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The Seventh Administrative Law Conference Chairman's Introduction to the Symposium Issue

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THE SEVENTH ADMINISTRATIVE LAW CONFERENCE CHAIRMAN'S INTRODUCTION TO THE SYMPOSIUM ISSUE

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I. INTRODUCTION TO THE CONFERENCE

THIS issue of the *Florida State University Law Review* includes articles developed from papers presented at the Seventh Administrative Law Conference. The Administrative Law Section of The Florida Bar presents the Conference annually as its major event. The First Administrative Law Conference, held in 1983, was organized by Judge Robert P. Smith, Jr., who was for many years a judge of the First District Court of Appeal and who authored many of that court's most important opinions in the area of Florida administrative law. Since that time, it has provided a forum for the important administrative law issues of the day.

The Seventh Administrative Law Conference was held at the Florida State Conference Center on March 16 and 17, 1990. It corresponded with, and was designed to celebrate, the fifteenth anniversary

* Associate Professor of Law, University of Miami School of Law, and Chairman, Seventh Administrative Law Conference sponsored by the Administrative Law Section of The Florida Bar. I am indebted to so many people for their help in making the Conference a success. Peg Griffin of The Florida Bar staff handled the logistics of the Conference, and it is thanks to her efforts that the Conference ran so smoothly. The Executive Council of the Administrative Law Section played an important role in the organization of the Conference. Without their strong support, the ideas I proposed to them would never have taken form. I would like to extend special thanks to Arthur England and Professor Patricia Dore who provided me with valuable advice in the preparation of the program. I thank those who helped publicize the Conference, especially those in the executive branch who helped secure the attendance of a large contingent of agency lawyers. I also thank the staff of the Legislature for providing participants with up to the minute information concerning developments in pending legislation and for listening to Conference input on those matters. Finally, I thank the participants themselves. Their participation in the small group discussions provided the assembled group with insights into the workings of the administrative process, and provided those who delivered papers with an additional source of material for their articles.

of the Florida Administrative Procedure Act (the APA or the act). We were fortunate to have an impressive group of speakers and small group leaders, as well as a large group of experienced participants. The participants were asked to read a set of Conference materials in advance. Those materials included background readings on the act in general and on the particular issues the Conference would address. The Conference focused on the rulemaking provisions of the act and was divided into three major segments.

Following Judge Smith's opening remarks, five academic papers were presented on the first morning of the Conference. Those papers have been developed into the five articles that are included in this symposium issue. The papers were designed to stimulate discussion concerning a number of issues related to rulemaking under the act.

During the next segment of the Conference, the general assembly divided into small groups so that the participants could discuss the issues addressed in the papers. Each group obtained a list of potential issues and were invited to discuss those topics, in any depth or order, or to discuss any other points that related to rulemaking in Florida. Most of the small groups were led by individuals who had played important roles in the development of the APA fifteen years earlier. The small group discussions were recorded, and the group leaders took notes to report to the assembled group when it reconvened.

The next morning, during the final segment of the Conference, the small group leaders who had been involved in the drafting and adoption of the act fifteen years ago discussed their experiences with the assembled group. Then, the small group leaders and those who had delivered papers acted as commentators on the act, reporting the discussion of the small groups and reacting to the reported discussions.

II. INTRODUCTION OF THE AUTHORS

The authors of these Symposium articles are the most distinguished academics that could be assembled to discuss current issues in Florida administrative law.¹ Arthur Earl Bonfield is the John Murray Professor of Law and the Associate Dean for Research at the University of Iowa School of Law. He has written almost thirty law review articles and three books in the area of administrative law. His book, *State Administrative Rulemaking*,² is the leading work on that subject. His

1. The following biographical material is derived, in large part, from the introductions given to each of the speakers by Drucilla Bell, the Chair of the Administrative Law Section of The Florida Bar.

2. A. BONFIELD, *STATE ADMINISTRATIVE RULEMAKING* (1986).

casebook, *State and Federal Administrative Law*,³ co-authored with Professor Michael Asimow of the University of California at Los Angeles, represents the first serious attempt to integrate state administrative law into the standard law school administrative law course.

Professor Bonfield served as one of the two Reporters for the National Conference of Commissioners on Uniform State Laws in the development of the 1981 Model State Administrative Procedure Act (1981 MSAPA). He currently serves as a Uniform Laws Commissioner from Iowa. He drafted the Iowa Administrative Procedure Act and the Iowa Open Meetings Law and chaired the Iowa Governor's Committee on the Revision of the Iowa Public Records Law. After enactment of the Iowa Administrative Procedure Act, Professor Bonfield acted as special counsel to the agencies of the state of Iowa to advise them concerning the implementation of the act. He now chairs the Iowa Governor's Task Force on Uniform Agency Rules of Procedure.

Professor Bonfield is also active in bar association efforts to improve the dispensation of administrative justice. He chaired the Iowa State Bar Association Committee on Administrative Law for ten years. In 1987 and 1988, he served as Chair of the 7,000 member Administrative Law and Regulatory Practice Section of the American Bar Association. In addition, Professor Bonfield was a consultant to the Administrative Conference of the United States from 1968 to 1976.

L. Harold Levinson is a Professor of Law at Vanderbilt University School of Law, and has served in that capacity since 1973. He was a Professor of Law at the University of Florida from 1966 to 1973. Professor Levinson has been a force in administrative law both nationally and in Florida for many years. He has published numerous law review articles in the area of administrative law, and is the co-author, with Arthur England, of the leading treatise on the Florida APA, the three-volume *Florida Administrative Practice Manual*.⁴

On the national level, Professor Levinson has served as a Reporter for the National Conference of Commissioners on Uniform State Laws in the development of the 1981 MSAPA. From 1976 to 1986, he served as a consultant to the Administrative Conference of the United States to identify innovations in state administrative law which might serve as models for potential federal reforms. He is currently engaged in writing a treatise on state administrative law.

3. A. BONFIELD & M. ASIMOW, *STATE AND FEDERAL ADMINISTRATIVE LAW* (1989).

4. A. ENGLAND & L. LEVINSON, *FLORIDA ADMINISTRATIVE PRACTICE MANUAL* (1990). The manual was supplemented by Richard A. Belz, and is now supplemented by the publisher.

Professor Levinson is probably best known in Florida for his important work in connection with the drafting and enactment of the current Florida Administrative Procedure Act as Chairman of the committee of the Law Revision Council⁵ charged with the oversight of the drafting of its legislative proposal. In this capacity, Professor Levinson had significant influence on the form of the act finally adopted. His work at that time was the subject of favorable comment in law review articles, and is still remembered by many who practice Florida administrative law.

Patricia Ann Dore is an Associate Professor of Law at Florida State University, and a Co-Chair of the Seventh Administrative Law Conference. She has been continuously and actively involved in Florida administrative law in Tallahassee since the act was adopted. She has taught a course on Florida Administrative Law annually since 1975. Many of the participants at the Conference, those who have gone on to shape the way the law has developed in this area, first learned about the act in her class. She has also been active in legislative efforts, and Legislators frequently seek her counsel on issues pertaining to the act. She recently served on an ad hoc task force formed to give the Legislature advice on proposals to amend the act considered in the 1990 Regular Session of the Legislature.⁶ Professor Dore has written a number of law review articles and book chapters on the Florida APA, including two chapters in the third edition of *Florida Administrative Practice*,⁷ recently published by The Florida Bar. Her most celebrated work to date is her scholarly and insightful critique of the way access to the administrative process has been regulated in Florida.⁸

Johnny C. Burris is a Professor of Law at Nova University's Shepard Broad Law Center. He has written a number of law review articles on federal and Florida administrative law and is the author of a chapter on the administrative process and constitutional principles in

5. Arthur England provided a short history of the Council at the Conference. I repeat it here because it is not widely known. The Florida Law Revision Council operated in Florida from the 1960's to the mid-1970's. The Legislature created the Council with the specific purpose of modernizing the law of the State. It had fairly free reign to do what it determined was important. Thus, the Law Revision Council was responsible for a new corporations act, the wrongful death act, the evidence code, the condominium act, and the landlord and tenant act. The landlord and tenant act is "the one that probably did them in. They did such a good job, they were abolished shortly after that." Transcript of Seventh Admin. L. Conf. proceedings 139-40 (Mar. 16, 1990) (remarks of Arthur England) [hereinafter Transcript vol. 1].

6. Drucilla Bell suggested in her introduction of Professor Dore at the Conference that "[b]y virtue of her sex and her constant nurturing of the statute, she has become known as the mother of the Florida APA." Transcript vol. 1, *supra* note 5, at 122 (remarks of Drucilla Bell).

7. Dore, *Overview of the Administrative Procedure Act and Procedure for the Adoption of Rules*, in *FLORIDA ADMINISTRATIVE PRACTICE* 2-1, 3-1 (3d ed. 1990).

8. Dore, *Access to Florida Administrative Proceedings*, 13 FLA. ST. U.L. REV. 967 (1986).

the third edition of *Florida Administrative Practice*.⁹ He is currently engaged in an effort to publish, each year in the *Nova Law Review*, "a manageable, yet comprehensive and critical, overview of recent significant developments in Florida case law dealing with administrative law."¹⁰

III. INTRODUCTION OF THE SMALL GROUP LEADERS

The small group discussion leaders, who became commentators when the large group reassembled on the second day, were also a distinguished group of individuals. Arthur England, who led a small group and introduced the small group leaders at the conference, played a central role in the adoption of the Florida APA. He was the Reporter engaged by the Law Revision Council to draft the proposed administrative procedure act that became the foundation of legislative efforts leading to the adoption of the present APA.¹¹ He has also contributed to administrative law as a commentator and as a distinguished jurist. He is the co-author of the *Florida Administrative Practice Manual*,¹² and served as a Justice, and then as Chief Justice, on the Supreme Court of Florida.

Professors Dore, Burris, and Levinson each led small groups.¹³ Other group leaders also played important roles in the adoption process fifteen years ago. Murray H. Dubbin,¹⁴ who now practices law in Miami, was a distinguished member of the Florida Legislature at the time the APA was enacted, serving as the Chair of the Committee on Rules and Calendar of the Florida House of Representatives. He was at that time, and still is, actively engaged in the practice of administrative law in Florida. He has also written law review commentary on the act. W.E. "Ted" Grissett currently practices law in Jackson-

9. Burris, *The Administrative Process and Constitutional Principles*, in *FLORIDA ADMINISTRATIVE PRACTICE* 1-1 (3d ed. 1990).

10. Burris, *Administrative Law*, 12 *NOVA L. REV.* 299, 300-01 (1988) (collects and analyzes cases from 1979 to 1987).

11. He explained the Reporter's role in this way at the Conference: The Law Revision Council contracted with someone believed to be skilled in a particular area to draft proposed legislation. In some cases, such as the APA, the proposed draft was a complete rewrite of the statute. The Reporter for that project presented each draft of the proposed act to the Council, and the Council responded with comments and questions. This process was repeated until a final draft was ready for submission to the Legislature. "[T]he process was a very intellectual process, it was a very detailed process." Transcript vol. 1, *supra* note 5, at 140 (remarks of Arthur England).

12. A. ENGLAND & L. LEVINSON, *supra* note 4.

13. The following material is derived in large part from the introductions given to each of the speakers by Arthur England.

14. Dem., Miami, 1963-1974.

ville. Fifteen years ago, he was a member of the Law Revision Council, and took an active role in shaping the Council's draft. Robert C. Hector,¹⁵ who is now retired and living in Miami, served in the Legislature at the time the APA was enacted, and chaired the subcommittee on the APA of the House Committee on Government Operations. Senator S. Curtis Kiser,¹⁶ presently a State Senator, was a member of the House of Representatives¹⁷ fifteen years ago. His interest in administrative procedure has been longstanding, and he has probably been as involved as anyone in the Legislature in on-going legislative efforts to address administrative procedure issues. Kenneth H. "Buddy" MacKay was scheduled to be a small group leader but instead addressed the assembled group. He is currently the Lieutenant Governor of Florida. At the time of the Conference, he practiced law in Miami. He has served in the Florida House of Representatives,¹⁸ the Florida Senate,¹⁹ and the United States Congress.²⁰ When the act was first being considered, he was the Chair of the House Committee on Government Operations, where he worked with Arthur England, Bob Hector, and others in the drafting and passage of the act. Buddy MacKay's place as a small group leader was filled by William C. Andrews,²¹ who is now an attorney in private practice in Gainesville. He was a member of the Florida House of Representatives at the time the APA was first enacted, and was a member of the Conference Committee convened to address differences between the House and Senate versions of the APA. The Honorable C. McFerrin Smith III is now the Chief Judge of the Seventh Judicial Circuit in Daytona Beach. Previously, he was the Executive Director of the Law Revision Council, and in that capacity played an active role in the development of the APA.

Other small group leaders were drawn from those active in the Administrative Law Section of the Florida Bar. Drucilla E. Bell²² was

15. Dem., Miami, 1966-1980.

16. Rep., Palm Harbor.

17. *Id.*, 1972-1982.

18. Dem., Ocala, 1968-1974.

19. *Id.*, 1974-1980.

20. Representative, 1983-1988.

21. Dem., Gainesville, 1966-1978.

22. Ms. Bell is an attorney in private practice in Clearwater. Her practice requires her to travel extensively through Europe and the Soviet Union, where she is active in negotiating potential joint venture agreements with representatives of Krasnodar and Leningrad. She is also active in the International Law Section of The Florida Bar and has been invited to join the American Bar Association's Central and Eastern European Law Initiative. Prior to entering private practice, she served in the General Counsel's office of the Department of Professional Regulation and the Department of Corrections.

Chair of the Administrative Law Section of The Florida Bar at the time of the Conference. William L. Hyde²³ was Chair-elect at the time of the Conference, and is presently the Chair of the Administrative Law Section. Betty J. Steffens²⁴ was a Co-Chair of the Seventh Administrative Law Conference.

IV. INTRODUCTION OF THE ISSUES

The Seventh Administrative Law Conference was, in some significant ways, a continuation of the Sixth. Professor Bonfield was a featured speaker at both conferences. During his previous appearance, he argued that to the extent feasible and practical, state agencies should be required to prefer rulemaking to adjudication.²⁵ This idea caught on, and legislation was proposed during the 1990 Regular Session to implement this concept. The proposed legislation was a focus of attention at the Conference because the Conference was held shortly before Session was scheduled to begin. Copies of the proposed legislation were included in the Conference materials, and questions of whether rulemaking should be required or somehow encouraged, and how the APA should be amended to accomplish those goals, were discussed at various points during the Conference. Although legislation requiring or encouraging rulemaking was not adopted during the 1990 Session, it is clearly an issue that will remain high on the legislative agenda.

In addition, I believe issues concerning rulemaking procedure and judicial review of agency rules are currently of great importance. If legislation is passed which mandates or in some way encourages agencies to make greater use of rulemaking, we can expect such issues to become even more important. Requiring more agency rulemaking will increase the volume of rulemaking and hence the demands on existing

23. Mr. Hyde is a private attorney in Tallahassee practicing primarily in the areas of environmental and land use law. He has published articles in the *Florida Bar Journal* and the *Florida State University Law Review* and has taught Continuing Legal Education programs in environmental and land use law and in the area of administrative practice and procedure. He regularly practices before the Department of Community Affairs, the Department of Environmental Regulation, the Department of Natural Resources, and many other federal, state, regional, and local agencies and governments.

24. Ms. Steffens is a private attorney in Tallahassee, practicing in the areas of administrative and government law and land use and environmental law. She is an appointed member of the Capitol Center Planning Commission. Prior to entering private practice she served as legal counsel and General Counsel for Governor Bob Graham. She has also served as Associate University Counsel to Florida State University and as legal advisor to the Career Service Commission.

25. For more detail concerning Professor Bonfield's position on this point, see Bonfield, *Mandating State Agency Lawmaking by Rule*, 2 *BYU J. OF PUB. L.* 161, 168-80 (1988); Bonfield, *State Administrative Policy Formation and the Choice of Lawmaking Methodology*, 42 *ADMIN. L. REV.* 121 (1990).

procedures. The increase in activity will dramatize existing weaknesses and drive issues of rulemaking procedure and judicial review of rules to the fore. Now is the time to take a careful look at those areas to assure that requiring more rulemaking will not aggravate existing problems.

If procedures for rulemaking and judicial review of agency rules are not up to the task when increased rulemaking activity occurs, we risk problems on both sides of the regulatory fence. If procedures are too cumbersome, we risk encouraging agencies to look for ways to avoid the new rulemaking requirements and, in the extreme, we risk hampering the effectiveness of administrative government in Florida. On the other hand, if the rulemaking process does not include adequate protection for substantial interests, individuals whose substantial interests are affected by rulemaking may prefer case by case adjudication of policy matters to rulemaking of that kind.

The articles included in this issue address the topics of rulemaking procedure and judicial review of agency rules from a variety of different perspectives. I hope that the varied approaches presented here will stimulate discussion and debate, focus attention on problem areas, and suggest solutions that the courts and the Legislature will find useful. Professor Bonfield brings his quest for the ideal state administrative rulemaking procedure to Florida. He grapples with the policy questions that underlie the drafting choices that statutes of this kind necessarily reflect. He then reviews the way the model act responds to those concerns. His article suggests the same balance between procedures adequate to protect private rights against unsound or illegal government action and "the need for effective, efficient, and economical government"²⁶ reflected in his other writing. The contrast between the rulemaking provisions of the ideal act described by Professor Bonfield and the Florida act is clear. Florida's rulemaking provisions give more power to affected interests and place less emphasis on efficiency than Bonfield's writings suggest is appropriate. Bonfield's disapproval of this balance comes through in his criticism of the draw out provision, which he believes may be unwise and undesirable because a petitioner may be able to coerce an agency to conduct a trial-type hearing during rulemaking where one may not be justified.²⁷

In my article, I argue in favor of the draw out. I suggest that the limiting construction that has been given the provision by the Florida courts has prevented affected persons from using adjudicatory process

26. Bonfield, *The Quest for an Ideal State Administrative Rulemaking Procedure*, 18 FLA. STATE U.L. REV. 617, 621 (1991).

27. *Id.* at 625 n.23.

to protect their substantial interests during rulemaking. I also demonstrate how the courts' construction of the draw out provision has affected judicial review, first leading to deferential review of rules, and then to hard look review modeled on the federal experience. I suggest that neither approach to judicial review is correct, and that a proper construction of the draw out provision will facilitate the substantial evidence review of agency rules contemplated in the act.

Both Professors Levinson and Dore take issue with my approach to the draw out. Levinson expresses concern that my approach will make the draw out more available, and "would impose on the rulemaking process an intolerable burden."²⁸ Professor Dore defends the court's present approach to the draw out, and takes a narrow view of its applicability.²⁹ She believes that the truly innovative aspect of the draw out proceeding is the effect it has on section 120.54(3) proceedings. In order to avoid the draw out, agencies provide additional procedures, such as cross-examination, in the section 120.54(3) hearing.

Professor Levinson's article addresses a variety of issues from the perspective of a drafter returning, years later, to see the results of his handiwork. Where he is dismayed to find the act's mandate is not being carried out, such as in the failure to index agency orders, he makes his concern clear.³⁰ Where debate rages, such as in the controversy surrounding whether the act should be amended to require rulemaking, he provides his thoughts. He also places the Florida act in historical perspective, listing its major accomplishments and describing its influence on the 1981 MSAPA.

Professor Dore joins the debate on required rulemaking. She brings to that debate her long experience with the act and her great familiarity with the legislative proposals that were the focus of discussion at the Conference. She focuses on the problems surrounding the implementation of the act's requirement of subject matter indexing of agency orders, and reviews a recent legislative proposal on that point. Dore does not just participate in existing debates, she creates a new one by proposing that the economic impact statement requirement in the act be modified along lines suggested in the 1981 MSAPA.

Finally, Dore takes the reader through the small group deliberations and reports. Since she formulated the questions those groups considered, reviewed the tapes of their discussions, and participated as a

28. Levinson, *The Florida Administrative Procedure Act After 15 Years*, 18 FLA. ST. U.L. REV. 749, 761 (1991).

29. Dore, *Seventh Administrative Law Conference Agenda and Report*, 18 FLA. ST. U.L. REV. 703, 729-32 (1991).

30. Levinson, *supra* note 28, at 764.

commentator on their reports at the Conference, she is uniquely suited for this task. Her report shows what many practitioners see as the act's strengths and weaknesses, its areas of comfort and confusion. She suggests a number of items that may well find themselves on an agenda for future reform.

Professor Burris also joins the debate on required rulemaking. He assumes that the act requires that agencies generally develop public policy through rules and he evaluates how the courts have performed in limiting the discretion of agencies to select the process through which they make policy. He concludes that the courts have failed to adequately constrain administrative discretion in this area, and suggests that the solution is greater enforcement of the rule/order dichotomy.

As a group, these articles address the important issues in rulemaking today and provide a variety of perspectives on how they should be resolved. The issues involved range from whether rules should be made, to how rules should be made, to how they should be reviewed by the courts. The analysis presented takes account of historical, theoretical, and practical concerns. Problems are noted and solutions are proposed. I am glad we have had this opportunity, and I hope when we look back, fifteen years from today, we can say that we also made a contribution to the development of the law in this area.