In the

Supreme Court of the United States

CHARLES W. STEADMAN,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 79-1266
	)	
SECURITIES AND EXCHANGE COMMISSION,	)	
	)	
Respondent.	)	

Washington, D.C.
December 3, 1980

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IN THE SUPREME COURT OF THE UNITED STATES

CHARLES W. STEADMAN, Petitioner, v. SECURITIES AND EXCHANGE COMMISSION, Respondent.	No. 79-1266

Washington, D.C.

December 3, 1980

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:38 o'clock p.m.

APPEARANCES:

PETER J. NICKLES, ESQ., Covington & Burling, 888 Sixteenth St., N.W., Washington, D.C. 20006; on behalf of the Petitioner

RALPH C. FERRARA, ESQ., General Counsel, Securities and Exchange Commission, Washington, D.C. 20549; on behalf of the Respondent

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in Steadman v. Securities and Exchange Commission.

Mr. Nickles, you may proceed whenever you are ready.

ORAL ARGUMENT OF PETER J. NICKLES, ESQ.,

ON BEHALF OF THE PETITIONER

MR. NICKLES: Mr. Chief Justice, and may it please the Court:

The issue presented in this case is whether the Securities and Exchange Commission should be required to apply a clear and convincing standard of proof, rather than a preponderance of evidence standard, in its disciplinary proceedings alleging violations of the anti-fraud provisions of the Securities statutes.

The Petitioner, Mr. Charles Steadman, is the president, chairman of the board and sole beneficial owner of the voting stock of Steadman Security Corporation. That company is registered with the SEC as investment advisor, advisors and managements, a number of mutual funds called the Steadman Funds.

More than 10 years ago, the SEC commenced a proceeding against Mr. Steadman and SSC, and over the objections of the Petitioner, it applied a preponderance of the evidence standard, defined violations of the anti-fraud provisions of the Securities statutes. On the basis of those violations

the SEC imposed the most extreme sanctions at its disposal. Those sanctions would bar Mr. Steadman from association with any investment advisor.

QUESTION: But the case was sent back for reconsideration of the sanctions, wasn't it?

MR. NICKLES: The case was sent back on remand because of the problem the Fifth Circuit had with the articulation of reasons for the extreme sanctions.

Mr. Justice Blackmun, the sanctions related not only to a bar on association with an investment advisor, they went on to bar Mr. Steadman from association or affiliation with a registered investment company, would suspend him from any association with a broker-dealer for one year.

QUESTION: Mr. Nickles, assume for a moment that the sanction had merely been a reprimand, a very mild sanction. Would you argue that the same clear and convincing standard would be required?

MR. NICKLES: Yes, Your Honor.

QUESTION: So that the severity of the sanction is really totally irrelevant to our consideration of the case?

MR. NICKLES: It is not irrelevant, because one gets into gradations of relevant factors dictating what standard of proof should be applied, and it will be our argument that when one has in this case, a combination of important factors such as the extreme sanctions and such as the

allegations of fraud, that that is a much easier case for this Court to impose a clear and convincing standard of proof.

QUESTION: What your argument really is, I guess, Mr. Nickles, that in view of the fact that a sanction of this severity is potentially imposable, then a clear and convincing standard is necessary before offending the statutes can be assumed.

MR. NICKLES: That's correct, Your Honor.

QUESTION: Because --

MR. NICKLES: And we have that exact --

QUESTION: -- the sanction, for one thing, as my brother Blackmun said, has been remanded, and for another thing just in logic, the -- your argument would be the same, whether the sanction actually imposed had been this one or some less severe one. But it is a relevant part of your argument that a sanction of this severity can be imposed?

MR. NICKLES: Absolutely.

QUESTION: Certainly one of the reasons, as I have understood it, that in a criminal case the proof must be beyond a reasonable doubt, is the fact that the sanction upon conviction can be loss of personal liberty and confinement in an institution, and in some extreme cases, death.

MR. NICKLES: That's correct, Your Honor. If one does not stand with that proposition, one gets into the

problem the D.C. Circuit was confronted with, after it issued its decision in Collins v. SEC, in which it said we want a clear and convincing standard of proof, and the SEC the next time around, in a case involving Whitney, said well, in this case we're only imposing a nine-month suspension on a broker-dealer, and so in this case, since the sanction is less than we imposed in Collins, we'll apply a preponderance of the evidence standard.

QUESTION: But that isn't quite consistent with your initial answer to Mr. Justice Stevens. You said it would--

MR. NICKLES: I don't --

QUESTION: -- make no difference to you, to your case, if there had been simply a reprimand.

MR. NICKLES: I believe, Your Honor, that the authorization to impose extreme sanctions is the triggering device to impose a higher standard of proof, but I am also saying the fact that the SEC imposed extreme sanctions is relevant in this context for the Court to understand the nature of the damage to reputation and profession that can be imposed by the SEC, on the basis of the lowest standard of proof known to the judicial system, preponderance of evidence standard.

I might also add that the net effect of the order of the SEC that was recognized by the SEC, is to force a sale by Mr. Steadman of his multi-million dollar enterprise,

Steadman Security Corporation, in effect a distress sale, and the SEC provided a 90-day period in which to sell the assets. So you have not only a bar, but you have a distress sale of the assets.

Now when the case went up on appeal to the Fifth Circuit --

QUESTION: Mr. Nickles, I take it you feel that the -- in this case and on the facts of this case, a different standard would have led to a different result?

MR. NICKLES: Absolutely. Your Honor, and the reason we say that, and I'll get into that in more detail, when the case went up to the Fifth Circuit, the Fifth Circuit said there's no question that but under Section 17(a)(1) of the 1933 Act, scienter is required, and they said the SEC made a finding of intent to deceive. But what do we have in the findings of the SEC to sustain that finding? All we have is the mere existence of the fact that Steadman and SSC had loans outstanding to certain banks of national reputation that held the custodianship of these funds. And the Fifth Circuit puzzled and said, why didn't the SEC make a finding that Mr. Steadman or SSC had intentionally offered the custodianship of these funds to the bank in exchange for the loans? And interestingly, they dropped a footnote, which relates to another point, and the footnote said the reason presumably why the SEC did not make those findings is because all of the

evidence was to the contrary. All of the bank officials that were put on the stand, testified that in every case the loans were made solely on the basis of the borrower's ability to repay at normal competitive interest rates and that there was in fact, no connection, no connection between the loans and the custodianships. But the SEC said, that doesn't matter. What matters is that there is a potential for conflict of interest. What matters is that Mr. Steadman potentially might keep excess amounts of the Fund's assets in non-interest bearing checking accounts and what matters is that he did not disclose that potential conflict of interest over a period of years. But I observe to the Court that at no time did the SEC even charge Mr. Steadman with keeping excess amounts of funds in non-interest bearing checking accounts and indeed, there was no finding and indeed, the finding was to the effect that the funds benefitted to a tune of several hundreds of thousands of dollars by reason of the transfer of the custodianships to these banks.

So there was no benefit, as such, to Mr. Steadman, there was no harm to the funds, and on that basis, the Fifth Circuit said, we see little basis for a finding of intentional misconduct. The point I make to the Court is that on that basis, that the mere existence at the same time of the loan relationship and the custodian relationship, the SEC found Mr. Steadman guilty of intentional misconduct, stigmatized

Mr. Steadman, deprived him of his livelihood, and forced a distress sale of Steadman Security Corporation.

It is on the basis, I submit, of the collateral banking relationships, that this sanction was imposed. There are other matters, but I submit to the Court, that with respect to the advisory fee issue, a tender solicitation fee issue, each of those items was performed on the advice of counsel and with the assent and knowledge of the fund directors.

Now what did the Fifth Circuit say? The Fifth Circuit said yes, we recognize that these sanctions are extraordinary. They said, we recognize that the sanctions are equivalent to disbarrment. We recognize that in disbarrment proceedings, clear and convincing evidence may be required. We recognize that in civil cases alleging fraud, clear and convincing evidence may be required. We recognize that the D.C. Circuit held in the Collins case, that clear and convincing proof is required. But we can protect Petitioners like Mr. Steadman by reviewing findings of violation pursuant to the arbitrary and capricious standard, of the Administrative Procedure Act and in particular, we can review the sanctions. But what is the standard of review for imposition of sanctions by administrative agencies? Very narrow. The Fifth Circuit recognized that the standard of review is to show that such sanctions are without justification in law, or in fact. But the Fifth Circuit so recognized that these

sanctions were extreme, that they held as a matter of law that in the context of this case, to show that sanctions would not be without justification in fact a compelling reason showing must be submitted by the SEC on remand.

Now our argument in support of the clear and convincing standard of proof is threefold. And we have all three factors present in this case. We have first, not only the authorization to impose extreme sanctions but the fact that they were imposed. We have second the allegations of fraud. And we have third the very substantial, institutional and procedural advantages that are accorded the SEC in its administrative proceedings.

Let me start with that last item --

QUESTION: Mr. Nickles, before you get into the specifics, just as a matter of putting the entire argument into perspective, you are not making a constitutional argument?

MR. NICKLES: Absolutely not.

QUESTION: Are you making a statutory argument?

MR. NICKLES: Not exactly, Your Honor. We are saying--

QUESTION: You're arguing as a matter of policy the Court should fashion a rule covering standard of proof?

MR. NICKLES: That's right. Just as in the -- the denaturalization cases, the expatriation cases, we're saying, as in Woodby, the Court has the power, this is a traditional power of the judiciary, to fashion a standard of

proof to administer federal statutes and litigation under federal statutes.

QUESTION: Now the government relies rather, toward the end of their brief, on the language of the Administrative Procedures Act?

MR. NICKLES: Yes, on Section 7(c)

QUESTION: And do you contend that that language should be construed to impose a clear and convincing burden, or that that language has nothing to do with the burden of proof?

MR. NICKLES: We contend it has nothing to do with this case, and this Court held in the Woodby case that language --

QUESTION: That was a different statute.

MR. NICKLES: It's the Immigration and Nationality Act, Your Honor. But essentially the same language and this Court said, that that language means to us scope of review and quality of evidence, and if the Court reviews the legislative history, it will find that at least its stated very clearly in the Attorney General's Report which was primarily relied on in the APA development, that one was talking about, in Section 7(c), scope of review and quality of evidence, not burden of proof. So we say that the APA is irrelevant and --

QUESTION: That language is entirely concerned with the scope of appellate review?

MR. NICKLES: Absolutely.

And we note, Your Honor, that the SEC never made that argument prior to this date.

QUESTION: Well I --

MR. NICKLES: Let me --

QUESTION: What precisely is the statute that authorizes you to appeal a finding of the SEC to the Court of Appeals, or to petition for review of it?

MR. NICKLES: It's a regular statutory provision under the Securities and Exchange Act, permits us to take a decision of the SEC of this type to a Court of Appeals in which the Petitioner has --

QUESTION: Is it set forth in -- in haec verba in your petition, or in the --

MR. NICKLES: The statute authorizing an appeal to the Court of Appeals is not set forth in the petition, what is set forth in the petition, Mr. Justice Rehnquist, are the two provisions Section 9(b) of the Investment Company Act and Section 203(e) and (f) of the Investment Advisors Act, which were the provisions that the SEC used to start this proceeding going.

QUESTION: But those define the substantive offense.

MR. NICKLES: No, they do not.

QUESTION: They don't?

MR. NICKLES: They do not. Your Honor, what we have

here, and if I might analogize to the Aaron kind of case that the Court had, you have substantive provisions that are alleged to be in violation, in this case 17(a) of the '33 Act, 10(b) of the '34 Act, 206(1) and (2) of the Investment Advisors Act. And then you have, on top of the substantive provisions, in effect, enabling provisions or enforcement provisions pursuant to which the SEC commences the disciplinary proceedings. And what you have is a double layered analysis.

Under 9(b) of the Investment Company Act and 203(e) and (f) of the Advisors Act, there is a requirement that prior to the imposition of a remedy, that is, any kind of sanction upon a respondent found to have violated a provision of the Securities law, the SEC must find that that violation was willful and that it is in the public interest to impose such a sanction. And so what we have here, Your Honor, is the argument not only that under common law it's clear that in fraud cases you impose a clear and convincing evidence. But under this Court's holding in Aaron, and with the statutory provisions in question here, you have a requirement that scienter be found; that is, intentional misconduct.

QUESTION: This is, undoubtedly, my own ignorance and no one else's fault, but what is the statutory language or statutory citation that enables you to appeal at all, or petition for review at all, from a finding of the SEC to the Court of Appeals?

MR. NICKLES: I don't, I don't have the specific U.S. Code annotation for the Court, but there's a standard provision permitting us to appeal to the Court of Appeals, Mr. Justice Rehnquist. It's not at all a matter of relevance to the issues here.

You can take an appeal from an order -- we could have taken an appeal from this order because of the location of Steadman Security Corporation to the D.C. Circuit, or because of the location of Mr. Steadman in Florida, we took the appeal to the Fifth Circuit. There's no substantive provision in the appeal statute that governs what the Fifth Circuit did. And I don't believe you'll find in the Fifth Circuit opinion any indication to that effect.

QUESTION: I certainly didn't, and I'm now puzzled as to -- why Congress didn't say anything about what standard the Court of Appeals should use in reviewing findings of the SEC, since the NLRB standard is substantial records supported by substantial evidence supported by the record and by the record as a whole, and there are other standards for other agency actions.

MR. NICKLES: Well certainly, the Fifth Circuit reviewed the order and findings of the Commission in this case, based on the APA standard of substantial evidence, arbitrary and capricious, and then reviewed the sanctions based on decisions of this Court.

QUESTION: So you're satisfied that the Fifth Circuit reviewed it on the APA standard?

MR. NICKLES: Yes. Let me start with the --

QUESTION: One other question, while we've got you interrupted, Mr. Nickles. It is true that Section 706 of the Administrative Procedures Act dealing with scope of review, does contain the normal provision that the lack of substantial evidence shall be grounds for reversal on the facts?

MR. NICKLES: Yes.

QUESTION: And are you saying that's a substantial duplication of what's found in Section 556 --

MR. NICKLES: We're not saying that necessarily, Your Honor. I think --

QUESTION: What is the difference in the function of 556(d), the language the government relies on, and the language in 706 defining scope of review?

MR. NICKLES: 706 is clear and simple a scope of review provision. I believe that 7(c) goes not only to the question of how the Court of Appeals reviews the findings below, but to the quality of the evidence. To be specific, while the SEC admits all kinds of evidence, hearsay, double-hearsay and all the rest, these items of evidence would not ordinarily be admissible under the Federal Rules of Evidence. The Court of Appeals would be entitled to insure itself that the SEC has relied upon probative evidence, substantial,

reliable and probative evidence, as distinguished from hearsay and other kinds of evidence which is not probative, in reaching its findings.

It goes, I think, as much to the question, Your Honor, of admissibility --

QUESTION: But the phrase is "reliable, probative and substantial" --

MR. NICKLES: Yes.

QUESTION: And substantial is surely not a test of admissibility.

MR. NICKLES: Your Honor, I think while the choice of words may not be as fortunate as we would hope, both in the Woodby case and in the Attorney General's Report, which is a key feature of the legislative history of the APA, it's indicated that's precisely what the Congress had in mind in using those terms.

Let me talk for a moment about the institutional and procedural advantages of the SEC --

QUESTION: Well, let me ask you, where do you think this standard applies that you're looking for, before the SEC, isn't it?

MR. NICKLES: Yes.

QUESTION: It's not on review.

MR. NICKLES: No.

QUESTION: It's just whether it's from the -- what

standard the administrative agency should use?

MR. NICKLES: Admissibility, yes.

The SEC's principal argument, really, is that the standard of proof is designed to allocate the potential for error in a fact finding proceeding. One is inevitably talking about probabilities in any kind of fact finding proceedings, the SEC says that we should use a preponderance of the evidence standard because that leaves everything about equal to both sides. And in that way we produce the most correct decisions.

Now that may be true of when we're dealing in a civil or criminal trial under the Federal Rules of Evidence. But I submit to this Court that the evidence at the end of an SEC proceeding is very different than the evidence would be at an identical proceeding if that proceeding were held in a civil trial or a criminal trial before federal and state courts. Let me tell the Court why.

The SEC has immense investigative powers, pretrial. The Respondent has none. A Respondent has no rights, in SEC proceedings, to depositions, no rights to -- access to the voluminous ex parte material that is developed by the SEC, during its investigation, no right to a list of prospective witnesses to be called by the SEC, no right to obtain exculpatory materials from the SEC until a witness testifies and after he testifies, and then beyond that, the admission of all kinds

of evidence that would not be admissible under the Federal Rules of Evidence.

The SEC is investigator, it is prosecutor, it is judge, it is jury. This Court knows the SEC, quite commendably, has sought to broaden the scope of its statutes. But in some cases, particularly when the SEC has gotten into the area of anti-fraud violations, this Court has seen fit to limit the SEC's interpretation. And we submit that it's particularly in these types of cases, where the individual is not accorded the rights that an individual is accorded in civil or criminal trials in a courtroom, that clear and convincing is required. And we say also that because of the allegations of fraud, clear and convincing is required.

We have findings of violation in this case of 17(a), of 10(b) of 206(1). Each of which, under the holdings of this Court, require a finding of intentional misconduct, and the two enforcement provisions, 9(b) of the Investment Company Act and 203(e) and (f) of the Advisors Act require a showing of willful violation. This Court, in the Addington case, indicated the importance in cases such as this where individual rights are at stake, to impose a higher standard of proof.

QUESTION: Now Addington was a constitutional case?

MR. NICKLES: Addington was a constitutional case.

QUESTION: And you make no constitutional claims?

MR. NICKLES: Absolutely. But Addington was recent,

Mr. Justice Stewart, Addington reviewed the types, the three basic types of burden of proof that have been imposed by this Court and when the Court talked in Addington about the expatriation and denaturalization cases, Schneiderman, Nishikawa, Woodby; it observed that the standard there was clear, unequivocal and convincing. Unequivocal being a standard which is perhaps beyond all doubt. And the Court decided that it would stick with a clear and convincing standard, as a matter of constitutional due process law.

QUESTION: Looking at other analogies, Mr. Nickles, would your argument apply equally to the Federal Trade Commission, for example? Because they can impose very severe sanctions.

MR. NICKLES: No. No, we have a situation, Mr. Justice Stevens, here, where we have an individual being deprived, potentially being deprived of his livelihood, and we have allegations of fraud which require the kind of inferential reasoning as to state of mind.

QUESTION: You can get both of those things in a Commission proceeding --

MR. NICKLES: Right. If both of those things were presented at the Commission proceeding, the Court might want to review the standard of proof being applied by the Federal Trade Commission. But I submit that in this case, under the rulings of the D.C. Circuit in the Collins and Woodby line

of decision, that this is an appropriate, heavier standard of proof right here.

I'll reserve the remainder of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Mr. Ferrara.

ORAL ARGUMENT OF RALPH C. FERRARA, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. FERRARA: Mr. Chief Justice and may it please the Court:

The Securities and Exchange Commission agrees with the Petitioner when he asks, or when he says, that this Court should mandate a standard of proof more stringent than the preponderance, and that his only basis for doing that is that the Court should exercise policy considerations to support its decision. For, as he correctly points out, there is no constitutional question involved in this case and there is no statute whatsoever that the Petitioner can point to, and say that it serves as a basis for his argument that the clear and convincing standard should apply to commission proceedings.

QUESTION: Is there any basis for him to suggest a supervisory power of the Court over the regulatory agency?

MR. FERRARA: There is, Mr. Chief Justice, and the Court has exercised its supervisory powers in other cases, particularly the cases that the Petitioner has cited to the Court in the course of his argument. But the Court also has deferred in exercising its supervisory powers, when there has

been a statute. And we have learned, through many cases that this Court has taught that the place to begin analyzing a securities case is with the language of the statute itself.

QUESTION: But this Court doesn't have the supervisory authority over agency proceedings that it does over lower federal courts, does it?

MR. FERRARA: It does not, Your Honor, but I believe what Mr. Nickles was referring to, was the Court's supervisory procedures to establish standards of proof in lower court proceedings and perhaps by analogy, to agency proceedings. But the Court has only --

QUESTION: That's the question. That's what my question was directed at. And it apparently concerns Mr. Justice Rehnquist. Do we have the kind of supervisory power over regulatory agencies that we do over district courts and courts of appeal?

MR. FERRARA: Once you eliminate the constitutional question and take, as a given, that there's a statute that governs the situation, then the Court in the past has said it would not exercise any supervisory power that it might have. The Court said, in Vance v. Terrazas, for example, when the Congress legislated a specific standard of proof to be employed in that case, the Court would defer, absent any constitutional considerations which it said was not involved in that case. In our case, as I said a moment ago, we have a

statute whose specific language prescribes a preponderance of the evidence standard of proof, that specific statutory language is supported by relevant legislative history and the varying interpretations of that language and that history have to be looked at in order to determine whether or not the interpretation that we believe is the correct one supports the underlying statutory scheme. That's what this Court has told the Commission, time and time again, is the proper mode of analysis for securities cases.

QUESTION: What do you say about the relevance of the Addington holding here?

MR. FERRARA: Well, we believe that the Court never need reach Addington. The APA governs here, it clearly governs and we never have to reach the question of whether the Court need balance -- balance the interest of the public against the interest of Mr. Steadman in determining what the correct standard of proof is. Here, the APA governs.

It's undisputable that -- let me back up for a moment in response to a question that Mr. Justice Rehnquist asked of the Petitioner. The federal securities laws do provide a scope of review provision; Section 25(a) of the Securities and Exchange Act of 1934 is typical and it provides that any person who is aggrieved by an order of the Commission may appeal that order to the Court of Appeals. Section 25(a) goes on to provide that the Commission's findings of fact

shall be supported if -- or should be affirmed if supported by substantial evidence in the record. Beyond that, the APA governs. As we know, the APA clearly covers all aspects of Commission adjudicatory proceedings unless the Federal Securities laws displace it in some respect. The scheme of the Federal Securities legislation though, is such that the APA substantially governs these proceedings including Section 7(c) of the Administrative Procedure Act.

That section specifically provides that no sanction may be imposed except in accordance with reliable, probative and substantial evidence. It says it very clearly. What does the language mean? The House Report, underlying the bill that became the Administrative Procedure Act, and that inserted the critical language to that Section 7(c), the words "in accordance with" and "substantial", explicitly characterized those words in 7(c) as a standard of proof to be applied in administrative adjudicatory proceedings.

Mr. Justice Clark, who at the time of the passage of the Administrative Procedure Act, was attorney general, in his dissenting opinion in the Woodby case, noted that language in the Immigration and Nationality Act which was similar to the APA should be construed as the APA language had always been construed. And that is that the language "reliable, probative and substantial" is a standard of proof. The majority in Woodby did not agree with that. Curiously,

the D.C. Court of Appeals, the very court that has decided the Collins and Woodby cases, and the Sea Island case, which was a case involving the Federal Communication Commission, where the D.C. Circuit Court of Appeals applied a clear and convincing standard, it too recognized that the language in 7(c) set a preponderance standard of the proof and then completely ignored the language and went on to apply the clear and convincing standard.

Well, that's why we believe the words of Section 7(c) and the appropriate legislative history supporting those words, confirm that the preponderance of the evidence standard is supported.

QUESTION: Could I ask you what is the -- is the board that did the adjudication in Woodby, was that an administrative agency?

MR. FERRARA: It was not an agency that was subject to the Administrative Procedure Act.

QUESTION: Expressly?

MR. FERRARA: That's correct. As a matter --

QUESTION: And that's why Section 7(c) was irrelevant in that case?

MR. FERRARA: That's correct. Mr. Justice Clark had argued in his dissent that the words that had been put into the Immigration and Nationality Act were similar to the words in 7(c), and that 7(c) had historically been interpreted as

requiring no more than preponderance. Now --

QUESTION: I know, but nevertheless, those words of the Immigration and Nationality Act related exclusively to --

MR. FERRARA: Scope of review.

QUESTION: -- related to review in the -- not to adjudication?

MR. FERRARA: That's correct. That, Mr. Justice White, is the critical difference between this case and Woodby. In Woodby, the words "reliable, probative and substantial" were added to the Immigration and Nationality Act, in order to provide a scope of review provision for the courts. It was not included in the Administrative Procedure Act for that purpose at all. The Administrative Procedure Act provides quite separately, for a scope of review section; that's Section 706 or Section 10(e) of the Act. And that brings you, I guess, to the --

QUESTION: Well, what did, apparently there was no statutory guide then for the standard of proof, before the administrative agency in Woodby?

MR. FERRARA: In Woodby, that's absolutely correct. But as I said a moment ago, that's what distinguishes this case so dramatically from Woodby. Again, I draw from the prior teachings of this Court in analyzing securities cases. What does the SEC's interpretation do to the underlying statutory scheme of the APA?

QUESTION: But the APA wasn't passed until 1946 --

MR. FERRARA: That's correct.

QUESTION: -- and the SEC Acts in question were passed in the '30's.

MR. FERRARA: That's correct.

QUESTION: So, what was the standard -- rather, what was the standard of proof before the SEC, between the time the SEC Acts were passed and the APA was passed?

MR. FERRARA: The scope of review was substantial evidence for facts.

QUESTION: Standard of proof. Standard of proof.

MR. FERRARA: Standard of proof, was historically always preponderance of the evidence standard. The Commission had always utilized that standard of proof.

QUESTION: Even in a fraud case?

MR. FERRARA: Even in a fraud case. Had always used it, and since 1967, the Commission's opinions have articulated its standard of proof rationale in terms of the Woodby case.

QUESTION: And even if, in -- I suppose you could argue the Administrative Procedure Act would govern, regardless of what the standard was before it was passed?

MR. FERRARA: Absolutely. Because the provisions, the standard of proof and the scope of review provisions of the Administrative Procedure Act apply to all administrative adjudications by the SEC, unless another law applies. And the

SEC law, the Federal Securities Laws do not apply, then the APA's application is pervasive and absolute.

Again, I think you have to look at the APA very carefully to distinguish it from the situation that we had in Woodby. Note that the APA beautifully provides, quite separately, for burden of proof which it places on the agency, quality of evidence that is, the admissibility of evidence, it proscribes irrelevant, immaterial or unduly repetitive evidence. It provides separately for standard of proof in the words that I cited to you before, that is, reliable, probative and substantial, and then provides, quite separately again, for scope of review. It talks about substantial evidence for factual findings, and arbitrary, capricious, and other standards for predictive or quasi-legislative judgments.

Now the Commission's position is that even if this Court disagreed, that the APA didn't by its language, its words, apply to this proceeding, then nonetheless, the Court should defer to the Commission's judgment to apply a standard of proof no greater than preponderance in this case.

QUESTION: May I ask one other question about the statutory language in the APA? Has that language ever been construed other than by an agency, to require nothing more than a preponderance of the evidence?

MR. FERRARA: Yes, as a matter of fact, it has. And it's been construed by the D.C. Circuit Court of Appeals.

In the Sea Island case, remarkably, the D.C. Circuit Court of Appeals looked at the language in Section 7(c) and said that it traditionally has been found to require no more than a preponderance and in the very next --

QUESTION: That's a strange way to describe preponderance, in all candor.

MR. FERRARA: I'm sorry?

QUESTION: If the Congress had meant preponderance, I don't know why they just didn't say that.

MR. FERRARA: Well there's, I think, a reason for that. The reason is that when you look at the words, when the words "substantial" and "in accordance with" were added to Section 7(c), there's a note to the House Report that I recall, that says something to the effect that the additional words "substantial" and "in accordance with" were added for the same reasons that words were added in the preceding footnote. And you go and you look at the preceding footnote and you see that what Congress was about in both this part of 7(c) and in the part of 7(c) referred to by the prior note, was conforming the language as best it could, rationalizing the language as best it could, between the standard of proof and scope of review provisions of the APA, so that courts wouldn't be confused with respect to standards of proof and scope of review. It's interesting how they did it.

The scope of review provision

of the APA had provided that review should occur on the basis of the entire record of the proceedings. The standard of proof, that is, Section 7 of the APA, said nothing about agency de novo review placed on the entire record of the proceeding. It was silent. So that Congress added the words based on the entire record of the proceeding to the agency review part of the APA, and it said it did that because some hypertechnical person might believe that if the Congress didn't specify that the agency -- by exact words -- that the agency should rely on the entire record because it did specify it for the appellate function, agencies might run amuck and not specify it on the entire record.

By similar reasoning, what the Court did when it reached the standard of proof section was to say we'd like to use the same words, the same notions, in the standard of proof section that we used in the scope of review section. Had the Congress done what you suggested, Mr. Justice Stevens, and that is, say the word preponderance in the standard of proof section, what that would have created in the Congress' mind, and this is what they said their problem was in doing that, is that ambiguity between the standard of proof and scope of review section, the standard of proof section would have said agencies are to decide by a preponderance. The scope of review section would have said, courts are to review on the basis of substantial evidence. And what I think the Congress was

worried about, although now I'm getting away from what the actual words of the legislative report say, is that appellate courts would have drawn on the preponderance standard that they would have specifically included in the scope of review provision and made it a scope -- I'm sorry, the standard of proof provision, and made it a scope of review provision. And the Congress didn't want that; they wanted substantial evidence to be the exclusive test for judicial review.

Now that's a rather complex answer, but unfortunately what you're tearing at are the tissues of legislative history to understand why Congress very carefully and -- in this very carefully honed act -- chose the words that it chose to express the meaning that it intended to convey in sorting through these various provisions, that the -- I know the Petitioner, in his reply brief, as I recall it, says that the Attorney General's manual, the authoritative guide to the APA, doesn't characterize Section 7(c) as a standard of proof section, but rather characterizes it as a scope of review section. But what he doesn't include in his reply brief is that the Attorney General's manual was written before the bill was enacted. And the critical language, the language about -- the addition of the language of "in accordance with" and "substantial" was not added until after the Attorney General's report was written. And now we have Mr. Justice Clark's dissenting

opinion in Woodby where he actually, and I think correctly, characterizes what the meaning of that language is.

QUESTION: Of course, the Attorney General's manual may be a little bit one-sided too. Congress passed the Walls over Logan Act in '41, and President Roosevelt vetoed it, and didn't get -- Congress didn't get around to passing an act that was signed by the President until 1946. And certainly it was in the interests of the administration to give as limited as possible a construction to the Act insofar as it would limit agency action.

MR. FERRARA: But that -- that may very well be, Justice Rehnquist. But I think the relevant point is that the silence of the Attorney General's manual on whether 7(c) is a standard of proof provision is easily explained by the fact that the provision didn't exist in its present form at the time the Attorney General's manual was written. I'm making there a very small point.

We are not the ones relying on or discrediting the Attorney General's manual for purposes of this proceeding.

The, as I said a moment ago, even if the -- even if this Court determined that the APA specific language of 7(c) was not applicable here and it did not prescribe a specific standard of proof as we think that it did, we believe that the agency's discretion in utilizing the preponderance of the evidence standard of proof should be respected. Our position

there is that this Court, in the Vermont Yankee case, noted that the Administrative Procedure Act admittedly in a rule-making proceeding, provided the statutory maximum. It provided the essentials. And then absent constitutional considerations which the Petitioner agrees are not in this case, or other extraordinary or compelling instances, the agency's discretion should be respected in adopting its own internal procedures. Regretably, I think, at times, this Court does not get a good deal of direct feedback on the effect of its decisions. But I can assure you that the very commonsense approach that this Court took in Vermont Yankee has saved governmental agencies thousands of hours, if not days or weeks, in conforming with real or imagined procedures engrafted upon the administrative process by the D.C. Circuit Court of Appeals. And I can tell you very clearly that many of us in administrative practice in Washington today believe that this case is to adjudicatory proceedings what Vermont Yankee was to rulemaking proceedings.

Ever since the Collins case, innumerable agency proceedings have been tangled with questions relating to the proper standard of proof. That is so, because as this Court knows, venue for reviewing administrative action typically will lie in the District of Columbia. Collins for that reason, might as well have been a case decided by this Court for purposes of administrative action. We are all, unless we'd

like to buck the D.C. Circuit once again, we are all bound by the Collins result. And it's just not the SEC; it again is virtually every other governmental agency in town.

The impact of the case on the Commission and other regulatory agencies is substantial. If there are no further questions, then?

MR. CHIEF JUSTICE BURGER: Well do you have anything further, Mr. Nickles?

REBUTTAL ORAL ARGUMENT OF PETER J. NICKLES, ESQ.,
ON BEHALF OF THE PETITIONER

MR. NICKLES: Mr. Chief Justice and may it please the Court:

Mr. Justice Stevens asked whether there was any authority for the proposition that the words in Section 7(c) of the Administrative Procedure Act have been construed to require a preponderance of the evidence. The answer is no. If the Court will look at Sea Island, which is the case cited by my brother, what the -- what the late Judge Leventhal said in Sea Island at page 243 was that that was the traditional standard used in civil proceedings, no reference at all to the APA, but that for reasons relating to sanction, relating to allegations of fraud, it thought Collins should be applied in that particular case. The other point is that this Court, in --

QUESTION: Mr. Justice Clark, in his dissenting

opinion in Woodby, spoke as though it was well established that that language did establish a burden of proof within the agency.

MR. NICKLES: I don't think so, Mr. Justice Clark -- Mr. Justice Stewart.

That was a dissenting opinion --

QUESTION: It was.

MR. NICKLES: -- and it was a footnote, without further citation.

QUESTION: That's right.

MR. NICKLES: The footnote said, this pattern, pattern was to limit the agencies to acting on reliable, probative and substantial evidence, as traditionally had been held satisfied when the agency decided on the preponderance of the evidence. That was an argument specifically rejected --

QUESTION: Well --

MR. NICKLES: -- by the majority.

QUESTION: -- except that his -- the argument was that those were the words of governing agencies governed by the Administrative Procedure Act. It was concededly clear that the Immigration and Naturalization Agency was not covered by the Administrative Procedure Act, and Justice Clark, in dissent, simply said that the similar words ought to have the same meaning. And he said that it was established what the meaning was in agencies governed by the Administrative

Procedure Act. Now, maybe --

MR. NICKLES: There's no --

QUESTION: -- maybe he was mistaken, but the fact that it was a dissenting opinion doesn't mean that he was disagreeing with the Court as to that.

MR. NICKLES: Mr. Justice Stewart, I don't think there's any opinion of this Court or any other Court that has held that a preponderance of the evidence standard is the required standard when one is talking about reliable, probative and substantial evidence.

The majority in Woodby took the same language and said that means to us quality of evidence. We have cited in our brief to the Attorney General's report and to the legislative history, which we think makes it crystal clear that Congress and the Attorney General were talking about quality of the evidence.

And finally, there's no question that the Woodby court decided that burden of proof, standard of proof is a question traditionally left to the judiciary --

QUESTION: Well, when Congress hadn't spoken on the subject?

MR. NICKLES: And I don't believe Congress has spoken, in this case.

QUESTION: Well that's the question, yes.

QUESTION: But it certainly hadn't in Woodby?

MR. NICKLES: It certainly hadn't in Woodby, and until --

QUESTION: And if Congress has spoken in the Administrative Procedure Act, to the standard of proof, I suppose it governs?

MR. NICKLES: If Congress spoke, and I suggest, Mr. Justice --

QUESTION: Well, if it has, if we -- if 7(c) governs this case, it governs this case.

MR. NICKLES: Congress knew how to say preponderance of the evidence.

QUESTION: And you say 7(c) applies to this case?

MR. NICKLES: It goes to the quality of the evidence, for the purposes of admissibility.

QUESTION: If they apply it to this case, then --

MR. NICKLES: Yes, thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:26 o'clock p.m. the case in the above-entitled matter was submitted.)

CERTIFICATE

North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 79-1266

CHARLES W. STEADMAN

v.

SECURITIES AND EXCHANGE COMMISSION

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BY: William J. Wilson