Florida's ALJs: Maintaining a Different Balance

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I. INTRODUCTION

"It is the highest masterpiece of legislation to know how to place properly the judicial power." Baron de Montesquieu

One recurring theme of administrative law concerns the scope of the adjudicatory role to be played by the administrative agency. For thirty years, the Florida Administrative Procedure Act has utilized the independent powers of administrative law judges (ALJs)1 as an institutional check on the exercise of adjudicatory power by agencies. This article contrasts the statutory provisions governing ALJs and their orders in the Federal and Florida Administrative Procedure Acts. It reviews the historical development of the two schemes, examines the underlying philosophical premises of each, and briefly considers the dynamics of these two different administrative law systems.

The Federal Administrative Procedure Act was the statutory synthesis of the progressive, pragmatic thesis of Roosevelt's New Deal and the conservative legal response to that proposition.2 Part II of this article contains a brief review of this federal administrative law history. It first describes the classical model of administrative law which predominated from the founding of the nation and which was subsequently challenged by the New Deal's "constitutional revolution."3 Special attention is given to the philosophical battle

1. Federal ALJs were initially denominated "hearing examiners." The Civil Service Commission bestowed the title "administrative law judge" in 37 FR 16787 (1972); the change was codified in statute by Pub. L. No. 95-251, 2(a)(1) in 1978. See 5 U.S.C. § 3105 (2004). The independent adjudicators set up in Florida's central panel were initially called "hearing officers." See FLA. STAT. ch. 120.65 (Supp. 1974) but were re-designated as "administrative law judges" by Chapter 96-159, Laws of Florida. For convenience, all will be referred to here consistently as administrative law judges, or ALJs.

2. Roosevelt's "New Deal" was neither the singular source nor the exclusive era for political and legal change in administrative government, but it did represent significant change compressed into a relatively short period. In addition to political compromise, the 1946 APA represented a restructuring of legal theory. An excellent article highlighting the political battle is George B. Shepherd's Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics, 90 N.W. U. L. REV. 1557 (1996). Several articles have described the change in constitutional theory highlighted during these years. See e.g., Richard Stewart, Madison's Nightmare, 57 U. CHIC. L. REV. 335, 337 (1990).

3. Stewart, supra note 2, at 337.
involved with the passage of the Administrative Procedure Act (APA) in 1946. This legislation was a compromise between those proclaiming a realistic need for agency expertise and the concerns of those decrying the destruction of a government of separated powers.\textsuperscript{4} The Federal APA’s creation of independent administrative law judges and statutorily prescribed judicial review confirmed a new procedural model of administrative law.

Florida’s original 1961 APA had few limitations on agency exercise of adjudicatory power, but when Florida’s Act was rewritten in 1974, its drafters were not entirely pleased with either the earlier Act’s performance or the compromise that had been achieved at the federal level.\textsuperscript{5} Part III discusses how the new APA which emerged in Florida represented a deliberate readjustment of the federal approach to reflect these concerns. The state returned to certain principles of the classical model of administrative law and chose to create a balance of power more restrictive of agency prerogative. Florida created one of the earliest central panels, granted its administrative law judges final order authority in rule challenge cases, and bifurcated agency authority with respect to treatment of recommended orders.\textsuperscript{6} This innovative approach was intended to preserve legitimate agency policy expertise but at the same time provide a more substantial check on the exercise of adjudicatory power by the agency.

Broader comparisons and analysis of the structure and dynamics of the federal and Florida systems are made in Part IV. The Federal Act, consistent with the procedural model, is characterized as judicially driven and emphasizing great deference to administrative agencies. The Florida approach, reflecting elements of the classical model, is seen as legislatively driven, providing checks on agency power.

Part V concludes that Florida’s system provides a balance of power among the institutions of government different than that at the

\textsuperscript{4} The compromise achieved was largely a victory for the New Deal pragmatists, with minor concessions to the defenders of the classical model. See \textit{infra} notes 85-100 and accompanying text.

\textsuperscript{5} For a more general discussion of models of administrative law and premises of the 1974 Florida APA and later reform efforts, with a particular discussion of appellate standards of review, see F. Scott Boyd, \textit{A Traveler’s Guide for the Road to Reform}, 22 FLA. ST. U. L. REV. 247 (1994).

\textsuperscript{6} See generally \textit{FLA. STAT.} ch. 120.50 (1974).
federal level and encourages consideration of the balance of power implications of administrative adjudication schemes in other jurisdictions.

II. FEDERAL HISTORY

"I thought the law was founded upon reason, and I and others have reason as well as the judges." King James I

The evolving structures of federal administrative law are most easily described with reference to some conceptual administrative law models. The first, the classical model, lasted from the beginnings of American administrative law until the 1930's, when the second, the procedural model, became ascendant. The Federal Administrative Procedure Act is an embodiment of the procedural model, and its history is intertwined with the history of this transition.


8. See infra note 27.

9. See infra note 91.

10. Although the APA embodied the procedural model, the 1930's are more accurately identified as a "beginning date" because the APA, though offering some refinements, was essentially a ratification of existing developments. The author elsewhere has suggested that the predominant federal model of administrative law has again changed to what might be termed the evaluative model. This latest development relates only peripherally to the function of administrative law judges and is not discussed here. For a brief discussion of the evaluative model as reflected in formal analysis requirements and judicial standards of review, see Boyd, supra note 5.
A. Separation of Powers and the Classical Model

It is impossible to consider the history of American administrative law without discussing the doctrine of separation of powers. This doctrine, about which so much has been written, has a long but confused pedigree. Its origins lie in the distant history of English government, when powers that once lay solely in the King were over long centuries painfully differentiated and eventually wrested away from the monarch to create parliament and courts.\(^{11}\) It is closely related to the concept of mixed government, which in the English example had brought major contending powers of society into balance, with elements of monarchy in the King, aristocracy in the House of Lords, and democracy in the House of Commons.\(^{12}\) Separation of powers is also integrally related to the idea that preservation of individual liberty requires limits on the exercise of government power.\(^{13}\) It is this last connection that has especially

11. What had actually happened was that in early times all the functions of government, whether legislative, administrative, or judicial, had resided in an almost undifferentiated form in certain authorities. Then, gradually, the settlement of disputes was handed over to be decided by certain high officers called judges, and a characteristic formal procedure for dealing with these affairs was elaborated side by side with the evolution of certain legal doctrines and methods of thought.


Robson went on to note that the very word “court” reflects the origin of the judicial function: “Curia, or court, formerly signified the king’s palace or mansion, and we still talk about the court of St. James’s, or of the court having moved to Windsor, when we intend to refer to the king’s person or entourage.” Id. at 41.

12. Separation of powers “easily became combined with the very different theory of mixed government, that is, the balancing of the estates of the society into three parts of the legislature.” GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, 152 (1969).

13. The history of English liberalism might be said to have begun with the Magna Carta in 1215 and would eventually escalate into the Glorious Revolution of 1688. The liberal political and social ideas of the 17th century exemplified by the writings of Montesquieu and Locke strongly influenced the radical Whigs in America. See WOOD, supra note 12, at 16. “[I]n all tyrannical governments the supreme magistry, or the right both of making and of enforcing the laws, is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together, there can be no public liberty.” 1 WILLIAM BLACKSTONE, COMMENTARIES *146.
influenced American administrative law.\textsuperscript{14}

Separation of powers inspired the founders of our nation\textsuperscript{15} because it was perceived as the only practical mechanism to restrict government power and so secure liberty.\textsuperscript{16} But if the principle of limited government was widely accepted, there was considerable disagreement as to how best to effectuate it in the structure of government. In 1788, Alexander Hamilton, James Madison, and John Jay published a series of newspaper essays that have come to be known as "The Federalist Papers."\textsuperscript{17} Their aim was to convince readers that the new Constitution proposed by the convention should be ratified.

In defense of the new Constitution's allocation of government power, Madison famously wrote: "[T]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."\textsuperscript{18} In context, Madison was not just making an argument against concentration of power; he actually was arguing - against opponents who claimed that in the new Constitution the powers were too mixed and not clearly identified -\textsuperscript{19} that pure separation was impossible. He

\textsuperscript{14} "Historically, the underlying premise of administrative law has been the limitation of government power in order to preserve private autonomy." Stewart, supra note 7, at 1811 (citing Louis C. Jaffe & Edith G. Henderson, Judicial Review and the Rule of Law: Historical Origins, 72 L.Q. REV. 345 (1956)).

\textsuperscript{15} Not only the United States Constitution, but each of the fifty states of the Union has a strict separation of powers clause, a general clause, or an implied clause. For a brief discussion and classification of each of the states, see F. Scott Boyd, Legislative Checks on Rulemaking Under Florida's New APA, 24 FLA. ST. U. L. REV. 309, 327-29 (1997).

\textsuperscript{16} "The device 'of the several powers being separated, and distributed into different hands, for checks, one upon another,' declared the Congress, was 'the only effectual mode ever invented by the wit of men, to promote their freedom and prosperity.'" WOOD, supra note 12, at 150.

\textsuperscript{17} ALEXANDER HAMILTON, JOHN JAY, & JAMES MADISON, THE FEDERALIST PAPERS (Gary Wills ed., 1988).

\textsuperscript{18} Id.; see also THE FEDERALIST NO. 47, at 244 (James Madison) (Gary Wills ed., 1988).

\textsuperscript{19} Separation of powers had been a central mechanism in the restructuring of the state constitutions during the preceding decade, several of the states had adopted more explicit separation clauses, and there were concerns, especially from the "antifederalists" that the proposed constitution did not limit governmental power sufficiently. See WOOD, supra note 12, at 150-61.
in fact was arguing that strict isolation was a sterile concept - that the realities of government and law would require accommodation.

Madison went on to argue that the important part of the concept of separation was not that precise functions could ever be separately assigned within the four corners of the Constitution, but that the executive, the legislative, and the judicial departments would naturally have a jealous inclination to prevent the others from encroaching on their power. He wrote: “but the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachment of the others.”[20] In other words, Madison describes that separation can be preserved, and the protection it provides secured, when those who wield each power are made to counter each other.

The Federalists, of course, prevailed; the convention’s work was ratified. The government created by the Constitution of the United States is in fact clearly separated into three parts. Article I states: “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”[21] Article II states: “The executive Power shall be vested in a President of the United States of America.”[22] Article III states: “The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”[23] Consistent with Madison’s argument, however, the precise functions which comprise each of these three fundamental powers are only vaguely described.

The first century of the republic under the new Constitution was a time of congressional government with essentially self-executing laws and minimal administration.[24] In place of the complex regulatory statutes that would later arise, the basis for regulation was

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22. U.S. Const. art. II, § 1, cl.1.
common law tort and property principles. In general, Congress was able to both pass the laws and directly oversee their implementation by the Executive.

Under this classical model of administration, legal analysis centered on who was to exercise what substantive powers, and on the source and limits of those powers. In addition to separation of powers, the model found expression in the doctrines of checks and balances, void-for-vagueness, dual federalism, and standards attached to grants of power. The central principle running through each of these doctrines is that governmental power must be exercised only within carefully controlled limits, kept in check by various constitutional restrictions. The classical model asserted that an agency may act only within the substantive boundaries set forth in its statutory grant and that it is the courts which determine the scope of this authority through interpretation of the statute. Narrow interpretation of statutory delegations and the concept of substantive limitations on administrative power are the hallmarks of the classical model.

One of the earliest delegation cases that reached the Supreme Court was Wayman v. Southard, decided in 1825. The case

26. The minimalist federal government outlined in Philadelphia in 1787 envisioned a handful of cabinet departments to conduct the scanty business of government, each headed by a Secretary responsible to the President and thinly peopled with political employees. Significant regulatory responsibilities were not in view; administration even of the public lands was decades in the future. Peter Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 COLUM. L. REV. 573, 582 (1984).
27. The term "classical model" is the author's. See Boyd, supra note 5, at 251. Numerous commentators have identified many of the same characteristics. This early period of federal administrative law also has been termed "constitutional fundamentalism," Richard Stewart, Beyond Delegation Doctrine, 36 AM. U. L. REV. 323 (1987); "structuralist," Shapiro & Levy, supra note 7; and "transitive," Edward L. Rubin, Law and Legislation in the Administrative State, 89 COLUM. L. REV. 369, 380 (1989).
28. 23 U.S. 1 (1825). Citation has been sometimes made to the earlier case of The Cargo of the Brig Aurora v. United States, 11 U.S. 382 (1813), as authorizing a delegation of legislative power to the President, but it seems better described as allowing Congress to make legislation contingent upon a specific event, and authorizing the President to determine and declare that such an event has in fact occurred.
involved the constitutional duty of the Congress to ordain and establish inferior courts. The legislation accomplishing this task had gone on to incorporate certain state procedures for returning of writs, filing of declarations, and other similar matters for the federal courts, and it then delegated to the federal courts the power to change these procedures. The power of the Congress to delegate this power to the courts was challenged, but upheld by the Court.

Three points of the case are instructive. First, the Court reiterated the concept that the three branches of government performed distinct functions. Second, the opinion declared that while essential legislative power could not be validly delegated, Congress exercised other powers that could be delegated if general guidance was provided. Third, the Court stated that determination of which powers could be delegated was difficult, and was a question ultimately for the judiciary. The Court’s approach, reiterating the basic principle while carving out exceptions or limitations, was to be repeated.

The first case involving congressional allocation of judicial power may have been American Insurance Co. v. Canter, decided only a few years later. Congress had established courts for the territory of Florida, not yet a state, and the question arose as to whether these courts were among those described in Article III of the Constitution, embracing life tenure for their judges and other attributes. The Court concluded that they were not. The decision

30. “The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law. . . .” The opinion also stated: “It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative.” Wayman, 23 U.S. at 46.
31. The opinion stated:
   The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.
   Wayman, 23 U.S. at 43.
32. “[T]he maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily.” Id. at 46.
33. 26 U.S. 511 (1828).
34. Id.
instead found that Congress had plenary authority with respect to the
territories and could grant judicial power to entities it created there
without any violation of Article III. American Insurance Co. v. Canter thus clearly authorized delegation of judicial power, though it
did so only in a very limited circumstance.

A case more influential in the later development of administrative
law was Den, ex dem. Murray v. The Hoboken Land and
Improvement Co., decided in 1855. This case involved a warrant
issued by the Solicitor of the Treasury regarding public debt revealed
through audit of a collector of the customs for the port of New York.
The process was issued without a court, as provided by the statute.
The plaintiffs claimed the statute constituted an exercise of judicial
power and so was in violation of Article III. The opinion first
pronounced that only a court or its agents could exercise the judicial
power of the United States, but went on to declare that there were
also some matters involving “public rights” that could either be
determined by the judiciary, should Congress so decide, or on the
other hand could be placed in the hands of the executive, putting the
government in the same position as a private person statutorily
granted extra-judicial remedies for wrongs committed against them.

35. These courts, then, are not constitutional courts, in which the
judicial power conferred by the Constitution on the general
government can be deposited. They are incapable of receiving it.
They are legislative courts, created in virtue of the general right
of sovereignty which exists in the government, or in virtue of that
clause which enables Congress to make all needful rules and
regulations, respecting the territory belonging to the United
States.

Id. at 546.

36. 59 U.S. 272 (1855).

37. It must be admitted that, if the auditing of this account, and the
ascertainment of its balance, and the issuing of this process, was
an exercise of the judicial power of the United States, the
proceeding was void - for the officers who performed these acts
could exercise no part of that judicial power. They neither
constituted a court of the United States, nor were they, or either
of them, so connected with any such court as to perform even any
of the ministerial duties which arise out of judicial proceedings.

Id. at 275.

38.
Although these early cases may have created some cracks in the separation of powers ideal, it was the passage of the Interstate Commerce Act in 1887 that heralded the end of the congressional century. For the first time, there was a clear delegation of executive, legislative, and judicial powers into a single entity.\textsuperscript{39} No longer did Congress feel capable of directly overseeing administration of the law. This was a substantial break from tradition, but the classical model of administrative law struggled on, perhaps in part because there was as yet no articulated theory to replace it.\textsuperscript{40} In any event, the Interstate Commerce Act contained fairly clear standards regarding the jurisdiction of the commission and the type of conduct to be regulated, and there was a substantial history of common law and state regulatory efforts to give the terms in the statute specific

\textit{To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.}

\textit{Id.} at 284.

\textsuperscript{39} Stewart, \textit{supra} note 2, at 337. “The very identifying badge of the modern administrative agency is the combination in the same hands of the judicial power to adjudicate cases and the legislative power of rulemaking, along with the executive powers to enforce, to investigate, to initiate, and to prosecute.” \textsc{KENNETH DAVIS, ADMINISTRATIVE LAW TREATISE} § 2:4, at 71 (2d ed. 1978).

\textsuperscript{40} A.V. Dicey, the legendary British authority on constitutional law, maintained that the fundamental principle of “rule of law” in England and the United States precluded the very existence of “delegated adjudication.” \textsc{A.V. DICEY, LECTURES INTRODUCTORY TO THE STUDY OF THE LAW OF THE CONSTITUTION} 172, 177 (1885). He said that proper interpretation of the rule of law meant that “no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary manner before the ordinary courts of the land.” \textit{Id.} Dicey later acknowledged, though criticized, the development of administrative law in England in his 8th edition, which was published in 1914, and wrote \textit{The Development of Administrative Law in England} 31 LQREV.148 (1915) the following year. Robson, \textit{supra} note 11.
meaning.  

As the exercise of judicial power by executive and independent agencies became more common, courts and commentators struggled to somehow distinguish the function being performed to remain consistent with constitutional design. Attempts were made to draw a distinction between questions of fact and questions of law for purposes of delegation. After all, even though determinations of

41. Stewart, supra note 7, at 1677, n.28. Asimow notes: “The 1887 Commission was remarkably toothless and was rendered even more ineffectual by hostile court decisions.” Michael Asimow, The Administrative Judiciary: ALJ’s in Historical Perspective, 20 J.NAALJ 157, 158 (2000).


43. In this discussion, no attempt has been made to identify or examine constitutional issues specifically associated with “independent” agencies at the federal level. Roosevelt’s New Deal agencies, with which the APA history is so intertwined, were almost exclusively executive branch agencies. Florida, consistent with its stricter approach to delegation, does not recognize that independent agencies can be created by the legislature, thus all agencies are within one of the branches, most often the executive. See Commission on Ethics v. Sullivan, 489 So. 2d 10 (Fla. 1986). As Peter Strauss has noted, whatever agencies’ formal structures might be, “[e]ach ‘legislates’ in adopting the rules the corporation is compelled to obey; each engages in executive activity in conducting investigations, adopting policies within the ‘legislative’ framework, or deciding to initiate formal proceedings; each ‘adjudicates’ the ensuing complaints.” Strauss, supra note 26, at 585.

44. As late as 1932, however, the Court declared in Crowell v. Benson: The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the executive department. That would be to sap the judicial power as it exists under the federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental
fact relevant to a case had historically been an integral part of judicial proceedings, these had been the provinces of the jury.\textsuperscript{45} Fact finding could therefore be delegated to an agency without any immediate sense of loss of power by the judiciary. The agency had to make factual determinations every day in order to carry out the laws, and the agency’s familiarity with the subject matter made it well-suited for the task. The agency could make factual determinations; the judge could then take those findings and apply the law on review.\textsuperscript{46} The ability of an agency to make determinations of fact that were binding on the courts seemed to be a small concession that did not affect separation of powers. But though there was no apparent reduction in the power of the judge as an individual, there was a reduction in the relative power of the court as a government institution in relation to the agency.

However tidy this split of jurisdiction initially may have appeared, the inevitable difficulties of differentiating between questions of law and fact soon arose.\textsuperscript{47} The “ultimate fact” of whether or not an individual has violated a legal standard is a mixed question of law and fact, involving not only the legal conclusion as to exactly what conduct constitutes a violation under the law, but also a factual evaluation of the conduct of the individual against that threshold.\textsuperscript{48} As time went on, agency conclusions of law were given an increasing degree of deference by the courts, including not only technical issues such as those involved with rate making, but also

\begin{quote}
rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law.
\end{quote}

285 U.S. 22, 56-57 (1932) (affirming the lower court determination that statute would be invalid if construed to deny trial de novo of issues of fact affecting the existence of the employer employee relation).

45. \textit{Id.} (referring to the historical and constitutional functions of juries in upholding the power of Congress to delegate the determination of factual issues).

46. Even Landis, an early staunch advocate of increased agency authority, maintained that questions of law were ultimately for the courts:

\begin{quote}
[T]hus I return to the issue of ‘law’ as being the dividing line of judicial review – as bounding the province of that ‘supremacy of law’ that is still our boast. Our desire to have courts determine questions of law is related to a belief in their possession of expertness with regard to such questions.
\end{quote}


47. \textit{See infra} note 191.

more purely legal questions such as interpretation of statutory terms.\footnote{Perhaps the most famous case prior to the APA involving judicial deference to agency determinations of ultimate fact was \textit{National Labor Relations Board v. Hearst Publications, Inc.}, in which the Supreme Court deferred to the Board’s determination that newsboys were ‘employees’ under the National Labor Relations Act. 322 U.S. 111 (1944). An argument can be made that some actually intended the Federal Administrative Procedure Act to reverse the judicial trend of extending deference to agency conclusions of law. Title 5 U.S.C., section 706 provides: “To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.” (2004).}

Efforts were next made to describe a discrete realm of “quasi-judicial” power based upon the subject matters involved.\footnote{Perhaps the most formal attempt was contained within the \textit{Report of the Committee on Ministers’ Powers} (sometimes referred to as the “Sankey Report” after Lord Justice Sankey). His Majesty’s Stationery Office (1932). Although dealing with separation of powers in a parliamentary system without a written constitution, the Sankey Report was widely quoted by scholars in support of all sides of the debate on this side of the Atlantic. \textit{Compare} \textit{American Bar Association, Report of the Special Committee on Administrative Law} 733-36 (1936) [hereinafter 1936 Report], \textit{with} Robson, supra note 11, at 419-69. In summary, the Sankey Report defined a judicial decision as presupposing an existing dispute and evincing four characteristics: (1) presentation (not necessarily oral) of their case by the parties; (2) to the extent that a dispute of fact was involved, the marshalling of evidence and the framing of argument on the evidence; (3) to the extent a question of law was involved, the submission of legal argument by the parties; and (4) a final decision with findings upon the facts in dispute and rulings on, and application of, the law of the land. \textit{Sankey Report} at 73-74. The Sankey Report went on to conclude that a quasi-judicial decision, while similar, did not necessarily involve the third element, and never involved the fourth. \textit{Id.} at 88-90. If the fourth element was present, the decision was properly classified as judicial. Robson, supra note 11, at 445.} Such a solution proved elusive. The courts in fact formerly handled some subjects now addressed through administrative adjudication, such as workers’ compensation, and it could not be denied that adjudication on other subjects vested for the first time in agencies would have been within the power of the courts but for the legislative delegation. We have continued to struggle with this issue to the present day. The difference between causes of action arising in common law, equity, or admiralty as opposed to statutory ones might yet provide one basis
of "subject matter" distinction,\textsuperscript{51} but there is no consensus.

\section*{B. The New Deal Constitutional Revolution}

When Franklin D. Roosevelt was elected in 1932, he immediately began to work with the Democratic Congress to fight the Depression through the creation of numerous new federal agencies that had been given broad missions.\textsuperscript{52} While supporters viewed the extensive discretion to be exercised by these agencies as governed more by principles of an objective science of public administration than by the art of politics,\textsuperscript{53} concerns began to grow:

So long as administrative power was kept within relatively narrow bounds and did not intrude seriously on vested private interests, the problem of agency discretion could be papered over by applying plausible labels, such as 'quasi-judicial' or 'quasi-legislative,' designed to assimilate agency powers to those exercised by traditional government organs. But after the delegation by New Deal congresses of sweeping powers to a host of new agencies under legislative directives cast in the most general terms, the broad and novel character of agency discretion could no longer be concealed behind such labels.\textsuperscript{54}

While the push for Congressional action that eventually resulted in the Administrative Procedure Act was motivated in large part by political opponents of the New Deal,\textsuperscript{55} that opposition often was expressed in the form of arguments about balance of powers. But it is not fair to say that all of those who voiced concern with this

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{51} See N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). But, as this divided opinion suggests, this is not a universally held view.
\item \textsuperscript{52} Shepherd, \textit{supra} note 2, at 1562.
\item \textsuperscript{54} Stewart, \textit{supra} note 7, at 1677 (footnotes omitted).
\item \textsuperscript{55} Shepherd, \textit{supra} note 2.
\end{itemize}
\end{footnotesize}
perceived threat to our government’s tripartite structure were simply opportunists embracing convenient arguments to oppose the objectives of the New Deal. The constitutional issues raised were legitimate ones. Interest in administrative reform had resulted in the introduction of legislation to constrain agencies before the Roosevelt administration and several key Congressional sponsors of administrative reform bills were in fact New Deal supporters. Whatever the varied political or philosophical motivations of legislators, the voice most directly framing the constitutional arguments to be highlighted here came from the American Bar Association’s Special Committee on Administrative Law. Beginning in 1933, the Special Committee and the ABA were engaged in a battle with the Roosevelt administration over “institutionalization.” That decade-long battle reflected concern


57. S. 5154, 70th Cong., 2d Sess. (1929). The sponsor of the bill was Senator George Norris, Chairman of the Senate Judiciary Committee. Norris apparently introduced the bill in order to control the excesses of Republican-controlled agencies, Shepherd, supra note 2, at 1567, just as conservatives’ reform bills later sought to control New Deal agencies.

58. Shepherd, supra note 2, at 1578, describes Senator Mills Logan, sponsor of 1933, 1936, 1939, and 1940 bills, as a Democrat who sometimes supported Roosevelt and the New Deal on issues other than administrative reform, and noted that Representative Emanuel Celler, sponsor of 1936 and 1939 House bills, was “like Logan, a New Deal Democrat.” Id.

59. The Special Committee on Administrative Law was first formed in 1933. It issued lengthy committee reports each year as part of the ABA Annual Report, recommending legislation, and generally lobbying for administrative reform. Shepherd, supra note 2, at 1571, fully recognizes the separation of powers element of the Special Committee’s opposition to the New Deal, “The committee argued with special vigor that agencies violated constitutionally required separations that were essential to the success of American government. The ABA opposed the combination, which had occurred in many agencies, of legislative, executive, and judicial functions: many agencies would establish rules, enforce them, and adjudicate violations.” He also identifies two other factors driving ABA opposition: first that the New Deal agencies threatened the major clients of the elite bar and second that the diminished importance of traditional litigation represented a personal threat to the legal profession.

60. Institutionalists view administrative adjudication as a process to formulate and announce public policy, while judicialists views adjudication as a process to preserve fairness and due process for the citizen. For a brief discussion of the
with two distinct constitutional issues: (1) the goal of decisional independence, grounded in the due process clause and (2) the goal of institutional check, grounded in balance of powers.\textsuperscript{61}

The ABA was very concerned with the treatment of adjudication as if it were simply another executive policymaking technique.\textsuperscript{62} Although the Supreme Court by this time often sanctioned quasi-judicial actions, it had never suggested that such adjudication was somehow an inherently executive function. Rather, it acknowledged that, within limits, adjudicative power could be delegated to the executive or independent agencies by legislative act.\textsuperscript{63} This distinction was critical to the ABA’s conception of the balance of powers problem and therefore to the solutions that the Special Committee proposed.\textsuperscript{64}

There were changes and developments in the position of the Special Committee over the years. At first, the creation of an administrative court that would conduct the adjudicatory hearings being performed by agencies was recommended.\textsuperscript{65} In 1936, it

\textsuperscript{61} “No such reactionary position is taken in insisting, nevertheless, on safeguarding individual interests and preserving the checks and balances involved in the common law doctrine of the supremacy of law and the constitutional separation or distribution of powers which is fundamental in our American polity.” AMERICAN BAR ASSOCIATION, REPORT OF THE SPECIAL COMMITTEE ON ADMINISTRATIVE LAW 342 (1938) [hereinafter 1938 REPORT].

\textsuperscript{62} “When, acting under a power conferred by statute . . . [an administrative official] holds a hearing and makes a determination . . . he is in fact performing a judicial function, which will be referred to as ‘quasi-judicial’ . . . [T]hose functions which are generally acknowledged to belong to the executive arm . . . are not comprised within the terms ‘quasi legislative’ and ‘quasi-judicial.’” AMERICAN BAR ASSOCIATION, REPORT OF THE SPECIAL COMMITTEE ON ADMINISTRATIVE LAW 410 (1933) [hereinafter 1933 Report].

\textsuperscript{63} See supra text accompanying notes 26 through 35.

\textsuperscript{64} From the outset, the Special Committee recognized the difficulty of any strict separation of power, “the boundary lines between executive, legislative, and judicial functions are not rigidly or unalterably fixed, any more than is the interpretation of any other part of the Constitution.” 1933 Report, supra note 62, at 409 n.4.

\textsuperscript{65} The Special Committee reports for 1933 and 1934 discussed different options, but recommended the creation of the special administrative court. In later years the recommendation was only to combine existing administrative courts into a single body, not divest other agencies of their adjudicatory functions, as the earlier proposals would have done. Shepherd suggests that this change was a
advocated creation of an administrative appellate tribunal, then, in 1937, this recommendation was given up, and appeal of administrative decisions to the circuit courts of appeals was advanced. For our purposes, however, the reports were quite consistent in the nature of the constitutional concerns and their recognition of the importance of independent fact-finding.

From the first, constitutional concerns were phrased in terms of Madisonian balance of powers, not strict separation. The 1936 report described in some detail balance of powers concerns with vesting legislative and judicial power in the hands of an agency also exercising executive power. Notwithstanding that several recent court cases had struck down New Deal programs vesting legislative or judicial powers in agencies, the Special Committee expressed no illusory hope that judicial decisions would ultimately return adjudication to the courts and legislation to the Congress. Instead, the report noted that the realistic objective should not be to end delegation to agencies, but rather to prevent the commingling of the legislative, judicial, and executive powers in a single agency.

tactical move reflecting Roosevelt's overwhelming popularity. See Shepherd, supra note 2, at 1574-75.

66. Shepherd, supra note 2, at 1582. The report recommended that aggrieved persons could request a hearing from a three-member interagency board. The board's decision could be appealed to the court of appeals.

67. 1936 Report, supra note 50, at 767.

68. The ABA was not alone in its criticism. The President's own study, the "Brownlow Report" famously characterized administrative agencies as a "headless fourth branch" of government, and noted that they carried on "judicial functions which threaten the impartial performance of that judicial work." REPORT OF THE PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES 68 (1937).


70.
The treatment of findings of fact was often mentioned in the reports. After an historical review which included battles between the English common law courts and the King, the 1936 report concluded, "Thus, the decision of issues of fact, originally removed as far as possible from the Executive, has been thrown bodily into the lap of the administrative agency exercising executive powers, and the courthouse doors are closed to trial of them by independent judges." 71

Significantly, independent fact-finding was seen as important for two reasons: first to ensure fairness and ensure due process; second to act as a check on concentration of power. 72

By 1940, with Roosevelt’s political power somewhat waning, 73 Congress was able to muster enough votes to pass the Walter-Logan Bill 74 containing many of the 1937 report’s recommendations. It allowed aggrieved persons a hearing before a board, with written record and findings, and appeal to the court of appeals. 75 The bill also addressed rulemaking. It required notice and public hearings, not simply comment, on all proposed rules and allowed preemptive rule challenges in federal court. 76

1936 REPORT, supra note 50, at 767 (citing O'Donoghue v. United States, 289 U.S. 516, 530 (1933)).

71. 1936 Report at 730.
72. 1938 REPORT, supra note 61, at 355.
73. Roosevelt’s court-packing plan, unveiled after the 1936 election, proved unpopular and was ultimately rejected. The opposition it engendered undermined public support for the New Deal to some degree and created an opposition legislative coalition. William Leuchtenburg, When the People Spoke, What Did They Say?: The Election of 1936 and the Ackerman Thesis, 108 YALE L. J. 2077, 2111 (1999); Shepherd, supra note 2, at 1581.
74. H.R. 6324, 76th Cong., 2d Sess. (1940).
75. AMERICAN BAR ASSOCIATION, REPORT OF THE SPECIAL COMMITTEE ON ADMINISTRATIVE LAW 847-48 (1937) [hereinafter 1937 Report].
76. Shepherd, supra note 2, at 1583.
The Senate Judiciary Committee’s report on the Walter-Logan Bill expressed balance of power concerns in no uncertain terms:

The basic purpose of this administrative law bill is to stem and, if possible, to reverse, the drift into parliamentarism which, if it should succeed in any substantial degree in this country, could but result in totalitarianism with complete destruction of the division of governmental power between the Federal and the State Governments and with the entire subordination of both the legislative and judicial branches of the Federal Government to the executive branch wherein are included the administrative agencies and tribunals of that Government.\(^7^7\)

One month after Walter-Logan was introduced in the Senate, President Roosevelt directed his Attorney General to form a committee to study administrative reform that quickly set to work to help prevent the passage of the bill.\(^7^8\) Although not succeeding in that objective -- Walter-Logan passed both houses, and was then vetoed by the President\(^7^9\) -- the committee report became an important part of the continuing debate.

The 1941 Report of the Attorney General’s Committee on Administrative Procedure contained quite a bit of discussion on the problem of separation of functions. The majority advocated internal separation of prosecuting and adjudicatory functions, while the minority would have insisted on segregation into different bodies. All agreed that a co-mingling of these powers was undesirable, however.

\(^7^7\) Id. at 1601. The House Judiciary Committee made a similarly strong statement:

It can never be admitted in this country that the administrative bureaucrats shall control the legislative and judicial branches of this Government. This may be considered as a warning to those who are more intent on securing and exercising greater autocratic powers in the administration of the laws than the Congress has conferred upon them.

\(^7^8\) Id. at 1604.

\(^7^9\) Shepherd, supra note 2, at 1598.

\(^8^6\) 86 Cong. Rec. 13, 942-43 (1940).
On the related issue of agency authority over the ALJ's recommended order, the 1941 Report noted:

In general, the relationship upon appeal between the hearing commissioner and the agency ought to a considerable extent be that of trial court to appellate court. Conclusions, interpretations, law, and policy should, of course, be open to full review. On the other hand, on matters which the hearing commissioner, having heard the evidence and seen the witnesses, is best qualified to decide, the agency should be reluctant to disturb his findings unless error is clearly shown.\textsuperscript{80}

Though this sentence might suggest "clear error" was being touted as an agency standard of review, in context, other passages reveal this language to constitute only policy recommendation to agencies, or perhaps a concession to the minority. At page 53 the report stated:

Agency heads should have the authority, when reviewing hearing commissioners' determinations, to affirm, reverse, modify (including the power to make the finding which they deem required by the record), or remand for further hearing. It should be open for them to adopt, wholly or partially, the findings, conclusions, decision, or order from which appeal has been taken.

Taken as a whole, the report language cannot be interpreted as advocating any legal restriction on the authority of the agency to make changes to findings of fact.

The bill recommended by the Final Report provided that in the absence of timely appeal by the affected party or directed review by the agency head, the order of the ALJ would become the final decision.\textsuperscript{81} Although the recommended bill allowed the agency full

\textsuperscript{80} Final Report of the Attorney General's Committee on Administrative Procedure 51 (1941).
\textsuperscript{81} Id. at 200.
discretion to affirm, reverse, modify, or set aside the hearing commissioner's decision, it also contained an interesting provision in Section 309:

Where the appellant asserts that the hearing commissioner's findings of fact are against the weight of the evidence, the agency may limit its consideration of this ground of appeal to the inquiry whether the portions of the record cited disclose that the findings are clearly against the weight of the evidence.\(^8\)

Although at first glance this provision might seem to be a restriction on agency power, upon closer consideration it is clear that it was not for two reasons. First, the option to limit the agency's consideration lay completely within the discretion of the agency itself. Second, limited consideration could only be applied on an appeal, not on directed review by the agency. Thus, it presumably would have provided deference only to recommendations adverse to the appellant, not to recommendations adverse to the agency. Even when applicable, this provision afforded only minimal deference to the findings of the hearing commissioner because they could be overturned despite the existence of competent, substantial evidence supporting the findings.\(^8\)

C. Decisional Independence and the Procedural Model

While few provisions of the 1946 APA were ultimately derived from the Attorney General's Report,\(^8\) both it and the Benjamin Report on agencies in the State of New York which was issued the following year,\(^8\) emphasized the need for agencies to retain control

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82. Id. at 201.
83. Allowing reversal if findings are against the weight of the evidence is almost, but not exactly, equivalent to de-novo evaluation by the agency. See the discussion at note 241 and accompanying text on the confusing comparative stringency of standards of review in connection with some state APA provisions.
84. Ken Davis & Walter Gellhorn, Present at the Creation: Regulatory Reform Before 1946, 38 ADMIN. L. REV. 507, 520 (1986). The Report was, however, incorporated into the legislative history.
over adjudicatory power, and proposed that concerns about fairness and due process could be addressed by a separation of functions within an agency.86

In the meantime, World War II had taken center stage and pressures to enact a generally applicable reform statute lessened. At war's end, calls for reform returned, but the animosity of the opposing factions was dissipated.87 Collaboration between executive and congressional players began in earnest.88 Private negotiations put together a bill that could be passed and signed into law. "The painstaking work of the Committees on the Judiciary of each house, as incorporated in their reports, and the cooperation of the attorney general did much to account for the unanimity of legislative opinion on what had for years been a controversial issue."89 As is usually the case with legislation, no one was completely satisfied, but all thought it was the best that could realistically be achieved.90 President Truman signed the Administrative Procedure Act into law.

The Act confirmed the new procedural model of administrative law91 that had been evolving. Under the procedural model, legal analysis centers on the way in which administrative decisions are reached. The model promotes application of expertise and procedural safeguards in decision-making, rather than external substantive limitations.92 The procedural model finds expression in concepts of adequate notice, impartiality, fair hearing, due process, and standards established by the agency exercising the authority.

There are two premises underlying these concepts. The first is

86. Id.
88. Shepherd identifies several factors explaining the new spirit of compromise. Shepherd, supra note 2, at 1675.
89. Id. at 1675 (quoting Arthur T. Vanderbilt, Legislative Background of the Federal Administrative Procedure Act, LEGISLATIVE BACKGROUND OF THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES 1, 12 (George Warren ed., 1947)).
90. Id.
91. The model is usually called "procedural," and there is general agreement on its characteristics. See, e.g., Davis, supra note 7, at 2; Shapiro & Levy, supra note 7, at 397. The procedural model has also been termed "traditional." Stewart, supra note 7, at 1671.
92. The author has discussed the procedural model's characteristics in conjunction with a comparison of federal and Florida law in Boyd, supra note 5, at 251-54.
that the questions confronting government are susceptible to
scientific rationality, that is, there are "correct" answers. The second
premise is that the way administrative decisions are reached can
determine the accuracy of those decisions. These premises of the
procedural model had their basis in "legal process" scholarship,which
compared the relative institutional competence of legislatures,
courts, and agencies. In general, the model concludes that courts are
well equipped to review the procedures which agencies follow, but
do not possess the necessary expertise to review the substance of
administrative decisions.

Deeply woven within the controversy in the years preceding
adoption of the APA were serious questions regarding fidelity to the
balance of powers ideal, largely sacrificed to the countervailing
pragmatic demands for agency expertise and efficiency. In the end,
the perspectives advocated by the ABA had only minimal influence.
As Shepherd summed it up, "Brilliantly reasonable minds readily
differed, with conviction, on whether New Deal programs' impositions
on individual rights and twisting of constitutional separations were acceptable or worthwhile. The APA was a cease-
fire armistice agreement that ended the New Deal war on terms that
favored New Deal proponents."^94

The Act did contain several provisions designed to bolster ALJ
independence. It placed their appointment, removal, compensation,
and tenure in the hands of the Civil Service Commission, and
allowed removal only for cause. It prohibited ex-parte
communications on a fact in issue, except after notice and provision
of opportunity for all parties to participate. It did not allow an ALJ
to be responsible to, or subject to the supervision of, an employee
performing investigatory or prosecutorial functions. It expressly
stated that no employee engaged in investigative or prosecutorial
functions could participate in the decision or recommended decision

93. Perhaps the best exposition of legal process approach is contained in
HENRY HART & ALBERT SACHS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE
94. Shepherd, supra note 2, at 1560-61.
97. 5 U.S.C. § 554(d)(2) (2004). The statute goes on to exempt the agency
head from this restriction.
in that case or related cases. Finally, the Act provided that ALJs were to perform no duties inconsistent with their adjudicatory responsibilities and should "be assigned to cases in rotation so far as practicable." 

The Federal APA thus created an internal separation of the adjudicatory function from other parts of the agency to insure independence of action by the administrative law judge, but was unwilling to assign ALJs outside of the agency in a central pool. The decision to keep ALJs within the various agencies was at least partly motivated by the emphasis placed upon agency expertise. ALJs were to provide independence but at the same time preserve the superior appreciation of the subject matter, interest group politics, and social and economic consequences of the issues to be decided that inhere in the agency. Similarly, one of the most telling provisions of the Federal APA relating to Administrative Law Judges is the provision regarding agency review of their orders. The Act provided that the ALJ would issue a preliminary decision that would become final unless reviewed by the agency. On review of the recommended decision, the Act provided that the agency would "have all of the powers which it would have in making the initial decision." Agency heads were free to substitute their judgment for that of the ALJ on questions of fact, law, and discretion.

Thus, as part of the federal transition from the classical model of administrative law to the procedural model, separation of powers was transformed into separation of functions. But though superficially similar, these two principles are fundamentally distinct. Under the classical model, just as the power of the federal government had been balanced against the power of the states and of the people, and the power of the Senate had been balanced against the power of the House of Representatives, so, too, the power of the legislature had been balanced against the power of the executive and the power of the judiciary. As noted earlier, separation of powers was based upon the notion that each department would have the incentive and ambition to defend its allocation of power from encroachment by the other departments. The objective was to thwart the concentration of

100. 5 U.S.C. § 557 (b) (2004).
101. Id.
102. See supra notes 15-23 and accompanying text.
power in any of the departments and so preserve individual liberty.

Separation of functions, however, is based upon the totally distinct concept that following proper procedures in the administration of policy can ensure justice. Just as a fair hearing requires adequate notice and an opportunity to present evidence and argument, it requires an independent and unbiased adjudicator. Separation of functions is premised upon the notion that any actual or apparent bias must be eliminated and that this can only be assured by divorcing investigatory and prosecutorial functions from adjudication. The objective is to ensure fairness and achieve individual justice. Separation of functions also has constitutional inspiration, but it is due process, not separation of powers.

The design of the Act attempted to enhance adjudicatory independence of the individual ALJ from agency prosecutorial function, but provided no external institutional check on agency exercise of adjudicatory power. Despite the ABA's concerns, the separation of functions provisions ultimately provided no restriction on the role of the agency as both executor of the law and adjudicator of disputes. The goals of efficiency and unitary process in implementation of policy had trumped balance of power concerns that counseled against placing executive and judicial power in the same institutional hands.

At the federal level, the classical model's attempts to define judicial power and confine its exercise to the courts were over. While debates continue, most administrative scholars can agree only that "judicial" power is that which is vested in the courts and "quasi-judicial" power is that which is exercised by administrative agencies. For purposes of separation of powers analysis, such a

103. The Sankey Report and similar taxonomies were criticized for incorporating procedural elements as defining characteristics. Under such a definition a legislature might properly delegate to an agency the power to affect important rights and duties of the individual if it proceeded without testimony or hearing, but could not do so if the agency were required to provide the safeguards customarily used to protect private rights. Such a constitutional regime would be self-contradictory. See Ray Brown, Administrative Commissions and the Judicial Power, 19 MINN. L. REV. 261, 269-70 (1935).

104. Administrative agencies have been called quasi-legislative, quasi-executive or quasi-judicial, as the occasion required, in order to validate their functions within the separation-of-powers scheme of the Constitution. The mere retreat to the qualifying
distinction is but a tautology, grounded in the reality that if judicial power were taken from agencies and every dispute had to be submitted to the courts, they would be overwhelmed, and the cost would be prohibitive.

Although there have been a few amendments, the APA as enacted in 1946 has remained remarkably unchanged.\textsuperscript{105} It is worth noting, however, that the federal courts have somewhat adjusted the significance of ALJ's orders on subsequent judicial appeal. In \textit{Universal Camera Corp. v. National Labor Relations Board},\textsuperscript{106} the Supreme Court rejected the Second Circuit's refusal to consider contrary findings of the hearing examiner when determining whether

\begin{quote}
'quasi' is implicit with confession that all recognized classifications have broken down, and 'quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed.
\end{quote}


\textsuperscript{105} This statement, as well as the broader thesis that the federal system is essentially a pure implementation of the procedural model, is of course an oversimplification. The development of hard look review is mentioned at note 117 and related text, and the idea of an evaluative model is mentioned at notes 10 and 223. More intriguingly, a couple of more recent changes might even be stirrings of a return to classical elements at the federal level. First was the passage of the Congressional Review Act. This 1996 APA amendment requires agencies to submit all rules to Congress for its review and allows for joint resolutions of disapproval. It has only been successfully used once, but the very adoption of the mechanism may reflect congressional concerns with the scope and exercise of agency power. A second development, perhaps more significant for the federal system given its judicial source, is the case of \textit{United States v. Mead Corp.}, 553 U.S. 218 (2001), in which the Court restricted the degree of deference accorded agency's statutory interpretations by declining to afford \textit{Chevron} deference to a letter ruling of the Customs Service, declaring the less formal and less strong deference of \textit{Skidmore} applicable instead. The result of the ruling seems to reverse \textit{Chevron}'s key innovation – that is, the universal default presumption that statutory silence or ambiguity indicates an implicit congressional delegation to the administering agency – in a large category of cases. After \textit{Mead}, it can be argued that there must be evidence of some actual congressional intent to delegate interpretative authority, either legislative rulemaking authority or formal adjudicatory authority, or some other indicia of legislative intent. This is hardly an adoption of Florida's strict position, but it does seem to indicate a retrenchment from \textit{Chevron}, which might become the high water mark of agency deference. For some thoughts suggesting the return of concerns about concentration of political power at the federal level, see also Peter Strauss, \textit{From Expertise To Politics: The Transformation Of American Rulemaking}. 31 \textit{Wake Forest L. Rev.} 745 (1996).

\textsuperscript{106} 340 U.S. 474 (1951).
an agency final order was supported by competent, substantial evidence. Justice Frankfurter crafted a looser interpretation, mandating consideration of the entire record, including the examiner’s findings, when determining the substantiability of evidence.\textsuperscript{107}

The Court’s review of the legislative history of the Act concluded that Congress had “expressed a mood” requiring that courts assume more responsibility for the reasonableness and fairness of decisions.\textsuperscript{108} The Court noted that the APA required consideration of the whole record, and the ‘substantiability’ of the evidence must therefore take into account whatever in the record fairly detracted from its weight.\textsuperscript{109} The findings of the ALJ are, of course, a part of that record, and so \textit{Universal Camera} directed that boards, and ultimately courts, give these findings the weight they reasonably command.\textsuperscript{110} The Court thus enhanced the effect of an ALJ’s findings of fact in the federal system.

III. \textbf{FLORIDA HISTORY}

"If we are to continue a government of limited powers, these agencies of regulation must themselves be regulated." \textit{Elihu Root}

The historical development of the procedural model of administrative law at the federal level traced above unquestionably had a profound influence on Florida administrative law, but Florida’s strong embrace of elements of the classical model distinguishes it from the federal system.

\textbf{A. Phantom Government}

Several factors compelled Florida to consider a wholesale revision of its Administrative Procedure Act by the early 1970’s. First, there were federal case law developments. The landmark decision in \textit{Goldberg v. Kelly},\textsuperscript{111} determined that certain procedures

\textsuperscript{107} Id. at 474.
\textsuperscript{108} Id. at 487.
\textsuperscript{109} Id.
\textsuperscript{110} Universal Camera, 340 U.S. at 497 (1951).
\textsuperscript{111} 397 U.S. 254 (1970).
were constitutionally required in the revocation of government benefits.\textsuperscript{112} \textit{Goldberg} neither reversed the long string of earlier decisions that had allowed administrative agencies to conduct their own hearings,\textsuperscript{113} nor required that full-fledged judicial proceedings be transplanted into the executive branch,\textsuperscript{114} but it did serve as introduction to an ongoing series of cases which have sketched, erased, and redrafted the parameters governing agency conduct of contested hearings. \textit{Goldberg} was another step toward the "judicialization" of administrative procedures and it forced Florida to re-evaluate its adjudicatory structures.\textsuperscript{115}

At the same time, other cases at the federal level were beginning to highlight the critical role of the judiciary in the procedural model of administrative law. In an effort to increase oversight, the district courts had interpreted the APA’s statement of basis and purpose in a broad fashion\textsuperscript{116} and in \textit{Citizens of Overton Park v. Volpe}, the Court had endorsed a "hard look" review, requiring the judiciary to make a more substantial inquiry into an agency’s processes and decision.\textsuperscript{117} At the same time, the Court reaffirmed that due process did not mandate any procedural checks on "legislative" decisions.\textsuperscript{118} These developments called attention to the need for stricter review of agency actions, but offered a solution that seemed to diminish legislative control and oversight.

A second impetus for the revision of Florida’s APA in the early 1970’s was that some of the premises of the procedural model of

\textsuperscript{112} \textit{Goldberg} ruled that welfare was a legal entitlement, meaning recipients could not constitutionally be deprived of their benefit without pretermination hearings invoking substantially all of the protections of a formal trial. \textit{Id.} at 262.

\textsuperscript{113} See supra notes 15-20 and accompanying text.


\textsuperscript{115} The broad and somewhat awkward historical effects of \textit{Goldberg} on state administrative procedure were surveyed in Henry J. Friendly, \textit{Some Kind of Hearing}, 123 U. PA. L. REV. 1267 (1975).


\textsuperscript{118} United States v. Fla. E. Coast Ry., 410 U.S. 224, 245-46 (1973) (finding that proceedings for the purpose of promulgating policy-type rules or standards not impacted by due process clause) (citing Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915)).
administration were being re-examined. Scholarship was beginning to question the value of the “scientific expertise” argument for vesting adjudicatory power in agencies. Agency decision-making began to be seen more as a political process of reconciling competing claims of various interest groups affected by agency policy. Agencies regulating various industries were accused of “capture” by the very interests they were supposed to be regulating. As the agency’s role increasingly came to be viewed as more political than scientific, concerns with concentration of power returned.

Finally, and probably most significantly, the Legislature was again concerned with the extent of executive agency power. During the 1950s and 1960s, a massive expansion of agency power had taken place, in terms of both the range of activity and the number and scope of administrative proceedings. In addition, whereas agency action in the past had focused primarily on institutions such as common carriers and public utilities, it had increasingly begun to directly involve members of the public. Small reforms had been initiated, but agencies had resisted. At first, they were even reluctant to publish their rules and legislation with mandatory publication requirements similar to those found in the Model Act were passed in 1955. A few years later, Florida’s first full-fledged APA was enacted, including minimal adjudication procedures, based substantially upon the Revised Model State Act. This 1961 Act required basic separation of functions within the executive branch, “No hearing

119. BERNARD SCHWARTZ, ADMINISTRATIVE LAW 23 (1976).
121. A good summary of the ideas and scholarship that subsequently arose challenging the New Deal’s justification for extremely broad agency discretion is found in Stewart, supra note 7, at 1676-88.
123. Id.
124. Initial efforts in June of 1953 to seek voluntary cooperation of state agencies in the publication and promulgation of their rules were abandoned in favor of actions to make publication mandatory. Report of the Committee on Administrative Law, 28 FLA. B. J. 146 (1954).
examiner shall, in any proceeding where he has presided as hearing examiner or a factually related proceeding, participate or advise the agency in entering its order except through his recommended order.”

One early case under this Act described the status of the examiner under this act as a “functionary” of the administrative agency.

The 1961 Act cured few problems, however, and the concerns with agency power continued. Coverage of the Act was in doubt, and agencies fought against inclusion. Even though the procedures mandated by the Act were minimal, the Law Revision Council Reporter noted that its provisions were “widely ignored.” Under the Act, agencies were able to issue oral orders, which were inherently subject to retroactive change and were essentially not reviewable by the judicial branch. Agencies also reportedly would delay or withhold adjudicatory decisions in certain embarrassing or controversial cases.

Pressures increased in the early 1970s, and the Florida Legislature was receiving numerous complaints about agency actions from citizens and interest groups. Specific examples of executive agency abuses compiled by a Legislative Committee included unlawful tax assessments, adoption of rules without statutory authority, and expansion of permitting requirements in direct

127. FLA. STAT. § 120.28 (1965) (repealed by 1974 Fla. Laws ch. 74-310 4).
129. Memorandum from Representative Curtis Kiser, Memorandum on Trip to Sacramento, California to Review the California Administrative Procedure Act 1, (December 1973) (on file at the Florida Joint Administrative Procedures Committee, Tallahassee) [hereinafter California Memorandum].
132. Id.
133. Memorandum from Committee on Rules and Calendar, Memorandum Outlining Problems with Administrative Governance 1 (on file at the Joint Administrative Procedures Committee) [hereinafter Undated Memorandum]. Although undated, references to specific incidents in the body of the report indicate it was prepared for consideration in conjunction with legislation during the 1974 session.
contravention of expressed legislative intent.\textsuperscript{134} From the legislative perspective, such complaints evidenced not routine failures of administration, but a fundamental systemic problem.\textsuperscript{135} A committee report described such agency actions as a threat to constitutional government and legislative power, “Related to these practical problems of concern to the average citizen, is a bedrock issue of constitutional government: To the extent that administrative agencies ignore or flout the standards laid down by the legislature in the law, they breach the constitution.”\textsuperscript{136}

Complaints that agencies were adopting rules and regulations contrary to expressed legislative intent were particularly disturbing to the Legislature.\textsuperscript{137} The Senate President began a publicity campaign to call attention to the problem by requesting an Attorney General’s Opinion.\textsuperscript{138} Use of the term “phantom government,” as an epithet to describe the perception of “out of control” executive agencies became common,\textsuperscript{139} and public support for the Legislature to more closely review executive branch exercise of delegated legislative and judicial power grew.\textsuperscript{140}

\textsuperscript{134} Id.
\textsuperscript{135} Some letters also shared this perspective: “If something is not done soon to put the government of Florida back into the hands of the people through our elected representatives, we predict problems not unequal to the present Federal situation of executive over-control.” Letter from Tri-County Engineering Company to Senator Thomas Johnson (November 27, 1973) (on file at the Joint Administrative Procedures Committee).
\textsuperscript{136} Undated Memorandum, supra note 133, at 1.
\textsuperscript{137} California Memorandum, supra note 129, at 2. See also Lewis, supra note 130, at 85 (mentioning some abuses of rulemaking by state agencies).
\textsuperscript{139} “Senate President Mallory Horne won a round in his fight against what he calls a ‘phantom government’ Friday as Attorney General Robert Shevin said state agencies cannot adopt rules without specific legislative authority.” United Press International, Shevin Says Laws Limit Agency Rulemaking, TALLAHASSEE DEMOCRAT, Dec. 29, 1973. See also John Van Gieson, Bill Tightening State Rules Clears, TALLAHASSEE DEMOCRAT, Apr. 19, 1974, (stating that “Senate President-designate Dempsey Barron, D-Panama City, is a particularly vocal critic of what he refers to as a ‘phantom government’ which makes decisions that go beyond legislative intent.” The term has remained in Florida politics). Raymond Mariotti, Senator Lewis Shadowing Phantoms, PALM BEACH POST-TIMES, Nov. 24, 1974; Mary Ann Lindley, 1974 and the Opera of the Phantom, TALLAHASSEE DEMOCRAT, June 29, 2003.
\textsuperscript{140} California Memorandum, supra note 129, at 1.
B. Professors, Practitioners, and Politicians

In early February of 1973, a subcommittee of the House Committee on Governmental Operations conducted hearings and staff studies of the Administrative Procedure Act. A modest bill primarily revising the definitions of “agency” and “rule” in order to clarify and expand coverage of the Act was subsequently passed by the House and Senate, while further revisions to the Act were delayed to allow more detailed staff work to be completed during the interim period between legislative sessions. This preliminary bill was vetoed by the Governor.

Meanwhile, in preparation for the 1974 legislative session, the Florida Law Revision Council had adopted as its principal interim project a complete re-write of the Administrative Procedure Act. The Council contracted with Arthur England to prepare a draft for consideration. England in turn sought assistance from the Center for Administrative Justice, an organization that had been created in 1972 by the American Bar Association.

An ad hoc group was put together by the Center for Administrative Justice to work with England. The group met in

142. H.R. 2145 (Fla. 1973).
143. Brief History, supra note 141, at 2.
145. Id.
146. Kennedy, supra note 122, at 66. For a brief article on the purposes and projects of the Center for Administrative Justice by its director, see Milton M. Carrow, Administrative Justice Comes of Age, 60 A.B.A. 1396 (1974).
147. The task force was headed by Milton Carrow, Director of the Center for Administrative Justice and former ABA Section of Administrative Law chair. Other members included: Frederick Davis, Professor of Law at the University of Missouri; Carroll Gilliam, Esq., Washington, D.C.; Cornelius Kennedy, Esq., Washington, D.C.; Joseph Griffin, Esq., Washington, D.C.; Harold Levinson, Professor of Law at Vanderbilt Law School; Hans Linde, Professor of Law at the University of Oregon, and Robert Park, Professor of Law at George Washington University.
September 1973 and prepared a draft containing several key provisions: mandating full availability of all agency decisions, enhancing public participation, minimizing distinctions between quasi-legislative and quasi-judicial actions, compartmentalizing judicial review, and creating a central panel of administrative law judges. ¹⁴⁸ A committee of the Law Revision Council then teamed up with the House subcommittee and continued hearings and staff work. On November 30, 1973, a second draft of a new APA bill was released, followed by more hearings.

In December of 1973, a task force ¹⁴⁹ from the Florida Law Revision Council went to California to study its central panel system. Meetings were held with the Office of Administrative Hearings, several departments of state government, the Attorney General, and private members of the administrative bar. ¹⁵⁰ While everyone with whom the task force talked was generally supportive of the California system, ¹⁵¹ a few deficiencies were identified. One concern was that findings of fact of the administrative law judge need not be accepted by the agency. ¹⁵²

In its report, the task force concluded that the centralized hearing officer system had worked with remarkable success since its inception in California, efficiently serving a large number of agencies while strongly enforcing the impression of impartiality. ¹⁵³ The report submitted to the Law Revision Council recommended all of the major features of the California central panel, as well as some improvements designed to further refine the concept. ¹⁵⁴ After

¹⁴⁹ The group included Senator Tom Johnson, Representative Curt Kiser, Pat Dore, FSU Professor of Law, William Falek, Executive Assistant to the Chief Justice of the Florida Supreme Court, Barry Lessinger, Attorney with the Department of Administration, and McFerrin Smith, Executive Director of the Law Revision Council. Preliminary Report to the Florida Law Revision Council: Task Force Trip to California to Review the California Hearing Examiner System (Mar. 9, 1974) (on file with the Florida Joint Administrative Procedures Committee).
¹⁵⁰ Id. at 2.
¹⁵¹ Id. at 13-14.
¹⁵² The California Office of Administrative Hearings recommended that some form of the competent substantial evidence rule be applied during agency review of an administrative law judges recommended order. Id. at 12-13.
¹⁵³ Id. at 14-15.
¹⁵⁴ Id. at 15.
additional cycles of public hearings before the Council and the subcommittee, followed by revisions, on March 9, 1974 the Council adopted a final, fifth draft. This draft included the California task force's recommendation for agencies to apply a competent substantial evidence review of findings of fact in recommended orders, and it became a starting point for House and Senate bills.\(^{155}\)

The pressures for administrative reform spawned several similar bills in the House, but each had distinctive elements: House Bill 2672 contained a central panel, but allowed the agency full authority to reject or modify findings of fact, conclusions of law, and recommendations;\(^{156}\) House Bill 2583 created a joint legislative committee to oversee rulemaking and agency actions pursuant to the Act;\(^{157}\) House Bill 2434 contained the task force recommendations regarding agency review of recommended orders.\(^{158}\) On April 15, 1974, these three bills were combined into a Committee Substitute by the House Governmental Operations Committee. After thirty-four floor amendments, CS/HBs 2672, 2434, and 2583 unanimously passed the House on April 17, and were sent to the Senate, where they were referred to the Rules and Calendar Committee.\(^{159}\)

Meanwhile, on the Senate side, Senate Bill 490 had been introduced. It contained most of the provisions in the combined House Committee Substitute, and, in addition, provided that the Director of the Division of Administrative Hearings was to make an annual written report to the President of the Senate and the Speaker of the House of Representatives outlining violations of the Act by agency heads, employees, or representatives.\(^{160}\) A Committee Substitute for Senate Bill 892 was focused substantially on control of executive branch rulemaking, and contained several provisions strongly reflective of the classical model of administrative law. It not only created a legislative oversight committee to review rules, but also granted central panel hearing officers the authority to declare proposed and existing rules invalid.\(^{161}\) Senate Bill 490 died in the Rules and Calendar Committee, while CS/SB 892 unanimously

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156. H.R. 2672 (Fla. 1974).
158. H.R. 2434 (Fla. 1974).
passed the Senate with 12 amendments on May 14, 1974.\textsuperscript{162}

When the House received CS/SB 892, they struck everything from the bill and replaced it with the language in the combined bill they had passed earlier.\textsuperscript{163} The Senate refused to concur in these amendments when it returned there, and a conference committee was appointed on May 27. The Conference Committee Report essentially merged CS/HBs 2672, 2434, and 2583 with CS/SB 892.\textsuperscript{164} This compromise was unanimously passed by both houses and signed into law by the Governor on June 25, 1974.\textsuperscript{165}

\textbf{C. Back to the Future}

The Florida APA as finally enacted provided for expanded and clarified coverage,\textsuperscript{166} basic procedures to ensure due process,\textsuperscript{167} and adequate public notice and record of agency actions.\textsuperscript{168} It also contained several innovative elements such as the draw out provision, participatory rule hearings, a legislative oversight committee, and compartmentalized judicial review\textsuperscript{169} that reflected a renewed commitment to the classical model of administrative law.\textsuperscript{170} But perhaps the greatest innovation of the new Act was the creation of the Division of Administrative Hearings and the roles assigned to the

\begin{itemize}
\item 162. \textit{Id. at} 401.
\item 164. \textit{Senate Bill Actions Report, at} 206, July 17, 1974.
\item 165. \textit{Brief History, supra note} 141, at page 2.
\item 166. \textit{See infra notes} 179-181 and accompanying text.
\item 167. The new Act attempted to provide, “[t]he right to present viewpoints and to challenge the view of others, the right to develop a record which is capable of court review, the right to locate precedent and have it applied, and the right to know the factual bases and policy reasons for agency action.” \textit{England, Reporters Comments, supra note} 144, at 5.
\item 168. The Act required meetings and workshops to be noticed in advance with copies of the agenda made available, the rulemaking process to be better publicized, adopted rules to be published in a code, and agency orders to be made available with a subject matter index. \textit{Kennedy, supra note} 122, at 65 (citing FLA. STAT. ch. 74.310 (1974)).
\item 169. The draw out provision, participatory rule hearings, compartmentalized judicial review are discussed in \textit{Stephen Maher, We’re No Angels: Rulemaking and Judicial Review in Florida, 18 FLA. ST. U. L. REV. 767 (1991)}. Florida’s legislative oversight committee, administrative rule challenges, and judicial review are specifically discussed as reflective of the classical model in \textit{Boyd, supra note} 5.
\item 170. \textit{See supra} notes 21-27 and accompanying text.
\end{itemize}
division's ALJs.

The role of the new ALJs was an important one. First, the Florida act had been designed to apply to virtually all state agencies\textsuperscript{171} and to be "self-effectuating." This is to say that unlike the Federal act, which applies only if an extraneous statute requires a hearing, Florida's APA applied through its own power whenever a person's substantial interests were affected.\textsuperscript{172} Then, if there was a disputed issue of material fact involved, the act went on to require use of an ALJ.\textsuperscript{173}

Second, while the due process concerns of \textit{Goldberg} undoubtedly motivated the Florida drafters,\textsuperscript{174} it is clear that use of the term "substantial interests"\textsuperscript{175} was intended to expand the use of ALJs beyond those instances constitutionally requiring a hearing process.\textsuperscript{176} As the reporter noted, the act now covered "the discretionary determinations of many governmental agencies and officers, which have been characterized as "quasi-judicial," quasi-legislative" or "quasi-executive," or have otherwise been exempted from the operation of administrative procedure laws."\textsuperscript{177} The Act

\textsuperscript{171} In comparison, Asimow has estimated that only 5 percent of agency adjudications in California are covered by its Act, Michael Asimow. \textit{Toward a New California Administrative Procedure Act: Adjudication Fundamentals}, 39 UCLA L. REV. 1067, 1073 (1992).

\textsuperscript{172} The Act provided: "The provisions of this section shall apply in all proceedings in which the substantial interests of a party are determined by an agency." Fla. Laws ch. 310 § 1 (1974). Compare the federal approach, "This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing . . . ." 5 U.S.C. § 554(a). \textit{See also} Camp v. Pitts, 411 U.S. 138 (1973).

\textsuperscript{173} The act allows an agency head to itself conduct the hearings, but this provision is almost never used. FLA. STAT. ch. 120.569(1) (2003).

\textsuperscript{174} \textit{Goldberg & Fuentes v. Shevin}, 407 U.S. 67 (1972), was specifically discussed at page 18 of \textit{England, Reporter's Comments, supra} note 144.

\textsuperscript{175} For example, substantial interest hearings were conceived to sometimes apply in rule adoptions. This attempt to end the strict dichotomy between rulemaking and adjudication was one of the most unusual aspects of the new Act. "A more flexible approach based upon whether there are policy issues or disputed issues of material fact to be determined will result in better decisions than procedures based upon the notions of rulemaking and adjudication." \textit{Kennedy, supra} note 122, at 69. For a discussion of the general failure of this innovative concept attributed to restrictive judicial interpretation, \textit{see generally} \textit{Maher, supra} note 169.

\textsuperscript{176} \textit{England, Reporter's Comments, supra} note 144, at 17.

\textsuperscript{177} \textit{Id.} at 18.
thus inserted ALJs into cases that previously would not have been constitutionally or statutorily subject to either administrative hearing or judicial review under writ of certiorari.\footnote{See Dickinson v. Judges of the District Court of Appeal, 282 So. 2d 168 (Fla. 1973); Bay Nat'l Bank & Trust Co. v. Dickinson, 229 So. 2d 302 (Fla. Dist. Ct. App. 1969). England, \textit{Reporter's Comments, supra} note 144, at page 18, expressly stated that the new Act was intended to overrule the law of these cases.}

In addition to the expanded use of ALJs in the most important and controversial cases, Florida chose to create its ALJs as part of a central panel.\footnote{Harold Levinson noted that "a central panel is likely to be accompanied by greater independence." L. Harold Levinson, \textit{The Central Panel System: A Framework that Separates ALJs from Administrative Agencies}, 65 \textit{J. AM. JUDICATURE SOC'Y} 236, 245 (1981).} The Division of Administrative Hearings, though not denominated as a department, was established as functionally independent within the executive branch.\footnote{The language "The Department of Administration shall provide administrative support and service to the division. The division shall not be subject to control, supervision, or direction by the Department of Administration" was added by Section 46, Chapter 79-190, Laws of Florida. The statute now reads: The Department of Management Services shall provide administrative support and service to the division to the extent requested by the director. The division shall not be subject to control, supervision, or direction by the Department of Management Services in any manner, including, but not limited to, personnel, purchasing, transactions involving real or personal property, and budgetary matters. \textsc{Fla. Stat.} ch. 120.65(1) (2003).} Its director was appointed by the Administration Commission and confirmed by the Senate.\footnote{\textsc{Fla. Stat.} ch. 120.65(1) (Supp. 1974).} It should be remembered that although central panels are now common, they were quite rare in 1974. The concept had been discussed, but seldom acted upon. At the Federal level, an administrative court had not been created,\footnote{\textit{See supra} note 99 and accompanying text.} but the general idea of housing ALJs outside of the agency had persisted. It had been the substance of a recommendation of the second Hoover Commission a decade later,\footnote{Where the proceeding before the administrative agency is strictly judicial in nature, and the remedy afforded by the agency is one characteristically granted by the courts, there can be no effective} but never became law. Separate administrative
bodies had occasionally been created to review decisions of certain other Federal agencies.\footnote{184} Among the states, California had been the first to adopt a central panel in 1945,\footnote{185} and twenty years later, Missouri had followed suit in a limited fashion,\footnote{186} but no other states had taken this step at the time Florida was considering its legislation.\footnote{187}

Several advantages of the central panel have been suggested,\footnote{188} perhaps the most prominent of which has been that it fosters the perception of fairness.\footnote{189} While due process and essential fairness can arguably be achieved without a central panel by careful attention to the separation of investigatory and prosecutorial functions, on the protection of private rights unless there is a complete separation of the prosecuting functions from the functions of decision.


\footnote{184} A separate administrative review body has not been widely used in the federal system, but has occasionally been employed. On October 27, 1972, about two years prior to Florida’s new APA, section 15(a) of Pub. L. No. 92-576 amended the Longshoremen’s and Harbor Workers’ Compensation Act to provide for a distinct administrative tribunal to review ALJ decisions under the competent substantial evidence standard (see subsection (b)(3) of 33 U.S.C. 921). There are also some often cited examples of “split-enforcement,” with rulemaking conducted by one agency and adjudication by another, such as the Occupational Safety and Health Administration (OSHA) and the Federal Mine Safety and Health Administration (FMSHA), 29 U.S.C. §§ 659, 661 (1994); 30 U.S.C. § 823 (1994) The old-age, survivors, disability and health insurance programs administered by the Social Security Administration (SSA) provide for adjudication by an administrative law judge with discretionary review by an Appeals Council.

\footnote{185} Asimow, \textit{supra} note 171, at 1071.

\footnote{186} Missouri’s 1965 Administrative Commission operated only with respect to certain licensing entities. \textit{See} Special Project – Fair Treatment for the Licensed Professional: The Missouri Administrative Hearing Commission, 37 MO. L. REV. 410 (1972).

\footnote{187} Hardwicke reports that Massachusetts and Tennessee also adopted central panels in 1974, but they could not have provided models for Florida’s consideration. John Hardwicke, \textit{The Central Panel Movement: A Work in Progress}, 53 ADMIN. L. REV. 419, 441 (2001).


\footnote{189} Asimow, \textit{supra} note 41, at 164.
one hand, from adjudicatory ones, on the other, it is less clear that the appearance of impartiality can be similarly achieved. In any event, procedural fairness was clearly one of Florida's objectives in creating its central panel, "It is ludicrous to think that an agency that sits as prosecutor, judge, and jury is not tainted with some prejudice that has to spill over into its decision-making at the various stages." But Florida's creation of a central panel should also be considered in light of its commitment to the classical model of administrative law. Administrative law judges were granted authority not only to conduct hearings on agency rules, but to issue final orders in such cases. After conducting a formal hearing upon petition of a substantially affected person, ALJs were authorized to determine if a proposed or existing agency rule constituted "an

190. As Bernard Segal noted:
Consider, for example, the unavoidable appearance of bias when an administrative law judge, attached to an agency, is presiding in litigation by that agency against a private party. One can fill the pages of the United States Code with legislation intended to guarantee the independence of the administrative law judge; but so long as that judge has offices in the same building as the agency staff, so long as the seal of the agency adorns the bench on which that judge sits, so long as that judge's assignment to the case is by the very agency whose actions or contentions that judge is being called on to review, it is extremely difficult, if not impossible, for that judge to convey the image of being an impartial fact finder.


192. FLA. STAT. ch. 120.56(2) (2003) (proposed rules); FLA. STAT. ch. 120.56(3) (2003) (existing rules). In 1991, Florida's APA was further amended to grant final order authority to ALJs in challenges to policy not adopted in rules, Sec. 3, Chapter 91-30, Laws of Florida, now codified at ch. 120.56(4) F.S. Provisions outside of the APA also provide for ALJ final orders in selected proceedings: Section 57.111(4)(d) F.S. (award of costs and attorney fees to prevailing small business party); Section 287.133(3)(e)2.e (order placing state vendor on convicted vendor list); Section 287.134(3)(d)2.e (order placing state vendor on discriminatory vendor list); Section 394.467(7)(a) F.S. (order regarding continued involuntary placement of mentally ill patients); Section 945.45(4) F.S. (order regarding continued placement of inmates in mental health treatment facilities); Section 1003.57(5) F.S. (order regarding identification, evaluation, and placement of exceptional students).
invalid exercise of validly delegated legislative authority." Both the particular language of this standard to determine invalidity and the placement of the proceedings in a forum beyond control of the agency strongly illustrates intent to provide a check on agency power. When considered in conjunction with other provisions of the Act which require agency policy formulation by rule, the broad plan to have the division defend legislative control by ensuring consistency with statutory authority becomes even clearer.

Perhaps the most revolutionary provision of Florida's new Act, however, constrained agencies in their treatment of recommended orders. ALJ findings of fact in substantial interest hearings could not easily be changed. As finally enacted, Florida's APA provided:

The agency may adopt the recommended order as the agency's final order. The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the

193. FLA. STAT. ch. 120.54(3) (Supp. 1974). Originally this authority was viewed as limited to a determination that a rule was beyond the authority granted to the agency under its enabling act. See Patricia Dore, Rulemaking Innovations Under the New Administrative Procedure Act, 3 FLA. ST. U. L. REV. 97, 98 (1975). The phrase was later statutorily defined more broadly to codify other bases of invalidity that had been described by the courts, such as procedural deficiencies. Fla. Laws ch. 87-365. The 1974 Act also authorized ALJs to determine if a rule was an "exercise of invalidly delegated authority." This was soon declared unconstitutional because it involved the power to rule a statute invalid, which power could not be delegated to the executive branch. Dept. of Admin. v. Div. of Admin. Hearings, 326 So. 2d 187, 188-89 (Fla. Dist. Ct. App. 1976). The Legislature later repealed this language in Chapter 76-131, Laws of Florida.

194. The statutory standards for decision have become more restrictive over the years. Under 1996 and 1999 amendments, agencies are required to have specific statutory authority to adopt a rule. Fla. Laws chs. 96-159, § 3, 99-379 § 2. For a critical view of such strict rule review standards in Florida and other states, see Jim Rossi, "Statutory Nondelegation": Learning from Florida's Recent Experience in Administrative Procedure Reform, 8 WIDENER J. PUBL. L. 301 (1999).

195. As noted in an early case, Florida's act was premised on the requirement that agencies adopt policy by rule. McDonald v. Dep't of Banking & Fin., 346 So. 2d 569 (Fla. Dist. Ct. App. 1977) (noting general requirement but creating an "incipient policy" exception). Subsequent amendments have more explicitly reiterated this requirement. ALJs issue final orders in separate proceedings to compel adoption of agency policy by FLA. STAT. ch. 120.56(4), and their determinations as to un-adopted policy in recommended orders cannot be easily overturned by an agency. FLA. STAT. ch. 120.57(1)(e).
recommended order, but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.\textsuperscript{196}

This innovative language placed the agency in the posture of a court in reviewing the findings of fact\textsuperscript{197} contained in a recommended order of the ALJ. While similar proposals had occasionally been advanced, Florida may have been the first to enact such a provision into law. The provision appears to have been crafted as a recommendation of the Law Revision Council group that went to California.\textsuperscript{198} This unique approach in bifurcating agency review of recommended orders was designed to promote the application of agency policy expertise by easily allowing modification of conclusions of law, while simultaneously providing a check on the exercise of agency adjudicatory power by making modification of factual findings difficult.\textsuperscript{199}

\textsuperscript{196} 1974 Fla. Laws 74-310 § 1 (codified as amended at FLA. STAT. ch. 120.57(10)(2003).

\textsuperscript{197} Mention should be made of the recognized difficulty in distinguishing findings of fact from conclusions of law. A finding of fact is a declaration that something happened or that a condition exists. Theoretically, such a finding is made prior to, and independent of, any consideration of the legal or policy consequences of that finding. In practice, facts and policy are often difficult to separate, as evidenced by the many cases describing “mixed questions of law and fact” or “ultimate facts.” Although not addressed by Florida’s APA, some court decisions have attempted to generally treat some findings of fact as conclusions of law for purposes of review. See McDonald, 346 So. 2d at 583.

\textsuperscript{198} While a similar review standard had been suggested when the Federal APA was being considered thirty years before, federal agencies were ultimately given full authority to modify findings of fact. The Second Hoover Commission also made a similar recommendation in 1955. With respect to adjudicatory matters, “The decision should only be set aside [by the agency] if clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record . . . .” 1955 Report to Congress, supra note 183, at Recommendation 49.

\textsuperscript{199} While the legislative history leaves no doubt that “balance of power” was the primary concern of the Legislature, other benefits can be suggested. Lack of agency control over findings of fact emphasizes the importance of the hearing itself by forcing the agency to marshal its evidence and argument for the benefit of an
It might be added that the Florida Legislature has continued to confirm and enhance the significance of an ALJ's recommended order. In 1996, restrictions upon agency treatment of certain ALJ conclusions of law and interpretation of rules were added to the Act, and when a court construed these provisions quite narrowly, the legislature immediately reiterated and clarified its broader intent. An agency may now only reject conclusions of law "over which it has substantive jurisdiction." These provisions have proven awkward in operation.

impartial third party. The competent substantial evidence standard ensures that deficits in evidence at the hearing cannot be ignored by the agency during an agency review process, ensuring that contested cases are truly determined "on the record."

200. 1996 Fla. Laws ch. 159 § 19. The amendments allowed an agency to modify only those conclusions of law over which it had substantive jurisdiction. This amendment recognized that in any contested case, legal issues will inevitably arise that are neither governed by the agency's enabling act nor especially within an agency's substantive expertise. For example, disputes may arise as to procedural or evidentiary issues common to all hearings, the resolution of which may implicate the fairness and consistency of adjudicatory proceedings under the APA. Additionally, in rare cases in which administrative adjudications must reach constitutional issues, there may or may not be applicable agency expertise. The statutory scheme's recognition that agency expertise may not extend on the one hand to the mundane identification of hearsay or on the other to the lofty protections of the First Amendment - but rather occupies some middle ground coextensive with the agency's policy portfolio - is surely theoretically correct. This in no way ensures that the particular mechanism of the Florida Statute premised on this conceptual reality will work as intended, however, see infra note 202.

201. Dep't of Children & Families v. Morman, 715 So. 2d 1076 (Fla. Dist. Ct. App. 1998) (Ervin, J., concurring) (statutory change had simply clarified existing law and did not affect an agency's authority to modify an ALJ's conclusion of law).

202. 1999 Fla. Laws ch. 379 § 6 (codified at FLA. STAT. ch. 120.57(1)(1) (2003). In addition to clarifying its earlier intent that an agency could not modify an ALJ's conclusions of law over which the agency had no substantive jurisdiction, the Legislature added a further requirement that an agency must state with particularity its reasons for modifying conclusions of law and make a finding that the agency's substituted conclusion is at least as reasonable as that which was modified. While more a "paperwork exercise" than a substantive restriction, the mood of the Legislature seems clear.

203. FLA. STAT. ch. 120.57(1)(1) (2003).

204. Creation of a single order, some portion of which is to be final as authored by the ALJ and other portions of which are only to be final as issued by the agency, creates difficulties. In Barfield v. Dep't of Health, 805 So. 2d 1008 (Fla. Dist. Ct. App. 2001), the ALJ ruled that grading sheets relied upon by the Board of Dentistry to deny a license application were hearsay. The Board in its
Taken as a whole, the broad scope of ALJ authority, the creation of a central panel, final order authority in rule challenge cases, and bifurcated review of recommended orders established Florida ALJs as a significant counterweight to agency power.\textsuperscript{205} As one national commentator noted regarding the power and structure of Florida’s ALJs, “Indeed, this step brings to administrative proceedings the separation of executive and judicial functions which is a traditional part of our concept of government.”\textsuperscript{206}

It was Florida’s conviction that with the delegation of adjudicatory authority to agencies performing executive functions, one of the original purposes of an independent judiciary had been lost. The virtue of adjudication by a separate “nonpolitical” branch of government as a check on the concentration of executive power was forfeited. Under Florida’s APA, the creation of a central panel with final order rejected this conclusion of law. On appeal, the court found that the Board lacked the substantive jurisdiction to reject such an evidentiary conclusion and so reversed the Board’s order on that ground. The court went on, however, to agree with the Board that the grading sheets met a hearsay exception. The court then stated that the Legislature could not have intended to make ALJ conclusions of law outside the substantive jurisdiction of the agency unreviewable, and so proceeded to rule that the license application should be denied. As to the unusual procedure, the court suggested that an agency harmed by recommended conclusions which it is powerless to reject has the option either of entering a final order under protest, and thereafter appealing from its own order as a party adversely affected, or of seeking immediate judicial review from the ALJ’s recommended order. Similar cases have arisen in other districts. See, e.g., G.E.L. Corp. v. Dep’t of Envtl. Protection, 875 So. 2d 1257 (Fla. Dist. Ct. App. 2004) (interpretation of APA attorneys’ fees provision outside agency substantive jurisdiction; agency should initiate interlocutory appeal); Deep Lagoon Boat Club, Ltd. v. Sheridan, 784 So.2d 1140 (Fla. Dist. Ct. App. 2001) (decision not to apply collateral estoppel was outside agency’s substantive jurisdiction; Department, although an appellee, argued that the Department Secretary’s reading of his authority was too limited). Presumably the ultimate legislative objective in highlighting areas beyond agency substantive expertise is to dissuade the courts from undue agency deference with regard to such issues. If so, it might be more effective to specifically clarify provisions on judicial review, or to allow “reversal” by the agency only pursuant to an extremely restrictive standard. If part of the concern is the practical difficulty and expense of appeal for the party injured by the agency’s reversal of an ALJ’s conclusions, perhaps strong attorneys’ fees provisions would be in order.


\textsuperscript{206} Kennedy, supra note 122, at 69.
protected findings of fact in its recommended orders and limited final order authority reinstated this institutional check. Admittedly, the check came from within the executive branch, not from the judiciary, but it similarly provided a balance to the concentration of power in the agency head.\textsuperscript{207}

Florida's dissatisfaction with the procedural model of administrative law was in no way unique. In fact, as noted earlier, it was contemporary federal practitioners and professors who provided the nucleus for many of Florida's innovations, which were, in that sense, a product of the times. "In enacting this comprehensive reform in the administrative procedures of state agencies, the Florida Legislature has drawn upon the legal thinking and experience of the 1970's, rather than the 1940's when the last major administrative procedure acts were conceived."\textsuperscript{208} However, Florida's creation of the Division of Administrative Hearings and its administrative law judges was also unavoidably a reflection of its own history of agency abuse of power and its own separation of power ideals.

IV. DESIGN, DYNAMICS AND DISCRETION

"[F]orm ever follows function, and this is the law. Where function does not change form does not change." Louis Sullivan

Federal and Florida histories go far to explain the different roles that ALJs play in each system. A more complete understanding of these differing roles, however, requires at least a quick look at the overall design of the two statutes, viewing the ALJ provisions in a larger context. As we have seen, the predominant philosophy inspiring the Federal APA is the procedural model, while in contrast Florida draws substantially from the classical model. These differing

\textsuperscript{207} This division of the executive power is not unusual in Florida government. "Floridians have a deep distrust of executive power, which they control by fragmenting it. The unusually broad authority assigned to the Division of Administrative Hearings by the Florida Legislature is but another reflection of this culture of distrust of executive authority, and the desire to rein it in." Dorsey, supra, note 205, at 77.

\textsuperscript{208} Kennedy, supra note 122, at 65. Mr. Kennedy was the Chairman of the Rulemaking and Public Information Committee of the Administrative Conference of the United States. This article suggests that Florida not only drew upon the legal thinking and experience of the 1970s, but also upon the legal thinking and experience of the 1770s.
philosophies are reflected in the basic design of the two Acts, which in turn support a different system dynamic.

A. Concept and Detail

At the time of enactment of the Federal APA, adjudication was the primary avenue for agency policy formulation.\textsuperscript{209} Agencies were primarily engaged in regulating major industries, and important policy questions arose under specific fact situations involving a particular respondent. Specific agency guidance could then be tailored to the adjudication at hand, leaving broader questions for development over time as those issues arose. The broad congressional delegations of power to agencies - providing little guidance to agencies and few substantive restrictions - reinforced the primacy of adjudication and maximized agency discretion. Nothing in the Federal APA altered this basic structure.

The design of the Federal APA is lean. It has only a relatively limited number of rather short provisions. The basic Act consists of only about nine sections, including one section for definitions,\textsuperscript{210} one for rulemaking,\textsuperscript{211} and three for adjudication.\textsuperscript{212} Even judicial review, in some ways the heart of the legislation, is essentially covered in four sections.\textsuperscript{213} But if the provisions are short, they are not especially simple. The Federal APA sets up many different procedures. Requirements for formal proceedings are linked to the requirements of enabling acts outside of the APA,\textsuperscript{214} and there are numerous broad exceptions created by the Act.\textsuperscript{215} It must be noted,

\begin{itemize}
  \item \textsuperscript{209} The APA’s emphasis upon rulemaking is often identified as the major innovation of the APA. See Davis & Gellhorn, \textit{supra}, note 84.
  \item \textsuperscript{210} 5 U.S.C. § 551 (2004).
  \item \textsuperscript{211} 5 U.S.C. § 553 (2004).
  \item \textsuperscript{212} 5 U.S.C. §§ 554, 556-57 (2004).
  \item \textsuperscript{213} 5 U.S.C. §§ 702-04, 706 (2004).
  \item \textsuperscript{214} "When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.” 5 U.S.C. § 553(c); “This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing . . . .” 5 U.S.C. § 554(a).
  \item \textsuperscript{215} Consider just the rulemaking exceptions: Section 553(a)(1) excludes rules dealing with military or foreign affairs functions; (a)(2) excludes rules relating to agency management or personnel, and rules relating to public property, loans,
too, that there have been remarkably few amendments to the Federal
APA. The basic lack of detail in the Act provides a great deal of
flexibility for agencies and courts. The many exemptions, mentioned
but not defined, and the lack of amendments leave much for
interpretation.

In the years after enactment of the Federal APA, as agency
regulation of a few large industries and institutions gradually gave
way to mass interaction with individuals in benefits and permitting
contexts, the agency flexibility fostered by loose and infrequent
adjudication came under criticism. Adjudication became less
valuable as precedent because each factual difference could be
litigated. Pressures for more comprehensive policy, described in
advance, mounted. In Florida, with its non-delegation tradition, this
translated first, into preferences for agency rulemaking as opposed to
policy making by adjudication, and second, into demands that these
rules be carefully circumscribed within substantive limits established
by the enabling legislation.

In terms of its design, the Florida Act is considerably longer than
the Federal APA. It sets forth, sometimes in excruciating detail, the
precise information that notices must contain, the standards for
award of attorneys’ fees, and the way the Florida Administrative
Weekly will be published. At the same time, the Florida
procedures are in many ways simpler. For example, there is only one
form of rulemaking, so there can be no controversy or cases about
which procedure ought to be followed. And the provisions are much
more comprehensive. While the basic definition of rule parallels the
definition in the Federal act, there are no exceptions for interpretive

grants, benefits or contracts; (b)(A) excludes rules of agency organization,
procedure, or practice as well as interpretive rules and policy statements from
notice and comment but not from publication or petition provisions; (b)(B) creates
a “good cause” exception that allow an agency to dispense with some or all
requirements.

216. In 1966 the Act was recodified as part of Title 5, with a few minor
changes. In 1976, ex parte communications were prohibited in formal proceedings.
In 1978, the sovereign immunity defense was eliminated in certain cases. In 1996,
the Congressional Review Act incorporated a congressional rule review mechanism
into the APA. See Steven Croley, The Administrative Procedure Act and

217. FLA. STAT. ch. 120.525 (2003).
218. FLA. STAT. ch. 120.595 (2003).
219. FLA. STAT. ch. 120.55 (2003).
rules, none for policies relating to public property, none for loans, grants, benefits or contracts. Policy statement is just another name for rule. There is no "good cause" exception. The Florida Act, not surprisingly, has been amended every year since it was first adopted.

B. Courts and the Legislature

Even this quick overview of the design of the Federal and Florida Acts suggests an important difference in the dynamic of the two administrative law systems. Primary oversight in the federal design comes from the judiciary; in the Florida design it comes from the legislature.

Steven Croley has noted that after having passed an "administrative constitution," Congress has permitted the other branches to develop Federal administrative law within the broad parameters set by the APA. The APA’s lean provisions offer broad avenues for agency and judicial interpretation. Of course, every statute must be applied to unforeseen circumstances and refined through adjudication, but the especially broad and un-amended provisions of the APA compel a strong emphasis on interpretation. The remarkable result, as Kenneth Davis acknowledged forty years after its enactment, is that it can be said that federal administrative law has not been significantly shaped by the APA, "Well, I'm a little surprised at my own conclusion, that the APA has not been especially significant legally. I think that administrative law is predominantly a combination of common law and constitutional law. The portions of it that are statutory are quite limited."221

This is not to say that federal administrative law has been stagnant. While the APA itself has seldom been amended, there have been several other acts that complement the APA, usually creating additional analyses to be conducted. Thus, the National Environmental Policy Act requires the preparation of an Environmental Impact Statement, the Regulatory Flexibility Act requires economic analysis of the impact on small entities, and there is the Paperwork Reduction Act, the Unfunded Mandates Reform

220. Croley, supra note 216, at 35.
221. Davis & Gellhorn, supra note 84, at 526.
Act, and countless more. But note that these additional acts do not change basic APA processes or enhance the role of Congress in agency policy formulation, but rather, in keeping with the procedural model, provide the judiciary with tools designed to ensure that agency decision-making is a thorough process, that certain values have been considered, that various constituencies are remembered.

But the primary source of evolution in the Federal APA has clearly been judicial interpretation. The list of judicial “interpretations” and “gloss” on the APA would provide a virtually complete history of federal administrative law. It has been the courts, sometimes working with only a thread of statutory language, that have directed federal administrative law. “The effect of the APA may be as low as [ten] per-cent.”

In stark contrast, the Florida Legislature - starting with its concern with “phantom government” during the development of its Act, and continuing essentially unabated through the ensuing years - has jealously guarded the delegation of power to the Executive branch. The years have seen pages of testimony given, numerous staff studies completed, the creation of several blue ribbon advisory groups, and even the creation of special ad hoc committees all wrapped in the rhetoric of “restoring the balance” to government by returning policy making to its “rightful” place in the hands of the Legislature. The provisions of the APA directed to this end or colored with that perspective are almost too numerous to count.

While some Florida courts have tried from time to time to follow

222. A remarkably long list of applicable statutes and requirements for Federal rulemaking has been catalogued by Mark Seidenfeld, A Table of Requirements for Federal Administrative Rulemaking, 27 FLA. ST. U. L. REV. 533 (2000).

223. The author has in fact argued that these “evaluative” tools of procedure have become so widespread, that in conjunction with “hard look” they deserve to be considered as a new administrative law model in their own right. See Boyd, supra note 5.

224. Croley, supra note 216, at 41-43.

225. “I would say there’s a lot more that ought to be called common law than is generally recognized. But this is law made by courts without interpreting a statute or the Constitution. Maybe the bulk of today’s administrative law is common law in that sense.” Davis & Gellhorn, supra note 84, at 526.


227. For a review of some recent provisions, see Boyd, supra note 15.
the lead of the federal courts and assume the primary role in guiding Florida's administrative law system, usually by citing to federal case law, they have been less than successful. In these instances, the legislature has usually been quick to react and frequently modifies and effectively overturns court decisions at odds with the classical flavor of Florida's APA.\textsuperscript{228}

\textit{C. Agency Deference and Agency Check}

Our comparative look at the structure and dynamics of the federal and Florida systems predicts that these two systems will have very different approaches to agency discretion. For if the federal system emphasizes the role of the judiciary and the Florida system emphasizes the role of the legislative branch, still the ultimate concern of administrative law is with neither of these, but with the agency.

At the federal level:

[t]he APA was passed in concern over administrative impartiality in certain agency decision making. Congress sought to achieve two fundamental goals: to eliminate agency control over the classification, discipline and conflict with hearing examiners, which is what ALJs were formerly called, and to separate the prosecutorial and adjudicatory functions, which previously had resided in the same person in some agencies.\textsuperscript{229}

Given such objectives, it was only natural that the APA would be designed to place the courts, experts at fair procedure and guardians of due process, in charge of agency oversight. The inevitable corollary was that the courts were ill-equipped to substantively police agency action, especially in the absence of focused legislative guidelines. The statutory scheme thus moved the system still further

\textsuperscript{228} See, \textit{e.g.}, Senate Staff Analysis of S. 206 (1999) (containing specific citation to four cases interpreting the APA on different issues that were being clarified or "overturned").

away from the concerns with substantive control on the exercise of power that had previously infused the classical model. The result has been an administrative system strongly emphasizing deference to the agency’s substantive policy role.

Florida’s continued embrace of the tenets of the classical model did not allow it to so completely abdicate substantive control over agency policy. The Florida legislature was being pressured to rein in executive agency excesses at home even as experts in the Federal APA were advocating reforms there. At the same time, however, the need for agency adjudication and policy expertise was clearly recognized. Florida’s compromise would ultimately seek to 1) channel agency policy authority into rulemaking while granting ALJs final order authority to ensure fidelity with delegated legislative authority and 2) bifurcate agency review of ALJ recommended orders in other cases to preserve agency expertise over conclusions of law while giving much more limited authority over findings of fact. These were true innovations in 1975, and together they provided a significant check on the concentration of power in the agency head. The legislature has continued over the years with this approach, and has further restricted agency discretion in several areas.

The retention of substantial policy control in the body of the legislature is not only a reflection of its APA, it is a reflection of its Constitution. While taken slightly out of context, two quotes well illustrate the differing philosophies of the federal and Florida approaches to agency discretion. In the absence of legislative guidelines governing agency discretion, the federal courts conclude that the APA lets the agency proceed as it determines best:

[R]eview is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion. In such a case, the statute ("law") can be taken to have 'committed' the decisionmaking to the agency's judgment absolutely.\(^\text{231}\)

In contrast, the Florida courts find in such a situation not only a

\(^{230}\) For a discussion of enhanced legislative oversight and restrictions, see Boyd, \textit{supra} note 15.

\(^{231}\) Heckler v. Chaney, 470 U.S. 821, 830 (1985)
violation of the APA, but a violation of the Florida Constitution:

When legislation is so lacking in guidelines that neither the agency nor the courts can determine whether the agency is carrying out the intent of the legislature in its conduct, then, in fact, the agency becomes the lawgiver rather than the administrator of the law.²³²

V. CONCLUSION

"It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory..."

Louis D. Brandeis

The vesting in administrative bodies of legislative power to be exercised through the adoption of rules and of judicial power to be exercised through the conduct of hearings had historically been declared by the courts not to violate separation of powers. But despite the federal example -- and in part because of it -- Florida was not convinced that the procedural model alone could provide sufficient oversight of agency exercise of this delegated authority. The federal system, essentially directed by judicial action and animated by the demands of due process, had required notice, procedures, and separation of functions, but ultimately had granted strong deference to agencies and fueled the growth of administrative power.

While Florida recognized the legitimate need to incorporate agency expertise into the adjudicatory process, the federal solution was increasingly seen as destructive of the balance of power among the institutions of government. In 1974, drawing on the familiar precepts of the classical model, Florida crafted an APA which returned more substantive policy control to the Legislature and attempted to strengthen the role of the courts in substantive review of agency action. Most significantly, a central panel of ALJs was created, with power to issue final orders in rule challenges and to compel findings of fact in other contested cases.

Bifurcating agency review authority over recommended orders

²³². Askew v. Cross Key Waterways, 372 So. 2d 913, 918-19 (Fla. 1978).
both enhanced adjudicatory independence -- fostering both due process and balance of power ideals -- and preserved significant agency control over policy implementation. In a formalist sense, the Florida structure is of course no more consistent with strict separation of powers than systems without restricted agency review of recommended orders -- or for that matter, systems without central panels, or even without ALJs. After all, the adjudicative process in each of these instances is vested outside the judicial branch. But in a more "Madisonian" sense, the Florida structure provides a realistic check on concentration of power in the agency head which statutes granting an agency unrestricted power to change the recommended order are incapable of providing.

Some commentators have suggested the differences between the federal and state APAs may be increasing over time. If so, it seems likely that this is because other states have also found federal solutions inadequate to their needs. The history of the central panel, for example, has been well documented. Though it has been noted that the jurisdiction, structure, process, and authority of the judges in these panels vary greatly, still the increasing number of central panels among the states constitutes a slow but steady trend.

233. The limitation set forth in Den, ex dem. Murray v. Hoboken Land and Improvement Co., 59 U.S. 272, 284 (1855) (declaring legislative delegation of common law, equitable, or admiralty powers to be unconstitutional), discussed supra notes 35-37, has continued vitality. Consistent with this approach, note Minnesota’s recent holding that delegation of equitable power was unconstitutional in violation of separation of powers, even though exercised by an ALJ in a central panel in Holmberg v. Holmberg. 588 N.W.2d 720 (Minn. 1999).

234. See supra notes 17-24 and accompanying text.


238. Hoberg, supra note 237; Hardwicke, supra note 187, at 420.
Specific attention to the concept of restricted agency review authority over ALJ decisions has been scant, but in addition to Florida, commentators have identified restrictions in the states of Colorado, Iowa, Montana, North Carolina, Oregon, South Carolina, and Texas. While few of these states have copied Florida’s

239. Flanagan, supra note 237, at 1357 (noting a few states, including Florida, that have restricted agency authority with respect to treatment of ALJ recommended orders and describes this approach as part of an “emerging trend”); see also William Fauver, An Agenda for Investigation: Should the APA be Amended to Provide Standards for Agency Review of Administrative Trials? 1973 DUKE L.J. 135 (1973) for a discussion of the issue at the federal level.

240. See Flanagan, supra note 237, at 1358; Rossi, Overcoming Parochialism, supra note 236, at 569; Scott McCown & Monica Leo, When Can an Agency Change the Findings or Conclusions of an Administrative Law Judge?, 50 BAYLOR L. REV. 65, 66 (1998).

241. COLO. REV. STAT. § 24-4-105(15)(b) (2004) (stating that findings of evidentiary fact, as distinguished from ultimate conclusions of fact, made by an ALJ shall not be set aside by the agency on review of the initial decision unless such findings of evidentiary fact are contrary to the weight of the evidence); IOWA CODE ANN. § 17A.15.3 (West 2004) (agency may reverse or modify any finding of fact if a preponderance of the evidence will support the determination); MONT. CODE ANN. § 2-4-621 (2003) (agency may not reject or modify the findings of fact unless the agency reviews the complete record and states with particularity that the findings were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law); N.C. GEN. STAT. § 150B-36(a)-(b3) (2003) (agency shall adopt each finding of fact contained in the ALJ’s decision unless the finding is clearly contrary to the preponderance of the admissible evidence, giving due regard to the opportunity of the ALJ to evaluate the credibility of witnesses, and if ALJ order is not adopted and agency order is appealed, the court conducts a de novo review of the record ); 2003 Or. Laws 75 (agency conducting a contested case hearing may modify a finding of historical fact made in the ALJ’s recommended order only if it is not supported by a preponderance of the evidence in the record, and a reviewing court conducts de novo review if changes are made); S.C. CODE ANN. § 1-23-610(D) (Law Co-op. 2003) (judicial standards of review are applicable to agency review of an ALJ order, and subsection (e) allows reversal or remand when the ALJ order is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record); TEX. GOV’T CODE ANN. § 2001.058(e) (Vernon 2004) (stating that agency may change a finding of fact if the administrative law judge did not properly apply or interpret applicable policies or may change a technical error in a finding of fact). It is interesting to consider the effect of statutory language employing variations of the “preponderance” standard of proof as an appellate standard of review. Professor Flanagan states at 1371: “The effect of this standard is to restrict substantially the agency’s power to amend facts found by the ALJ.” Flanagan, supra note 237. But simply requiring an
"competent substantial evidence" standard, the precise wording of a standard of review may not be critically important as a measure of the amount of deference given. As has been noted, "on balance, the number of cases in which the choice of words would determine the judicial outcome are probably not worth the battles that have been fought over the proper standard to be applied." The general concept of restricting the power of the agency head with respect to recommended orders, on the other hand, remains significant.

The United States Supreme Court, and to a greater or lesser extent the state courts, have long endorsed legislative delegation of agency to support contrary findings by a preponderance standard, as the Iowa language appears to do, effectively makes applicable the standard of proof that would apply if the agency was hearing the case initially, in the absence of any ALJ recommended order. This would not in itself seem to constitute any restriction, though if a reviewing court subsequently departed from the traditional substantial evidence standard, it could have that effect indirectly. Some of the above states complicate matters by allowing rejection of a fact not supported by a preponderance of the evidence, because this need not always equate to adoption of a contrary fact, but still any restriction on agency authority seems minimal. Admittedly, application of standards of review is hardly a precise science, and as illustrated by Universal Camera, 340 U.S. 474, the overall "mood" of these schemes might have the intended effect. In any event, though perhaps counterintuitive, it should be clear in theory that allowing an agency to reverse findings unsupported by competent, substantial evidence is more restrictive of its authority than allowing an agency to reverse findings unsupported by a preponderance of the evidence.

244. The Model Act Creating A State Central Hearing Agency, proposed in 1997, leaves this issue to a State's APA or provisions of substantive law, but the wording interestingly appears to create a "default" in favor of finality in the absence of such direction: "In reviewing a proposed (initial, recommended) decision or order received from the administrative law judge, the agency head or governing body of the agency shall not modify, reverse or remand the proposed decision of the administrative law judge except for specified reasons in accordance with law." Model Act Creating a State Central Hearing Agency, Section 1-11, Proposed Decisions and Orders, at http://www.law.fsu.edu/library/admin/alj.html. (last visited Nov. 30, 2004).
245. Some jurisdictions have specific constitutional authority for the exercise of judicial power by administrative agencies. Article V, Section One of the Florida Constitution provides, "commissions established by law, or administrative officers or bodies may be granted quasi-judicial power in matters connected with the functions of their offices."
judicial power to executive branch entities. The federal government and each state must therefore determine whether, and where, to delegate such power within these constitutional limits. Some jurisdictions have sought to vest plenary adjudicatory authority in agencies. Others conversely have given full final order authority to bodies external to the agency. In delegating a portion of adjudicatory power to centrally housed ALJs and restricting the power of agencies to modify findings of fact contained in their recommended orders, Florida has sought a middle ground. It has attempted to grant the agency significant control over conclusions of law beyond that which could be exercised if a court had conducted the hearing, yet at the same time to provide an institutional check on the concentration of power in the agency head.

It is, of course, impossible to ever empirically demonstrate the "proper" balance between the legislative, judicial, and executive branches. Florida’s choice may be variously condemned by defenders of executive prerogative, apologists of legislative authority, or advocates of judicial power as going too far, or not going far enough. From any perspective, however, consideration of how the administrative law judge affects the institutional balance of power within a jurisdiction is an important factor that deserves more attention than it has received.

246. See supra notes 27-36 and accompanying text.

247. Asimow reports that the California Coastal Council hears every matter en banc and does not employ hearing officers. Asimow supra note 171 at 1107. Other California Agencies using ALJs may reject their orders. CAL. GOVT. CODE § 11517(c) (West 2004).