

1986

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Repository Citation

Koch, Charles H. Jr., "Gelhorn and Davis Highlight APA Anniversary Program" (1986). *Popular Media*. 96.
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Gellhorn and Davis Highlight APA Anniversary Program

by Charles H. Koch, Jr.*

The spring meeting of the Section Council included a two-part program to commemorate the 40th anniversary of the Administrative Procedure Act. The program, planned by Thomas Susman, brought together Professor Walter Gellhorn, University Professor Emeritus at Columbia University, and Professor Kenneth Culp Davis, Distinguished Professor at the University of San Diego School of Law, to reminisce about the early history of the APA. This significant addition to the oral history of administrative law was moderated by Paul Verkuil, President of the College of William and Mary.

Professors Gellhorn and Davis served together in the late 1930s on the staff of Attorney General Jackson's Committee on Administrative Procedure. The committee was established by President Roosevelt to write a comprehensive act regulating administrative procedures. Professor Gellhorn was staff director and Professor Davis was one of the staff members. Director Gellhorn observed that staff member Davis was well worth his \$3,600 salary. (Davis claimed he was paid \$4,200.)

These two central characters in the creation and development of modern administrative law regaled the Section meeting with tales and personal exchanges from the pre-APA era. When asked directly who was the intellectual leader of the committee, Davis, after surveying the contributions of several others, literally pointed to Gellhorn as *the* intellectual leader. Gellhorn refused founding fatherhood; while admitting to intercourse, he would not admit to sole paternity.

One of the rules of the exchange was that the two would disagree. Surprisingly, they did! One basic disagreement that appears to have survived these 45 years concerns the value of the generalizing done in the APA. Gellhorn came out rather strongly against generalization. He carried this to the present by suggesting that the Administrative Conference, for one, should concentrate more on improving the procedures of specific agencies. Davis stated that the generality of the APA is valuable, and expressed regret that the *Final Report of the Attorney General's Committee* had a page and a half opposed to generalizing. Nonetheless, the exchange left no doubt that a major strength of the APA, although itself a generalized framework, is the firm base provided by the monographs on each

then-existing agency prepared by the staff led by Gellhorn.

The work of the Attorney General's Committee was surrounded by an air of hostility to the administrative process. The opposition was led by the ABA. Indeed, at one point Davis said that during that period the ABA was a "pernicious force." He quickly added that later the ABA, guided by Carl McFarland, was a substantial positive force in the enactment of the final version of the APA—which did not occur until 1946. Because of McFarland's efforts, he asserted, this controversial legislation was passed with virtually no dissent.

Both men considered Roscoe Pound the prime villain of the pre-APA era. Gellhorn quoted Pound's opinion about James Landis, a strong advocate for the administrative process and whose book, *The Administrative Process*, served as the strongest early brief for the process: Pound simply labeled Landis a Marxist. That quote illustrated the environment in which the committee had to work.

Gellhorn disclosed that the growing tide of opposition to the administrative process as a concept of government put special pressure on the committee. For one thing, it was necessary for the members to complete their task quickly. Part of the time pressure came from the parallel efforts by Congress, with support of the ABA, to pass legislation that would have hamstrung that process. Congress passed the Walter-Logan bill for that purpose, but President Roosevelt vetoed it, ostensibly to give his committee time to recommend its own legislation. Still, the Walter-Logan veto was very nearly overridden.

One of the highlights of the exchange was Gellhorn's impression of Senator Logan. Asking the audience to imagine a large man with prodigious jowls, Gellhorn shook those imaginary jowls, as Logan did some 46 years ago, and imitated the Senator's animated proclamation that he was merely trying to protect due process. "You cannot argue with that, can you?" Logan asked Gellhorn and, not surprisingly, the young staff director said that he could not.

Indeed they were all young, the men who created the legislation that has lasted for forty years. Gellhorn made special note of that fact, calling himself the "old man" of the group. Davis interrupted to point out that this old man, whom he had described as the intellectual leader, was himself only 33 years old at the time.

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Gellhorn/Davis

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In one sense Gellhorn and Davis have not changed; for they managed to push their historical reconstruction forward into the future. Davis in particular surprised the audience by suggesting that the Supreme Court, if it insists on doing rulemaking, should use notice and comment procedures and outside experts. By instinct, then, these two men, who essentially created administrative law and who have guided its development, deal with the future in the same fundamental ways they dealt with the past. Indeed, their continued writing, teaching, and guiding of younger administrative law scholars will likely have an impact for decades to come.

Regulatory Reform Discussed

Fundamental questions about the future were also raised in a separate session, held prior to the Davis-Gellhorn exchange, in which scholars of more recent vintage looked at regulatory reform since the APA. They took an irreverent look at regulatory reform in order to understand why such reform has been so unsuccessful.

Professor Charles Koch, Dudley W. Woodbridge Professor of Law at the College of William and Mary, opened the program by expressing the urgent need for real progress in improving the administrative process. Doubt about the efficacy of the process, he found, is a major impetus behind the movement to avoid government involvement. "Reformers" today search not for reform of the administrative process but for alternatives to it and other legal processes, such as the return to "regulation" by market forces. While some of this is a valuable adjustment and updating of the nation's mixed economy, the danger in this trend, he observed, is that an overcommitment to deregulation, aggravated by dissatisfaction with the process, will upset the balance between government involvement and unbridled business behavior.

Thomas McGarity, Cooper Ragan Professor of Law at the University of Texas, categorized varieties of regulatory reform as "substantive," "procedural," "structural," or "cognitive." Currently, he found, we are in an era of cognitive reform, i.e., a time of prescribing changes in the way that the agencies think about problems, such as requiring cost-benefit analyses and other impact statements. In general, he demonstrated that each type of reform was motivated by its advocates' views toward positive government.

Marianne Smythe, associate professor of law and assistant provost of the University of North Carolina,

took the most irreverent look at regulatory reform. Aiming primarily at the current stampede to deregulation, she predicted that the antigovernment alliance of liberals and conservatives that has supported economic deregulation will break down when the issue becomes health, safety and welfare deregulation. Comparing the deregulation movement to a religious sect, with the conservatives as the orthodox and the liberals as the heretics, she beguiled the audience with religious parallels and pithy quotes from the various disciples of the movement. She predicted a new battle for possession of the District of Columbia—on one side, the orthodox reformists who hunger for a world in which Washington is a sleepy town on the Potomac and the new hit tune is "Mommas don't let your babies grow up to be bureaucrats"; on the other side, the heretics who, while not born again believers in the old religion, will be forced to defend Washington from the jihad and preserve the best of the old beliefs.

These papers will be published in the Fall 1986 issue of the *Administrative Law Review*, commemorating the 40th anniversary of the APA. Included also will be the transcript of the Davis-Gellhorn exchange. Due to Paul Verkuil's foresight, the exchange was videotaped. To order a copy of the tape, send \$30, payable to the "College of William and Mary," to Professor Charles H. Koch, Jr., Marshall-Wythe School of Law, College of William and Mary, Williamsburg, VA 23185. (Please indicate whether you want Beta or VHS.)



Professor Walter Gellhorn, Federal District Judge Walter H. Rice (S.D. Ohio), and Dean Frederick Davis were the judges at the seventh annual National Administrative Law Moot Court Competition, held in March at the University of Dayton. Boston College prevailed over Florida State University in the final round. Sixteen law schools participated in arguments on the reviewability of decisions of the Veterans Administration.