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Steadman Vs. Sec

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Appeal No. : 450 U.S. 91

Appellant : Steadman

Respondent : Sec

Judgement :

Steadman v. SEC - 450 U.S. 91 (1981)
U.S. Supreme Court Steadman v. SEC, 450 U.S. 91 (1981)

Steadman v. Securities and Exchange Commission

No. 79-1266

Argued December 3, 1980

Decided February 25, 1981

450 U.S. 91

CERTIORARI TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

SYLLABUS

After an on-the-record hearing before an Administrative Law Judge and review by the Securities and Exchange Commission (SEC) in which the preponderance of the evidence standard of proof was employed, the SEC held that petitioner had violated various antifraud provisions of the federal securities laws, and sanctions were imposed. Petitioner sought review in the Court of Appeals on the alleged ground, *inter alia,* that the SEC's use of the preponderance of the evidence, rather than the clear and convincing, standard of proof in determining whether he had violated the securities laws, was improper. The Court of Appeals rejected the argument.

HELD

1. In adjudicatory proceedings before the SEC, 7(c) of the Administrative Procedure Act applies. It provides in pertinent part that a sanction may not be imposed by an administrative agency except on consideration of the whole record or parts thereof cited by a party and supported by and "in accordance with the reliable, probative, and substantial evidence." Pp. 450 U. S. 95 -97.

2. The SEC properly used the preponderance of the evidence standard of proof in determining whether the antifraud provisions of the federal securities laws had been violated. Pp. 450 U. S. 97 -104.

(a) Section 7(c)'s language implies the enactment of a standard of proof. By allowing sanctions to be imposed only when they are "in accordance with . . . substantial evidence," Congress implied that a sanction must rest on a minimum quantity of evidence. And the phrase "in accordance with" lends further support to a construction of 7(c) as establishing a standard of proof, suggesting that the adjudicatory agency must weigh the evidence and decide, based on the weight of the evidence, whether a disciplinary order should be issued. Pp. 450 U. S. 98 -100.

(b) While 7(c)'s language is somewhat opaque as to the precise standard of proof to be used, the legislative history clearly reveals that Congress intended to adopt a preponderance of the evidence standard. Pp. 450 U. S. 100 -102.

Page 450 U. S. 92

(c) Such intent is buttressed by the SEC's longstanding practice of imposing sanctions according to the preponderance of the evidence. Pp. 450 U. S. 103 -104.

603 F.2d 1126, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C.J., and WHITE, MARSHALL, BLACKMUN, REHNQUIST, and STEVENS, JJ., joined. POWELL, J., filed a dissenting opinion, in which STEWART, J., joined, *post,* p. 450 U. S. 104 .

JUSTICE BRENNAN delivered the opinion of the Court.

In administrative proceedings, the Securities and Exchange Commission applies a preponderance of the evidence standard of proof in determining whether the antifraud provisions of the federal securities laws have been violated. The question presented is whether such violations must be proved by clear and convincing evidence, rather than by a preponderance of the evidence.

I

In June, 1971, the Commission initiated a disciplinary proceeding against petitioner and certain of his wholly owned companies. The proceeding against petitioner was brought pursuant to 9(b) of the Investment Company Act of 1940 [Footnote 1]

Page 450 U. S. 93

and 203(f) of the Investment Advisers Act of 1940. [Footnote 2] The Commission alleged that petitioner had violated numerous provisions of the

federal securities laws in his management of several mutual funds registered under the Investment Company Act.

After a lengthy evidentiary hearing before an Administrative Law Judge and review by the Commission in which the preponderance of the evidence standard was employed, [Footnote 3] the

Page 450 U. S. 94

Commission held that, between December, 1965, and June, 1972, petitioner had violated antifraud, [Footnote 4] reporting, [Footnote 5] conflict of interest, [Footnote 6] and proxy [Footnote 7] provisions of the federal securities laws. Accordingly, it entered an order permanently barring petitioner from associating with any investment adviser or affiliating with any registered investment company, and suspending him for one year from associating with any broker or dealer in securities. [Footnote 8]

Petitioner sought review of the Commission's order in the

Page 450 U. S. 95

United States Court of Appeals for the Fifth Circuit on a number of grounds, only one of which is relevant for our purposes. Petitioner challenged the Commission's use of the preponderance of the evidence standard of proof in determining whether he had violated antifraud provisions of the securities laws. He contended that, because of the potentially severe sanctions that the Commission was empowered to impose and because of the circumstantial and inferential nature of the evidence that might be used to prove intent to defraud, the Commission was required to weigh the evidence against a clear and convincing standard of proof. The Court of Appeals rejected petitioner's argument, holding that, in a disciplinary proceeding before the Commission, violations of the antifraud provisions of the securities laws may be established by a preponderance of the evidence. 603 F.2d 1126, 1143 (1979). *See* n 8, *supra.* Because this was contrary to the position taken by the United States Court of Appeals for the District of Columbia Circuit, *see Whitney v. SEC,* 196 U.S.App.D.C. 12, 604 F.2d 676 (1979); *Collins*

Securities Corp. v. SEC, 183 U.S.App.D.C. 301, 562 F.2d 820 (1977), we granted certiorari to resolve the conflict. 446 U.S. 917 (1980). We affirm.

II

Where Congress has not prescribed the degree of proof which must be adduced by the proponent of a rule or order to carry its burden of persuasion in an administrative proceeding, this Court has felt at liberty to prescribe the standard, for "[i]t is the kind of question which has traditionally been left to the judiciary to resolve." *Woodby v. INS,* 385 U. S. 276 , 385 U. S. 284 (1966). However, where Congress has spoken, we have deferred to "the traditional powers of Congress to prescribe rules of evidence and standards of proof in the federal courts" [Footnote 9] absent countervailing constitutional constraints.

Page 450 U. S. 96

Vance v. Terrazas, 444 U. S. 252 , 444 U. S. 265 (1980). For Commission disciplinary proceedings initiated pursuant to 15 U.S.C. 80a-9(b) and 80b-3(f), we conclude that Congress has spoken, and has said that the preponderance of the evidence standard should be applied. [Footnote 10]

The securities laws provide for judicial review of Commission disciplinary proceedings in the federal courts of appeals [Footnote 11] and specify the scope of such review. [Footnote 12] Because they do not indicate which standard of proof governs Commission adjudications, however, we turn to 5 of the Administrative Procedure Act (APA), 5 U.S.C. 554, which "applies . . . in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing," except in instances not relevant here. [Footnote 13] Section 5(b), 5

Page 450 U. S. 97

U.S.C. 554(c)(2), makes the provisions of 7, 5 U.S.C. 566, applicable to adjudicatory proceedings. [Footnote 14] The answer to the question presented in this case turns, therefore, on the proper construction of 7. [Footnote 15]

The search for congressional intent begins with the language of the statute. *Andrus v. Allard,* 444 U. S. 51 , 444 U. S. 56 (1979); *Reiter v. Sonotone Corp.,* 442 U. S. 330 , 442 U. S. 337 (1979);

Page 450 U. S. 98

62 Cases.of Jam v. United States, 340 U. S. 593 , 340 U. S. 596 (1951). Section 7(c), 5 U.S.C. 556 (d), states in pertinent part:

"Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and *in accordance with* the reliable, probative, and *substantial evidence.* "

(Emphasis added.)

The language of the statute itself implies the enactment of a standard of proof. By allowing sanctions to be imposed only when they are "in accordance with . . . *substantial* evidence," Congress implied that a sanction must rest on a *minimum quantity* of evidence. The word "substantial" denotes quantity. [Footnote 16] The phrase "in accordance with . . . substantial evidence" thus requires that a decision be based on a certain quantity of evidence. Petitioner's contention that the phrase "reliable, probative, and substantial evidence" sets merely a standard of *quality* of evidence is, therefore, unpersuasive. [Footnote 17]

The phrase "in accordance with" lends further support to a construction of 7(c) as establishing a standard of proof. Unlike 10(e), the APA's explicit "Scope of review" provision that declares that agency action shall be held unlawful

Page 450 U. S. 99

if "unsupported by substantial evidence," [Footnote 18] 7(c) provides that an agency may issue an order only if that order is "supported by and *in accordance*

with . . . substantial evidence" (emphasis added). The additional words "in accordance with" [Footnote 19] suggest that the adjudicating agency must weigh the evidence and decide, based on the weight of the evidence, whether a disciplinary order should be issued. The language of 7(c), therefore, requires that the agency decision must be "in accordance with" the weight of the evidence, not simply supported by enough evidence " *to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.'" Consolo v. FMC,* 383 U. S. 607 , 383 U. S. 620 (1966), quoting *NLRB v. Columbian Enameling & Stamping Co.,* 306 U. S. 292 , 306 U. S. 300 (1939). Obviously, weighing evidence has relevance only if the evidence on each side is to be measured against a standard of proof which allocates the risk of error. *See Addington v. Texas,* 441 U. S. 418 , 441 U. S. 423 (1979). Section 10(e), by contrast, does not permit the reviewing court to weigh the evidence, but only to determine that there is in the record "`such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,'" *Consolo v. FMC, supra* at 383 U. S. 620 , quoting *Consolidated Edison Co. v. NLRB,* 305 U.S.

Page 450 U. S. 100

197, 305 U. S. 229 (1938). It is not surprising, therefore, in view of the entirely different purposes of 7(c) and 10(e), that Congress intended the words "substantial evidence" to have different meanings in context. Thus, petitioner's argument that 7(c) merely establishes the scope of judicial review of agency orders is unavailing. [Footnote 20]

While the language of 7(c) suggests, therefore, that Congress intended the statute to establish a standard of proof, the language of the statute is somewhat opaque concerning the precise standard of proof to be used. The legislative history, however, clearly reveals the Congress' intent. The original Senate version of 7(c) provided that "no sanction shall be imposed . . . except as supported by relevant, reliable, and probative evidence." S. 7, 79th Cong., 1st Sess. (1945). After the Senate passed this version, the House passed the language of the statute as it reads today, and the Senate accepted the

amendment. Any doubt as to the intent of Congress is removed by the House Report which expressly adopted a preponderance of the evidence standard:

"[W]here a party having the burden of proceeding has come forward with a *prima facie* and substantial case, he will prevail unless his evidence is discredited or rebutted. In any case, the agency must decide 'in accordance with the evidence.' Where there is evidence pro and con, the agency must weigh it and decide *in accordance with the preponderance.* In short, these provisions require a conscientious and rational judgment on the whole record in accordance with the proofs adduced."

H.R.Rep. No.1980, 79th Cong., 2d Sess., 37 (1946) (emphasis added). [Footnote 21]

Nor is there any suggestion in the legislative history that a standard of proof higher than a preponderance of the evidence was ever contemplated, much less intended. Congress was primarily concerned with the elimination of agency decisionmaking premised on evidence which was of poor quality -- irrelevant, immaterial, unreliable, and nonprobative -- and of insufficient quantity -- less than a preponderance. *See id.* at 36 37 and 45; S. Doc. No. 248, 79th Cong., 2d Sess., 32322 and 376-378 (1946); n 21, *supra.*

The language and legislative history of 7(c) lead us to conclude, therefore, that 7(c) was intended to establish a standard of proof, and that the standard adopted is the traditional preponderance of the evidence standard. [Footnote 22]

III

Our view of congressional intent is buttressed by the Commission's longstanding practice of imposing sanctions according to the preponderance of the evidence. As early as 1938, the Commission rejected the argument that in a proceeding to determine whether to suspend, expel, or otherwise sanction a brokerage firm and its principals for, *inter alia,* manipulation of security prices in violation of 9 of the Securities Exchange Act of 1934, 15 U.S.C. 78i, a standard of proof greater than the preponderance of the evidence standard was required. *In re White,* 3 S.E.C. 466, 539-540 (1938). Use of the preponderance standard continued after passage of the APA, and persists today. *E.g., In re Cea,* 44 S.E.C. 8, 25

Page 450 U. S. 104

(1969); *In re Pollisky,* 43 S.E. C. 458, 459-460 (1967). The Commission's consistent practice, which is in harmony with 7(c) and its legislative history, is persuasive authority that Congress intended that Commission disciplinary proceedings, subject to 7 of the APA, be governed by a preponderance of the evidence standard. *See Andrus v. Sierra Club,* 442 U. S. 347 , 442 U. S. 358 (1979); *United States v. National Association of Securities Dealers, Inc.,* 422 U. S. 694 , 422 U. S. 719 (1975); *Skidmore v. Swift & Co.,* 323 U. S. 134 , 323 U. S. 140 (1944).

In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.,* 435 U. S. 519 , 435 U. S. 524 (1978), we stated that 4 of the APA, 5 U.S.C. 553, established the "maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures." In 7(c), Congress has similarly expressed its intent that adjudicatory proceedings subject to the APA satisfy the statute where determinations are made according to the preponderance of the evidence. Congress was free to make that choice, *Vance v. Terrazas,* 444 U.S. at 444 U. S. 265 -266, and, in the absence of countervailing constitutional considerations, the courts are not free to disturb it.

Affirmed.

[Footnote 1]

Section 9(b) of the Investment Company Act of 1940, 15 U.S.C. 80a-9(b), empowers the Commission, in specified circumstances,

"after notice and opportunity for hearing . . . [to] prohibit, conditionally or unconditionally, either permanently or for such period of time as it in its discretion shall deem appropriate in the public interest, any person from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter. . . ."

[Footnote 2]

Section 203(f) of the Investment Advisers Act of 1940, 15 U.S.C. 803(f), empowers the Commission, in specified circumstances, after notice and opportunity for hearing "on the record," to

"censure or place limitations on the activities of any person associated or seeking to become associated with an investment adviser, or suspend for a period not exceeding twelve months or bar any such person from being associated with an investment adviser. . . ."

[Footnote 3]

Disciplinary proceedings before the Securities and Exchange Commission are governed by the Commission's Rules of Practice, 17 CFR 201.1 *et seq.* (1980), which enlarge, in certain respects, protections afforded by the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* *Cf. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.,* 435 U. S. 519 , 435 U. S. 524 (1978) (as to 5 U.S.C. 553, "[a]gencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them"). A respondent in a disciplinary proceeding is entitled to receive timely notice of the charges against him and the questions of fact and law to be determined. 17 CFR 201.6(a) (1980). He may retain counsel to represent him in connection with the proceeding,

201.2(b), file an answer to the charges against him and move for a more definite statement of those charges, 201.7(a) and (d), and have a trial-type hearing presided over by an impartial administrative law judge, other duly-appointed officer, or a Commission member, 201.11(b)-(c). The respondent may present oral or documentary evidence, cross-examine adverse witnesses, and object to the admission or exclusion of evidence. 201.14(a). A respondent may compel production of evidence by subpoena, 201.14(b), and may obtain witness statements in the possession of the Commission's staff for cross-examination purposes, 201.11.1. At the conclusion of the hearing, the respondent has the right to submit briefs and proposed findings of fact and conclusions of law. 201.16(d). The initial decision of the administrative law judge must include findings of fact and conclusions of law, with supporting reasons, on all material issues of fact, law, or discretion presented on the record. 201.16(a). A respondent may seek review by the Commission, which may affirm, reverse, or modify the initial decision based on its independent review of the record. 201.17(g)(2), 201.21.

[Footnote 4]

Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a); 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5 thereunder, 17 CFR 240.10b-5 (1980); 206 (1)-(2) of the Investment Advisers Act of 1940, 15 U.S.C. 80b (1)-(2).

[Footnote 5]

Section 17(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78q(a), and Rule 17a-5 thereunder, 17 CFR 240.17a-5 (1980); 30(a) and 34(b) of the Investment Company Act of 1940, 15 U.S.C. 80a-29(a) and 80a-33(b).

[Footnote 6]

Sections 15(a)(1), 17(a), and 17(e) of the Investment Company Act of 1940, 15 U.S.C. 80a-15(a)(1), 80a-17(a), and 80a-17(e).

[Footnote 7]

Section 20(a) of the Investment Company Act of 1940, 15 U.S.C. 80a-20(a).

[Footnote 8]

Petitioner was allowed 90 days in which to sell his stock in Steadman Securities Corp. Compliance with the Commission's order has been stayed pending completion of judicial review.

Because the Commission imposed severe sanctions on petitioner, the Court of Appeals remanded to the Commission "to articulate carefully the grounds for its decision, including an explanation of why lesser sanctions will not suffice." 603 F.2d 1126, 1143 (CA5 1979).

[Footnote 9]

There is no reason to accord less deference to congressionally prescribed standards of proof and rules of evidence in administrative proceedings than in federal courts. *See Woodby v. INS,* 385 U.S. at 385 U. S. 284 (ascertaining first that Congress had not legislated a standard of proof for administrative deportation proceedings before determining appropriate standard).

[Footnote 10]

Because the task of determining the appropriate standard of proof in the instant case is one of discerning congressional intent, many of petitioner's arguments are simply inapposite. He contends, for example, that, as a matter of policy, the potentially severe consequences to a respondent in a Commission proceeding involving allegations of fraud demand that his burden of risk of erroneous factfinding should be reduced by requiring the Commission to prove violations of the antifraud provisions of the securities laws by clear and convincing evidence. This argument overlooks, however, Congress' "traditional powers . . . to prescribe . . . standards of proof. . . ." *Vance v. Terrazas,* 444 U. S. 252 , 444 U. S. 265 (1980). It is not for this Court to determine the wisdom of Congress' prescription.

[Footnote 11]

Title 15 U.S.C. 77i, 78y, 80a-42, and 80b-13 provide for judicial review of Commission orders in the courts of appeals.

[Footnote 12]

Commission findings of fact are conclusive for a reviewing court "if supported by substantial evidence." 15 U.S.C. 78y, 80a-42, and 80b-13; *cf.* 77i (Commission findings conclusive "if supported by evidence") .

[Footnote 13]

This disciplinary proceeding, brought by the Commission pursuant to 15 U.S.C. 80a-9(b) and 80b-3(f), is clearly a "case of adjudication" within 5 U.S.C. 554. *See International Telephone & Telegraph Corp. v. Electrical Workers,* 419 U. S. 428 , 419 U. S. 445 (1975). Both 80a-9(b) and 80b-3(f) also explicitly require an "opportunity for [an agency] hearing." Moreover, the disciplinary proceeding must be conducted "on the record." The phrase "on the record" appears in 80b-3(f), and while it does not appear in 80a-9(b), *see* n 1, *supra,* the absence of the specific phrase from 80a-9(b) does not make the instant proceeding not subject to 554. *See United States v. Florida East Coast R. Co.,* 410 U. S. 224 , 410 U. S. 238 (1973); *United States v. Allegheny-Ludlum Steel Corp.,* 406 U. S. 742 , 406 U. S. 757 (1972); *Seacoast Anti-Pollution League v. Costle,* 572 F.2d 872, 876 (CA1), *cert. denied,* 439 U.S. 824 (1978). Rather, the "on the record" requirement for 80a-9(b) is satisfied by the substantive content of the adjudication. Title 15 U.S.C. 80a-42 provides for judicial review of Commission orders issued pursuant to 80a-9(b). Substantial evidence review by the Court of Appeals here required a hearing on the record. *See Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U. S. 402 , 401 U. S. 415 (1971); *Seacoast Anti-Pollution League v. Costle,* 572 F.2d at 877. Otherwise, effective review by the Court of Appeals would have been frustrated. *Ibid.* In addition, the substantive violations to be proved pursuant to 80a-9(b)(1)-(3) are virtually identical to the substantive violations stated in 80b-3(e)(1), (4), and (5), which are incorporated by reference into 80b-3(f). The only substantive difference between 80b-3(f) and 80a-9(b) is that the former permits the Commission to impose sanctions on persons affiliated with an investment adviser

and the latter on persons affiliated with an investment company. In both statutes, the Commission is required to prove violations of the securities law provisions enumerated, precisely the type of proceeding for which the APA's adjudicatory procedures were intended. *See generally* 410 U.S. at 410 U. S. 246 .

[Footnote 14]

Section 5(b), 5 U.S.C. 554(c)(2), provides that

"[t]he agency shall give all interested parties opportunity for . . . hearing and decision on notice and in accordance with sections 556 and 557 of this title."

[Footnote 15]

Petitioner makes no claim that the Federal Constitution requires application of a clear and convincing evidence standard. *See* Tr. of Oral Arg. 10.

[Footnote 16]

Webster's Third New International Dictionary (1976) defines "substantial" to mean "considerable in amount."

[Footnote 17]

Section 7(c), of course, also sets minimum quality of evidence standards. For example, the provision directing agency exclusion of "irrelevant, immaterial, or unduly repetitious evidence" and the further requirement that an agency sanction rest on "reliable" and "probative" evidence mandate that agency decisionmaking be premised on evidence of certain level of quality. Thus, while the words "reliable" and "probative" may imply quality of evidence concerns, the word "substantial" implies quantity of evidence.

[Footnote 18]

Section 10(e) of the APA, 5 U.S. C 706, is entitled "Scope of review," and provides, in pertinent part, that

"[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute."

706(2)(e).

[Footnote 19]

Section 10(e) expressly refers to 7. Addition of the words "in accordance with" could not have been inadvertent. *See* n 18, *supra.* This is especially true in light of the House Report's discussion of the relationship between 7(c) and 10(e):

"'substantial evidence' [in 10(e)] means evidence which on the whole record is clearly substantial, plainly sufficient to support a finding or conclusion under the requirements of section 7(c), and material to the issues."

H.R.Rep. No.1980, 79th Cong., 2d Sess., 45 (1946).

[Footnote 20]

It is true that the phrase "substantial evidence" is often used to denote the scope of judicial review. *See* n 12, *supra.* But to conclude that the phrase "substantial evidence" in 7(c) defines the scope of judicial review would make the "substantial evidence" language of 10(e) redundant. Moreover, it is implausible to think that the drafters of the APA would place a scope of review standard in the middle of a statutory provision designed to govern evidentiary issues in adjudicatory proceedings. Section 7 is entitled "Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision." It "is made up almost entirely of a specification of the various elements of trial procedure." 2 K. Davis, Administrative Law Treatise 10:07, p. 332 (2d ed.1979). More specifically, 7(c) allocates the burden of proof (placing it on the proponent of a rule or order), provides for a broad rule governing admissibility of evidence, directs an agency to exclude "irrelevant, immaterial, or unduly repetitious evidence," and delineates the evidentiary basis on which a "sanction may . . . be imposed."

Petitioner's argument overlooks the different functions of initial decisionmaking and judicial review of it. *See Charlton v. FTC,* 177 U.S.App.D.C. 418, 422, 543 F.2d 903, 907 (1976); *see generally* 4 K. Davis, Administrative Law Treatise 29.01-29.11 (1958). As we recognized in *Consolo v. FMC,* 383 U. S. 607 (1966), the reviewing court is not to weigh the evidence, which *Consolo* assumed had already been done.

[Footnote 21]

Representative Walter of Pennsylvania, author of the House Report and a principal drafter of the legislation, speaking during the floor debate on the day the bill was passed by the House, stated as to the meaning of the phrase "in accordance with . . . substantial evidence" that

"the accepted standards of proof, as distinguished from the mere admissibility of evidence, are to govern in administrative proceedings as they do in courts of law and equity."

S. Doc. No. 248, 79th Cong., 2d Sess., 365 (1946). This statement suggests that the usual preponderance standard was contemplated. *See Sea Island Broadcasting Corp. v. FCC,* 200 U.S.App.D.C. 187, 190, 627 F.2d 240, 243 (1980) ("The use of the *preponderance of evidence' standard is the traditional standard in civil and administrative proceedings. It is the one contemplated by the APA, 5 U.S.C. 556 (d)"), cert. denied,* 449 U.S. 834 (1980); *Collins Securities Corp. v. SEC,* 183 U.S.App.D.C. 301, 304, 562 F.2d 820, 823 (1977) ("The traditional standard of proof in a civil or administrative proceeding is the preponderance standard . . ."); 9 J. Wigmore, Evidence 2498 (3d ed.1940); *cf. Woodby v. INS,* 385 U.S. at 385 U. S. 288 (Clark, J., dissenting).

Moreover, during the floor debate, in the context of a discussion of 10(e), it was noted that the substantial evidence test became the scope of review standard because of a desire to have courts review agency decisionmaking more carefully than under the then-prevalent scintilla of evidence test. It is clear from the debate that Congress intended agency decisionmaking to be done according to the

preponderance of the evidence:

"MR. SPRINGER. . . . The gentleman from Iowa . . . has gone rather carefully over the provisions of the bill. I desire to call attention to only one . . . relating to the question of reviewable acts, the review of the proceedings by the judiciary, and the scope of the review. Under the present procedure, in many cases where there is any evidence, even a scintilla of evidence, decisions have been rendered and predicated on that character of evidence before the hearing tribunal."

"MR. HANCOCK. Even though contrary to the preponderance of the evidence."

"MR. SPRINGER. Yes, . . . that has been done in many cases even though it is contrary to the preponderance of the evidence introduced at the hearing."

S. Doc. No. 248, *supra* at 376.

[Footnote 22]

Petitioner's reliance on *Woodby v. INS, supra,* is misplaced. There, the Court required the Immigration and Naturalization Service to establish facts in deportation proceedings by clear, unequivocal, and convincing evidence. The Court adopted this standard of proof because deportation proceedings were not subject to the APA, and the Immigration and Nationality Act (INA) did not prescribe a standard of proof, only the scope of judicial review. The Court reached this conclusion after examining the language, legislative history, and purpose of 106(a)(4) and 242(b)(4) of the INA. That both sections contained the words "reasonable, substantial, and probative evidence" has little bearing on the construction of somewhat different language in an entirely different statute. The language, purpose, and legislative history of these sections of the INA differ in material respects from the language, purpose, and legislative history of 7(c). Section 106(a)(4) was explicitly labeled a judicial review provision. Section 242(b)(4) was also construed by the Court to be "addressed to reviewing courts," 385 U.S. at 385 U. S. 283 , in part because, at the time that the provision was adopted, there was no other scope of judicial review provision in the INA, *id.* at 385 U. S. 284 . The APA, by contrast, was passed with an explicit judicial review

provision, 10(e), and with a provision explicitly governing evidentiary matters before the agency, 7(c). To the extent 242(b)(4) was viewed by the Court as representing a "yardstick for the administrative factfinder," the Court concluded that the provision was directed at the quality of evidence upon which an order could be based. *Id.* at 385 U. S. 283 . The language of 242(b)(4) differs from the language of 7(c), which includes the additional phrase "in accordance with." Moreover, as explained above, the legislative history and purpose of 7(c) make clear that it was not limited to quality of evidence concerns or directed at all at judicial review.

We thus accept Justice Clark's statement in dissent, with which the Court in *Woodby* did not disagree, that 7(c) and 10(e) of the APA have "traditionally been held satisfied when the agency decides on the preponderance of the evidence." *Id.* at 385 U. S. 289 , n. 1. Justice Clark's understanding of 7(c), as expressed in *Woodby,* is entitled to particular respect. We have previously noted that the Attorney General's Manual on the Administrative Procedure Act (1947) has been "given some deference by this Court because of the role played by the Department of Justice in drafting the legislation," *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.,* 435 U.S. at 435 U. S. 546 , and Justice Clark was Attorney General both when the APA was passed and when the Manual was published.

JUSTICE POWELL, with whom JUSTICE STEWART joins, dissenting.

The Securities and Exchange Commission (SEC), acting under the antifraud provisions of the Investment Company Act of 1940 and the Investment Advisers Act of 1940, has imposed severe sanctions on petitioner. He has been barred permanently from practicing his profession and also forced to divest himself of an investment at a substantial loss. In making its findings of fraud and imposing these penalties, the SEC applied the "preponderance of the evidence" standard of proof.

The Court today sustains the action of the SEC, holding

that 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. 556(d), commands the use of this standard in disciplinary proceedings brought under the securities laws. The Court recognizes, however, *ante* at 450 U. S. 95 -96, that the general provisions of the APA are applicable only when Congress has not intended that a different standard be used in the administration of a specific statute. The critical inquiry thus is the identification of the standard of proof desired by Congress.

The SEC acted in this case under 9(b) of the Investment Company Act of 1940, 15 U.S.C. 80a-9(b), and 203(f) of the Investment Advisers Act of 1940, 15 U.S.C. 80b-3(f). Sanctions imposed under these sections are the functional equivalent of penalties for fraud. At common law, it was plain that allegations of fraud had to be proved by clear and convincing evidence. *E.g., Addington v. Texas,* 441 U. S. 418 , 441 U. S. 424 (1979); *Woodby v. INS,* 385 U. S. 276 , 385 U. S. 285 , n. 18 (1966); *Weininger v. Metropolitan Fire Insurance Co.,* 359 Ill. 584, 598, 195 N.E. 420, 426 (1935); *Bank of Pocahontas v. Ferimer,* 161 Va. 37, 40-41, 170 S.E. 591, 592 (1933); *Bowe v. Gage,* 127 Wis. 245, 251, 106 N.W. 1074, 1076 (1906). Congress enacted the Investment Company and Investment Advisers Acts against this common law background. There is no evidence that Congress, when it adopted these Acts, intended to authorize the SEC to abandon the then-applicable standard of proof in fraud adjudications. *See Whitney v. SEC,* 196 U.S.App.D.C. 12, 604 F.2d 676 (1979); *Collins Securities Corp. v. SEC,* 183 U.S.App.D.C. 301, 562 F.2d 820 (1977).

The APA, upon which the Court relies, did not become law for some seven years after the enactment of the two statutes under which the SEC imposed these penalties. Again, the Court points to no specific evidence that Congress intended the APA to supplant the burden of proof rule generally applicable when the securities laws were enacted. Thus, the APA -- the *general* statute applicable only where a *specific*

statute is not should have no bearing on the proof burden in this case.

I imply no opinion on the question whether the evidence supports the SEC's allegations against petitioner. It is clear, however, that the SEC's finding of fraud and its imposition of harsh penalties have resulted in serious stigma and deprivation. *Cf. Addington v. Texas, supra.* * In the absence of any specific demonstration of Congress' purpose, we should not assume that Congress intended the SEC to apply a lower standard of proof than the prevailing common law standard for similar allegations. With all respect, it seems to me that the Court's decision today lacks the sensitivity that traditionally has marked our review of the Government's imposition upon citizens of severe penalties and permanent stigma.

* Petitioner has practiced the profession of investment adviser for many years. He has been forever barred from resuming that profession. Many penalties imposed under our criminal laws -- such as monetary fines and probation -- are far legs severe, and yet these can be imposed only under the "beyond a reasonable doubt" standard of the criminal law.

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