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THE ORIGINS OF THE APA: MISREMEMBERED AND FORGOTTEN VIEWS

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In the first weeks of the new Trump administration, the *Harvard Law Review* published an article warning that attacks on federal regulatory agencies – and calls for closer judicial supervision of agency decisions – heralded a revival of the “anti-administrativism” that animated attacks on the New Deal in the 1930s.¹ That article invoked an earlier, more detailed study of debates in the 1930s, which argued that the APA was not the product of an evolving consensus but a “fierce compromise” between pro- and anti- New Deal forces.²

It has become conventional wisdom. In December of 2019, the Trump Administration’s Solicitor General opened a conference on “modernizing the Administrative Procedure Act” with the observation that the Justice Department was well-placed to encourage new thinking, since a Justice Department initiative at the end of the 1930s had helped persuade Congress to abandon the Walter-Logan bill which was “highly restrictive of federal agencies.”³ Instead, he claimed, the 1941 Report of the Attorney General’s Committee on Administrative Procedure helped persuade Congress to embrace the more accommodating provisions of the post-war APA.

Such accounts are misleading in two ways, as this article will show. First, they exaggerate the distance between the APA, as enacted after the war, and the proposals advocated by critics of regulatory practice in the 1930s. Such characterizations make the APA seem like a “compromise” between opponents and defenders of the New Deal - reducing the legal debates of the 1930s to partisan or political disputes about the substance of New Deal regulatory programs. Second, they leave out a range of other issues which the Attorney General’s Committee recognized as deserving the attention of reformers. That may well be because positions on these issues do not lend themselves to later interpretations preoccupied

¹ Gillian E Metzger, *1930s Redux: the Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017)

² George Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW U.L. REV. 1557 (1996)

³ JUSTICE NEWS, Solicitor General Noel Francisco Delivers Remarks at Department of Justice Summit on Modernizing the Administrative Procedure Act, Dec. 6, 2019 (<https://www.justice.gov/opa/speech/solicitor-general-noel-francisco-delivers-remarks-department-justice-summitt-modernizing>)

with partisan or political motivations supposed to have been at stake in better known debates. Correcting the stories that have come down to us is not merely a service to historical accuracy. The actual debates of that era remain relevant to our time in different ways than conventional accounts have recognized.

Origins of the Attorney General's Committee

The chairman of the Attorney General's Committee was Dean Acheson. He had served as assistant secretary of the Treasury in the first year of Roosevelt's first term, before resigning (over policy disagreements) and entering active law practice at Covington and Burling. The Attorney General's committee was sometimes called "the Acheson Committee."

After the war, Acheson would serve as Undersecretary and then Secretary of State for President Truman, helping to launch the Marshall Plan, NATO and the overall containment strategy that guided U.S. policy through decades of Cold War. Acheson titled his memoir of that era – whimsically, more than boastfully – *Present at the Creation*.⁴

Acheson also published a separate memoir about his prewar experience. He did not use that volume to highlight his role as chairman of the Committee on Administrative Procedure. He devotes less than a page to that episode in his memoir and his account does not leave an ordinary reader thirsting for more detail: The Committee, he says, "labored hard and obscurely on this then unknown and now forgotten task"⁵ He speaks approvingly but very briefly of the post-war APA – in a way that confirms the sense that he did not want to revisit old debates: "The Administrative Procedure Act ... has for nineteen years with minor amendments been accepted by regulators and regulated as providing workable and fair procedures."⁶

⁴ Dean Acheson, *PRESENT AT THE CREATION, MY YEARS AT THE STATE DEPARTMENT* (1969). The book's epigraph is a statement attributed to a medieval Spanish king: "Had I been present at the creation, I would have given some useful hints for the better ordering of the universe."

⁵ *MORNING AND NOON* (1965), p. 215. The full sentence adds the thought those who "labored" at this task can "take our satisfaction from Justice Holmes's observation that 'legal progress is often secreted in the interstices of legal procedure.'"

⁶ *MORNING AND NOON*, 215. The memoir devotes much more space to explaining how Acheson came to be appointed to the Committee – after provoking FDR's displeasure by resigning his Treasury post in 1933 over a disagreement on the legality of Roosevelt's decision to decouple the dollar from gold. After assisting Felix Frankfurter's confirmation to the Supreme Court, he was restored to Roosevelt's favor but declined proposed appointments to the D.C. Court of Appeals and then to a high post in the Department of Justice and felt he could not decline the (temporary and

Officially, the idea for the committee had originated with Attorney General Frank Murphy. In mid-December of 1938, Murphy had written to President Roosevelt to propose a study of “procedural reform in the wide and growing field of administrative law.”⁷ The need was for administrative procedure “which affords quick and well informed action, grounded upon the fundamentals of fair play.” Murphy noted that new rules of civil procedure had recently been adopted for federal district courts after extensive study and debate by a “representative group of the bar, appointed by the Supreme Court.” He called for a similar study of administrative procedure.

The analogy was slightly misleading, however, since the issue was not simply procedure but institutional authority – who could decide what, not just the order or process for decisions. President Roosevelt endorsed the idea but offered a more pointed rationale for the project. His official reply to the Attorney General in February 1939 did not emphasize administrative efficiency or public trust but *judicial* acceptance. He noted the challenges faced by the “Department of Justice in endeavoring to uphold actions of the administrative agencies of the Government when the validity of their decisions is challenged in the courts ...”⁸ FDR seemed to be thinking less about the recently adopted Federal Rules of Civil Procedure than the failure, a year earlier, of his proposal to “pack” the Supreme Court with more sympathetic justices.

At all events, both the Justice Department and the White House must have been aware that denunciations of administrative abuse were then echoing in the halls of Congress. Reform proposals had been urged by the American Bar Association and taken up by congressional committees. Congress approved the Walter-Logan bill – sponsored by Rep. Francis Walter (D-Pa) and Sen. Marvel Mills Logan (D-Ky) -- at the end of 1940. FDR blocked it with one of his rare vetoes. His veto statement, while criticizing the measure, also urged Congress to wait for the Attorney General’s Committee to complete its inquiries and make its own recommendations. He did not need to mention that as Washington debated the fine

part-time) appointment to the Attorney General’s Committee. The whole account implies – somewhat misleadingly – that there were no great issues at stake in the Committee’s work.

⁷ The letter appears on p. 251 of the FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE (1941), as the first document in Appendix A, “Origin and Progress of the Attorney General’s Committee.” There is no account of who might have advised Murphy to pursue this proposal, though the letter begins by noting that it aims “to renew the suggestion which I have made publicly at different times, that there is a need for procedural reform in the wide and growing field of administrative law.”

⁸ *Id.*, p. 252

points of administrative procedure, the Luftwaffe was bombing London every night and the German army tightening its grip on France and the Low Countries.

Meanwhile, the Attorney General's Committee pressed forward with its charge. Attorney General Murphy seems to have recruited most members for their political reliability but others for their broader respectability. If Acheson is counted, a majority of the members had performed high level legal service for the New Deal.⁹ There were also two judges in the initial slate¹⁰ and a number of relatively young law professors.¹¹ The staff director was also recruited from a distinguished law school: Professor Walter Gellhorn of Columbia.

The eleven continuing members turned out to be divided on important issues. The Committee submitted its *Final Report* (the official if unimaginative title) on January 22, 1941. It comprised roughly 200 pages of text. But three members – former AAG Carl McFarland, returned to private practice in 1939 and active in the American Bar Association; Blythe Stason, Dean of University of Michigan Law School; Chief Justice Arthur Vanderbilt of New Jersey – offered some fifty pages of “Additional Views,” advancing a more stringent analysis with more detailed proposals. Chief Judge D. Lawrence Groner of the D.C. Court of Appeals also offered his own (even more stringent) “Additional Views.”

The body of the *Final Report* emphasized the complexity of the issues. The minority had decided to spell out their own proposals for new legislation which they called, “A Code of Standards of Fair Administrative Procedure” (running to 30 pages). The majority responded with its own legislative proposal, demurely entitled “A Bill” and running to some 12 pages. Given that the Justice Department chose so many of its own lawyers for the committee, a margin of 7-4 was not a ringing endorsement for the “majority” proposals. What became the APA actually owed far

⁹ Robert Jackson, at the time Solicitor General, was among the original members but resigned when appointed Attorney General, himself in January of 1940. James W. Morris, an assistant to successive attorneys general since the beginning of the Roosevelt administration, was initially tapped to serve as chairman, then relinquished that position to Acheson, when appointed to the D.C. District Court in the spring of 1939. Other New Deal lawyers included Golden W. Bell, who had been Assistant Attorney General for Legal Counsel since 1937; Carl McFarland, another AAG who had been at DoJ since 1933; Lloyd Garrison had been the initial chairman of the National Labor Relations Board (though by 1940 was a professor at University of Wisconsin); Francis Biddle, who had served as chairman of the National Labor Relations Board and would subsequently service as Robert Jackson's successor as Attorney General (and as judge at the Nuremberg trial).

¹⁰ Duncan Lawrence Groner had been appointed to the D.C. Court of Appeals by President Hoover in 1931, then elevated to the Chief Justice position (as it was then called) by President Roosevelt in 1937. Arthur Vanderbilt, a reformer of courts in New Jersey as Chief Justice, had been president of the ABA in 1938, as the ABA began to weigh in on administrative law debates.

¹¹ Harry Shulman, professor at Yale Law School; Ralph Fuchs, Brookings Institution economist, then professor at Washington Law School in St. Louis; Blyth Stason, professor at University of Michigan; Henry Hart (Harvard Law School professor, protégé of Frankfurter, clerk for Brandeis).

more to the proposals of the Committee's minority. From what appears in the *Final Report*, one might conclude the debate was not so much on *what* to do as *how much* to do. Even the APA did not adopt all that the minority members proposed.

But 1941 was not the time to sort through a debate on fine-grained questions of administrative procedure. In the summer of 1940, Roosevelt had appointed Republican elder statesmen to head the War Department and the Navy Department and announced in December that America must gear up its production of war materials to make itself the “arsenal of democracy.”¹² Congress agreed to military conscription – a “draft” – for one year in 1940, then renewed it without limit the next year, which also saw congressional approval for the “Lend-Lease” program of massive military aid to Britain and then to Soviet Russia. Congress was preoccupied with the challenges of impending war. And the war came to the United States in full before the end of the year. The Acheson Report was put on the shelf until the last months of that war.

The Pre-War Debate about the Rule of Law

The Acheson Committee was designed, at some level, as a response to gathering protests against the practices of regulatory agencies. Certainly it gained that charge after President Roosevelt, in vetoing the Walter-Logan bill, insisted that before new legislation could be adopted, the Attorney General's Committee must be given time to complete its comprehensive study of the relevant issues.

In the first decades after the adoption of the APA, legal commentators embraced the claim that the AG's Committee had succeeded in building support for a broad consensus, so that Congress ultimately enacted the Administrative Procedure Act by large majorities. Some of the most prominent post-war commentators were bound to find this compelling, since they had served on the staff of the AG's Committee at the time (or in allied positions at DoJ).¹³ In more recent

¹² “Arsenal of Democracy,” Radio Address from the White House, Dec. 29, 1940, reprinted in PEACE AND WAR: U.S. FOREIGN POLICY 1939-1941, 598-607

¹³ Kenneth C. Davis and Walter Gellhorn, *Present at the Creation: Regulatory Reform Before 1946*, 38 ADMIN. L. REV. 511 (1986). The title – borrowed from Acheson's famous memoir of his State Department service – acknowledged the service of Davis and Gellhorn on the staff of the Acheson Committee in 1940. Gellhorn went on to edit one of the leading case books in admin law; David, the leading treatise. Davis also credits the influence of Louis Jaffe (professor of law at Harvard, co-editor of a leading case-book) as a consultant to the Justice Department when the APA was adopted. Gellhorn offered a more extended account – emphasizing continuity with the Acheson committee's work – in: *The Administrative Procedure Act: The Beginnings* 72 Va. L. Rev. 219 (1986). A non-participant in the creation endorsed the general account: Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 Va. L. Rev. 253 (1986)

decades, political scientists have argued that the debate over administrative procedure was really a proxy for larger debates about the New Deal.¹⁴ Both these interpretations assume that the debate in the 1930s was at best overblown. Quite prominent figures at the time took were quite insistent about the larger implications of the debate.

The American Bar Association framed the underlying contest as a struggle for “the rule of law” as against “administrative absolutism.” In 1938, the ABA committee on administrative law recruited the dean of the Harvard Law School, Roscoe Pound, to serve as its chairman. Soon after, he produced a report comparing the trend toward “administrative absolutism” among federal agencies to the methods of dictatorial rule in Europe and analyzed defenders of the trend in American universities as followers of “Marxian philosophy.”¹⁵ He did not intend the latter phrase as a mere rhetorical flourish. He tried to explain the charge with learned references to works by Soviet jurists. And he did not hesitate to deploy the same language in criticizing Roosevelt’s veto of the Walter-Logan bill in 1940.¹⁶ Pound did not talk in that way because he was a dogmatic formalist or a lifelong reactionary. Earlier in his career, he had coined the term “social engineering” – as a term of praise for what could be achieved by well-crafted adjustments to the common law.¹⁷

Trends in the outside world seemed to show that the rule of law could no longer be taken for granted. It looked quite imperiled in the late 1930s, as Stalinist dictatorship intensified in Russia and Nazi dictatorship in Germany. As the Acheson Committee continued its deliberations, the slide to tyranny became an avalanche, as more and more countries fell under Soviet or Nazi control.¹⁸ We now have a term for the Soviet and Nazi regimes – “totalitarian.” It was not yet in general use before World War II. But people already saw the point: everything might be up for grabs because the rulers in these states saw nothing beyond their

¹⁴ Foremost in this literature: McCubbins, Noll, Weingast, *Political Origins of the Administrative Procedure Act* 15 J. of LAW, ECON & ORG 180 (Mar. 1999). With more historical detail but to the same effect: George Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW U.L. REV. 1557 (1996) (which acknowledges advice from McNollGast); Martin Shapiro, *The APA: Past Present, Future*, 72 Va. L. Rev. 447 (1986)

¹⁵ *Report of the Special Committee on Administrative Law*, 63 ANNU. REP. ABA 331 (1938)

¹⁶ *The Place of the Judiciary in a Democratic Polity*, 27 ABA J. 133 (1941)

¹⁷ Linus J. Macmanaman, *Social Engineering: The Legal Philosophy of Roscoe Pound*, 33 ST. JOHN’S L. REV. 1 (1958)

¹⁸ Germany and Russia divided Poland between themselves in September of 1939. The Soviet Union swallowed Lithuania, Latvia and Estonia and a slice of Romania in June of 1940, as Germany seized control of France and the Low Countries, following earlier seizure of Norway and Denmark.

reach. Talk about the rule of law was, in some way, a symbol of a broader anxiety – which did not mean it was merely rhetorical.

The critics could point to disturbing trends at home. President Roosevelt had started his second term by proposing to expand the size of the Supreme Court to ensure that new appointees would provide a compliant majority. His veto statement on the Walter-Logan bill – which provoked Pound’s denunciation – blamed critics of administrative procedure for wanting to give a central role to lawyers.¹⁹ It could easily be understood to mean administrators should not have to be much distracted by law.

That sentiment was, in fact, proclaimed by prominent New Dealers. James Landis, former Chairman of the Security and Exchange Commission, enthused about disregard for law: “One of the ablest administrators that it was my good fortune to know, I believe, never read, at least more than casually, the statutes that he translated into reality. He assumed that they gave him power to deal with the broad problems of an industry and upon that understanding he sought his own solutions.”²⁰

The critics focused their alarm on a charge that made agencies sound like lynch mobs: current practice allowed the same agency to make the rules, then serve as “prosecutor, judge, jury and executioner” in enforcing them. Wasn’t this the antithesis of rule by law? The Acheson Committee’s *Final Report* grappled with the charge. In fact, it focused most of its attention on this very issue.

Its brilliant tactic was to diffuse the issue by conducting – and publishing – an elaborate survey of some three dozen agencies and programs to determine how they dealt with this issue. Specialized monographs published with the main report run to hundreds of pages. So the committee acknowledged the concerns of critics and then responded in stupefying detail. Along the way, it changed the subject from the abstract meaning of rule of law to the technical tedium of administrative process. Early on, the *Report* warns that, “while much criticism is general in language, the thought behind it is specific. As a generality, it may not be sound, but as a specific criticism of a particular practice of a particular agency it may be justified.”²¹ The strategy of the Report was to counter “generality” with an avalanche of specifics.

¹⁹ Veto Message, Dec. 18, 1940 (“... a large part of the legal profession has never reconciled itself to the existence of the administrative tribunal. Many of them prefer the stately ritual of the courts in which lawyers play all of the speaking parts ... Many lawyers still prefer to distinguish precedent and to juggle leading cases”)

²⁰ James Landis, *THE ADMINISTRATIVE PROCESS* (1938), p. 75

²¹ *FINAL REPORT*, p. 2.

Soon after the release of the report, there was a program celebrating the scientific rigor of these studies. It was hosted by the Columbia Law School – the home institution of Prof. Gellhorn, the Committee’s staff director. Justice Frankfurter participated. He praised the Report with high-table diction.²² There was even praise from John Foster Dulles, then a leading figure in the New York bar (and in the following decade, Acheson’s successor as Secretary of State).²³ Other commentary also expressed respect for the Committee’s wide-ranging research.²⁴

But for all its accumulation of factual detail – sometimes actually interesting – the *Report* did not prove very much about the subject it purported to investigate. Staffers asked various agencies how they organized their operations and in particular, how they protected hearing examiners from pressure. Then they wrote up what the agencies told them. The specialized monographs on individual agencies or programs (published as a companion volume with the *Report*) offer little we would now recognize as data – such as how often commissioners (or other top administrators) disregarded the findings of the hearing examiner and how often courts, in turn, upheld the agency’s ultimate determination. The monographs have few numbers at all, beyond telling how many examiners had been employed in each agency. They certainly do not try to measure the effectiveness or even the actual work product of various agencies.

What the specialized studies do bring home to a dutiful reader is how much variety there was, already in 1940, among different agencies and how differently the issue might appear from one agency to the next. But they also show that officials had given some thought to procedure and taken some steps to reassure regulated or affected interests. They even show broadly similar impulses, regarding the separation of examiners from presenters of evidence.

The appeal to the complicating differences among different programs was, by its own logic, a claim to leave administrators to make their own expert determinations, even on questions of procedure. It all might seem too complicated for a single rule of the sort familiar to judges, so it might best be left to experts in each agency to sort out. A law professor of a leftist bent made that precise point in

²² Frankfurter, *The Final Report of the Attorney General’s Committee on Administrative Procedure*, 41 COL. L. REV. 585 (1941)

²³ Dulles, “The Effect in Practice of the Report on Administrative Procedure,” 41 COL. L. REV. 617 (1941)

²⁴ Louis Jaffe, *The Report of the Attorney General’s Committee on Administrative Procedure*, 8 U.CHI. L. REV. 401 (1941)

response to the Report.²⁵ But no one on the Acheson Committee would insist on that logic (at least in public).

Instead, the Committee urged that officials taking evidence – the *Report* dignified them with the novel title, “hearing commissioners” – should not participate at all in the gathering or presentation of the evidence at the hearing. That basic demarcation of roles was not enough for the minority, which discoursed at length on the remaining challenges. The “hearing commissioner” must not only have an independent role but a judicial-style seclusion from other agency officials. Allowing the “hearing commissioner” to seek advice from agency experts on the side would be “entirely subversive of every fundamental notion of fair procedure. ... A secret conference of a few minutes [with other agency officials] destroys an entire trial.”²⁶ So the minority proposed elaborate safeguards against such *ex parte* communications by hearing examiners.

All members of the Committee agreed, in principle, that the answer to complaints about the mingling of powers in administration was an internal separation of investigating and prosecuting functions from judging. But the minority demanded this separation be safeguarded with explicit rules on relevant communication between “hearing commissioners” and other staff. It might look like a disagreement on whether the “administrative process” should be required to conform to judicial process. One could even imagine this as the central struggle over the fate of the New Deal – if one inclined to the view propounded by political scientists decades later.

If you emphasize the independence of the trial examiner, you embrace the idea that each case should be decided by a neutral umpire because the agency has no greater claim to coerce or punish than the regulated firm has to retain its liberty and property rights. That is how we think about judges or juries hearing contending claims in ordinary litigation between private parties (and all the more so in criminal trials). But a regulatory agency is not only an enforcer of rules but an engine of national policy.

²⁵ A. H. Feller, *Administrative Law Investigation Comes of Age*, 41 COL. L. REV 589 (1941), warning that success of the NLRB in protecting “labor rights could not have been accomplished as successfully if the powers of investigation and adjudication had not been combined” (600) and criticizing the proposed “code” of procedure (proposed by the minority on the Acheson committee) as “unfortunate” since it “proceeds on the premise of the necessity of uniformity.” (615) After the war, Feller served as General Counsel of the United Nations. He committed suicide in 1952 when called to appear before a congressional investigating committee. His article remains an unusually cogent exposition of those most opposed to the ABA view.

²⁶ Note on “Code” (offered in Additional Views), Sec. 309, §m, p. 243

It certainly looks like a policy-maker if you think regulatory aims may be central to the overall health of the economy but not readily subject to rules, as was said of commissions engaged in regulating transportation sectors. The Interstate Commerce Commission, the Civil Aeronautics Board, the Federal Maritime Commission were designed not only to arbitrate between shippers and carriers but to advance an overall economic vision. If you think the aim is to guide investment – to plan the main lines of economic development – then it makes less sense to constrain regulators with procedural safeguards for the return-on-equity interests of regulated firms.

There was gathering debate on how or whether “rule of law” could apply to the new responsibilities of regulatory management. Should Washington engage in overall economic planning? Was “planning” even a sensible aim for the economy overall? Could a state with such ambitions still provide security to private property? Would it end by making everyone feel too dependent on government to feel safe in criticizing or opposing public policies? One would not need to see this as a straight path to “serfdom” or “despotism” to feel qualms. Politicians (and later, professors) who used extreme language were talking about something that might be considered fundamental.²⁷

Tellingly, though, there is scarcely a word about this larger debate in the Acheson Committee’s *Report*. The aim of the Acheson Committee was not to settle great questions. Nor even to clarify them. In effect, its aim was to push them off or bury them in procedural details.

Apart from tactical advantage and lawyerly instinct, the Committee did, in fact, have reason to resist the great ideological debates in the background. It is not at all obvious, even in retrospect, that the fate of any particular New Deal agency was at stake in these procedural questions. It was certainly not obvious to lawyers and judges at the time.

One reason to doubt that view (which we can call the “political science view”) is that even the Walter-Logan bill was content to call for “fair and independent” hearings without spelling out what this would require. Walter-Logan did not even require that hearing examiners have a separate status within the agency. It prescribed that hearings would be conducted by a panel of three agency employees, only one of whom need be a lawyer and all of whom might very well spend most of their time as investigators, prosecutors or rule-drafters, so long as they did none of those things on the particular case where they were enlisted as fact-finders (even if the case had close similarities to cases they might otherwise be pursuing as

²⁷ Gordon Hewart, *THE NEW DESPOTISM* (1929); Hayek, *THE ROAD TO SERFDOM* (1944)

prosecutors). In all of this, Walter-Logan followed the earlier proposals of Dean Pound's 1938 ABA Report.²⁸

The Walter-Logan bill still assumed – as did all sides on the Acheson Committee – that the findings of the hearing examiners could be reviewed by agency heads (the secretary of an executive department or the commissioners of an independent commission). At that level, competing policy responsibilities might well distract or distort the judgement of officials, even if they purported to decide individual cases solely on the record compiled for each particular case.

Yet a more thorough-going separation had already been proposed. In 1937, the President's Committee on Administrative Management had urged a thorough-going reorganization of federal agencies. It was known as the Brownlow Report for its chairman, University of Chicago Professor Louis Brownlow, a leading figure in the new field of public administration. The Brownlow Report urged (among other things) that the rule-making and prosecutorial functions of independent regulatory commissions should be given to executive agencies under direct presidential control; adjudication of particular cases would then be left to a "judicial section" in the agency that would remain entirely independent.²⁹ The Report was published with a preface by President Roosevelt, endorsing its recommendations, expressing no concern at all about the proposed isolation of regulatory adjudication.³⁰

²⁸ H.R. 6324 (July 13, 1939), Sec. 4 (a): "Every head of an agency shall from time to time designate three employees of his agency for such intra-agency boards ... as may be necessary and desirable. ... When the members of any board are not engaged in the hearing of administrative appeals as hereinafter provided, such employees shall be assigned to other duties in the service of the agency concerned." The same language (virtually word for word) appears in the proposed ABA bill: See *Report of the Special Committee on Administrative Law*, 63 ANNU. REP. ABA 331 (1938) (Sec. 3: "Proposed Act to Provide for the more expeditious settlement of disputes with the United States") at 364 ("Statutory Approval and Authority for Administrative Boards and Prescribing Their Procedure")

²⁹ Robert Cushman, *The Problem of the Independent Regulatory Commissions*, REPORT OF THE PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT (1937). Cushman was a professor in the Cornell Department of Government. In the 1950s, he hired an undergraduate student, Ruth Bader, to help with research. She would reach the Supreme Court as Bader Ginsburg and speak warmly of Cushman as a champion of civil liberties. Jon Craig, Ruth Bader Ginsburg reminisces about her time on the Hill, CORNELL CHRONICLE, Sept. 22, 2014 ("The jurist's respect for the First and Fifth Amendments is rooted in college research for Professor Robert Cushman in which she tracked 'black lists' of the entertainment industry during the McCarthy era.") Cushman's proposal in the Brownlow report was subsequently developed in a full length book, THE INDEPENDENT REGULATORY COMMISSIONS (1941). The argument was not seen as placing him on the political right.

³⁰ REPORT OF THE PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT (1937), *Message from the President of the United States*, January 12, 1937, iv, v ("I endorse this program [including placing commissions under presidential control] ... in doing so [implementing this program] we shall know that we are going back to the Constitution and giving to the executive the

Congress was not at all receptive to this sort of reorganization, however. It favored the “independence” of regulatory commissions. The minority on the Acheson Committee noted the experience – and noted that their own proposal was more modest than the Brownlow scheme.³¹ It was, however, more demanding than what the majority sought.

After the war, Congress was content to accept most of the recommendations of the Acheson minority. The APA laid down express restrictions on communications with hearing examiners outside the hearing. By then, it did not seem momentous.³² Whatever symbolic weight the issue might have had in the 1930s, it no longer seemed urgent.

The Congress which enacted the Walter-Logan bill in 1940 still had a solid majority of New Deal supporters. When Congress approved the APA in 1946, it was approved by voice vote in both chambers with no recorded dissents. President Truman signed it without fuss. It was not a compromise in relation to the claims advanced by the ABA and the supporters of Walter-Logan. It was an extension or elaboration of those claims (regarding the independence of adjudicative proceedings from other agency functions). No one then protested that the APA would jeopardize the operations of established New Deal agencies.

So the question that ought to be asked is why President Roosevelt thought it necessary to veto Walter-Logan. If he saw the procedures it laid down as threatening to the New Deal, it may well be because he had a view of the New Deal as something much larger than the aggregate of already established agencies and programs.³³ Certainly, it was not an idiosyncratic view. The leftwing National Lawyers Guild denounced Walter Logan as “an attempt to prevent the effective enforcement of the bulk of the New Deal legislation” and “an attack on democratic procedure.”³⁴

modern tools of management and up-to-date organization which will enable the government to go forward efficiently.”)

³¹ FINAL REPORT, “Additional Views of McFarland, Stason and Vanderbilt,” at 206, describing proposal of the Committee on Administrative Management as a “complete and drastic program of separation” between adjudication and other agency functions.

³² APA, §554

³³ Even many thoughtful and informed observers lost track of this debate. In the 1990s, I asked Prof. Joseph Cropsey what his University of Chicago mentor and colleague Leo Strauss had thought about the New Deal. Cropsey had a degree in economics, had written his PhD dissertation about Adam Smith and later wrote the (very hostile) article about Karl Marx in the *History of Political Philosophy* collection he edited with Strauss. “What did Mr. Strauss think of the New Deal? Do you mean trucking regulation? Mr. Strauss was not interested in trucking regulation.”

³⁴ Mortimer Riemer, National Lawyers Guild, Letters, THE NEW YORK TIMES, June 14, 1939

If the real issue was whether we would have comprehensive economic planning, he might have expected, by the end of 1940, that full wartime mobilization would make some version of that inevitable. But voters displaced more New Deal supporters at each wartime election and in 1946 they returned Republican majorities to both houses of Congress. Wartime planning (with rationing and price controls) left a permanent enduring shadow over the more grandiose visions of pre-war New Dealers. Barely a dozen years after the enactment of the APA – the statute that was supposed to have “saved the New Deal”³⁵ – scholars of regulation derided the inertia and aimlessness of independent commissions.³⁶

Yet the Report of the Attorney General’s Committee was not merely an effort to defuse the great background debate about the rule of law in the modern world. The Committee also grappled with a range of other issues barely noticed in subsequent accounts of its work.³⁷ That is particularly unfortunate, because the issues are still with us.

The President as Administrative Manager

If you believed in planning, you should have thought the array of regulatory commissions and agencies needed some central coordinating authority. That was the argument of the Brownlow Report, dressed up in the management nostrums of public administration experts. Congress had firmly rejected that idea in 1937 (when it seemed a disturbing complement to FDR’s simultaneous, immensely controversial plan to enlarge the Supreme Court to pack it with pro-New Deal justices).

The Acheson Report did not go there. Perhaps it was not really a question of “procedure,” anyway. But the *Final Report* did emphasize the range and complexity of challenges faced by different agencies. It therefore raised the question: Could there really be one statutory formula to cover all the agencies?

³⁵ Shepherd, *Fierce Compromise*, 1680: “The fight over administrative reform was the major political battle for the life of the New Deal.”

³⁶ Notably, Marver H. Bernstein, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* (1955)

³⁷ Joanna Grissinger, *Law in Action: The Attorney General’s Committee on Administrative Procedure*, 20 J. of POL. HIST. (2008) is one of the few scholarly contributions to focus on the work of the Committee. It offers useful background on the political climate of the era but focuses almost all its attention on the committee’s proposals for internal separation of adjudicatory functions within agencies.

The *Report* proposed that Congress should establish an Office of Federal Administrative Procedure. It would have a Director appointed by the President – and removable by the President. It would “conduct inquiries into practice and procedures” and “make recommendations” on “practices, procedures and methods of organization which have proved most satisfactory.”³⁸ It might sound like the for today’s Administrative Conference – itself a mid-1960s add-on to the APA. In fact, the original proposal was more than that.³⁹

To begin with, the *Report* envisioned that Director of Administrative Policy would: “receive complaints regarding the procedure of particular agencies, investigate those which appear to be made in good faith and report thereon to the complainants and to the agency concerned, recommending to the agency any measures which seem to the director desirable to correct the deficiency.”⁴⁰ The *Report* does not say the agency would be bound to accept the Director’s assessment of the complaint, let alone heed his recommendation of how to fix the problem. But it gives agencies incentives to listen carefully.

One such claim on agency attention was that the Director would be responsible for making an annual report to the President (as to Congress), accounting for “the work” of the Office of Federal Administration Procedure – such as assessing complaints – and then extend “recommendations on the practices and procedures of the agencies.”⁴¹ It might be a good place to indicate that some agencies were in need of personnel changes at the top. Or a change in budget allocations. John Foster Dulles saw the proposal as “a projection, in permanent form, of the Attorney General’s Committee, with continuing authority to investigate agencies ...” and called it the “most important and constructive proposal of the *Report*.”⁴²

The proposal did not leave this office as a mere advisory body, however. The majority of the Acheson committee proposed that “hearing commissioners” – what we now call Administrative Law Judges – should be dependent on approval of the

³⁸ FINAL REPORT, “Bill,” Sec. 5 (1), (2), p 194

³⁹ ACUS, established in 1964, has no authority other than to convene conferences, sponsor studies and make recommendation: 5 U.S.C. §591-596. Characteristically, the presiding official is “Chairman” rather “Director” (though selected by presidential appointment, subject to Senate confirmation and serving a five year term).

⁴⁰ FINAL REPORT, “Bill,” Sec. 5(3), p. 194

⁴¹ Id, Sec. 5(7), p. 194

⁴² Dulles, *The Effect in Practice of the Report on Administrative Procedure*, 41 COL. L. REV. 617 (1941) at 618

Director of the Office of Administrative Procedure. He would be responsible for deciding on the choice of individual “commissioners” (from nominees by the agency – but he could ask for further nominees if not satisfied with the first three). He would also have the last word on removing “hearing commissioners” accused of misconduct (after opportunity for a hearing on the charges against them).⁴³

The minority report was in broad agreement with these suggestions. It emphasized that when appointing and removing hearing commissioners, the Director should act only with the agreement of his two associates on a three person board (comprised of the Director, a judge of the D.C. Court of Appeals and an official from the Administrative Office of U.S. Courts).⁴⁴ This suggestion accepted the premise that hearing commissioners should be subject to central oversight but sought to ensure the oversight would be somewhat insulated from political pressure. This refinement implicitly acknowledged that the Director would be seen as a political agent of the President and potentially quite powerful, hence the need to constrain (or at least, chaperone) his decisions on the sensitive question of appointing and removing hearing commissioners.

The minority report proposed another revealing refinement. It recommended that the President be authorized to suspend existing procedures in any particular agency for a period of two years.⁴⁵ The minority claimed it was “obvious” that this might sometimes be necessary.⁴⁶ It did not question that decisions to suspend normal rules should be made by the President. In effect, this provision underscored something which the majority report may have thought implicit (and better left unsaid): agency heads would look for presidential approval before suspending their normal rules of procedure. The minority may even have made the change a bit more difficult by imposing a formal process for suspending normal procedure.

None of this corresponds to anything in the Walter-Logan bill.⁴⁷ Barely a trace of these proposals remained in the bills that became the APA after the war.

⁴³ FINAL REPORT, “Bill,” Sec. 302 (3), (6); in contesting charges constituting “cause” for removal – brought by the agency or by the Attorney General - a “hearing commissioner” could “demand a hearing” either “before the Office of Federal Administrative Procedure [presumably the Director or designated representatives of the Director] or “before a trial board consisting of the Director and two other individuals designated by the Office.” 6(a)

⁴⁴ FINAL REPORT, “Code of Standards,” Sec. 109(a), p. 222

⁴⁵ Id., Sec. 111, pp. 223-24

⁴⁶ Id. 224 (Note on this section)

⁴⁷ As the minority proposal took the trouble to point out, Sec. 111, Note, p. 224 (“Neither the Logan-Walter bill nor the committee proposal makes any provision as suggested above” – regarding suspension of rules”)

The APA does authorize suspension of normal rule-making procedure in special circumstances – but at the decision of the agency (which might be an independent commission).⁴⁸

Probably the main reason Congress was so resistant to embracing presidential management proposals was that it did not want to acknowledge a central role for the President (or some immediate appointee of the President) in all regulatory policy. The object of reform was to constrain the agencies by procedural requirements. Reformers were not attracted to the idea of putting a presidential agent in charge of monitoring, guiding, enforcing these procedural norms.

Of course, that did not put an end to the impulse of presidents to stretch a guiding hand toward regulatory agencies.

Rule-Making Procedure

The Walter-Logan bill was vetoed by President Roosevelt on the grounds that it would slow down the work of agencies and open too many avenues to unproductive legal wrangling. So it is notable that even the Walter-Logan bill imposed hardly any procedures for rule-making. One of the few requirements was an obligation to issue interpretative regulations within one year of a new statute's taking effect – presumable to encourage policy development by rules rather than adjudication and so stabilize expectations for regulated firms.⁴⁹ The Pound Committee of the ABA also had very little to say about rule-making procedure.⁵⁰

Given how little was demanded by outside critics, the majority on the Acheson Committee also decided there was no need for new procedures here. In the model bill accompanying the majority report, provisions on rule-making are less than one page (compared with seven pages on adjudication). Almost all the

⁴⁸ §553(b)(B): "... this subsection does not apply ... when the agency for good cause finds (and incorporates the finding and a brief statement of reasons in the rules issued) that notice and public procedure thereon are impractical, unnecessary or contrary to the public interest" (referring to Notice and Comment rule-making)

⁴⁹ H.R. 6324 (July 13, 1939), Sec. 2(b): "Administrative rules under all statutes hereafter enacted shall be issued as herein provided within one year after the date of the enactment of the statute subject to the adoption thereafter of further rules from time to time"

⁵⁰ *Report of the Special Committee on Administrative Law*, 63 ANNU. REP. ABA 331 (1938) at 362 ("Proposed Act to Provide for the more expeditious settlement of disputes with the United States" Sec. 1, "Implementing Rules and Regulations" offers less than page, which does say rules should be adopted "after publication of notice to and hearing of interested parties" but does not say anything further about the contents of the notice or procedure of the "hearing")

provisions on rule-making actually deal with ancillary matters – such as requirements to publish rules after their adoption and to report new rules to Congress on an annual basis.⁵¹ There is no prescribed procedure at all for developing rules.

It was the minority members who thought about procedures here. Their proposed “Code” offered seven pages of requirements for rule-making. Most notably, it required advance “notice” in the *Federal Register* and specified that the notice should provide an account of “the issues or scope of the proposed rules,” given “with as much particularity and definiteness as deemed practicable.”⁵² That is more demanding than the requirements for informal rule-making ultimately specified in the APA.⁵³

The minority’s proposed “Code” also insisted on the primacy of rules: “administrative agencies ... shall, as a fixed policy, prefer and encourage rule making in order to reduce to a minimum the necessity for case-by-case administrative adjudication.”⁵⁴ Accordingly, it went on to warn against evading rule-making procedures with interpretive rulings: “Each agency shall issue, *in the form of rules*, all necessary or appropriate rules interpreting the statutory provisions under which it operates ...”⁵⁵ The Code particularly cautioned against displacing rule-making with “rulings” such as “opinions of general counsel,” not adopted by public procedure.⁵⁶

None of these strictures or cautions can be found in the APA. Nor does the APA embrace the admonition in the proposed Code against rules that “merely repeat legislative provisions.”⁵⁷ On rule-making procedure, as on much else, the APA ended up offering a compromise that leans toward the proposals of the Acheson Committee’s minority, but stops well short of codifying all those proposals.

⁵¹ “A Bill,” Sec. 201-205, p. 195

⁵² Sec. 208, p. 228

⁵³ §553

⁵⁴ Sec. 201 (c)

⁵⁵ Sec. 202 (d) (emphasis added)

⁵⁶ Sec. 212, Note, p. 231: Contrast, APA §553(b)- “this subsection [on rule-making procedures] does not apply to interpretive rules”

⁵⁷ Sec. 203, p. 226

Courts as Enforcers

President Roosevelt had acknowledged, when endorsing a study of administrative procedure, that his main concern was to satisfy courts. Or was it to guide courts and encourage them to back off?

The Walter-Logan bill, reflecting the aims of the American Bar Association, was supposed to ensure that administrative agencies remained subject to reliable judicial supervision.⁵⁸ It was most aggressive in authorizing immediate review of new regulations. Perhaps also in authorizing review by “anyone aggrieved” – without any guidance about who that term might cover.⁵⁹

The bill did seek to pin down the issues that courts should consider when reviewing a new regulation – consistency with constitutional requirements, consistency with the authority conferred by the relevant statute, etc. It also made clear that this initial review would not necessarily bind a subsequent court viewing the regulation as applied to a particular regulated party. Even when reviewing agency adjudications, Walter-Logan acknowledged that review should respect an agency’s initial determinations as a fact-finder.⁶⁰ The bill also sought to discourage abusive appeals by authorizing courts to impose penalties and fees for frivolous claims.

The Acheson *Report* took considerable trouble to explain to readers that courts could not, under the Constitution, simply give judgements outside a concrete case and that courts could not give judgments when they could not speak with finality.⁶¹ But then it had very little to say about actual standards of review.

It was the Committee’s minority which urged more clarification of the judicial role. A particularly notable passage in their “Additional Views” included this caution:

⁵⁸ See Pound, ABA Journal

⁵⁹ H.R. 6324 (July 1939), Sec. 3: “the U.S. Court of Appeals for the District of Columbia ... shall have jurisdiction, upon petition filed within thirty days from the date any administrative rule is published in the Federal Register, to hear and determine whether any such rule ... is in conflict with the Constitution of the United State or the state under which it issued. ... Nothing contained in this section shall prevent the determination of the validity or invalidity of any rule which may be involved in any suit or review of an administrative decision or order in any court of the United States as now or hereafter authorized.”

⁶⁰ Id

⁶¹ FINAL REPORT, pp 75-96

It is unsatisfactory to the citizen and unfair to the courts to provide for judicial review without defining its scope. In effect the courts are asked to choose between themselves and other public agencies, they are asked to assume or deny themselves power of review and they are made a party to the result of conflicting statutory interpretations. Under these circumstances, it is natural that the courts should lean backwards to deny themselves power which Congress has not clearly conferred on them.”⁶²

Elsewhere, the minority deplored that, “The courts have been given no legislative directions or almost none [in existing statutes]. The structure of judicial review, therefore, rests upon the precarious basis of judicial decisions rendered in scattered and dissimilar cases.”⁶³ But the minority also recognized that, “The Logan-Walter bill in its final form stated no greater scope of review than is now widely recognized by the courts” though it might “sweep into the hopper” disputes not previously subject to judicial review.⁶⁴

On the other hand, the minority report itself indicated that review should be available to “any person adversely affected” by an agency decision – seemingly encouraging a wider view of standing than the APA.⁶⁵ It also stipulated that review should be available for the “lawfulness and *adequacy* of procedure,”⁶⁶ a formula that seems to invite courts to take a wider role in defining which procedures would be “adequate.”

The minority report also proposed that attorneys be licensed to practice before agencies and subject to “disbarment” there for “good cause.” It recommended this licensing function could be assigned to the proposed new Office for Administrative Procedure (which the majority report already made responsible for the selection and discipline of agency hearing examiners).⁶⁷ Presumably that

⁶² FINAL REPORT, Additional Views, p. 212

⁶³ Id. Note on Sec. 311, p. 245

⁶⁴ Id.

⁶⁵ Id., Sec 311(b), p. 246: Compare APA §702: “A person ... adversely affected or aggrieved by agency action *within the meaning of a relevant statute*, is entitled to judicial review thereof.” (emphasis added) Famously, the Supreme Court seemed to disregard the APA’s qualification (“within the meaning of a relevant statute”) in its broadening of standing in *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970)

⁶⁶ Id., Sec. 311(e), p. 246 (emphasis added)

⁶⁷ Id., Sec. 105, pp. 219-220

arrangement would give courts more confidence when reviewing appeals by such certifiably knowledgeable and experienced advocates.

The minority report then itemized the claims courts should resolve – questions of conformity with “constitutional right,” “statutory authority or jurisdiction,” support for “findings, inferences, conclusions of fact” or actions “otherwise arbitrary or capricious.” The list is very close to what finally appeared in §706 of APA.⁶⁸ Where the minority report also invites courts to review the “adequacy of procedure” used by the agency, the APA speaks more narrowly of the agency’s “observance of procedure required by law.”⁶⁹

On the other hand, the final text of the APA also omitted this admonition, which the minority report proposed for the conclusion of the “scope of review” provision in their model code: “Provided, however, that upon such review due weight shall be accorded the experience, technical competence, specialized knowledge, and legislative policy of the agency involved as well as the discretionary authority conferred upon it.”⁷⁰ The APA also omitted the clarification that “substantial evidence” should mean “support of all findings of fact, including inferences and conclusion of fact, upon the *whole* record” [original emphasis] and “if it means a more restricted review, should be clarified by more precise language.”⁷¹

The Aftermath – And After

The Attorney General’s Committee was interested in assuring fair process for regulated interests. The minority was particularly interested in that or particularly interested in assuring public trust in the administrative process. The Committee was also concerned to improve administrative procedures in other ways. In fact, the minority was particularly fertile in suggestions for improvements in other areas.

Compared with proposals advanced in the Report of the Attorney General’s Committee, the legislation enacted by Congress in 1946 was more limited. It adopted many proposals of the minority (such as insulation of hearing examiners and notice and comment for rule-making) but left out many things suggested in the minority’s proposed bill and left out even some proposals in the main Report. The Administrative Procedure Act offered nothing about a Federal Office of

⁶⁸ In the statute as originally enacted this was Sec. 10, now codified at 5 USC as §706.

⁶⁹ §706(2)(D)

⁷⁰ Sec 311(e), pp. 246-47

⁷¹ Additional Views by McFarland, Stason, Vanderbilt at 211-212.

Administrative Procedure, with a Director answering to the White House while demanding answers from the agencies. The APA said very little about rule-making procedure (for “informal” rule-making). It neglected several admonitions of the Acheson Committee’s minority on this topic, along with its suggestion that the president be authorized to suspend otherwise required procedures.

The same could be said of minority suggestions regarding judicial review. The APA gave very little guidance to courts about scope of review and declined to clarify vague terms like “substantial evidence.” Nor, of course, did it adopt the Walter-Logan bill’s provisions, authorizing immediate review of new agency regulations by “any party who may be aggrieved.”⁷²

On the other hand, many of these things have come to pass -- elaboration of rule-making requirements, White House sponsored review of rule-making procedure, expansion and intensification of judicial review (along with periodic calls for relaxation of judicial review) and immediate review of new rules. The status of hearing examiners (to use the original APA terminology) has been further enhanced with an exalted new title – “Administrative Law Judge.” The new term would probably have struck even the minority on the Acheson Committee as somewhat too grand – they embraced the term “hearing commissioner,” which still seems to give priority to the *administrative* rather than judicial aspect of the role. But it is certainly in the spirit of the minority’s recommendations for safeguarding the independence of the official presiding over formal hearings.

In the decades since its enactment, the requirements of the APA have been considerably enlarged or altered by judicial interpretation, sometimes also by administrative or executive practice – but rarely (on matters of substance) by legislative amendment. That suggests that the Congress which originally enacted this set of compromises was not riven with demands for more or fewer or different procedural constraints on agencies. It is not persuasive to see it as emerging from a “pitched battle for the life of the New Deal” in which conservatives “sought to use administrative reform as a means to stop the New Deal,” as political scientists have contended.⁷³

⁷² Sec. 5(a) “Any party to a proceeding before any agency or independent agency ... who may be aggrieved by the final decision or order of any agency ... may at his election file a written petition ... for [judicial] review of the decision.” It does not impose restrictions on who may become a “party to a proceeding” – and agencies tended to allow a range of “parties” to participate.

⁷³ Shepherd, *Fierce Compromise*, 1560, 1682. To make the claims seem plausible, Shepherd assigns numerical scores – on a 1 to 10 scale – to indicate the level of procedural burden in various proposed measures, where Walter-Logan earns an 8 and APA a 5. The basis of such characterizations is not explained. Similarly, McNollgast, *The Political Origins of the Administrative Procedure Act*: “the future of the New Deal was at stake” so “political preferences over economic outcomes as well as prosaic political strategizing and coalition building played major roles” in acceptance of APA (at 183). The main evidence offered is that New Deal supporters were more likely to oppose Walter-Logan in

Nor is it plausible to see the APA as a merely superficial gesture toward (which disguised a substantial retreat from) the ABA's demands in the 1930s.⁷⁴ The successive positions of individual participants seem to bely this. Carl McFarland, who joined the "minority" wing of the Acheson committee, had served the New Deal as Assistant Attorney General only a few years before – and would then serve in a senior position in ABA's administrative law section a few years later. He pronounced the final version of the APA in 1946 as satisfying the ABA's main concerns.⁷⁵

Larger political trends seem to confirm the same view. Republican majorities gained control of both houses of Congress only a few months after enactment of the APA. They did impose new controls on the National Labor Relations Board in the Taft-Harley Act, which they sustained against President Truman's veto. They did not seek to alter the terms of the APA. Nor did they seek to do so after the 1952 elections, when renewed Republican congressional majorities could rely on a Republican president not to threaten a veto on wider measures. A dozen years later, Democrats won commanding majorities in both houses of Congress, while a Democratic president supported legislation to establish new regulatory agencies and programs. No one seems to have thought it would be logical to protect or enhance them by rewriting the APA.

This subsequent history undermines the notion that the APA was, at the time, a painful compromise between supporters and opponents of the New Deal. Another, related reason is that liberals and conservatives – or regulatory enthusiasts and regulatory skeptics – have changed sides on many fundamental elements of regulatory control. New Dealers preached trust in agency expertise but liberals of the 1960s and 70s urged distrust and the need for courts to ensure agencies took a "hard look" at policy alternatives. Conservatives who saw courts as essential guarantors for the rule of law in the 1930s were, by the 1980s, preaching the need for judicial restraint and deference to agency expertise (as in the *Chevron* doctrine). Conservatives had distrusted presidential authority in the 1930s and often embraced it with enthusiasm in the 1970s and 80s. Particular institutional arrangements do not have settled political valiance as the surrounding political context changes – something which would no doubt have occurred to members of Congress in 1946.

Still, changes over time do confirm that the APA did not settle all that much by its own terms. Its drafters would not have been surprised by that. One of the

1940 but there were fewer of them by 1946 – which might explain why *they* were more open to compromise by but not why their opponents were, still less why the compromise stuck.

⁷⁴ Shapiro, *APA*, 72 Va. L. Rev. 447 (1986) (end)

⁷⁵ Grisinger, *Law in Action*, 407

ways the enacted text of the APA does embrace the spirit of the Acheson Committee's Report (apart from its adoption of many particular proposals) is its acknowledgement that there cannot be the same rule for all agencies or all programs or functions. The text repeatedly recites exceptions or acknowledges cross-cutting statutory directives for particular settings.⁷⁶ The APA reads like the handiwork of lawyers, always mindful of exceptions and possible complications.

The APA has been called “the Constitution of the Administrative State.”⁷⁷ That is surely misleading in important ways, not least because the APA was not meant to displace the original Constitution which still outranks it and occasionally overshadows it. There is also this difference: unlike the original Constitution, the APA does not start with a stately Preamble, reciting its underlying aims.

That is, in fact, another departure from the proposals of the Acheson committee and perhaps a telling one. The minority was particularly emphatic on this point. They urged that a reform statute should “identify the few basic considerations and express them in legislative statements of policy, of principles or of standards for the guidance of administrators ...” They noted that statutes commonly included such generalized statements of policy, then echoed Dean Pound's warnings against a reversion to unbounded government: “To say that man can be so governed but that agents of the state cannot or should not be so governed, is a recognition of rejected forms of government.”⁷⁸ So their proposed bill begins with this “Declaration of general policy”:

The exercise of all powers of government through administrative

⁷⁶ E.g., §553(a) – exceptions for “military or foreign affairs functions” and “agency management, personnel, public property, loans, grants, benefits or contracts”; §554(a) – exceptions for (among others) “selection or tenure of an employee, “conduct of military or foreign affairs functions,” “decisions [which] rest solely on inspections, tests or elections,” “certification of worker representatives,”

⁷⁷ See Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law*, 41 Wm. & Mary L. Rev. 1463, 1473 (2000) (footnote omitted) (“[A] number of commentators have likened the Administrative Procedure Act (APA) to a constitution”); see, e.g., Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 Va. L. Rev. 253, 253 (1986) (“My thesis is a simple one: the APA is more like a constitution than a statute.”); Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 Colum. L. Rev. 1, 90 (1998) (describing the APA as a “regulatory constitution”); Cynthia R. Farina, *On Misusing “Revolution” and “Reform”: Procedural Due Process and the New Welfare Act*, 50 Admin. L. Rev. 591, 626 n.189 (1998) (describing the APA as “constitution-like”); Keith Werhan, *The Neoclassical Revival in Administrative Law*, 44 Admin. L. Rev. 567, 583 n.115 (1992) (“In operation, the APA, particularly its provisions for judicial review, functions more like our Constitution than a statute.”). [THANKS TO JOEL NOLETTE, “END THE FAILED AUER EXPERIMENT” LEAST DANGEROUS BLOG, Mar 15, 2017] (SEE ALSO USAGE OF CASS SUNSTEIN)

⁷⁸ FINAL REPORT (Additional Views and Recommendations of Mssrs. McFarland, Stason and Vanderbilt), pp 214-15

officers and agencies, so far as such exercise affects rights or withholds or confers benefits or privileges, shall be conducted according to established and published procedures and practices which shall assure the adequate protection of such rights, the impartial conferring of authorized benefits or privileges and the effectuation of the declared policies of Congress and shall be adapted to the reasonable necessities and difference of legislation and subject matter involved.⁷⁹

Even the majority agreed to place a similar statement at the start of its own proposed bill.⁸⁰ It was a tacit acknowledgement of the concerns expressed by the American Bar Association in the 1930s on the need to reaffirm the “rule of law.” The drafters of the APA dispensed with such hortatory language. There is no general “Declaration of policy” in the APA.⁸¹ Perhaps it would not have made much difference in practice. But this absence left the central issue in the pre-war debate buried in the statute’s technical provisions on particular elements of procedure. That did not, of course, suppress the concern to protect rule of law.

One year after enactment of the APA, the Supreme Court had occasion to cite the authority of the Attorney General’s Committee. *SEC v. Chenery Corporation* (II),⁸² turned on the legality of an SEC ruling, requiring managers of a public utility holding company to surrender their personal holdings of stock in the company, though the Commission had neither issued a general rule on the subject nor indicated that its ruling derived from a general doctrine it would apply in future cases. In upholding the SEC’s decision, the Supreme Court cited the AG’s Committee for the claim that the administrative process requires flexibility. As it happened, the Court reached this conclusion only by overturning the contrary ruling of the D.C. Court of Appeals. That decision had been written by Chief Judge Groner, who had served on the Acheson Committee and sided with the minority.⁸³

⁷⁹ Id. p. 217 (Sec. 101)

⁸⁰ Id., p. 192 (Sec. 1)

⁸¹ There may be an echo of the proposed “Declaration of policy” in the APA provision authorizing reviewing courts to “hold unlawful and set aside agency action, findings and conclusions found to be ... arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law ...” §706(2)(A) It is characteristic that this appears as a detail at the end of the APA’s text rather than a clarion call at the outset.

⁸² 332 U.S. 194 (1947)

⁸³ *Chenery Corp v. SEC*, 154 F.2d 6 (D.C. Circ., 1946). Richard Epstein’s book, *DUBIOUS MORALITY OF ADMINISTRATIVE LAW* (2020), 165-66, praises Groner’s opinion for its confident and sensible reading of the relevant statute (“Groner’s view is no crabbed reading of the powers of the administrative state” but a recognition that administrative agencies should not twist words out of context to “make otherwise lawful conduct unlawful.”)

The Supreme Court ruling then provoked a scalding dissent from Justice Robert Jackson – who, as attorney general in 1941, had been the first recipient of the Acheson Committee Report. In his *Chenery* dissent, Jackson protested the Court’s decision in terms that might have gratified Roscoe Pound:

The Court’s averment concerning this order that ‘It is the type of judgment which administrative agencies are best equipped to make and which justified the use of the administrative process’ is the first instance in which the administrative process is sustained by reliance on that disregard for law which enemies of the process have always alleged to be its principal evil. It is the first encouragement this Court has given to conscious lawlessness as a permissible rule of administrative action. This decision is an ominous one to those who believe that men should be governed by laws that they may ascertain and abide by, and which will guide the action of those in authority as well as of those who are subject to authority.⁸⁴

Justice Jackson ended his report with a reminder of his past support for “fostering the administrative process.” He did not need to say he had supported the New Deal, both at the Justice Department (as Solicitor General, then Attorney General) and as Supreme Court justice.

The debate about the rule of law in the formative period of the APA was not simply nor primarily a debate about whether to encourage or resist particular regulatory programs. It was not simply nor primarily about such issues (discussed in the Acheson Report) as presidential oversight or judicial review or procedures for rule-making. The debate was principally about reconciling administrative authority with the rule of law. None of those most engaged by this debate in the 1930s – at least on the side of critics – would be surprised to find that this debate is still with us. The rule of law is a challenging and disputed ideal. But it was surely more than a mere slogan.

One way in which the Administrative Procedure Act does justify the term “constitution of the administrative state” is that we still argue about what it requires and what it allows – as we do with the more authoritative Constitution. Part of the reason is that proposals that were rejected in 1946 remained in the stream of debate – or at least, in the logic or repertoire of regulatory reform proposals. Formulas affirmed in the APA sometimes proved inadequate to satisfy ongoing impulses – as with the review provision for persons “adversely affected or

⁸⁴ 332 U.S. 194 at . Compare Roscoe Pound, *Place of the Judiciary* (at 134): “... we are told that ... not to leave administrative agencies at large in this way is technical legalism. Note what it is that is thus stigmatized. It is legalism to require such tribunals to keep within the limits of their jurisdiction and powers given them by the statute creating them. It is legalism to require them to take the policies they apply from the Act of Congress under which they sit and not from their own ideas of particular cases.”

aggrieved within the meaning of the relevant statute”⁸⁵ The APA sought to settle no more than seemed necessary at the time. That has probably helped explain its durability. The APA aimed at more than its drafters could agree upon at one time. That does not mean they were simply negotiating a partisan truce in a set of partisan disputes about contending policy priorities.

⁸⁵ §702: *Association of Data Processing Service Organizations v Camp*, 397 U.S. 150 (1970) and ongoing debates over the meaning of “aggrieved within the meaning of the relevant statutes”