

# STATUTORY REFORM OF THE ADMINISTRATIVE PROCESS: THE AMERICAN EXPERIENCE AND THE ROLE OF THE BAR

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*In 2004, the Japanese government was completing a restructuring of its judicial review system and was looking forward to a follow-up round of legislative activity to reform its administrative procedures. I was asked to speak to the Japan American Society for Legal Studies about the American experience with administrative law reform at the congressional level. In particular, I was asked to discuss the role that administrative lawyers have played in these legislative deliberations. The result was the following presentation, which has been slightly edited for American publication. I hope it will appeal to American readers who may be interested in a quick overview of regulatory reform debates in Congress over the past sixty years.*

## INTRODUCTION

I am pleased to have this opportunity to speak to you about statutory reform of the administrative process—a topic that has interested me from the earliest days of my academic career, as I will explain. In this talk, I will try to highlight the role that administrative lawyers have played in promoting, or sometimes resisting, legislative changes. I will also try to analyze why some reform efforts have succeeded and others have failed.

Before I get into details, let me articulate two broad reasons why an administrative reform effort may be unsuccessful. The first is that it may be too ambitious. To appreciate this possibility, think about some of the reasons why an overly ambitious effort may be launched in the first place. Remember that the American system of separated powers of government is very different from a parliamentary system such as Japan's. Either or both of the Houses of Congress can be controlled by a party that is different from the President's party. Moreover, even when the same party

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1. Henry Hitchcock Professor of Law, Washington University in St. Louis. I am grateful for the assistance of Professors Takehisa Nakagawa and Setsuo Hiyama in making the arrangements for my presentation to the (JASLS) and related events. I was particularly gratified to have the opportunity to appear on a program together with my sometime translator, Professor Takayoshi Tsuneoka. *See* ERNEST GELLHORN & RONALD M. LEVIN, *ADMINISTRATIVE LAW AND PROCESS IN A NUTSHELL* (3d ed. 1990), published in translation as *GENDAI AMERIKA GYOSEI HO* (Keikichi Ohama & Takayoshi Tsuneoka trans., 1996).

controls Congress and the White House, legislative leaders often pursue an agenda that is different from the President's agenda. Indeed, an energetic group of legislators can actively promote a bill, and sometimes succeed in getting it enacted, without the support of their own party leaders.

In the administrative law field, disagreements within the government about proposed legislation can be intensified by the fact that the executive branch is usually the actual target of the measures being considered. Thus, arguments about administrative law reform may reflect philosophical differences, but they also are often fueled by the eternal competition for power between the executive and legislative branches. Proposals in Congress that have a distinctly anti-agency flavor can often gain quite a bit of momentum, notwithstanding the vigorous opposition of the executive branch. In general, however, when an administrative reform movement is perceived as making a fundamental assault on agencies' effectiveness, it triggers strong defensive moves by supporters of regulation, resulting in stalemate.

The second major reason why an administrative reform may fail is that it can be regarded as unnecessary. As a matter of fact, statutory reform of administrative law in our system is a fairly rare phenomenon. In saying this, I do not at all mean to say that our regulatory system has been static. On the contrary, it has undergone dramatic evolution in a number of respects in recent decades. What I do mean to say is that much, probably most, of this evolution has occurred through nonstatutory means, including decisions reached by the courts, executive orders issued by the President, and regulations and guidelines developed by agencies themselves. Legislative action is difficult to obtain in our country, and reformers often view it as a last resort. In short, the question of whether Congress should legislate is often not a question of whether change should occur at all, but instead a question of whether statutory action is needed as a vehicle for reform.

With these observations in the background, I will offer you a quick historical tour of statutory reform of American administrative law in the modern era. For purposes of exposition, I will divide my narrative into four phases:

— The first phase, which I will call the Era of Codification, is the period that culminated in the enactment of our Administrative Procedure Act<sup>2</sup> (APA) in 1946. The APA approximately corresponds to the Japanese

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2. Pub. L. No. 79-404, 60 Stat. 237 (codified as amended at 5 U.S.C. §§ 551–59, 701–06, 1305, 3105, 3344, 5372, 7521 (2000)).

Administrative Procedures Law<sup>3</sup> and Administrative Case Litigation<sup>4</sup> Law combined.

— The second phase, which I will call the Era of Consolidation, began in the late 1940s and lasted for about two decades. This was a period in which administrative lawyers gradually became reconciled to the limited nature of what the APA had accomplished.

— The third phase, which I will call the Era of Adaptation, extended through roughly the 1960s and 1970s. During this period, administrative lawyers and Congress worked in partnership on a variety of reform measures, recognizing that new challenges in the regulatory state called for elaboration and alterations in the APA framework.

— Finally, the fourth phase, which I will call the Era of Disillusionment, began around 1980 and has lasted until the present day. The most prominent reform activities during this period have been led by business interests and their political allies. These movements have been driven by an underlying mood of disenchantment with the progressive approach to regulation that prevailed during the earlier periods. The administrative law bar has largely resisted these reform initiatives, although it has also worked constructively with Congress on forward-looking enactments in specialized areas.

These neat chronological divisions are imperfect. There was, in fact, a good deal of overlap among the four eras. I will try to explain the limitations of the model during my exposition. But still, the trajectory of developing attitudes has conformed fairly well to the transitions I have just described, and this simplified model will provide a vehicle that will enable me to tell a coherent story. As I have hinted, administrative lawyers have had their greatest success in promoting statutory reform during the third phase.

#### THE ERA OF CODIFICATION

I will turn first to the Era of Codification. As I mentioned, the defining feature of this period was the protracted legislative struggle that led to adoption of the Administrative Procedure Act in 1946.<sup>5</sup> In the 1930s, Congress created a number of new administrative agencies to address the hardships of the Great Depression. In doing so, Congress was following

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3. Gyosei tetsuzuki ho [Administrative Procedures Law], Law No. 88 of 1993.

4. Gyosei jiken soshō ho [Administrative Case Litigation Law], Law No. 139 of 1962.

5. The following account draws heavily on George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996).

the leadership of President Franklin D. Roosevelt, whose progressive political platform had come to be known as the New Deal. During the early Roosevelt years, conservative business interests that felt threatened by New Deal programs assumed, with good reason, that they would be shielded by the conservatively minded courts. In 1937, however, decisions of the Supreme Court signaled that it would not invoke the Constitution to invalidate the New Deal in its entirety.<sup>6</sup> Accordingly, business interests turned to Congress.

At that time, the American Bar Association strongly supported the conservatives' effort to rein in New Deal agencies. The ABA had appointed a deeply conservative Special Committee on Administrative Law. Its members viewed the agencies with great suspicion. One reason was that those agencies threatened the material interests of their corporate clients. Another reason was that the procedures of these agencies were more informal than those of the regular courts, with which bar members were more comfortable. Moreover, many administrative lawyers of the day believed that the combination of executive, legislative, and judicial functions in a single agency could lead to autocracy or Marxism, and perhaps even to dictatorships like those emerging at the time in Europe.<sup>7</sup>

Over a period of several years, the ABA Special Committee drafted a series of bills to regulate the administrative process and found sympathetic legislators who were willing to introduce them into Congress. The most important of these proposals came to be known as the Walter-Logan bill. It provided for public hearings in rulemaking proceedings, for trial-type hearings conducted by appeal boards within the agencies themselves, and for broadly available judicial review.<sup>8</sup> Members of the opposition Republican Party in Congress supported the bill, and so did conservative members of the President's own party, the Democrats. On the other hand, the President strenuously opposed the bill, as did those Democratic legislators who were devoted to New Deal programs. Ultimately, the bill did pass in Congress in 1940, but President Roosevelt exercised his veto to disapprove the bill. The House of Representatives was unwilling to defy the President, who had just been re-elected. Supporters of the bill could

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6. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

7. See Shepherd, *supra* note 5, at 1591–93; G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 116–27 (2000) (emphasizing constitutional objections).

8. Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 271–72 (1978).

not muster the two-thirds vote needed to override Roosevelt's veto. Thus, the Walter-Logan bill did not become law.

After this defeat, the ABA decided to scale back its objectives. It replaced the very conservative members of its Special Committee with more moderate lawyers, and it began to seek a compromise.<sup>9</sup> For example, the ABA became less insistent on expanding judicial review of agency actions, in part because the courts were increasingly dominated by liberal judges appointed by Roosevelt.<sup>10</sup> Meanwhile, the administration came to understand that the public saw a need for and expected some reforms. When Roosevelt died, the new President, Harry S. Truman, was even more amenable to reform legislation.<sup>11</sup>

In a new spirit of cooperation, the ABA Special Committee submitted a revised draft bill. The bill became the basis for extensive negotiations involving the Special Committee, congressional leaders, and lawyers from the Department of Justice. These discussions led directly, after much maneuvering, to the final text of the APA. The bill spelled out in detail the features of an administrative hearing in order to ensure minimal procedural protection for regulated interests. But the bill also accommodated government concerns, because it provided that any given agency must comply with these requirements only if its enabling statute required it to grant the APA hearing. For many rulemaking proceedings, only a simple "notice and comment" procedure would be required.<sup>12</sup> The bill recognized a general principle that agency action should be subject to judicial review, but the negotiators chose to leave an ambiguity as to the extent, if any, to which the bill went beyond existing judicial review principles.

Ultimately, Congress enacted the APA by a unanimous vote, although historians tell us that not many of the participants in this protracted struggle were very enthusiastic about the final product.<sup>13</sup> Progressives were wary of its burdens but supported it anyway, because the administration and agencies had indicated that they could live with the bill's modest requirements. Conservatives were disappointed at not having achieved more, but they reluctantly supported the APA because they had come to believe that a moderate bill was the most they could attain at that time.

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9. Shepherd, *supra* note 5, at 1645–47.

10. *Id.* at 1644.

11. *Id.* at 1641–43, 1647–48, 1658–59.

12. *See* 5 U.S.C. §§ 553(b)–(d) (2000).

13. Shepherd, *supra* note 5, at 1678–81.

## THE ERA OF CONSOLIDATION

The enactment of the APA led directly to what I call the Era of Consolidation. This was a period of great stability. For more than two decades, Congress showed very little interest in revisiting the core provisions of the Act that it had taken so long to adopt.

I do not mean to suggest that no one tried to reopen the debate. On the contrary, the ABA remained actively engaged in doing exactly that. In 1946 the ABA reorganized the Special Committee and gave it a new name—the Section of Administrative Law. Leaders of the Section believed that the Administrative Procedure Act had not gone far enough. In 1956, a committee of the Section proposed that the APA should be repealed and replaced by what the committee called a Code of Federal Administrative Procedure.<sup>14</sup> The changes contemplated by this Code would have been dramatic. Under its provisions, more regulations would have been issued through formal hearings, adjudicative hearings would have been conducted using the same rules of evidence as are used in the courts, and all agency actions would have become reviewable in court unless a statute prescribed otherwise.<sup>15</sup> In short, the ABA's reform agenda at this time was similar, at least in its general thrust, to some of the measures that the ABA had unsuccessfully sought during the struggles over the original APA.

A bill that incorporated the principles of the Code was introduced in Congress in 1959.<sup>16</sup> The federal administrative agencies, however, had not participated in the drafting of this bill, and they vigorously objected to it.<sup>17</sup> The bill made no progress in the legislature. Congressional supporters later rewrote the bill as a set of proposed amendments to the APA. The revised version passed one House of Congress in 1966 but advanced no further.

Finally, the ABA decided that the Code proposal was politically infeasible and abandoned it. After further deliberation, the association endorsed, in 1970, a less ambitious package of twelve recommendations for amendments to the APA.<sup>18</sup> Yet even this modest package achieved little success. Only one of the twelve recommendations was ever

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14. The following account is based primarily on Cornelius B. Kennedy, *Foreword: A Personal Perspective*, 24 ADMIN. L. REV. 371, 372–81 (1972).

15. 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 1.04 at 32 (1st ed. 1958).

16. S. 1070, 86th Cong. (1959), reprinted in *Landmarks Along the Way*, 24 ADMIN. L. REV. 412 (1972).

17. 1 DAVIS, *supra* note 15, at 26.

18. *The 12 ABA Recommendations for Improved Procedures for Federal Agencies*, 24 ADMIN. L. REV. 389 (1972).

enacted—a prohibition on off-the-record meetings between agency decisionmakers and private persons who have an interest in a proceeding.<sup>19</sup>

Why were these ABA initiatives so unsuccessful? Observers in the United States have offered a variety of reasons.<sup>20</sup> The opposition of the bureaucracy was certainly one contributing factor. In addition, some believe that the issues involved were obscure and did not hold much inherent interest for politicians, compared with other items on their legislative agenda. I would also suggest that, in hindsight, there was little need for reforms of the kind that the ABA favored. The essence of those reforms was to make formal administrative proceedings look more like judicial proceedings, and over time that prescription has come to seem more and more obsolete. The judgment of history has been that the 1946 APA reached a basically sound reconciliation of competing considerations on those issues, and the reformers were not able to demonstrate a very urgent need to improve on that compromise.

#### THE ERA OF ADAPTATION

Meanwhile, the underlying realities of administrative law practice were changing. For example, new substantive legislation was being passed. New agencies were created to enable government to protect consumers from dangers to their health, their safety, and their pocketbooks. To implement these new responsibilities, agencies turned increasingly to rulemaking.<sup>21</sup> Adjudicative decisionmaking, which had received so much attention from the ABA's reformers, was losing its prominence.

The question on many minds was whether these and other new realities of administrative law called for new legislation—laws that would take account of developments that the drafters of the 1946 statute had not foreseen. In a number of cases, administrative lawyers reached a consensus in favor of change, and the result was the enactment of reform statutes to update and supplement the APA. This was the defining theme of the third era, the Era of Adaptation.

To be candid, however, I must admit that my effort to divide the modern history of statutory reform into four discrete periods does not work very well in this instance. It would be more accurate to say that the

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19. Pub. L. No. 94-409, § 4(a), 90 Stat. 1246 (1976) (codified at 5 U.S.C. § 557(d) (2000)).

20. See, e.g., William H. Allen, *The Durability of the Administrative Procedure Act*, 72 VA. L. REV. 235, 242–47 (1986).

21. Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139, 1147–48 (2001).

second and third periods overlapped. The decade of the 1960s should be seen as both the tail end of the Era of Consolidation and the beginning of the Era of Adaptation.

Beginning during this period, the ABA did not have to serve as the only prominent forum for dialogue and consensus-building among lawyers about administrative law reform. In 1964, after experience with a series of temporary entities, Congress created a new long-term institution within the government to address these issues—the Administrative Conference of the United States (ACUS). The Conference was, in fact, a partnership between the government and the private sector. Its 75 to 100 members were drawn primarily from the agencies, but practitioners and academics were well represented. ACUS made periodic recommendations to Congress, the courts, and the agencies themselves about ways to improve the administrative process. It also maintained a small permanent staff to support its advisory and coordinating functions.

Let me give you several examples of the reform laws that Congress passed during this period, with the ABA and ACUS serving as voices for the administrative law community. In 1966, Congress enacted the Freedom of Information Act (FOIA).<sup>22</sup> This law was a complete overhaul of section 3 of the original APA, the public information section. Although section 3 nominally provided for publication of agency rules, policy statements, and other important government documents, studies by the ABA and others demonstrated that it had not been effective.<sup>23</sup> The new law clarified this requirement and added new sanctions for noncompliance. More importantly, FOIA provided that any government document that the agency was not required to publish on its own must nevertheless be released to “any person” on request, unless the document fell within any of nine exemptions spelled out in the Act.<sup>24</sup> Furthermore, if the government did not comply with such a request, the requester would be entitled to file suit in a federal court, and the government would have the burden of justifying its failure to disclose the information.

FOIA was adopted primarily as a result of the advocacy of a congressional subcommittee chairman, aided by strong support from news organizations, which expected to benefit from the reform.<sup>25</sup> The executive branch was not enthusiastic about the extra work that the new law was

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22. Pub. L. No. 89-554, 80 Stat. 383 (codified as amended at 5 U.S.C. § 552 (2000)).

23. See 1 JAMES T. O'REILLY, *FEDERAL INFORMATION DISCLOSURE* § 2.2 at 8 (3d ed. 2000).

24. 5 U.S.C. § 552(b) (2000).

25. See HERBERT N. FOERSTEL, *FREEDOM OF INFORMATION AND THE RIGHT TO KNOW: THE ORIGINS AND APPLICATIONS OF THE FREEDOM OF INFORMATION ACT* 39–42 (1999).



expected to create, not to mention the greater accountability that is inherent in a disclosure statute. The government managed to get some of the exemption provisions clarified to meet its needs, but it did not openly oppose enactment of the bill. In fact, government compliance with the Act has proven to be much more expensive than most of its supporters realized.<sup>26</sup> Disagreements about the scope of the exemptions have also generated much litigation, as well as occasional corrective amendments by Congress. Undoubtedly, however, the broad availability of information that FOIA has brought about has had an important and beneficial impact on the openness of government operations.

A similar piece of legislation was the Government in the Sunshine Act,<sup>27</sup> adopted in 1976. It complemented FOIA by establishing a general requirement that administrative bodies (other than bodies that are headed by a single administrator) must conduct their meetings in open session. The Act contains a series of exemptions like those found in FOIA.<sup>28</sup>

The organizations of administrative lawyers did not play a prominent role in the enactment of the statutes that I have just mentioned, but they did take the lead in advocating another statute that Congress adopted in 1976. This law brought about a partial abolition of the ancient doctrine of sovereign immunity.<sup>29</sup> This doctrine, which the United States had inherited from early English law, asserted that the government may not be sued without its consent. The doctrine had never been applied literally, but some cases did enforce it. The results of those cases seemed unjust to many observers. Moreover, cases in which courts decided whether the government had consented to suit in particular situations were unpredictable and poorly reasoned.

The ABA and ACUS, working in partnership, each issued recommendations advocating legislative abolition of sovereign immunity.<sup>30</sup> Congress adopted almost the exact language that the two organizations had proposed. One reason for the success of the reform is that the Department of Justice also endorsed it. At the time, the Justice Department was represented on this issue by an assistant attorney general, Antonin Scalia, who is now a distinguished Justice of the United States Supreme Court. Justice Scalia had earlier served as the chairman of ACUS

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26. Antonin Scalia, *The Freedom of Information Act Has No Clothes*, REGULATION, March/April 1982, at 15.

27. Pub. L. No. 94-409, § 3(a), 90 Stat. 1241 (codified as amended at 5 U.S.C. § 552b (2000)).

28. 5 U.S.C. § 552b(c) (2000).

29. Pub. L. No. 94-574, § 1, 90 Stat. 2721 (codified in relevant part at 5 U.S.C. §§ 702, 703 (2000)).

30. 95 ABA ANN. REP. 342 (1970); ACUS Recommendation 69-1, 1 A.C.U.S. 23 (1969).

and had also written about sovereign immunity issues as a law professor. Another factor that helped to secure the government's support was that the bill was carefully limited in its scope. For example, it applied only to lawsuits in which the plaintiff sought to force the government to cease unlawful conduct for the future. Suits for money damages were excluded from the legislation. (There are, however, other statutes that grant the government's consent to be sued for damages in some, but not all, circumstances.)

At the same time, Congress enacted another judicial review reform bill that had been proposed by ACUS.<sup>31</sup> This measure allowed a plaintiff to bring suit against the United States without having to allege that the value of the matter in controversy exceeded a specific minimum dollar amount, as had previously been required in many circumstances.

#### THE ERA OF DISILLUSIONMENT

##### *The 1978–82 Regulatory Reform Bill*

As the 1970s drew to a close, it appeared likely that this series of legislative developments would culminate in a major “regulatory reform” bill that would make significant revisions in the APA. The slogan “regulatory reform” had become popular with politicians of both parties. A bill pending in Congress would have prescribed a variety of changes in the APA.<sup>32</sup> Some provisions would simply have codified practices that had already become common, such as the practice of incorporating all materials pertaining to a given rulemaking proceeding into an organized “rulemaking file.” A limited set of procedures for holding hearings on important contested issues in rulemaking would also have been codified. Furthermore, various exemptions from rulemaking procedure would have been repealed, as recommended by the Administrative Conference. Although the ABA had not originated the bill, it cooperated in this congressional initiative. Representatives of the Administrative Law Section spent much time commenting on the bill's proposals and suggesting additional language.

The regulatory reform drive of 1978–82 did not succeed, however, and I would like to note some of the reasons why it did not. At that time, many citizens and their elected representatives were becoming highly

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31. Pub. L. No. 94-574, § 2, 90 Stat. 2721 (1976) (current version at 5 U.S.C. § 1331 (2000)); ACUS Recommendation 68-7, 1 A.C.U.S. 22 (1968).

32. See S. 262, 96th Cong. (1979), summarized in S. REP. 96-1018, 96th Cong. (1980).

disenchanted with government. This development was best symbolized by the election of Ronald Reagan to the presidency in 1980, as the candidate of the Republican Party. One of the main themes of President Reagan's campaign was a pledge to "get the government off the backs of the American people." Not only was his anti-regulatory message a symptom of broad dissatisfaction with administrative agencies, but his electoral victory also gave further impetus to that sentiment by bringing into the government many officials who shared his philosophy. Party control of the Senate shifted from the Democrats to the Republicans. As a result of this shift in attitudes toward government, among both the public and its representatives, what I call in this paper the Era of Disillusionment was under way.

Against this background, I can summarize briefly what happened to the regulatory reform movement. It had begun as a vehicle for relatively modest reforms. Among its sponsors were progressives who were largely comfortable with traditional regulatory methods, although interested in pushing the system somewhat in the direction of deregulation. Over time, however, the legislative package changed, as proponents of regulatory reform added more drastic provisions to it—provisions driven by the anti-government ideology that had come into vogue. For example, some of the bills specified that the Office of Management and Budget, an arm of the White House, must closely supervise the agencies in their preparation of cost-benefit analyses, and that a congressional committee should be able to delay the effective date of a new rule if the committee wanted to give the full Congress an opportunity to nullify the rule.<sup>33</sup>

Individually, these provisions might not have triggered much resistance. In their totality, however, they were perceived by Democrats, and their supporters, as much too hostile to regulation. Thus, in the end, although the leading bill had majority support in both the Senate and the House of Representatives, Democratic leaders in the House resorted to procedural maneuvers during the closing weeks of 1982 to prevent it from passing.<sup>34</sup> This sequence of events is a good example of the situation I mentioned at the beginning of my talk: a reform movement that failed because it was too ambitious.

Another noteworthy aspect of the regulatory reform drive of 1978–82 is that administrative lawyers were not at the forefront of it. They did play a role, but support for the measure came primarily from business groups

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33. H.R. 746, 97th Cong. (1981), summarized in H.R. REP. 97-435, 97th Cong. (1982).

34. *Prospects for Regulatory Reform Legislation*, AD. L. NEWS, Summer 1983, at 3.

that were complaining loudly about “overregulation.” (Of course, these groups typically spoke through lawyers who represented that specific constituency.) These groups were especially upset about what they regarded as costly and burdensome regulations issued by agencies such as the Environmental Protection Agency and the Occupational Safety and Health Agency.

This feature of the reform movement was the subject of an interesting essay written in 1981 by the future Justice Scalia, who at the time was a professor and was also the Chairman of the ABA Administrative Law Section.<sup>35</sup> He observed that, whereas the original APA was “preeminently lawyers’ legislation,” the impetus behind the current movement was “more commercial or economic.” He did not find this development altogether reassuring. As he wrote, “[t]he interest of the laity in administrative process, which now seems so flattering, may prove to be a bane.”<sup>36</sup>

One additional provision of the bill reflected very active involvement of the ABA, although in a most ironic way. I will explain the circumstances in detail, because they grew out of my own first project for the ABA. Senator Dale Bumpers, from the state of Arkansas, had offered an amendment to the APA to reduce drastically the degree of deference that courts display toward administrative agencies during judicial review. In 1979, as a young attorney in a law firm, I wrote a report for the Administrative Law Section criticizing the Bumpers Amendment.<sup>37</sup> The governing Council of the Section unanimously endorsed a resolution opposing the amendment and forwarded it to the ABA House of Delegates. But the House adopted an exactly contrary resolution—one that *favored* the Bumpers Amendment.<sup>38</sup> Obviously, anti-regulatory sentiment was strong in the ABA at that time. The bar’s endorsement gave impetus to the amendment, which then was incorporated into the various regulatory reform bills pending in Congress.

Although the leaders of the Administrative Law Section were not enthusiastic about these developments, the vote of the House of Delegates meant that they were obliged to support the Bumpers Amendment. Therefore, they worked cooperatively with congressional leaders to revise the amendment into less radical form. Although these consultations did

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35. Antonin Scalia, *Chairman’s Message*, 33 ADMIN. L. REV. v (1982).

36. *Id.* at x.

37. David R. Woodward & Ronald M. Levin, *In Defense of Deference: Judicial Review of Agency Action*, 31 ADMIN. L. REV. 329 (1979).

38. See Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1, 6 & n.29 (1985).

result in some improvements to the text of the amendment, the administration, ACUS, and many congressional Democrats were strongly opposed to the Bumpers Amendment, and this opposition contributed to the collapse of the legislative package.

### *The 1995 Regulatory Reform Bill*

Over the next dozen years, ideological conflict over regulatory policy continued, but the issue of revision of the APA was not actively pursued. That issue came back to life, however, in 1995, just after the Republicans regained control of Congress in the 1994 elections. The new congressional leaders were committed to a platform of sharply reducing the scope of federal regulation. After quickly pushing through a few minor measures reflecting that goal, they turned to an ambitious bill to amend the APA extensively. It was to be called the Comprehensive Regulatory Reform Act.<sup>39</sup>

Had it been enacted, the Act would have brought about a considerable departure from the purely procedural nature of the current APA. It would have inserted provisions that were openly designed to promote substantive goals.<sup>40</sup> For example, the bill would have required that, when an agency wanted to issue a “major” rule, it would have to give specific consideration to alternative approaches such as “performance-based standards” and “market-based mechanisms.” Furthermore, the agency would have been required to select the “least cost alternative” approach to achieving statutory goals. The bill also set forth detailed criteria for conducting cost-benefit analyses and risk assessments, and it made the agency’s compliance with these criteria judicially reviewable, which is not the practice now.

To a large extent, therefore, the controversy over this legislative proposal became a focal point for one of the major ideological divisions of the time. That observation is borne out by the identities of some of the prominent leaders who played active roles in the legislative debate. One principal sponsor of the bill was Senator Robert Dole, the Senate majority leader. In the following year, 1996, he became the Republican Party’s nominee for the U.S. presidency. On the other hand, one spokesman for

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39. S. 343, 104th Cong. (1995).

40. Ronald M. Levin, *Administrative Procedure Legislation in 1946 and 1996: Should We Be Jubilant at This Jubilee?*, 10 ADMIN. L.J. AM. U. 55, 57–59 (1996).

the opponents of the bill was Senator John Kerry, who later became the Democratic Party's nominee in the 2004 presidential election.<sup>41</sup>

Ultimately, history repeated itself. The 1995 bill met the same fate as the 1978–82 proposals on regulatory reform. Environmental groups and other citizen groups that favored strong regulation lobbied forcefully against the proposed legislation. Legislative opponents, mostly Democrats, used the Senate's parliamentary rules to prevent the bill from becoming law, even though the Democrats were the minority party at the time.<sup>42</sup> Once again, an administrative reform bill with strong ideological overtones led to polarization and finally to stalemate.

Another way in which the 1995 controversy resembled the previous regulatory reform effort is that the pressure to pass the reform bill came primarily from the business community, a key Republican constituency, rather than from the organized bar.<sup>43</sup> Indeed, the voice of the ABA was rather indistinct in this debate, largely because of the association's own internal divisions. The Administrative Law Section had reservations about many provisions of the bill, but some members of the Section of Business Law were strong supporters of the legislation. The ABA's ambivalence tended to make it a less forceful presence in this controversy than it had been in some past reform controversies.

The prominence of business interests in promoting legislation on administrative law has continued to the present day. A recent example is the Information Quality Act, adopted in 2000, which allows private interests to petition an agency to obtain correction of information that the agency has disseminated.<sup>44</sup> The Act came about because an industry lobbyist induced a friendly legislator to insert its language into a lengthy spending bill.<sup>45</sup> Almost no one knew the provision was there, and it became law with no real scrutiny by agencies or the public. The long term lesson is that, in the United States, administrative lawyers will probably continue to have to share the reform stage with economic interest groups that have much greater political influence in Congress. As Justice Scalia

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41. See *MacNeil/Lehrer Newshour: Changing the Rules* (PBS television broadcast July 17, 1995) (transcript available at LEXIS, News Library, Newshr File).

42. Bob Benenson, *Procedural Overhaul Fails After Three Tough Votes*, 53 CONG. Q. 2159 (1995).

43. Levin, *supra* note 40, at 57.

44. Pub. L. No. 106-554, § 515, 114 Stat. 2763 (2000).

45. Rick Weiss, "Data Quality" Law is Nemesis of Regulation, WASH. POST, Aug. 16, 2004, at A1.

said in the essay I mentioned, these groups believe that sometimes “the politically simplest way to alter substance is to alter process.”<sup>46</sup>

Getting back to 1995, one of the most distressing legislative moves of that year, from the standpoint of the administrative law community, was Congress’s decision to terminate the Administrative Conference of the United States. Several factors contributed to this regrettable decision.<sup>47</sup> The new Congressional leadership wanted to show that it could “shrink the size of government” with the symbolic statement of eliminating at least a few agencies. Moreover, some ACUS recommendations had offended the organized associations of administrative law judges—the officers who conduct hearings in many agency adjudications. Some of the aggrieved members of these organizations had contacts in Congress and encouraged the trend toward elimination of the Conference. More fundamentally, the termination of ACUS was a sign of the apparent lack of importance that legislators ascribed to serious deliberations on administrative reform. However, this setback seems to have been only temporary. Recently, after the oral presentation of these remarks, Congress approved legislation to bring ACUS back to life,<sup>48</sup> although it has not yet appropriated funds to pay for the revived agency.

#### CONCLUSION

I have painted a relatively bleak picture about legislative reform efforts during the past twenty years, and I do not want to overstate my argument. Even despite the trends that I have been describing, some statutory improvements have made their way through Congress—generally in specialized subject areas that are less likely to be ideologically charged or controversial. For example, Congress adopted by consensus a set of statutes to guide the use of negotiation and alternative dispute resolution in administrative proceedings.<sup>49</sup> In effect, it has responded to some of the “collaborative governance” themes that Professor Freeman discusses in her presentation. In his commentary, Professor Lubbers has more to say about these laws and their implementation. Congress also has recently legislated to update the Freedom of Information Act in light of the new

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46. Scalia, *supra* note 35, at x.

47. See Gary J. Edles, *The Continuing Need for an Administrative Conference*, 50 ADMIN. L. REV. 101, 127–32 (1998).

48. Federal Regulatory Improvement Act of 2004, Pub. L. No. 108-401, 118 Stat. 2255 (2004).

49. Negotiated Rulemaking Act, Pub. L. No. 101-648, 104 Stat. 4970 (1990) (codified at 5 U.S.C. §§ 561 et seq. (2000)); Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2738 (1990) (codified at 5 U.S.C. §§ 571 et seq. (1990)).

issues posed by electronic communications.<sup>50</sup> I could cite several other examples as well.

Moreover, the ABA Administrative Law Section continues to generate proposals for statutory reform. A current example is an elaborate proposal drafted by Professor Michael Asimow, my casebook co-author.<sup>51</sup> It would amend the APA to extend certain hearing rights to adjudicative cases that are now heard by presiding officers who are not administrative law judges. It is less fraught with ideological overtones than the rulemaking initiatives that I was discussing earlier. Accordingly, we have hopes that it will make real progress, although it is too soon to know for sure.

Despite these positive developments, the history that I have recounted tends to demonstrate a point that I made at the outset: statutory reform of administrative law in our system is a relatively rare event. Value conflicts and fears about policy consequences have often prevented legislative proposals from achieving success.

And yet, as I said, administrative law has in fact been quite dynamic during the past few decades, thanks to changes instituted by courts, the President, and agencies themselves.<sup>52</sup> A prominent example is the rulemaking process, which has undergone dramatic change without amendment of the controlling APA provision. One reason for the failure of the various bills that I have described is that much of what they sought has been achieved by other means. Executive orders issued by successive Presidents have prescribed cost-benefit principles that agencies routinely apply as they develop their most significant regulations.<sup>53</sup> Agencies themselves, acting on their own initiative or with encouragement from the presidential administration, have strengthened their analytical capabilities. Some, for example, have created internal offices with expertise in economic or other technical disciplines. Most importantly, the courts have forced changes in the rulemaking process by intensifying the scrutiny they give to administrative rules. To survive judicial review of an important rule, an agency will have to give a careful explanation of the justifications for the rule, maintain a record that contains evidentiary support for the

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50. Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048 (1996). See also E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899 (2002).

51. See Michael Asimow, *The Spreading Umbrella: Extending the APA's Adjudication Provisions to All Evidentiary Hearings Required by Statute*, 56 ADMIN. L. REV. 1003 (2004).

52. See Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 VA. L. REV. 253 (1986).

53. See Exec. Order 12,866, 58 Fed. Reg. 51,735 (1993), *superseding* Exec. Order 12,291, 46 Fed. Reg. 13193 (1981).



factual premises of the rule, and respond to significant criticisms presented in the rulemaking comments.<sup>54</sup>

A second example is judicial review. During the latter half of the twentieth century, barriers to obtaining judicial review were substantially relaxed—primarily as a result of the courts' own initiative.<sup>55</sup> Prior to this period of transformation, a plaintiff usually lacked standing to challenge an agency action in court unless he could show that the government had infringed an interest that the underlying law directly protected. Furthermore, the validity of a rule could not be challenged until the government brought an enforcement action to implement it. These are principles that Japanese lawyers would find at least somewhat familiar. But they have been abandoned in the United States. Now a plaintiff who has actually been injured by a government action has standing if he can demonstrate merely that his interests are generally compatible with the purposes of the statute. And a citizen can often obtain judicial review of a regulation as soon as it is promulgated. Yet, during this entire period of transformation, the text of the APA remained unchanged (except in regard to sovereign immunity). The innovations occurred because the courts changed their interpretation of the APA language, stimulated by academic commentary.

Indeed, some American scholars argue that statutory reform *should* be a last resort—a route to avoid except where absolutely necessary.<sup>56</sup> They argue that a more decentralized approach to reform allows for differences in the solutions that will be adopted in various government programs. In other words, an agency should be able to take advantage of its particular experience and expertise in fitting procedures to its specific problem areas. Also, the argument runs, a nonstatutory approach permits experimentation. Procedures that do not work out as intended can be revised with less effort than would be needed if those procedures were required by statute. If we accept this line of argument, there is a strong case for a broadly phrased, open-ended administrative procedure act, which allows for evolution through nonstatutory means.

I will close with a simple hypothesis for your consideration. Because of its different political structure, Japan is not likely to see its legislative and

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54. See JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 317–28 (3d ed. 1998) (summarizing principles for reviewing rules for abuse of discretion).

55. See Ronald M. Levin, *The Administrative Law Legacy of Kenneth Culp Davis*, 42 SAN DIEGO L. REV. 315, 338–43 (2005).

56. Craig N. Oren, *Be Careful What You Wish For: Amending the Administrative Procedure Act*, 56 ADMIN. L. REV. 1141 (2004); Sidney A. Shapiro, *A Delegation Theory of the APA*, 10 ADMIN. L.J. AM. U. 89, 106–09 (1996).

executive branches come into conflict in a manner that would be directly comparable to what I have described in the United States. Nevertheless, my country's experience may illustrate, in a dramatic and perhaps exaggerated form, some of the political hazards that could lie ahead as Japan pursues its own approaches to statutory reform of administrative law.