

## Memorandum 90-23

Subject: Study N-102 - Application of Administrative Procedure Act  
(Draft of Statute)

At the January 1990 meeting the Commission made the basic policy decision that the new administrative procedure act should cover all state agencies except where a good case is made for an exception or exemption.

Attached to this memorandum is a staff draft of an initial framework for the administrative procedure act. The draft includes the following features:

- (1) Location in the Government Code among general provisions, in a spot where there is room for expansion and adjacent to an existing statute governing costs in civil actions resulting from administrative proceedings.
- (2) Application to all state agencies except the Governor, Courts, Legislature, and University of California.
- (3) Application in all cases where a hearing is required by statute or constitution.
- (4) Authority for state or local agencies voluntarily to apply the statute in proceedings where it would not otherwise be required.

The draft is intended merely as a framework for development of more detailed provisions. For example, application to all state agencies involves a number of major policy determinations that will be resolved as we work through the administrative procedure act and consider its application to various agencies. Thus, the term "state" is defined in very general terms for now. But as we study different agencies, particularly local/state hybrids, we will need to either refine the definition of "state" or the application of the statute to include or exclude the particular agency.

Similarly, we start from the initial premise that a single administrative procedure act applies to all state agencies. But as we develop the details of the act and study its application to various state agencies, we may need to modify the act, or make an exception for a specific agency, or even exempt the agency completely if its

functions are so different from the model that general provisions cannot reasonably be applied to it. This we will only discover when we are farther into the statute than we are now.

One policy question the Commission should address at this point is whether we should seek to apply the statute to the University of California, which is a constitutional agency with constitutional protection from legislative control. The legal question of whether we can constitutionally apply the statute to the University of California is raised in the Note following draft Section 615.010 (application of division to state).

We would like to be able to review and approve or modify the attached draft provisions so we can start the process of building the new administrative procedure act. We plan to go through the draft section by section at the Commission meeting.

Respectfully submitted,

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ns81  
3/20/90

Tentative Recommendation  
relating to  
ADMINISTRATIVE ADJUDICATION

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.<sup>1</sup> 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 (referred to in this report as the "1981 Model Act").

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

Existing California Law Governing Administrative Adjudication<sup>2</sup>

California's Administrative Procedure Act<sup>3</sup> was enacted in 1945<sup>4</sup> in response to a study and recommendations by the Judicial Council.<sup>5</sup> The Judicial Council studied only occupational licensing agencies and the statute originally covered only the adjudications conducted by those agencies.<sup>6</sup> 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.<sup>7</sup>

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2. 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).

3. 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.

4. 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.

5. 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).

6. 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.

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

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 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.<sup>8</sup> 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.<sup>9</sup> The administrative law judge writes a proposed decision which the agency head can adopt, modify, or reject.<sup>10</sup> There is little or no flexibility in the system to accomodate the many differing types of determinations an agency now may be required to make.

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8. 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. 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.

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

10. Gov. 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.

The Administrative Procedure Act covers only specified named agencies, and it covers only those functions required by the agency's organic statute.<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup>

#### 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

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11. 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 1988 Supp.)

12. 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.

13. 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.<sup>14</sup>

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14. 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.<sup>15</sup> 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,

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15. 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.<sup>16</sup>

(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.<sup>17</sup>

(3) *[not yet drafted]*

#### University of California

Article 9, Section 9 of the California Constitution makes the University of California independent and free of legislative

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

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

control.<sup>18</sup> Although the Commission's fundamental recommendation is that the new Administrative Procedure Act apply to all agencies of the state, it is not clear whether the University may be subjected to the new act under this provision.

The procedures provided in the new act are reasonable, flexible, and satisfy basic due process constraints that apply to the University of California as well as to all other state agencies. The Commission therefore recommends *[not yet drafted; depends on whether the Commission recommends extension of the new act to the University, with or without a constitutional amendment, or whether the Commission merely includes precatory language encouraging the University to elect to be governed by the act]*.

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18. 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.

CALIFORNIA 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. CALIFORNIA ADMINISTRATIVE PROCEDURE ACT

PART 1. GENERAL PROVISIONS

CHAPTER 1. SHORT TITLE AND DEFINITIONS

Article 1. Short Title

§ 600. Short title

600. (a) This division may be cited as the California Administrative Procedure Act.

(b) A reference in any other provision of law to the Administrative Procedure Act, or to Chapter 3.5 (commencing with Section 11340) of, Chapter 4 (commencing with Section 11370) of, or Chapter 5 (commencing with Section 11500) of, Part 1 of Division 3, means this division.

Comment. Section 600 restates former Section 11370. References to the "1981 Model Act" 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 Act § 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 Act, Section 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.

§ 610.250. "Agency head"

610.250. "Agency head" means an individual or body of individuals in whom the ultimate legal authority of the agency is vested by any provision of law.

Comment. Section 610.250 is drawn from 1981 Model Act § 1-102(3). The definition of agency head is included to differentiate for some purposes between the agency as an organic entity that includes all of its employees, and those particular individuals in whom the final legal authority over its operations is vested.

§ 610.370. "Local agency"

610.370. "Local agency" means county, city, public district, public authority, 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 615.020 (application of division to local agencies). See also Section 610.310 ("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 Act § 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 Act, Section 551(4), defining all rate making as rule making. 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 rule making provisions. See the Comments on Section 610.700 ("rule" defined).

The definition does not include an executive order issued by the governor this division. See Sections [1-104 and 3-202]. Although the term contains the word "order", such an executive order is in the nature of a rule rather than an order.

§ 610.520. "Person"

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

Comment. Section 610.520 supplements the definition of "person" in Section 17. It is drawn from 1981 Model Act § 1-102(8). It is broader than Section 17 in its application to a governmental subdivision or unit; it includes 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.

#### § 610.610. "Provision of law"

610.610. "Provision of law" means the whole or a part of the federal or state constitution, or of any federal or state (i) statute, (ii) rule of court, (iii) executive order, or (iv) rule of an administrative agency.

Comment. Section 610.610 is drawn from 1981 Model Act § 1-102(9). References are made, in numerous parts of this division, to external sources of authority. In order to express differing meanings, various terms are used to denote the external sources of authority intended—some references are to "statute", others are to "statute or rule", and still others are to "provision of law". As indicated by this section, the term "provision of law" is intended to have a uniform meaning whenever used in this division. Its meaning is not intended to include either the common law decisions of courts in non-statutory settings, or the adjudicative decisional precedents of administrative agencies. It does, however, include controlling case law constructions of the expressly enumerated species of law. "Provision of law", therefore, is not as broad a term as "law"; so, "required by law" is intended in this division to include all species of law, while "provision of law" is more limited.

#### § 610.700. "Rule"

610.700. "Rule" means the whole or a part of an agency statement of general applicability that implements, interprets, or prescribes (i) law or policy, or (ii) the organization, procedure, or practice requirements of an agency. The term includes the amendment, repeal, or suspension of an existing rule.

Comment. Section 610.700 is drawn from 1981 Model Act § 1-102(10). For a discussion of this definition which includes all agency statements of general applicability that implement, interpret, or prescribe law or policy, without regard to the terminology used by the issuing agency to describe them, see Bonfield, "The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process", 60 Iowa L. Rev. 731, 826-832 (1975). [In Section [3-116] this division instead

expressly exempts specified statements from the procedural and publication requirements applicable to rules. The contents of a rule when initially adopted are specified in Section [3-111(a)].]

Consistent with the definition in this section, rate making and licensing determinations of general applicability, that is, addressed to all members of a class by description, are rules subject to the rule-making provisions of this division. Attention should be called to the fact that rules, like statutory provisions, may be of general applicability even though they may be of immediate concern to only a single person or corporation, provided the form is general and others who may qualify in the future will fall within its provisions.

§ 610.730. "Rule making"

610.730. "Rule making" means the process for formulation and adoption of a rule.

Comment. Section 610.730 is drawn from 1981 Model Act § 1-102(11). The definition of "rule making" in this section is a modified form of Federal Act, Section 551(5).

§ 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 is new. This division applies to state agencies other than the legislature, the courts, the governor, and the University of California. See Section 615.010 (application of division to state) and Comment; see also Section 610.190 ("agency" defined). It does not apply to local agencies. See Section 615.020 (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.*

§ 610.800. "Statute"

610.800. "Statute" includes the Constitution of the State of California and the Constitution of the United States.

Comment. Section 610.800 is new.

## CHAPTER 2. APPLICATION OF DIVISION

### § 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, or the governor.

(c) This division does not apply 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 Act § 1-103(a). Agencies exempt from this division are [to be drafted].

Subdivision (b) supersedes Section 11342(a). It is drawn from 1981 Model Act § 1-102(1). Express exclusions from the application of this division are the legislature, the courts, 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 (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. Subdivision (a) states the general rule that all state agencies will be governed by the new act. Many agencies are not now covered by it. We anticipate that all agencies will be studied during the course of this project so that any necessary exceptions and exemptions can be drawn. However, the presumption is against any exceptions or exemptions.

Note. Subdivision (c) accedes to Article 9, Section 9 of the California constitution, which in effect makes the University of California a branch of government co-equal with the legislative, executive, and judicial branches, and free of legislative control.



Professor Asimow argues that the University may be subjected to the Administrative Procedure Act, stating that "it is likely that the University's autonomy does not extend to procedural regulations (such as administrative procedure, health and safety regulation, open meetings, etc.)." The staff does not agree with this analysis--administrative procedure cannot be lumped together with health and safety and open meetings. The health and safety (vaccination) cases and loyalty oath cases are based on whether or not the particular regulation is germane to the operation of the University or whether it is directed to broader social needs. In this case it would be hard to argue that administrative procedure relates to anything other than the operation of the University, over which the University is given absolute control. The same can be said about the open meeting law, which is why a constitutional amendment was necessary to impose the open meeting law on the University. In the staff's opinion, a constitutional amendment would be necessary to impose the Administrative Procedure Act on the University of California.

This does not mean the University is free of all administrative procedure control, since the due process clauses of the state and federal constitutions do apply. However, it does mean some frustration of one of our key objectives in this project--to have a uniform set of rules to govern all state administrative procedure. Presumably, if we do a good job of drafting a flexible and useful administrative procedure act that is constitutionally sound, it will be in the University's interest to elect to be governed by the act.

#### § 615.020. Application of division to local agencies

615.020. (a) This division does not apply to a local agency unless this division is made applicable by a provision of law.

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

(c) Part 4 (commencing with Section 640.010) of this division applies to school districts.

Comment. Section 615.020 is drawn from 1981 Model Act § 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.

Subdivision (c) continues a provision of former Section 11501 that made the state administrative adjudication provisions applicable to school districts.

#### § 615.030. Election to apply division

615.030. Notwithstanding any other provision of this chapter, an agency otherwise exempt from application of this division may by rule elect to apply this division or any of its provisions to itself.

Comment. Section 615.030 is new.

## PART 4. ADJUDICATIVE PROCEEDINGS

CHAPTER 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 a provision of law.

(b) This part applies to rule-making 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.

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

Note. 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. The 1981 Model Act extends it to all orders of state agencies, unless the order is a decision:

(1) to issue or not to issue a complaint, summons, or similar accusation;

(2) to initiate or not to initiate an investigation, prosecution, or other proceeding before the agency, another agency, or a court; or

(3) under Section [4-103], not to conduct an adjudicative proceeding.

The 1981 Model Act's commentary to this provision states that it does not preclude emergency action in circumstances where such action would be the appropriate adjudicative proceeding under Section [4-501]. The provision lists, as exceptions, the situations in which an agency may issue an order without first conducting an adjudicative proceeding. Paragraph (1) enables an agency, on the basis of its investigation and other non-adjudicative processes, to decide whether to issue or not to issue a complaint, etc., without first conducting an adjudicative proceeding. Paragraph (2) enables an agency to decide to initiate or not to initiate an investigation, prosecution, or other proceeding, either before the agency itself or before another agency or a court, without first conducting an adjudicative proceeding. For example, a law enforcement officer may, without first conducting an adjudicative proceeding, issue a "ticket" that will lead to a proceeding before any agency or court. Paragraph (3) enables an agency to decide to dismiss or not to dismiss a matter, in accordance with Section [4-103], without first conducting an adjudicative proceeding.

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).

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 615.010 (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 615.010  
(application of division to state) and 615.020 (application of division  
to local agencies).

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 ~~sueh~~ the member has knowledge of the specific questions to be asked on the licensing entity's next examination and directly or indirectly discloses any ~~sueh 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 California Administrative Procedure Act. The other changes in the section are technical.