessions' interpretation of that footnote and the Acting Secretary's holding. In that footnote, the Acting Secretary referred to *Marathon Oil*, but concluded that as a non-EAJA case and in light of her reading of other cases, it was not persuasive. *Graham & Rollins (Acting Secretary)*, ARB No. 2021-0047, slip op. at 14 n.10. Finding *Marathon Oil* unpersuasive is a far cry from finding that the Secretary would have been forced to reach a different result had the case arisen in the Ninth Circuit.

[92] Secretary's Order No. 01-2020, 85 Fed. Reg. at 13188; *see* Petition at 1 (identifying the relevant issue as "[w]hether under Ninth Circuit case law, H-2B enforcement actions fall within the scope of the Equal Access to Justice Act").

[93] Secretary's Order No. 01-2020, 85 Fed. Reg. at 13187 (stating that the Board is bound to follow rules of decision and precedent, "until and unless the Board or other authority explicitly reverses such rules of decision or precedent").

outmanned and overmatched when facing heavy-handed government enforcement actions. The problems EAJA sought to address were magnified with the exponential growth of the administrative state. This imbalance of power led to many ills. Individuals and small businesses were rolled over by arbitrary or capricious exercises of agency power, small businesses were unjustly compelled to pay penalties rather than fight unfair government action in costly litigation, and small businesses were specifically targeted for agency action precisely because they did not have the resources to litigate. Thus, EAJA serves several important goals: it reduces the disparity between individuals, small businesses, and other organizations with limited resources vis-à-vis the federal government; it encourages and reduces the hurdles for private parties to challenge unreasonable and oppressive government behavior; and it deters unreasonable and heavy-handed behavior by agencies, federal officials, and regulators. The concerns and goals giving rise to EAJA in 1980 are, perhaps, more pressing and important today than ever before.

The FAD in *Graham & Rollins* does not include any meaningful discussion of the important purposes behind EAJA. The decision featured a hyper-technical (and, in our view, misguided) statutory analysis, without addressing the context and issues presented in the underlying case and the purposes of the relevant statute. Any interpretation of the scope of EAJA must necessarily consider, as a backdrop, the important purposes of that Act. Indeed, "[e]xamination of purpose is a staple of statutory interpretation that makes up the daily faire of every appellate court in the country."[94] The failure to discuss or apparently even consider the purposes of EAJA necessitates further review by the Secretary in this case.

B. The Decision Gave Excessive Weight to Sovereign Immunity

While giving little or no weight to the purposes behind EAJA, the FAD at the same time gave excessive weight to the principle of sovereign immunity. It is clear that sovereign immunity heavily influenced—if not outright dictated—the Concurrence's and the Acting Secretary's decisions in *Graham & Rollins*. Both introduced their discussions by laying out the principles of sovereign

---

[94] *McCreary Cnty. v. Am. Civ. Liberties Union of Ky.*, 545 U.S. 844, 861 (2005) (citations omitted); *accord Abramski v. United States*, 573 U.S. 169, 179 (2014) ("In [interpreting the statute], we must (as usual) interpret the relevant words not in a vacuum, but with reference to the statutory context, structure, history, and purpose.") (internal quotations and citations omitted).

immunity and signaled the overwhelming weight they gave the doctrine. For example, the Concurrence led her analysis by stating that when deciding whether EAJA applied to H-2B enforcement proceedings, "we must remain mindful that EAJA constitutes a partial waiver of sovereign immunity."[95] She then went on to conclude that when "[c]onsidering the fundamental principles" of sovereign immunity, there was not sufficient indicia that Congress intended to waive sovereign immunity and apply EAJA in the H-2B context.[96]

The Acting Secretary leaned even heavier into the application of sovereign immunity. The FAD began with a discussion of the "Governing Legal Framework" by emphasizing the "elementary" and "crystal clear" principles of sovereign immunity and noting the "high threshold" a litigant must overcome to demonstrate that Congress intended to waive it—"both as to whether Congress has waived immunity at all and as to the scope of any waiver."[97] With that preface, sovereign immunity then featured in nearly every section of the legal analysis, including in teeing up the general issues of the applicability of EAJA,[98] in discussing the text of the H-2B enforcement provision,[99] in deemphasizing the longstanding presumption regarding applicability of the APA in quasi-judicial proceedings,[100] in discussing what the Acting Secretary perceived as an ambiguity in the H-2B statute,[101] and even in distinguishing cases cited by the Majority.[102] In fact, in the 18 page opinion, "sovereign immunity" was referenced *44 times*. As we read the FAD, the decision gave sovereign immunity so much weight as to make it effectively determinative and nearly impossible to overcome.

---

95 *Graham & Rollins (ARB)*, ARB No. 2021-0047, slip op. at 37.

96 *Id.* at 38.

97 *Graham & Rollins (Acting Secretary)*, ARB No. 2021-0047, slip op. at 4-5.

98 *Id.* at 5 ("Additionally, because EAJA constitutes a partial waiver of the United States' sovereign immunity . . . it must be strictly construed in favor of the United States.") (internal quotation and citation omitted).

99 *Id.* at 7 ("This principle [of plain text reading] applies with even greater force when determining whether a statute waives sovereign immunity . . .").

100 *Id.* at 11-12 (stating that such presumption is "contrary to bedrock sovereign immunity principles," that the APA Manual did not discuss sovereign immunity, and that the APA Manual could not waive sovereign immunity).

101 *Id.* at 14-15 (concluding that in light of such ambiguity, there could be no waiver of sovereign immunity).

102 *Id.* at 16 n.13.

While we do not disagree with many of the general statements of the law with respect to sovereign immunity and the importance that doctrine has in our legal system, we do disagree with the outsized and effectively decisive reliance the FAD placed on sovereign immunity in that case. While it is generally true that waivers of sovereign immunity must be clear, there is no doubt or ambiguity that Congress waived sovereign immunity through EAJA.[103] As outlined above, to counteract growing overreach by the federal government and negate existing and nearly insurmountable disincentives and disparities that discouraged (or outright prevented) litigants, especially small businesses, from pursuing even the most meritorious and just defenses against heavy-handed and unjustified government action, Congress enacted EAJA. EAJA waived sovereign immunity, indicated Congress's intent to place the goal of incentivizing private parties to vindicate and defend their rights ahead of preserving the federal treasury, and subjected the government to liability for attorney's fees in cases in which it could not substantially justify its position.[104] In invoking the general principle that statutory ambiguities are construed in favor of retaining immunity, the decision singularly focused on perceived ambiguities in the H-2B enforcement statute, without acknowledging the proper starting point that EAJA itself provides a clear and unambiguous waiver of sovereign immunity.

Furthermore, while we generally agree with the notion that courts should be careful not to construe a waiver of sovereign immunity more broadly than Congress intended, it is equally true that once Congress has waived sovereign immunity—as it has clearly done with EAJA—courts "should be careful not to 'assume the authority to narrow the waiver that Congress intended.'"[105] As we read the FAD in

---

103 *See Five Points Rd. Joint Venture v. Johanns*, 542 F.3d 1121, 1125 n.3 (7th Cir. 2008); *Aageson Grain & Cattle*, 500 F.3d at 1045.

104 5 U.S.C. § 504(a).

105 *Ardestani*, 502 U.S. at 137 (quoting *United States v. Kubrick*, 444 U.S. 111, 118 (1979)); *accord Internal Revenue Serv. v. Murphy*, 892 F.3d 29, 40 (1st Cir. 2018) ("We thus must be careful not to be more stinting in the interpretation of the provision than its language requires, for just as the courts should not construe a waiver of sovereign immunity more broadly than Congress intended, neither, however, should we assume the authority to narrow the waiver that Congress intended.") (internal quotations and citations omitted); *Five Points Rd.*, 542 F.3d at 1124 n.3 ("The Government contends, rightly, that any such waiver must be strictly construed in favor of the United States. Nevertheless, once Congress has waived sovereign immunity over certain subject matter, a court should be careful not to assume the authority to narrow the waiver that Congress intended. As we point out in our statutory analysis, here, Congress expressly has waived sovereign immunity with respect to attorney's fees and costs to a prevailing party in an adversarial

Graham & Rollins, the presumption in favor of preserving sovereign immunity was nearly so strong and so fundamental to the analysis as to be effectively insurmountable, even when Congress clearly expressed in EAJA that it intended to waive sovereign immunity and subject the government to liability for unreasonable litigation.

The Supreme Court has warned against over-relying on sovereign immunity principles in assessing the applicability of EAJA. In *Richlin Security Service Co. v. Chertoff*,[106] a prevailing litigant sought to recover paralegal fees under EAJA, but the government opposed its request.[107] The Supreme Court ruled in favor of the litigant, holding that the litigant could recover paralegal fees at prevailing market rates.[108] The Supreme Court stiffly rejected the government's insistence that the scope of EAJA must be narrowly construed in light of sovereign immunity: "The sovereign immunity canon is just that—a canon of construction. It is a tool for interpreting the law, and we have never held that it displaces the other traditional tools of statutory construction."[109]

Courts of appeals likewise have pushed back against agencies' overreliance on the principle that waivers of sovereign immunity should be strictly construed in EAJA cases, particularly in light of the Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo*.[110] As the Tenth Circuit recently explained:

> That said, we may not resort to the sovereign immunity canon at the first sign of any potential ambiguity in the text as this would abdicate our responsibility to interpret the statutes in front of us. Before turning to the canon, we must

---

adjudication under section 504.") (internal quotations and citations omitted); *Aageson Grain & Cattle*, 500 F.3d at 1045 ("Even *Ardestani* acknowledged, however, that the Supreme Court has recognized that, once Congress has waived sovereign immunity over certain subject matter, the Court should be careful not to assume the authority to narrow the waiver that Congress intended. . . . [W]e shall not assume the authority to narrow Congress's waiver of sovereign immunity under the EAJA.") (internal quotations and citations omitted).

106 553 U.S. 571 (2008).

107 *Id.* at 574-75.

108 *Id.* at 577-80.

109 *Id.* at 589.

110 603 U.S. 369 (2024).

> exhaust all traditional tools of statutory construction. . . . Put differently, we cannot reflexively apply the sovereign immunity canon to adopt an immunity-preserving interpretation simply because that interpretation appears plausible on preliminary review.[111]

The important principle that courts should be careful not to narrow the waiver of sovereign immunity that Congress intended is especially important and true in the context of EAJA. The purpose of narrowly construing waivers of sovereign immunity is to "protect the public fisc and to provide breathing space for legitimate Government action that might be deterred by litigation."[112] But, "these purposes are *already* fulfilled by the EAJA's requirement that even prevailing parties may not be awarded fees unless the Government's position lacked substantial justification."[113] In other words, while waiving sovereign immunity, EAJA also builds in important guardrails and restrictions on when a litigant can prevail against the government and recover against the "sovereign," thereby still protecting the public fisc. [114] Narrowing the applicability of EAJA even further

---

111 *Daley v. Ceja*, 158 F.4th 1152, 1157 (10th Cir. 2025) (citing *Loper Bright*, 603 U.S. at 385; other internal quotations and citations omitted).

112 *Ardestani*, 502 U.S. at 147 (Blackmun, J., dissenting).

113 *Id.*

114 *See, e.g.,* H.R. REP. NO. 96-1418, at 11 ("The standard [for determining whether government action is substantially justified] should not be read to raise a presumption that the government position was not substantially justified, simply because it lost the case. Nor, in fact, does the standard require the government to establish that its decision to litigate was based on a substantial probability of prevailing. Furthermore, the government should not be held liable where 'special circumstances would make an award unjust.' This 'safety valve' helps to insure that the government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts. It also gives the court discretion to deny awards where equitable considerations dictate an award should not be made."). Importantly, these limitations should quell any fear of opening the floodgates for attorney's fees against the government. What constitutes "substantial justification" under EAJA has been much litigated and suffice it to say it is a defense often successfully asserted by the government. *See* Kevin W. Brown, *What constitutes substantial justification of government's position so as to prohibit awards of attorneys' fees against government under Equal Access to Justice Act (28 U.S.C.A. § 2412(d)(1)(A))*, 69 A.L.R. Fed. 130 (annotating hundreds of cases). The "special circumstances" proviso is much less litigated and intended to allow the government to pursue novel but credible legal theories and allow consideration of equitable factors. In the key case of *Pierce v. Underwood*, the Supreme Court (majority opinion authored by Justice Scalia) rejected the petitioner's argument that "substantial justification" should mean "justified to a high degree" and opted for a test more favorable to the government of

through the overly rigid application of sovereign immunity principles is both superfluous and plainly inconsistent with the Congressional intent behind the Act because Congress already clearly built limiting guardrails into the Act.[115]

Finally, we believe the primacy given to sovereign immunity is especially problematic given Congress's apparent lack of concern with application of the doctrine when passing EAJA. EAJA necessarily had to waive sovereign immunity against the federal government to allow recovery of costs, and there is some mention and recognition of a waiver of the so-called "American Rule" in the legislative history behind the Act.[116] Even so, a search of the legislative history and a review of both the 1980 and 1985 enabling statutes finds little discussion of "sovereign immunity," much less any suggestion that the concept should be regarded with paramount importance in restricting the interpretation of EAJA or used as an interpretive rule in defining (mush less limiting) the scope of the Act.

"justified to a degree that would satisfy a reasonable person." 487 U.S. 552, 565 (1988). A more stringent test, less favorable to the government and favored by Justice Brennan, was rejected. *See id.* at 578 (Brennan, J., concurring in part).

115 *Ardestani*, 502 U.S. at 147-48. We recognize that Justice Blackmun's view did not ultimately prevail in *Ardestani*. Nevertheless, as noted above, even the majority in that case recognized the fundamental principle that once Congress has waived sovereign immunity, courts "should be careful not to assume the authority to narrow the waiver that Congress intended." *Id.* at 137. The Acting Secretary relied on the *Ardestani* majority decision, which she said stands for the proposition that the Supreme Court "rejected the argument that EAJA applies to all 'trial-type proceedings in which the Government is represented,'" and which she says "foreclosed" the Majority's arguments. *Graham & Rollins (Acting Secretary)*, ARB No. 2021-0047, slip op. at 11, 15. We read *Ardestani* to address a different, less specific issue than the line of courts of appeals cases cited above. In *Ardestani*, it appears that the plaintiff's principal argument was that EAJA should apply to all proceedings that were conducted *like* those defined in APA Section 554, even if they were not specifically and technically "governed by" that section. *Ardestani*, 502 U.S. at 134 ("She thus contends that the phrase 'under section 554' encompasses all adjudications 'as defined in' § 554(a), even if they are not governed by the procedural provisions established in the remainder of that section."). In other words, the Supreme Court had to decide the meaning and reach of the phrase "under section 554" in EAJA. The narrower issue here and in the cited courts of appeals cases, which were decided both before *and after Ardestani*, is the application of the phrase "under section 554" (as defined by *Ardestani*) to the statutes at issue. The Supreme Court in *Ardestani* did not reject the principle that courts can safely presume that quasi-judicial proceedings were intended by Congress to be governed by APA Section 554, absent an expression of congressional intent to the contrary. Thus, we disagree that the Majority's arguments in *Graham & Rollins* are "foreclosed" by *Ardestani*.

116 *E.g.,* H.R. REP. NO. 96-1418, at 9-10.

To the contrary, the limited discussion in the legislative history suggests that sovereign immunity was *not* intended as a bar to application of EAJA. For example, in one hearing on the legislation and related other bills, Representative Robert Kastenmeier (D-WI) stated:

> However, since that time, it has come to our attention that the United States, as a sovereign, is generally not liable for attorneys' fees even under the common law bad faith exception. Also, although the United States may be liable for attorneys' fees under approximately 20 Federal statutes, there are many other cases in which the United States cannot be held liable absent a statute.
>
> **It is the purpose of all the pending bills to expand the liability of the Federal Government in agency proceedings and court actions**.[117]

This statement confirms that Congress clearly intended to waive sovereign immunity, while simultaneously providing no sense that that waiver should be narrowly interpreted to limit the reach of EAJA or to undermine the protections of the Act. While EAJA has not engendered widespread awards against agencies, for reasons that have been much debated,[118] it remains a clear expression of congressional concern over the problems posed by a powerful administrative deep state and the need to provide some avenue of relief for a small entity which successfully proves its innocence in an enforcement action—and allows for that relief by waiving sovereign immunity and permitting an award of attorney's fees and costs under certain conditions.

---

117 *Award of Attorney Fees Against the Federal Government: Hearings Before the Subcomm. on Courts, Civ. Liberties, & the Admin. of Justice of the Comm. on the Judiciary, House of Representatives*, 96th Cong. 1 (1980) (Statement of Rep. Robert Kastermeier). In one other mention, Senator Domenici was very critical of the Department of Justice's (DOJ) apparent assertion of sovereign immunity in cases in which it pursued protracted litigation "beyond common sense." 125 CONG. REC. 5766 (Mar. 21, 1979).

118 *See, e.g., Equal Access to Justice Reform Act of 2005: Hearing Before the Subcomm. on Courts, the Internet, & Intell. Prop., Comm. on the Judiciary, House of Representatives*, 109th Cong. (2006).

Thus, we believe it was improper to interpret the sovereign immunity waiver encompassed in EAJA as narrowly or restrictively as the Acting Secretary did in *Graham & Rollins*.

C. *Congress Intended H-2B Enforcement Proceedings to be Decided on the Record*

When we strip away the undue weight given to sovereign immunity and consider the fundamental purposes as expressed by Congress in passing EAJA, it becomes clear, as the Majority decided in *Graham & Rollins*, that Congress intended the H-2B enforcement proceedings to be determined "on the record." While we do not intend to restate the entirety of Majority's opinion (which we believe is thoroughly researched, well-reasoned, and legally correct, and which we endorse in full), we believe it is important to emphasize critical points in the Majority's analysis, while at the same time addressing counterpoints in the Acting Secretary's analysis with which we do not agree. In short, despite the absence of the words "on the record" in the H-2B enforcement statute, it is clear from the nature of the proceedings and the longstanding and well-established presumptions about the APA's applicability to quasi-judicial proceedings that these H-2B enforcement proceedings are precisely the type of proceedings to which the APA was intended to apply.

i. Talismanic Statutory Language is Not Required

First, we cannot overstate the fundamental principle that the H-2B enforcement statute need not use the words "on the record" or make explicit reference to APA Section 554 to conclude that Congress intended for the proceedings to be determined on the record.[119] What counts instead, as the Majority explained, is whether we or the Secretary can otherwise conclude that Congress intended for the agency to adhere to the requirements of the APA.[120]

Federal courts, including the Supreme Court, hold this principle to be true and have routinely found that statutes that do not contain such language are still

---

[119] *Graham & Rollins (ARB)*, ARB No. 2021-0047, slip op. at 9-10.

[120] *Id.* at 10 (citing *St. Louis Fuel & Supply Co. v. Fed. Energy Regul. Comm'n*, 890 F.2d 446 (D.C. Cir. 1989); *Lane v. U.S. Dep't of Agric.*, 120 F.3d 106 (8th Cir. 1997); *Dantran, Inc. v. U.S. Dep't of Lab.*, 246 F.3d 36 (1st Cir. 2001); *Aageson Grain & Cattle*, 500 F.3d at 1046; *Friends of the Earth v. Reilly*, 966 F.2d 690, 692-95 (D.C. Cir. 1992)).

governed by the APA.[121] Even cases that ultimately conclude that that the proceedings are not governed by the APA—including some of those cited by the Acting Secretary[122]—still recognize that such explicit language need not be present and do not turn on the presence or absence of such talismanic language.[123]

---

[121] *E.g., Steadman v. S.E.C.*, 450 U.S. 91, 97 n.13 (1981) ("[T]he absence of the specific phrase ['on the record'] from [the statute] does not make the instant proceeding not subject to § 554. . . . Rather, the 'on the record' requirement for [the statute] is satisfied by the substantive content of the adjudication.") (citations omitted); *Union Pac. R.R. Co. v. Surface Transp. Bd.*, 113 F.4th 823, 836 (8th Cir. 2024) ("In summary, the crucial question is not whether particular talismanic language was used but whether the proceedings under review fall within that category of quasi-judicial proceedings deserving of special procedural protections.") (internal quotations and citations omitted); *Five Points Rd.*, 542 F.3d at 1126 ("The NAD statutes do not require expressly the hearing to be on the record; nonetheless, Congress' intent is clear. . . . [T]hose magic words need not appear for a court to determine that formal hearings are required. Congress need only clearly indicate its intent to trigger the formal, on-the-record hearing provisions of the APA.") (internal quotations and citations omitted); *Dantran*, 246 F.3d at 46 ("That the statute does not command a hearing 'on the record'—in the language of APA section 554—is of modest significance, as it has long been recognized that the applicability of the APA does not turn on the presence or absence of the precise words 'on the record' . . . . Rather, the resolution of this issue turns on the substantive nature of the hearing Congress intended to provide.") (internal quotations and citations omitted); *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872, 876 (1st Cir. 1978) ("Both [statutes] provide for public hearings, but neither states that the hearing must be 'on the record.' . . . At the outset we reject the position of intervenor PSCO that the precise words 'on the record' must be used to trigger the APA. . . . Rather, we think that the resolution of this issue turns on the substantive nature of the hearing Congress intended to provide."); *Marathon Oil*, 564 F.2d at 1262 ("Since [the statute] requires only an 'opportunity for a public hearing' and fails to specify that permit limitations must be 'determined on the record,' the EPA argues that the formal adjudicatory hearing provisions of the APA are inapplicable. We disagree.").

[122] *Graham & Rollins (Acting Secretary)*, ARB No. 2021-0047, slip op. at 8.

[123] *E.g., Friends of Earth*, 966 F.2d at 693 ("The text [of the statute] requires only a 'public hearing'; it does not expressly require either that the withdrawal hearing be 'subject to section 554' or that the hearing be 'on the record.' Nevertheless, the absence of these 'magic words' is not dispositive.") (citations omitted); *St. Louis Fuel*, 890 F.2d at 448-49 ("Our decision, we emphasize, does not turn, mechanically, on the absence of magic words. What counts is whether the statute indicates that Congress intended to *require* full agency adherence to all section 554 procedural components.") (citations omitted); *City of W. Chi. v. U.S. Nuclear Regul. Comm'n*, 701 F.2d 632, 641 (7th Cir. 1983) ("Although Section 554 specifies that the governing statute must satisfy the 'on the record' requirement, those three magic words need not appear for a court to determine that formal hearings are required.") (citations omitted).

Dantran, Inc. v. United States Department of Labor is particularly instructive on this point. In that case, after six years of litigation challenging the Department of Labor's attempt to bar them from government contracting for alleged violations of the Service Contract Act (SCA), the plaintiff finally prevailed.[124] The plaintiff then sought recovery of attorney's fees from the Department under EAJA.[125] Similar to the H-2B enforcement statute here, the SCA provided an opportunity for a hearing, but did not specifically state that a determination had to be made "on the record."[126]

The First Circuit Court of Appeals began its analysis by flatly rejecting the notion that the absence of the words "on the record" dictated the outcome of the case.[127] To the contrary, the court found the absence of those magic words only "of modest significance."[128] Instead, "the resolution of this issue turns on the substantive nature of the hearing Congress intended to provide."[129] With this fundamental principle in mind, the court determined that it had "no reason to doubt that Congress intended this adjudication to be governed by standard APA procedures."[130] As is the case here (and as discussed more fully below), the court observed that the enforcement proceedings dealt with factual findings with the potential for a "serious impact on private rights." This was "exactly the kind of quasi-judicial proceeding for which the adjudicatory procedures of the APA were intended.[131]

Like federal courts, the Department of Labor itself has also determined that the APA and EAJA apply to statutes that do not explicitly require determinations "on the record" or refer explicitly to the APA. In 29 C.F.R. § 16.104, the Department identifies several proceedings that the Agency has "deemed to be adversarial

---

124 *Dantran*, 246 F.3d at 38.

125 *Id.*

126 *Id.* at 45. The SCA provided: "Where the Secretary does not otherwise recommend because of unusual circumstances, he shall, not later than ninety days after a hearing examiner has made a finding of a violation of this chapter," place the individual on the debarment list. *Id.* (quoting 41 U.S.C. § 354(a)).

127 *Id.* at 46.

128 *Id.*

129 *Id.* (quoting *Seacoast*, 572 F.2d at 876).

130 *Id.*

131 *Id.* (citation omitted).

adjudications which are covered by" EAJA.[132] Of the statutes listed, as least three do not explicitly require the determinations to be made "on the record" or explicitly invoke the APA.[133] Even absent such magic words, the Department has still determined the statutes must be determined "on the record." The same should hold true here.

The Majority and Concurrence in *Graham & Rollins* both agreed that the absence of the words "on the record" or explicit reference to the APA was not determinative.[134] The Acting Secretary also agreed that the absence of such language from the H-2B enforcement statute was not determinative.[135] However, it is clear from the remainder of the Acting Secretary's analysis that, like the weight afforded to sovereign immunity, the absence of the talismanic words was effectively determinative in the decision.[136] That approach was inconsistent with overwhelming federal authority to the contrary and warrants reconsideration by the Secretary in light of the other clear indicia of Congressional intent discussed below.

---

[132] 29 C.F.R. § 16.104(a). The regulation was last amended on July 9, 2007, prior to the Department of Labor receiving authority over H-2B enforcement matters. *Graham & Rollins (ARB)*, ARB No. 2021-0047, slip op. at 6 n.19. Therefore, the H-2B enforcement statute naturally does not appear on the list.

[133] 29 C.F.R. § 16.104(a)(5)(i) (citing 29 U.S.C. § 2936, which has since been repealed ("[T]he applicant may request a hearing before an [ALJ].")), (ii) (citing 26 U.S.C. § 3303(b) (stating that the Secretary may not take action until "after reasonable notice and opportunity for hearing") and § 3304(c) (stating that the Secretary may not take action until "after reasonable notice and opportunity for hearing")), (iii) (citing 42 U.S.C. § 503(b) ("Whenever the Secretary of Labor, after reasonable notice and opportunity for hearing . . . .")).

[134] *Graham & Rollins (ARB)*, ARB No. 2021-0047, slip op. at 9-10, 38-39.

[135] *Graham & Rollins (Acting Secretary)*, ARB No. 2021-0047, slip op. at 7 (quoting *St. Louis Fuel*, 890 F.2d at 448, for the proposition that "EAJA applicability 'does not turn, mechanically, on the absence of magic words.'").

[136] *See id.* at 6 ("[T]he majority failed give sufficient weight to the text of the INA . . . ."), 8 ("[I]n addition to the lack of any explicit 'on the record' language or provision incorporating section 554 or the APA, there is no other textual evidence of Congressional intent . . . to require the H-2B enforcement proceedings be conducted on the record or in full compliance with section 554.").

ii. H-2B Enforcement Proceedings Are Precisely the Type of Quasi-Judicial Proceedings to Which the APA Was Meant to Apply

Rather than focusing on the presence or absence of specific talismanic language or magic words, federal courts make clear that the relevant inquiry should instead focus on the "substantive content of the adjudication" to determine whether Congress intended for the proceedings to be determined on the record under the APA.[137] In conducting this analysis, courts look for certain hallmarks or characteristics of what they refer to as "quasi-judicial proceedings." For example, courts consider whether the proceedings deal with disputes of fact or require specific factual findings and whether the proceedings involve issues impacting specific parties and private rights.[138] When the adjudication at issue bears these characteristics, courts presume that Congress intended for the proceedings to be determined "on the record," even if such language is missing from the statute.

For example, in *Dantran*, discussed above, the underlying proceedings involved a government contractor seeking review of an administrative order debarring the contractor from receiving government contracts for its alleged violations of the SCA.[139] The First Circuit stated that the applicability of the APA "turns on the substantive nature of the hearing Congress intended to provide."[140] For the SCA proceedings, the court had "no reason to doubt that Congress intended this adjudication to be governed by standard APA procedures," because the adjudication "involve[d] specific factual findings with potential for serious impact on private rights."[141] The court concluded that this was "exactly the kind of quasi-

---

137 *Steadman*, 450 U.S. at 97 n.13; *accord Union Pac.*, 113 F.4th at 836 ("Application of the procedural safeguards [of the APA] 'rests on the substantive character of the proceedings involved,' '[a]bsent congressional intent to the contrary.' . . . A court's inquiry must be 'focused on the nature of the administrative determination before [it].'") (quoting *Marathon Oil*, 564 F.2d at 1263-64); *Seacoast*, 572 F.2d at 876 ("Rather, we think that the resolution of this issue turns on the substantive nature of the hearing Congress intended to provide."); *Marathon Oil*, 564 F.2d at 1264 ("In summary, the crucial question is not whether particular talismanic language was used but whether the proceedings under review fall within that category of quasi-judicial proceedings deserving of special procedural protections.") (citations omitted).

138 *E.g., Union Pac.*, 113 F.4th at 836; *Dantran*, 246 F.3d at 46; *Seacoast*, 572 F.2d at 876; *Marathon Oil*, 564 F.2d at 1261.

139 *Dantran*, 246 F.3d at 38.

140 *Id.* at 46 (citation omitted).

141 *Id.* (internal quotations and citation omitted).

judicial proceeding for which the adjudicatory procedures of the APA were intended."[142]

The First Circuit reached a similar result in an earlier case, *Seacoast v. Anti-Pollution League v. Costle*, dealing with a party's application to the EPA for a permit to discharge pollutants.[143] Like in *Dantran*, the First Circuit determined that Congress intended the APA to apply to the proceedings, despite the absence of the words "on the record" from the applicable statute, because "the resolution of this issue turns on the substantive nature of the hearing Congress intended to provide."[144] The proceedings required the agency decisionmaker to "make specific factual findings about the effects of discharges from a specific point source," and to determine whether to grant permits to a specific applicant based on these findings.[145] Additionally, the decision would "not make general policy," and "[o]nly the rights of the specific applicant will be affected."[146] Further, "the factual questions involved in the issuance of [the permits] will frequently be sharply disputed."[147] Based on these characteristics, the court determined that "[t]his is exactly the kind of quasi-judicial proceeding for which the adjudicatory procedures of the APA were intended."[148]

---

142 *Id.* (internal quotations and citations omitted). The Acting Secretary attempted to distinguish *Dantran* because the First Circuit also considered the fact that "the APA is indirectly made applicable by statute" through a chain of cross-references to another statute. *Id.* at 47; *see also Graham & Rollins (Acting Secretary)*, ARB No. 2021-0047, slip op. at 8. However, the fact that the court was also able to patch together a "chain of relationship" pointing to the applicability of the APA does not detract from *Dantran*'s central thesis that "the resolution of this issue turns on the substantive nature of the hearing Congress intended to provide." *Dantran*, 246 F.3d at 46 (internal quotations and citations omitted).

143 572 F.2d at 874.

144 *Id.* at 876.

145 *Id.*

146 *Id.*

147 *Id.*

148 *Id.* As the Acting Secretary noted in *Graham & Rollins*, the First Circuit later rejected a party's reliance on *Seacoast* in *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12 (1st Cir. 2006). *See Graham & Rollins (Acting Secretary)*, ARB No. 2021-0047, slip op. at 14 n.10. However, the First Circuit in *Dominion Energy* stated that it "in no way disparage[d] the soundness of *Seacoast*'s reasoning," but was compelled to adopt the agency's new, conflicting interpretation because the Supreme Court had since decided *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *Dominion*

The Ninth Circuit likewise concluded in *Marathon Oil* that the nature of the proceedings, rather than the words of the statute, determined whether Congress intended for formal APA procedures to apply. In that case, the underlying proceedings dealt with limitations placed by the EPA on applicants' permits with respect to offshore oil platforms.[149] Once again, although the statute provided an opportunity for a hearing, it did not explicitly reference the APA or clearly signal that determinations had to be made "on the record."[150] The EPA argued that the absence of the words "on the record" signaled that the formal hearing provisions of the APA were inapplicable.[151] The Ninth Circuit disagreed, reasoning that the determination of whether the APA applied "does not rest on the presence or absence of the magical phrase 'on the record.'" Instead, "[a]bsent congressional intent to the contrary, it rests on the substantive character of the proceedings involved."[152]

In reaching this conclusion, the court explained that "Congress recognized that certain administrative decisions closely resemble judicial determinations and, in the interest of fairness, require similar procedural protections" under the APA.[153] "These 'quasi-judicial' proceedings determine the specific rights of particular individuals or entities. And, like judicial proceedings, the ultimate decision often turns, in large part, on sharply-disputed factual issues."[154] These classic adjudications are "precisely the category of proceedings Congress sought to address in the APA."[155]

The Eighth Circuit recently conducted the same analysis in *Union Pacific Railroad v. Surface Transportation Board*, dealing with adjudications of rate disputes between shippers and rail carriers.[156] Once again, the statute called for an

---

Energy, 443 F.3d at 18. As discussed *infra* page 45, the Supreme Court has since overturned *Chevron*, so *Seacoast*'s reasoning should still stand in the First Circuit.

149 *Marathon Oil*, 564 F.2d at 1256.

150 *Id.* at 1262.

151 *Id.*

152 *Id.* at 1263.

153 *Id.* at 1261.

154 *Id.*

155 *Id.* at 1264.

156 113 F.4th at 828.

opportunity for a hearing, but did not explicitly state that the adjudication had to be determined "on the record."[157] Citing heavily to *Marathon Oil*, the court confirmed that its inquiry must be "focused 'on the nature of the administrative determination before [it],'" rather than on the presence or absence of magic words.[158] Considering the nature of the proceedings, the court determined that the agency adjudicator was "engaging in 'an agency process leading to a final disposition' of the parties' rate dispute," signaling that Congress intended formal APA procedures to apply.[159]

These proceedings that bear the characteristics of traditional judicial adjudications can be contrasted with other, less formal adjudications and other proceedings that do not warrant the same presumption regarding the applicability of formal APA procedures. For example, in *Friends of the Earth v. Reilly*, the Court of Appeals for the D.C. Circuit considered proceedings to withdraw a state's authorization to administer a hazardous waste program.[160] Consistent with *Dantran*, *Seacoast*, *Marathon Oil*, and *Union Pacific*, the court in *Friends of the Earth* opined that "it is the nature of the issues to be resolved in the [ ] proceeding which is determinative" of whether Congress intended the APA to apply.[161]

The court explained that "a section 554 hearing, with its attendant procedural protections, has as its primary purpose the determination of 'adjudicative facts,' i.e., those facts which 'usually answer the questions of who did what, where, when, how, why, with what motive or intent . . . [and] are roughly the kind of facts that go to a jury in a jury case.'"[162] In contrast, the withdrawal proceedings at issue in that case primarily involved legal issues and issues best classified as involving "legislative facts"—"those 'general facts which help the tribunal decide questions of law and policy.'"[163] Thus, the proceedings were not the type of quasi-judicial proceedings for which courts presume Congress intended APA Section 554 to apply.

---

157 *Id.* at 836.

158 *Id.* (quoting *Marathon Oil*, 564 F.2d at 1264).

159 *Id.* (quoting *Marathon Oil*, 564 F.2d at 1263).

160 966 F.2d at 691.

161 *Id.* at 693 (citation omitted).

162 *Id.* (quoting Kennth Culp Davis, *Administrative Law Treatise* § 12.3, at 413 (2d ed. 1979)).

163 *Id.* at 693-94 (quoting Davis § 12.3, at 413).

An earlier case from the Third Circuit Court of Appeals, *Bell Telephone Company v. Federal Communications Commission*, applied similar reasoning.[164] In that case, the court considered whether the statute at issue, dealing with a requirement for telephone companies to provide certain communication services and facilities to other carriers, required an evidentiary hearing under the APA.[165] Analyzing the nature of the issues involved in the proceedings, the court determined that an APA evidentiary hearing was not required.[166] "When an administrative agency develops a general policy applicable on a prospective basis, courts have found it unnecessary to require evidentiary hearings" under the APA.[167] The court specifically contrasted the issues there dealing with the implementation of "a new policy based upon the general characteristics of an industry," with more traditional "[a]djudicatory hearings . . . when the agency bases its decision on the peculiar situation of individual parties who know more about this than anyone else."[168] Whereas the former are not subject to the APA, the latter are.

All of these cases—many of which were already cited in *Graham & Rollins*—consistently and abundantly make clear that when Congress enacts statutes providing for proceedings that bear the hallmarks of traditional judicial adjudications, including proceedings dealing with the rights of particular individuals or entities and decisions that turn on disputed factual issues, Congress *presumes* that the hearings will be conducted "on the record" in accordance with the formal procedures of the APA. In contrast, when the proceedings deal with

---

164 503 F.2d 1250 (3d Cir. 1974).

165 *Id.* at 1253-54, 1264.

166 *Id.* at 1266.

167 *Id.* (citations omitted).

168 *Id.* at 1266-67. The FAD appears to have selectively quoted *Bell Telephone*, stating "[t]he phrase 'opportunity for hearing' lacks the reference to a 'record' necessary to trigger the evidentiary requirements of the [APA]." *Graham & Rollins (Acting Secretary)*, ARB No. 2021-0047, slip op. at 13-14 (quoting *Bell Tel.*, 503 F.2d at 1264). In context, it is clear that the reason the Third Circuit reached this result is because the adjudication in the case did not bear the classic characteristics of a typical quasi-judicial adjudication; therefore, consistent with the presumption proffered above, more explicit reference to "on the record" proceedings was necessary to trigger application of the APA. Indeed, the Third Circuit cited *United States v. Florida East Coast Railway Co.*, 410 U.S. 224 (1973), and *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972), both of which dealt with rulemaking, as opposed to traditional quasi-judicial adjudication, and both of which suggested that traditional quasi-judicial adjudication would not need the same "on the record" language to trigger the APA. *See infra* note 183.

questions of law or policy, "legislative facts," or only apply prospectively, Congress must state more clearly if it intends for APA Section 554 to apply.[169]

As the Majority in *Graham & Rollins* took great care to explain, this basic dichotomy between quasi-judicial proceedings and other, less formal adjudications and rulemaking, is important and consistent with longstanding interpretations and presumptions about the APA dating back *nearly 80 years*, or more.[170] Not long after the APA was passed in 1946, the Attorney General issued the APA Manual in 1947, providing a definitive and thorough examination of the APA, its purposes, and its legislative history. Consistent with *Dantran*, *Seacoast*, *Marathon Oil*, *Union Pacific*, *Friends of the Earth*, and *Bell Telephone*, the APA Manual clearly explains when "on the record" language is needed to trigger the APA and conversely when it is assumed by Congress that the APA applies to the proceedings even in the absence of such language. In rulemaking and non-traditional or residual "fringe" adjudication, for example, Congress must include specific language that the proceedings must be determined "on the record" or otherwise expressly invoke the APA for the APA's procedural requirements to attach. In contrast, Congress presumes that traditional quasi-judicial proceedings, like the H-2B enforcement proceedings here, are governed by the APA even in the absence of such language:

> It is believed that with respect to adjudication the specific statutory requirement of a hearing, without anything more, carries with it the further requirement of decision on

---

[169] To be clear, we do not read the words "on the record" out of the statute or otherwise consider them surplusage or meaningless. *See Graham & Rollins (Acting Secretary)*, ARB No. 2021-0047, slip op. at 10 n.6. As the Majority carefully explained, the legislative history of the APA explains when and why more precise or explicit "on the record" language is needed when dealing with rulemaking or less formal adjudication. *Graham & Rollins (ARB)*, ARB No. 2021-0047, slip op. at 11-15; *see also Seacoast*, 572 F.2d at 877 ("Our holding does not render the opening phrases of s 554 of the APA meaningless. We are persuaded that their purpose was to exclude governmental functions . . . which traditionally have never been regarded as adjudicative in nature . . . . Without some kind of limiting language, the broad sweep of the definition of 'adjudication', defined principally as that which is not rule making, 5 U.S.C. s 551(6), (7), would include such ordinary procedures that do not require any kind of hearing at all.") (citations and quotations omitted).

[170] Our concurring colleague provides a robust, incredibly thorough examination of the history and passage of the APA dating back even further. His analysis shows that with the passage of the APA, lawmakers intended that if Congress mandated a hearing for adjudications, then the agency's decision would be decided based on the record developed at the hearing.

> the basis of the evidence adduced at the hearing. With respect to rule making, it was concluded, *supra*, that a statutory provision that rules be issued after a hearing, without more, should not be construed as requiring agency action "on the record," but rather as merely requiring an opportunity for the expression of views. That conclusion was based on the legislative nature of rule making, from which it was inferred, unless a statute requires otherwise, that an agency hearing on proposed rules would be similar to a hearing before a legislative committee, with neither the legislature nor the agency being limited to the material adduced at the hearing. No such rationale applies to administrative adjudication. In fact, it is assumed that where a statute specifically provides for administrative adjudication (such as the suspension or revocation of a license) after opportunity for an agency hearing, such specific requirement for a hearing ordinarily implies the further requirement of decision in accordance with evidence adduced at the hearing. H.R. Rep. p. 51, fn. 9 (Sen. Doc. p. 285).[171]

Courts like the First Circuit in *Dantran* and *Seacoast* recognize the APA Manual's authoritative analysis in assessing Congress's intent.[172]

Here, there is no question that the H-2B enforcement proceedings bear the same characteristics and hallmarks of quasi-judicial proceedings as *Dantran*, *Seacoast*, *Marathon Oil*, and *Union Pacific* and as recognized in the APA Manual.

---

171 APA Manual at 42-43; accord *id.* at 33 (stating certain statutes "rarely specify in terms that the agency action must be taken on the basis of the 'record' developed in the hearing;" however, when agency action follows a hearing required by statute, the "agencies themselves and the courts have long assumed that the agency's action must be based upon the evidence adduced at the hearing"), 42 ("Other statutes authorizing agency action which is clearly adjudicatory in nature, such as the revocation of licenses, specifically require the agency to hold a hearing but contain no provision expressly requiring decision 'on the record'. . . . [Agencies] ha[ve] always assumed that these orders must be based upon the evidentiary record made in the hearing, and the courts have held that upon review the validity of an order issued under the [enabling act] must be determined upon the administrative record. It seems clear that administrative adjudication exercised in this context is subject to sections 5, 7 and 8 [APA Sections 554, 556, 557].") (citations omitted).

172 *Dantran*, 246 F.3d at 46; *Seacoast*, 572 F.2d at 877.

As the Majority explained in *Graham & Rollins*, these proceedings involve disputed issues of fact that impact the rights of specific parties.[173] The Administrator penalizes specific employers for alleged violations of H-2B program requirements. The proceedings are fact-intensive and often involve heavily disputed factual questions—whether the employer engaged in the behavior of which it is accused, and whether such behavior violates the program regulations. The proceedings are also constrained to the specific entities named in the action and address only past alleged violations—the decisions reached by the agency are not prospective, do not dictate or create matters of general policy, and, though they have precedential value, do not specifically address the rights or responsibilities of any other entity outside of the adjudication. The proceedings also carry significant and immediate economic consequences for the specific entities involved, including repayment of wages, payment of civil money penalties, and debarment. Thus, the H-2B enforcement proceedings are "exactly the kind of quasi-judicial proceeding for which the adjudicatory procedures of the APA were intended."[174]

In the FAD, the Acting Secretary stated that she "disagree[d] with the majority that caselaw under EAJA supports a conclusion that Congress intended for H-2B enforcement proceedings to be covered by EAJA because they are 'quasi-judicial.'"[175] She likewise proffered that "courts have generally rejected the majority and Respondent's argument that a statutorily required adjudicative hearing is presumptively 'on the record.'"[176]

The FAD largely disregarded or attempted to distinguish the cases cited above, citing instead other cases, none of which, in our view, undercut the longstanding fundamental principles and presumptions articulated above. First, the decision cites *Crestview Parke Care Center v. Thompson*.[177] In that case, the Centers for Medicare and Medicaid imposed a civil money penalty on a nursing facility as a sanction for violations of regulations.[178] The nursing facility requested a hearing before an ALJ to dispute the penalty.[179] Unlike here, the statute at issue in that

---

173 *See Graham & Rollins (ARB)*, ARB No. 2021-0047, slip op. at 18.

174 *See Dantran*, 246 F.3d at 46 (internal quotations and citations omitted).

175 *Graham & Rollins (Acting Secretary)*, ARB No. 2021-0047, slip op. at 15.

176 *Id.* at 13.

177 373 F.3d 743 (2004).

178 *Id.* at 744.

179 *Id.*

case required the agency to hold a hearing "on the record." Because the statute included the words "on the record," the Sixth Circuit concluded that the statute expressly "invoke[d] the panoply of procedures described by the formal-adjudication provisions of the APA."[180]

In dicta, the Sixth Circuit also proffered that "[t]he Supreme Court has also implied that formal adjudication procedures are only necessary when a statute uses the magic words 'on the record,'" citing *United States v. Florida East Coast Railway*.[181] *Florida East Coast Railway* dealt with agency *rulemaking*, rather than *adjudication*.[182] As discussed above, the presumptions are radically different in the two contexts—while "magic words" may be necessary in the rulemaking context to signal adherence to the APA, they are not required in traditional adjudication, as all of the courts of appeals cases cited above indicate and as even the Acting Secretary acknowledged in *Graham & Rollins*. Indeed, the Supreme Court suggested as much in *Florida East Coast Railway* and a subsequent case, *United States v. Allegheny-Ludlum Steel Corporation*, with both stating that the decisions turned on the specific fact that the agency action at issue was rulemaking and that the outcome would differ for cases involving adjudication.[183] Thus, the Sixth Circuit's statement is inconsistent with the weight of federal authority, including the very case it cited for the proposition.

---

180 *Id.* at 748.

181 *Id.*

182 *Fla. E. Coast Ry.*, 410 U.S. at 231.

183 In *Florida East Coast Railway*, the Supreme Court concluded the statute which required action "after hearing," was not required to be decided on the record under the APA. However, the case involved rulemaking, and the Supreme Court recognized that the term "hearing" "undoubtedly has a host of meanings," which "undoubtedly will vary, depending on whether it is used in the context of a rulemaking-type proceeding or in the context of a proceeding devoted to the adjudication of particular disputed facts." *Id.* at 239. The Court also took care to discuss "[t]he basic distinction between rulemaking and adjudication," and distinguish another case because it involved "a 'quasi-judicial' proceeding of a quite different nature form the one we review here." *Id.* at 244. In *Allegheny-Ludlum Steel*, the Supreme Court likewise concluded another statute, which required action "after hearing," was not required to be decided on the record under the APA. However, the case again involved rulemaking, and the Supreme Court again took care to distinguish between rulemaking and adjudication. *Allegheny-Ludlum Steel Corp.*, 406 U.S. at 757.

Next, the FAD cited *Chemical Waste Management, Inc. v. U.S. Environmental Protection Agency*[184] and *Dominion Energy Brayton Point, LLC v. Johnson*.[185] In both cases, the courts of appeals determined that statutes that required proceedings to be conducted after a "hearing," without explicit reference to whether the proceedings needed to be determined "on the record," did not trigger the APA.[186] However, both cases turned on *Chevron U.S.A. v. Natural Resources Defense Council*,[187] under which courts deferred to federal agencies' reasonable interpretations of ambiguous statutes.[188] Citing *Chevron*, the courts in both cases deferred to agency interpretations that the statutes did not trigger the APA's procedural requirements.

Significantly, the Supreme Court expressly and firmly overturned *Chevron* in 2024's *Loper Bright Enterprises v. Raimondo*.[189] In that decision, the Court held that rather than deferring to agency interpretations, "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority."[190] Thus, the reasoning of *Chemical Waste Management* and *Dominion Energy* no longer stands and the cases cannot undermine the weight of authority discussed above.[191]

Finally, the FAD cited *City of West Chicago v. U.S. Nuclear Regulatory Commission*.[192] Consistent with the many cases cited above, the Seventh Circuit

---

184 873 F.2d 1477 (D.C. Cir. 1989).

185 443 F.3d 12 (1st Cir. 2006).

186 *Chem. Waste Mgmt.*, 873 F.2d at 1480-82; *Dominion Energy*, 443 F.3d at 14-17.

187 467 U.S. 837 (1984).

188 *Chem. Waste Mgmt.*, 873 F.2d at 1480-82; *Dominion Energy*, 443 F.3d at 14-17.

189 603 U.S. 369 (2024).

190 *Id.* at 412.

191 In *Loper Bright*, the Court explained that *Chevron* incorrectly "demand[ed] that courts mechanically afford *binding* deference to agency interpretations, even those that have been inconsistent over time. Still worse, it forces courts to do so even when a pre-existing judicial precedent holds that the statute means something else . . . ." *Loper Bright*, 603 U.S. at 399 (emphasis original). *Dominion Energy* provides a quintessential example of this concern in action. In that case, the EPA had previously required formal evidentiary hearings consistent with the APA via regulation. After *Chevron*, though, the EPA amended the regulations to remove the evidentiary hearing requirement and cited *Chevron* to compel the court to defer to its new interpretation. *Dominion Energy*, 443 F.3d at 15.

192 701 F.2d 632 (7th Cir. 1983).

recognized in that case that the statute need not include the "magic words" of "on the record" for Congress to have intended for formal hearings under the APA to apply.[193] Like the cases above, the Seventh Circuit also recognized the distinction between formal adjudication and informal adjudication.[194] Even so, the Seventh Circuit ultimately concluded it could not discern "evidence that Congress intended to require formal hearings" under the statute at issue.[195] Notably, though, the Seventh Circuit did not carefully review the characteristics of the nature of the proceedings in determining whether the APA applied to the statute and proceedings at issue. As a result, the Seventh Circuit's analysis diverges markedly from its sister courts discussed above.[196]

Accordingly, we believe the longstanding and well-established presumptions articulated by the Majority in *Graham & Rollins* dictate the conclusion that Congress intended for these proceedings to be governed by the APA and decided on the record.

D. The Decision Gave Undue Weight to Language Contained in Other Provisions of the INA

In concluding that Congress did not intend to require that H-2B enforcement proceedings be conducted on the record, the Acting Secretary, like the Concurrence, observed that unlike the H-2B enforcement provision, "'several of the other

---

193 *Id.* at 641.

194 *Id.* at 644.

195 *Id.* at 645.

196 Elsewhere, the FAD also cited *St. Louis Fuel* in support of the proposition that "in cases where the statutory provisions at issue does not demonstrate intent to apply all of section 554's required procedures, courts have concluded that EAJA does not apply." *Graham & Rollins (Acting Secretary)*, ARB No. 2021-0047, slip op. at 8. Consistent with *Dantran*, *Seacoast*, *Marathon Oil*, *Union Pacific*, and the other cases cited above, the court in *St. Louis Fuel* recognized that the "absence of magic words" was not determinative. *St. Louis Fuel*, 890 F.2d at 448. However, the statute at issue there provided specific procedural requirements that "provide[d] something less than APA section 554 mandates." *Id.* at 449. Indeed, legislative history confirmed that the statute was intended to "afford[ ] a little bit less opportunity for a full adjudicatory type hearing than is afforded by the Administrative Procedure Act." *Id.* Thus, Congress clearly did not intend for the APA to apply to the proceedings. Here, in contrast, there are no separately identified minimum procedural requirements that would suggest "something less than APA section 554 mandates." If anything, the absence of alternative procedural requirements suggests that Congress instead intended for APA Section 554 to apply.

enforcement provisions Congress added elsewhere to the INA, both before and after the 2005 enactment of the H-2B enforcement provisions,' *do* 'expressly invoke and incorporate APA section 554.'"[197] The Acting Secretary then cited to selected provisions governing the employment of unauthorized migrants, a provision governing document fraud, and a provision governing international marriage brokers, as well as certain enforcement provisions under the H-1B, H-1B1, and E-3 programs.[198] Citing the Supreme Court's decision in *Russello v. United States*,[199] the Acting Secretary stated that "[t]hese INA provisions demonstrate that when Congress intends for an immigration enforcement proceeding to be subject to section 554's procedures for formal adjudications, it is aware of the language it can use to make such intent clear."[200]

We disagree. The canon applied by the Supreme Court in *Russello* logically depends on the provisions in question being very closely aligned and being drafted in close temporal proximity. To be sure, it may be a valid interpretive presumption in certain cases like *Russello*, where the reviewing court can confirm that Congress was careful and deliberate in drafting disparate pieces of legislation.[201] However, this presumption does not apply when the sections are dissimilar, with different language and different formulations addressing different circumstances;[202] when there are examples or proof of inexact drafting in the statute;[203] when there are alternative explanations for a difference in statutory language;[204] when the provisions are not enacted or considered simultaneously;[205] or when the provisions

---

197 *Graham & Rollins (Acting Secretary)*, ARB No. 2021-0047, slip op. at 8 (quoting *Graham & Rollins (ARB)*, ARB No. 2021-0047, slip op. at 39) (emphasis original).

198 *Id.* at 8-9.

199 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress act[ed] intentionally and purposely.").

200 *Graham & Rollins (Acting Secretary)*, ARB No. 2021-0047, slip op. at 9.

201 *Russello*, 464 U.S. at 22-24.

202 *Reichert v. Kellogg Co.*, Nos. 24-1442, 5945, 2026 WL 734673, at *10 (6th Cir. Mar. 16, 2026).

203 *Port Auth. Trans-Hudson Corp. v. Sec'y, U.S. Dep't of Lab.*, 776 F.3d 157, 165 (3d Cir. 2015).

204 *Gormon v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1156 (9th Cir. 2009).

205 *U.S. ex rel. Int'l Bhd. of Elec. Workers Loc. Union No. 98 v. Farfield Co.*, 5 F.4th 315, 332 (3d Cir. 2021) (citation omitted).

address wholly distinct subject matters.[206] Thus, "*Russello* does not provide a dispositive canon. Even at its strongest, *Russello* provides a single canon, a subset of a single tool of statutory interpretation, which may be displaced by other tools."[207]

In this case, the FAD cited a handful of disparate provisions of the INA that were passed by different Congresses at different times in different legislation, and that deal with different types of proceedings that are handled in different contexts.[208] In our view, we think it is unreasonable and illogical to apply the *Russello* presumption in these circumstances and conclude that the omission of the words "on the record" in the H-2B enforcement provision evinces a *careful* and *purposeful* choice by Congress to omit this provision from the scope of the APA. To ascribe the determinative meaning the Assistant Secretary asserts would be a myopic view of the legislative machinations of Congress in drafting provisions which can often be ad-hoc in reality and not necessarily consistent with each other, depending on the circumstances and timing of that draftsmanship. Stated more directly, the congressional cauldron of decision-making does not always proceed on a linear straight line of logic, as is assumed under the *Russello* presumption.

Instead, we believe it is far more appropriate to conclude, consistent with eighty years of legal interpretations discussed above, that Congress intended for these proceedings to be determined "on the record" under formal APA adjudication procedures, just like the myriad other quasi-judicial proceedings across the administrative landscape that bear the same characteristics.

---

206 *Id.* (citations omitted).

207 *Grand Trunk W. R.R. Co. v. U.S. Dep't of Lab., Admin. Rev. Bd.*, 875 F.3d 821, 825 (6th Cir. 2017) (citation omitted).

208 The provisions cited by the Acting Secretary also use different language to invoke the "on the record" or APA requirement. Some require a hearing "in accordance with the requirements of section 554 of Title 5" (8 U.S.C. §§ 1324a(e)(3)(B), 1324c(d)(2)(B)); one requires a hearing "on the record in accordance with subchapter II of chapter 5 of Title 5 (popularly known as the Administrative Procedure Act)" (8 U.S.C. § 1375a(d)(5)(A)(ii)); and some require a hearing "in accordance with section 556 of Title 5" (8 U.S.C. § 1182(n)(2)(B), (n)(2)(G)(viii), (t)(3)(B)). If anything, the disparate language and lack of uniformity evince a lack of purposeful draftsmanship by Congress.

E. Common Sense Dictates that Congress Intended H-2B Enforcement Proceedings be Determined "On the Record"

Finally, we end with obvious common sense that supports concluding that Congress intended formal APA procedures, including the requirement for a determination to be made "on the record," to apply to H-2B enforcement proceedings, just like other traditional quasi-judicial adjudications. Employers participating in the H-2B program must comply with many requirements and conditions. For example, as was at issue in this case, employers must pay the appropriate wage to the H-2B employees, free and clear.[209] Employers must also ensure that they do not give preferential treatment to H-2B employees over domestic employees;[210] must provide full-time work;[211] must list, and abide by, job qualifications and requirements;[212] must pay visa fees and transportation costs to and from the place of employment;[213] must disclose, and abide by, the geographical area of intended employment;[214] must abide by certain requirements if employees separate from employment early;[215] and are bound by a continuing requirement to hire U.S. workers.[216] The Administrator may bring enforcement actions for violations of these program regulations and seek the recovery of unpaid wages, civil money penalties, and debarment from participating in the H-2B program for up to five years, among other remedies.[217]

Thus, H-2B enforcement proceedings can involve serious accusations of wrongdoing and steep remedies. If H-2B enforcement proceedings like these are not made and decided "on the record," then each case "could be decided on the basis of evidence that a court would never see or, what is worse, that a court could not be sure existed."[218] Congress cannot have intended such a result and the proposition

---

209 29 C.F.R. § 503.16(a), (b).

210 *Id.* § 503.16(q).

211 *Id.* § 503.16 (d).

212 *Id.* § 503.16 (e).

213 *Id.* § 503.16(j).

214 *Id.* § 503.16(x).

215 *Id.* § 503.16(y).

216 *Id.* § 503.16(t).

217 *Id.* §§ 503.19, .20.

218 *See Seacoast*, 572 F.2d at 877.

that an agency could bring enforcement actions and sanctions against an employer, or any other entity, in a hearing type forum without concurrently creating a record of those proceedings for the purposes of subsequent review by another body is absurd. The time of the King's Star Chamber is long past. Yet this is the logical result of the FAD's reasoning.[219] Instead, we think it is safe and imminently reasonable to conclude, in line with nearly 80 years of precedent and legal presumptions, and in line with common sense, that Congress intended to apply the panoply of procedural protections provided by the APA to these quasi-judicial adjudications.

CONCLUSION

In sum, we are bound by the Acting Secretary's decision in *Graham & Rollins*, and therefore are compelled to affirm the ALJ's dismissal of this case. However, for the reasons above, we encourage the Secretary of Labor to revisit and reverse *Graham & Rollins*, apply the reasoning of the Majority to this case, and conclude that EAJA applies to these H-2B enforcement proceedings so that Morton Concessions' EAJA fees petition can be considered by the ALJ below.

SO ORDERED.

RANDEL K. JOHNSON
Chief Administrative Appeals Judge

PHILIP G. KIKO
Administrative Appeals Judge

---

[219] This absurd result also buttresses the conclusions of the concurring opinion discussing why it was not logically necessary to always state "on the record" every time a hearing was required in a statute. As night follows day, the two logically and simply flow together.

Judge Burrell, concurring:

The majority opinion cites the ATTORNEY GENERAL'S MANUAL,[220] for explanation as to why Congress used "on the record" in Section 5 (now Section 554). In this concurring opinion, I expand upon those points with a fuller illumination of Congress's use of "on the record" language and how it came to be in the form it was for the APA.

INTRODUCTION[221]

The APA at Section 554(a) provides as follows:

> This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved [listing several exceptions]. . . .[222]

In the H-2B grant at issue, Congress provided for penalties and remedies if the Secretary finds "after notice and opportunity for hearing" failures in the conditions of the petition warrant action.[223] It does not expressly provide for the hearing "to be determined on the record":

> If the Secretary of Homeland Security finds, **after notice and an opportunity for a hearing**, a substantial failure to meet any of the conditions of the petition to admit or otherwise provide status to a nonimmigrant worker under section 1101(a)(15)(H)(ii)(b) of this title or a willful misrepresentation of a material fact in such petition . . . .[224]

---

220 ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947).

221 Throughout, emphasis is added to key statutory or congressional language for effect.

222 5 U.S.C. § 554.

223 8 U.S.C. § 1184(C)(14)(A)(i) ("the Secretary of Homeland Security may, in addition to any other remedy authorized by law, impose such administrative remedies (including civil monetary penalties in an amount not to exceed $10,000 per violation) as the Secretary of Homeland Security determines to be appropriate . . . .").

224 8 U.S.C. § 1184(C)(14)(A).

For reasons set out below, H-2B's statutory hearing language should be construed to require the Secretary's decision to be made upon the record developed at hearing.

1. Precursors to the APA: Initial Reform Efforts Addressed Formal Adjudication

The APA, enacted in 1946, has a rich legislative history as the reform effort worked through various stages of academic, judicial, and legislative input. In the late 1930s, Congress sought to reform administrative procedure across the Executive Branch. The President and the Attorney General formed a committee to review administrative procedure and make recommendations for reform.[225] Over the course of a multi-year period, the AG Committee conducted studies and held public hearings. The AG Committee issued a final report in January 1941, hereinafter "FINAL REPORT."[226]

One of the criticisms of administrative procedure before the APA's watershed reform was inconsistent agency adjudication deficient in key respects. In the FINAL REPORT, the AG Committee distinguished between formal and informal adjudication.[227] The AG Committee identified that over 90% of administrative matters were decided informally without formal procedure, that is "without controversy, and by agreement between the agency and the individual citizen who is affected."[228] "[I]n all but a surprisingly small percentage of cases, these methods [of

---

[225] SEN. DOC. NO. 77-8, 77th CONG. 1st Sess. (FINAL REPORT) at 1-4 (President Roosevelt requested the Attorney General form the Committee); *see also* SEN. DOC. NO. 79-248, 79th CONG. 2d Sess. at 48, 189-90. Around the same time, both the House and the Senate passed the Walter-Logan Bill to address problems with administrative procedure, but this legislation was vetoed by the President in 1940. The President wanted the AG Committee's input before signing far-reaching legislation. SEN. DOC. NO. 79-248 at 49, 64-65, 189-90, 351 for history of the Walter-Logan Bill.

[226] FINAL REPORT, *supra* note 225.

[227] *Id.* at 5 (briefly covering attributes of both forms of adjudication). In formal procedure, "testimony is taken, subject to cross-examination, and embodied into a record." *Id.*

[228] HEARINGS BEFORE A SUBCOMMITTEE OF THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE, 77TH CONG. 1ST SESS. ON S. 674, S. 675, AND S. 918, PART 1, APRIL 2-APRIL 29, 1941, at 804.

informal adjudication] finally dispose of the matter at hand."[229] The AG Committee appreciated the need to standardize formal adjudication when needed but to allow for informal adjudication where available to speed up resolution at lower cost.

A. Congress's Gatekeeper Test in Section 301

In the FINAL REPORT, the AG Committee included proposed legislation.[230] Growing out of the FINAL REPORT, the Senate Judiciary Committee also proposed legislation and held hearings on administrative reform in 1941. Chief among the bills considered by the Judiciary Committee was S. 675.[231]

Both the AG Committee's proposal and the Senate's S. 675 provided for comprehensive reform of agency adjudication in Title III to address *when* formal procedure is required, and if formal adjudication is required, describing in subsequent sections of Title III *what* constitutes standard formal procedure across the various agencies.

The issue before us requires a thorough examination of the legislative language indicating when formal procedure applies, which was addressed in a preface or gatekeeper test at Section 301 of the proposed legislation. The gatekeeper function was critical for reform because Congress wanted to preserve informal adjudication where possible given that the vast majority of agency orders take place without hearing. The gatekeeper language built upon existing agency statutory frameworks or enabling legislation rather than directing Congress to amend agency statutes on this point.[232]

---

229 FINAL REPORT, *supra* note 225, at 5, 17-18; *see also id.* at 35 ("Comparatively few cases flower into controversies in which the parties take conflicting positions of such moment to them that resort is necessary to the procedure of the courtroom"). For example, the AG Committee cited millions of informal adjudications in tax, veterans affairs, and social security. FINAL REPORT, *supra* note 225, at 35, 38-39.

230 FINAL REPORT, *supra* note 225, at 191.

231 HEARINGS, *supra* note 228, at 17. There were three bills to consider: S. 675 was the Committee's majority position, S. 674 was the Committee's minority provision, and S. 918 was a third provision receiving less attention. SEN. DOC. NO. 79-248 at 190.

232 In describing the proposed language, Acting Attorney General Biddle stated S. 675, the favored proposal, "requires formal adjudicatory proceedings and the hearing commissioner system **only in those cases where formal proceedings are already required by Congress in the specific statutes administered**." HEARINGS, *supra* note

> SEC. 301. APPLICATION OF TITLE. The provisions of sections 302 to 309, inclusive, of this title shall be applicable only to proceedings wherein rights, duties, or other legal relations are required by law to be determined after opportunity for hearing, and, if a hearing be held, only upon the basis of a record made in the course of such hearing. They shall not apply to . . . . [233]

The gatekeeper language in these drafts is the precursor to Section 554 of the APA in its current form. Just as Section 554 determines when the formal procedures of Sections 554 and 556-557 apply, Section 301 determined when Sections 302-309 would apply. Conceptually, the current version of the APA's 554 language is identical to Section 301. Both the final version and the precursor drafts require the application of formal procedure when Congress provides for a hearing before adjudication. However, the text shifted from initial proposal to final adoption concerning "on the record" language.

There are three elements of Section 301: (1) proceedings wherein rights, duties, or other legal relations are at issue;[234] (2) "required by law to be determined

---

228, at 1477 (reform is not intended to change existing informal procedures; only where trial examination is now in effect).

233 HEARINGS, *supra* note 228, at 20 (S. 675). Section 301 of the AG Committee's proposed bill is identical for purposes of the gatekeeper test. FINAL REPORT, *supra* note 225, at 195.

234 In adversarial proceedings, administrative judges weigh contested arguments and evidence to resolve disputes with economic or important consequence for the parties. These disputes are resolved through trial-like proceedings. *See* J. Forrester Davidson, *Use of Public Documents and Reports in Administrative Proceedings*, 25 IOWA L. REV. 555, 573-74 (1940) (observing that legislative facts are prospective whereas adjudicative facts put to rest past individual conflicts and are judicial in nature); Kenneth Culp Davis, *The Requirement of Opportunity to be Heard in the Administrative Process*, 51 YALE L.J. 1093, 1094, 1112 (1942) (distinguishing speech-making, legislative hearings from trial-type hearings where the latter require opportunity for evidence, cross-examination, and findings of fact based upon evidence of record).

after opportunity for hearing;"[235] and (3) "if a hearing be held . . . only upon the basis of a record."[236]

The drafters' use of "required by law" recognized both Congress's statutory text in agency statutes as well as constitutional requirements raised by the courts when reviewing agency determinations.[237] Prior to the pivotal APA reform, courts reviewing agency action[238] mandated that agency determinations affecting the rights or legal relations of parties comply with constitutional requirements that: (1) agencies give notice of the claim and disclose evidence of opposing parties or the government;[239] (2) parties have an opportunity to challenge that evidence or cross-examine witnesses;[240] (3) the agency consider only the evidence of record and not

---

235 "Required by law" was criticized because agencies did not know if "law" included their regulations whereby they *ex gratia* provided for hearings when statutes were silent. HEARINGS, *supra* note 228, at 1456. The Justice Department recommended changing "required by law" to "required by statute or the Constitution" which tips a hat to the heavy influence courts had in shaping administrative reform with "due process" requirements for agency procedure. *Id.*; *see also id.* at 577 (recommending changing "required by law" to "only to proceedings wherein rights, duties or other legal relations are required by the constitution or statutes to be determined after opportunity for formal hearing, and if such a hearing be held, only upon the basis of a record made in the course of such hearing.").

236 HEARINGS, *supra* note 228, at 20 (S. 675).

237 *Supra* note 235; *see also* George E. Hale, *Administrative Hearings under the Federal Constitution*, 30 KENTUCKY L.J. 137, 137 (1942); Elden S. Magaw, *Legal Aspects of Administrative Hearings and Findings Part II*, 12 MISS. L. J. 393, 397 (1940); Elden S. Magaw, *Legal Aspects of Administrative Hearings and Findings Part I*, 12 MISS. L. J. 295, 309 (1940).

238 *See, e.g.*, *Morgan v. United States*, 298 U.S. 468 (1936); *Morgan v. United States*, 304 U.S. 1 (1938); *Interstate Com. Comm'n v. Louisville & Nashville R.R. Co.*, 227 U.S. 88 (1913); *United States v. Abilene & S. Ry. Co.*, 265 U.S. 274 (1924); *Ohio Bell Tel. Co. v. Pub. Utils. Comm'n of Ohio*, 301 U.S. 292 (1937).

239 *West Ohio Gas Co. v. Pub. Utils. Comm'n of Ohio*, 294 U.S. 63, 69-70 (1935) (citing instance where commission included into the record several annual reports without giving the company any notice of the inclusion and opportunity to challenge with evidence); *see also* Hale, *supra* note 237, at 138-44 (examining the requirements of administrative notice); Magaw, *Part II*, *supra* note 237, at 395 (there must be notice and hearing at some stage in the proceedings where determination involves life, liberty, or property); FINAL REPORT at 130 (identifying areas for the Veterans' Administration Office to improve notice and disclosure of information); FINAL REPORT, *supra* note 225, at 154 (criticizing the Post Office practice of suspending mails upon unverified complaints without giving notice and opportunity to answer or rebut allegations).

240 The right to submit evidence and argument in a quasi-judicial proceeding involving named individuals and entities implies that the decision will be based on that evidence.

consider ex parte evidence in reaching a decision;[241] and (4) the agency's findings of fact be supported by substantial evidence of record.

In the *Morgan* cases, the United States Supreme Court combined 50 suits against the U.S. Department of Agriculture to discuss common problems with administrative procedure.[242] The Department of Agriculture had fixed maximum rates for buying and selling livestock but its procedure did not comply with statutory requirements for a full hearing before the agency decision.[243] The Court said there was no need to look to the Constitution to determine whether a hearing was required because the requirement was in the statute.[244] In criticizing the agency's procedure, the Court discussed the attributes of what constitutes a full hearing.[245] The Court concluded that no hearing was given if the person who

---

Magaw, *Part II*, note 237, at 405 (right to present evidence); Hale, *supra* note 237, at 144 (presentation of evidence); FINAL REPORT at 137 (recommending changes to Department of Agricultural proceedings to more closely resemble quasi-judicial proceedings); FINAL REPORT, *supra* note 225, at 140-41 (recommending that in cases of recovery of overpayment that the payee be given an opportunity to be heard to argue and rebut contested facts associated with the overpayment and waiver); FINAL REPORT, *supra* note 225, at 142 (criticizing banking practice where applications are denied and recommending agencies provide notice of evidence and opportunity for rebuttal).

241 *Morgan*, 298 U.S. at 480, 481; *Abilene & S. Ry. Co.*, 265 U.S. at 286-89 (order that relied upon evidence not of record was deemed invalid); *see also* Hale, *supra* note 237, at 155-56 & n.103 (collecting cases where courts held that administrative decision must be based on evidence introduced at hearing and incorporated into the record).

These principles were discussed in the debates on proposed legislation. FINAL REPORT, *supra* note 225, at 144 (discouraging use of ex parte information by decision-makers in marine inspection and discipline cases); *id.* at 155-56 (recommending improvement in War Department procedure regarding fixing prices and the use of ex parte information not disclosed to all affected prior to hearing so they may have opportunity to confront it); *id.* at 163 (discussing use of ex parte or extra-record information in investigations at the Department of Interior); *id.* at 179 ("The Committee believes that the Commission or its hearing officer may properly take official notice of such information when clearly relevant, if in the course of the hearing, or thereafter, there is notice of what is proposed to be done and if opportunity is given to every party to explain or rebut the information of which official notice is to be taken.").

242 *See Morgan v. United States*, 298 U.S. 468 (1936); *Morgan v. United States*, 304 U.S. 1 (1938).

243 *Morgan*, 298 U.S. at 471; *Morgan*, 304 U.S. at 18-20 (discussing full hearing with respect to due process and fairness concerns).

244 *Morgan*, 298 U.S. at 477-78.

245 *Morgan*, 298 U.S. at 479-80; *see also Morgan*, 304 U.S. at 18-19 ("But a 'full hearing'—a fair and open hearing—requires more than that. The right to a hearing

decides did not consider the evidence or argument of record.[246] Plaintiffs were entitled to be apprised of the government's charges and given the opportunity to meet the evidence before the agency's final decision:

> A proceeding of this sort requiring the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an order supported by such findings, has a quality resembling that of a judicial proceeding. Hence it is frequently described as a proceeding of a quasi judicial character. The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. **The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations** which in other fields might have play in determining purely executive action. The 'hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given.[247]

Morgan worked its way through the courts and the Supreme Court numerous times over a multi-year period.[248]

---

embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.").

246 *Morgan*, 298 U.S. at 480-81.

247 *Id.* at 480-81.

248 *See, e.g.*, *Morgan v. United States*, 298 U.S. 468 (1936); 304 U.S. 1 (1938); 307 U.S. 183 (1939); 313 U.S. 409 (1941).

Similarly, in *Interstate Commerce Commission v. Louisville & Nashville Railroad Co.*, the Supreme Court rejected the government's attempt to defend a Commission agency decision in conflict with the hearing record.[249] The Supreme Court held that the law gave the parties a right to a hearing, the right to know of and challenge the evidence against it,[250] and imposed upon the agency the duty that the decision be decided in accordance with the facts proved at that hearing.[251] The Court stated as follows:

> But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, **and at the same time imposed the duty of deciding in accordance with the facts proved**. A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.[252]

---

249 227 U.S. 88, 90 (1913).

250 227 U.S. at 93 (". . . [F]or manifestly there is no hearing when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain, or refute. . . . All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding . . . .").

251 227 U.S. at 91-92 ("In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi judicial in character, are void if a hearing was denied; if that [hearing] granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence' or if the facts found do not, as a matter of law, support the order made.") (internal citations omitted).

252 *Id.* at 91.

The Commission was not empowered to ignore the hearing record and trial examiner's adjustment when determining whether a rate was unreasonable.[253] This resulted in an extra-record or arbitrary decision.

With this background, the AG Committee appreciated that courts on judicial review would ask several questions, and these became a basis for ideal formal procedure set out in the proposed draft:

> Are notice and hearing prerequisite to the validity of the administrative action? If so, what kind of notice and what kind of hearing? Before whom may the hearing be held and by whom must the administrative determination be made? Was the aggrieved party given proper opportunity to present relevant evidence and to contest evidence used by the agency? Is the administrative decision required to be based only on evidence of record and, if so, did the agency take into consideration evidence not made part of the record? Is the agency required to formulate findings as a basis for its action and, if so, did it properly make the required findings? These are questions which the court may ask on review and the answers to which may determine the validity of the administrative action.[254]

These requirements became the substance of "formal procedure" implemented by the reform effort.[255] With particular significance to our matter, if

---

253 *Id.* at 91, 92.

254 FINAL REPORT, *supra* note 225, at 88 (citing *Morgan*).

255 *Id.* at 62:

> There are certain criteria of fairness in the hearing process which, in the absence of clear evidence of inapplicability in particular circumstances, should regularly be observed. Before adverse action is to be taken by an agency, whether it be denying privileges to an applicant or bounties to a claimant, before a cease-and-desist order is issued or privileges or bounties are permanently withdrawn, before an individual is ordered directly to alter his method of business, or before discipline is imposed upon him, **the individual immediately concerned should be apprised not only of the contemplated action with sufficient precision to permit his preparation to resist, but, before final action, he should be apprised of the**

the statute required a hearing, courts recognized a requirement that the record and decision be based upon the evidence adduced at that hearing out of due process concerns.[256] During the AG Committee and Senate Judiciary Committee hearings on formal procedure for adjudications, these cases and others were identified. In particular, *Louisville & Nashville Railroad Co.* was identified as one of the sources of Section 301's language—that the agency decision be based on the record at hearing.[257]

These cases had the effect of tethering the decision to the hearing record; judicial review required a record and decision on the record supported by substantial evidence.[258] "Whatever may be the practice before administrative tribunals then, the constitutional theory is plain; an administrative tribunal must

---

> **evidence and contentions brought forward against him so that he may meet them. He must be offered a forum which provides him with an opportunity to bring his own contentions home to those who will adjudicate the controversy in which he is concerned**. The forum itself must be one which is prepared to receive and consider all that he offers which is relevant to the controversy.
>
> These may properly be termed the fundamentals ordinarily requisite to a fair hearing leading to adverse action against an individual.

256 *Supra* notes 241, 250-54 and accompanying text.

257 Mr. Aitchison, Commissioner of the Interstate Commerce Commission commented:

> . . . The final qualification, "and, **if a hearing be held, determine only upon the basis of a record made in the course of such hearing**," is intended, of course, to differentiate between cases of the familiar type of the *Norwegian Nitrogen case,* 288 U.S. 294, and the *Louisville & Nashville case,* 227 U.S. 88, 91, where it was held that **the statutory right to a full hearing "imposes the duty of deciding in accordance with the facts proved**." This distinction we consider to be sound: Experience readily indicates the line of division between cases where the hearing is, at most, advisory, and those where it is all-controlling; and this line of division should be maintained.

HEARINGS, *supra* note 228, at 453-54.

258 FINAL REPORT, *supra* note 225, at 88 (identifying that reviewing courts will review factual questions and questions of law under appropriate standards); *id.* at 134 (recommending that denial of applications be given the opportunity for a hearing so that the record at hearing could serve as a source for judicial review).

act only on information presented to it at a hearing."[259] The AG Committee wrote in the FINAL REPORT:

> The parties, then, are entitled to be apprised of the data upon which the agency is acting. They are entitled not only to refute but, what in this situation is usually more important, to supplement, explain, and give different perspective to the facts upon which the agency relies. In addition, upon judicial review, the court must be informed of what facts the agency has utilized in order that the existence of supporting evidence may be ascertained.[260]

All reform roads lead to the statutory hearing. The statutory hearing was the foundational block for APA reform. Before the APA was enacted, many enabling statutes required hearings for quasi-judicial action, perhaps because it had been a long-standing requirement of courts that agencies do so. When Congress, in existing agency statutes, required hearings for disputes involving individual rights and legal relations, this triggered proposed reform ensuring that agencies comply with formal procedure set out in the proposed legislation.[261]

B. "On the Record" is Part of Determination Following Agency Hearing

Under Section 301, formal procedure was limited to enabling statutes requiring a hearing before adjudication. The accompanying language requiring the decision to be made "upon the record" is part and parcel of the entire interwoven fabric of reforms. To specify that the decision must be "on the record" is not necessary if one is discussing a quasi-judicial hearing involving rights where the statute requires hearing before decision. It is not so much that the enabling statute

---

259 Hale, *supra* note 237, at 156 (citations omitted) (summarizing cases).

260 FINAL REPORT, *supra* note 225, at 72.

261 *Supra* note 232; SEN. DOC. NO. 79-248 at 330 ("The [] bill is designed primarily to secure publicity of administrative law and procedure, to require that administrative hearings and decisions shall be conducted in such manner as to preclude the secret reception of evidence or argument, to restate but not expand the right of and procedures for judicial review, and to foster the foregoing by requiring an intra-agency segregation of deciding and prosecuting functions and personnel. **No attempt is made to require formal administrative hearings where the law under which the agency operates has not so required**. No attempt is made to limit existing administrative authority. Agencies are simply confined to the scope of their authority.").

required the agency decision to be "on the record" as it provided for an agency hearing in connection with the agency's order or adjudication. The "on the record" text fits interstitially between the statutory pillars of (1) agency making a decision and (2) that decision taking place after notice and opportunity for hearing. The common statutory grant for agency adjudication does not merely state that notice and a hearing take place but that the order "be determined upon" . . . "agency finds after". . . "be based on" . . . "made upon" a hearing.[262] It is tautological that if Congress has specified that the agency's decision must be made following notice and opportunity for hearing, that the agency's decision be based on that hearing record.[263] The Supreme Court in the *Chicago Junction Case*[264] observed that Congress's choice to provide a hearing before an opinion created a quasi-judicial action wherein evidence is introduced and judgment follows the record thereof:

> Congress by using the phrase 'whenever the Commission is of opinion, after hearing,' prescribed quasi judicial action. Upon application of a carrier, the Commission must form a judgment whether the acquisition proposed will be in the public interest. It may form this judgment only after hearing. The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action.[265]

During the Senate Judiciary Committee's hearings, agencies commented that there was some confusion around the proposed Section 301 language. One agency questioned the awkwardness of Section 301's language for both a statutory hearing, but also a conditional that "if a hearing be held" by resolving: "certainly it must be implicit in any statutory requirement for hearing that decision will be made upon the record."[266]

---

262 *Supra* note 232.

263 *Supra* notes 241, 250-54, 257 and accompanying text.

264 264 U.S. 258 (1924).

265 264 U.S. at 264-65 (footnotes omitted).

266 HEARINGS, *supra* note 228, at 546.

One explanation for why draftsmen chose the language they did was that some agencies pre-APA had loose language or procedures for what they deemed a "hearing." Oral arguments, narratives, or conferences might be viewed as a hearing even though they were not adversarial,[267] i.e., they were not in front of trial examiners with evidence and argument from opposing parties constituting the hearing record upon which the decision was made concerning the rights of parties.

In a statement to the Senate Judiciary Committee, the DOJ observed the general theme throughout the APA reform effort that informal adjudication is preferred, but for those areas where there is a trial examiner, the agency holds a formal hearing, and its decision is required to be based upon the formal record developed at hearing:

> The most important factor is that the bill is not intended to change existing informal procedures. **The hearing-commissioner system is, in general, to be used only where the trial examiner system is now in effect. Where the agency does not hold a formal hearing and where its decision is not required to be based upon the formal record of that formal hearing (the situation where the trial examiner system is most commonly used), the provisions of sections 302 and 309 of S. 675 are not intended to apply**. **In no case is a formal hearing before a hearing commissioner intended to be required where no formal hearings are now required by law to be held.**
>
> Nevertheless, some confusion seems to exist concerning the applicability of S. 675 to informal adjudications. This apparently is because some agencies, such as the Bureau of Internal Revenue and the Veterans' Administration, attach a different meaning to the word "hearing" and to the word "record" than that attached to those words by the bill. Representatives of those agencies feel that any sort of hearing, including ordinary conferences or the sort of narrative oral argument taking place before the Veterans'

---

267 *Abilene & S. Ry. Co.*, 265 U.S. at 289 ("Every proceeding is adversary, in substance, if it may result in an order in favor of one [party] as against another.").

> Administration, are included. They also regard that a file of information may be interpreted to be a "record." Of course, one can scarcely envisage an administrative decision of any sort which is not based upon a file. **But the requirement of section 301 is that the record be made in the course of the hearing. This seems to exclude situations where decision is made in part upon the basis of some sort of informal hearing and in part on the file, since the file clearly is not the record made in the course of such hearing**.[268]

Reformers needed to address ambiguity to preserve the important line between formal and informal procedure. For adjudicatory hearings, the evidence is gathered at hearing and the decision is made on the basis of that record at hearing.[269] When considering these requirements for full hearing and adjudication, it is needless to state that the agency decision be determined on the record.[270] To allow adjudication to include extra-record material on disputes involving rights of parties would run contrary to judicial standards cited by courts on review and reverse the reform effort.[271]

2. McCarran-Summers S. 7 in 1945-1946

Following the Senate Judiciary Committee hearings in 1941, World War II intervened and occupied concern. Congress picked up the issue of reforming administrative procedure in 1944. Senator McCarran introduced S. 7 in early January 1945.[272] Accompanying S. 7, Congressman Summers introduced an

---

268 HEARINGS, *supra* note 228, at 1500-01.

269 *Id.* at 831 ("Although comparatively few cases reach the stage of formal adjudication—and by that I mean full hearing where testimony is under oath and subject to cross-examination and where the ultimate decision must be based solely on such testimony and evidence—positions are strongly held, interests clash, and issues are often difficult and technical.").

270 Magaw, *Part II*, *supra* note 237, at 411 ("Corollary to the right of cross-examination is the well settled rule that the decision of the administrative body must be based on evidence of record. . . ."); *see also supra* notes 241, 250-54, 257, 262-263, and accompanying text.

271 *Supra* notes 237-254.

272 SEN. DOC. NO. 79-248 at 300.

identical bill, H.R. 1203, in the House.[273] At this point, the draft APA was the culmination of almost ten years of investigation, deliberation, and craftsmanship by judges, practitioners, agencies, and congressmen.[274]

A. Section 301 became Section 5 in S. 7

What was Section 301 in the earlier effort became Section 5 in the 1945 draft of S. 7. The draftsmen of the Senate Judiciary Committee had taken up the recommendations provided to the Senate Judiciary Committee in 1941 and changed "required by law" to "required by statute."[275] They removed the "if there is a hearing . . . on the basis of a record" clause completely.[276]

In a set of revisions in early 1945, S. 7's gatekeeper language for adjudication was revised to add back "on the record" in the form it would take in the enacted version of Section 5 (currently in Section 554):

> Sec. 5. In every case of **adjudication required by statute to be determined on the record after opportunity for an agency hearing**,[277] except to the extent that there is

---

273 *Id.* at 11, 300-01.

274 *Id.* at 48.

275 *See, e.g.*, HEARINGS, *supra* note 228, at 209, 1456 (recommending changes).

276 The reproduced June 1945 Committee Print indicates that the Committee chose not to include the initial language of S. 7 because it is identical to H.R. 1203, which was included. SEN. DOC. NO. 79-248, at 11. H.R. 1203 (S. 7's initial draft) provided for Section 5 as follows:

> Section 5. In every case of adjudication required by statute to be determined after opportunity for an agency hearing, except to the extent there is directly involved any matter subject to a subsequent trial of the law and the facts de novo . . . .

SEN. DOC. NO. 79-248, at 157. The Committee then took additional comment and made a set of revisions for the June Print. *Id.*

277 Section 301 had stated that formal procedure is required if the "law" requires a hearing and, if a hearing be held, "only upon the basis of a record." The "if a hearing be held . . ." language is itself a conditional. Why have a conditional "if a hearing be held . . ." on top of a requirement that presupposes a hearing by statute? The answer may be because the language "opportunity for hearing" accounts for the situation where a statutory hearing might not take place due to settlement or default proceedings. So, if we reformulate the

> involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court, (2) the selection or tenure of an officer or employee of the United States, (3) proceedings in which decisions rest solely on inspections, tests, or elections, (4) the conduct of military, naval, or foreign affairs function, (5) cases in which an agency is acting as an agent for a court, and (6) the certification of employee representatives—[278]

Throughout the subsequent discussions on the draft, the language relevant to our discussion does not change for adjudications.[279] The reformatting and inclusion of "on the record" in its final form in the June 1945 draft does not appear to be a substantive change. The draftsmen explained these changes and included other notes and suggestions but did not provide any comment on the change of adding "on the record" back into the test.[280] Numerous times, universally or near universally, when draftsmen and commentators discussed the meaning of or explained the gatekeeper test for formal adjudication, they did so without discussing the "on the record" language. Rather, the language triggering formal procedure was described simply in the form: formal procedure is required when the agency's statute requires "hearing before adjudication" or "adjudication after notice and opportunity for hearing."

Critically, when explaining the revised draft quoted above with "on the record" included in final form, the Senate Judiciary Committee explained:

> . . . The introductory clause removes from the operation of sections 5, 7, and 8 all administrative procedures in which **Congress has not required orders to be made upon a**

---

requirement without accounting for nonparticipation, the easiest way to combine the phrases is to move "upon the basis of a record" behind "to be determined" as follows:

> [T]he formal procedure set out in the subsequent provisions shall be applicable only to proceedings wherein rights, duties, or other legal relations are *required by law to be determined upon the basis of a record* after opportunity for hearing.

This is very similar to the final version of Section 5.

278 SEN. DOC. NO. 79-248 at 21.

279 *Id.* at 4, 21.

280 *Id.* at 21-22.

> **hearing**, . . . Limiting application of the sections to those cases in which **statutes require a hearing** is particularly significant, because thereby are excluded the great mass of administrative routine as well as pensions, claims, and a variety of similar matters in which **Congress has usually intentionally or traditionally refrained from requiring an administrative hearing**.[281]

This explanation, one of the most informed explanations available for the final gatekeeper test, ignores "on the record" as a unique facet and generalizes that Section 5 limits formal procedures to those cases where Congress has required orders to be made upon a hearing. The proper way to look at this gatekeeper language is that formal procedures apply when **"Congress has required orders be made upon [*a record developed at*] a hearing"** or a variation thereof. The statutory hearing implies a record and a decision upon that record.[282]

This understanding of not attaching significance to the words "on the record" carries throughout the course of the congressional debates leading up to the APA's passage. Subsequent explanations, as the draft language worked through the House and Senate in 1945 and 1946 and received further input from agencies and interested parties, yields the same explanation.

In a section-by-section analysis of a November 1945 draft of S. 7, Senator McCarran described the gatekeeper test of Section 5:

> The various subsequent provisions of section 5 relating to adjudications apply **only where the case is otherwise required by statute to be determined upon an**

---

281 *Id.* at 21-22; *see also id.* at 22 (further references in explanation and suggestions affirming that the test is **"required by statute to be made after hearing"**); *id.* at 23 (regarding subsection (a) "notice" provision of Section 5, the Committee explained "Since this section, and thereby sections 7 and 8 relating to hearings and decisions, **applies only where statutes require a hearing**, notice of hearing is an obvious and indispensable requisite."); *see also id.* at 28 (in re Section 7 on hearings, the Committee explained that Section 7 is "**not designed to require hearings where Congress has not already done so by statute.**"); *id.* at 79 (House Judiciary Committee Hearings June 1945) ("[formal adjudication] shall [not] apply to any case **unless Congress has specifically, by some other statute, required an administrative hearing**.").

282 *Supra* notes 264-266.

> **agency hearing . . . .** The general limitation of this section to cases **in which other statutes require the agency to act upon or after a hearing is important**. . . . The numbered exceptions remove from the operation of the section **even adjudications otherwise required by statute to be made after hearing**.[283]

The House explained the proposed language in a May 1946 draft of S. 7:

> This section is **limited to cases in which other statutes require an agency to act upon or after a hearing**, but even then the numbered exceptions remove from the operation of the section **adjudications otherwise required by statute to be made after hearing or opportunity therefor**.[284]

Similar explanations were given throughout congressional proceedings.[285]

---

283 SEN. DOC. NO. 79-248 at 202 (analysis of provisions).

284 *Id.* at 260 (House Judiciary Committee May 1946).

285 *Id.* at 303 (Sen. McCarran March/May CONGRESSIONAL RECORD 1946 explaining that the bill requires no agency hearings **unless other statutes already provide so, and where statutory hearings are provided for,** the bill fills in required formal procedure); *id.* at 304, 305 (same, "**adjudications [or] orders shall be made after agency hearing, or opportunity for such hearing**" then formal requirements for the hearing and subsequent decision); *id.* at 315 (for both adjudication and rulemaking, describing the trigger for formal procedure simply as where other statutes require the adjudication or rules to be determined after or upon an agency hearing); *id.* at 353-54 (House Proceedings CONGRESSIONAL RECORD May 1946) ("Section 5 deals with administrative adjudications of particular cases **where Congress has required adjudications to be made upon a hearing**. Sections 7, 8, and 11 spell out the details of hearing and decision procedures in all cases in which, by other legislation, Congress has required an agency hearing."); *id.* at 359 (House Proceedings May 1946) ("It applies, however, **only where Congress by some other statute has prescribed that the agency shall act only upon a hearing** and, even in that case, there are six exceptions. The requirements of section 5 are thus **limited to cases in which statutes otherwise require a hearing** . . . .").

B. Gatekeeper Clause for Formal Rulemaking in S. 7

S. 7 also addressed rulemaking reforms. Most rulemaking is promulgated informally. In less frequent cases, Congress requires formal procedures for rulemaking.[286] When formal rulemaking was required, the gatekeeper test of S. 7 was similar to that of adjudication. In a June 1945 draft of S. 7, draftsmen set out the gatekeeper test for formal rulemaking:

> . . . Where rules are **required by law to be made upon the record** after opportunity for or upon an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.[287]

As with adjudication, when the draftsmen explained the provisions, they did so without attaching any significance to "upon the record." Explaining the formal rulemaking trigger, the draftsmen stated as follows:

> As to th[e] type of rules, moreover, it leaves agencies free to choose from the several common types of informal public rule making procedures, the simplest of which is to permit interested persons to submit written views or data, **except where Congress has required that rules be issued only upon a hearing**. In the latter case, the hearing and decision procedures of sections 7 and 8 necessarily apply . . . . It should be noted that no requirement of formal administrative hearing, is imposed **except where Congress has by some other statute required that rules be issued upon hearing**.[288]

---

286 Formal rulemaking is the exception for rulemaking. HEARINGS, *supra* note 228, at 1468, 1520; APA MANUAL, *supra* note 220, at 32. Most rulemaking is informal by conference or public hearings in the legislative sense where decision-makers can hear and take public comment on proposed reform. *Id.* at 34. In other cases of unique or far-reaching consequences, Congress has specified enhanced requirements for rulemaking with fact-finding and judicial review in mind. FINAL REPORT, *supra* note 225, at 108-109; HEARINGS, *supra* note 228, at 1468, 1520; APA MANUAL, *supra* note 220, at 32.

287 SEN. DOC. NO. 79-248 at 19; *see also id.* at 157 (H.R. 1203).

288 SEN. DOC. NO. 79-248 at 19, 20; *see also id.* at 76 (House Judiciary Committee Hearings June 1945) ("There seems to be fairly complete agreement that you can provide and you should provide only for one thing. That is that, **unless Congress in some other**

In May 1946, the House Judiciary Committee recommended amending the formal rulemaking gatekeeper language to be identical to the formal gatekeeper language for adjudication. The amendments included changing "required by law" to "required by statute," which had already been done for adjudications.[289] The House Judiciary Committee also adjusted the "upon the record" language. The current version stated "upon a record," and the proposed change would state "on the record" to match with Section 5 for formal adjudication. In making the "on the record" change, the House Judiciary Committee commented:

> The change is made [to S. 7's rulemaking language in Section 4] to conform to the language used in the introductory clause of section 5 respecting adjudications. **A statute may, in terms, require a rule or order to be made upon the record of a hearing, or in the usual case be interpreted [by due process concerns] as manifesting a Congressional intention so to require, and in either situation sections 7 and 8 would apply save as other exceptions are operative.**[290]

The House Judiciary Committee's reviewers recognized that "on the record" is usually derived from the courts construing the statutory language in light of the Constitution. In either case, the result is the same: when Congress requires the agency rule to be made upon a statutory hearing, it is the record at hearing that forms the basis of the rule.[291]

---

statute has required the regulation to be made upon hearing, the only thing that should be required is for the agency to give notice of making of any substantive rule and allow people to submit at least in writing their suggestions and to consider them before the issuance of whatever regulations are made."); *id.* at 200-01 (November 19, 1945 draft) (Senator McCarran's analysis of provisions) (omitting "on the record" from the explanation of Sec. 4 as to when formal procedures must accompany rulemaking); *id.* at 259 (same, House explanation May 1946).

289 SEN. DOC. NO. 79-248 at 285 (House Judiciary Committee May 1946 appendix).

290 *Id.* at 285 n.9; *see also supra* note 235 (citing DOJ's recommendation to change "required by law" to "required by statute and Constitution"); Magaw, *Part I*, *supra* note 237, at 325-27 (observing that courts construe which type of hearing, legislative or adversarial, is required by a statute authorizing rulemaking).

291 While the draftsmen explained the gatekeeper test for formal rulemaking in simple terms, following that of adjudication, the distinction between informal and formal rulemaking was more difficult for the courts following enactment of the APA. *See, e.g.*,

At this point, both rulemaking and adjudication gatekeeper tests had "on the record" language and were explained without recognizing the element as distinct from the enabling legislation's grant of a statutory hearing before formal rulemaking or adjudication:

> Where existing statutes require that either general regulations (called "rules" in the bill) or particularized adjudications (called "orders" in the bill) be made **after agency hearing or opportunity for such hearing,** then section 7 spells out the minimum requirements for such hearings, section 8 states how decisions shall be made thereafter, and . . . . Sections 4 and 5 prescribe the basic requirements for the making of rules and the adjudication of particular cases. In each case, **where other statutes require opportunity for an agency hearing,** sections 7 and 8 set forth the minimum requirements for such hearings. . . . [292]

United States v. Florida East Coast Ry. Co., 410 U.S. 224 (1973); *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972); *see also* Emily S. Bremer, *Blame (Or Thank) the Administrative Procedure Act for Florida East Coast Railway*, 97 CHI.-KENT L. REV. 79 (2022). Many rulemaking statutes provided for informal presentation of input including informal public hearings. HEARINGS, *supra* note 228, at 1468, 1520. After the APA's enactment, statutes of this type were in focus. Courts did not conclude that formal rulemaking through Sections 7 and 8 (§ 556 and § 557) was applicable notwithstanding the language mandating that the rule follow statutory hearing. While quasi-judicial adjudication can be simplified to the requirement of decision following statutory hearing, *supra* notes 262-271, quasi-legislative rulemaking with mandated hearings must be sorted between speech-based hearing (§ 553(c) first sentence) and true formal rulemaking based on fact-finding and record (§ 553(c) last sentence). APA MANUAL, *supra* note 220, at 31-35 (distinguishing rulemaking with public hearings from rarer formal rulemaking mandating rule be made upon record at hearing); *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 186 (1935) (even though the statute required hearing before promulgation of rule, findings of fact were not required because of the general application of the rule contra an administrative adjudication in the nature of a judgment against an individual where such findings of fact upon a record are present); Magaw, *Part I*, *supra* note 237, at 311-16.

[292] SEN. DOC. NO. 79-248 at 194 (McCarran discussing the Committee's approach to the proposed legislation); *id.* at 251 (same); *see also id.* at 248 (House Judiciary Committee May 1946) (answering complaints from the 1941 hearings and responding how the current draft addressed those concerns: "Some agencies did not want hearings provided (pp. 1389-1398, 1394), and the present bill provides the details for **hearings only where other statutes require a hearing.** (See sec. 4 (b) and the introductory clause to sec. 5.)"); *id.* at 252

C. *Section 5's Gatekeeper Test Harmonizes Accompanying Formal Procedures on Evidence, Exclusivity, and Judicial Review*

The gatekeeper test of Section 5 links conceptually to other formal procedure reforms and reinforces the concept of agency decision decided upon a record at hearing. Section 5 is the gatekeeper test; Section 7 establishes requirements for a formal hearing; Section 8 establishes requirements of the agency decision; and Section 10 provides for judicial review of agency decisions.

As part of the formal procedure triggered by the gatekeeper test, Congress provided for the record at hearing to be the exclusive source of the agency decision. In other words, agency decision should be based on the hearing record and not upon ex parte information.[293] In the June 1945 revised draft, Senate Judiciary draftsmen proposed Section 7(d):

> (d) Record. The transcript of testimony and exhibits, together with all papers and requests relating to the hearing, **shall constitute the exclusive record** for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, be made available to the parties. Where any agency decision rests, on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.[294]

The draftsmen explained this provision as follows:

> This subsection provides that administrative hearings shall be reduced to a record, and made available to all parties. **The statement of the exclusiveness of the**

(House Judiciary Committee May 1946) ("Sections 4 and 5 prescribe the basic requirements for the making of rules and the adjudication of particular cases. In each case, **where other statutes require opportunity for an agency hearing**[,] sections 7 and 8 set forth the minimum requirements for such hearings and the agency decisions thereafter while section 11 provides for the appointment and tenure of examiners. . . .").

293 *Supra* note 241.

294 SEN. DOC. NO. 79-248 at 31. The May 1946 draft (House Judiciary Committee) is similar. *Id.* at 271.

> **record of the administrative hearing** is a necessary recognition **that upon it, and no other evidence**, the further administrative proceedings must be had, the final administrative decision made, and judicial review be confined. **Unless the record is so recognized as exclusive, the purpose and value of the hearing may be rendered nil, for it is orally the record that informs the parties of the evidence for or against them**. The rule of official notice is that recommended by the Attorney General's Committee, particularly the safeguard that parties be apprised of matters so noticed and accorded an "opportunity for reopening of the hearing in order to allow the parties to come forward to meet the facts intended to be noticed."[295]

The House included then Attorney General Tom Clark's input into the proposals wherein he tied Section 7(d) together with the gatekeeper test on statutory hearings:

> The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute **the exclusive record for decision**, in the cases covered by section 7. This follows from the proposition that sections 7 and 8 deal only **with cases where by statute the decision is to be based on the record of hearing**.[296]

Similarly, Section 8 embodies the concept of agency decision upon the record at hearing as it lists out the methods for parties to get argument and evidence before the deciding official.[297] Section 8(b) emphasizes this content as the source of

---

295 *Id.* at 32.

296 *Id.* at 412 (appendix to Attorney General's statement) (House Proceedings May 1946).

297 The proposed language in the June Print was as follows:

> (b) SUBMITTALS AND DECISIONS. Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the

the decision thereby connecting with other formal procedures, which require decisions upon record of hearing.[298]

Similarly, the draft and final language for judicial review in Section 10 includes the above-discussed concept of agency record developed at hearing. For the June 1945 revised draft, the proposed legislation provided that reviewing courts shall set aside agency action for, among other reasons, being:

> Section 10(e)(5) . . . unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8. . . .[299]

> consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. **All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record**; and (2) the appropriate rule, order, sanction, relief, or denials thereof.

Id. at 33.

298 The draftsmen explained:

> This subsection, in its first sentence, merely states the recognized rule respecting proposed findings, exceptions, and argument. The second sentence deals with the form and content of final decisions and determinations. **The requirement of written findings and conclusions, coupled with a statement of reasons, is indispensably necessary so far as administrative agencies undertake to make decisions upon the record of a hearing**.

Id. at 33-34; *see also id.* at 210 (Senator McCarran, November 1945) ("The requirement that the agency must state the basis for its findings and conclusions, means that such findings and conclusions must be sufficiently related to the record as to advise the parties of their record basis. Most agencies will do so by opinions which reason and relate the issues of fact, law, and discretion."); *id.* at 273, 288 (House Judiciary Committee May 1946) (text, explanation, and suggested amendments for Section 8 in subsequent drafts).

299 *Id.* at 39.

The Senate Judiciary Committee explained this provision as follows:

> The fifth category necessarily limits the substantial evidence rule to cases in **which Congress has required an administrative hearing in which the administrative record** may be made.[300]

In subsequent revisions to Section 10's text, legislators clarified the language by revising 10(e)(5) to state: "unsupported by substantial evidence in any case reviewed **upon the record of an agency hearing provided by statute**, . . ."[301] This revised text was explained as follows: "If the agency **is proceeding upon a statutory hearing and record**, **the cause will appear there.** . . ."[302] The APA's final language on Section 10(e)(5) is as follows:

> [U]nsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed **on the record of an agency hearing provided by statute. . . .**[303]

CONCLUSION

The APA's final gatekeeper language of Section 5 sets out as follows:

> Sec. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is

---

300 *Id.*

301 *Id.* at 278 (House Judiciary Committee May 1946).

302 *Id.* at 278-79 (House Judiciary Committee May 1946).

303 Sec. 10(e), *id.* at 8 (final language).

> acting as an agent for a court; and (6) the certification of employee representative. . . .[304]

As mentioned above, congressional explanations for the gatekeeper test repeatedly skipped "on the record" when examining the language. There is a good reason for this. "On the record" is not a unique facet that requires explanation but is part of the statutory hearing record that forms the basis of the decision when Congress specifies that the agency must "find," "decide," or "determine" after "notice and opportunity for hearing." When Congress specifies that the agency is to determine after "notice and opportunity for hearing" that some right or obligation accrues to one or another, it is necessarily establishing a quasi-judicial setting wherein the agency makes that decision on the hearing record—giving the party notice and an opportunity to confront all of the evidence adverse to its position.[305]

Our H-2B statute fits this model as the Secretary finds, after notice and opportunity for hearing, the rights and legal relations of employers and non-immigrant workers. It states as follows:

> If the Secretary of Homeland Security finds, after notice and an opportunity for a hearing, a substantial failure to meet any of the conditions of the petition to admit or otherwise provide status to a nonimmigrant worker under section 1101(a)(15)(H)(ii)(b) of this title or a willful misrepresentation of a material fact in such petition—[306]

---

304 *Id.* at 4 (final language).

305 *Supra* notes 262-271.

306 8 U.S.C. § 1184(C)(14)(A).

Under H-2B, the Secretary has the ability to award civil monetary penalties and other relief authorized by law.[307] This is a quasi-judicial adjudication resolving adjudicative facts with important consequences for specified parties to the dispute. I concur with the majority that H-2B is properly construed as an adversarial adjudication thereby satisfying EAJA's partial waiver of sovereign immunity.

THOMAS H. BURRELL
Administrative Appeals Judge

---

307 *Supra* note 223.