1998

The ABA Section of Administrative Law and Regulatory Practice - From Objector to Protector of the APA

Jeffrey Lubbers

THE ABA SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE — FROM OBJECTOR TO PROTECTOR OF THE APA

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As George Shepard detailed in his masterful account of the events leading up to the passage of the Administrative Procedure Act[1] in 1946, the American Bar Association (ABA), and especially its Special Committee on Administrative Law, was for years the leading opponent to legislation recognizing the authority of federal agencies to decide cases and make rules.[2] The ABA's Special Committee was established in 1933,[3] at the beginning of the Roosevelt administration, and it immediately took the position that the establishment of administrative agencies violated the Constitution's principle of separation-of-powers.[4] Colonel O. R. McGuire, one of the Special Committee's leading members who became the Committee's Chairman in 1936, was a "strident opponent of the New Deal."[5] Under his leadership, and that of Roscoe Pound, who pinch-hit as Chairman in 1938, the Committee issued reports that referred to the New Deal agencies as engaging in "administrative absolutism" and their supporters as "Marxian."[6] To effectuate its view that limits on agency powers were necessary, the Committee drafted and supported various administrative court proposals,

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1. Pub. L. No. 404, 60 Stat. 237 (1946) (codified as amended in scattered sections at 5 U.S.C. (1994)).

2. *See* George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (Summer 1996) (providing detailed history of Act).

3. *See id.* at 1569.

4. *See id.* at 1571.

5. *See id.* at 1573.

6. *Id.* at 1590-92.

culminating in the Walter-Logan Bill, which President Roosevelt vetoed in 1940.[7]

AN ATTITUDE CHANGE

This combative attitude changed when Carl McFarland, a member of the Attorney General's Committee on Administrative Procedure, became the Chairman of the Special Committee in 1941.[8] Following McFarland's leadership, the Committee adopted a conciliatory attitude and supported various compromises that allowed the Administrative Procedure Act (APA) to eventually pass unanimously in 1946.[9] Professor Kenneth Culp Davis, a staff member of the Attorney General's Committee, provides insight about the ABA's attitude change:

> The ABA of the period 1933-1941 was, in my view, (and this is an opinion) a pernicious organization; it was extremely harmful. However, during the period 1941 to 1946 the ABA, with Carl McFarland as its representative, was very helpful in putting the Administrative Procedure Act through Congress.[10]

Despite its endorsement of the APA, the Special Committee still harbored some lingering doubts about its effectiveness. In 1945, the Committee submitted its report recommending support of the pending APA and also urging the establishment of the Section of Administrative Law. The Report of the Special Committee said:

> In supporting this legislation the Association has avoided seeking too much too soon. If it passes, a beginning will have been made — but only a beginning....The legislation which may be secured could be wasted in large part by the failure of the Association to make provision for adequate follow-up....It will be necessary to follow carefully the operation of any procedure act which Congress may pass. This will involve the taking of measures to prevent subsequent emasculation of the statute or to secure amendments which time and experience may show to be desirable....Beyond all else, however, the administrative system must not be permitted to supply an aura of due process and procedural regularity for what are essentially arbitrary and dictato-

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7. *See* Shepherd, *supra* note 2, at 1599 n.182. As Professor Shepherd notes, the Federal Bar Association (FBA), on the other hand, strongly opposed the Walter-Logan Bill. In response, Colonel McGuire accused FBA members of "prostitu[ting] the public rights for their pecuniary or personal aggrandizement."

8. *Id.* at 1645-46.

9. Indeed, in 1981, then-Section Chairman Antonin Scalia went so far as to say: "The APA was preeminently lawyers' legislation. The prime factor in its enactment was unquestionably the American Bar Association...." Antonin Scalia, *Chairman's Message*, 33 ADMIN. L. REV. iii, viii (Fall 1981).

10. Kenneth C. Davis & Walter Gellhorn, *Present at the Creation: Regulatory Reform Before 1946*, 38 ADMIN. L. REV. 511, 524 (1986).

rial methods of government.[11]

The wariness with which the Committee viewed the APA led it to suggest that creation of the Section was necessary to help strengthen and institutionalize the Association's oversight of the Act.[12]

Accordingly, the ABA House of Delegates formally anointed the Section of Administrative Law (Section),[13] which had been created in 1946,[14] to serve as the successor to the Special Committee on Administrative Law in 1950, and directed that the Section:

> [B]y all necessary and proper means including appearances before legislative committees (1) preserve the gains made by the adoption of the Administrative Procedure Act as the law of the land, (2) develop and seek the adoption of improvements thereof as well as additional measures to like purposes, and (3) procure the assistance of officers, units, and members of this Association as well as the cooperation of those of state and local bar associations....[15]

From then on, the Section served as a forceful advocate for maintaining the integrity of the APA by resisting the grant of special exemptions and the prevention of its comprehensive overhaul. The following selective chronology of significant activities of the Section shows the breadth and importance of its work. Throughout these fifty years, the Section flourished under the leadership of Chairs of the highest caliber within the profession. Perhaps more than most ABA Sections, academic leaders, such as professors of administrative law, have played a very important role in the management and intellectual leadership of the Section. Furthermore, the general procedural nature of administrative law has largely served to inoculate the Section from special interest or client-based domination. Members' actions tend to reflect the broad public interest reflected in the polar goals of governmental fairness and efficiency. As such, the APA, with its flag planted firmly midway between those poles, has generally served as the Section's brick fortress — to be occasionally repointed, but generally defended from attack.

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11. *Supplemental Report of the Special Committee on Administrative Law*, 70 REP. OF THE A.B.A. 272-73, 275 (1945).

12. *Id.* at 273.

13. The Section changed its name by adding "and Regulatory Practice" in 1988. The House of Delegates approved the action in August 1988. *See* A.B.A., 1988 ANNUAL MEETING, SUMMARY OF ACTIONS OF THE HOUSE OF DELEGATES 25.

14. *See* Resolution of the House of Delegates, Dec. 1945; *Report of the Special Committee on Administrative Law*, 71 REP. OF THE A.B.A. 213 (1946). *See also Section of Administrative Law Organizes and Plans for Work Brought into Being*, 32 A.B.A. J. 451 (1946).

15. 75 REP. OF THE A.B.A. 446 (1950).

THE 1950S

In the early years, some agencies that suddenly found their proceedings covered by the new APA sought exemptions from it.[16] The Section opposed the issuance of exemptions, although it was not always successful in its opposition. An illustration of a Section failure is the unsuccessful effort by the Section to stop the Immigration and Naturalization Service from obtaining a statutory exemption from the APA's adjudication procedures for its deportation proceedings after the Supreme Court ruled that the APA applied in the famous case of *Wong Yang Sung v. McGrath.*[17] The exemption "attached as a rider to the Supplemental Appropriations Act of 1951 — was adopted, in spite of every effort which the Section's officers could exert."[18] In the next few years, the Section mounted an unsuccessful effort to obtain repeal of the exemption.[19] On the other hand, when the Interstate Commerce Commission (ICC) found that its motor carrier licensing proceedings were covered by the APA in *Riss & Co. v. United States,*[20] the Section successfully mobilized opposition to a rumored plan by the ICC to seek an exemption.[21] Soon after, the ICC announced it would comply.[22]

The Section was also generally quite supportive of government-sponsored studies of administrative procedure. In 1951, the Section endorsed the creation of the President's Conference on Administrative Procedure.[23] This Conference, subsequently created by President Eisenhower in 1953,[24] was the first of two "temporary conferences" leading to the passage in 1964 of the Administrative Conference Act, which created the "permanent" Administrative Conference of the United States (ACUS).[25] The Section enjoyed a close working relationship with the Eisenhower Conference as indicated in its resolution of August 1954:

> [T]he Section of Administrative Law expresses its appreciation of the continued interest which the President's Conference on Administrative Procedure has manifested

16. *Committees on Section Administration: The National Committee,* 3 ADMIN. L. BULL. 67, 69-70 (1951) [hereinafter *National Committee*].

17. 339 U.S. 33 (1950).

18. *See National Committee, supra* note 16, at 67, 68.

19. *See id.* at 69 (reporting on progress of bills and expressing confidence in their passage). The bills, however, were not passed.

20. 341 U.S. 907 (1951).

21. *See National Committee, supra* note 16, at 69-70.

22. *Id.*

23. *See* John W. Cragun, *Chairman's Page,* 6 ADMIN. L. BULL. 43 (No. 1, 1953).

24. *See* Memorandum Convening to President's Conference on Administrative Procedure, PUB. PAPERS, 219 (Dwight D. Eisenhower, Apr. 1953, 1953).

25. Pub. L. No. 88-499, 78 Stat. 615 (1964) (codified at 5 U.S.C. §§ 591-96 (1994)). For a lengthy discussion of ACUS, see Gary J. Edles, *The Continuing Need for an Administrative Conference,* 50 ADMIN. L. REV. 101 (1998).

> in the views of the Section and its members regarding the matters considered by the Conference....[The Section] hopes that the functions of the Conference will be continued either through the continuation of the Conference or the creation of an effective Office of Administrative Procedure.[26]

The Eisenhower Conference subsequently made a similar recommendation concerning the need for a permanent Conference.

By 1956, the ABA was heavily involved in analyzing the ambitious recommendations of the Hoover Commission on Legal Services and Procedure. The Association created a Special Committee on Legal Services and Procedure, and later adopted several of the Special Committee's recommendations, including: enactment of a Code of Federal Administrative Procedure to replace the APA, creation of a new office of Administrative Procedure and Legal Services to oversee proposed new laws dealing with hearing examiners and performance of legal services in the federal government, establishment of several new specialized Article III courts (*e.g.*, Labor Court, Trade Court and Tax Court), and a statute governing the practice of law before federal agencies.[27] The Section was given the task of drafting the proposed Code of Federal Administrative Procedure. A section committee subsequently wrote the draft that was presented to Congress in 1957.[28]

In 1959, the Senate Judiciary Committee accepted a Section recommendation and created a Special Subcommittee on Administrative Procedure.[29] The subcommittee survives today as the Subcommittee on Administrative Oversight and the Courts. Section Chairman John B. Gage reported on the Section's proposed Federal Administrative Code, Federal Administrative Practice Act and a statutory code of Standards of Agency Conduct, all of which were being studied by Congressional Committees.[30] Congress enacted the Agency Practice Act in 1965.[31] It provides that an attorney in good standing in any state may represent persons before federal agencies.[32] Chairman Gage commented:

> The legislative approach to the goal established is, however, but a part — perhaps the smaller part — of the responsibility placed on the Section. The duty to protect the gains made by the enactment of the [APA] can be fulfilled in many instances more directly by voluntary action of the federal agencies themselves. It is in this field that, up-to-date, the greatest accomplishments of the Section have occurred....I believe the

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26. Robert M. Benjamin, *Chairman's Page*, 7 ADMIN. L. BULL. 36 (No. 1, 1954).

27. *See* William H. Allen, *The Durability of the Administrative Procedure Act*, 72 VA. L. REV. 235, 237-38 (1986) (detailing efforts to remedy faults in APA).

28. *Id.*

29. *See* John B. Gage, *Chairman's Page*, 11 ADMIN. L. BULL. 61 (1958-1959).

30. *Id.* at 203-04.

31. Pub. L. No. 89-332, 79 Stat. 1281 (1965) (codified at 5 U.S.C § 500 (1994)).

32. *Id.*

Section should take much encouragement from what has been accomplished agency-wise largely as the result of its activities and constant interest.[33]

THE 1960S

In 1960, Chairman Whitney Harris gave his views on some of the general goals of the Section:

> The Section...has a basic interest in the preservation and strengthening of the independence of our primary regulatory agencies. These agencies are, indeed, the source of most of that body of rules and principles which we describe as "administrative law." In our efforts to improve the procedures by which regulatory bodies perform their functions, we have sometimes proposed, for formal contested cases, the adaptation of rules which have proven their worth in the trial of cases before courts. For this reason, our Section sometimes has been thought to advocate "judicialization" of the administrative process. This is not the case. Formal proceedings are useful only in contested cases which have all the basic attributes of court litigation.
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> The Section...does not limit its interest to cases of formal adjudication. On the contrary, the Section is concerned that there be more extensive and effective utilization by agencies of their rule-making or quasi-legislative powers. As Mr. Justice Clark observed in his address to the Section, "too often basic continuing problems are left to *ad hoc* adjudication."[34]

Chairman Harris also got the Section involved in the Administrative Law Committee of the Inter-American Bar Association. At its 1960 meeting in Bogota, Colombia, the Administrative Law Committee produced two fundamental resolutions addressed to all nations in the Western Hemisphere:

> 1. The law should never prevent the judiciary from reviewing and declaring, by appropriate process, the unconstitutionality or illegality of any act of the various authorities of the State.
>
> 2. Representation of persons in cases before administrative courts and agencies, which involve the application of the law, should be restricted to lawyers.[35]

By 1962, the Section's attention shifted to the second temporary Administrative Conference, President Kennedy's Administrative Conference of 1961-1962. Section Chairman Raoul Berger was a skeptic of the utility of the Conference.[36] He also was upset that agencies had generally opposed the Section-drafted Code of Administrative Procedure, and that it was

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33. John B. Gage, *Chairman's Page,* 11 ADMIN. L. BULL. 203, 204, 206 (1959).

34. Whitney P. Harris, *Chairman's Page,* 13 ADMIN. L. REV. 3, 4-5 (1960).

35. Whitney P. Harris, *Chairman's Page,* 13 ADMIN. L. REV. 105, 106, 107 (1961).

36. *See* Raoul Berger, *Chairman's Page,* 14 ADMIN. L. REV. 225, 225 (1962) (stating that conference might chill objectives of Section).

likely an "agency-dominated" Conference would do the same.[37] He favored a more independent Office of Administrative Procedure resembling an Inspector General to report on problems in the agencies.[38] After Chairman Berger's term, this opposition to the creation of a permanent ACUS gradually faded, and the Section became an enthusiastic supporter of the ACUS concept. The Section actively supported the passage of the Administrative Conference Act in 1964, and then lobbied vigorously for the appointment of a Chairman and Council Members.[39]

The Section continued to be supportive of ACUS activities throughout the next three decades[40] and often worked closely with ACUS on recommendations.[41] As ACUS funding became precarious in 1994, the ABA took strong stands in favor of preserving ACUS.[42] Unfortunately, these pleas were unavailing, and the Section newsletter's front page headline in the Winter 1996 issue was "R.I.P. A.C.U.S."[43]

In 1965, the ABA took a significant institutional step. It authorized the Section, subject to certain conditions and clearances, to participate directly in the federal agencies' proceedings for the adoption or amendment of procedural regulations.[44] As Chairman Frederic Kirgis stated, "[t]his, for the

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37. *Id.* at 225-26.

38. *Id.* at 226.

39. Section Chairman Richard Keatinge reported on the appointment of ACUS Chairman Jerre Williams in 1968. He mentioned that "the Section had sought the appointment of the officers...ever since permanent Administrative Conference legislation was enacted four years ago." Richard Keatinge, *Chairman's Page*, 20 ADMIN. L. REV. vii, xi (No. 2, 1968).

40. *See* A.B.A., 1989 MIDYEAR MEETING, SUMMARY OF ACTION OF THE HOUSE OF DELEGATES 35 (authorizing ABA's continued support of ACUS and provision of funds sufficient for ACUS to continue its role as government's in-house advisor and coordinator of administrative procedural reform).

41. Frequently, the Section would take up recommendations adopted after ACUS in order to obtain the ABA's imprimatur. For example, see the House of Delegates' resolution "endorsing the guidelines concerning the implementation [of presidential review of rulemaking] adopted by [ACUS]...." A.B.A., 1990 ANNUAL MEETING, SUMMARY OF ACTIONS OF THE HOUSE OF DELEGATES 18-19. Occasionally, ACUS also considered and approved initiatives originating with the ABA. *See ACUS Recommendation 95-3, Review of Existing Agency Regulations*, 60 Fed. Reg. 43,108, 43,109-10 (Aug. 18, 1995) (originating with Section sponsored survey and report).

42. *See* Thomas S. Susman, *Commentary, Now More Than Ever: Reauthorizing the Administrative Conference, Reforming Regulation and Reinventing Government*, 8 ADMIN. L. J. AM. U. 677 (1994) (testimony of Thomas M. Susman on behalf of ABA before House Committee on Judiciary Subcommittee on Administrative Law and Governmental Reform).

43. *See* William Funk, *R.I.P. A.C.U.S.*, 21 ADMIN. & REG. L. NEWS 1 (Winter 1996) (criticizing congressional action that voted to terminate ACUS funding and praising ACUS work).

44. *See* Frank C. Newman, *Chairman's Page*, 17 ADMIN. L. REV. 229, 229-30 (1965) (stating that pending resolution would authorize Section to participate in proceedings of any

first time, grants a long needed authorization to participate in rule-making procedure of governmental agencies on matters of practice."[45]

In 1967, the Section's major activity was the presentation of a two-day National Institute on Federal Agency Practice in Washington. Four broad topics were chosen for examination at the Institute: (1) interpretive and advisory rulings, including the then still not effective Freedom of Information Act; (2) prehearing activity and discovery; (3) the conduct of a hearing; and (4) agency and judicial review. Leading scholars, jurists, agency officials, and practitioners participated on the panels of this well-attended event.[46] Other National Institutes were held in 1969 on federal discretionary grant programs and later in 1974 on federal agency practice and the public interest.[47]

The tumultuous year of 1968 did not leave the Section unmoved. Chairman Ben Fisher noted that, "[t]he militant left, the militant right and now even the aroused center, are all demanding a more direct, local involvement in the decision making process."[48] He also noted "the need for legal aid in the administrative law field for the poor and the underprivileged."[49] These thoughts were turned into action in the midwinter meeting of 1969, with the House of Delegates' passage of two section-sponsored resolutions. The first resolution urged states and local governments to "give consideration to the establishment of an ombudsman authorized to inquire into administrative action and to make public criticism."[50] The second resolution proposed the founding of a Federal Administrative Justice Center in Washington to help train hearing examiners and lawyers in government service.[51]

THE 1970S

In 1971, the Section opposed the Nixon administration's proposed legislation that exempted the wage price control regulation from the APA.[52]

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federal agency for adoption or amendment of regulations subject to several terms and conditions).

45. Frederic L. Kirgis, *Chairman's Page,* 18 ADMIN. L. REV. 3, 6 (1965).

46. *See* Ben C. Fisher, *Chairman's Page*, 21 ADMIN. L. REV. vii, x (No. 2, 1969).

47. *See* Frank M. Wozencraft, *Chairman's Page,* 25 ADMIN. L. REV. vii, vii (No. 4, 1973) (detailing four issues to be discussed at Institute's panels).

48. Ben C. Fisher, *Chairman's Page,* 21 ADMIN. L. REV. vii, vii (No. 1, 1968).

49. *Id.* at viii.

50. Ben C. Fisher, *Chairman's Page,* 21 ADMIN. L. REV. vii, vii (No. 2, 1969).

51. *Id.* Although legislation was introduced to create such a center (*i.e.*, S. 3686, 91st Cong. (1970)) by Senators Kennedy and Mathias, and Section representatives testified in favor of the legislation, it was not enacted.

52. The Economic Stabilization Act Amendment of 1971, Pub. L. No. 92-210, 85 Stat. 743 (1971).

Chairman Milton Carrow reported that "[f]ortunately, with the assistance of our Section on the procedural points, both House and Senate committees extensively rewrote the proposed legislation, and Congress passed a bill which included the pertinent sections of the [APA], verbatim, plus other safeguards."[53]

In 1972, a dispute arose between a sister section of the ABA, the Section on Antitrust Law, and the Administrative Law Section. The Antitrust Section persuaded the House of Delegates to support a resolution that would require the Federal Trade Commission's rulemaking, unlike that of most agencies, to be subject to formal on-the-record hearings when material facts were disputed.[54] The Administrative Law Section opposed that proposal because it felt that, in the words of Chairman Carrow, "[i]t was our view that the Section on Antitrust Law intended to place substantial and frustrating obstacles in the way of the [FTC] rulemaking power by imposing excessive adjudication requirements."[55] This dispute presaged some of the later divisions within the ABA on broader "regulatory reform" proposals.

By the mid-seventies, the Section had turned its attention to some of the post-Watergate openness laws like the Freedom of Information Act Amendments of 1974[56] and the Government in the Sunshine Act of 1976.[57] The Section also became involved in issues concerning when attorneys' fees should be paid to public interest groups participating in administrative and judicial review proceedings.[58]

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53. *See* Milton M. Carrow, *Chairman's Page,* 24 ADMIN. L. REV. v, vi (No. 1, 1972) (discussing Economic Stabilization Act Amendments of 1971).

54. The legislation was later enacted as part of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub. L. No. 93-637 (1975) (codified at 15 U.S.C. § 57A(h)(1) (1994)).

55. Carrow, *supra* note 53, at vi, (No. 2). The Section's criticism proved to be persistent. *See ACUS Recommendation 80-1, Trade Regulation Rulemaking Under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act,* 45 Fed. Reg. 46,771 (July 11, 1980) (giving subsequent criticism by Administrative Conference of such procedures after they were required in FTC rulemaking).

56. *See* Franklin M. Schultz, *Chairman's Page,* 23 ADMIN. L. REV. 213, 213 (No. 3, 1971) (describing Section's instrumental role in enacting Freedom of Information Act and Section's subsequent survey on agency non-compliance).

57. *See* Jerre S. Williams, *Chairman's Message,* 27 ADMIN. L. REV. iii, iv-vi (No. 4, 1975) (stating that House of Delegates adopted Section-sponsored resolution suggesting principals for Congress to follow in considering proposed Sunshine Act). *See also* A.B.A., 1987 MIDYEAR MEETING, SUMMARY OF ACTION OF HOUSE OF DELEGATES 17 (1987) (offering guidelines to agencies and courts for interpreting term "meeting" as used by Government in Sunshine Act).

58. The Section endorsed a resolution supporting such reimbursements. *See* Jerre S. Williams, *Chairman's Message,* 28 ADMIN. L. REV. v, viii-ix (No. 2, 1976) (advocating reimbursements). Senator Edward Kennedy, along with several other Senators, introduced a bill, S. 2715, 94th Cong. (1976), which provided for the payment of attorneys' fees to public

In 1976, the Section also began reconsidering its long-standing opposition to legislative veto of agency regulations — a position it had first espoused in 1961.[59] Ultimately, the Section led the ABA's efforts in presenting an *amicus curiae* brief against the legislative veto in the *Chadha* case,[60] which mirrored the Supreme Court's decision to broadly strike down all legislative vetoes as unconstitutional.[61]

As the 1980s approached, Congress was preparing for another of its periodic attempts to achieve "regulatory reform." One of the first harbingers of this was the so-called "Bumpers Amendment" to the APA's provisions on scope of judicial review of agency action.[62] The bill, which was passed by the Senate in 1979, reversed the presumption of validity of agency regulations and subjected them to de novo review in the courts. The Section sponsored the leading analysis of the legislation[63] and came down firmly against the proposal. When the Section's resolution reached the floor, however, the House of Delegates made a one-word change that resulted in ABA support for the proposal.[64] This "swing toward restricting agency power"[65] represented by the Bumpers Amendment continued in Congress with numerous bills calling for legislative veto of agency rules.

THE 1980S

In his retiring chairman's report, Joseph Barbash noted that:

> [T]he principal unfinished business of the Section during the past year was "REGULATORY REFORM." Actually, the Section has been concerned with regu-

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interest groups participating in the administrative process.

59. The 1961 House of Delegates resolution, proposed by the Section, opposed "legislation calling for or requiring Congressional review of the administrative regulations of federal administrative agencies as a prerequisite to their promulgation." *See* 86 REP. OF THE A.B.A. 725 (1961) (stating opposition to such legislation and including text of Section's report).

60. INS v. Chadha, 462 U.S. 919 (1983).

61. *See* William H. Allen, *Chairman's Message,* 35 ADMIN. L. REV. iii, iii (No. 3, 1983) (discussing outcome of *Chadha* case and ramifications of invalidation of legislative veto).

62. S. 111, 96th Cong. (1979).

63. *See* David R. Woodward & Ronald M. Levin, *In Defense of Deference: Judicial Review of Agency Actions,* 31 ADMIN. L. REV. 329, 330-31 (No. 3, 1979) (stating that courts should be allowed to recognize and defer to unique role each administrative agency plays in formulating law).

64. Ultimately, the legislation was not enacted, in part, because of the opposition of the Administrative Conference. *See ACUS Recommendation 79-6, Elimination of the Presumption of Validity of Agency Rules and Regulations in Judicial Review, as Exemplified by the Bumpers Amendment,* 45 Fed. Reg. 2307-08 (Jan. 11, 1980) *and ACUS Recommendation 81-2, Current Versions of the Bumpers Amendment,* 46 Fed. Reg. 62,806 (Dec. 29, 1981).

65. Joseph Barbash, *Chairman's Message,* 31 ADMIN. L. REV. iii, iii (No. 4, 1979).

latory reform over its entire life, for although created as the "guardian of the Administrative Procedure Act," it has recognized...that the procedures governing administrative agencies must constantly be reexamined in an ever-changing society.[66]

The regulatory reform bills of 1981-1982 fell short of passage. In 1981, Chairman Antonin Scalia, after noting the key role that the ABA played in the passage of the APA, stated, in words that ring as true in the 1990s as they did in 1981:

> It is different with the Regulatory Reform Act of 1981. The ABA has, to be sure, had considerable influence in generating and shaping reform initiatives through its Commission on Law and the Economy, its Coordinating Group on Regulatory Reform (and I must modestly add) its Section of Administrative Law. But none of the proposals currently pending could remotely be described as an "ABA bill"; and business associations — in particular the Business Roundtable — have had at least an equivalent role in bringing this legislation to the floor.
>
> It is not clear to me whether the reduced role of our profession in the current reform should be cause for satisfaction or concern. There is much to be said for the proposition that — just as war is too important to be left to the generals — administrative procedure is too important to be left to the lawyers. But that truth can be pursued to a fault. The fact is that even if the goals are commercial and economic, when they are sought to be achieved through *process* it is lawyers, rather than economists or businessmen, who are (or at least supposed to be) the experts. They have if nothing else, an intimate familiarity with the manner in which the process can be used or abused by their own kind. The job they did last time was, after all, not bad. A thirty-five-year life span for a procedural "formula upon which opposing social and political forces have come to rest" is quite respectable in a field that has changed as rapidly as federal administration. There may be reason to fear that the product produced in 1981 will be less enduring.
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> The interest of the laity in administrative process, which now seems so flattering, may prove to be a bane. It is, come to think of it, extraordinary that a Congress bent upon major substantive change in the nature and scope of regulation would turn, not to the substantive statutes in question, but to the basic framework of administrative procedure.[67]

In 1984, the Section began to consider the proposed creation of a Corps of Administrative Law Judges, a proposal which would divide and bedevil the Section for the next decade.[68] In addition, the Section began its debate

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66. Joseph Barbash, *Retiring Chairman's Message,* 33 ADMIN. L. REV. ix, x (No. 1, 1981).

67. Antonin Scalia, *Chairman's Message,* 33 ADMIN. L. REV. v, ix-x (No. 4, 1981). *See* Ronald M. Levin, *Administrative Procedure Legislation in 1946 and 1996: Should We Be Jubilant at This Jubilee?* 10 ADMIN. L. J. AM. U. 55, 56-57 (1996) (discussing article written by Justice Scalia about regulatory reform and 1946 legislation).

68. *See* Charles D. Ablard, *Chairman's Message,* 36 ADMIN. L. REV. v (No. 4, 1984). For example, in 1989, the Section proposed a resolution (Report 103D) linking "support in

on the advantages and disadvantages of President Reagan's Executive Orders 12,291 and 12,498, which gave the White House a large measure of control over executive agency rulemaking.[69] This led to a Section-sponsored House of Delegates resolution approved in 1986 supporting such executive oversight but urging limitations and transparency in its exercise.[70] But the major undertaking was an ambitious "restatement" of the law concerning judicial review of agency action.[71]

The fortieth anniversary year of the APA, 1986, was marked by the memorable section-sponsored dialogue between Professors Walter Gellhorn and Kenneth Culp Davis, two giants of administrative law scholarship, on the events leading up to the Act's passage.[72] Perhaps it was no coincidence that in 1986 the Section also created its Annual Award for Scholarship, which it presented to the most outstanding work of legal scholarship in administrative law published in the preceding year. Shortly afterwards, in 1989, the Section instituted an annual award for Outstanding Government Service.

In 1989-1990, the Section persuaded the ABA to give significant support[73] to an effort led by the Administrative Conference to enact the Negotiated Rulemaking Act and Administrative Dispute Resolution Act, both enacted in 1990.[74] These laws, in effect, modernized the APA by author-

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principle" for such legislation to other reforms in the selection and evaluation of administrative law judges (ALJs), that was rejected in favor of a resolution giving less conditional support for the idea offered by the Judicial Administrative Division and some other Sections (Report 112). *See* A.B.A., 1988 ANNUAL MEETING, SUMMARY OF ACTIONS OF THE HOUSE OF DELEGATES 25, 37-38. *See also* A.B.A., 1994 ANNUAL MEETING, SUMMARY OF ACTIONS OF THE HOUSE OF DELEGATES 22-23 (describing resolution urging changes in ALJ selection and handling of complaints about ALJs).

69. *See* William E. Murane, *Chairman's Message,* 38 ADMIN. L. REV. iii, iii-iv (No. 1, 1986) (expressing view that Executive Orders 12,291 and 12,498 were designed to carry out mandate that regulatory action not be taken unless potential benefits outweigh potential costs).

70. *See* A.B.A., 1986 MIDYEAR MEETING, SUMMARY OF ACTIONS OF THE HOUSE OF DELEGATES 9. Future ABA positions urging additional restraint and transparency were issued in 1992 and 1993. *See also* A.B.A., 1992 MIDYEAR MEETING, SUMMARY OF ACTIONS OF THE HOUSE OF DELEGATES 18; A.B.A., 1993 MIDYEAR MEETING, SUMMARY OF ACTIONS OF THE HOUSE OF DELEGATES 16.

71. *See* William E. Murane, *Scope-of-Review Doctrine: Restatement and Commentary,* 38 ADMIN. L. REV. 233, 235 (1986); Ronald M. Levin, *Scope-of-Review Restated: An Administrative Law Section Report,* 38 ADMIN. L. REV. 239 (1986).

72. *See* Davis & Gellhorn, *supra* note 10.

73. *See* A.B.A., 1988 ANNUAL MEETING, SUMMARY OF ACTIONS OF THE HOUSE OF DELEGATES 21-24 (discussing Section-sponsored House of Delegates resolution supporting increased use of ADR by federal agencies).

74. Negotiated Rulemaking Act of 1990, 5 U.S.C. §§ 561-570 (1994); Administrative Dispute Resolution Act, 5 U.S.C. §§ 571-583 (1994).

izing (though not requiring) innovative methods of dispute resolution in both rulemaking and agency adjudication.

THE 1990S

In March 1991, a Section program filled the Great Hall of the Department of Justice. The occasion was a debate between Justice Scalia and then-Circuit Court Judge Stephen Breyer on the use of legislative history by reviewing courts. Though not transcribed, a summary of the debates' high points was included in the Section's newsletter.[75] This debate symbolized the active participation of two distinguished jurists in the Section's affairs. Justice Scalia had served as Section Chair in 1981-1982 and Justice Breyer was a Council Member from 1989-1992. When he was nominated to the Supreme Court, Justice Breyer had just been nominated as Section Vice-Chair.[76]

The Section also established a Committee on Professional Standards, headed by former Chair Sally Katzen, to develop guidelines for federal officials on their government ethics obligations. In 1993, the House of Delegates approved the Committee's guidelines.[77] That same year, the Section sponsored the publication of "The Lobbying Manual: A Compliance Guide for Lawyers and Lobbyists."[78] Former Section Chair Thomas Susman edited this popular guide.[79]

As the golden anniversary year of the APA began, Congress was once again in the throes of debating a comprehensive "regulatory reform" bill. The Administrative Law Section and the Business Law Section were co-chairs, or more appropriately, co-jousters,[80] on the ABA's Coordinating

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75. *See* Michael D. Sherman, *The Use of Legislative History: A Debate Between Justice Scalia and Judge Breyer*, 16 ADMIN. L. NEWS 1 (Summer 1991) (summarizing debate between Justice Scalia and then-Judge Breyer).

76. *See Justice Breyer and Administrative/Regulatory Law*, 19 ADMIN. & REG. L. NEWS 1 (Summer 1994) ("At the time of his nomination he was the Section's Liaison with the Judiciary and the designated nominee for Vice-Chair of the Section.").

77. *See* A.B.A., 1993 ANNUAL MEETING, SUMMARY OF ACTIONS OF THE HOUSE OF DELEGATES 24. The Committee Report was published in Cynthia Farina, *Keeping Faith: Government Ethics & Government Ethics Regulation (ABA Committee on Government Standards)*, 45 ADMIN. L. REV. 287 (1993).

78. THOMAS M. SUSMAN, THE LOBBYING MANUAL: A COMPLIANCE GUIDE FOR LAWYERS AND LOBBYISTS (Thomas M. Susman ed., 1993). A revised and updated edition will be published in 1998.

79. *Id.*

80. *See* Stephen Engleberg, *Conflict of Interest is Cited in Regulatory Bill Lobbying*, N.Y. TIMES, April 5, 1995, at A23 (recounting ABA President Bushnell's removal of Business Law Section representative George Freeman as co-chair of ABA Working Group on Regulatory Reform due to his firm's lobbying on behalf of corporate clients for legislation).

Committee on Regulatory Reform. Administrative Law Section Chair Philip Harter, opined:

> Congress is now engaged in a great deliberation on regulatory reform, an amendment of administrative procedure, a change in the APA. Does this signal a dissatisfaction with the APA, a fundamental change, a failure of the APA, a repudiation of the compromises struck so long ago?
>
> Although it may be heretical to say in the current environment, the APA as it has evolved works pretty well; no very well....Very few of the complaints seem to center on a failure of the administrative process itself when notice and comment rulemaking, as it has evolved, has been followed. [81]

CONCLUSION

The Section was active in critiquing the various regulatory reform bills considered by the 104th Congress that would have extensively revised the APA. The bills' overreach prevented their enactment, although portions of the bills did receive bi-partisan support and were enacted.[82] The upshot is that a stripped down "comprehensive regulatory reform" bill is now being considered in the 105th Congress.[83] Whether this year's model will prove to be politically acceptable is unclear at this point. But it seems likely that Phil Harter's celebratory defense of the APA still holds:

> To a degree we are just where we were fifty years ago. It is time to step back, survey good procedure, and capture it so that all may know and follow it while still allowing growth and experimentation. The basic structure of the APA is totally intact. Its po-

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The other co-chair, Administrative Law Section representative Philip Harter, is quoted as saying that "in several instances he felt Mr. Freeman's testimony on the bill had diverged from the association's position." *Id.*

81. Philip J. Harter, *Chair's Message — The APA at 50: A Celebration, Not a Puzzlement*, 21 ADMIN. & REG. L. NEWS. 2, 13 (Winter 1996).

82. *See* Jerry L. Mashaw, *Reinventing Government and Regulatory Reform: Studies in the Neglect and Abuse of Administrative Law*, 57 U. PITT. L. REV. 405, 419 (1996) (suggesting that the primary regulatory reform bill in the 104th Congress be titled "The Administrative Gridlock, and Lawyers and Economist's Relief Act of 1995"). These developments are well chronicled in Section publications. *See, e.g.*, John F. Cooney, *Back to the Future: Regulatory Reform Legislation*, 20 ADMIN. & REG. L. NEWS 1 (Spring 1995); William F. Funk, *Report on Regulatory Reform*, 20 ADMIN. & REG. L. NEWS 1 (Summer 1995); William F. Funk, *More Stealth Regulatory Reform*, 21 ADMIN. & REG. L. NEWS 1 (Summer 1996); John F. Cooney, *Regulatory Reform in the 104th Congress*, 22 ADMIN. & REG. L. NEWS 1 (Winter 1997). For more detailed accounts, *see Daniel* Cohen & Peter L. Strauss, *Recent Developments: Regulatory Reform & the 104th Congress, Congressional Review of Agency Regulations*, 49 ADMIN. L. REV. 95 (Winter 1997).

83. *See* John F. Cooney, *Regulatory Reform: The Long and Winding Road*, 23 ADMIN. & REG. L. NEWS 1 (Fall 1997) (describing S. 981, "The Regulatory Improvement Act of 1997").

litical goals still live. Indeed, the gloss that has developed is largely the basis for the deliberations.[84]

84. *See* Harter, *supra* note 81, at 13.