

Memorandum 90-113

Subject: Study N-100 - Administrative Adjudication (Draft of Statute)

Attached to this memorandum is a revised draft of the proposed new Administrative Procedure Act, incorporating decisions made by the Commission to date. Our plan is to revise the draft from time to time and build a complete statute as the Commission progresses through the study.

The current draft incorporates the Commission's most recent decisions (1) not to require that all administrative law judges be employed by a central panel, (2) to exempt the judicial branch and the Governor's office from the adjudicative provisions of the statute, and (3) to exempt the University of California from the new act. In this connection, we note that we have received a letter from the Board of Prison Terms (Exhibit 1) opposed to any requirement of central panel administrative law judges for their hearings. The Board also asks for an exemption from application of the new act; the staff has written to them explaining that the Commission will not be in a position to consider the exemption request until it has determined the substance of the new act.

The current draft recodifies existing provisions relating to the Office of Administrative Hearings at Sections 640.210-640.280. There are additional provisions in the 1981 Model State APA relating to the central panel that could be useful, and we have given a copy of those to OAH for review. If it looks like it would be desirable to incorporate any of those provisions in the new act, we will supplement this memorandum.

The current draft includes a few conforming changes. Ultimately there will be many changes needed, whether for renumbering, terminology, other technicalities, or substance. We have not incorporated many of them at this point simply because of their sheer bulk and because it will be most efficient to draft all necessary conforming changes at once.

We would call the Commission's attention to the following specific provisions of the draft statute:

§ 612.030. Application of division notwithstanding exemption. The purpose of this rather nebulous provision is to make clear that even though an agency or its functions may not generally be subject to the Administrative Procedure Act, there could be overriding administrative procedures that apply to all agencies. The example given in the Comment is discharge of an employee by a state agency; if the statutes governing discharge of employees by all agencies state the Administrative Procedure Act applies, then it will apply to an agency that might otherwise generally be exempt from the act. We expect to refine this section as we proceed, but we want to capture the basic concept here for now.

§ 640.250. Assignment of administrative law judges and hearing officers. In a Note to this section we quote from the 1981 Model State APA that an agency may not select the judge assigned by OAH or reject a selection. We do not know whether this has ever been a problem in California, but it is a provision worth considering.

§ 640.260. Voluntary temporary assignment of hearing personnel. This section authorizes OAH to supervise an administrative law judge voluntary transfer program, to enable administrative law judges, with the consent of the employing agency, to conduct hearings for other agencies. The Commission had decided not to develop such a scheme itself, but simply to authorize such a scheme to be developed by the persons affected if there is sufficient interest in it.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

Board of Prison Terms

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CALIFORNIA COMM'N

AUG 07 1990

RECEIVED



(916) 322-6729

July 27, 1990

California Law Revision Commission
 4000 Middlefield Road, Suite D-2
 Palo Alto, California 94303-4739

Attn: Mr. Edwin K. Marzec, Chairperson

Dear Mr. Marzec:

Re: Administrative Law Revision Project

I write on behalf of the California Board of Prison Terms, hereinafter, the Board, on the topic of the work being pursued by the California Law Revision Commission with respect to Administrative Law.

The Commission has indicated that notice was sent to the Board of a public hearing scheduled for May 31 - June 1, 1990, however, we have been unable to confirm receipt of that notice. Notwithstanding our disappointment in not having the opportunity to participate in the meeting, we ask that you accept this writing as our expressed opposition to the Commission's intention to recommend to the legislature the following: (1) implement a central administrative law judge panel and (2) consolidate the rules applicable to the hearings of all administrative agencies into one or two sets of rules.

The Board strongly recommends that any such plans be made inapplicable to it for the following reasons.

BOARD'S RESPONSIBILITIES

The Board's responsibilities are so varied and comprehensive that the central panel and consolidated APA concepts simply won't work effectively in relationship to the Board and its operation. Let me briefly explain some of the many responsibilities of the Board.

The Board is the state agency with authority to determine parole suitability and, if suitable, fix the term of imprisonment for the indeterminately sentenced prisoners (Penal Code (Pen. Code), §§1168 subd. b, 3040 et seq.), to recommend resentencing to the judiciary in certain specified cases (Pen. Code, §§1170, subds. (d) and (f)), to advise the Governor on clemency matters, including matters dealing with the death penalty (Pen. Code, §4801 et seq.), to determine whether a return to custody or other remedy is appropriate in those cases involving the 61,525 persons on parole and under California's jurisdiction who are found to have violated their parole (Pen. Code, §3056 et seq.), to apply the July 1, 1977 determinate sentence law (DSL) retroactively to nonlife prisoners (Pen. Code, §§1170.2, 3041 subd.(c)),

to conduct parole suitability hearings pursuant to the case of *In re Stanworth* (1982) 33 Cal.3d 176, to conduct Legal Status Reviews (LSR) pursuant to the case of *Haygood v. Younger* (1985) 769 F. 2d 1350, and to perform other duties and functions as required by law.

To perform all of these duties and responsibilities, the Board, comprised of nine Commissioners appointed by the Governor with the advice and consent of the Senate for four year staggered terms (Pen. Code, §5075), employs deputy commissioners (for purposes of our discussion, Administrative Law Judges) to whom it assigns appropriate duties, including that of hearing cases and making decisions, with such decisions conforming to the policies and practices approved by the majority of the Board (Pen. Code §5076.1; Title 15 California Code of Regulations §2008). To accomplish the aforementioned tasks, the Board has the power to establish and enforce rules and regulations (Pen. Code, §§ 3052, 5076.2).

BOARD HAS INCOMPARABLE RESPONSIBILITIES

The unique characteristic of the Board is that it makes decisions which impact on liberty interests as opposed to property interests, which is the case in virtually all other state agencies. This salient feature sets the Board apart from all other state administrative adjudicatory agencies.

The Board conducts thousands of hearings involving liberty interests each year. For fiscal year 1988-89, its commissioners and administrative law judges conducted 15,836 parole violation and parole violation extension hearings, 48,259 screenings (parole violation charges which are settled prior to the hearing), and 874 life parole consideration hearings. Additionally, the Board took 82,880 Central Office Calendar actions (e.g., determinations of whether a person should be discharged from parole (Pen. Code, §3001), appeals of denials of requests for attorneys (CCR §2055, etc.)).

BOARD HAS FOCUSED EXPERTISE

These hearings and actions necessitate expertise, both in knowledge of the criminal law and in exercising judgment as to whether a prisoner or parolee's conduct is such that he or she poses a risk to the public if released. Discretion in each case is not a mechanical application of a legal principle to a factual situation, but applying years of police, correctional or parole experience and knowledge to such questions as whether or not a person serving a sentence of life for a double rape-murder has sufficiently shown that he or she no longer would pose a threat to public safety if released on parole (Pen. Code, §§3043, 3043.5, 3041 subd. (b)). Thus, the decisions of the Board relate not merely to "facts" presented at a hearing, but to a weighing of qualities of the individual who is the focus of the hearing. As indicated, this expertise is essential to public safety.

Clearly, an administrative law judge without this special expertise does not belong at a Board hearing adjudicating such issues as whether a particular act of misconduct satisfies the elements of a particular crime, whether the parolee's past history, current activities and future potential would make release from custody a viable alternative to sending that person back to prison, or whether a life prisoner with an extensive criminal history has shown adequate personality change to the point that he or she no longer poses a threat to the public if released.

Just as the Board's uniquely qualified and criminal justice-oriented personnel would be ill-prepared to conduct other hearings without extensive retraining, those of other agencies would be ill-prepared to conduct the Board hearings.

Therefore, a "central ALJ Panel" would be entirely inappropriate for Board hearings.

Turning now to the Commission's interest in consolidating all state agencies under one administrative procedure act's (APA) hearing rules, again, the Board respectfully suggests that such a plan is ill-advised, inappropriate and, in this instance, potentially unconstitutional.

BOARD HAS BROAD DISCRETION

Insofar as life parole consideration is concerned, under *In re Fain* (hereinafter, *Fain I*) 65 Cal. App.3d 376, 394, the board's discretion in parole matters has been described as "great," "absolute," and "almost unlimited." The Board's exercise of its broad discretion "involves the deliberate assessment of a wide variety of individualized factors on a case by case basis, and the striking of a balance between the interests of the inmate and of the public." (*Fain I*, supra, 65 Cal. App. 3d 389, as cited in *In re Powell* (1988) 45 Cal.3d 894.) The decision turns on a "discretionary assessment of a multiplicity of imponderables, entailing primarily what a man is and what he may become rather than simply what he has done." (*Greenholtz v Inmates of the Nebraska Penal & Correctional Complex*, 442 U.S. 1, pp. 9, 10). This unprecedented recognition of the Board's inherent responsibility and skill in the area of paroles would be dramatically curtailed should the decision making powers be handed over to those lacking the necessary abilities and expertise to properly and effectively decide the critical issues attendant to the parole process.

On the subject of the Board's recognized discretionary skill, "[T]he BPT is an administrative agency authorized to grant parole and fix release dates. (Pen. Code, §5075 et seq.; *Fain I*, supra, 65 Cal.App.3d 376, 389; *In re Schoengarth* (1967) 66 Cal.2d 295, 304). The BPT is also empowered to rescind a parole date for cause. (*Fain I*, supra, at pp. 388-394; *In re Fain* (1983) 139 Cal. App. 3d 295, 302 (*Fain II*); see Pen. Code, §§341.5, 341.7; Administrative Code, Title. 15, §2450.)" (Citing from *In re Gregory Ulas Powell*, Crim. No. 24441, No. A024627, filed June 27, 1988, at page 8812 of The Daily Journal D.A.R. 8811.) To join the Board's hearing functions with those of other agencies would effectively cut off the Board's long history of judicially recognized discretionary skill.

BOARD MUST MAINTAIN CONTROL

The legislature binding the Board to the same rules as all other state agencies would improperly deprive the Board of authority to carry out the statutory duties assigned it. Moreover, such would inappropriately allow for the control of Board activities, by assigning control to those who have insufficient knowledge of the subject matter and the weighing processes involved. Indeed, the reason that the current APA does not apply to the Board's activities is that the legislature has recognized that the Board has a unique role within government, a role requiring a specialized approach to the paroling process.

CONCLUSION

It is the opinion of the Board that the implementation of a central panel of administrative law judges and the implementation of a consolidated APA would be

Mr. Edwin K. Marzec
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not only inappropriate to the Board, but potentially such that public safety would suffer. With all due respect, we would ask that should the Commission affirmatively recommend the aforementioned changes to the Legislature, that the Commission also recommend that the Board be exempt.

Thank you for your attention to our concerns. Should additional information be necessary, please do not hesitate to contact either of the following: Mr. Robert L. Patterson, Executive Officer, or Mr. William V. Cashdollar, Chief Counsel, at (916) 445-4071.

Sincerely,



RON E. KOENIG
Chairman

#N-100

ns105
8/21/88

Tentative Recommendation
relating to
ADMINISTRATIVE ADJUDICATION

*att.
White*

INTRODUCTION

History of Project

The Legislature in 1987 authorized the California Law Revision Commission to make a study of whether there should be changes to administrative law.¹ The Commission has divided the study into four phases, in the following order of priority: (1) administrative adjudication, (2) judicial review, (3) rulemaking, (4) non-judicial oversight.

This is the first in a series of reports on the administrative law study. It presents the Commission's recommendations concerning administrative adjudication. Professor Michael Asimow of UCLA Law School served as the Commission's consultant on this phase of the study. The Commission also made extensive use of materials from other jurisdictions, including the Model State Administrative Procedure Act (1981) promulgated by the National Conference of Commissioners on Uniform State Laws,² and the federal Administrative Procedure Act.³

1. 1987 Cal. Stat. res. ch. 47; see *Annual Report*, 19 Cal. L. Revision Comm'n Reports 501, 517 (1988).

2. Referred to in this report as the "1981 Model State APA".

3. 5 U.S.C. §§ 551-59, 701-06, 1305, 3105, 3344, 5362, 7521 (1976), originally enacted as Act of June 11, 1946, ch. 324, 60 Stat. 237. The federal statute is referred to in this report as the "federal APA".

Existing California Law Governing Administrative Adjudication⁴

California's Administrative Procedure Act⁵ was enacted in 1945⁶ in response to a study and recommendations by the Judicial Council.⁷ The Judicial Council studied only occupational licensing agencies and the statute originally covered only the adjudications conducted by those agencies.⁸ The decision to limit coverage to licensing agencies was not based on a principled decision that an administrative procedure act was inappropriate for other agencies of government; rather, the Judicial Council thought that improvements in the procedures of other agencies were needed, but it was not prepared to make recommendations with respect to them.⁹

The Judicial Council's report and the resulting legislation was a pioneering effort. The creation of a central panel of hearing officers, for example, was an idea that was far ahead of its time. There were no comparable administrative procedure acts at that time and the idea of an administrative procedure code applicable to agencies in

4. The description of existing California law governing administrative adjudication is drawn from the report on the matter prepared for the Commission by its consultant. See Asimow, *Administrative Adjudication: Structural Issues* 4-7 (October 1989).

5. The Administrative Procedure Act appears at Government Code Sections 11340-11528. Adjudication is governed by Sections 11500-11528. Provisions relating to the Office of Administrative Hearings are at Sections 11370-11370.5.

6. 1945 Cal. Stats. ch. 867. Provisions on rulemaking were added in 1947 and substantially revised in 1979. 1947 Cal. Stats. ch. 1425; 1979 Cal. Stats. ch. 567. The adjudication provisions have had only minor revisions since 1945.

7. Judicial Council of California, Tenth Biennial Report (Dec. 31, 1944). See Clarkson, *The History of the California Administrative Procedure Act*, 15 *Hast. L. J.* 237 (1964).

8. The Judicial Council recommended a scheme of judicial review applicable to all administrative adjudications, not just those of licensing agencies. See Judicial Council of California, Tenth Biennial Report 26 (Dec. 31, 1944). This statute was the precursor of present Code of Civil Procedure Section 1094.5.

9. Judicial Council of California, Tenth Biennial Report 10, 28 (Dec. 31, 1944). The Judicial Council expressed hope that its work would be adapted to nonlicensing agencies such as tax, workers' compensation, public utilities, and benefit adjudications. These agencies were not covered because of practical limitations on the resources of the

general was untried and controversial. The Judicial Council and the Legislature moved cautiously, but the Administrative Procedure Act was well conceived and has served well in the 45 years since it was enacted.

During that time, the provisions of the Administrative Procedure Act relating to adjudication and judicial review have been little changed.¹⁰ Yet the regulatory and social welfare responsibilities of state government have broadened in ways unforeseen in 1945 and the scope of administrative adjudication is vastly greater now.

The California Administrative Procedure Act prescribes a single and unvarying mode of formal, trial-type adjudicatory procedure conducted by an independent hearing officer (administrative law judge) assigned by the Office of Administrative Hearings.¹¹ The administrative law judge writes a proposed decision which the agency head can adopt, modify, or reject.¹² There is little or no flexibility in the system to accommodate the many differing types of determinations an agency now may be required to make.

The Administrative Procedure Act covers only specified named agencies, and it covers only those functions required by the agency's

Judicial Council. See Kleps, *California's Approach to the Improvement of Administrative Procedure*, 32 Calif. L. Rev. 416 (1944).

10. The Administrative Procedure Act now covers a few agencies engaged in prosecutory functions that are not concerned with occupational licensing, such as the Fair Employment and Housing Commission and the Fair Political Practices Commission. Also the act has been amended to include provision for interpreters and to ban ex parte contacts with administrative law judges. Gov't Code §§ 11500(g), 11501.5, 11513(d)-(i), 11513.5.

The provisions on rulemaking were completely rewritten in 1979 and cover almost all California agencies.

11. The procedures relating to disputes about granting licenses differ slightly from those relating to revoking or suspending licenses. Government Code § 11504.

12. Gov't Code § 11517(b),(c). Thus the final decision rests with the agency heads who are also responsible for rulemaking and law enforcement. With very few exceptions (the only known exceptions are the Alcoholic Beverage Control Appeals Board and the Fair Employment and Housing Commission), adjudication is not separated from other regulatory functions in agencies governed by the Administrative Procedure Act.

organic statute.¹³ Many important California agencies are wholly uncovered by the adjudicative provisions of the act: the Public Utilities Commission, the Workers Compensation Appeals Board, the Coastal Commission, the State Board of Equalization, the Agricultural Labor Relations Board, the State Personnel Board, and numerous others. Some agencies are partially covered by the act, but major areas of their adjudication remain uncovered.¹⁴

Adjudication in agencies not covered by the Administrative Procedure Act is subject to procedural rules of some sort. In each case, there are statutes, regulations, and unwritten practices that prescribe adjudicatory procedures. The procedures vary greatly from formal adversarial proceedings to informal meetings. The only unifying theme is that adjudication in these agencies is not conducted by an administrative law judge assigned by the Office of Administrative Hearings. Instead, the persons who make the initial decision in these agencies are employed by the agencies themselves.¹⁵

Comprehensive Revision of Administrative Adjudication Statute

The Law Revision Commission recommends enactment of a new California Administrative Procedure Act. The new act builds on the existing Administrative Procedure Act, but takes into account the many developments that have occurred in the 45 years since enactment of California's groundbreaking law. This period has seen an explosive growth of our knowledge and experience in administrative law and

13. Government Code § 11501. However, the Administrative Procedure Act is made specifically applicable to most license denials and licensee reprovls. Bus. & Prof. Code §§ 485, 495. A list of agencies covered by the Administrative Procedure Act, broken down into covered and uncovered functions, is found in California Administrative Hearing Practice 31-95 (Cal. Cont. Ed. Bar Supp. 1988)

14. For example, the Administrative Procedure Act covers only certain adjudicatory functions of the Departments of Insurance and Corporations, Department of Motor Vehicles, and the Horse Racing Board.

15. In some agencies (such as the Coastal Commission), there is no initial decision; the agency head or heads hear the evidence and argument themselves and their initial decision is also the final decision.

procedure, including development of well-articulated statutes in other states and at the federal level, as well as promulgation of several generations of model State Administrative Procedure acts.

Comprehensive revision of the administrative procedure statute will enable California to take full advantage of these major developments in the law. It will enable complete and thorough procedural reform that could not easily be achieved on a piecemeal basis. And it will enable development of a broad and flexible statute that has the potential to be applied to a wider range of agencies and functions than are now governed by the Administrative Procedure Act.

APPLICATION OF STATUTE

Application to All State Agencies

The existing scheme of having different rules of administrative procedure applicable to different agencies, or in some cases having different rules applicable to the same agency depending on the type of proceeding, makes it difficult for the public and for practitioners who must deal with administrative agencies. The situation is aggravated by the fact that although the Administrative Procedure Act is readily accessible, other applicable rules of administrative procedure may not be. It is often the case that the most important elements of an agency's procedural code are not written.¹⁶

16. Asimow, Administrative Adjudication: Structural Issues 16-17 (October 1989):

Nowhere is it written that outsider ex parte contacts with the agency heads are tolerated, but they are tolerated in some agencies. The extent to which agency functions are internally separated remains obscure as does the process whereby agency heads reconsider ALJ decisions. Alternatively, the regulations may provide for procedures that are in fact never used. Nowhere are the rules about discovery stated. The factors that an agency uses to make particular kinds of decisions are seldom reduced to regulations or guidelines or even made available through a system of accessible adjudicatory precedents. Essentially, a great deal of the substantive law and procedure of the non-APA agencies is accessible only through the institutional memory of staff.

The present system confers an advantage on agency staff and specialists who often deal with the agency or are former staff members or agency heads. They are familiar with the unwritten procedures and precedents and traditional ways of resolving issues. They know about the unwritten exceptions and ways of avoiding obstacles. Such a system seriously disfavors inexperienced advocates and the clients they represent, particularly community or public interest organizations that do not have access to the few experts in the procedure of a particular agency.

Uncodified procedures may be arbitrarily or unevenly applied because staff members may adhere to them or make exceptions to them as they feel is proper. In many cases, staff members would like to improve agency procedure, but agency heads resist changes or ignore established procedure. Since no one is certain precisely what is expected or required, it is often difficult to decide what procedure or behavior is appropriate under the circumstances.

When each agency has its own procedural law, the quality of judicial review is also degraded. For example, when a court engages in judicial review of agency action and a procedural issue is drawn into question, the court has recourse only to precedents relating to that agency, if there are any. Even though the same problem is clearly dealt with by the Administrative Procedure Act and there is a well developed scheme of precedents relating to that problem, the court must reinvent an appropriate independent result.

For these reasons the Law Revision Commission recommends expansion of the Administrative Procedure Act to govern the hearing procedures of all state agencies.¹⁷ In order to accomplish this result, it is necessary that the act be sufficiently flexible to accommodate all the variant types of proceedings engaged in by the agencies. The Commission believes that the proposed new California Administrative Procedure Act achieves this objective, as explained below. Of course,

17. This recommendation is limited to state agencies. Extension of the Administrative Procedure Act to local agencies is beyond the scope of the present study.

there are special cases where a limited exception is warranted or a special procedure is necessary. These cases are also noted below, but they constitute the exception rather than the rule.

Definition of "State Agency"

As a rule, state agencies are easily distinguished from local agencies. In a few cases, however, there are hybrid types of agencies, with the result that it is unclear whether their administrative adjudications are to be governed by the new Administrative Procedure Act. The new act deals with these situations so as to effect the broadest possible coverage:

(1) If the agency is created or appointed by joint or concerted action of the state and one or more local agencies, the new act applies.¹⁸

(2) If the public entity is a local agency but existing statutes make the current Administrative Procedure Act applicable to it, the local agency is governed by the new act.¹⁹

(3) *[not yet drafted]*

The new act also authorizes local agencies voluntarily to adopt the provisions of the new act. This may be useful for a local agency that needs administrative adjudication rules but does not have the resources or desire to formulate its own procedural code. Adoption of the new act will ensure the local agency of workable procedures that satisfy due process of law.

Separation of Powers

Separation of powers doctrine requires that the heads of the three branches of state government be autonomous and independent in their internal affairs. *[The scope of these exemptions may depend on the*

18. This provision is drawn from 1981 Model Act § 1-102(1).

19. An example is school districts, which are governed by the existing Administrative Procedure Act under Government Code Section 11501.

rulemaking or adjudicatory functions of the government head. The Commission has not yet reviewed the rulemaking functions.]

The Legislature. The Legislature is constitutionally and statutorily vested with a number of adjudicative functions, such as judging the qualifications and elections of its members and expulsion of members,²⁰ determination of ethics violations of members,²¹ impeachment of state officers and judges,²² and confirmation of gubernatorial appointments.²³ These judgments are politically sensitive in nature, and the procedure for arriving at them is not susceptible to formalization but must be left to the political judgment of the Legislature based on its determination of the propriety of the procedure for each of these decisions.

Exclusion of the Legislature from coverage of the new act would not frustrate the objective of a uniform body of administrative procedural law applicable to all state agencies, since the adjudicative decisions made by the Legislature are not the type that impact the relations between the average citizen and the state bureaucracy.

The Judicial Branch. The judicial branch of state government includes, besides the court system,²⁴ the Judicial Council,²⁵ the Commission on Judicial Appointments,²⁶ the Commission on Judicial

20. Cal. Const. Art. 4, § 5.

21. Gov't Code §§ 8940-55 (Joint Legislative Ethics Committee).

22. Cal. Const. Art. 4, § 18.

23. See, e.g., Cal. Const. Art. 4, § 20 (approval by Senate of gubernatorial Fish and Game Commission appointees; removal by concurrent resolution adopted by each house).

24. The court system in California consists of the Supreme Court, courts of appeal, superior courts, municipal courts, and justice courts. Cal. Const. Art. 6, § 1.

25. Cal. Const. Art. 6, § 6.

26. Cal. Const. Art. 6, § 7.

Performance,²⁷ and the Judicial Criminal Justice Planning Committee.²⁸

With respect to adjudicatory functions of the agencies within the judicial branch:

(1) The Judicial Council does not conduct constitutionally or statutorily required adjudicatory hearings.

(2) The Commission on Judicial Appointments conducts hearings to make judicial appointment confirmation decisions that are vested in the discretion of the commission and are political in nature. The administrative adjudication provisions of the new act would be inappropriately applied to them.

(3) The Commission on Judicial Performance conducts judicial misconduct and involuntary disability retirement hearings by procedures whose formulation is constitutionally vested in the Judicial Council.²⁹

(4) The Judicial Criminal Justice Planning Committee does not conduct constitutionally or statutorily required adjudicatory hearings.

Since the judicial branch agencies either do not conduct constitutionally or statutorily required administrative hearings, or the hearings they do conduct are or should be constitutionally exempt, the new Administrative Procedure Act has been drafted to exempt the entire judicial branch (not just the courts) from its application.

The Governor's Office. Although the Administrative Procedure Act is designed primarily for executive branch agencies, the head of the executive branch--the Governor and the Governor's executive office--must be able to make the kinds of political decisions necessary to run the executive branch effectively, free of administrative procedure act formalities in a way that appears appropriate to the Governor. The Administrative Procedure Act maintains the integrity of

27. Cal. Const. Art. 6, § 7.

28. Penal Code § 13830.

29. Cal. Const. Art. 6, § 18(h) ("The Judicial Council shall make rules implementing this section and providing for confidentiality of proceedings."). The Judicial Council Rules of Court provide procedures at Rules 901-922.

the Governor and Governor's office by exempting it from application of the act.³⁰

University of California

Article 9, Section 9 of the California Constitution makes the University of California independent and free of legislative control.³¹ Although the Commission's fundamental recommendation is that the new Administrative Procedure Act apply to all agencies of the state, it does not appear that the University may be subjected to the new act under this provision.

Basic due process constraints apply to rulemaking and adjudicatory proceedings by the University of California as they do to all other state agencies. The Commission's inquiry reveals that the University has developed well-articulated notice and hearing procedures. Given the constitutional independence of the University, the Commission recommends that the Legislature not mandate that the University of California be subject to the Administrative Procedure Act.

Nonetheless, the procedures provided in the new Administrative Procedure Act are reasonable, flexible, and satisfy basic due process constraints. The Commission believes the procedures provided in the new act are suitable for the University of California's rulemaking and adjudicatory proceedings. The statute should make clear that the

30. There are a few exceptions to this general rule. See, e.g., Bus. & Prof. Code § 106.5 ("The proceedings for removal [of specified board members] shall be conducted in accordance with the provisions of Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code, and the Governor shall have all the powers granted therein.")

31. Subdivision (a) of the section provides in relevant part:

The University of California shall constitute a public trust, to be administered by the existing corporation known as "The Regents of the University of California," with full powers of organization and government, subject only to such legislative control as may be necessary to insure the security of its funds and compliance with the terms of the endowments of the university and such competitive bidding procedures as may be made applicable to the university by statute for the letting of construction contracts, sales of real property, and purchasing of materials, goods, and services.

University may voluntarily adopt the Administrative Procedure Act. Adoption of the act by the University would promote the important objective of a uniform body of law applicable throughout the state. It would also make consistent the University's internal governance with the procedures the University must follow in its external relations with the rest of the state.

CENTRAL PANEL OF ADMINISTRATIVE LAW JUDGES

Background

Under existing California law, many types of adjudicative hearings of many state agencies are conducted by administrative law judges and hearing officers employed by the Office of Administrative Hearings in the Department of General Services.³² However, most of the major state agencies employ their own administrative law judges and hearing officers.³³ The Law Revision Commission estimates that at least 95% of the state's administrative law judges and hearing officers are employed by the adjudicating agencies rather than the Office of Administrative Hearings. And this figure does not take into consideration hearings conducted by agency heads, agency attorneys, and agency lay experts.

The Law Revision Commission has devoted substantial resources to consideration of whether independent administrative law judges, employed by the Office of Administrative Hearings or by a successor central panel, should play a greater role in the California administrative adjudication process. The Commission's conclusion, for the reasons outlined below, is that there should not be a general

32. Gov't Code §§ 11501-2. The Office of Administrative Hearings has identified 95 state and miscellaneous agencies for which it currently conducts some or all adjudicative hearings.

33. Each of the following major adjudicative agencies employs a greater number of administrative law judges or hearing officers than the total number employed by the Office of Administrative Hearings: Board of Prison Terms, Unemployment Insurance Appeals Board, Department of Industrial Relations, Workers Compensation Appeals Board, Public Utilities Commission, Department of Social Services.

removal of state agency hearing personnel and functions to a central panel. Any transfer of an agency's hearing functions to the central panel should be specific to that agency and its functions and should be based on a showing of the need for the particular transfer.

History of Central Panel in California

California was the first, and for many years the only, jurisdiction in the United States to adopt the concept of a central panel of hearing officers who would hear administrative adjudications for a number of different agencies. The California central panel was created in 1945 as a result of recommendations of the Judicial Council for adoption of the Administrative Procedure Act. The Judicial Council recommended creation of a central panel to maintain a staff of qualified hearing officers available to all state agencies.³⁴ The Council pointed out that the central panel would create a corps of qualified hearing officers who would become expert in a number of fields, yet who would not have a potential conflict of interest with the agency for which they conducted hearings and would convey an appearance of fairness in hearings. The Judicial Council also foresaw some organizational efficiency in this arrangement.

Although the Judicial Council considered the possibility that hearing officers be drawn from the central panel for all agency hearings, the report did not recommend this and the legislation that was enacted did not require use of the central panel by the larger administrative agencies. While recognizing that a complete separation of functions would be desirable in the larger agencies, "Any such requirement would have produced such a drastic alteration in the existing structure of some agencies, however, that it was thought unwise."³⁵

The California system is generally considered a success. It has been copied elsewhere and central panels are now in place in Colorado,

34. Judicial Council of California, Tenth Biennial Report 11 (1944).

35. Report at 14.

Florida, Iowa, Massachusetts, Minnesota, Missouri, New Jersey, North Carolina, Tennessee, Washington, and Wisconsin. Proposals for adoption of the central panel system have recently been or are currently being considered in four other states of which the Law Revision Commission is aware--Hawaii, New York, North Dakota, and Oregon. Legislation is also pending in Congress for a central federal panel.

Expansion of California Central Panel

With this favorable experience, a logical conclusion might be that the central panel system should be expanded in California to cover all administrative hearings. The main argument in favor of broader use of the central panel is that central panel administrative law judges are independent of the agency and therefore are able to give hearings that are fair both in appearance and in fact. Other benefits of centralization are felt to be economy, efficiency, and improved working conditions for administrative law judges.

The Law Revision Commission's study of the operation of the central panel system in California and in the other jurisdictions that have adopted it, including review of California's major administrative agencies not presently covered by the central panel, indicates that despite these potential benefits, there are a number of serious objections to expansion of the central panel beyond its present scope in California.³⁶

36. Among the concerns with expansion of the central panel that have been expressed by various state agencies, the following are common:

(1) The agency deals in a specialized area for which special knowledge and expertise is necessary, which could not be maintained in a central panel setting.

(2) The agency has a high volume operation that must deal with cases in a way far different from the typical central panel administrative law judge hearing.

(3) The cases dealt with by the agency take months or even years to complete, so they would not be appropriate for central panel treatment.

(4) The cases dealt with by the agency are time-sensitive, and the agency must be able to control the administrative law judges in order to control processing of the cases.

(5) The agency manages federal funds, which are subject to regulations requiring that the agency itself resolve the issues.

(6) The agency's board is charged with responsibility for deciding issues and the board itself hears the cases; the board does not wish to delegate this responsibility to a hearing officer, and removal of this function to the central panel is inappropriate.

(7) The agency's hearing procedure is constitutionally exempt from

First, there does not appear to be a compelling case for a general removal of hearing officers to the central panel. The concept of fairness and the appearance of fairness is sound in theory, but the Commission's investigation did not reveal any evidence of unfairness or a perception of unfairness in California.

Second, the various agencies are generally satisfied with their present in-house hearing personnel. They have tailored their systems to their particular needs and the hearing personnel appear to be functioning appropriately.

Third, further centralization is unlikely to generate savings for the state and it could increase costs for some agencies. The Department of Finance in 1977 conducted a fiscal study of the concept of statewide centralization of administrative law judges and concluded it was not clear any savings would result.³⁷ There is also no concrete evidence from other central panel states of any significant savings. One reason for this, besides the greater bureaucracy involved in centralization, is the likelihood that centralization would lead to a leveling upward of minimum qualifications and salary ranges among the wide range of lay and professional hearing officers and administrative law judges that presently exists in state government. There would also likely be increased costs for some agencies in which administrative law

legislative control.

(8) The whole purpose of the agency is to be a neutral appeals board; removing the hearing officers to a central panel will serve no useful purpose.

(9) The agency's hearing officers are also part-time legal advisers; removal of the hearing officers will cause increased expense for legal advice.

(10) The agency has used central panel officers occasionally in the past, but the experience was not wholly satisfactory.

(11) The agency conducts informal hearings; it would be inappropriate to formalize the hearings and a waste of money to have a highly-paid administrative law judge conduct the informal hearings.

37. California Department of Finance, Program Evaluation Unit, *Centralized v. Decentralized Services: Administrative Hearings* (November 1977).

judges serve several functions, acting as legal advisors as well as hearing officers; loss of these persons to a central panel would cause the agencies to incur additional expense for legal costs.

Fourth, the agency charged with administering an area of state regulation needs to be able to control the enforcement process. This includes not only the timing of hearings but also the use of a hearing officer familiar with the technicalities of the area and the policies of the agency.

Fifth, each agency, its mission and needs, is unique. The Commission has found that it is not possible to generalize with respect to the central panel issue and the propriety of the central panel for all agencies. Any recommendation for transfer of an agency's functions should be specific, based on a review of the individual agency and its operations.

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DIVISION 3.3. ADMINISTRATIVE PROCEDURE ACT

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§ 610.010. Application of definitions

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§ 640.220. Office of Administrative Hearings

§ 640.230. Administrative law judges

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CHAPTER 2. FORMAL ADJUDICATIVE HEARING

Article 1. General Provisions

§ 642.010. Applicability

ADMINISTRATIVE PROCEDURE ACT

SECTION 1. Division 3.3 (commencing with Section 600) is added to Title 1 of the Government Code, to read:

DIVISION 3.3. ADMINISTRATIVE PROCEDURE ACT

PART 1. GENERAL PROVISIONS

CHAPTER 1. SHORT TITLE AND DEFINITIONS

Article 1. Short Title

§ 600. Short title

600. (a) This division, and Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2, constitute and may be cited as the Administrative Procedure Act.

(b) A reference in any other statute or in a rule of court, executive order, or rule of an administrative agency to the hearing provisions of the Administrative Procedure Act, or to Chapter 4 (commencing with Section 11370) or Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, means this division.

Comment. Section 600 restates a portion of former Section 11370. A reference in another statute or in a rule to the rulemaking provisions of the Administrative Procedure Act continues to refer to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2.

References to the "1981 Model State APA" in Comments to sections in this division mean the Model State Administrative Procedure Act (1981) promulgated by the National Conference of Commissioners on Uniform State Laws, from which a number of the provisions of this division are drawn.

Article 2. Definitions

§ 610.010. Application of definitions

610.010. Unless the provision or context otherwise requires, the definitions in this article govern the construction of this division.

Comment. Section 610.010 restates the introductory portion of former Section 11500.

§ 610.190. Agency

610.190. "Agency" means a board, commission, department, officer, or other administrative unit, including the agency head, and one or more members of the agency head or agency employees or other persons directly or indirectly purporting to act on behalf of or under the authority of the agency head. To the extent it purports to exercise authority subject to any provision of this division, an administrative unit otherwise qualifying as an agency shall be treated as a separate agency even if the unit is located within or subordinate to another agency.

Comment. Section 610.190 supersedes former Section 11500(a). It is drawn from 1981 Model State APA § 1-102(1). The intent of the definition is to subject as many governmental units as possible to the provisions of this division. The definition explicitly includes the agency head and those others who act for an agency, so as to effect the broadest possible coverage. The definition also would include a bureau, committee, council, division, or office.

The last sentence of the section is in part derived from federal APA § 551(1), treating as an agency "each authority of the Government of the United States, whether or not it is within or subject to review by another agency". A similar provision is desirable here to avoid difficulties in ascertaining which is the agency in any situation where an administrative unit is within or subject to the jurisdiction of another such body.

Note. Gov't Code § 11500(a) also provides, "Wherever the word 'agency' alone is used the power to act may be delegated by the agency, and wherever the words 'agency itself' are used the power to act shall not be delegated unless the statutes relating to the particular agency authorize the delegation of the agency's power to hear and decide." This language will be relocated to a substantive provision dealing with authority of an agency to delegate power.

§ 610.370. Local agency

610.370. "Local agency" means a county, city, district, public authority, public agency, or other political subdivision or public corporation in the State of California other than the state.

Comment. Section 610.370 is new. Local agencies are not governed by this division, subject to exceptions. See Section 612.020 (application of division to local agencies). See also Section 610.770 ("state" defined).

§ 610.400. Order

610.400. "Order" means an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one or more specific persons.

Comment. Section 610.400 is drawn from 1981 Model State APA § 1-102(5). The definition of order makes clear that it includes only legal determinations made by an agency that are of particular applicability because they are addressed to named or specified persons. In other words, an order includes every agency action that determines any of the legal rights, duties, privileges, or immunities of a particular identified individual or individuals. This is to be compared to the Section 610.700 definition stating that a rule is an agency statement establishing law or policy of general applicability, that is, applicable to all members of a described class. The primary operative effect of the definition of order is in Part 4 (commencing with Section 640.010), governing adjudicative proceedings.

Consistent with the definition in this section, rate making and licensing determinations of particular applicability, addressed to named or specified parties such as a certain utility company or a certain licensee, are orders subject to the adjudication provisions of this statute. Cf. federal APA § 551(4), defining all rate making as rulemaking. On the other hand, rate making and licensing actions of general applicability, addressed to all members of a described class of providers or licensees, are rules under this statute, subject to its rulemaking provisions.

Note. The Law Revision Commission intends to address issues involving proceedings that are adjudicatory/rulemaking hybrids. Included in this matter are orders that have precedential or stare decisis effect and proceedings that result in both an order and a rule or determination of general application.

§ 610.520. Person

610.520. "Person" includes an individual, partnership, corporation, governmental subdivision or unit thereof, or public or private organization or entity of any character.

Comment. Section 610.520 supplements the definition of "person" in Section 17. It is drawn from 1981 Model State APA § 1-102(8). It would include the trustee of a trust or other fiduciary.

The definition is broader than Section 17 in its application to a governmental subdivision or unit; this would include an agency other than the agency against whom rights under this division are asserted by the person. Inclusion of such agencies and units of government insures, therefore, that other agencies or other governmental bodies can, for example, petition an agency for the adoption of a rule, and will be accorded all the other rights that a person will have under the division.

§ 610.770. State

610.770. "State" means the State of California and includes any agency or instrumentality of the State of California, whether in the executive department or otherwise.

Comment. Section 610.770 supplements Section 18 ("state" defined). This division applies to state agencies other than the Legislature, the courts and judicial branch, and the Governor and Governor's office. See Section 612.010 (application of division to state) and Comment; see also Section 610.190 ("agency" defined). It does not apply to local agencies. See Section 612.020 (application of division to local agencies); see also Section 610.370 ("local agency" defined).

Note. This definition may be refined or elaborated, or the application provisions may be revised, during the course of the study as we learn about the functions of various public entities that may be state/local hybrids.

If not refined or elaborated, it will be deleted in reliance on Section 18 (defining "state").

CHAPTER 2. APPLICATION OF DIVISION

§ 612.010. Application of division to state

612.010. Except as otherwise expressly provided by statute:

(a) This division applies to all agencies of the state.

(b) This division does not apply to the Legislature, the courts or judicial branch, or the Governor or office of the Governor.

(c) This division does not apply to the University of California.

Comment. Section 612.010 supersedes former Section 11501. Whereas former law specified agencies subject to the Administrative Procedure Act, Section 612.010 reverses this statutory scheme and applies this division to all state agencies unless specifically excepted. The intent of this statute is to subject as many state governmental units as possible to the provisions of this division.

Subdivision (a) is drawn from 1981 Model State APA § 1-103(a). Agency functions exempt from this division are *[to be drafted]*.

Subdivision (b) supersedes Section 11342(a). It is drawn from 1981 Model State APA § 1-102(1). Note that exemptions from the division are to be construed narrowly.

Subdivision (b) exempts the entire judicial branch, and is not limited to the courts. Judicial branch agencies include the Judicial Council, the Commission on Judicial Appointments, the Commission on Judicial Performance, and the Judicial Criminal Justice Planning Committee.

Subdivision (b) exempts the Governor's office, and is not limited to the Governor. For an express statutory exception to the Governor's exemption from this division, see Bus. & Prof. Code § 106.5 ("The proceedings for removal [by the Governor of a board member in the Department of Consumer Affairs] shall be conducted in accordance with the provisions of Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code, and the Governor shall have all the powers granted therein.")

Subdivision (c) recognizes that the University of California enjoys a constitutional exemption. See Cal. Const. Art. 9, § 9 (University of California a public trust with full powers of government, free of legislative control, and independent in administration of its affairs). Nothing in this section precludes the University of California or any other exempt agency of the state from electing to be governed by this division. See Section 615.030.

Note. *The exemptions for the judicial branch and the Governor's office have not yet been reviewed to determine whether they are appropriately extended beyond the courts and the Governor for purposes of administrative rulemaking.*

§ 612.020. Application of division to local agencies

612.020. (a) This division does not apply to a local agency except to the extent this division is made applicable by statute.

(b) This division applies to an agency created or appointed by joint or concerted action of the state and one or more local agencies.

Comment. Section 612.020 is drawn from 1981 Model State APA § 1-102(1). See also Section 610.370 ("local agency" defined). Local agencies are excluded because of the very different circumstances of local government units when compared to state agencies. The section explicitly includes joint state and local bodies, so as to effect the broadest possible coverage.

This division is made applicable by statute to local agencies in a number of instances, including:

Suspension or dismissal of permanent employee by school district. Ed. Code § 44944.

Nonreemployment of probationary employee by school district. Ed. Code § 44948.5.

Evaluation, dismissal, and imposition of penalties on certificated personnel by community college district. Ed. Code § 87679.

Note. This draft does not include a general provision that school districts are covered. Cf. Gov't Code § 11501. School districts are only covered with respect to functions expressly made applicable by statute. *Henry George School of Social Science v. San Diego Unified School District*, 183 Cal. App. 2d 82, 6 Cal. Rptr. 661 (1960); cf. *Bertch v. Social Welfare Dept.*, 45 Cal. 2d 524, 289 P. 2d 485 (1955). These functions are mentioned in the Comment.

§ 612.030. Application of division notwithstanding exemption

612.030. Notwithstanding a general exemption of an agency or an agency's functions from application of this division, a specific agency action is subject to this division to the extent the action is governed by another statute to which this division is applicable.

Comment. Section 612.030 is new. Even though some agencies and agency functions may be declared exempt from application of the Administrative Procedure Act, the exemption is not unqualified. If a general statute governs an agency action and the Administrative Procedure Act is applicable under the statute, the agency's action is subject to the Administrative Procedure Act notwithstanding the apparent exemption of the agency or its functions. Thus, such agency actions as [list to be compiled, e.g., discharge of employees] are subject to the Administrative Procedure Act notwithstanding a general exemption of the agency or its functions from the act.

§ 612.040. Election to apply division

612.040. Notwithstanding any other provision of this chapter, an agency may, by rule, ordinance, or other appropriate action, adopt this division or any of its provisions for the formulation and adoption of a

rule or for the formulation and issuance of an order, even though the agency, rule, or order is exempt from application of this division.

Comment. Section 612.040 is new. An agency may elect to apply this division even though the agency would otherwise be exempt (Sections 612.010 (application of division to state) and 612.020 (application of division to local agencies)) or the particular action taken by the agency would otherwise be exempt (Section 640.010 (adjudicative proceedings; when required; exceptions)).

PART 4. ADJUDICATIVE PROCEEDINGS

CHAPTER 1. GENERAL PROVISIONS

Article 1. Availability of Adjudicative Proceedings;
Applications; Licenses

§ 640.010. Adjudicative proceedings; when required; exceptions

640.010. (a) An agency shall conduct an adjudicative proceeding as the process for formulating and issuing an order for which a hearing or other proceeding is required by the federal or state constitution or by statute.

(b) This part applies to rulemaking proceedings only to the extent that another statute expressly so requires.

Comment. Subdivision (a) of Section 640.010 states the general principle that an agency shall conduct an appropriate adjudicative proceeding before issuing an order. It thus provides the linkage between the definition of order in Section 610.400 and the various types of adjudicative proceedings described in Part 4. This section does not specify which type of adjudicative proceeding should be conducted at all. If an adjudicative proceeding is required by this section, the proceeding may be either the formal, conference, summary, or emergency adjudicative proceeding, in accordance with other provisions of this part.

This part by its terms applies only to adjudicative proceedings required by the constitution or by statute. However, an agency may by rule require a hearing for a particular decision that is not constitutionally or statutorily required, and may elect to have the hearing governed by this part. See Section 612.040 (election to apply division).

According to subdivision (b), if another statute expressly requires all or some designated portions of Part 4 to govern a category of rulemaking proceedings, the agency must use the adjudicative procedures of Part 4 in rulemaking, but only to the extent expressly required by the other statute. However, if another statute merely requires the rulemaking agency to conduct a hearing, or to base a rule on the record, the proceedings of Part 4 are not applicable; instead, the specific procedures of the other statute are applicable, in conjunction with the rulemaking procedures of Part 3.

Note. Statutory hearings will need to be reviewed to determine whether this part will operate satisfactorily. See, e.g., Pub. Cont. Code § 4107 (Subletting and Subcontracting Fair Practices Act).

The Commission has deferred decision on the issue of applying this part to all state agency actions that affect individual rights. When the draft of this part is complete, the Commission will consider whether it should be so extended.

Article 2. Office of Administrative Hearings

§ 640.210. Definitions

640.210. As used in this article:

(a) "Director" means the executive officer of the Office of Administrative Hearings.

(b) "Office" means the Office of Administrative Hearings.

Comment. Subdivision (a) of Section 640.210 continues former Section 11370.1 without substantive change. Subdivision (b) is new.

§ 640.220. Office of Administrative Hearings

640.220. (a) There is in the Department of General Services the Office of Administrative Hearings which is under the direction and control of an executive officer who shall be known as the director.

(b) The director shall have the same qualifications as an administrative law judge, and shall be appointed by the Governor subject to confirmation of the Senate.

(c) A reference in a statute to the Office of Administrative Procedure means the Office of Administrative Hearings.

Comment. Section 640.220 continues subdivisions (a) and (b) of former Section 11370.2 without substantive change.

Note. We have retained subdivision (c) even though a computer search of the state codes shows only one section still containing an obsolete reference to the Office of Administrative Procedure. See Rev. & Tax. Code § 1636, to be corrected in the conforming revisions. However, there may be references in uncodified statutes that are not in the computer data base that should be converted, so we have carried over this provision.

§ 640.230. Administrative law judges

640.230. (a) The director shall appoint and maintain a staff of full-time, and may appoint pro tempore part-time, administrative law judges sufficient to fill the needs of the various state agencies.

(b) Each administrative law judge shall have been admitted to practice law in this state for at least five years immediately preceding the appointment and shall possess any additional qualifications established by the State Personnel Board for the particular class of position involved.

Comment. Subdivision (a) of Section 640.230 continues the first sentence of former Section 11370.3 and the second sentence of former Section 11502 without substantive change.

Subdivision (b) continues the third sentence of former Section 11502 without substantive change.

§ 640.240. Hearing officers and other personnel

640.240. The director shall appoint hearing officers, shorthand reporters, and such other technical and clerical personnel as may be required to perform the duties of the office.

Comment. Section 640.240 continues the second sentence of former Section 11370.3 without substantive change.

§ 640.250. Assignment of administrative law judges and hearing officers

640.250. (a) The director shall assign an administrative law judge for an adjudicative proceeding required by statute to be conducted by an administrative law judge employed by the office.

(b) On request from an agency, the director may assign an administrative law judge or a hearing officer for an adjudicative proceeding not required by statute to be conducted by an administrative law judge employed by the office.

(c) The director shall assign a hearing reporter as required.

(d) An administrative law judge, hearing officer, or other employee so assigned shall be deemed an employee of the office and not of the agency to which the judge, officer, or other employee is assigned.

(e) When not engaged in conducting an adjudicative proceeding, an administrative law judge or hearing officer may be assigned by the director to perform other duties vested in or required of the office, including those provided for in Section 640.280.

Comment. Subdivision (a) of Section 640.250 supersedes the first part of the third sentence of former Section 11370.3. Adjudicative proceedings required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings include:

[(1) A proceeding required to be conducted under the Administrative Procedure Act. Gov't Code § 11502.]

[(2) A proceeding arising under Chapter 20 (commencing with Section 22450) of Division 8 of the Business and Professions Code on request of a public prosecutor. Bus. & Prof. Code § 22460.5.]

Subdivision (b) continues the second part of the third sentence of former Section 11370.3 without substantive change.

Subdivision (c) continues the third part of the third sentence of former Section 11370.3 without substantive change.

Subdivision (d) continues the fifth sentence of former Section 11370.3 without substantive change.

Subdivision (e) continues the sixth sentence of former Section 11370.3 without substantive change.

Note. *The 1981 Model State APA precludes the agency from influencing the decision on assignment of a particular ALJ--"an agency may neither select nor reject any individual administrative law judge for any proceeding except in accordance with this Act." The Act provides a procedure for disqualification of an ALJ for bias, prejudice, interest, "or any other cause provided in this Act or for which a judge is or may be disqualified".*

§ 640.260. Voluntary temporary assignment of hearing personnel

640.260. (a) If the office cannot furnish one of its administrative law judges in response to an agency request, the director may designate in writing a full-time employee of an agency other than the requesting agency to serve as administrative law judge for the proceeding, but only with the consent of the employee and the employing agency. The designee must possess the same qualifications required of administrative law judges employed by the office.

(b) The office may adopt, and the director may implement, rules to establish procedures for designations under this section.

Comment. Section 640.260 is new. It is drawn from 1981 Model State Act § 4-301(c).

Note. The Commission decided not to pursue further the concept of a voluntary temporary transfer list for ALJs to help combat ALJ burnout, but felt that an appropriate agency could be authorized to implement such a system if there is interest among the agencies and ALJs to do this.

It makes sense to authorize OAH to supervise such a system, and there is a similar structure established for it in the 1981 Model State APA, which we have adapted here for our purposes. The OAH would be able to recover its costs of running such a system pursuant to Section 640.270 (cost of operation).

§ 640.270. Cost of operation

640.270. The total cost to the state of maintaining and operating the office shall be determined, and collected by the Department of General Services in advance or upon such other basis as it may determine, from the state or other public agencies for which services are provided by the office.

Comment. Section 640.270 continues former Section 11370.4 without substantive change.

§ 640.280. Study of administrative law and procedure

640.280. (a) The office is authorized and directed to:

(1) Study the subject of administrative law and procedure in all its aspects.

(2) Submit its suggestions to the various agencies in the interests of fairness, uniformity, and the expedition of business.

(3) Report its recommendations to the Governor and Legislature at the commencement of each general session.

(b) All agencies of the state shall give the office ready access to their records and full information and reasonable assistance in any matter of research requiring recourse to them or to data within their knowledge or control.

Comment. Section 640.280 continues former Section 11370.5 without substantive change. See also Section 610.190 ("agency" defined).

CHAPTER 2. FORMAL ADJUDICATIVE HEARING

Article 1. General Provisions

§ 642.010. Applicability

642.010. (a) Except as otherwise provided by statute, an adjudicative proceeding is governed by this chapter.

(b) This chapter does not govern an adjudicative proceeding if any of the following is applicable:

(1) A rule that adopts the procedures for the conference adjudicative hearing or summary adjudicative proceeding in accordance with the standards provided in this part for those proceedings.

(2) Section [4-501 (emergency adjudicative proceedings)].

(3) Section [2-103 (declaratory proceedings)].

Comment. Section 642.010 is drawn from 1981 Model State APA § 4-201. It declares the formal hearing to be required in all adjudicative proceedings except where otherwise provided by statute, agency rule pursuant to this part, the emergency provisions of this part, or Section [2-103] on declaratory proceedings. The formal hearing is analogous to the "adjudicatory hearing" under the former Administrative Procedure Act. Former Section 11500(f). The other procedures are new.

Note. This section is included merely to help show the intended structure of the new Administrative Procedure Act as it is assembled. The Commission has not yet considered, accepted or rejected, or modified any of the procedures referred to in this section.

The 1981 Model State APA establishes three procedural models for adjudication. The first, called "formal adjudicative hearing", is analogous to the standard procedures under the current California Administrative Procedure Act. The other two models are new. They are

called "conference adjudicative hearing" and "summary adjudicative proceedings". In addition, emergency adjudication is authorized when necessary.

The notion of establishing more than one model adjudicative procedure is found in some of the more recent state acts, including Delaware, Florida, Montana, and Virginia; see Comment to Section [4-102]. Bills have been introduced in Congress to amend the Federal APA by creating more than one type of adjudicative procedure. See also 31 Ad. L. Rev. 31, 47 (1979).

A justification for providing a variety of procedures is that, without them, many agencies will either attempt to obtain enactment of statutes to establish procedures specifically designed for such agencies, or proceed "informally" in a manner not spelled out by any statute. As a consequence, wide variations in procedure will occur from one agency to another, and even within a single agency from one program to another, producing complexity for citizens, agency personnel and reviewing courts, as well as for lawyers. These results have already happened, to a considerable extent, at both the state and federal levels.

The number of available procedures in the administrative procedure act should not, however, be so large as to make the act too complicated or to create uncertainty as to which type of procedure is applicable. The 1981 Model State APA establishes three basic types of adjudicative procedure, as a proposed middle ground between a formal hearing only and other theoretical alternatives that could establish large numbers of models.

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CONFORMING REVISIONS AND REPEALS
[Government Code]

Gov't Code §§ 11370-11370.5 (repealed), Office of Administrative Hearings

CHAPTER 4. OFFICE OF ADMINISTRATIVE HEARINGS

§ 11370. Administrative Procedure Act

11370. Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370), and Chapter 5 (commencing with Section 11500) constitute, and may be cited as, the Administrative Procedure Act.

Comment. Former Section 11370 is restated in Section 600 (short title).

§ 11370.1. "Director"

11370.1. As used in the Administrative Procedure Act "director" means the executive officer of the Office of Administrative Hearings.

Comment. Former Section 11370.1 is continued in subdivision (a) of Section 640.210 ("director" defined) without substantive change.

§ 11370.2. Office of Administrative Hearings

11370.2. (a) There is in the Department of General Services the Office of Administrative Hearings which is under the direction and control of an executive officer who shall be known as the director.

(b) The director shall have the same qualifications as administrative law judges, and shall be appointed by the Governor subject to confirmation of the Senate.

(c) Any and all references in any law to the Office of Administrative Procedure shall be deemed to be the Office of Administrative Hearings.

Comment. Former Section 11370.2 is continued in Section 640.220 (Office of Administrative Hearings) without substantive change.

§ 11370.3. Personnel

11370.3. The director shall appoint and maintain a staff of full-time, and may appoint pro tempore part-time, administrative law judges qualified under Section 11502 which is sufficient to fill the needs of the various state agencies. The director shall also appoint hearing officers, shorthand reporters, and such other technical and clerical personnel as may be required to perform the duties of the office. The director shall assign an administrative law judge for any proceeding arising under Chapter 5 (commencing with Section 11500) and, upon request from any agency, may assign an administrative law judge or a hearing officer to conduct other administrative proceedings not arising under that chapter and shall assign hearing reporters as required. The director shall assign an administrative law judge for any proceeding arising pursuant to Chapter 20 (commencing with Section 22450) of Division 8 of the Business and Professions Code upon the request of a public prosecutor. Any administrative law judge, hearing officer, or other employee so assigned shall be deemed an employee of the office and not of the agency to which he or she is assigned. When not engaged in hearing cases, administrative law judges and hearing officers may be assigned by the director to perform other duties vested in or required of the office, including those provided for in Section 11370.5.

Comment. The first sentence of former Section 11370.3 is continued in subdivision (a) of Section 640.230 (administrative law judges) without substantive change. The second sentence is continued in Section 640.240 (hearing officers and other personnel) without substantive change.

The first part of the third sentence is superseded by subdivision (a) of Section 640.250 (assignment of administrative law judges and hearing officers). The second part is continued in subdivision (b) of Section 640.250 without substantive change. The third part is continued in subdivision (c) of Section 640.250 without substantive change.

The fourth sentence is omitted as unnecessary. See Section 640.250(a) (assignment of administrative law judges) and Bus. & Prof. Code § 22460.5.

The fifth sentence is continued in subdivision (d) of Section 640.250 (assignment of administrative law judges and hearing officers) without substantive change.

Subdivision (e) continues the sixth sentence of former Section 11370.3 (assignment of administrative law judges and hearing officers) without substantive change.

§ 11370.4. Costs

11370.4. The total cost to the state of maintaining and operating the Office of Administrative Hearings shall be determined by, and collected by the Department of General Services in advance or upon such other basis as it may determine from the state or other public agencies for which services are provided by the office.

Comment. Former Section 11370.4 is continued in Section 640.270 without substantive change.

§ 11370.5. Administrative law and procedure

11370.5. The office is authorized and directed to study the subject of administrative law and procedure in all its aspects; to submit its suggestions to the various agencies in the interests of fairness, uniformity and the expedition of business; and to report its recommendations to the Governor and Legislature at the commencement of each general session. All departments, agencies, officers and employees of the State shall give the office ready access to their records and full information and reasonable assistance in any matter of research requiring recourse to them or to data within their knowledge of control.

Comment. Former Section 11370.5 is continued in Sections 610.190 ("agency" defined) and 640.280 (study of administrative law and procedure) without substantive change.

Gov't Code §§ 11500-11528 (repealed). Administrative adjudication

CHAPTER 5. ADMINISTRATIVE ADJUDICATION

§ 11500. Definitions

11500. In this chapter unless the context or subject matter otherwise requires:

(a) "Agency" includes the state boards, commissions, and officers enumerated in Section 11501 and those to which this chapter is made applicable by law, except that wherever the word "agency" alone is used the power to act may be delegated by the agency, and wherever the words

"agency itself" are used the power to act shall not be delegated unless the statutes relating to the particular agency authorize the delegation of the agency's power to hear and decide.

Comment. The introductory portion of former Section 11500 is restated in Section 610.010 (application of definitions).

Subdivision (a) is superseded by Section 612.010 (application of division to state).

§ 11501. Application of chapter

11501. (a) This chapter applies to any agency as determined by the statutes relating to that agency.

(b) The enumerated agencies referred to in Section 11500 are:

Accountancy, State Board of
Air Resources, State Board of
Alcohol and Drug Programs, State Department of
Alcoholic Beverage Control, Department of
Architectural Examiners, California State Board of
Attorney General
Auctioneer Commission, Board of Governors of
Automotive Repair, Bureau of
Barber Examiners, State Board of
Behavioral Science Examiners, Board of
Boating and Waterways, Department of
Cancer Advisory Council
Cemetery Board
Chiropractic Examiners, Board of
Collection and Investigative Services, Bureau of
Community Colleges, Board of Governors of the California
Conservation, Department of
Consumer Affairs, Director of
Contractors, Registrar of
Corporations, Commissioner of
Cosmetology, State Board of
Dental Examiners of California, Board of
Education, State Department of
Electronic and Appliance Repair, Bureau of
Engineers and Land Surveyors, State Board of Registration for
Professional
Fair Employment and Housing Commission
Fair Political Practices Commission
Fire Marshal, State
Food and Agriculture, Director of
Forestry and Fire Protection, Department of
Funeral Directors and Embalmers, State Board of

Geologists and Geophysicists, State Board of Registration for
Guide Dogs for the Blind, State Board of
Health Services, State Department of
Highway Patrol, Department of the California
Home Furnishings and Thermal Insulation, Bureau of
Horse Racing Board, California
Housing and Community Development, Department of
Insurance Commissioner
Labor Commissioner
Landscape Architects, State Board of
Medical Board of California, Medical Quality Review Committees and
Examining Committees
Motor Vehicles, Department of
Nursing, Board of Registered
Nursing Home Administrators, Board of Examiners of
Optometry, State Board of
Osteopathic Examiners of the State of California, Board of
Personnel Services, Bureau of
Pharmacy, California State Board of
Public Employees' Retirement System, Board of Administration of the
Real Estate, Department of
San Francisco, San Pablo and Suisun, Board of Pilot Commissioners for
the Bays of
Savings and Loan Commissioner
School Districts
Secretary of State, Office of
Shorthand Reporters Board, Certified
Social Services, State Department of
Statewide Health Planning and Development, Office of
Structural Pest Control Board
Tax Preparer Program, Administrator
Teacher Credentialing, Commission on
Teachers' Retirement System, State
Transportation, Department of, acting pursuant to the State Aeronautics
Act
Veterinary Medicine, Board of Examiners in
Vocational Nurse and Psychiatric Technician Examiners of the State of
California, Board of

Comment. Former Section 11501 is superseded by Sections 612.010 (application of division to state) and 612.020 (application of division to local agencies).

§ 11502. Administrative law judges

11502. All hearings of state agencies required to be conducted under this chapter shall be conducted by administrative law judges on the staff of the Office of Administrative Hearings. The Director of

the Office of Administrative Hearings has power to appoint a staff of administrative law judges for the office as provided in Section 11370.3 of the Government Code. Each administrative law judge shall have been admitted to practice law in this state for at least five years immediately preceding his or her appointment and shall possess any additional qualifications established by the State Personnel Board for the particular class of position involved.

Comment. The first sentence of former Section 11502 is ... The second sentence is continued in subdivision (a) of Section 640.230 (administrative law judges) without substantive change. The third sentence is continued in subdivision (b) of Section 640.230 without substantive change.

§ 11502.1. Health planning unit

11502.1. There is hereby established in the Office of Administrative Hearings a unit of administrative law judges who shall preside over hearings conducted pursuant to Part 1.5 (commencing with Section 437) of Division 1 of the Health and Safety Code. In addition to meeting the qualifications of administrative law judges as prescribed in Section 11502, the administrative law judges in this unit shall have a demonstrated knowledge of health planning and certificate-of-need matters. As many administrative law judges as are necessary to handle the caseload shall be permanently assigned to this unit. In the event there are no pending certificate of need of health planning matters, administrative law judges in this unit may be assigned to other matters pending before the Office of Administrative Hearings. Health planning matters shall be given priority on the calendar of administrative law judges assigned to this unit.

Comment. Section 11502.1 is not continued. The requirement that health facilities and specialty clinics apply for and obtain certificates of need or certificates of exemption is indefinitely suspended. Health & Saf. Code § 439.7 (1984 Cal. Stats. ch. 1745, § 14).

CONFORMING REVISIONS AND REPEALS
[Other Codes]

Bus. & Prof. Code § 106.5 (amended). Removal of board member by Governor

106.5. (a) Notwithstanding any other provision of law, the Governor may remove from office a member of a board or other licensing entity in the department if it is shown that such ~~the~~ member has knowledge of the specific questions to be asked on the licensing entity's next examination and directly or indirectly discloses any such ~~question~~ ~~or~~ of the questions in advance of or during the examination to any applicant for that examination.

(b) The proceedings for removal shall be conducted in accordance with the provisions of ~~Chapter 5 of Part 1 of Division 3 of Title 2 Part 4 (commencing with Section 640.010) of Division 3.3 of Title 1 of the Government Code, and the Governor shall have all the powers granted therein.~~

Comment. Section 106.5 is amended to correct the reference to the administrative adjudication part of the Administrative Procedure Act. The other changes in the section are technical.

Bus. & Prof. Code § 22460.5 (amended). Registration of professional copiers

22460.5. ...

(c) If the public prosecutor determines from the investigation that cause may exist for the suspension or revocation of the certificate of registration, ~~he or she~~ the public prosecutor shall set the matter for hearing and give notice to the registrant. That hearing shall be conducted in accordance with ~~Chapter 5 of Part 1 of Division 3 of Title 2 Part 4 (commencing with Section 640.010) of Division 3.3 of Title 1 of the Government Code, and, for the purposes of those provisions, the public prosecutor shall be deemed to be the agency, but shall be charged as provided by Section 11527 of the Government Code.~~

Comment. Section 22460.5 is amended to correct the reference to the administrative adjudication part of the Administrative Procedure Act. An adjudicative proceeding under this section is conducted by an administrative law judge employed by the Office of Administrative Hearings. See Gov't Code § 640.250(a) and Comment.

The other changes in the section are technical.

Note. Other conforming revisions will need to be made in this subdivision.

Rev. & Tax. Code § 1636 (amended). Hearing officers

1636. The county board of supervisors may appoint one or more assessment hearing officers or contract with the Office of Administrative Procedure ~~Proceedure~~ Hearings for the services of a hearing officer pursuant to Chapter 14 (commencing with Section 27720) of Part 3 of Division 2 of Title 3 of the Government Code to conduct hearings on any assessment protests filed under Article 1 (commencing with Section 1601) of this chapter and to make recommendations to the county board of equalization or assessment appeals board concerning such protests. Only persons meeting the qualifications prescribed by Section 1624 may be appointed as an assessment hearing officer.

Comment. Section 1636 is amended to correct a reference to the Office of Administrative Hearings. See Gov't Code § 640.220(c) (Office of Administrative Hearings).