NOTES

TAKING THE PATH LESS TRAVELLED: FOIA'S IMPACT ON THE TENSION BETWEEN THE D.C. CIRCUIT AND *VERMONT YANKEE*

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The battle looked to be over; the smoke had all but cleared. Vermont Yankee*—wherein the Supreme Court announced that the APA established the "maximum" procedural requirements for informal rulemaking—ostensibly brought the steady advance of judicial innovation and oversight in the regulatory state to a halt. Since* Vermont Yankee *was decided, however, the D.C. Circuit has continued the offensive and treated the case as a mere bridgehead. More specifically, the D.C. Circuit remains steadfast in its use of the pre-*Vermont Yankee *case* Portland Cement *to oblige agencies engaged in notice-and-comment rule making to abide by disclosure rules that cannot be found in the text of the APA or any other organic statute. Judge Brett Kavanaugh of the D.C. Circuit recently examined this apparent conflict and determined that* Portland Cement *stands on "shaky legal foundation" due to its dearth of statutory roots. Judge Kavanaugh's assessment is not* sui generis*. In fact, few other seemingly inconsistent decisional lineages have sparked as much commentary on the APA. In an attempt to further pollinate the landscape of the current battleground, this Note journeys along the path laid down by Judge Kavanaugh and discovers a textually grounded alternative to* Portland Cement*. If the D.C. Circuit heeds Judge Kavanaugh's advice and overturns* Portland Cement*, interested parties could simply file FOIA requests to obtain the information* Portland Cement *requires agencies to disclose. The goal of this Note is to*

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explore and uncover the practical and legal consequences of a disclosure regime anchored in FOIA, and with any luck change the stakes of the debate.

INTRODUCTION

ALMOST forty years ago, the Supreme Court reversed the Court of Appeals for the D.C. Circuit in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*[1] A three-judge panel had nullified a grant of nuclear power plant licenses by the Nuclear Regulatory Commission ("NRC") because the NRC failed to document the potential environmental consequences of operating the plants. In overturning the D.C. Circuit's searching evaluation of the NRC's decision, the Supreme Court declared that reviewing courts are generally not free to impose rule-making procedures on agencies absent explicit statutory authority to do so. The Court announced, "§ 553 [of the Administrative Procedure Act] . . . established the *maximum* procedural requirements which Congress was willing to have the courts impose upon [federal] agencies."[2]

Vermont Yankee is considered one of the most important decisions in all of administrative law. Indeed, "[f]ew decisions have sparked such universal recognition among the practicing bar and academic community or produced such extensive commentary on the Administrative Procedure Act (APA) and its rulemaking provisions."[3] One commentator has gone as far as calling *Vermont Yankee* a "milestone" in the development of the modern regulatory state.[4]

But an important question that has emerged concerning *Vermont Yankee*'s legacy is whether the D.C. Circuit is faithfully following the decision in all aspects of its administrative jurisprudence. Judge Brett Kavanaugh of the D.C. Circuit recently explored this issue in *American Radio Relay League, Inc. v. FCC*, and cautioned that the court has in es-

[1] 435 U.S. 519, 558 (1978).

[2] Id. at 523–24 (emphasis added).

[3] Paul R. Verkuil, Judicial Review of Informal Rulemaking: Waiting for *Vermont Yankee II*, 55 Tul. L. Rev. 418, 418 (1981).

[4] Gillian E. Metzger, The Story of Vermont Yankee, *in* Administrative Law Stories 124, 126 (Peter Strauss ed., 2006).

sence spurned *Vermont Yankee*'s principal thrust.[5] The majority in *American Radio* relied on the pre-*Vermont Yankee* case *Portland Cement Ass'n v. Ruckelshaus*[6] to require additional disclosure on the part of the Federal Communications Commission ("FCC").[7] That mandate, however, exceeded the scope of the APA's express demands. Judge Kavanaugh proclaimed that *Portland Cement*'s "lack of roots" in any statutory text creates "a serious jurisprudential problem because the Supreme Court later rejected this kind of freeform interpretation of the APA. In its landmark *Vermont Yankee* decision, which came a few years after *Portland Cement*, the Supreme Court forcefully stated that the text of the APA binds courts."[8]

In *Portland Cement*, the D.C. Circuit deemed inadequate the Environmental Protection Agency's ("EPA") rule-making process because the agency failed to timely disclose and make available the test results and testing methods it used to form proposed emissions standards.[9] But instead of mooring its opinion in the admittedly straightforward and comprehensive statutory guidelines[10]—with which the EPA complied—the court employed purposive reasoning to invalidate the EPA's emission standards. The D.C. Circuit explained that "[t]he time constraint of the [statute] is perhaps not decisive."[11] According to the court, "[i]t is not consonant with the *purpose* of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, [to a] critical degree, is known only to the agency."[12]

It is this reasoning that has made the D.C. Circuit's post-*Vermont Yankee* reliance on *Portland Cement* particularly attractive for commentary by the academy. In fact, Judge Kavanaugh is not the only one to conclude that *Portland Cement* "stands on a shaky legal foundation."[13] Professors Jack Beermann and Gary Lawson argue that *Portland Ce-*

[5] Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 245–48 (D.C. Cir. 2008) (Kavanaugh, J., concurring in the judgment).
[6] 486 F.2d 375 (D.C. Cir. 1973).
[7] *Am. Radio*, 524 F.3d at 240.
[8] Id. at 246.
[9] 486 F.2d at 378, 402.
[10] Id. at 381.
[11] Id.
[12] Id. at 393 (emphasis added).
[13] *Am. Radio*, 524 F.3d at 246.

ment is "a violation of the basic principle of *Vermont Yankee*."[14] At the very least, others say, the Supreme Court's decision in *Vermont Yankee* raises "a question concerning the continuing vitality of the *Portland Cement* requirement."[15]

These observations, detractors might reply, do not paint a complete picture. To their credit, some skeptics may assert that as a matter of policy there are good reasons to read *Vermont Yankee* in a way that absolves any tension between the D.C. Circuit and the Supreme Court, the least of which is the idea that government transparency and disclosure should be encouraged. The purpose of this Note is to respond by assuring those critics: "Folks, there is another way." In fact, lying in wait is a ready-made substitute for *Portland Cement* that has the virtue of maintaining the signal contribution of *Vermont Yankee*—that Congress and the Constitution, not the courts, should shackle the administrative state with procedural burdens. My contribution is both textually sound and pragmatic; I suggest an alternative mechanism for agency disclosure in notice-and-comment rule making that avoids the interpretive gymnastics of the *Portland Cement* doctrine.

Should the D.C. Circuit adopt Judge Kavanaugh's understanding of *Vermont Yankee* and overrule *Portland Cement*, interested parties would retain a powerful tool for obtaining materials used by agencies in promulgating regulations: the ability to file a Freedom of Information Act ("FOIA") request.[16] The technical data and test results at issue in *Portland Cement* fit comfortably within the term "record" as defined in the current FOIA text. Moreover, those materials appear to be "matters of official record" that must be disclosed under Section 3 of FOIA's original predecessor. A system of disclosure in informal rule making governed by FOIA not only acts as a backstop for the *Portland Cement* doctrine, but it also avoids any perceived interpretive conflict between the D.C. Circuit and the Supreme Court by restoring the courts to a "limited

[14] Jack M. Beermann & Gary Lawson, Reprocessing *Vermont Yankee*, 75 Geo. Wash. L. Rev. 856, 894 (2007).

[15] 1 Richard J. Pierce, Jr., Administrative Law Treatise § 7.3, at 435 (4th ed. 2002).

[16] 5 U.S.C. § 552 (2012). This method of obtaining information assumes, of course, that Congress has not mandated disclosure under any relevant organic statute.

role, affecting as little as possible the outcome" of administrative proceedings.[17]

Part I of this Note explores the development of a nationwide administrative jurisprudence during the 1960s and 1970s that was not anchored in any express statutory or constitutional text. Part I also describes the seminal administrative law case *Vermont Yankee*. Part I concludes by outlining Judge Kavanaugh's concurrence in *American Radio*, which draws attention to the fact that the D.C. Circuit's continued reliance on *Portland Cement* is inconsistent with binding Supreme Court precedent. Part II uncovers an alternative to *Portland Cement* that is safely lodged within the confines of a duly enacted statute. FOIA—according to its current language and the APA's original disclosure provisions—offers a viable substitute for *Portland Cement*, should the D.C. Circuit decide to abandon that decision. Finally, Part III wraps things up by addressing the concerns and legal questions that might arise in a world without *Portland Cement*.

I. FROM *PORTLAND CEMENT* TO *VERMONT YANKEE*: AN EVOLVING ADMINISTRATIVE STATE

Throughout the middle of the twentieth century, the federal judiciary cultivated a host of notice-and-comment rule-making requirements, the contours of which could not be discovered in the text of the APA. The Supreme Court seemingly brought this runaway train of judicial innovation to a screeching halt in *Vermont Yankee* when the Court declared that the APA is the procedural ceiling for Section 553 rule making. But despite the Court's emphatic statement in that case, some observers, including Judge Kavanaugh, suggest that the D.C. Circuit continues to saddle agencies with extra-statutory procedural obligations. In the Sections that follow, I describe the genesis of judicially spawned procedures in notice-and-comment rule making, the Supreme Court's response, and the conceivable tension between the D.C. Circuit and its judicial superior following *Vermont Yankee* that inspired Judge Kavanaugh's concurrence in *American Radio Relay League, Inc. v. FCC*.

[17] Stephen Breyer, *Vermont Yankee* and the Courts' Role in the Nuclear Energy Controversy, 91 Harv. L. Rev. 1833, 1845 (1978).

A. An Expanded Role for the Judiciary

In the 1960s and 1970s, federal courts considerably reshaped the law of administrative procedure. Informal rule making evolved through the construction by courts of an obstacle course of procedural requirements mandated neither by statute nor by the Constitution.[18] These innovations most often amplified judicial oversight and control of agency decision making. What occurred "during this period, in effect, is a general shift in authority over regulatory policy from agencies to courts."[19]

What caused the change? According to one commentator, courts' assertiveness during that period can be explained by a philosophical disenchantment with decision making by "experts" and nonpolitical elites.[20] Often termed the populist ideal paradigm, this approach to government action is deeply disturbed by policymaking through a headless fourth branch democratically unaccountable to the people.[21] Other government institutions like the legislature and the courts, goes the theory, were not only regarded as the appropriate decision makers under our constitutional framework, but were also seen as immune from the types of pathologies that plagued the administrative state, such as interest group capture.[22]

As outlined above, federal courts most clearly expressed this fresh perspective through the establishment of rule-making procedures more onerous than the rudimentary notice-and-comment practices in the APA. By changing the procedural rules governing informal rule making and by engaging in more aggressive review of agency decisions, federal judges could force agencies to open their doors to formerly unrepresented points of view and cabin what they perceived as a near-limitless em-

[18] Antonin Scalia, Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court, 1978 Sup. Ct. Rev. 345, 348.

[19] Thomas W. Merrill, Capture Theory and the Courts: 1967-1983, 72 Chi.-Kent L. Rev. 1039, 1040 (1997).

[20] Id. at 1050–52.

[21] Indus. Union Dep't v. Am. Petroleum Inst. (The Benzene Case), 448 U.S. 607, 686–87 (1980) (Rehnquist, J., concurring in the judgment). This is by no means the only reason the administrative state changed in the 1960s and 1970s, but it is most commonly deployed by scholars. For a comprehensive survey explaining what accounted for the increase in judicial oversight, see Richard J. Pierce, Jr., The Role of Constitutional and Political Theory in Administrative Law, 64 Tex. L. Rev. 469, 481–89 (1985).

[22] Merrill, supra note 19, at 1051.

powerment in the APA.[23] For example, in *International Harvester Co. v. Ruckelshaus*, a truck manufacturer and three major automobile companies sought review of an EPA decision that denied applications for a one-year suspension of emissions standards prescribed by statute for light-duty vehicles.[24] The court declared that at least some limited right of cross-examination should be afforded on remand to explore perceived defects in the agency's regulatory methodology.[25] Although the decision did not mandate cross-examination in every informal rule making, *International Harvester*'s limited applicability nevertheless extended beyond the text of Section 553, which contained no reference to such a procedural right.[26] In so holding, the court determined that informal rulemaking proceedings should not categorically "be disposed of merely on written comments, the minimum protection assured by the Administrative Procedure Act for rulemaking, but [may] also comprehend oral submissions of a legislative nature."[27]

International Harvester was but the tip of a much larger iceberg. In *Natural Resources Defense Council v. United States Nuclear Regulatory Commission*,[28] the D.C. Circuit once again injected the administrative state with procedural requirements to remedy what it perceived as deficiencies in the rule-making process. The court found the proceedings at issue defective because the Nuclear Regulatory Commission failed to permit adequate adversary probing of waste disposal issues.[29] The court determined that the Commission could have employed many additional procedural devices beyond those listed in the APA, including "document discovery," "interrogatories," "limited cross-examination," and "memoranda explaining methodology."[30] According to the D.C. Circuit, "the procedures prescribed by § 553 will not automatically produce an adequate record."[31]

[23] Pierce, supra note 21, at 513.
[24] 478 F.2d 615, 630–31 (D.C. Cir. 1973).
[25] Id.
[26] See 5 U.S.C. § 553 (2012); see also O'Donnell v. Shaffer, 491 F.2d 59, 62 (D.C. Cir. 1974) ("This Court has long recognized that basic considerations of fairness may dictate procedural requirements not specified by Congress.").
[27] *Int'l Harvester*, 478 F.2d at 630.
[28] 547 F.2d 633, 637, 656–57 (D.C. Cir. 1976).
[29] Id. at 653.
[30] Id.
[31] Id. at 657.

Other courts of appeals followed the D.C. Circuit's lead. In *Appalachian Power Co. v. Environmental Protection Agency*, the Fourth Circuit demanded that prior to the implementation of federal ambient air quality standards "interested parties [should be] afforded full opportunity to present their contentions with respect to the proposed plan. Because of the nature of the regulations and their drastic impact, such opportunity might well include the right to more than merely the [statutory] opportunity to comment."[32] The validity of process, according to the court, hinges not on the text of the APA but rather on "the importance of the issues before the agency" and "[t]he kind of questions involved."[33]

Within this incubator of judicially hatched procedures and aggressive review of agency decision making, the D.C. Circuit in 1973 decided *Portland Cement*.[34] *Portland Cement* involved an EPA Administrator's promulgation of "stationary source" standards for new or modified Portland Cement plants pursuant to the Clean Air Act ("CAA").[35] After designating Portland Cement plants stationary sources of air pollution under the CAA, the Administrator published proposed emissions standards and a document that set forth the EPA's reasons for seeking regulation.[36]

The Administrator first proposed the emissions standards on August 3, 1971, and they were adopted later that year on December 16. Although the Administrator published the required statutory notice and met the statutory deadlines, challengers of the regulations claimed that the Administrator did not provide sufficiently detailed test results and methodological information to manufacturers early enough in the process to allow for comment and criticism.[37] They argued that during the comment period, the EPA furnished interested parties with an impact statement that failed to disclose the location, technique, and outcome of at

[32] 477 F.2d 495, 503 (4th Cir. 1973).

[33] Id. at 501 (first quoting Marine Space Enclosures, Inc. v. Fed. Mar. Comm'n, 420 F.2d 577, 586 n.22 (1969); then quoting Walter Holm & Co. v. Hardin, 449 F.2d 1009, 1015 (1971) (internal quotation marks omitted)).

[34] 486 F.2d 375.

[35] Id. at 378. Section 111 of the Clean Air Act directed the Administrator to promulgate "standards of performance" governing emissions of air pollutants by new stationary sources constructed or modified after the effective date of pertinent regulations. See 42 U.S.C. § 7411 (1976).

[36] *Portland Cement*, 486 F.2d at 378.

[37] Id. at 375, 392, 402.

least one test conducted on Portland Cement plants.[38] The EPA did not release that information until mid-April the following year.[39]

The D.C. Circuit accepted the challengers' contention, despite acknowledging that "a strong argument can be made that the Clean Air Act . . . assumed that the agency would not be subject to the additional time required to prepare a 'detailed' proposal of an impact statement, circulate the statement to the agencies for comment and assess the comments made."[40] Indeed, the D.C. Circuit treated the seemingly precise language of the CAA[41] as a mere speed bump rather than a roadblock. After noting that "[t]he time constraint of the [CAA] is . . . not decisive,"[42] the court held that "[i]t is not consonant with the *purpose* of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that . . . is known only to the agency."[43] The court fashioned a novel requirement: Agencies must disclose in their notices all the critical evidence and reasoning that underlie their proposals so that interested parties can competently comment upon the information in the agency's possession.

Portland Cement makes clear that agency disclosure did not escape the steady encroachment by courts into the sphere of authority once monopolized by statutory text.[44] The D.C. Circuit—and other courts of appeals—treated the provisions of the many dually enacted organic statutes as the *minimum* procedure permissible, rather than as a procedural ceiling subject to an agency's discretionary judgment. Although the obligations levied by the D.C. Circuit on the EPA in *Portland Cement* may have amplified the then-existing APA disclosure regime, such a development may not be surprising given the dogmatic setting outlined above in which courts reacted to the democratic accountability paradigm pervading the political landscape.[45]

[38] Id. at 392.
[39] Id.
[40] Id. at 380.
[41] Id. The CAA, consistent with the APA, established detailed time schedules for the promulgation of new source standards: Within 120 days of the inclusion of a "category," the CAA required that the Administrator propose standards, and ninety days thereafter the standards went into effect. See 42 U.S.C. § 7411 (1976).
[42] *Portland Cement*, 486 F.2d at 381.
[43] Id. at 393 (emphasis added).
[44] See supra notes 34–43 and accompanying text.
[45] See supra notes 34–43 and accompanying text.

B. The End of an Era?

The unbounded discretion of federal judges to load procedural requirements on agencies engaged in informal rule making was ostensibly cabined in *Vermont Yankee*.[46] At issue in *Vermont Yankee* was the validity of a rule adopted by the Atomic Energy Commission assigning a series of numerical values to the environmental effects of nuclear fuel cycles, which would thereafter be factored into the cost-benefit analyses in licensing proceedings for individual reactors.[47] The rule-making procedures used by the Commission included oral comment, but not discovery or cross-examination.[48] The case came before the Supreme Court after the D.C. Circuit deemed the Commission's process inadequate, contrary to the text of the APA.[49]

Employing what might be the most well-known language in all of administrative law, the Supreme Court wrote:

> [G]enerally speaking [5 U.S.C. § 553] . . . establishe[s] the *maximum procedural requirements* which Congress was willing to have the courts impose upon [federal] agencies in conducting rulemaking proceedings. [While] [a]gencies are free to grant additional procedural rights in the exercise of their discretion, . . . reviewing courts are generally not free to impose them if the agencies have not chosen to grant them. . . . Even apart from the [APA] . . . the formulation of procedures [should] basically . . . be left within the discretion of the agencies to which Congress ha[s] confided the responsibility for substantive judgments.[50]

The Court explicitly rejected the argument, which it attributed to respondent Natural Resources Defense Council, that Section 553 of the APA "merely establishes lower procedural bounds and that a court may routinely require more than the minimum when an agency's proposed rule addresses complex or technical factual issues or 'Issues of Great Public Import.'"[51]

[46] 435 U.S. 519.
[47] Id. at 525–27.
[48] Id. at 529.
[49] Id. at 520.
[50] Id. at 524 (emphasis added) (footnote omitted).
[51] Id. at 545.

The Court explained the alarming consequences of the practice that had developed in the lower courts: "[I]f courts continually review agency proceedings to determine whether the agency employed procedures which were, in the court's opinion, perfectly tailored to reach what the court perceives to be the 'best' or 'correct' result, judicial review would be totally unpredictable."[52] Continuing to up the ante would "undoubtedly" lead agencies down a dangerous path toward "adopt[ing] full adjudicatory procedures in every instance. Not only would this totally disrupt the statutory scheme . . . but all the inherent advantages of informal rulemaking would be totally lost."[53] These considerations prompted the Court to conclude that the D.C. Circuit "seriously misread or misapplied [the] statutory and decisional law cautioning reviewing courts against engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress."[54] Stated simply, in *Vermont Yankee* the Supreme Court put its foot down—democratically unaccountable judges could no longer make nationwide policy determinations "through the backdoor mechanism" of dragging the administrative state through the big muddy of additional process.[55]

C. The D.C. Circuit After Vermont Yankee

Despite what some claimed to be the end of the *ancien régime* after *Vermont Yankee*,[56] the D.C. Circuit continues to rely on its reasoning in *Portland Cement* to bind agencies with procedural mandates not explicit in the text of the APA.[57] Perhaps the most visible example is *American Radio Relay League, Inc. v. FCC*.[58] Taking center stage in that case were five studies consisting of scientific data gathered from field tests used by the FCC in proposing and subsequently promulgating a rule.[59] The FCC deemed portions of these studies "internal communications that were not

[52] Id. at 546.
[53] Id. at 547.
[54] Id. at 525 (citing FCC v. Schreiber, 381 U.S. 279, 290 (1965)).
[55] Richard J. Pierce, Jr., Waiting for Vermont Yankee II, 57 Admin. L. Rev. 669, 672 (2005) (citing Breyer, supra note 17, at 1845).
[56] Beermann & Lawson, supra note 14, at 894.
[57] See, e.g., Interstate Nat. Gas Ass'n of Am. v. Fed. Energy Regulatory Comm'n, 494 F.3d 1092, 1096 (D.C. Cir. 2007).
[58] 524 F.3d 227, 236 (D.C. Cir. 2008).
[59] Id. at 237.

relied upon in the decision making process" and thus redacted those segments from the agency's record.[60] The D.C. Circuit invalidated the FCC's decision not to publish the redacted pages for notice-and-comment. The court candidly relied on *Portland Cement* in holding that it is not consonant with the "purpose" of a rule-making proceeding to "cherry-pick" a study upon which the FCC relied in formulating the rule.[61] "Applying the Administrative Procedure Act *and* [the] Portland Cement line of decisions," the majority opinion remanded the case, instructing the FCC to release the redacted portions of the field tests.[62]

In a concurring and dissenting opinion, Judge Kavanaugh argued that a conflict exists between the majority's reliance on *Portland Cement* and the Supreme Court's holding in *Vermont Yankee*.[63] Although he conceded that the court properly applied *Portland Cement*, Judge Kavanaugh declared that "there is 'nothing in the bare text of § 553 that could remotely give rise to the *Portland Cement* requirement.'"[64] That, he claimed, is at odds with the signal contribution of *Vermont Yankee*—that the APA provides "the *maximum* procedural requirements which Congress was willing to have courts impose upon agencies."[65] Judge Kavanaugh pointed out that the D.C. Circuit has repeatedly applied *Portland Cement* without analyzing the "tension" between it and *Vermont Yankee*.[66] He further opined that the *Portland Cement* doctrine "creates a serious jurisprudential problem" and "stands on a shaky legal foundation"[67] because it cannot be found within the four corners of the APA. Under *Vermont Yankee*, "Congress and the agencies, but not the courts, have the power to decide on proper agency procedures."[68] It is Judge Kavanaugh's opinion that drives the discussion in Part II.

[60] Id. (quoting Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband over Power Line Systems, 21 F.C.C.R. 9308, 9324–25 (Aug. 7, 2006)) (internal quotation mark omitted).

[61] Id. at 236–37 (citing Conn. Light & Power Co. v. Nuclear Regulatory Comm'n, 673 F.2d 525, 530 (D.C. Cir. 1982)).

[62] Id. at 245 (Kavanaugh, J., concurring in the judgment) (emphasis added).

[63] Id. at 246 ("I do not believe *Portland Cement* is consistent with the text of the APA or *Vermont Yankee*.").

[64] Id. (quoting Beermann & Lawson, supra note 14, at 894).

[65] *Vt. Yankee*, 435 U.S. at 524 (emphasis added).

[66] *Am. Radio*, 524 F.3d at 247 (Kavanaugh, J., concurring in the judgment).

[67] Id. at 246.

[68] Id. (citing Beermann & Lawson, supra note 14, at 894).

II. A TEXTUAL ALTERNATIVE

What if Judge Kavanaugh is right? What happens if the D.C. Circuit acknowledges the tension between *Vermont Yankee* and *Portland Cement* and overrules the latter? Are those who think it wise to abide by the *Portland Cement* doctrine up a creek without a paddle? To that I respond: Fear not, for the Sections that follow uncover a substitute for the *Portland Cement* doctrine that is derived entirely from duly-enacted legislation. Should the D.C. Circuit decide to crumble the "shaky legal foundation" of *Portland Cement* and abandon that decision, parties seeking disclosure of the materials at issue in *Portland Cement* are not without recourse; there is a legislative backstop in FOIA. Part II first outlines the requirements of the current formulation of FOIA and its original predecessor. It then confirms that the data addressed in *Portland Cement* fit under the statutory umbrella of both. Put simply, overturning *Portland Cement* will ultimately result in the same amount of government disclosure.

A. FOIA

Recall that *Portland Cement* requires the disclosure of information that agencies rely on when formulating proposed rules.[69] More specifically, the court in that case obliged the EPA to disclose the location and methodological data used in precomment period testing that formed the basis of a proposed regulation establishing standards of pollution emissions for Portland Cement plants.[70] The information was not made available during the comment period between the date of the proposed rule and the promulgation of the final rule.[71]

FOIA, codified in portions of Section 552 of the APA, is a federal law, enacted in 1966, that establishes the right of the public to obtain information from federal government agencies.[72] At its core, FOIA is designed to make government information accessible to the people. It describes the information federal agencies must publish as a matter of course. More to the point, FOIA requires federal agencies on request to

[69] *Portland Cement*, 486 F.2d at 394.
[70] Id. at 392.
[71] Id.
[72] 5 U.S.C. § 552 (2012).

make promptly available to any person any "records" in their possession, unless the records fall within one of nine exemptions.[73] Thus, empirical and methodological information that forms the basis of proposed rules is only covered by FOIA if it is considered a record under the Act.

Unfortunately, FOIA does not define the term "records." When Congress has not otherwise explained the words of a statute, courts generally give those terms "their ordinary, contemporary, common meaning."[74] Indeed, it is often "ask[ed], not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used."[75] The ordinary meaning of "record" when Congress enacted FOIA in 1966 was broad but clear: "That which is written or transcribed to perpetuate a knowledge of acts or events."[76] In normal parlance, information that is written down encompasses a great deal more than the empirical test results and locations and methodological data relied on by agencies in formulating proposed rules.

The Supreme Court used the term "record" in this natural and commonsensical manner in *United States Department of Justice v. Tax Analysts*.[77] According to the Court, in order to possess "records" under FOIA, an agency simply must (1) "'create or obtain' the requested materials"; and (2) possess them because of the legitimate conduct of agency business.[78] The Court made clear that restricting "the term 'agency records' to materials generated internally would frustrate Congress's desire to put within public reach the information available to an agency in its decision-making processes."[79] Indeed, in enacting FOIA "Congress sought 'to open agency action to the light of public scrutiny.'"[80] *Tax Analysts*, moreover, was not an aberration. To my knowledge, no other de-

[73] Id. § 552(a)(3)(A).

[74] Perrin v. United States, 444 U.S. 37, 42 (1979); see also Schindler Elevator Corp. v. United States ex rel. Kirk, 563 U.S. 401, 407 (2011) (holding that "report" carries its ordinary meaning within the context of the False Claims Act).

[75] Oliver Wendell Holmes, The Theory of Legal Interpretation, 12 Harv. L. Rev. 417, 417–18 (1899).

[76] See Webster's New International Dictionary 2081 (2d ed. 1960).

[77] 492 U.S. 136, 142, 146 (1989).

[78] Id. at 144–45 (quoting Forsham v. Harris, 445 U.S. 169, 182 (1980)).

[79] Id. at 144.

[80] Id. at 142 (quoting Dep't of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 772 (1989)).

cision has used "records" in a way that would exclude the testing methods and results that serve as the bedrock of an agency rule-making process; rather, the courts have adhered to the term's ordinary (and expansive) meaning. For instance, courts have understood "records" to include everything from visitor logs[81] to paperwork pertaining to immigrant detention facilities.[82]

To further gild the lily, the statute's legislative history, for those who wish to make use of it, is in accord with the courts' understanding. The Senate hearings leading up to FOIA's enactment contain a direct reference to the meaning of "records." A representative of the Interstate Commerce Commission remarked, "[S]ince the word 'records' . . . is not defined, we assume that it includes all papers which an agency preserves in the performance of its functions."[83] The senator's remarks are not surprising given that FOIA's predecessor "had failed to provide the desired access to information relied upon in Government decision making, and in fact had become 'the major statutory excuse for withholding Government records from public view.'"[84] In enacting FOIA, Congress designed a broad right of access and established "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language."[85] Congress believed that this philosophy, when put into practice, would help "ensure an informed citizenry, vital to the functioning of a democratic society."[86]

The current administration also supports an expansive application of the term. The President and the Attorney General have issued memoranda to all agencies emphasizing that FOIA reflects a "profound national commitment to ensuring an open Government" and directing those

[81] See Wash. Post v. Dep't of Homeland Sec., 459 F. Supp. 2d 61, 69, 72–74 (D.D.C. 2006).

[82] See Nat'l Immigrant Justice Ctr. v. U.S. Dep't of Homeland Sec., No. 12C5358, 2015 WL 433580, at *1, *10 (N.D. Ill. Feb. 1, 2015).

[83] Forsham v. Harris, 445 U.S. 169, 184 (1980) (quoting Letter from Charles A. Webb, Chairman, Interstate Commerce Comm'n, to Sen. James O. Eastland, Chairman, Comm. on the Judiciary (May 12, 1965), *reprinted in* Administrative Procedure Act: Hearings on S. 1160 et al. before the Subcomm. on Admin. Practice & Procedure of the S. Comm. on the Judiciary, 89th Cong. 244 (1965)).

[84] GTE Sylvania, Inc. v. Consumers Union, 445 U.S. 375, 384 (1980) (quoting H.R. Rep. No. 89-1497, at 3 (1966), *as reprinted in* 1966 U.S.C.C.A.N. 2418, 2420).

[85] S. Rep. No. 89-813, at 3 (1965).

[86] NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

agencies to "adopt a presumption in favor of disclosure."[87] The President further suggests that "in the face of doubt, openness prevails."[88]

Applying what appears to be a ternary and disclosure-friendly understanding of "records" to the methodological information and testing data in *Portland Cement* is anything but a problematic exercise. To be sure, it was the EPA that "create[d]" the results stemming from emissions tests it conducted on Portland Cement plants, and it was the EPA that possessed the information because the agency engaged in "legitimate conduct"—at least conduct it was statutorily authorized to undertake—by crafting emissions standards for the plants.[89]

But the analysis does not end there, for there is another hurdle that must be cleared before agencies will be obliged to disclose records under FOIA. Agencies may withhold records from requesting parties if such records are captured by any of the nine exemptions listed in Section 552(b) of the United States Code.[90] Although other exemptions may in theory present issues, in the interests of relevancy and brevity this discussion will only delve into the provision most likely to apply in the *Portland Cement* context: privileged records "related solely to the internal personnel rules and practices of an agency."[91] It is surely not absurd to imagine a world in which Section 552(b)(2) is read so broadly that it envelops the data at issue in *Portland Cement*—methodological infor-

[87] Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683, 4683 (Jan. 21, 2009) [hereinafter President Obama's FOIA Memorandum]; accord Memorandum from Eric Holder, U.S. Att'y Gen., to Heads of Exec. Dep'ts and Agencies, Concerning the Freedom of Information Act (Mar. 19, 2009) [hereinafter Attorney General Holder's FOIA Guidelines], http://www.usdoj.gov/ag/foia-memo-march2009.pdf [https://perma.cc/7WKY-PN38]; see also Office of Info. Policy, U.S. Dep't of Justice, President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines: Creating a New Era of Open Government (Apr. 17, 2009), http://www.justice.gov/oip/blog/foia-post-2009-creating-new-era-open-government [https://perma.cc/P3KN-Q4H3] (providing an overview of the current status of the Department of Justice's review and administration of FOIA).

[88] President Obama's FOIA Memorandum, supra note 87, at 4683.

[89] See supra note 78 and accompanying text.

[90] 5 U.S.C. § 552(b) (2012) (listing the exemptions as documents kept secret for the national defense; internal personnel rules and practices of an agency; statutory exemptions; trade secrets and privileged financial information; privileged inter-agency or intra-agency memoranda or letters; personnel and medical files and similar files; information compiled for law enforcement purposes; information related to the regulation or supervision of financial institutions; or geological and geophysical information and data).

[91] Id. § 552(b)(2).

mation, agency data, and testing locations. In fact, the Ninth Circuit did just that in *Milner v. United States Department of the Navy*, when it exempted from FOIA coverage explosives data and maps used by the Navy in storing munitions at a naval base.[92]

But the plain language of FOIA and the Supreme Court paint a different picture of Section 552(b)(2). In an 8–1 ruling, the Supreme Court reversed the Ninth Circuit in *Milner*, writing that no one "staring at these charts of explosions and using ordinary language would describe them" as personnel rules and practices.[93] The Court rejected a spacious interpretation of the exception that would cover all internal documents and practices that guide employees in discharging their duties. Instead, the Court wrote that Section 552(b)(2) "encompasses only records relating to issues of employee relations and human resources."[94] "An agency's 'personnel rules and practices' all share a critical feature: They concern conditions of employment in federal agencies—such matters as hiring and firing, work rules and discipline, compensation and benefits."[95]

Applying this holding to the facts of *Portland Cement* leads inescapably to the conclusion that the testing methodologies and data used in proposing emissions standards do not involve "employee relations and human resources."[96] The materials at issue in *Portland Cement* concern environmental analyses conducted on plants owned by a private company, not the workplace rules or treatment of agency employees. By no stretch of the imagination does the seemingly clear language—"related solely to the *internal personnel* rules and practices of an agency"—encompass the data concerning the public environmental impact of Portland Cement plants. Thus, had the cement manufacturers in *Portland Cement* sought the test results and methodological information from the EPA via FOIA request, a straightforward and jurisprudentially faithful reading of FOIA would prescribe disclosure.

Not only does the current version of FOIA mandate agency disclosure of Portland Cement data, but even under FOIA's more restrictive predecessor—the "Public Information" section of the original APA—the out-

[92] 575 F.3d 959 (9th Cir. 2009).
[93] 131 S. Ct. 1259, 1269 (2011).
[94] Id. at 1271.
[95] Id. at 1261.
[96] Id. at 1271.

come would not change.[97] Section 3 of the APA's earliest design contained the disclosure provisions by which agencies were forced to abide: "Save as otherwise required by statute, *matters of official record* shall in accordance with published rule be made available to *persons properly and directly concerned* except information held confidential for good cause found."[98]

The Act left undefined "matters of official record" and "persons properly and directly concerned." But according to the 1947 Attorney General's Manual on the Administrative Procedure Act setting forth the Department of Justice's understanding of the APA, "official record[s]" included (1) "applications, registrations, petitions, reports and returns filed by members of the public with the agency pursuant to statute or the agency's rules"; and (2) "all documents embodying agency actions, such as orders, rules and licenses."[99] Attorney General (and later Justice) Tom C. Clark further described "matters of official record" by explaining what the phrase is not: "The great mass of material relating to the internal operation of an agency is not a matter of official record."[100] "For example, intra-agency memoranda and reports prepared by agency employees for internal use are not matters of official record since they merely reflect the research and analysis preliminary to official agency action. . . . [and] they usually involve matters of internal management . . . ."[101] The Attorney General described "persons properly and directly concerned" as "individuals who have a legitimate and valid reason for seeking access to an agency's records."[102] To be sure, the Attorney General's Manual interpreting the statute is in no way binding on our federal courts. The Supreme Court has instructed, however, that the courts should defer to the Attorney General on statutory matters within her authority "only if Congress has not expressed its intent with respect

[97] 5 U.S.C. § 1002 (1946). FOIA was designed to expand access to government information, which Congress determined was not adequate under the public information provisions.

[98] Id. § 1002(c) (emphasis added).

[99] Tom C. Clark, U.S. Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act 24 (1947).

[100] Id. at 25.

[101] Id.

[102] Id.

to the question, and then only if the administrative interpretation is reasonable."[103]

Turning to the test results and procedures in *Portland Cement*, one is hard-pressed to think of a way in which the EPA could have avoided disclosure under Section 3. The cement manufacturers in *Portland Cement* were no doubt "properly and directly concerned."[104] Not only did those organizations comment on the proposed rule and seek information during the comment period, but they were the targets of the EPA's proposal. Moreover, there is no indication in *Portland Cement* that the methodological data and test results were confidential or "relat[ed] to the internal operation of an agency."[105] In fact, the EPA made the information available after it promulgated the proposed regulation.

Yet some critics might charge that the information at issue in *Portland Cement* would have escaped the reach of Section 3 since that data did not embody "agency action[]" under Attorney General Clark's rubric. The EPA used the testing materials in its proposed rule *before* the emissions standards were actually promulgated, the argument might go, and thus the information requested encompassed merely "the research and analysis preliminary to official agency action,"[106] not the action itself. However, that interpretation of the phrase "agency action" ignores the realities of *Portland Cement*. In its notice of proposed rule making, which announced the impending agency regulation, the EPA noted, "The standards of performance set forth herein are based on stationary source testing conducted by the Environmental Protection Agency . . . ."[107] According to the D.C. Circuit, this information "formed the basis" of the EPA's ultimate regulation, which the EPA was required to issue within ninety days of the proposal.[108] If data that serve as the very bedrock of an agency's policy making cannot be waived through the Section 3 gates as part of an agency action, then disclosure of just about anything is foreclosed. That surely cannot be the proper result, for Attorney General Clark's suggested understanding of Section 3 noted that

[103] Presley v. Etowah Cty. Comm'n, 502 U.S. 491, 508 (1992).
[104] 5 U.S.C. § 1002(c) (1946).
[105] Clark, supra note 99, at 25.
[106] Id.
[107] *Portland Cement*, 486 F.2d at 392 (citing EPA Standards of Performance for New Stationary Sources, 36 Fed. Reg. 15704 (Aug. 17, 1971) (to be codified at 42 C.F.R. pt. 466)).
[108] Id. at 395.

if there was any doubt about whether agency materials were official records, agencies should err on the side of greater disclosure.[109]

In sum, the modern formulation of FOIA and its precursor cover the methodological and test data at issue in *Portland Cement*. Consequently, FOIA is but an alternate route to the same destination at which *Portland Cement* arrived. Put another way, if the D.C. Circuit reconciles the interpretive tension between *Portland Cement* and *Vermont Yankee* by overruling *Portland Cement*, interested parties can still file FOIA requests and oblige agencies engaged in informal rule making to divulge the records the D.C. Circuit mandated the EPA to disclose in *Portland Cement*.

B. The Realities Under FOIA's Reign

The consequences of this conclusion are stark. Simply put, rejection of the *Portland Cement* decision merely results in an indisputably textual *Portland Cement* regime vis-à-vis FOIA. Imagine two worlds. The first world is one in which the "shaky legal foundation"[110] upon which *Portland Cement* rests is recognized by the D.C. Circuit and the case is overturned. More precisely, imagine a world in which the APA obliges agencies merely to provide in their general notices of proposed rule making "reference to the legal authority under which the rule is proposed" and "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[111]

At first blush this disclosure system makes *Portland Cement* a mere artifact, given that it required agencies to disclose the methodological data and test results that lay the foundation for rule-making proposals. Proponents of *Portland Cement* and the disclosure it necessitates might balk at the prospect of *less* government transparency, even in the face of *Vermont Yankee*. But as shown above,[112] proper requests for information under FOIA result in disclosure of the materials governed by *Portland*

[109] Clark, supra note 99, at 24–25. It is important to remember that, under Section 3, agencies were left as the final judges of their own compliance. But the point of this discussion is to show that the information at issue in *Portland Cement* would not have been categorically excluded by that provision.

[110] Am. Radio Relay League v. FCC, 524 F.3d 227, 246 (D.C. Cir. 2008) (Kavanaugh, J., concurring in the judgment).

[111] 5 U.S.C. § 553(b) (2012).

[112] See supra Section II.A.

Cement. Therefore, in this scenario the *means* of obtaining agency records have changed, not the end results.

Now think about a second world, a world in which the current jurisprudential state remains intact. In this situation any methodological incongruence between *Vermont Yankee* and *Portland Cement* exposed by Judge Kavanaugh is swept under the rug. Indeed, the D.C. Circuit in this setting continues to require the release of testing data and methodological information that serve as the foundation for proposed rules.

The outcome in both scenarios is the same: disclosure. But before we call the first setting a perfectly viable substitute for the second, it is important to address when that disclosure would occur, for in *Portland Cement* the D.C. Circuit required that the materials at issue be released during the comment period. According to FOIA, "Each agency, upon any request for records . . . shall determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination . . . ."[113] In the typical Section 553 rule making, a FOIA request can be made by an interested party and processed by an agency several times over during the comment period. Indeed, Congress, and agencies if they are given the discretion to do so, will specify rule-making comment periods that, on average, range from thirty to sixty days.[114] For complex rule making the period may be longer. To take but one example, in *Portland Cement* the claimants alleged that the EPA failed to publish its test results and methodological data within the ninety-day statutory window.[115] Thus, under FOIA, agencies could be required to disclose information that forms the basis of proposed rules *earlier* in the rule-making process than they would have to do under *Portland Cement*.

Not so fast, critics of FOIA will respond. In 2014 alone, the federal government received 714,231 FOIA requests, a twenty-six percent increase from 2013.[116] And that figure does not account for the number of

[113] 5 U.S.C. § 552(a)(6)(A)(i) (2012).

[114] Office of the Fed. Register, A Guide to the Rulemaking Process (2011), https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf. [https://perma.cc/YAV4-L5K3].

[115] *Portland Cement*, 486 F.2d at 380–81.

[116] U.S. Dep't of Justice, FOIA Data at a Glance—FY 2009 Through FY 2014 (2015), http://www.foia.gov/index.html. [https://perma.cc/KC8Y-FJBE].

requests that were backlogged during the same period: 159,741.[117] Moreover, federal agencies are big;[118] they have many components and offices, so finding the sought-after documents in the billions of pages held can be a labor-intensive, time-consuming, and expensive process. Surely advocating for a regime under which requests would increase, the argument might go, is a pragmatically unwise solution that will cause delay and swallow up the finite resources of the administrative state. There are, in essence, practical grounds for maintaining interpretive harmony between *Portland Cement* and *Vermont Yankee*.

But that argument proves too much. According to the Department of Justice's Annual FOIA Reports for Fiscal Year 2014, agencies released records for ninety-one percent of processed requests.[119] And despite receiving over 150,000 more requests in 2014 than in 2010, the average time agencies took to release the requested materials dropped from 28.34 days to 20.51 days during that period.[120] Although the three-week government shutdown in 2014 attributed to the increased backlog,[121] the trend in recent years has actually been a decrease in backlogged FOIA requests. From 2009 to 2012, for instance, the backlog shrank from 77,377 to 71,790 requests.[122] To be sure, the figures generated by this report should be viewed with some skepticism; the government entities that produce the data have an incentive to describe a smoothly operating disclosure mechanism.[123] But that does not belie the truth of the general point: For interested parties seeking disclosure of the test results and methodological data that serve as the foundation of proposed rules, FOIA offers an effective and timely device.

[117] Id.

[118] For example, the EPA alone had over 15,000 employees in its workforce in the 2014 fiscal year. U.S. Envtl. Prot. Agency, EPA's Budget and Spending (2016), http://www2.epa.gov/planandbudget/budget. [https://perma.cc/M2XJ-KY5T].

[119] U.S. Dep't of Justice, Summary of Annual FOIA Reports for Fiscal Year 2014 (2015), http://www.justice.gov/sites/default/files/oip/pages/attachments/2015/05/01/fy_2014_annual_report_summary.pdf. [https://perma.cc/CNU6-2GZF].

[120] Id. at 13.

[121] Id. at 3. "A request is reported as 'backlogged' when it has been pending at an agency longer than the statutory period of twenty working days, or if unusual circumstances are present, up to thirty working days." Id. at 8 n.6.

[122] Id. at 9.

[123] The report was created by the Office of Information Policy based on data prepared by each of the federal agencies subject to FOIA. Id. at 1.

That conclusion should not be surprising, for what requesters face under FOIA is a relatively inexpensive and simple process. Parties are not required to give a reason to request documents or explain the anticipated use of the materials. In fact, all that is necessary to begin processing a request is a letter to the proper FOIA officer in the appropriate government agency, which "reasonably describes" the records sought, and an agreement to pay the agency's published fees for searching and copying records.[124] Recall that the burden is on the government to justify *nondisclosure* by showing that the information requested falls within one of nine exemptions. In other words, the statutory procedure for obtaining records under FOIA involves nothing more than filling out a few forms.

The goal here is not to assert that disclosure under FOIA is superior to the *Portland Cement* regime as a practical matter. In fact, none of the foregoing discussion proves that FOIA is the best way for citizens to obtain agency records. It may or may not be. Rather, the nub is that there is a textually anchored, pragmatically sound, and simple alternative to *Portland Cement* that does not run the risk of rendering a decision of the Supreme Court advisory. Justice Scalia has commented that the crucial question regarding *Portland Cement* is not whether the D.C. Circuit employed a "fundamentally erroneous approach," but rather "how the error could . . . [go on] so long uncorrected."[125] The Supreme Court lacks the institutional resources to ensure full compliance with its decisions. It has room on its docket for a limited number of cases, and the administrative decisions from the lower courts may be routinely pitched as issues best left to the expertise of agency officials. Given these constraints, it becomes all the more important for the lower courts to decide cases in ways that respect in fullest measure the highest Court's approach. To the extent that those engaged in the debate surrounding *Portland Cement* believe the D.C. Circuit has defaulted on that obligation, this Note attempts to show them that the grass is just as green on the other side.

III. ADDRESSING THE FALLOUT

It is worth taking a moment to address the legal issues that might arise under a disclosure regime governed by FOIA. Although a properly

[124] 5 U.S.C. § 552(a)(3), (4) (2012).
[125] Scalia, supra note 18, at 371.

timed request obliges agencies to disclose the test results and methodological data that form the basis of proposed rules during the comment period, the utility of that obligation has yet to be considered. In the paragraphs that follow, this Note concludes by discussing two worrisome scenarios for *Portland Cement* supporters in which agencies may circumvent disclosure under FOIA.

The first situation is one in which a FOIA request is filed but the responding agency simply refuses to provide the materials requested within the statutory deadline. Not surprisingly, the plain language of FOIA supplies requesting parties with a comprehensive remedial scheme to challenge this de jure violation. As outlined above, an agency is required to make a determination on the merits of a FOIA request within twenty working days. If the agency fails to release the information, the requester has a right to file an administrative appeal of the agency's decision, which also must be resolved within twenty working days.[126] If the request is denied on appeal with the agency, the requesting party can file suit in a United States District Court.[127] According to FOIA, "[T]he district court . . . has jurisdiction to enjoin the agency from withholding agency records . . . [and] shall determine the matter de novo."[128] If the requesting party "substantially prevail[s]" in court by obtaining the sought-after records, that party may be awarded reasonable attorneys' fees and other litigation costs "reasonably incurred."[129] Thus, the same judicial backstop that looms large in the current administrative state awaits agencies if they violate the statutory demands of FOIA.

Of course, it would take a particularly brazen group of agency officials to scoff at the explicit demands of FOIA. Instead, agencies might avoid disclosure under the statute by navigating a less direct route. In this second scenario the agency sets its rule-making comment period shorter than the twenty-day response time under FOIA—perhaps ten or fifteen days. The agency in this situation can avoid responding to FOIA requests before a proposed regulation is promulgated because the comment period is so short. Put directly, an agency can dodge disclosure during the comment period and still satisfy FOIA's text. Proponents of

[126] 5 U.S.C. § 552(a)(6)(A)(ii).
[127] Id.
[128] Id. § 552(a)(4)(B).
[129] Id. § 552(a)(4)(E)(i).

Portland Cement surely would shudder at the idea that abandoning that decision gives agencies the option of reducing transparency.

But interested parties are not left without recourse, for there is a claim to be made that the agency has committed an abuse of discretion in authorizing such a brief comment period. The APA affords interested parties the opportunity to participate in informal rule making through the submission of written data, views, or arguments during the comment period.[130] The District Court for the District of Columbia has clarified that when "the comment period [is] insufficient to allow [parties] the opportunity to consider the rule and its supporting analysis and provide meaningful comment," an abuse of agency discretion has occurred.[131] Indeed, the opportunity to comment should be "full and fair."[132] Establishing a comment period that is so abbreviated parties cannot access the data upon which a proposed rule is based does not allow for "meaningful" comment and hardly can be described as "full and fair." In essence, setting an unreasonably brief comment period may in fact gut the comment period of its principal function and "leads in the direction of arbitrary decision-making."[133]

CONCLUSION

In *American Radio Relay League*, Judge Kavanaugh proclaimed that the *Portland Cement* doctrine has a "lack of roots" in any statutory text and consequently creates "a serious jurisprudential problem because the Supreme Court later rejected this kind of freeform interpretation of the APA" in *Vermont Yankee*.[134] For almost four decades, scholars, practitioners, and judges alike have taken sides on a much larger issue that festers beneath the surface of those cases: the proper role of the courts in the federal administrative law system. This Note jumps into the fray and explores the consequences of a regime under which Judge Kavanaugh's view is decisive. As it turns out, taking the path laid down by Judge Ka-

[130] Id. § 553(c).

[131] Conference of State Bank Supervisors v. Office of Thrift Supervision, 792 F. Supp. 837, 844 (D.D.C. 1992).

[132] Phillips Petroleum Co. v. EPA, 803 F.2d 545, 559 (10th Cir. 1986).

[133] United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 252 (2d Cir. 1977).

[134] Am. Radio Relay League v. FCC, 524 F.3d 227, 246 (D.C. Cir. 2008) (Kavanaugh, J., concurring in the judgment).

vanaugh is but another route to *Portland Cement*'s destination. If the D.C. Circuit answers Judge Kavanaugh's call and abandons *Portland Cement*, interested parties would be left with an equally effective and statutorily prescribed tool for obtaining materials used by agencies in promulgating regulations: file a FOIA request. Simply put, burying *Portland Cement* would lead inextricably to the resurrection of its results.

The purpose here is not to declare a winner in what has become a long struggle. But this Note does seek to calm the waters of the current debate by assuring opponents of Judge Kavanaugh's approach that rejection of *Portland Cement* does not sound the death knell for access to agency records during rule making. Accordingly, it is my hope that this Note sheds light on a substitute for the *Portland Cement* doctrine that has eluded examination, and with any luck changes the stakes of the current debate.