Comment on "The Political Origins of the Administrative Procedure Act," by McNollgast

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This is an interesting article that seeks to explain the content and passage of the Administrative Procedure Act (APA). The analysis is meant to illustrate a broader claim that struggles over administrative procedure actually are struggles over substance. The particular claim here holds that, in the years 1933–1946, there was a political controversy over the procedures that administrative agencies should follow when deciding cases or enacting rules. Contrary to the assertions of the lawyers of that day and this, however, the controversy was epiphenomenal: The actual struggle was over the future of New Deal programs.

McNollgast tell this story: As a matter of theory, the legislature is concerned that the agency not deviate from the preferences of the enacting coalition, and that members of the coalition do not later defect to cause the agency to deviate. Accordingly, when Congress agrees on a policy and the president agrees as well, there is no need for administrative procedure. Rather, the agency should be given discretion because then it will be most effective in realizing the enacting coalition's policy preferences. But when the unanimity conditions no longer hold, Congress will attempt to raise the agency's cost of deviating from a status quo that a majority of Congress continues to prefer. An effective way to do this is to increase the procedural requirements the agency must satisfy to implement policy. This will increase the agency's cost of doing anything, and also can facilitate fire alarm oversite.

This story states that when Congress and the president were all New Dealers, they permitted their agencies to make policy relatively free from procedural constraints. This is consistent with the facts. The story also purports to explain the APA as a set of procedural constraints designed to preserve the substance of New Deal policies. The New Deal Democrats and President Roosevelt fought procedural change until the election returns began to show that the Congress and possibly the next president would turn against the New Deal. Then the Democrats supported procedural reform—the APA—that would make it more difficult for agencies to depart from the status quo. McNollgast thus conclude: "the APA was designed in part for procedural due process and in part to protect the New Deal," and that the APA would "help limit the ability

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of new Republican regulatory officials from perverting New Deal legislation should the Republicans capture the presidency."

This comment notes two problems with the McNollgast story and suggests an alternative explanation for the APA. Regarding problems, the story initially is incomplete because Congress imposes two kinds of procedural restraints on agencies: generic restraints that apply to all agencies and specific restraints that apply to individual agencies. The APA, the Freedom of Information Act, and the Government in the Sunshine Act are generic procedural restraints. Examples of procedural reforms that were meant explicitly to restrain particular agencies are the Taft–Hartley Act (constraining the National Labor Relations Board) and the several Congressional efforts to constrain the Social Security Administration. McNollgast plausibly argue that many in Congress wanted to restrict the power of agencies to repeal New Deal programs, but they do not show why Congress chose generic procedural reform rather than the apparently more effective method of directly constraining the agencies that, in Congress's view, could do the most harm.

The second and more serious problem is that McNollgast explain the Democrats' preference for procedural reform but do not satisfactorily explain the Republicans' preference for reform. Since Republican votes were necessary for passage of the APA, the article's explanation is incomplete. Recall here the crucial methodological premise for this line of research: the political actors' *expressed* concerns for procedural reform are unilluminating; rather, the actors' policy preferences are best recovered from what they did. Now consider another of the article's descriptions of the APA: the act gave the New Dealers "most of their way on economic policy." The Republicans "achieved some of their desires on individual rights," but the data "rejects the theory that individual rights were the sole objective of procedural due process reforms." The Republicans did *argue* for procedural reform on the grounds that it would protect individual rights. McNollgast show, however, that in the 1930s such talk was a smokescreen for procedural reforms that would kill the New Deal. How did the Republicans in the 1940s come to prefer procedural reforms that would freeze the New Deal in place?

It is possible to be a little more precise about this concern. For much of the 1930s, there was a liberal Democratic president and a liberal Democratic Congress. The Republicans only controlled the courts. Thus, McNollgast explain why the Democrats wanted no procedural constraints on agencies while the Republicans wanted many enforced by judicial review. At the time the APA was passed, the Republicans knew that they had a good chance to control both houses of Congress after the next election, and that they also had a good chance to elect the next President in 1948. The federal courts, however, were and would remain for a long time largely Democratic. If the Republicans got the Congress later in 1946 and the presidency in 1948, their situation would have been the same as that of the Democrats in 1936. The Republicans in 1946 thus should have preferred the status quo to the APA. If there were few procedural constraints on agencies and very limited judicial review in 1948, as there was prior to the APA, the newly staffed Republican agencies could have repealed

the New Deal and the courts could not have stopped them. Why would the Republicans agree to the APA in 1946?

McNollgast answer that the Republicans could have repealed the New Deal whether Congress passed the APA or not, if the Republicans did well in the next elections. Since the Republicans could not be sure of capturing the presidency in 1948, and the APA also would impede further New Deal advances, the Republicans benefited from passage of the 1946 act. This response seems unpersuasive because the Republican's best strategy in the face of a strong but not certain chance to control the government 2 years hence apparently was to do nothing until then. If the Republicans did get the presidency and the Congress, they could continue the procedural rules of the 1930s, but with different players. If they lost the presidency in 1948, the Democrats probably would continue to want the APA for the reasons that McNollgast give, and the Republicans could go along then. The Republicans thus should have voted for the status quo in 1946 because (1) the APA moved closer to the Republican's ideal point but was still very far away; (2) the 1946 improvement in the status quo would still be available to the Republicans in 1948 unless they both failed to regain the presidency and did badly in the next Congressional elections. This combination was highly unlikely and did not happen; and (3) in McNollgast's words, "by voting for the APA the Republicans sacrificed the prospect of a de facto repeal of the New Deal through the election of a Republican president in 1948." In sum, if the Republicans did not really care about individual rights, which seems plausible, but did care about economic policy, which also seems plausible, then stalling until 1948 was the Republican's best strategy. Therefore, McNollgast lack a good explanation for why Republicans in 1946 did not block the APA.

An alternative explanation for passage of the statute that analysts perhaps should consider can be sketched here. The explanation is suggested by two facts. First, the 1947 Taft–Hartley Act severely constrained the New Deal agency that the Republicans most disliked—the NLRB. This suggests that when the Republicans wanted to constrain at least some New Deal agencies, they apparently had the power and the knowledge to do it. A possible inference from this story is that the APA was not primarily about New Deal economic policy. The second fact is that the first bill introduced in Congress to make broad changes in federal administrative procedure was drafted by the American Bar Association (ABA) in 1933; the ABA was a powerful supporter of Congress's initial attempt to enact procedural reform, the Walter–Logan Bill; and the bill that ultimately became the APA was widely known as the ABA bill.

Today, law reforms often are pushed or blocked by lawyer groups who function largely as autonomous agents—the trial lawyers (who block tort reform), the bankruptcy bar (which helps to retain a litigation intensive bankruptcy system), the corporate bar (which helps to retard a free market in corporate control). The political actions these lawyer groups take correlate very strongly and positively with their incomes. There was a correspondence between the views of the lawyers respecting the APA and some business parties in the 1930s. Anything that would slow up agency action then would both help business and make work for lawyers. As time went on, the business people probably learned that they

could get specific helpful reforms from Congress, but the lawyers pushed on. These lawyers prefered generic procedural reform because that introduced a much greater amount of lawyering into the entire federal administrative process than there had been before. Much of this lawyering would be done by the New Deal lawyers who had staffed the agencies, and who strongly supported and helped draft the APA. Thus, Roosevelt may have been right in 1940 when he described the Walter–Logan Act as lawyers' legislation. In brief, the more procedure there is and the more due process there is, the more money for lawyers there is. Therefore, the contribution of the lawyers to passage of the APA may have been larger than the McNollgast story permits.

To summarize, this is an interesting article. It is broadly correct in its claims that procedure means substance to the participants in the administrative process, and that the APA was not the product of lofty social views. The article's analysis is incomplete, however, in not explaining why Congress pursued generic rather than specific procedural reform in 1946, and in not fully accounting for the preferences of the Republicans. Also, the role of the organized bar should have figured more prominently in the analysis.