Michigan's APA Turns 40

By Richard D. McLellan

Michigan's Administrative Procedures Act of 1969[1] (APA) reached its 40th birthday this year.

With this introduction, some readers of the *Bar Journal* may quickly turn the page. But for administrative law practitioners, administrative law judges, and the occasional lawyer looking for new fields of practice, the history of Michigan's APA is an interesting one.

Since its effective date in 1970, the APA, like most 40-year-olds, has had its up and downs. It is no longer the freshly passed law providing promised clarity and fairness in government proceedings. Instead, it has had many changes, improvements, and setbacks over 40 years.

But the law has succeeded in accomplishing its key purpose: establishing a solid framework for the quasi-legislative and quasi-judicial functions carried out by the executive branch agencies in Michigan state government.

This article looks at the background and history surrounding the original passage of the APA in 1969 and significant changes during the past 40 years. It focuses on the most controversial aspect of the APA—the rulemaking process.

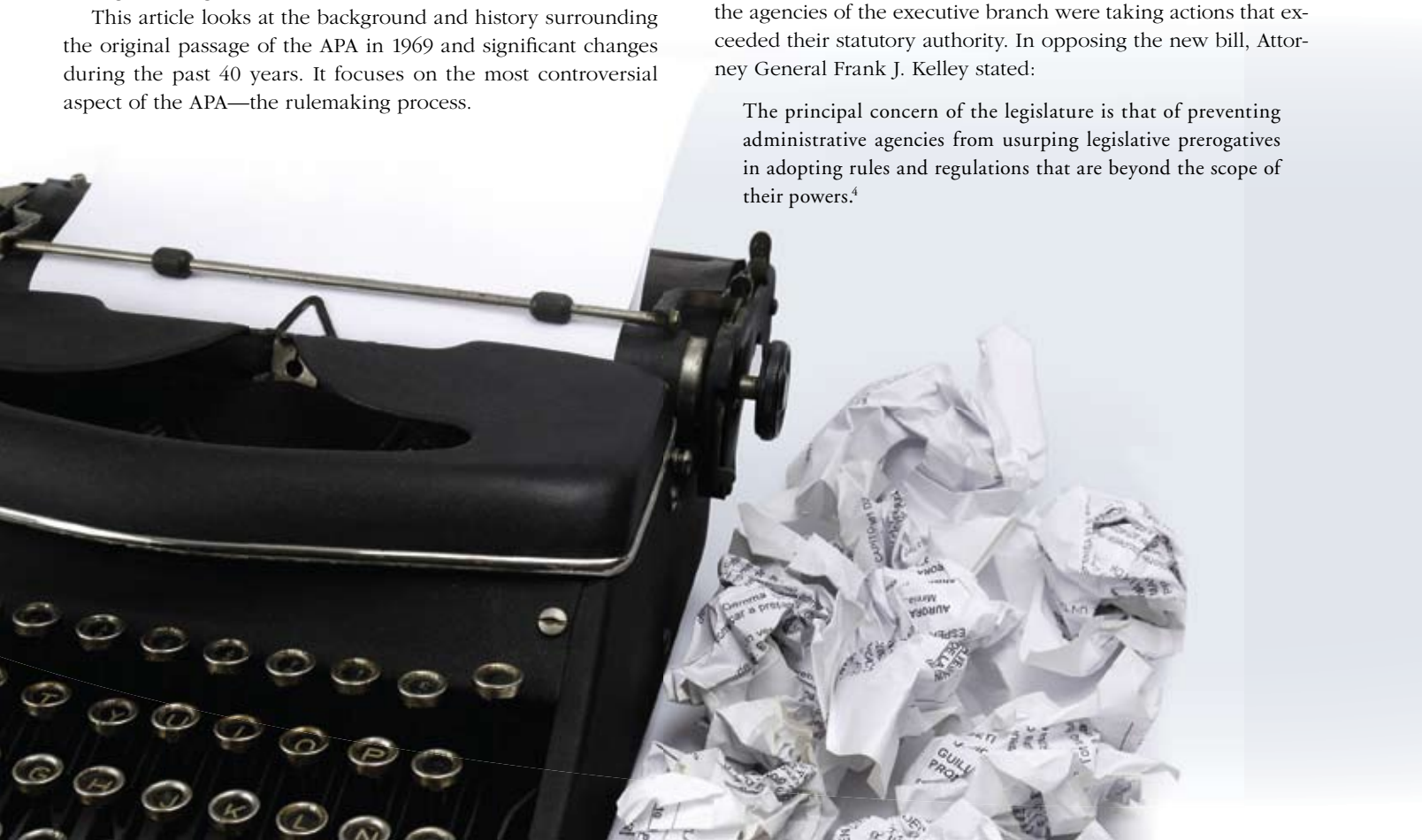
Governor Romney's Pocket Veto

In 1968, the legislature passed a version of an Administrative Procedures Act[2] that was "pocket vetoed"[3] by Governor George Romney, who neither signed the bill nor returned it to the legislature before the end of the legislative session. Shortly afterward, Governor Romney resigned to become Secretary of Housing and Urban Development in the Nixon administration.

Senate Bill 241

With the departure of Governor Romney and the arrival of Governor William Milliken in early 1969, the legislature again attempted to pass an administrative procedures act. The new bill was Senate Bill No. 241 of 1969 (SB 241). Much of the impetus behind the act was the perception among some legislators that the agencies of the executive branch were taking actions that exceeded their statutory authority. In opposing the new bill, Attorney General Frank J. Kelley stated:

> The principal concern of the legislature is that of preventing administrative agencies from usurping legislative prerogatives in adopting rules and regulations that are beyond the scope of their powers.[4]



In addition, individuals and companies complained of being affected by "secret rules"—policies that agencies did not publicly disclose but used to adjudicate matters within the agency.

The driving force behind SB 241 was Robert "Bob" J. Huber, a Republican state senator from 1965 to 1970 and a one-term congressman from 1973 to 1975 who was defeated by future Governor James J. Blanchard in the post-Watergate Democratic landslide of 1974.

Sen. Huber claimed SB 241 "embodies the most modern principles and practices in administrative law." The bill was based on the 1968 failed legislation, modern state administrative codes, the federal Administrative Procedures Act, and the work of the Michigan Law Revision Commission and several legal scholars and authorities. The 1969 bill included a number of changes from the 1968 bill requested by administrative agencies and departments. Unlike the then-existing legislation, SB 241 sought to combine in one bill the two major fields of administrative law: (1) the law governing the exercise of quasi-legislative power or rulemaking by executive agencies, and (2) the law governing the quasi-judicial power involved in adjudicatory proceedings in executive branch agencies.

SB 421 repealed the 1943 and 1952 laws relating to rules and regulations but provided that a reference to the new APA would be deemed a reference to the old laws.[5] There are still approximately 50 statutes in the Michigan compiled laws that include language similar to the following:

> The department may promulgate rules and regulations for the enforcement and administration of this act in accordance with the provisions of Act No. 88 of the Public Acts of 1943, as amended, being sections 24.71 to 24.80 of the Compiled Laws of 1948, and subject to Act No. 197 of the Public Acts of 1952, as amended, being sections 24.101 to 24.110 of the Compiled Laws of 1948.

New Protection for the Public

Sen. Huber and proponents argued the new legislation brought many benefits related to rulemaking, including:

- A major expansion of the rights of the public to information concerning the policies and practices of an administrative agency
- Preserving important rights of public notice and public participation in adopting and promulgating rules
- Providing that a rule may not make an act or omission to act a crime—a matter uncertain under the existing law
- Limited permission for incorporation by reference in rules of nationally published rules and other matters

Similarly, the bill sought to provide new benefits in the conduct of adjudicatory proceedings, including:

- A more practical and less technical standard for evidence having a probative value
- Broadened provisions for depositions
- A strengthened right to obtain records for cross-examination purposes
- Separating hearing officer functions from other agency personnel

Sen. Huber asserted that "in short, the bill seeks to deal with adjudicatory proceedings in a manner which is flexible and at the same time sets forth the fundamental ingredients of due process."

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Executive Agencies Strike Back

Under Michigan's Constitution of 1963 and the Executive Reorganization Act of 1965,[6] Michigan state government was organized into 19 principal departments and the executive office of the governor. Under instruction from the governor, each principal department was asked to analyze SB 421 and indicate whether the agency supported or opposed the legislation with arguments for and against the bill.

Broadly, Michigan state agencies opposed the legislation using a variety of arguments:

- "Will require additional personnel."
- "Increased time requirements may be anticipated in all agencies."
- "Additional administrative expense will be incurred by those departments affected."
- Attorney General Frank J. Kelley: "The bill is a complex maze consisting of overly technical and overly restrictive procedural requirements. It contains numerous ambiguities which will require considerable interpretation and litigation to settle."
- Kelley again: "To replace existing law with an entirely new statute will cause considerable consternation involving long study on the part of many state officials."
- "Neither the Senate bills nor the House bills would materially affect the problems related to non-promulgated standards and guidelines."
- Arguments against the bill: "This would include overextension of its application to matters defined as rules; complexity of procedures; and delays for adoption, approval and revision of rules."
- "It is very cumbersome…and would make the promulgation of regulations a complicated and tedious process."

And this shocking statement from the Department of State Police: "[C]ould even require the hiring of legal talent…."

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One state department, however, understood the potential benefits of a new APA. The Michigan Department of Military Affairs, under Major General Clarence C. Schnipke, director and adjutant general, advised the executive office:

> The basic philosophy of providing for systematic review of proposed rules, participation in the rule making process, hearings in contested cases, and judicial review when administrative remedies have been exhausted has been established and accepted in this country. Participation in the decision making process establishing rules and appeals from potential or actual agency decisions permits citizens an important role in the rule making and adjudicating procedures. To the extent, the bill protects the rights of the body politic, the proposal is a sound one.

As the bill worked its way through the legislature, a number of changes were made to address issues raised by state agencies. In the end, the bill passed the House by a vote of 96–1 and the Senate by a vote of 33–0.

In a signing memorandum submitted to the governor, David J. Dykehouse, legal counsel to the governor, modestly stated:

> This bill provides for a number of reforms of administrative procedures, both as to rule-making and contested cases. The bill was completely revised by me from the form in which it originally passed the Senate and is now, in my judgment (and the distinguished lawyers who worked with me would concur), the best administrative procedures act in the United States.

40 Years of Changes

Although the APA was touted as "the best administrative procedures act in the United States," the Michigan legislature immediately began to amend it. The first changes were made to the definition of "agency action"[7] and were scheduled to take effect at the same time as the main act.

It is in the quasi-legislative rulemaking area, however, where there has been the most controversy and change. Because a rule has the force and effect of law but is subject to lengthy procedures in order to be effective, several agencies have successfully sought changes in the definition of "rule"[8] to exclude certain rule-like agency decisions, including:

- Rules or policies that only concern the inmates of a state correctional facility
- Special local watercraft controls
- Certain certificate-of-need actions for health care facilities
- Certain policies under the Social Welfare Act
- Provisions of an agency's "standard for contract"

Other techniques used by agencies to avoid the rulemaking process are to issue guidelines, unpromulgated policies, inter-agency memoranda, bulletins, directives, interpretive statements, and letters.

Michigan courts have frequently blocked attempts to impose mandatory policies through these alternative techniques and have generally upheld the policies underlying the rulemaking provisions of the APA:

- The actual action undertaken by the agency, not its label, will determine whether a rule is required.
- The APA's preference for policy determined by rules means that the definition of rule is to be broadly construed and exceptions to be narrowly construed.
- Administrative policies not promulgated under the APA are without legal authority or effect.
- Agencies may not circumvent the APA procedural requirements.

Guidelines are a special exception to the definition of a rule. The APA defines "guideline" as:

> an agency statement or declaration of policy which the agency intends to follow, which does not have the force or effect of law, and which binds the agency but does not bind any other person.[9]

Guidelines have their own chapter[10] of the APA requiring notice and publication, but the APA provides that "an agency shall not adopt a guideline in lieu of a rule."[11] Since the 1977 adoption of chapter 2, there have been no reported cases challenging the use of guidelines in lieu of mandatory rules.

The Governor's Override of a Veto

Until 1977, no law vetoed by the governor had been overridden by the two-thirds vote of the legislature authorized by the Constitution.[12] But the continuing controversy over the scope of legislative control over executive agency rulemaking led the legislature to adopt Act No. 108 of the Public Acts of 1977, giving the joint committee on administrative rules in the legislature approval power over agency rules. At the time the provision was ruled unconstitutional (see below) it read, in part, as follows:

> (9) If, within the time period provided by subsection (6), the committee [JCAR] disapproves the proposed rule or the committee chairperson certifies an impasse after votes for approval and disapproval have failed to receive concurrent majorities, the committee shall immediately report that fact to the legislature and return the rule to the agency. The agency shall not adopt or promulgate the rule unless 1 of the following occurs:
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> (a) The legislature adopts a concurrent resolution approving the rule within 60 days after the committee report has been received by, and read into the respective journal of, each house.
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> (b) The committee subsequently approves the rule.

The legislature overrode the veto of Governor Milliken, starting a 20-year period in which agencies and those involved in the rulemaking process had to deal with a powerful joint committee on administrative rules (JCAR). JCAR oversight arguably acted to contain the excesses of state agencies seeking to exceed their statutory power.

The Supreme Court declined to issue an advisory opinion to Governor Milliken on the constitutionality of the 1977 amendments, but stated: "The Court stands ready to examine carefully, and to resolve expeditiously, any controversy that comes to it out of application of 1977 PA 108 in a factual setting."[13] It would take 20 years for the Court to address the issue.

The intrusion of the legislature and particularly a committee of less than the whole legislature in the process of executive agencies was always constitutionally suspect. In 1984, to protect its powers under Act No. 108, the legislature submitted House Joint Resolution "P" to the voters, seeking approval of the legislature's power to approve or disapprove administrative rules proposed by state agencies; the measure was defeated by more than 500,000 votes.

The issue was finally resolved when then Governor John Engler directed the Department of Corrections (DOC) to promulgate rules without going through the JCAR review and approval process. In

its lead opinion, the Supreme Court outlined the process the DOC used to circumvent the legislative approval process:

> In 1995, the Department of Corrections (DOC) proposed a series of administrative rules that limited the number and type of persons who could visit a prison inmate. DOC then submitted its proposed rules to the Joint Committee on Administrative Rules (JCAR). At public hearings before JCAR, prisoner rights groups, prisoners' relatives, and other interested persons expressed vigorous opposition to the proposed rules. JCAR did not approve the rules and scheduled more hearings.
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> DOC then withdrew the proposed rules from JCAR and adopted them without JCAR's approval. DOC forwarded the rules to the Governor and the Office of Regulatory Reform, which, in turn, sent them to the Secretary of State. The rules then became effective without a certificate of legislative or JCAR approval.

A legal challenge to the DOC quickly followed and ultimately led to the Supreme Court's ruling the legislative approval process unconstitutional—a matter the Court had refused to address 20 years earlier.

As the author of the lead opinion, Justice Marilyn Jean Kelly recognized that the legislature may delegate to executive agencies the authority to adopt rules and regulations. Facing a challenge to the legislature's retention of authority to approve rules, Justice Kelly articulated the question facing the Court:

> The issue here is whether the Legislature, upon delegating such authority, may retain the right to approve or disapprove rules proposed by executive branch agencies.

In a lengthy analysis of Michigan's Constitution and similar federal and state cases, Justice Kelly concluded:

> The Legislature's reservation of authority to approve or disapprove rules proposed by executive branch agencies violates the Michigan Constitution. Action taken pursuant to that authority is inherently legislative in nature and does not comply with the enactment and presentment requirements of the constitution. Accordingly, it usurps the role of the Governor in the legislative process and violates the separation of powers provision. Therefore, I would hold that subsections 8, 9, 10, and 12 of § 45 and the first sentence of subsection 1 of § 46 are unconstitutional.
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> I also would hold that the offending portions of §§ 45 and 46 may be severed from the rest of the APA without declaring the entire APA unconstitutional. I would distinguish this holding from that of the Court of Appeals, because it would not strike down §§ 45 and 46 in their entirety. This holding would sever only the specified portions of the sections. The remaining portions would remain effective.

Now, 40 years since its enactment, the exercise of quasi-legislative powers by executive agencies is solidly a function of the executive branch. If the legislature chooses to enact a law and delegate to an executive agency the power to fill out the law by issuing regulations, the legislature may not further interfere unless it changes the law following the constitutionally prescribed procedures.

Michigan citizens, including its lawyers, benefit from a system in which both the legislature and executive branch follow well-established, transparent processes for adopting the laws that affect all our lives. ■

Richard D. McLellan has practiced administrative and public policy law in Lansing for 42 years. He is chair of the Michigan Law Revision Commission, a position he has filled since 1986. In 1969, he served as an administrative assistant to Governor William G. Milliken when the Administrative Procedures Act of 1969 was enacted.

FOOTNOTES

1. MCL 24.201 *et seq.*
2. SB 1374.
3. Const 1963, art 4, §33 provides, in part: "Every bill passed by the legislature shall be presented to the governor before it becomes law, and the governor shall have 14 days measured in hours and minutes from the time of presentation in which to consider it. If he approves, he shall within that time sign and file it with the secretary of state and it shall become law. If he does not approve, and the legislature has within that time finally adjourned the session at which the bill was passed, it shall not become law."
4. Memorandum to the Executive Office re Analysis of Senate Bill No. 241 (April 10, 1969).
5. MCL 24.312 provides: "A reference in any other law to Act No. 88 of the Public Acts of 1943, as amended, or Act No. 197 of the Public Acts of 1952, as amended, is deemed to be a reference to this act."
6. 1965 PA 380, MCL 16.101 *et seq.*
7. MCL 24.203.
8. MCL 24.207.
9. MCL 24.203(6).
10. MCL 24.221 through 24.228.
11. MCL 24.226.
12. Const 1963, art 4, §33 (in part): If [the governor] disapproves, and the legislature continues the session at which the bill was passed, he shall return it within such 14-day period with his objections, to the house in which it originated. That house shall enter such objections in full in its journal and reconsider the bill. If two-thirds of the members elected to and serving in that house pass the bill notwithstanding the objections of the governor, it shall be sent with the objections to the other house for reconsideration. The bill shall become law if passed by two-thirds of the members elected to and serving in that house.
13. Request for Advisory Opinion on Constitutionality of 1977 PA 108, 402 Mich 83, 87; 260 NW2d 436 (1977).