

Memorandum 90-102

Subject: Study N-102 - Application of Administrative Procedure Act
(Application to the Courts)

BACKGROUND

The Commission has made an initial decision that the adjudicative hearing provisions of the new Administrative Procedure Act should not apply to the courts. The Commission asked the staff to further investigate the scope of this exemption, reviewing distinctions between the courts themselves and state agencies that have functions within the judicial branch of state government.

JUDICIAL BRANCH

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.

The judicial branch includes the Judicial Council (Cal. Const. Art. 6, § 6), the Commission on Judicial Appointments (Cal. Const. Art. 6, § 7), and the Commission on Judicial Performance (Cal. Const. Art. 6, § 7). There is also a Judicial Criminal Justice Planning Committee in the judicial branch. Penal Code § 13830.

JUDICIAL COUNCIL

The Judicial Council is composed of members of the judiciary, the State Bar, and the Legislature. Cal. Const. Art. 6, § 6. The judiciary contingent consists of the Chief Justice and one other Supreme Court justice, three court of appeal judges, five superior court judges, three municipal court judges, and two justice court judges, all appointed by the Chief Justice. The State Bar contingent is four members appointed by the Board of Governors. And the

legislative contingent is one Senator and one Assembly Member, appointed by the Legislature.

The primary constitutional function of the Judicial Council is to improve the administration of justice through surveying judicial business and making recommendations to the courts, the Governor, and the Legislature, and by adopting rules for court administration, practice, and procedure. Other functions are prescribed by statute.

The staff is not aware of any constitutionally or statutorily required hearings conducted by the Judicial Council.

COMMISSION ON JUDICIAL APPOINTMENTS

The Commission on Judicial Appointments consists of the Chief Justice, the Attorney General, and the presiding justice of the court of appeal of the affected district or, in the case of a Supreme Court appointment, the longest-presiding justice of any court of appeal. Cal. Const. Art. 6, § 7. The commission confirms nominations or appointments by the Governor to the Supreme Court and courts of appeal. Cal. Const. Art. 6, § 16; Gov't Code § 68121.

Neither constitution nor statute addresses the matter of the conduct of proceedings by the Commission on Judicial Appointments. The staff's feeling is that confirmation of a gubernatorial appellate court appointment is a political decision, vested in the discretion of the commission, and the commission should be free to fashion its own procedures for arriving at a decision. The staff recommends against application of the Administrative Procedure Act to decisions of the Commission on Judicial Appointments.

COMMISSION ON JUDICIAL PERFORMANCE

The Commission on Judicial Performance consists of (1) two Court of Appeal judges, two superior court judges, and one municipal court judge, all appointed by the Supreme Court; (2) two lawyers appointed by the State Bar; and (3) two public members appointed by the Governor. Cal. Const. Art. 6, § 8. The commission has previously written to us opposing the concept of having its hearings conducted by central panel administrative law judges. See Memorandum 90-72.

The commission conducts administrative hearings on two types of matters--(1) judicial misconduct and involuntary disability retirement, and (2) voluntary disability retirement.

The first function is authorized by the state constitution, which also states that "The Judicial Council shall make rules implementing this section and providing for confidentiality of proceedings." Cal. Const. Art. VI, § 18(h). The Judicial Council Rules of Court provide procedures at Rules 901-922. These rules are supplemented by a few statutes that deal with such matters as witness fees, oaths, subpoenas, etc. Gov't Code § 68750-68755. The Commission on Judicial Performance believes that this matter is constitutionally beyond legislative control, and the staff agrees.

The second function of the Commission on Judicial Performance--approval of voluntary disability retirement applications by judges--is statutory. The statute requires no hearing and the commission reports that in the past the commission's procedure has been informal, with the commission itself being the finder of fact. They are in the process now of making the procedure more formal, probably with a judge of a court of record appointed as the hearing officer in a case. The objective of the formalization is to create a procedure parallel to judicial misconduct hearings.

While the commission acknowledges that the legislature could control hearings under this section, it prefers to have as much control over the process as possible. This will enable them to provide procedures for voluntary disability retirement parallel to those for discipline cases. "Having this more uniform approach should facilitate the commission in processing both types of claims."

Because a hearing in this case is required by neither the constitution nor a statute, the voluntary disability retirement function is beyond the scope of our proposed administrative procedure act.

JUDICIAL CRIMINAL JUSTICE PLANNING COMMITTEE

The Judicial Criminal Justice Planning Committee has seven members appointed by the Judicial Council. The Committee is designed to give

judicial branch advice and assistance to the state Office of Criminal Justice Planning and to review application of federal funds in the criminal court system. Penal Code §§ 13830-13834.

The staff has been able to discover no statutorily or constitutionally required adjudicatory proceedings conducted by the Judicial Criminal Justice Planning Committee.

CONCLUSION

There is a clear distinction between the court system and the judicial branch agencies. However, the judicial branch agencies either do not conduct hearings, or the hearings they conduct would not be covered by the administrative procedure act since they are either (1) constitutionally exempt or (2) not required by constitution or statute.

It would be appropriate to exclude the judicial branch agencies from coverage of the new administrative procedure act for purposes of administrative adjudication. However, this does not end the matter, since the administrative procedure act will also cover administrative rulemaking. Until we have examined the area of administrative rulemaking and determined whether application of the administrative procedure act is appropriate or inappropriate, it would be premature to exempt the judicial branch agencies completely.

The staff recommends that the statute exempt the judicial branch agencies for now, with a note that the Commission has not examined the application of administrative rulemaking provisions to the judicial branch agencies. If, on completion of the study of rulemaking, it appears that the judicial branch agencies should be covered for that purpose, we would draw an appropriately narrow provision.

We would thus revise proposed Section 615.010 along the following lines:

§ 615.010. Application of division to state

615.010. 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 and judicial branch, or the Governor.
- (c) This division applies to the University of California.

Comment. Section 615.010 supersedes former Section 11501. Whereas former Section 11501 specified agencies subject to the Administrative Procedure Act, Section 615.010 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). Agencies 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). Express exclusions from the application of this division are the Legislature, the courts and judicial branch, and the Governor. Note that it is only "the Legislature", "~~the courts~~", and "the Governor", that are excluded, and not "the legislative branch", "~~the judicial branch~~", and "office of the Governor", and that exemptions from the division are to be construed narrowly. 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 (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 (c) makes clear that the University of California is governed by this division, notwithstanding Section 9 of Article 9 of the California Constitution.

Note. The Commission is investigating the scope of the exemptions for ~~the courts and the Governor~~, with respect to the functions of different elements of ~~the court system and gubernatorial functions~~. The draft may be made more specific, and may be phrased in terms of functions rather than entities.

The exemption for the judicial branch has not yet been reviewed to determine whether it is appropriately extended beyond the courts for purposes of administrative rulemaking.

Respectfully submitted,

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