The Florida Administrative Procedure Act after 15 Years

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Almost every aspect of the new Florida Administrative Procedure Act (APA) was innovative and bold in 1974. Today, when we commemorate its fifteenth birthday, the basic features introduced in 1974 remain in place, although the Act has gone through numerous amendments since then.

This Essay starts by placing the Act in the context of prior Florida law and the law of other jurisdictions. The remainder of the Essay reflects on some issues raised by current proposals to amend or reinterpret the Act: rule review, required rulemaking, the draw-out, and the subject-matter index of orders.

I. THE FLORIDA APA IN CONTEXT

Florida was a fruitful place in the 1970's for innovative developments in administrative procedure. The state was experiencing rapid population growth, diversification of the economy, and political realignment that made Florida remarkably open to new ideas. In this climate, the Florida Law Revision Council embarked on a project to draft a new Florida Administrative Procedure Act and retained Arthur England as Reporter. At a crucial stage of the project, some members of the Council accompanied England on a weekend visit to Washington to brainstorm with some national experts on the features that should be included in a state-of-the-art revision of the 1961 Florida APA.

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* Copyright, 1991, L. Harold Levinson. This Essay expands upon remarks made at the Seventh Florida Administrative Law Conference at Tallahassee in March 1990.
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The ideas generated in this weekend session, combined with the existing expertise of the Florida participants and enriched by later input from other sources in the state, culminated in the first draft of the 1974 Florida APA. The eclectic and cosmopolitan nature of the drafting process produced an Act that has well served a growing and diverse state and also has provided significant guidance on the national scene.

A. The Relationship Between the 1974 Florida APA and Prior Florida Law

In 1975, I identified the following features as the major accomplishments of the 1974 Florida APA:

* the expanded range of agencies and functions covered by the Act;
* the requirement of model rules of procedure, to be adopted by the Administration Commission;
* the "draw-out"—an adjudicative hearing during a pending rulemaking proceeding;
* the creation of the Division of Administrative Hearings (DOAH), a central panel of hearing officers;
* a provision for DOAH's review of proposed or existing rules;
* creation of the Joint Administrative Procedures Committee (JAPC), a legislative committee;
* Joint Committee review of proposed rules;
* public access to rules, orders, and a subject-matter index of each;
* the availability of declaratory statements from agencies;
* a requirement that agencies follow their own adjudicative precedents or give a satisfactory reason for the departure;

4. Levinson, supra note 2, at 695-99 (summarizing highlights of the Act discussed earlier in the same article).
5. Id. at 622-31; Fla. Stat. §§ 120.50, 120.52 (1989).
the right to an adjudicative proceeding whenever an agency determines or affects a person's substantial interests;\textsuperscript{15}

* creation of an informal adjudicative proceeding, to be used when no disputed issue of material fact is involved;\textsuperscript{16}

* a general requirement that DOAH assign hearing officers to preside at formal adjudicative proceedings;\textsuperscript{17}

* admissibility of evidence in accordance with the "reasonably prudent person" test;\textsuperscript{18}

* participation in formal adjudicative proceedings by nonparties;\textsuperscript{19}

* a time limit for rendition of the final order;\textsuperscript{20}

* a requirement for prompt disposition of licensing proceedings;\textsuperscript{21}

* a prohibition against ex parte communications and remedies if such communications take place;\textsuperscript{22}

* a single form of action and single scope of review for judicial review in the district court of appeal, except when the circuit court renders declaratory judgments or exercises jurisdiction conferred by other statutes;\textsuperscript{23} and

* circuit court enforcement of agency action upon petition by an agency or, in some circumstances, by any substantially interested person.\textsuperscript{24}

The people who put together this package of innovations in the 1974 Florida APA intended to achieve radical improvements in the fairness of the administrative process. In many respects we wanted to make a clear break with prior Florida law. For example, the Reporter's Comments\textsuperscript{25} document our intent to overrule the result in the Bay National Bank\textsuperscript{26} case, discussed later in this Essay.

\textsuperscript{15} Levinson, supra note 2, at 656-58; Fla. Stat. § 120.57 (1989).

\textsuperscript{16} Levinson, supra note 2, at 663-68; Fla. Stat. § 120.57(2) (1989).

\textsuperscript{17} Levinson, supra note 2, at 659-60; Fla. Stat. § 120.57(1)(a) (1989).

\textsuperscript{18} Levinson, supra note 2, at 651; Fla. Stat. § 120.58(1)(a) (1989).

\textsuperscript{19} Levinson, supra note 2, at 662; Fla. Stat. § 120.57(1)(b)(4) (1989).

\textsuperscript{20} Levinson, supra note 2, at 653-54; Fla. Stat. § 120.59(1) (1989).

\textsuperscript{21} Levinson, supra note 2, at 670; Fla. Stat. § 120.60 (1989).

\textsuperscript{22} Levinson, supra note 2, at 674-78; Fla. Stat. § 120.66 (1989).

\textsuperscript{23} Levinson, supra note 2, at 678-83; Fla. Stat. § 120.68, .73 (1989).

\textsuperscript{24} Levinson, supra note 2, at 689-93; Fla. Stat. § 120.69 (1989).


\textsuperscript{26} Bay Nat'l Bank & Trust Co. v. Dickinson, 229 So. 2d 302 (Fla. 1st DCA 1969), cited with approval in Dickinson v. Judges of the Dist. Court of Appeal, 282 So. 2d 168 (Fla. 1973). The Bay Nat'l Bank decision is discussed infra, text accompanying notes 101-03.
In other respects, however, we preserved many pre-1974 concepts. Perhaps the most important point, in this connection, is that we preserved the basic distinction between rulemaking and adjudication. This distinction is fundamental to the structure of the 1974 Act, which deals quite separately with rulemaking and adjudication regarding procedure, presiding officer, publication, and binding effect.\textsuperscript{27}

The concept of adjudication pervades the 1974 Act although the word itself is conspicuously absent, having been replaced by the phrase "agency determination of substantial interests."\textsuperscript{28} This change in terminology signifies the drafters' intent to reject judicial precedents, particularly the \textit{Bay National Bank} decision, which had interpreted the term "adjudication" under prior law.\textsuperscript{29}

The 1974 APA is linked to prior Florida law in another important respect. The 1972 revision of article \textit{V}, the judiciary article of the Florida Constitution, provided a strong foundation for the APA by authorizing the Legislature to confer quasi-judicial powers upon agencies and provide for judicial review of agency action.\textsuperscript{30} This constitutional support facilitated some of the most significant innovations in the 1974 APA.

\textbf{B. Relationship Between Florida APA and Laws of Other States}

The 1974 Florida APA drew upon the prior law of other states to some extent. The basic distinction between rulemaking and adjudication is found, not only in the 1961 Florida APA,\textsuperscript{31} but also in the federal APA,\textsuperscript{32} the 1961 Model State APA,\textsuperscript{33} and the APA's of other

\begin{enumerate}
\item The distinction is relaxed only slightly by the requirement, in narrowly defined circumstances, of an adjudicative-type proceeding, generally called the "draw-out," during a pending rulemaking proceeding, supra note 6, discussed infra text accompanying notes 96-112.
\item F. L. A. St. § 120.57 (1989). This term replaces § 120.22 of the 1961 Florida APA.
\item Levinson, \textit{supra} note 2, at 628.
\item F. L. A. Const. art. \textit{V}, § 1 (commissions may be granted quasi-judicial powers); \textit{id.} § 3(b)(7) (supreme court may directly review administrative action, as prescribed by general law); \textit{id.} § 4(b)(2) (similar provision regarding district courts of appeal); \textit{id.} § 5(b) (similar provision regarding circuit courts).
\item The 1961 Model State APA, 15 U.L.A. 147 (1990), deals separately with rulemaking, § 3, and contested cases, § 9. The comment to the definitional section of this Act explains the terminology as follows:
\begin{quote}
The term "contested case" is used in the Model Act, instead of the word "adjudica-
\end{quote}
The central panel of hearing officers, known in Florida as the Division of Administrative Hearings (DOAH), was adapted from the California Office of Administrative Hearings. The Reporter's Comments make a number of references to the APA's of Massachusetts, Oregon and Texas, in connection with various features of the Florida Act. The elaborate system of legislative oversight was apparently derived from contacts between Florida legislators and their counterparts in other states who had developed similar systems. Finally, national and local experts contributed a wide variety of ideas, some based directly on existing statutes or pending legislative proposals in various states, others based on the experts' speculations as to the features that should be incorporated in a state-of-the-art APA.

Having benefited from the prior law of other states, the 1974 Florida APA in turn exerted significant influence on subsequent developments in other states. This influence is seen most clearly in the 1981 revision of the Model State APA. The 1974 Florida Act, sometimes
in conjunction with APA's of other states, had an impact on numerous 1981 Model Act provisions, including the following:

* conversion of proceedings from one type to another;\(^{40}\)
* indexing of agency orders;\(^ {41}\)
* required adoption of model rules of procedure;\(^ {42}\)
* the APA as a source of the right to an adjudicative hearing;\(^ {43}\)
* the requirement of prompt agency processing of applications;\(^ {44}\)
* the creation of multiple models of the adjudicative process with varying levels of formality;\(^ {45}\)
* participation in adjudicative proceedings by non-parties;\(^ {46}\)
* adjudicative fact-finding based on evidence that would satisfy a reasonably prudent person;\(^ {47}\)
* the central panel of hearing officers;\(^ {48}\)
* the unitary system of judicial review of all types of agency action;\(^ {49}\)
* judicial review in an appellate court;\(^ {50}\)
* the scope of judicial review;\(^ {51}\) and
* enforcement of agency action.\(^ {52}\)

\(^{40}\) 1981 MSAPA, supra note 39, § 1-107. For Florida APA equivalents, see Fla. Stat. § 120.54(17) (1989) (draw-out), and Levinson, supra note 2, at 666, n.284 (conversion from informal adjudication to formal adjudication, implied by Fla. Stat. § 120.57).


\(^{44}\) 1981 MSAPA, supra note 39, § 4-104; Florida APA equivalent, Fla. Stat. § 120.60 (1989).

\(^{45}\) 1981 MSAPA, supra note 39, § 4-201 to 4-506; Florida APA equivalent, Fla. Stat. § 120.57(2) (1989).

\(^{46}\) 1981 MSAPA, supra note 39, § 4-211(3); Florida APA equivalent, Fla. Stat. § 120.57(1)(b)(4) (1989).


\(^{48}\) 1981 MSAPA, supra note 39, §§ 4-301, 4-202(a); Florida APA equivalent, Fla. Stat. § 120.65 (1989).


\(^{52}\) 1981 MSAPA, supra note 39, §§ 5-201 to 5-205; Florida APA equivalent, Fla. Stat. § 120.69 (1989).
The Florida APA has been heavily litigated. When no Florida judicial precedent is directly on point, cases from other jurisdictions can provide helpful guidance on interpreting the Florida Act, especially if the APA’s of those jurisdictions contain provisions similar to those of the Florida Act on the topic under consideration. Even if the APA wording is not the same, out-of-state cases may still be useful, especially if they address the common law of administrative procedure, such as the basic differences between rulemaking and adjudication.

II. RULE REVIEW

An agency faces six major obstacles during and after the rulemaking process. First, the agency must allow interested persons to present evidence and argument during the regular rulemaking proceedings. Second, a person may request a draw-out hearing. Third, a person may ask DOAH to determine the validity of a proposed rule. Fourth, a person may ask DOAH to determine the validity of an existing rule. Fifth, the Joint Committee conducts its legislative review process. Finally, the rule is subject to judicial review.

These are all excellent safeguards, but they may not all be necessary. The Reporter’s draft of the Law Revision Council bill did not include all of these safeguards. Some of them were in the Reporter’s draft and were adopted by the House bill. A completely separate set of controls was included in the Senate bill. The two bills were basically fused together in what became the 1974 APA. While this may have been an expedient way of getting the statute enacted, it gave Florida one of the nation’s most cumbersome systems of rulemaking and rule review.

Two of today’s symposium speakers propose to add further burdens to the system by requiring agency rulemaking in a broader range of situations, and by making the draw-out more readily available. Both proposals would impose new burdens on the agencies and on

55. Id. § 120.54(17) (1989).
56. Id. § 120.54(4) (1989).
57. Id. § 120.56 (1989).
58. Id. § 120.545 (1989).
59. Id. § 120.68 (1989).
60. Levinson, supra note 2, at 622.
citizen participants in the rulemaking process. In addition, the first proposal would increase the workload of the Joint Committee, and both proposals would increase the workload of DOAH. I am concerned that the imposition of these extra burdens could seriously and needlessly endanger the system.

Before commenting on each of these proposals, I will discuss the existing burdens on the Joint Committee and DOAH, and will suggest ways to relieve rather than increase these burdens.

A. Joint Committee Review of Rules

The 1974 APA created the Joint Administrative Procedures Committee, known generally as the Joint Committee or JAPC. The Joint Committee consists of three members of the Senate appointed by the Senate President and three members of the House appointed by the House Speaker. The Joint Committee reviews all proposed rules and may also review existing rules. If the Joint Committee finds a proposed or existing rule questionable, the agency has an opportunity to present argument and evidence in support of its position. If not convinced by the agency, the Joint Committee gives public notice of its objections. These objections, however, do not deprive the rule of legal effect, because the APA confers only advisory powers upon the Joint Committee.

The Joint Committee has done an outstanding job, thanks to the dedication of its staff, its director, and the legislators who have served on the committee. The report for calendar year 1989 shows that the Joint Committee reviewed 4,865 rules and filed twenty-four formal objections. This small number of objections does not reflect the full measure of the Joint Committee’s effect on the rulemaking process. Many additional concerns were resolved informally. Further, I believe the very existence of the committee and agency awareness of the committee’s review process provide additional assurance of a high-quality rulemaking process.

63. See discussion in text accompanying notes 91-112, infra.
64. FLA. STAT. §§ 11.60, 120.545 (1989). The acronym JAPC is generally pronounced “jap-see.”
65. Id. § 11.60(1).
66. Id. § 120.545(1).
67. Id. § 120.545(2), .545(3), .545(4), .545(5).
68. Id. § 120.545(8).
69. Id.
I cannot help wondering, however, how much longer the Joint Committee and its staff will be able to carry this rule review workload, even at its present volume. Additionally, the volume will increase if agencies are required to promulgate a significantly larger number of rules than they do now. If the workload becomes too much for the Joint Committee to handle, part or all of the rule review function may have to shift to the executive branch.

In a growing number of states, the executive branch is involved, in one way or another, in the function of overseeing rules.\(^7\) In some states, this oversight simply means that no rule can become effective without the signature of the Governor.\(^7\) In another group of states, rules become effective without the Governor's signature, but the Governor can veto any rule at any time.\(^7\) Either of these systems can be elaborated by requiring an executive agency to assist the Governor by reviewing all proposed or existing rules.\(^7\) For example, California has established an executive-branch agency, the Office of Administrative Law, to conduct routine rule review.\(^7\) This agency may disapprove proposed rules, but the Governor may reverse its decisions. In one of his first acts after taking office, President Reagan issued an executive order creating a federal system of executive-branch rule oversight that is clearly derived from the system Mr. Reagan experienced as Governor of California.\(^7\)

Further variations are possible, depending on whether the executive agency merely advises the Governor or is empowered to render an initial order subject to the Governor's review.\(^7\) Still another possibility is the creation of a nonbinding system of executive-branch review, in which neither the Governor nor any executive agency has the power to approve or veto rules; this system would effectively create in an execu-

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72. A. Bonfield & M. Asimow, supra note 34, at 503.

73. Id. This approach is taken in the 1981 MSAPA, supra note 39, § 3-202.

74. The 1981 MSAPA, supra note 39, establishes an administrative rules counsel to advise the Governor, id. § 3-202(c), but the Act does not require this counsel or the Governor to conform to any particular system of rule review. In contrast, the California Act creates an executive agency and requires it to follow a certain system. CAL. GOVT. CODE §§ 11340.1-2, 11349.1-6 (West Supp. 1990).

75. A. Bonfield & M. Asimow, supra note 34, at 504-05.

76. Id. at 506, 325-27.

77. The 1981 MSAPA vests only advisory functions in the administrative rules counsel, see supra note 74. The California Act empowers the Office of Administrative Law to take initial action, subject to reversal by the Governor. CAL. GOVT. CODE §§ 11349.1, .3, .5 (West Supp. 1990).
tive agency the same type of advisory review now performed in Flor-
ida by the Joint Committee.

The emerging emphasis on executive oversight results, in part, from
a number of state court decisions holding the legislative veto unconстi-
tutional as a violation of the separation of powers.78 These decisions
have no direct bearing on the situation in Florida because the Joint
Committee serves in an advisory capacity and therefore does not en-
croach on the power of the executive branch. Another reason for the
increasing popularity of executive oversight is quite relevant in Flor-
ida—the perceived need to relieve part-time legislators of the addi-
tional burden of rule review.

Under any system of executive oversight, the Legislature can still
exercise its own review by looking over the shoulders of the executive
oversight agency. Thus, in Florida, if an executive agency took over
the routine tasks of the existing oversight function, the Joint Commit-
tee could selectively review the work of that executive oversight
agency.

The task of designing an acceptable system of executive oversight of
rules would be especially difficult in Florida because of the frag-
mented structure of the executive branch of government.79 That
branch is headed by a Governor elected on a ticket with a Lieutenant
Governor, but other independently elected officers also serve as the
Cabinet and share in the exercise of executive power, as prescribed
by the Florida Constitution.80 The Florida APA allocates various func-
tions to various components of the executive branch of government.
For example, the Administration Commission (a Cabinet agency)
adopts model rules of procedure, allows agencies to modify these
rules, and confers exemptions from any requirements of the Act.81
The Department of State handles the publication of rules,82 the De-
partment of Administration provides administrative support for
DOAH,83 and the Governor appoints individuals to serve as substi-
tutes following the disqualification of an elected agency head.84 If the
Legislature decided to place the function of rule review in the execu-
tive branch, the question of where to locate it would require serious
consideration.

Arnell, 791 P.2d 410 (Idaho 1990) (two-house veto system does not violate Idaho separation of
powers).
79. Fla. Const., art. IV.
80. Id., §§ 1, 2, 4-5.
81. Fla. Stat. §§ 120.54(10), 120.63 (1989).
82. Id. § 120.55 (1989).
83. Id. § 120.65(1).
84. Id. § 120.71(1).
I do not suggest an immediate transfer of rule review from the Joint Committee to an executive agency; we should, however, keep the possibility in mind as an option that may become more attractive if the Joint Committee experiences an increase in its workload or a decrease in its capacity to handle the existing volume of rule review.

B. DOAH Review of Rules

The 1974 APA created the Division of Administrative Hearings (DOAH) to provide a central panel of hearing officers.85 DOAH hearing officers spend most of their time presiding over formal adjudicative hearings, but DOAH has an additional function under the APA: review of the validity of proposed rules and existing rules.86 In rule review matters, the decision of the DOAH hearing officer is subject only to judicial review.87

The Florida system of rule review by DOAH is unique.88 I do not criticize the system on that account, because I have always admired the spirit of innovation in this state. I cannot help noticing, however, that other states have seen no need to adopt similar systems. Apparently, legislators in other states are satisfied that their systems of legislative or executive oversight and judicial review provide adequate controls over agency rulemaking.

In 1989, DOAH's total case load was 7,194 cases.89 Of these, 193 were rule challenge cases, consisting of 119 challenges to proposed rules, 72 challenges to existing rules, and 2 challenges to combinations of proposed and existing rules.90 The small percentage of challenges may itself reflect the high effectiveness of the rule review function, because the availability of rule review is likely to encourage agencies to draft their rules with extra care.

III. Required Rulemaking

Under a proposal, considered but not passed by the 1990 Legislature, the Legislature would express its preference that agencies develop policy by rulemaking and even provide for sanctions if an

85. Levinson, supra note 2, at 671-74; FLA. STAT. § 120.65 (1989).
86. Levinson, supra note 2, at 639-41, 648-49; FLA. STAT. §§ 120.54(4), .56 (1989).
87. This result is accomplished by designating the hearing officer's decision as "final agency action." See FLA. STAT. §§ 120.54(4)(d), .56(5) (1989).
88. A system that was similar in some respects was held unconstitutional as a violation of the separation of powers in State Tax Comm'n. v. Administrative Hearing Comm'n., 641 S.W.2d 69 (Mo. 1982).
90. Id.
agency failed to do so. In order to evaluate the practicality of this proposal, we should at least obtain an estimate of how many more rules agencies would have to promulgate under the proposed regime. If only several hundred more rules would be promulgated each year, the proposal could be practical; on the other hand, the proposal would be totally impractical if thousands of new rules had to be processed each year. A large increase in the volume of rulemaking would not only burden the agencies themselves, it would also have a serious impact on the rule review work of the Joint Committee and would increase the potential number of rule challenge cases in DOAH’s docket.

One of the attractive features of required rulemaking is its potential for reducing the volume or complexity of future adjudication. This result may be anticipated because an increase in the use of rulemaking may clarify an agency’s interpretations and policies, and may consequently reduce the risk of disagreement when the agency applies these rules in specific situations. I believe the case for required rulemaking would be strengthened if a cost/benefit analysis projected that the costs of required rulemaking would be significantly offset by the benefits of reduced volume or complexity of adjudicative proceedings. In the absence of any analysis along these lines, I seriously doubt that required rulemaking would indeed be cost-effective.

Instead of imposing an across-the-board rulemaking requirement encompassing all agencies and all programs, the Legislature should consider imposing the requirement selectively on specific agencies regarding specific programs, where past agency performance indicates a special need for more extensive rulemaking. In addition, the Legislature can address the problem by crafting enabling acts with the maximum feasible specificity, so as to reduce the need for policy-making when agencies implement the statutes.92

Even when agencies make policy during adjudicative proceedings, significant safeguards are available under the Florida APA, as interpreted in McDonald v. Department of Banking & Finance.93 If the staff of an agency intends to use an adjudicated case as a vehicle for developing new policy, the staff must put the proposed “incipient policy” into issue during the adjudicative hearing so that all parties will have an opportunity to address it. The policy issue must then be re-

92. Statutes may vest considerable discretion in an administrative agency so long as they meet a threshold requirement of specificity. See Askew v. Cross Keys Waterways, 372 So. 2d 913 (Fla. 1978). Evidently, a higher level of specificity would be needed in order to minimize the need for agencies to make policy when implementing the statute.
93. 346 So. 2d 569 (Fla. 1st DCA 1977).
solved by the hearing officer, subject to review by the agency head and appellate review by the courts. The policy decision in each case becomes part of the body of precedent, which should be accessible to the public through the subject-matter index. This precedent will be persuasive in future cases, under the theory of administrative stare decisis, and may provide sufficient guidance to agency staff and affected persons to satisfy the concerns of those who advocate increased use of rulemaking.

IV. **Draw-Out**

The “draw-out” provision of the 1974 Florida APA requires that an agency suspend a pending rulemaking proceeding and convene an adjudicative proceeding if a person “timely asserts that his substantial interests will be affected in the proceeding and affirmatively demonstrates that the [rulemaking] proceeding does not provide adequate opportunity to protect those interests.”

I am concerned about Professor Maher’s proposal to make the draw-out more readily available. If carried to an extreme, this proposal could convert rulemaking into an adjudicative process at the will of anybody who wants it to become one. This approach would impose on the rulemaking process an intolerable burden that was not intended by the drafters of the 1974 Act.

In my mind, the “draw-out” provision does not eliminate the traditional distinction between rulemaking and adjudication. The drafters built upon a foundation laid by some of the classic decisions of the United States Supreme Court that guarantee at least a rudimentary type of adjudicative hearing to a person whose interests are affected in an individualized way by agency action. The draw-out provides for

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98. The accompanying text reflects the opinion I personally held during the drafting of the 1974 Florida APA, and have continued to hold since then. To the best of my knowledge and recollection, my opinion on this issue was shared by the other drafters. I was aware that the federal APA allows for adjudicative hearings during rulemaking if required by another statute. I also knew about some of the situations in which federal agencies had to conduct such hearings, including the 214-day hearing to determine the permissible ingredients of ice cream, or the four-month hearing to fix a general standard for the ingredients of peanut butter. See W. Gellhorn & C. Byse, *Administrative Law Cases and Comments* 733-34 (6th ed. 1974). I did not intend to impose this type of burden on Florida agencies.
99. The classic cases are Londoner v. Denver, 210 U.S. 373 (1908) (rudimentary hearing is constitutionally required for individualized determinations), and Bi-Metallic Investment Co. v. Colorado, 239 U.S. 441 (1915) (hearing not required for across-the-board regulation). During
an adjudicative process, not only in the situations where the Supreme Court precedents require it, but also in a slightly broader range of circumstances, which the drafters tried to capture in the words of the APA.

Significantly, the language triggering the right to a draw-out is the same language that is in APA section 120.57 triggering the general right to an adjudicative proceeding. In either situation, the right to an adjudicative hearing arises when an agency determines a person's substantial interests. The use of the same statutory language in each provision indicates a legislative intent to apply similar standards in both situations. The draw-out provision therefore derives meaning from the purpose underlying section 120.57.

That purpose was to protect a person whose individualized, substantial interests were determined, even if no other statute or constitutional provision guaranteed the right to a hearing. In order to achieve this result, the drafters expressed their intent to overrule prior case law, notably the 1969 decision in Bay National Bank & Trust Co. v. Dickinson. That case arose from the denial of a banking license. Applying the 1961 Florida APA, the Bay National court held that the Comptroller did not adjudicate any party's rights, duties, privileges, or immunities when he exercised his statutory function of passing upon an application for a bank charter. Consequently, the court held that the Comptroller's action was not an "order" subject to the APA, but was instead a "quasi-executive" function.

Bay National reflected the traditional view that a license applicant did not have the right to a hearing. In contrast, the traditional view recognized that a licensee threatened with suspension or revocation did have a constitutionally guaranteed right to a hearing, except in

the drafting of the Florida APA, the interplay between these two cases was repeated with approval in United States v. Florida East Coast Ry. Co., 410 U.S. 224 (1973). At that time, legal thinking about the constitutional right to a hearing was dominated by Goldberg v. Kelly, 397 U.S. 254 (1970) (holding that procedural due process requires that pretermination evidentiary hearing be held when public assistance payments to welfare recipient are discontinued). Florida East Coast was later elaborated by Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978), while Goldberg was clarified by a number of cases, including Goss v. Lopez, 419 U.S. 565 (1975).

100. Levinson, supra note 2, at 639, 656-58; FLA. STAT. §§ 120.54(17), .57 (1989).
102. In reaching this conclusion, the Bay National court characterized the agency's function, in passing upon a license application, as "a quasi-executive or quasi-legislative function in which legal rights, duties, privileges, or immunities are not the subject of adjudication." 229 So. 2d at 306. A vestige of the Bay National view survives, unfortunately, in Metsch v. University of Florida, 550 So. 2d 1149 (Fla. 3d DCA 1989) (APA hearing is not available to an unsuccessful applicant for admission to state law school). This decision takes a position which, I thought, had been superseded by the 1974 APA.
emergency situations. This traditional distinction between applicants and licensees continues to find expression in judicial interpretations of due process; the courts continue to guarantee fewer procedural rights to applicants than to incumbents.

The drafters of section 120.57 of the 1974 Florida APA intended to give a broader range of procedural protections than those mandated by the due process clause of the state and federal constitutions, and to afford these protections to applicants as well as to incumbents. In addition to clarifying the matter of incipient policymaking, the McDonald case also recognizes that the 1974 APA guarantees an adjudicative hearing to a bank charter applicant.

The adjudicative hearing guaranteed by the 1974 Florida APA may be either formal or informal, depending on whether or not a disputed issue of material fact is involved. By providing for informal as well as formal hearings, the drafters intended to protect the agency from being clogged by needless formalities.

This discussion of section 120.57 may help explain the purpose of the similarly-worded draw-out provision. While section 120.57 guarantees a hearing even though the subject matter may be regarded as a “privilege” rather than a “right” under the traditional view, the draw-out provision guarantees an adjudicative process even though the result of the agency action may be characterized as a “rule” rather than an “order” under the traditional usages of these terms. The hearing, however, is available only when the agency determines “substantial interests.” This term indicates a legislative intent to extend the guarantee of a hearing beyond the traditional limits, while at the same time establishing a new set of limits that is developed over time by agency practice and case law. As a final word about the draw-out, I should mention that a draw-out proceeding may be conducted as either formal or informal adjudication, under the provisions of sec-

103. See, e.g., Keating v. State, 173 So. 2d 673, 677 (Fla. 1965) (due process guarantees notice and an opportunity for an adjudicative hearing before an agency may suspend or revoke a liquor license).

104. See, e.g., Walters v. National Ass’n of Radiation Survivors, 473 U.S. 305, 320 n.8 (1985) (holding that Supreme Court precedents guarantee a hearing before an existing flow of benefits can be cut off, but no Supreme Court precedent guarantees a hearing to an applicant for benefits).

105. Reporter’s Comments, supra note 25, at 18.

106. 346 So. 2d 569 (Fla. 1st DCA 1977).

107. Id. at 578.

108. FLA. STAT. § 120.57 (1989).


110. See notes 101-107, supra, and accompanying text.

111. Levinson, supra note 2, at 639, 656-58; FLA. STAT. §§ 120.54(17), 57 (1989).
tion 120.57, depending on whether or not the matter involves a disputed issue of material fact.\textsuperscript{112}

V. SUBJECT MATTER INDEX OF AGENCY ORDERS

No matter how many rules the agencies adopt, citizens will still need access to a subject matter index of orders. The Florida Act requires each agency to prepare a subject matter index of its orders and to make this index available to the public.\textsuperscript{113} The purpose is to protect citizens against arbitrariness, to give citizens the means of finding out whether they are receiving treatment equal to similarly situated persons, and to give the courts the opportunity to determine whether the agency is acting arbitrarily or evenhandedly.

Having discovered, to my great dismay, that the indexing requirement is not being faithfully carried out,\textsuperscript{114} I encourage concerned persons to invoke the enforcement mechanism provided by the APA itself. Section 120.54(5) requires the agency to furnish all information called for by section 120.53 within thirty days or explain why it is not furnishing the information.\textsuperscript{115} The Reporter's Comments to the APA note that citizens may invoke Section 120.54(5) as a basis for requesting an agency to provide access to its index because section 120.53 requires the agency to give this information.\textsuperscript{116} If the agency fails to provide an index, a party may seek judicial review of the agency's action.\textsuperscript{117} In this litigation the agency will have to explain its failure to comply with the statutory requirement of maintaining an index.

As a technical matter, indexing is probably much easier now than it was in 1974 when this statute was written because computers and data processing are much more advanced. An appropriate state agency, perhaps the Administration Commission through the Model Rules,\textsuperscript{118}

\begin{itemize}
\item \textsuperscript{112} FLA. STAT. §§ 120.54(17), .57 (1989).
\item \textsuperscript{113} FLA. STAT. § 120.53(2)(c) (1989). In December 1989, the Administrative Conference of the United States noted that some federal agencies have failed to comply with the indexing requirements established by the Freedom of Information Act, 5 U.S.C. § 552(a)(2). The Conference made a series of recommendations for more effective implementation of the indexing requirements, including use of computer technology. Recommendation 89-8, Agency Practices and Procedures for the Indexing and Public Availability of Adjudicatory Decisions, 1 C.F.R. § 305.89-8 (1990).
\item \textsuperscript{114} See studies prepared for this Conference, including \textit{Staff of Fla. Sen. Comm. on Govtl. Ops., A Supplement to A Review of Indexing of Agency Orders Issued Pursuant to Chapter 120, F.S., The Administrative Procedure Act, April 1989} (March 1990).
\item \textsuperscript{115} FLA. STAT. § 120.54(1) (1989).
\item \textsuperscript{116} Reporter's Comments, \textit{supra} note 25, at 14.
\item \textsuperscript{117} FLA. STAT. § 120.52(2) (1989) defines "agency action" to include "any denial of a request made under s. 120.54(5)." FLA. STAT. § 120.68(1) provides for judicial review of "final agency action."
\item \textsuperscript{118} Levinson, \textit{supra} note 2, at 631-34; FLA. STAT. § 120.54(10) (1989).
\end{itemize}
or the Department of State through delegation,\textsuperscript{119} could simplify the indexing function by designing a uniform front page to be attached to every adjudicative decision. The front page should have places for names of the parties, docket number, statutory section number, rule section number, perhaps key words pertaining to the subject matter, and a symbol indicating whether the agency regards this as a precedent-setting decision.

If all front pages of agency orders were uniformly styled, they could be computer processed. I envision a terminal in every county courthouse of the state where any lawyer, judge, or citizen has access to the index that would reveal, among other matters, the agency's own perception as to which of its prior orders were precedent-setting. All other orders would be indexed as well, so people could check on the agency and challenge the agency's characterization of an order.

If the index were readily available along the lines I have suggested, or by some other means, agencies would be more effectively encouraged to stay within their own precedents. Amending the Equal Access to Justice Act\textsuperscript{120} to provide attorney's fees and costs to parties who maintain actions against agencies that depart from adjudicated precedent without explanation also may be appropriate.

VI. CONCLUSION

The 1974 Florida APA was innovative and complicated at the time of its enactment. Its provisions on rule review may have been too cumbersome from the very beginning. The system may not be able to survive significant increases in the total number of rulemaking proceedings or in the number of those proceedings that turn into formal hearings as a result of the draw-out. These practical considerations must be weighed against any advantages that are claimed by pending proposals calling for the adoption of amendments that would require rulemaking or for reinterpretations that would expand the availability of the draw-out.

Practical considerations also are relevant with regard to the APA requirement of a subject matter index of orders. The excuse for the widespread violation of this requirement seems to be that compliance is and always has been impractical. This excuse may have had some validity in 1974, but it is much weaker today in view of technological advances that make compliance much more feasible now than it was then.

\textsuperscript{119} The Department of State is already responsible for publishing rules, Fla. Stat. § 120.55 (1989).
\textsuperscript{120} Fla. Stat. § 57.111 (1989); see also Fla. H.B. 2539, § 3 (1990).
Even though compliance with the indexing requirement may still be burdensome, agencies should make renewed efforts to comply, and individuals who need access to the index should renew their efforts to make sure the agencies comply. The subject matter index was a crucial feature of the 1974 APA. The intent was to contribute significantly to the fairness of agency adjudication by establishing a type of administrative *stare decisis*. The judicial review provisions of the APA cannot be fully effective unless the agencies comply with the indexing requirement. Agencies should not continue to frustrate the clear intent of the APA unless compliance is absolutely impossible.