

Happy 75th Birthday, APA!

By: Susan E. Dudley | December 2, 2021

In brief...

The 75th anniversary of the Administrative Procedure Act provides an opportunity to reflect on the important role it has played in the development of the administrative state — and where we go from here.

The Administrative Procedure Act (APA) of 1946 celebrated a milestone birthday this year. Its requirements—that regulations be grounded in statutory law and an administrative record that includes public notice-and-comment—have guided executive branch rulemaking without significant amendment for 75 years. It is one of the most important and enduring pieces of legislation ever enacted, yet its passage wasn't always assured. This commentary, excerpted from my [recent *Daedalus* essay](#) on “Milestones in the Evolution of the Administrative State,” reviews the contentious and messy, yet constructive, process that yielded this landmark act.

Passage of the APA followed more than a decade of debate on the constitutionality of Congress's apparent delegation of its Article I powers to a “fourth branch.” It reflected a “[fierce compromise](#),” balancing the competing goals of bureaucratic expertise and legislative accountability.

[Shepherd](#) provides a fascinating account of the shifting coalitions and aborted efforts at administrative reform between 1937 and 1946. Early in that period, the American Bar Association (ABA) supported legislation that would have created an administrative court to oversee administrative agencies, especially disfavored New Deal agencies, such as the National Labor Relations Board, the Department of Labor's Wage and Hour Division, and the Securities and Exchange Commission. Progressive members of Congress and the agencies themselves objected to these proposals and, in response, President Roosevelt established the United States Attorney General's Committee on Administrative Procedure in 1939 to study administrative reform and propose alternative legislation.

In 1940, Congress passed the Walter-Logan bill, with support from the ABA and conservatives in Congress. President Roosevelt vetoed the bill, which would have required agencies to present a record of findings supporting decisions and issue interpretive rules after notice and opportunity for hearings.

Perhaps most importantly, it would have subjected agency actions to judicial review of jurisdictional questions as well as whether they were supported by substantial evidence.

The Attorney General's Committee, composed of distinguished non-governmental lawyers and a small staff, subsequently offered two bills, drafted by its majority and minority. The majority's bill offered small reforms, codified some existing practices, and would have established an Office of Administrative Procedure to recommend further changes, as appropriate. The Committee minority's bill contained judicial review provisions similar to the Walter-Logan bill and also recommended that agencies first propose rules and receive public comment before issuing regulation. Congress debated these bills extensively in 1941, but set them aside after the declaration of war on Japan and Germany in December.

The emergency powers used during the war constrained individual freedom, and according to the ABA "illustrated and emphasized the admitted defects of administrative justice." However, the war also forced compromise and cooperation. Shepherd notes that proponents of reform and the administration "sought to avoid a pitched political battle during war; each side sought to avoid creation of a public perception that it was willing to impede the war effort for partisan advantage in other areas." Bills introduced in 1944 attempted to find middle ground between the administration, agencies, New Deal opponents in Congress, and the ABA.

These efforts reached fruition on June 11, 1946, when President Truman signed the Administrative Procedure Act into law. It established procedures an agency must follow to promulgate binding rules and regulations within the area delegated to it by statute. Agencies must provide public notice of all rules and provide an opportunity for public comment. Final rules are subject to judicial review to determine whether they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," among other things. For administrative adjudications, where the enabling statute calls for public hearings on the record, decisions must be based on substantial evidence. As long as executive branch agencies act within the rulemaking authority delegated to them by Congress, and follow the procedures in the APA, recent courts have not found it unconstitutional for them to write and enforce regulations.

According to Shepherd:

The landmark Administrative Procedure Act of 1946 and its history are central to the United States' economic and political development. The APA was the bill of rights for the new regulatory state. In a new era of expanded government, it defined the relationship between government and governed. The APA's impact has been profound and durable and represents the country's decision to permit extensive government, but to avoid dictatorship and central planning. The APA permitted the continued growth of the regulatory state that exists today.

While the APA may be showing its age, its history shows that principled debate and constructive compromise are worth pursuing and can yield lasting change.