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The Legislative History of the Administrative Procedure Act

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THE LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT

Roni A. Elias+

INTRODUCTION

During the twentieth century, one of the most important developments in American government and politics was the expanding power of administrative agencies of all kinds. Indeed, this expansion may have been the most important development. Beginning with the Progressive Era and continuing at an accelerated pace during the New Deal and after World War II, administrative agencies performed a wider variety of government functions and imposed more regulations than ever before.

The enactment of the Administrative Procedure Act (“APA”) of 1946¹ was the crucial event in the course of this expansion. The APA established both a classification for different types of agency decision-making and a set of procedural rules to govern that decision-making in every respect. By providing an effective method for regulating agency action, the APA preserved individual rights as

+I am so blessed & greatly appreciate the love of my life, M.G.S, for her love and making me smile every minute of every day & making me a better person. To Dr.'s Aida & Adil Elias, my first great teachers in life, I thank you and appreciate more than words can ever say. I am truly grateful to the best brother anyone could be blessed to have, my brother, Pierre A. Elias. To the *Fordham Law Environmental Law Review*, for their non-stop attention to detail I appreciate and thank. I thank Dr. Yolanda Jones, Florida A&M, College of Law.

1. P.L. 79-404, 60 Stat. 237 (1946). The APA is codified at 5 U.S.C. § 551, *et seq.*

against the abuse of administrative power and made such action more authoritative and acceptable to the public.

The APA was the culmination of long-term efforts to regulate the decision-making of administrative agencies, and it reflected a significant political compromise. This compromise involved two groups generally associated with the Republican and Democratic parties. Those oriented toward the Republican side worried that the growth of the administrative state posed a threat to individual rights and the efficiency of the free market. Democrats and their allies, especially supporters of President Franklin Roosevelt and the New Deal, saw advantages in using administrative agencies as instruments by which experts could make effective policies that were responsive to specific problems and needs in a way that legislation could never be. The ultimate structure of the APA reflects the prime objectives of these two groups in important ways, and that reflection is apparent in both the text of the statute itself and its legislative history.

This paper traces the outlines of that reflection. In Part I, it reviews the political background leading up to the proposal of the legislation in the 79th Congress that became the APA. In Part II, it reviews the circumstances surrounding how the APA developed and was eventually enacted during 1945 and 1946. Part III discusses the evolution of the definitions of the crucial statutory terms that categorized agency and culminated in Section 2 of the APA. Parts IV-VI describe how the APA regulated agency rulemaking, agency adjudication, and the judicial review of agency action respectively.

I. THE POLITICAL MOVEMENT FOR PROVIDING THE UNIFORM REGULATION OF ADMINISTRATIVE PROCEDURE

Until the twentieth century, the United States had no uniform body of administrative law.² Many Americans resisted the creation of formal, uniform administrative law because they believed that such a body of law would enhance the ability of government to exercise power over citizens and that, regardless of any procedural

2. Martin Shapiro, *A Golden Anniversary? The Administrative Procedures Act of 1946*, 19 REGULATION 40 (1996).

protections, it would ultimately diminish individual rights.³ Consequently, throughout the nineteenth century and into the twentieth, when Congress delegated authority to an administrative agency, any relevant or necessary procedural rules were included in the enabling legislation.⁴

As administrative agencies increased their authority and power during the New Deal, there were still no comprehensive standards for governing agency action. When Congress asked Harry Hopkins, head of the Federal Emergency Relief Administration in the early New Deal era, to explain how he made his decisions and to identify the criteria he used to allocate funds, he simply declined to answer.⁵ Given the well-established skepticism about administrative agencies, such a response only enhanced doubts about the expansion of the administrative state.⁶ This was particularly true among Republican opponents of the Roosevelt administration. They were already troubled about the substantive objectives given to agencies by New Deal legislation; any suggestion of procedural high-handedness in the pursuit of those objectives only intensified those concerns.⁷

Lacking a Congressional majority and control of the White House, Republicans relied on the judiciary to prevent the implementation of New Deal programs and the grant of extensive authority to agencies. During the first two years of President Roosevelt's first term, courts issued more than 1,600 injunctions against the enforcement of New Deal legislation.⁸ But after the Supreme Court's decision in *West Coast Hotel v. Parrish*,⁹ which turned the tide on judicial resistance to the New Deal, Roosevelt's Republican opponents proposed legislation designed to limit the power of regulatory agencies by imposing a series of strong procedural and judicial constraints on their actions, including strict limits on agencies' discretion to make policy and change existing law.¹⁰

3. *Id.*

4. *Id.*

5. John Joseph Wallis, *The Political Economy of New Deal Federalism*, 29 *ECON. INQUIRY* 510 (1991).

6. Matthew D. McCubbins et al., *The Political Origins of the Administrative Procedure Act*, 15 *J.L. ECON. & ORG.* 180, 196 (1999).

7. *Id.* at 199.

8. WALTER F. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* 55 (1962).

9. *W. Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

10. McCubbins et al., *supra* note 6, at 190.

One instrument for advancing these legislative proposals was the Special Committee on Administrative Law of the American Bar Association (“ABA”), which was established in 1933 and led by Roscoe Pound. The Special Committee’s concluded that New Deal agencies were acting without considered judgment, without due process, without sufficient consideration of the issues, and without granting parties the right to be heard or procedures for relief.¹¹ In addition, the Special Committee was concerned that agencies were improperly blending modes of procedure that should be distinct, namely rulemaking, factual investigation, and adjudication.¹²

In 1938, the Special Committee drafted “An Act to Provide for a More Expeditious Settlement of Disputes with the United States,” later known as the Walter–Logan bill.¹³ The focus of this bill was the creation of a new United States Court of Appeals for Administration “to receive, decide, and expedite appeals from federal commissions, administrative authorities, and tribunals in which the United States is a party or has an interest, and for other purposes.”¹⁴ This appellate court would have the authority to evaluate agency rulings and grant relief for individuals and firms affected by agency decisions.¹⁵ Given the backing of the ABA and prominent scholars such as Pound, the Walter-Logan bill won majorities in both houses of Congress, but President Roosevelt vetoed it.¹⁶

Recognizing the political momentum in favor of some procedural reform for administrative action, the Roosevelt administration undertook its own efforts at drafting legislation imposing procedural rules. In 1939, as the Walter–Logan bill was making its way through Congress, President Roosevelt set up a committee led by the Attorney General to investigate the need for procedural reform.¹⁷ Roosevelt hoped that the committee would recommend moderate reforms and isolate those in Congress who wanted more radical

11. *Id.* at 196.

12. *Id.*

13. *Id.* at 195-96.

14. American Bar Association, *Report of the Special Committee on Administrative Law*, in AMERICAN BAR ASSOCIATION ANNUAL REPORT (1938).

15. McCubbins et al., *supra* note 6, at 195-96.

16. *Id.* at 196.

17. *Id.* at 195-96.

reforms of administrative procedure.¹⁸ Early in 1941, the Attorney General's committee submitted its report.¹⁹ It provided an overview of the administrative process as it then existed, a set of recommendations, and monographs on twenty-seven different agencies.

The report made three principal recommendations: (1) the creation of a new office with power to appoint and remove hearing commissioners; (2) the publication of agency rules, policies and interpretations, including the dates at which agency rules went into effect; and (3) the appointment of special hearing officers in adjudicatory proceedings.²⁰ But the impulse to reform administrative procedure was thwarted by two important factors. First, the continued popularity of President Roosevelt and his programs diminished Democratic support for alternatives to Walter-Logan. Congressional Democrats might have been willing to vote for administrative procedure reform, but they would not press for it.²¹ Second, and even more importantly, as the U.S. responded to the looming threat of World War II and to the war itself, reforms that would have made administrative action slower and more easily challenged seemed less appealing. The wartime need for quick and decisive government action in all areas made it seem an inopportune moment for restricting agency autonomy.²²

II. THE PROPOSAL OF THE ADMINISTRATIVE PROCEDURE ACT

By 1946, many of the factors that had inhibited progress towards the reform of administrative procedure had weakened or disappeared entirely. The shooting war in Europe and Asia was over – although

18. George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1594-98 (1996).

19. FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE (1941). See Shepherd, *supra* note 18, at 1632-38.

20. McCubbins et al., *supra* note 6, at 197.

21. See *id.*

22. See *id.*

the Cold War was just beginning. President Roosevelt had died and his replacement, Harry Truman, lacked his predecessor's political persuasiveness and power.²³ Democrats had lost their commanding majorities in the House and Senate.²⁴

Given all of these significant changes, Democrats had newfound motives for wanting to reform administrative procedure, especially if those reforms made it harder for agencies to depart from the status quo.²⁵ They worried that they might lose control of Congress in the mid-term elections of 1946 as well as the White House in the presidential election two years later. If these worries were realized, they anticipated that the ascendancy of the Republican Party could lead to the elimination or constriction of many New Deal programs.²⁶

Thus, in the immediate aftermath of the war, Congressional Democrats began to consider how to preserve the New Deal without control of both the White House and Congress.²⁷ This consideration led Democrats to support procedural restraints on agency action for two principal reasons.²⁸ First, Democrats recognized that the absence of formal procedural requirements for agency action would give a Republican president exceptional discretion to direct agency decision-making in whatever way he might choose.²⁹ Legislation that mandated a fairly rigorous system of procedural safeguards for administrative action would create a significant amount of inertia favoring the status quo established during the New Deal era.³⁰ As one commentator has noted, "with the procedural restraints in place, the Republicans could only repeal New Deal regulatory policies if they gained control of both houses of Congress and the presidency."³¹

Second, Democrats began to appreciate that strengthening judicial review of agency action would favor the preservation of the New Deal status quo. In the wake of a sixteen-year Democratic

^{23.} See generally BERNARD BAILYN ET AL., *THE GREAT REPUBLIC: A HISTORY OF THE AMERICAN PEOPLE* 773 (3d ed. 1985).

^{24.} *Id.*

^{25.} *Id.* at 190-91.

^{26.} *Id.*

^{27.} *Id.*

^{28.} *Id.* at 192.

^{29.} McCubbins et al., *supra* note 6, at 192.

^{30.} *Id.*

^{31.} *Id.*

administration, the judiciary was filled with Roosevelt appointees who were friendly to New Deal programs.³² A reform of administrative procedure that enhanced the judicial review of agency action would tend to favor Democratic political objectives – the inverse of the situation that prevailed for most of the 1930s, when empowering judges to review agency action meant giving Republican-appointees power over Democratic programs.³³

Republicans retained their own reasons for wanting administrative procedure reform, even if such reform provided some advantages to Democrats in the preservation of New Deal policies. For one thing, Republicans concluded that promoting judicial review of agency action would not simply lead to a result in which Democratic judicial appointees ratified New Deal policies.³⁴ Regardless of who appointed the judges, judicial review would make it harder for agencies to set new directions in policy and to act on the basis of unconstrained discretion.³⁵ Thus, Republicans saw advantages for their party's constituencies, even if Republican appointees no longer controlled the judiciary.³⁶ In addition, Republicans concluded that they would not lose their ability to enact legislation to undo the New Deal just because they also enacted legislation that putting judicial constraints on the scope of agency discretion.³⁷ In other words, Republicans concluded that, if they could win both the White House and Congress, they could accomplish their political ends even more effectively than if they tried to do so by controlling agency appointments and relying upon the exercise of untrammelled agency discretion.

Second, if the Republicans did gain control of the office of the president, they were also likely to gain control of Congress. In fact, they briefly did control both the House and the Senate twice after 1946: 1947–1948, and 1953–1954. In either period, had a Republican who was antagonistic to the New Deal been president rather than Harry Truman in the earlier period or Dwight Eisenhower in the later one, Republicans could have undone the New Deal by statutory

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 194.

³⁵ McCubbins et al., *supra* note 6, at 194.

³⁶ *Id.*

³⁷ *Id.* at 194-95.

repeal. Voting for the APA did not preclude voting for more substantial changes later on.³⁸

Congress passed the APA in early 1946, with the Senate approving in February, and the House in May.³⁹ President Truman signed the bill into law in June.⁴⁰ In general, the legislation created three principal categories of administrative action: (1) rulemaking, in which agencies imposed regulations; (2) adjudication, in which agencies resolved disputes by finding facts and making conclusions of law; and (3) discretionary agency decision-making.⁴¹ The APA imposed specific procedural regimes for rulemaking and adjudication, and it did not require any particular kind of formal procedure for actions conferred to agency discretion.⁴²

III. DEFINING THE CATEGORIES OF AGENCY ACTION

Like many statutes, the APA begins with a section defining its essential terms.⁴³ This definitional section of the APA is important not only because it specifies the meaning of important term, but also because it establishes a foundational – and novel – categorization of types of agency action. This categorization is the basis upon which the APA establishes its procedural requisites. In this respect, it reflects both a legal conception of how agencies work and a political conception of the extent to which agency procedures should protect the status quo and permit official discretion.

The legislative history reveals that these foundational definitions were the subject of extensive revision throughout the legislative process. Congress' definition of the fundamental categories of agency action changed substantially while various drafts of the APA were pending before the House and the Senate. This change involved differing views of how to draw lines between different kinds of agency action. In particular, this change led to a distinction between “forward looking” agency decisions of general applicability, which

38. *Id.*

39. *Id.* at 197-98.

40. *Id.*

41. P.L. 79-404, 60 Stat. 237 (1946); *see also* MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS? 45 (1988) (discussing the APA).

42. SHAPIRO, *supra* note 41, at 45.

43. Section 2, P.L. 79-404, 60 Stat. 237 (1946).

are designed to regulate future conduct, and “backward looking” decisions, which apply to the specific circumstances of particular parties and are designed to resolve disputes about past events. This distinction proved to be a crucial factor in determining the structure of administrative procedure under the APA.

In the original version of the APA, which was introduced into the Senate in January 1945, “rule” was defined in the following way:

“Rule” means the whole or any part of any agency statement of general applicability designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency. “Rule making” means agency process for the formulation, amendment, or repeal of a rule and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor, or of valuations, costs, or accounting, or practices bearing upon any of the foregoing.⁴⁴

Thus, the original Senate proposal expressly defined “rule” as an “agency statement of general applicability.”⁴⁵ In addition, it provided an implied definition of “rule” through the definition of “rule making,” which related to the “approval or prescription for the future” of rates, wages, and the like.⁴⁶

By contrast, that same bill seemed to define the adjudicative process as anything that was not rulemaking. The original Senate bill defined “order” as “the whole or any part of the final disposition or judgment (whether or not affirmative, negative, or declaratory in form) of any agency” and “adjudication” as agency “process, in a particular instance other than rule making but including licensing.”⁴⁷

In the revised text of the Comparative Committee Print, however, the definition of “rule making” was changed to “agency process for the formulation, amendment, or repeal of a rule and includes rate making or wage or price fixing.”⁴⁸ The change was explained this way:

44. SEN. REP. No. 752, pp. 11, 39 (1945), in ADMINISTRATIVE PROCEDURE ACT, LEGISLATIVE HISTORY, 79TH CONGRESS, 1944-46, SEN. DOC. No. 248, pp. 197, 225 (hereinafter “APA LEGISLATIVE HISTORY”).

45. *Id.*

46. *Id.*

47. S. REP. No. 752, p. 218 (1945).

48. Robert W. Ginnane, “Rule Making,” “Adjudication” and Exemptions Under the Administrative Procedure Act, 95 U. PENN. L. REV. 621, 624-27 (1947).

The House Judiciary Committee hearings and some of the agency comments disclose a misunderstanding that “rule making” includes rate making or price or wage fixing, although both on principle under the repeated decisions of the Supreme Court, and by the specific language of subsection 2(c) such functions are definitely rule making. The classification of these functions as rule making, which they properly are, is important because many provisions of the bill do not apply to rule making. If deemed necessary the language of the definition may be amplified by adding, after the word “include” in the second sentence, the words “the prescription for the future of rates, wages, prices, facilities, appliances, services, allowances therefor, or of valuations, costs, accounting, or practices bearing thereon.”⁴⁹

Thus, the final version of the APA substantially expanded the definition of the concept of “rule” and correspondingly narrowed the definition of the concept of “adjudication.” As one commentator has noted, this change was apparently designed to meet agency insistence that flexible procedures must be provided for cases characterized by the shaping of broad policies upon the basis of masses of technical data—cases in which it would be idle to expect an effective determination from a single hearing officer as required for adjudication procedures.⁵⁰

Thus, after the combined efforts of the House and Senate, the definition of “rule” reflected some confusion. After starting with the concept of agency action of general applicability, it had been enlarged to include agency action of particular applicability and future effect with respect to important classes of matters. This definition apparently conflicted with the concepts of “order” and “adjudication” as set forth in the original Senate bill.

As the Senate bill was reported by the House Committee on the Judiciary in May 1946, the definitions of “rule” and “order” were in their final form, with the concept of “future effect” being particularly important.⁵¹ Thus, “rule” was defined as “any agency statement of general or particular applicability and future effect.” The House Committee report explains that this “change of the language to

49. *Id.*

50. *Id.* at 626 (citing Testimony of I. C. C. Commissioner Aitchison before House Judiciary Subcommittee, in *APA LEGISLATIVE HISTORY* at 235-36, pp. 91 *et seq.*).

51. H.R. Rep. No. 1980, in *APA LEGISLATIVE HISTORY* at 235-36.

embrace specifically rules of ‘particular’ as well as ‘general’ applicability is necessary in order to avoid controversy and assure coverage of rule making addressed to named persons. The Senate Committee report so interprets the provision, and the other changes are likewise in conformity with the Senate Committee report (p. ii).”

⁵² Correspondingly, the definition of “order” was changed to include the word, “injunctive.”⁵³ The House Committee report explained that this addition is prompted by the fact that some people interpret “future effect” as used in defining rule making, to include injunctive action, whereas the latter is traditionally and clearly adjudication. It is made even more necessary that this matter be clarified because of the amendment of Section 2(c) to embrace clearly particularized rule making as set forth in note 1.⁵⁴

The ultimate effect of all of these changes is to make the distinction between “rulemaking” and “adjudication” turn on the chronological orientation of agency action. A “rule” is agency action that has “future effect” or an “approval or prescription for the future.”⁵⁵ This approach to defining “rulemaking” discarded the conventional approach that preceded the APA, discarding the emphasis on the creation of standards of “general applicability” as being a crucial aspect of rulemaking.⁵⁶ As an additional part of establishing this chronological orientation, the term “injunctive” was added to the definition of both “order” and “adjudication” “to assure that such matters as orders to cease and desist from unfair methods of competition and unfair labor practices would be classified as adjudication.”⁵⁷ As the House Judiciary Committee Report put it:

52. *Id.* at 283.

53. *Id.* at 284.

54. *Id.* at 284; *see also id.* at 254 (“‘Injunctive’ action is a common determination of past or existing lawfulness, although the remedy or sanction is in form cast as a command or restriction for the future rather than as a fine, assessment of damages or other present penalty.”).

55. Ginnane, *supra* note 48, at 626.

56. *See* 1944 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, p. 329 (outlining the Model State Administrative Procedure Act, which distinguished between “rule” and “contested case” by defining “rule” “every regulation, standard, or statement of policy or interpretation of general application and future effect.”); *see also* Ginnane, *supra* note 48, at 626-27.

57. Ginnane, *supra* note 48, at 626-27.

“Rules” formally prescribe a course of conduct for the future rather than pronounce past or existing rights or liabilities. . . . The term “order” is essentially and necessarily defined to exclude rules. “Licensing” is specifically included to remove any question, since licenses involve a pronouncement of present rights of named parties although they may also prescribe terms and conditions for future observance.⁵⁸

The legislative history shows that this understanding was broadly held. For example, in explaining the Administrative Procedure Bill to the House, Representative Walter distinguished rule making from adjudication by pointing out:

First, there are the legislative functions of administrative agencies, where they issue general or particular regulations which in form or effect are like the statutes of the Congress. . . . The second kind of administrative operation is found in those familiar situations in which an officer or agency determines the particular case just as, in other fields of law, the courts determine cases.⁵⁹

Similarly, in a memorandum to the Senate Judiciary Committee, Attorney General Clark explained:

Proceedings are classed as rule making under this act not merely because, like the legislative process, they result in regulations of general applicability but also because they involve subject matter demanding judgments based on technical knowledge and experience. . . . In many instances of adjudication, on the other hand, the accusatory element is strong, and individual compliance or behavior is challenged; in such cases, special procedural safeguards should be provided to insure fair judgments on the facts as they may properly appear of record.⁶⁰

Interestingly, this substantial reconfiguration of the foundational concepts in the statute did not entail a corresponding reconfiguration of the sections prescribing the procedures for various agency functions, Sections 4, 5, 7 & 8 of the APA. This suggests that, from

58. H.R. REP. NO. 1980, *in* APA LEGISLATIVE HISTORY at 254.

59. 79 CONG. REC. 5754 (May 24, 1946), *in* APA LEGISLATIVE HISTORY at 352-53.

60. S. REP. NO. 752, *in* APA LEGISLATIVE HISTORY at 225.

Congress' perspective, the decisive part of the draft bills was the operational procedures for agency action and that the definition of the categories for agency action was adapted to fit the operational procedures.⁶¹

IV. RULEMAKING PROCEDURE

As a general rule, the APA requires that, when an agency promulgates legislative rules, or rules made pursuant to congressionally delegated authority, the exercise of that authority is governed by the informal rulemaking procedures outlined in Section 4.⁶² In an effort to ensure public participation in the informal rulemaking process, agencies are required to provide the public with adequate notice of a proposed rule followed by a meaningful opportunity to comment on the rule's content.⁶³ Although the APA sets the minimum degree of public participation the agency must permit, Congress emphasized that this procedure was only a minimum requirement and that "[matters] of great importance, or those where the public submission of facts will be either useful to the agency or a protection to the public, should naturally be accorded more elaborate public procedures."⁶⁴

To assure this degree of public participation in rulemaking, the APA requires that the notice of proposed rulemaking include "(1) a statement of the time, place, and nature of public rulemaking proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved."⁶⁵ Once adequate notice is provided, the agency must provide interested persons with a meaningful opportunity to comment on the proposed rule through the submission of written "data, views, or arguments."⁶⁶ Once the comment period has closed, the APA directs the agency to consider the "relevant matter presented" and incorporate into the adopted rule a "concise general statement" of the "basis and purpose" of the final

61. Ginnane, *supra* note 48, at 627.

62. Pub. L. No. 79-404, 60 Stat. 237, § 4 (1946).

63. *Id.*

64. H.R. REP. NO. 1980, *in* APA LEGISLATIVE HISTORY at 259.

65. Pub. L. No. 79-404, 60 Stat. 237, § 4(a) (1946).

66. *Id.* § 4(c).

rule.⁶⁷ Although the statutory text does not elaborate on what kind of statement should be included, the legislative history materials show that the general statement of basis and purpose should “enable the public to obtain a general idea of the purpose of, and a statement of the basic justification for, the rules.”⁶⁸

The APA also provided for a more elaborate procedure for certain kinds of rulemaking. The APA provides that “when rules are required by statute to be made on the record after opportunity for an agency hearing” the formal rulemaking requirements of § 7 and § 8 of the APA apply.⁶⁹ Under this mode of procedure, the agency must undertake rulemaking by engaging in trial-like procedures, which include the presence of a neutral hearing officer,⁷⁰ the opportunity for parties to present evidence and conduct cross-examination of contrary evidence,⁷¹ and the agency’s ultimate determinations must be made on the basis of the entire record and must include reasoned explanations in terms of that record.⁷²

V. **ADJUDICATION PROCEDURE**

The APA’s provisions governing adjudication created little in the way of novel procedures. Their principal effect was to require that agencies make adjudicative decisions according to basic elements of well-established judicial procedure.⁷³ Accordingly, it required an internal separation of functions between adjudicators and adversaries.⁷⁴ The APA also required the establishment of a record as the basis for any adjudicative decision, and this record would be developed by permitting parties with adverse interests to submit evidence and have an opportunity to rebut their opponents’ evidence through cross-examination and similar procedures.⁷⁵ Finally, when

67. *Id.*

68. S. REP. NO. 752, *in* APA LEGISLATIVE HISTORY at 225.

69. Pub. L. No. 79-404, 60 Stat. 237, § 4(b) (1946) (referring to §§ 7 & 8 of the APA).

70. *Id.* § 7(a).

71. *Id.* § 7(b).

72. *Id.* § 8.

73. *See id.* §§ 7 & 8.

74. *Id.* § 7(a).

75. P.L. 79-404, 60 Stat. 237, § 7(c)-(d) (1946).

the hearing officer made a final decision, it had to include substantial reasons based on the evidence in the record.⁷⁶

VI. JUDICIAL REVIEW

As the history of the political forces behind the APA indicates, the provision for substantial judicial review of agency action was a crucial part of the statutory scheme. Thus, Section 10 of the APA provided that “any person suffering legal wrong because of an agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.”⁷⁷ There are only two exceptions to the availability of judicial review of agency action. Judicial review is not available (1) “to the extent that ... statutes preclude judicial review” and (2) “where agency action is committed to agency discretion by law.”⁷⁸

When courts do review agency action under the APA, they can “hold unlawful and set aside agency action, findings, and conclusions” on the basis of the entire administrative record when such conclusions are found to be:

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) contrary to constitutional right, power, privilege, or immunity;

(3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(4) without observance of procedure required by law;

(5) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.⁷⁹

This description of the standards for judicial review indicates that the level of judicial scrutiny may vary, depending on whether the

76. *Id.* § 8.

77. *Id.* § 10(a).

78. *Id.* § 10.

79. *Id.* § 10(e).

court is reviewing formal or informal rulemakings—respectively “substantial evidence” or “arbitrary and capricious.”⁸⁰

The provisions for judicial review under the APA were not meant to exclude previously established rules for judicial review of agency action. The legislative history shows that Congress intended the APA’s form of judicial review to supplement, not replace, those established forms. The Senate subcommittee report was unequivocal in asserting that the APA’s methods of review are “of two kinds: (a) those contained in statutes and (b) those developed by the courts in absence of legislation.”⁸¹ Thus, the APA did not preclude the use of habeas corpus proceedings to obtain review of agency action in exclusion and deportation proceedings.⁸²

By calling for judicial review on the basis of the entire agency record, the APA also did not intend to establish a greater level of judicial scrutiny for agency action than was already established. During subcommittee testimony in 1941 regarding an earlier version of the APA, which was based on the findings of the minority report of the Attorney General’s Committee, several witnesses and several of the members of the Senate subcommittee before whom the hearings were being conducted had expressed doubt as to the exact meaning and purpose of the requirement that review be “on the whole record.”⁸³ Responsive testimony made it unequivocally clear that the purpose of the phrase was not “to broaden the review powers of the court. . . to any extent.”⁸⁴ When that same statutory language came up in connection with the APA four years later, the phrase was altered in a memorandum submitted to Congress by the minority of the Attorney General’s Committee so that it read almost exactly like the language in the Act as finally passed.⁸⁵

This point was reiterated in the Congressional Debate. Carl Mc Farland, testifying at the 1945 hearings, reiterated the assurances that

80. JEFFREY LUBBERS, *A GUIDE TO FEDERAL AGENCY RULEMAKING* 296 (4th ed. 2006).

81. SEN. COMM. PRINT, 25 *in* APA LEGISLATIVE HISTORY at 36.

82. *U. S. ex rel. Vajtauer v. Comm’r of Immigration*, 273 U. S. 103 (1927).

83. *Sen. Hearings* (1941) p. 1357, 1359, *in* APA LEGISLATIVE HISTORY.

84. “In view of the doubts expressed, it is suggested that the phrase ‘upon the whole record’ be eliminated or the phrase ‘after consideration of the whole or such parts of the record as may be cited by the parties’ be substituted.” *Id.* at 1401. The latter suggestion was the one adopted.

85. *House Hearings* (1945) p. 37-40 *in* APA LEGISLATIVE HISTORY.

the Act did not alter the substantial evidence rule and “reflected” the then-established judicial rule for judicial review of agency action.⁸⁶ Senator Morse⁸⁷ and Representative Walter⁸⁸ endorsed these views on the floor of their respective houses, and the Attorney General assured the Senate that the APA’s judicial review provisions were “intended to embody the law as declared . . . ”⁸⁹

The APA’s judicial review provisions also inspired some concern that they would make it possible for the courts to engage in a “premature” review that would imperil agencies’ discretion and authority to complete the process of their decision-making.⁹⁰ But the drafters of the APA made it clear that the right to judicial review would only materialize when the party alleging a grievance had suffered an actual injury to an established legal right. This assurance is reflected by the requirement explicit in Section 10(a) that a petitioner must show a “legal interest” which is being immediately jeopardized by the challenged agency action.⁹¹

CONCLUSION

The emergence of the administrative state during the twentieth century has been one of the most controversial aspects of American political history. That controversy has circled principally around two competing contentions: (1) whether the delegation of government power, especially regulatory power, to unelected officials impairs individual freedom and threatens the efficiency of the free market; and (2) whether the complexities of modern society and economic life can only be effectively managed by experts who reside in government agencies, who are insulated from the dynamics of partisan politics, and who have extensive discretion to make policy and rules and to resolve disputes.

86. 92 CONG. REC. 2196 (March 12, 1946).

87. 92 CONG. REC. 5760 (May 24, 1946).

88. SEN. REP. 44; SEN. DOC. 230 in APA LEGISLATIVE HISTORY.

89. *See, e.g.*, 92 CONG. REC. 5762 (May 24, 1946).

90. Alfred Long Scanlan, *Judicial Review Under the Administrative Procedure Act – In Which Judicial Offspring Receive a Congressional Confirmation*, 23 NOTRE DAME L. REV. 501, 534 (1948).

91. *Id.* at 512.

The Administrative Procedure Act is an attempt to come to grips with both of those contentions. Through its establishment of a notice-and-comment procedure for rulemaking, through its requirement of trial-like procedures for agency adjudication, and, above all, through its provision of judicial review for the overwhelming majority of agency decisions, the APA creates a foundation for protecting the rights of individuals and enterprises against the abuse of power by unelected officials. Through its acceptance of a high degree of discretionary authority by agencies, the APA also accommodates the need to let agencies employ their expertise with efficiency and dispatch.

The APA manages to serve both of these competing political interests by framing the nature and requisites of agency action within a structure that is consistent with the fundamental principles of constitutional due process. To the extent that agencies act like legislatures, making forward-looking rules to bind individual conduct, they are held to the kinds of procedural standards within which legislatures must operate. To the extent that agencies act like courts, deciding factual issues and imposing orders as a means of resolving disputes arising from past events, agencies are held to procedural standards characteristic of the courts. Overall, the APA makes the administrative state safe for American democracy.