Reforming the APA: Legislative Adventures in the Labyrinth

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"That's not a regular rule: you invented it just now."
"It's the oldest rule in the book," said the King.
"Then it ought to be Number One," said Alice.

Actually, a regular session of the Florida Legislature is like Wonderland: a sixty-day clock ticks, rabbit trails\(^2\) crisscross the hallways, and jabberwockies mill about the Capitol's fourth-floor rotunda. To address the needs or concerns of constituents, senators and representatives introduce bills that must negotiate the labyrinthine process if laws are to be made or changed. Like Alice, proposed bills are challenged at every turn, words and phrases are interpreted differently by members of each chamber (as well as committee staff and lobbyists), and rules of the game appear mysterious and confusing to nonparticipants.

Typical in many ways, the 1994 Regular Session of the Florida Legislature was laden with weighty issues, including renovation of the state's juvenile justice system, innovation of universal health care for Floridians, and restoration of the Everglades. While reformation of the Administrative Procedure Act (APA)\(^3\) did not garner substantial media attention, the issue was intensely debated among legislators, the

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1. LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND 162 (Heritage Press 1941) (1865).
2. In the legislative process, the term "rabbit trail" refers to a specious or spurious bill introduced for the purpose of diverting the attention of opposing interests.
business community, and representatives of executive branch agencies. No less than twenty-four bills proposing serious modifications to the APA were filed for consideration during the Regular Session. At *sine die*, however, the only measure passed by both chambers was House Bill 1981, which modified certain evidentiary provisions of the APA.

The recent interest in amending chapter 120 stems from the growing impact of governmental regulation upon the daily lives of Florida citizens. On the effective date of the APA twenty years ago, some ninety-three agencies administered 9442 rules contained in the *Florida Administrative Code* (the *Code*); as of February 1994, approximately 139 agencies enforced 27,912 rules. Licensed professionals such as barbers, realtors and doctors are regulated by the Department of Business and Professional Regulation; homeowners wishing to construct a family boat dock must comply with rules promulgated by the Department of Environmental Protection, the U.S. Army Corps of Engineers, an area water management district and a regional planning council, as well as the ordinances of local government; and small or minority business entrepreneurs of everything from daycare centers to dry cleaners are subject, at a minimum, to regulation by the Departments of Commerce, Revenue, State, Business and Professional Regulation, and Health and Rehabilitative Services.

With increasing frequency, individual citizens and members of the Florida business community adversely affected by the actions of governmental agencies have lodged complaints with their elected state officials. Not only have those representatives listened, but many even campaigned on reform platforms that included the streamlining of governmental regulation. As a result, over the last few years significant progress has occurred in environmental regulation, managed

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4. *FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1994 REGULAR SESSION*, at 9. The Final Legislative Bill Information list 37 bills affecting chapter 120, but many of the listed bills dealt with other substantive issues and only tangentially impacted the APA.

5. *FLA. H.R. JOUR. 2260* (Reg. Sess. 1994); *FLA. S. JOUR. 1662* (Reg. Sess. 1994). Latin for "without day," *sine die* describes the final adjournment of a duly convened session of the Legislature. By custom in Florida, the President of the Senate and the Speaker of the House of Representatives (in their respective chambers) simultaneously strike gavels to signify the adjournment as the Senate and House sergeants-at-arms drop white handkerchiefs in the fourth-floor rotunda of the Capitol.

6. Ch. 94-161, § 1, 1994 Fla. Laws 954 (amending *FLA. STAT. § 120.58* (1993)) (providing for the admissibility of similar fact evidence in administrative hearings and restricting the use of certain evidence in professional licensure proceedings that involve allegations of sexual misconduct).

7. Counties and municipalities are considered "agencies" only "to the extent they are expressly made subject to [the APA] by general or special law or existing judicial decisions." *FLA. STAT. § 120.52(1)(c)* (1993).


9. See, e.g., ch. 94-356, §§ 1, 485-95, 500-04, 1994 Fla. Laws 2625, 2885, 2895 (to be
health care services, emergency preparedness and responsiveness, and the performance and accountability of state government. Yet, the basic processes of the APA, through which Floridians interact with state agencies, have not changed significantly over the last twenty years.

I. APA Reform in the House of Representatives

In November 1992, incoming Speaker of the Florida House of Representatives, Bolley L. "Bo" Johnson, established the House Select Committee on Agency Rules and Administrative Procedures (House Select Committee) to "encourage greater citizen input" in the rule-making process and to investigate whether agencies "stray from legislative intent" in the promulgation and enforcement of rules. In the event committee members found modification of the APA appropriate, the House Select Committee was authorized to prepare and introduce legislation to address problem areas in the law.

Under the chairmanship of Representative Randy Mackey, the House Select Committee conducted public hearings throughout Florida to gather information on the types of problems that citizens and
business entities encountered when dealing with governmental agencies. When it became apparent from the testimony given at those meetings that the processes established by chapter 120 should be examined to ensure they facilitate effective interaction between agencies and those affected by administrative rules, Chairman Mackey estab-

18. Tape recordings of all committee meetings are available from the Secretary of the House Select Committee, 224 House Office Building, Tallahassee, Fla. 32399-1300.

19. In his commentary on House Select Committee proceedings, Stephen T. Maher asserts "These hearings were a forum to allow constituents to vent their anger—not to find out whether, and to what extent, the bureaucracy was out of control. Agency witnesses recognized this and did not even try to mount a defense." Stephen T. Maher, Getting Into the Act, 22 FLA. ST. U. L. REV. 277, 282 (1994).

Mr. Maher is correct in his description of angry testimony in front of the House Select Committee. What he has omitted is the reason for that anger: the enforcement of often contradictory or obfuscatory administrative rules. For example, St. Cloud property owner Robert Herring twice had to move a 20-by-70 foot wooden bulkhead along his property's lake shoreline to comply with permitting requirements of the U.S. Army Corps of Engineers and the former Florida Department of Environmental Regulation, and had to pay a $1000 fine and sign a consent order admitting to erroneously "filling" along the shore. Fla. H.R. Select Comm. on Agency Rules and Admin. Procs., tape recording of proceedings (Jan. 4, 1993) (on file with comm.) (testimony of Robert Herring). Mr. Herring was nonetheless cited by the Florida Game & Fresh Water Fish Commission and had to bear the expense and humiliation of a criminal trial (he was acquitted by the jury). Id. Mr. Herring's $800 seawall became a $15,000 nightmare. In addition, the following agency representatives who appeared before the House Select Committee would probably be surprised to learn that their testimony did not defend the actions or positions of their respective agencies:

<table>
<thead>
<tr>
<th>Date of Hearing</th>
<th>Representative and Agency</th>
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</thead>
<tbody>
<tr>
<td>Feb. 8, 1993</td>
<td>Nikki Ann Clark, Dan Thompson and Janet Llewellyn, Department of Environmental Regulation</td>
</tr>
<tr>
<td>Feb. 15, 1993</td>
<td>Janet Llewellyn, Department of Environmental Regulation</td>
</tr>
<tr>
<td>Feb. 22, 1993</td>
<td>Richard W. Cantrell, Janet Llewellyn and Dan Thompson, Department of Environmental Regulation</td>
</tr>
<tr>
<td>Sept. 13, 1993</td>
<td>Bob Jackson and Lisa Nelson, Department of Business and Professional Regulation; Jerry L. Potter and Marshall Stivers, Department of Transportation</td>
</tr>
<tr>
<td>Sept. 20, 1993</td>
<td>Jeremy Craft, Department of Environmental Protection; David L. Jordan and Rebecca Jetton, Department of Community Affairs</td>
</tr>
<tr>
<td>Oct. 4, 1993</td>
<td>Barton L. Bibler, Department of Environmental Protection; David W. Fisk, Suwanee River Water Management District; Robert M. Viertel and Richard McLean, Southwest Florida Water Management District</td>
</tr>
<tr>
<td>Nov. 1, 1993</td>
<td>Lisa Nelson, Department of Business and Professional Regulation; Linda Shelley, Department of Community Affairs</td>
</tr>
<tr>
<td>Nov. 29, 1993</td>
<td>Lisa Nelson, Department of Business and Professional Regulation; Deborah Kearney, Office of the Governor</td>
</tr>
</tbody>
</table>

20. In response to Mr. Maher's comment that "[p]eople have always had problems with government agencies and they always will. That is why we have laws and lawyers[.]", Maher, supra note 19, at 283, I note there will always be poor and sick people too, but that fact does not relieve society from undertaking programs to help them. The APA often has been the vehicle by which poor policy and bad bureaucrats have undermined the people’s faith in their own government. If a map for crossing the desert reflects circuitous routes, fails to mark the location of oases, confuses the traveler with conflicting scales, is impossible to follow without an experi-
lished an APA Task Force (Task Force) to advise and assist House Select Committee staff in developing APA reform legislation for the 1994 Regular Session. The Task Force included appellate court judges, private sector and agency attorneys, legal scholars, and administrative hearing officers. It was divided into working groups upon the participants' identification of three main areas in the APA that warranted modification: (1) creation of an economical, expeditious summary hearing process within section 120.57; (2) revision of the rulemaking process set forth in section 120.54, with special emphasis on clarifying procedural time limitations, requirements for preparation of economic impact statements, consistency with section 120.535, and proposed rule challenges under section 120.54(4); and (3) development of uniform standards of appellate review, including the degree of deference to be given agency expertise and clarification of legislative oversight in both rule promulgation and enforcement.

During the summer and fall of 1993, the Task Force working groups discussed ways to modify the APA to address perceived problems. Due to the various perspectives of the participants, consensus proposals were difficult to draft, but by the end of 1993, the House


With such an accumulation of administrative law expertise, I find it difficult to agree with Mr. Maher's statement that "[m]any of the key players in fashioning proposed changes to the rulemaking sections of the APA had little or no actual experience with rulemaking. They were also quite unfamiliar with the APA as a whole." Stephen T. Maher, From the Chair, XV ADMIN. L. SEC. NEWSL. 2 (June 1994). Members of the Task Force assigned to the rulemaking working group included F. Scott Boyd, Johnny C. Burris, Wade L. Hopping, Susan B. Kirkland, G. Steven Pfeiffer, Betty J. Steffens, William E. Williams, and ex officio member Lawrence E. Sellers, Jr.


23. See supra note 21.


25. Mr. Maher's view on the proposed bill drafting process is as follows:
Select Committee had four Proposed Committee Bills for the 1994 Regular Session. Proposed Committee Bill ARS 94-1, later House Bill 135, revived the House Select Committee's 1993 Regular Session attempt to authorize agencies to adjust rule criteria to address the special needs of counties having populations of less than 50,000.Officials from several small local governments told the House Select Committee that compliance with some administrative rules would lead to financial ruin or require diversion of substantial revenue from public services. Many small counties already tax residents at the maximum legal millage and would be forced into bankruptcy or reallocation of ad valorem tax revenues to accommodate certain administrative mandates.

The House Select Committee's Proposed Committee Bill ARS 94-2, later House Bill 835, would have modified the rulemaking provisions

As for the allegation that Task Force members were "used" to lend credibility to the House Select Committee's proposed bills, Mr. Maher's comment is an affront to those Task Force members who collectively contributed hundreds of hours in travel time, meetings and proposal preparation. Moreover, it was during the Task Force organizational meeting (not attended by Mr. Maher) that participants were polled as to what, if anything, needed to be changed in the APA. The responses indicated that there were three "problem" areas in need of attention: creation of a summary hearing procedure, adjustment of the rulemaking process, and clarification of evidentiary and appellate standards. See supra notes 22-24 and accompanying text.

28. For example, Bud Parmer, Gadsden County Administrator and spokesman for the Small County Coalition, stated that a policy of the former Department of Environmental Regulation requiring the county to obtain a permit for the semi-annual clearing and repacking of ditches along unpaved county roadways would have cost Gadsden County $4.5 million dollars—$500,000 more than its entire annual budget. Telephone Interview with Bud Parmer, former Gadsden County Administrator (Aug. 2, 1994).
of section 120.54 to require agencies to publish an initial notice of rule promulgation, as well as a final notice once any changes were made to the proposed rule. The bill would have expanded the opportunities for public participation in rulemaking, as well as enhanced legislative oversight functions of the Joint Administrative Procedures Committee (JAPC). In addition, the legislation would have shifted the deadline for challenging a proposed rule to within twenty-one days after publication of final notice of the intended action. Proposed Committee Bill ARS 94-4, later House Bill 837, contained mostly technical changes to chapter 120, including identification of agency orders that must be indexed, modification of review processes relating to agency procedural rules, confirmation that appellate courts can consolidate certain proceedings, and authorization for direct appeal of a rule challenge when no disputed issue of fact is involved.

A product of the Task Force summary procedure working group, the House Select Committee's Proposed Committee Bill ARS 94-3, later House Bill 833, proposed an alternative administrative hearing process within section 120.57(1) that provided for limited discovery and the issuance of final orders by administrative hearing officers. The text of House Bill 833 was refined by the House Select Committee's Proposed Committee Bill ARS 94-5, later House Bill 2429, to add a mediation alternative and address technical concerns voiced by administrative hearing officers.

The proposed expedited hearing procedure was a low-cost, due process-oriented alternative to the formal adjudicatory process of section 120.57(1)(b). It would have allowed any party in a section 120.57(1) proceeding to file a motion for summary hearing within twenty days after service of the initial assignment order from the Division of Administrative Hearings (DOAH), with other parties having the normal seven days to file motions in opposition. If an objection was filed, the hearing officer would determine whether to conduct the

29. Fla. HB 835 (1994) (proposed amendment to Fla. Stat. § 120.54 (1993)).
30. Id.
34. Fla. HB 2429, § 1 (1994) (proposed amendment to Fla. Stat. § 120.57(1) (1993)).
proceeding in accordance with the summary procedure by considering seven factors.\textsuperscript{35}

If the hearing officer determined that the case was appropriate for summary disposition, the case would be set for a final hearing date within forty-five days; if no motion for summary hearing was filed or the hearing officer decided that the case was more suited to the existing formal adjudicatory process, the matter would proceed in accordance with the remaining provisions of section 120.57(1)(b).\textsuperscript{36} Within the summary procedure framework, discovery would be limited to the informal exchange of documentary evidence and witness lists, with the hearing officer having discretion to allow additional discovery upon an appropriate showing of necessity.\textsuperscript{37} To evaluate the usefulness of the new process, the bill required DOAH to maintain a register for two years, listing the cases that proceeded through summary disposition.\textsuperscript{38}

By enumerating detailed criteria to guide hearing officers’ decisions on whether cases should proceed through the summary process, the drafters and supporters of House Bill 2429 felt the proposed law contained sufficient guidance to facilitate the separation of complex, policy-laden cases from the simpler, fact-intensive cases that hearing officers are fully capable of deciding. Accordingly, the proposed summary process authorized entry of a final order by the hearing officer, with all parties having an equal right to appeal that decision.\textsuperscript{39}

\textsuperscript{35} Whether, having been duly served with the initial order, the parties understand the differences between the two types of formal administrative hearings available under this paragraph and paragraph (c), as well as the procedure for selecting the appropriate hearing process.

\textsuperscript{36} Id.

\textsuperscript{37} Id.

\textsuperscript{38} Id.

\textsuperscript{39} Id.
In response to commentary by Stephen Maher, the author finds it difficult to understand how the proposed summary procedure could lead to the abuse of intervenors in controversial matters. With detailed criteria to guide decisionmaking, surely the same hearing officers who determine the validity of administrative rules are equally competent to decide when a case is sufficiently complex, intervenor intensive, or replete with fact questions that require extensive discovery to warrant its adjudication through the formal processes of section 120.57(1)(b).

Regarding Mr. Maher's discussion of an "opt out" summary procedure, while that process was one of three the Task Force summary procedure group initially proposed, the House Select Committee discarded it in favor of the "opt in" measures incorporated in House Bill 833 and House Bill 2429. The automatic summary hearing of the "opt out" procedure was considered too rigid and potentially hostile to due process requirements, while a "unanimous consent" summary process would have little effect on the public's need for a simple and inexpensive hearing alternative, since parties to a section 120.57(1)(b) proceeding can currently agree to limit motions, issues and discovery.

With regard to the final order authority provision contained in the summary procedure proposals, Mr. Maher states that:

[T]he controversial nature of this proposal [was not] explained when the simplified procedure proposal came before the House Select Committee on Agency Rules and Administrative Procedures. In fact, from the presentation and discussion, it appeared that this aspect of the proposal was not controversial.

Mr. Maher's views are misguided and not supported by the legislative record. House Select Committee bill analyses and staff presentations of House Bill 833 and House Bill 2429, as well as testimony by supporters of these bills, show the proposal to vest final order authority in hearing officers in summary cases was carefully noted and discussed.

40. See Maher, supra note 19, at 303-05.
41. See Maher, supra note 19, at 304.
42. See Fla. HB 833 (1994); Fla. HB 2429 (1994).
43. Maher, supra note 19, at 305, n.52.
44. Perhaps the most important part of this section—of the summary procedure itself—is that the hearing officer of DOAH would render the final order. It would not be a recommended order that would then go back to the agency. Presumably, the cases that would go through the summary process have already gone through a weeding process if there was an objection, and the decision of the hearing officer will be
Although House Select Committee staff solicited agency input and comments, no agency representative appeared before the committee during several hearings on the summary proposals to express concern or criticism about House Bill 833 or House Bill 2429.\textsuperscript{45} When House Select Committee staff contacted the Governor’s Office of Legislative Affairs to ascertain the official executive position on the summary hearing proposal, a representative of that office stated she knew of no problem with the proposed summary procedure of House Bill 2429.\textsuperscript{46} It was only when House Bill 237, revised to include the summary hearing process of House Bill 2429, was readied for House floor debate

\textsuperscript{45} Id. (testimony of Robert M. Rhodes).

\textsuperscript{46} Telephone Interview with Deborah K. Kearney, Dep. Gen. Couns., Office of the Governor (on or about Feb. 23, 1994).
that the general counsel for one state agency—who had participated in House Select Committee hearings without commenting on the summary procedure proposal—persuaded the Governor's Office to retract its earlier "no problem" position and the summary hearing provision was stricken from House Bill 237.

II. GOVERNMENTAL REFORM IN THE SENATE

In September 1992, incoming Senate President Pat Thomas created the Senate Select Committee on Governmental Reform (Senate Select Committee) to focus on "improving the effectiveness and efficiency of state government." Government officials, legislators, and lobbyists alike were impressed with the new committee, a veritable "Who's Who" of powerful Democratic and Republican senators. Encompassing issues of government performance and accountability, the scope of the Senate Select Committee was broader than that of the House Select Committee; yet, Senator Thomas directed it to review agency promulgation and enforcement of administrative rules. Specifically, Senator Thomas cautioned that "we must not allow agencies to expand on the law while making their rules. I ask you, therefore, to ensure that all agency rules are based on statutory authority and that the rules do no more than the law requires." Like the House Select Committee, the Senate Select Committee held numerous public hear-

47. Mr. Maher is wrong when he states that this agency general counsel had not participated in earlier committee hearings on the summary procedure bills. See Maher, supra note 19, at 305, n.52. Indeed, although the counsel was in attendance and spoke to the committee on other proposed bills, he did not file an appearance record with the committee secretary or otherwise indicate any desire to speak to the committee regarding concerns he might have had about the summary procedure proposals.


49. Dem., Quincy.

50. President Thomas appointed the following Senators to the new committee: Charles Williams (Chair), Democrat, Live Oak; S. Curtis Kiser (Vice Chair), Republican, Dunedin 1972-1994; W.D. Childers, Democrat, Pensacola; Ander Crenshaw, Republican, Jacksonville (Senate President, 1992-93) 1972-1978, 1986-1994; Fred R. Dudley, Republican, Cape Coral; Kenneth C. Jenne II, Democrat, Ft. Lauderdale; Toni Jennings, Republican, Orlando; George G. Kirkpatrick, Jr., Democrat, Gainesville; James A. Scott, Republican, Ft. Lauderdale; and Robert Wexler, Democrat, Boca Raton.

51. Letter from Senator Pat Thomas, Pres. Pro Tempore, to Senator Charles Williams, Chair, Senate Select Committee (Sept. 14, 1993) (on file with author).

52. Members of the Senate Select Committee included the Chair (Sen. Jenne) and Vice Chair (Sen. Crenshaw) of the Appropriations Committee, the Chair (Sen. Childers) and Vice Chair (Sen. Jennings) of the Commerce Committee, the Chair (Sen. Wexler) and Vice Chair (Sen. Kiser) of the Finance, Taxation and Claims Committee, the Vice Chair of the Judiciary Committee (Sen. Dudley), and the Chair (Sen. Kirkpatrick) and Vice Chair (Sen. Scott) of the Rules and Calendar Committee.

53. See supra note 51.
ings to gather information on the impact of government regulation and possible solutions to alleged abuses of the administrative process. Midway through the 1994 Regular Session, the Senate Select Committee published reports on enhancing government accountability and strengthening legislative oversight of the rulemaking process.

The Senate Select Committee’s legislative proposals differed in perspective from those of the House Select Committee, primarily as the result of specific directives by President Thomas. The most significant Senate recommendations for changing the APA included: (1) establishing a general rulemaking limitation whereby “[a]gencies could only adopt rules which implement, interpret, or make specific the particular powers and duties granted by the enabling statute,” with all rules being voided that were adopted prior to July 1, 1994, based on a delegation of rulemaking authority broader than that limitation; (2) authorizing JAPC to suspend a rule to which it voted an objection, with the Legislature considering the suspended rule as a general bill during the next Regular Session—if the Legislature does not act, the suspension would expire and the agency could proceed with adoption of the rule; (3) creating a law revision council to “conduct a comprehensive review of the APA and recommend changes to the Legislature”; (4) requiring economic impact statements for all proposed rules unless otherwise waived by the legislation being implemented; (5) providing that a JAPC objection would create the presumption that a proposed rule exceeded delegated legislative authority and the agency would have the burden of proving that the rule was valid in any administrative or judicial proceeding; (6) expanding the time frame for challenging a proposed rule to include the twenty days following publication of any change in the rule; and (7) requiring each agency to prepare a “rule development statement” indicating what evidence the agency relied on, rejected, or did not consider during rulemaking.

54. Staff of Fla. S. Select Comm. on Govtl. Reform, Recommendations for Governmental Reform (Feb. 28, 1994) (on file with comm.); see also supra note 12 and accompanying text.
55. Staff of Fla. S. Select Comm. on Govt. Reform, Recommendations for Administrative Rulemaking (Feb. 28, 1994) (on file with comm.) [hereinafter Rulemaking Recommendations].
56. See supra notes 50-53 and accompanying text.
58. Id.
59. Id. at 5.
60. Id.
61. Id. at 6.
62. Id.
63. Id. at 7.
In addition to the legislative chambers investigating governmental regulation, the Florida Chamber of Commerce (Florida Chamber) identified the need for "red tape reform" after a poll of its members revealed that eighty-three percent of the responding businesses believed that "burdensome government rules [were] an obstacle to profits." In fact, the Florida Chamber's board of directors adopted the following position for the organization's 1994 legislative agenda:

The Florida Chamber of Commerce supports mandating that agencies consider the economic impact of their actions at all stages of the rulemaking process; strengthening legislative oversight of the regulatory process to establish greater checks and balances in the regulatory arena; amending Florida's Administrative Procedures Act to make it less adversarial, more user-friendly, and to extend its provisions to the Florida Game and Fresh Water Fish Commission; and supports further legislative action on agency streamlining, cost-effectiveness analysis of agency rules and eliminating costly and burdensome regulations.

Indeed, the Florida Chamber's intensive lobbying provided significant motivation for the filing and progression of House Bill 237, which was the most promising yet ultimately unsuccessful vehicle for APA reform during the 1994 Regular Session.

Prefiled in November 1993 with more than one hundred cosponsors, House Bill 237 was obviously going somewhere in the 1994 Regular Session. When the House Select Committee initially considered the proposal on the first day of the Session, representatives from the Governor's Office voiced concern over portions of the bill and pledged to work with the Speaker's Office, staff of the House Select Committee, and representatives of the Florida Chamber to craft a product that would address issues raised in the bill yet be acceptable to the Chief Executive. Over the next several weeks, these parties negotiated and redrafted the legislation to address the Governor's concerns while still providing for significant modification of chapter 120.

By the time House Bill 237 passed the House Select Committee,
it had been revised to include many of the provisions contained in House Bills 135, 835 and 837\textsuperscript{69} and was recognized as the primary House vehicle for APA reform.

As unanimously passed by the House on April 4, 1994,\textsuperscript{70} House Bill 237 would have significantly modified the APA. To address agency complaints that legislative delegations of rulemaking authority are often vague, the bill would have created section 11.0755, \textit{Florida Statutes}, to require the Legislature to consider and identify in each grant of rulemaking authority the degree of specificity, expertise, public input and legislative review necessary for promulgation of rules under the delegation.\textsuperscript{71} To increase legislative oversight of agency rulemaking, the bill would have enlarged the membership of JAPC and expanded its authority.\textsuperscript{72}

House Bill 237 also would have amended the definition of "invalid exercise of delegated legislative authority" so that legislative intent and a rule's reasonable relation to the implemented statute would be considered in the determination of its validity.\textsuperscript{73} Furthermore, to overcome judicial decisions that have afforded agencies wide discretion in statutory interpretation,\textsuperscript{74} the bill would have made clear that "[a] rule does not acquire a presumption of validity solely because it has been through the rulemaking process or solely because it is within the range of permissible interpretations of the implemented statutes."\textsuperscript{75}

The bill would have significantly modified the rulemaking provisions of section 120.54. First, an agency would be required to publish an \textit{initial} notice of intention to adopt a rule at least forty-nine days prior to the intended action.\textsuperscript{6} The bill also would have required publication of a \textit{final} notice after the last public hearing but no later than twenty-one days before adoption of the rule.\textsuperscript{77} The final notice would

\textsuperscript{69} See supra notes 25-33 and accompanying text.
\textsuperscript{70} FLA. H.R. Jour. 1041, 1071 (Reg. Sess. 1994).
\textsuperscript{71} FLA. H.R. Jour. 1041 (Reg. Sess. 1994) (amendment 1 to Fla. CS for HB 237, § 1 (1994)) (proposed FLA. STAT. § 11.0755).
\textsuperscript{72} \textit{Id.} (amendment 1 to Fla. CS for HB 237, § 2 (1994)) (proposed amendment to FLA. STAT. § 11.60 (1993)).
\textsuperscript{73} \textit{Id.} (amendment 1 to CS for HB 237, § 3 (1994)) (proposed amendment to FLA. STAT. § 120.52(8) (1993)).
\textsuperscript{74} See, e.g., Department of HRS v. Framat Realty, Inc., 407 So. 2d 238 (Fla. 1st DCA 1981).
\textsuperscript{75} FLA. H.R. Jour. 1041, 1042 (Reg. Sess. 1994) (amendment 1 to Fla. CS for HB 237, § 3 (1994)) (proposed amendment to FLA. STAT. § 120.52(8) (1993)).
\textsuperscript{76} \textit{Id.} (amendment 1 to Fla. CS for HB 237, § 4 (1994)) (proposed amendment to FLA. STAT. § 120.54(1)(b) (1993)). Currently an agency must publish notice of a proposed rule 21 days before the intended action. FLA. STAT. § 120.54(1)(b) (1993).
\textsuperscript{77} FLA. H.R. Jour. 1041, 1042 (Reg. Sess. 1994) (amendment 1 to Fla. CS for HB 237, § 4 (1994)) (proposed amendment to FLA. STAT. § 120.54(2) (1993)).
contain any changes to the initial text and would either reflect the final text of the rule or a reference to earlier text publications, thereby facilitating public access to the complete text of a rule before adoption. The bill would have altered the time for filing a proposed rule challenge to within twenty-one days following publication of the final notice so that the proposed rule would no longer be a "moving target" subject to modification after a rule challenge had been filed. Initial and final notices of the text would be provided to JAPC at the same time as publication, and the proposed rule could not be filed for adoption until any challenge was resolved or the time for filing a challenge had expired.

Another area ripe for reform centered on the requirement that agencies prepare an economic impact statement as part of the rule-making process. The public complains that agencies disregard a proposed rule's economic impact on business interests, and agencies protest that they lack the resources (i.e., economists) to provide detailed cost analyses. House Bill 237 would have replaced the economic impact statement with a "statement of estimated regulatory costs" (SERC), which would include: (1) an analysis of the regulatory costs to small businesses and counties; (2) a description and estimated number of persons that would be economically affected by the proposed rule; (3) an estimate of direct, readily ascertainable costs associated with implementation of the rule; and (4) an estimate of anticipated costs that two persons or entities from different geographic areas and of varying size would probably incur as a result of the regulation.

A proposed rule could be challenged on the basis of the SERC if the agency failed to prepare the statement following a request for its preparation, or if the agency failed to consider information submitted with regard to regulatory costs of the rule.

In addition, House Bill 237 provided that "if an affected person provides an agency with a written proposal for a lower cost regulatory alternative to a proposed rule that substantially accomplishes the statutory directive, the agency must either adopt the alternative approach or provide a detailed written explanation of its reasons for rejecting the alternative." By revising the economic impact statement provi-
sion and tightening the requirement that agencies choose the lowest net cost regulatory alternative, proponents of the legislation hoped to make economic considerations a meaningful part of the rulemaking process.

The bill also would have required an agency to prepare a "rulemaking record" and retain the record as long as the rule was in effect.\(^{85}\) The record would contain copies of the following items: all notices required by section 120.54; all requests for workshops and public hearings and the agency's responses to each; any tape recording, transcript or written summary of each workshop or public hearing; all requests for preparation of a SERC and written public comments on the regulatory costs of the rule, as well as any preliminary and final SERC; all written comments or alternatives submitted to the agency; all materials filed with JAPC, correspondence between JAPC and the agency, and any notice of disapproval filed by JAPC; and all written inquiries from standing committees of the Legislature and the agency's responses thereto.\(^{86}\)

Under the bill's provisions, if JAPC objects to a proposed rule and the agency fails to modify or withdraw the rule, provide notice of its intent to amend or repeal an existing rule to comply with the objection, or pursue the adoption of the proposed modification, withdrawal, or repeal of the rule, "then in any subsequent proceeding to determine the validity of the rule . . . there shall be no presumption that the rule is a valid exercise of delegated legislative authority."\(^{87}\) Additionally, House Bill 237 would have amended section 120.58 to allow the admission of the following evidence of legislative intent: bill analyses, economic impact statements, fiscal notes, reports and records of special committees or commissions, floor debates, and House and Senate journals.\(^{88}\)

### IV. LEGISLATIVE SHOWDOWN

While House Bill 237 was winding through the legislative process, Senate Bill 1440 was scheduled for consideration by the Senate Rules and Calendar Committee.\(^{89}\) Responding to a request by Senator Williams, representatives of the Governor's Office delivered a memorandum to the Senator detailing their concerns with the Senate APA reform bill.\(^{90}\) The Governor questioned the legality of the Senate's

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85. Id. at 1044 (proposed amendment to Fla. Stat. § 120.54(6) (1993)).
86. Id.
87. Id. at 1047 (amendment 1 to Fla. CS for HB 237, § 6 (1994)) (proposed Fla. Stat. § 120.545(9)).
88. Id. at 1050 (amendment 1 to CS for HB 237, § 10 (1994)) (proposed Fla. Stat. § 120.58(4)).
90. The author earlier reported that the staff director of the Senate Select Committee stated
proposal to repeal all rules not clearly designed to implement specific statutes, because under current law rule revocation must follow the same procedure as initial rulemaking.\textsuperscript{91} The Governor's Office raised serious concerns over the constitutionality of Senate Bill 1440's grant of rule suspension power to JAPC on grounds that the provision would be an unlawful legislative delegation in violation of the separation of powers doctrine.\textsuperscript{92} Furthermore, the Governor's Office argued that authorizing rule suspension would encourage lobbying of JAPC members to avoid adoption of rules that implemented controversial legislation. That is, interests failing to defeat particular measures during session would "live to breathe another day."\textsuperscript{93}

With regard to Senate Bill 1440's requirement that agencies prepare economic impact statements on all proposed rules, the Governor's Office instead advocated adoption of the SERC and lower-cost alternative proposals described in House Bill 237.\textsuperscript{94} The Governor's concern with House and Senate attempts to weaken the presumption of validity that clothes agency rules was discussed in a memorandum recommending alternative language to both chambers' proposals.\textsuperscript{95}

The Governor's Office memorandum further noted that the Senate proposal to extend the rule challenge deadline to twenty days after
publication of a notice of change was nearly identical to the twenty-
one day period required by House Bill 237, and that the latter also
duly addressed an agency's preparation of a "rule development
statement." The memorandum went on to discuss each of the indi-
vidual recommendations of the Senate Select Committee reflected in
Senate Bill 1440 and proposed changes to comport with the negotiated
language contained in House Bill 237.

During the Senate Select Committee’s discussion of Senate Bill 1440
on February 23, 1994, and again at the Senate Rules and Calendar
Committee meeting of March 14, 1994, a Governor’s Office representa-
tive testified about several provisions of the bill that were problem-
atic for the Governor. The representative further indicated to
Senator Jenne that a proposal would be forthcoming to address those
concerns. On the following day, another memorandum was delivered
to Senator Jenne with an attached proposal to amend Senate Bill 1440
with language “that the Governor’s Office would find acceptable.”

As the last eighteen days of the Regular Session ticked by, represent-
tatives of both chambers, the Governor’s Office, and the Florida
Chamber continued to refine the language of House Bill 237, and the
summary procedure created by House Bill 2429 was incorporated into
the bill before it was placed on the Special Order Calendar for March
31, 1994. While the Governor’s Office had earlier indicated that it
had no problem with the summary hearing process, when House Bill
237 was brought to the House floor, legal counsel for one state agency
objected to that portion of the new procedure that authorized hearing
officers to issue final orders. Even though an amendment was drafted
that would have given an agency the power to prohibit a case from
proceeding through summary disposition, the Governor’s Office in-
sisted that the summary process language be deleted since it was not
included in the earlier negotiations of House Bill 237.

96. Memorandum from John Moyle, Jr. and Deborah Kearney, Office of the Gov., to Sen.
Charles Williams, Chair, Fla. S. Select Comm. on Govtl. Reform (Mar. 14, 1994) (on file with
author).
97. Id.; see also Memorandum from John Moyle, Jr., Legis. Affairs Dir., Office of the
Gov., to Sen. Ken Jenne, Member, Fla. S. Select Comm. on Govtl. Reform (Mar. 15, 1994) (on
file with author).
98. Fla. S. Select Comm. on Govtl. Reform, tape recordings of proceedings (Feb. 23, 1994)
(on file with comm.).
99. Id.
100. See Memorandum from John Moyle, Jr., Legis. Affairs Dir., Office of the Gov., to
Sen. Ken Jenne, Member, Fla. S. Select Comm. on Govtl. Reform (Mar. 15, 1994) (on file with
author).
101. FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1994 REGULAR SESSION, HISTORY OF
HOUSE BILLS at 230, HB 237.
House Bill 237 was certified to the Senate after unanimous passage in the House.\(^\text{102}\) On the last day of the Regular Session, Senator Williams amended House Bill 237 on the Senate floor by substituting the text of Senate Bill 1440—the Senate Select Committee's proposals for changes to chapter 120—along with Senator Kiser's amendment adding the summary procedure language of House Bill 2429.\(^\text{103}\) As thus amended, House Bill 237 passed the Senate without opposition and was sent back to the House.\(^\text{104}\)

Inasmuch as the Governor's Office, the Speaker's staff, the Florida Chamber, and the sponsors of House Bill 237 felt that the House measure had been more fully negotiated and carefully crafted to address issues paramount to those parties, the Senate amendments were unacceptable to the extent they deviated from the House measure. Accordingly, the House modified the Senate amendment to incorporate the text of House Bill 237 as passed by the House on April 4, 1994, and returned the legislation to the Senate in the early hours of the last scheduled day of the Regular Session.\(^\text{105}\)

The Speaker and the President of the Senate extended the 1994 Regular Session from April 8 to April 16, 1994, to consider issues relating to health care, juvenile justice, the Everglades, and appropriations.\(^\text{106}\) Although outside the call of the extension, House Bill 237 was taken up by the Senate\(^\text{107}\) and was amended to: (1) revise the definition of "invalid exercise of delegated legislative authority"; (2) limit the admissibility of certain legislative materials as evidence; (3) change the membership of JAPC back to its original composition; and (4) delete a provision that would have authorized JAPC to conduct a hearing if a substantive legislative committee objected to a proposed rule.\(^\text{108}\)

Upon receiving the amended bill from the Senate, the House refused to concur in three of the Senate amendments (agreeing only to the change modifying JAPC's composition), and returned the bill to the Senate.\(^\text{109}\) Since the House was apparently not interested in accept-

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104. Id. at 1026.
106. Id. at 1701.
108. Id. at 1445-46.
109. The strongest House objection to the Senate amendments centered on its modification of the definition of "invalid exercise of delegated legislative authority." Rather than clarifying standards for review, the Senate changes would have deleted existing tests and could have been interpreted as having an effect other than what it intended. See, e.g., Fla. SB 1440, § 4 (1994) (proposed amendment to FLA. STAT. § 120.52(8) (1993)) (including within the definition of "invalid exercise of delegated legislative authority" any agency rule which "does not implement a specific law").
ing any other substantive Senate provisions, the bill was not considered further by the Senate, and it died in Senate messages at the close of the Regular Session on April 15, 1994.\textsuperscript{110}

V. CONCLUSION

The failure of the 1994 Florida Legislature to pass significant reform of the APA in the face of substantial constituent complaints and overwhelming legislative support reaffirmed the bureaucracy’s position of power in the administrative process.\textsuperscript{111} After two special legislative committees investigated allegations of agency abuse in the administrative process and assembled respected experts in administrative law to draft reform legislation, the fact that none of those proposals passed the Legislature leads one to question whether meaningful revision of chapter 120 can be accomplished. Although substantial testimony before the House and Senate Select Committees indicated that Florida’s citizens need and want a simple, inexpensive hearing process in which the agency is not both prosecutor and judge, and despite nearly seventy-five percent of the House Select Committee’s APA Task Force of administrative law experts indicating that creation of a summary hearing process within the APA should be a priority, the Governor’s Office refused to support the procedure unless final order authority remained with the agency. While the Governor’s representatives participated in House Bill 237 negotiations with the Speaker’s Office and House Select Committee staff to forge an acceptable product, it is this author’s opinion that executive agencies heaved a great sigh of relief when, at sine die, the APA remained virtually untouched.

\textsuperscript{110} FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1994 REGULAR SESSION, HISTORY OF HOUSE BILLS at 230, HB 237.

\textsuperscript{111} Contrary to Mr. Maher’s description, I do not “blame” the bureaucracy for the 1994 Legislature’s failure to amend chapter 120. See Maher, supra note 19, at 306. Instead, the lack of change to the APA was simply a reaffirmation of the advantage agencies hold in the administrative process. Likewise, I do not “blame” the Governor for the failure of APA reform. In his defense, I noted earlier that one of the Governor’s duties as the chief executive of Florida is to protect and defend the power and authority of executive branch agencies. My criticism is instead directed to the manner in which the summary procedure provision was initially accepted by the Governor’s Office (on behalf of all executive agencies), but was then stripped out of House Bill 237 some six weeks later when one agency counsel (who had plenty of opportunity and was indeed invited to voice his concerns) complained about the final order authority provision.