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WHAT AGENCIES ARE EXEMPT FROM THE ADMINISTRATIVE PROCEDURE ACT?

Frank C. Newman*

The federal Administrative Procedure Act¹ is riddled with exemptions. They affect sections, subsections, clauses, sub-clauses; and there is extensive literature concerning them.² Exemptions that apply to the APA as a whole, however, are few; and lawyers specially concerned with the health of the administrative process have labored to keep them few.³

This article will argue, illustratively, that the United States Commission on Civil Rights is not exempt from the APA. To the contrary, a recent decision article in Volume 35 of the NOTRE DAME LAWYER states, "The Administrative Procedure Act . . . applies only to agencies which are engaged in rule-making or adjudication; since the Civil Rights Commission does neither, it is not subject to the procedural provisions of the APA."⁴ The authority the writer cites does not support those conclusions,⁵ but his view is mirrored in recent pronouncements of the United States Department of Justice.⁶ This article is a hopeful attempt to forestall some damage that could result from that prestigious sponsorship.

There is a fair argument that the Civil Rights Commission does not adjudicate within the meaning of the APA.⁷ But to say that it does not make rules seems strange when one of the Commission's most important documents

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1 60 Stat. 237-44 (1946), 5 U.S.C. §§ 1001-11 (1958) (hereafter called the APA).

2 See miscellaneous references in 4 DAVIS, ADMINISTRATIVE LAW TREATISE 554-55 (1958); Ginnane, "Rule Making," "Adjudication" and Exemptions Under the Administrative Procedure Act, 95 U. PA. L. REV. 621 (1947); Nathanson, *Some Comments on the Administrative Procedure Act*, 41 ILL. L. REV. 368 (1946). Concerning agencies' effecting exemptions by coerced waiver agreements see Note, 48 CALIF. L. REV. 832, 834 (1960).

3 See HOOVER COMMISSION TASK FORCE REPORT ON LEGAL SERVICES AND PROCEDURE 143 (1955); ABA, ADMIN. LAW BULL. 198 (No. 9, 1956).

4 35 NOTRE DAME LAWYER 440 (1960); accord, 6 How. L. J. 86, 87 (1960) ("the Act does not apply"). [For a more extended treatment of administrative investigatory powers under the APA, see Note, 35 NOTRE DAME LAWYER 77 (1959). Ed.]

5 The reference given is footnote 3 of *Larche v. Hannah*, 177 F. Supp. 816, 819 (W.D. La. 1959). In that footnote, however, the court pronounced only with respect to § 7 of the APA (though its discussion concededly is fuzzy). The writer in the NOTRE DAME LAWYER does not restrict his comments to § 7, and in his footnote 2 cites that section as merely one example of procedural rights granted to witnesses by the APA. Other rights appear in § 6, and this article argues that the Commission must respect those rights even though it is not governed by § 7.

6 See *Hearings on Federal Registrars before the Senate Committee on Rules and Administration*, 86th Cong., 2d Sess. 610, 629-31 (1960) (excerpts from Appellants' Brief and Reply Brief in *Hannah v. Larche*).

7 APA § 2(d) states: "[A]djudication' means agency process for the formulation of an order"; and "'Order' means . . . the final disposition . . . of any agency in any matter other than rule-making but including licensing." A decision to issue a subpoena could be regarded as a "final disposition" in an investigatory matter (*i.e.*, a "matter other than rule-making"), but the point is doubtful.

Less doubtful is the argument that an agency decision to publicize information which defames, degrades, or incriminates a person is "the final disposition . . . of . . . [a] matter other than rule-making." But the Supreme Court, unaided by thoughtful briefs, apparently rejected that argument in *Hannah v. Larche*, 363 U.S. 420 (1960). Cf. Newman, *Due Process Investigations, and Civil Rights*, 10 J. PUBLIC L. 000 (1961); Rourke, *Law Enforcement Through Publicity*, 24 U. CHI. L. REV. 225 (1957).

states (after reciting procedural provisions of the Civil Rights Act of 1957), "In addition to these statutory provisions, the Commission has adopted the following supplementary Rules of Procedure . . . [eleven of them, on three mimeographed sheets]."⁸ Most startling is the suggestion that the Commission, whose primary duty is to "investigate" (with subpoenas when appropriate),⁹ is exempt from section 6(b) of the APA, which governs "investigations," and section 6(c), which governs "subpoenas."

What Is An "Agency"?

How does the Department of Justice justify ignoring Sections 6(b) and (c) and the rule-making requirements of the APA? "[T]he Commission on Civil Rights," said the Solicitor General last year, "is not an 'agency' within the terms of the Administrative Procedure Act. . . ." Why not? Apparently: *first*, because section 2(a) defines "agency" as "each authority";¹¹ *second*, because the Senate Judiciary Committee reported that "'authority' means any officer or board . . . which by law has authority to take final and binding action with or without appeal to some superior administrative authority";¹² and *third*, because Congressman Walter stated that "whoever has the authority to act with respect to the matters later defined is an agency."¹³ Therefore, concluded the Solicitor General, we should exclude the Civil Rights Commission from the APA because "[it], of course, can take no final or binding action with respect to 'the matters later defined,' *i.e.*, rule-making and adjudication. . . . [I]t neither makes rules (other than those relating to its procedures)¹⁴ nor adjudicates."¹⁵

What has been assumed, inexplicably, is that only rule-making and adjudication are "the matters later defined." Even if Congressman Walter by that phrase meant merely the formal definition sections (and not section 6, for example), why was section 2(g) overlooked, which section defines "agency action" as including not just the products of rule-making and adjudication but "the whole or part of every rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act"? What are to be regarded, say, as sanctions? Declares section 2(f):

"'Sanction' includes the whole or part of any agency (1) prohibition, requirement, limitation, or other condition affecting the

⁸ Rules of Procedure for Hearings of the Commission on Civil Rights, July 1, 1958, p. 3.

⁹ Sections 104(a)(1) and 105(f) of the Civil Rights Act, 71 Stat. 634 (1957), 42 U.S.C. §§ 1975c (a)(i) and 1975d (f) (1958).

¹⁰ *Hearings on Federal Registrars*, *supra* note 6, at 631.

¹¹ "'Agency' means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia."

¹² *Hearings on Federal Registrars*, *supra* note 6, at 630.

¹³ *Id.* at 631.

¹⁴ This parenthetical clause ("other than those relating to its procedures") is quixotic. Congress clearly intended that procedural rule-making should be subject to the APA. See §§ 3(a)(2) and 4(d), for instance. Does the Department of Justice now propose to repeal those requirements by parenthetical allusion? *Cf. Hearings on Federal Registrars*, *supra* note 6, at 629 n.4.

¹⁵ *Id.* at 631. The Civil Rights Commission does, of course (within the meaning of the Senate Judiciary Report, text preceding note 12, *supra*), take "final or binding action" with respect to subpoenas. See *Cudahy Packing Co. v. Holland*, 315 U.S. 357, 363 (1942).

freedom of any person; (2) withholding of relief; (3) imposition of any form of penalty or fine; (4) destruction, taking, seizure, or withholding of property; (5) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees; (6) requirement, revocation, or suspension of a license; or (7) taking of other compulsory or restrictive action."

In good conscience can we conclude that a subpoena is not a "taking of . . . compulsory . . . action"? That would surely obfuscate section 6, which by no stretch of the imagination is limited to rule-making and adjudicatory proceedings,¹⁶ and which includes several requirements affecting not only subpoenas, but also any "other investigative act or demand." Given the definitions of "agency action" and "sanction" quoted above, would the Department of Justice argue, too, that agencies like the Civil Rights Commission are exempt even from this comprehensive requirement of section 6(a)?

So far as the orderly conduct of public business permits, any interested person may appear before any agency or its responsible officers or employees for the presentation, adjustment, or determination of any issue, request, or controversy in any proceeding (interlocutory, summary, or otherwise) or in connection with any agency function. Those words "any agency" and "any agency function" are noteworthy. They scarcely denote "any agency that is engaged in adjudication or non-procedural rule-making."

Accordingly, I submit that the Civil Rights Commission is subject to the APA. The reasons stated have been textual, for the statute's words seem clear. If we posit ambiguity, though, are there in the congressional history, the administrative experience, or the relevant judicial opinions any hints whatever that Congress would *not* have wanted this kind of agency to publish its rules in the *Federal Register*, for instance, or to observe the general requirements applicable to subpoenas and other investigative acts, or to recognize the informal right to "appear" guaranteed by section 6(a), just quoted? Obviously not. The Solicitor General's excerpt from Congressman Walter's speech alone tells us that. "[T]here are excluded legislative, judicial, and territorial authorities," said the Congressman. "[T]here is included any other authority regardless of its form or organization. In short, whoever has the authority to act with respect to the matters later defined is an agency."¹⁷

16 See *United States v. Smith*, 87 F. Supp. 293, 294 (D. Conn. 1949): "The adjudicative functions of the Internal Revenue Bureau are specifically exempted from the [Administrative Procedure] Act. It is significant that the [APA] section on ancillary matters is not so exempted." The Solicitor General apparently overlooked the *Smith* case. To support his conclusion that "Section 6 . . . on its face applies only to ancillary functions of those governmental bodies whose functions come within the principal provisions of the Act" (*Hearings on Federal Registrars*, *supra* note 6, at 629 n.4), he cites only *Torras v. Stradley*, 103 F. Supp. 737 (N.D. Ga. 1952), which, if carefully analyzed, will be seen as in accord with the *Smith* case. Cf. *Backer v. Comm'r*, 275 F.2d 141 (5th Cir. 1960). On p. 13 of the Department of Justice Memorandum in Support of Motion for Summary Judgment in *Larche v. Hannah*, 177 F. Supp. 816 (W.D. La. 1959), the *Torras* case is cited for the astonishing proposition that § 6 "does not apply to investigatory proceedings." The argument that § 6 applies only to agencies which are sometimes subject to "the principal provisions of the Act" (§§ 4, 5, 7, and 8?) would cover § 3 as well as § 6; and Congress patently wanted § 3 to apply very broadly.

17 *Hearings on Federal Registrars*, *supra* note 6, at 631. The word "authority" appears to have been intended to exclude "mere 'housekeeping' functions." LEGISLATIVE HISTORY OF THE APA 253 (1946).

When a commission has authority to issue subpoenas, when "action" is defined in the APA to include any "requirement . . . affecting the freedom of any person"¹⁸ and the "taking of other compulsory or restrictive action," and when the Congress has spelled out over-all prescriptions for investigations and subpoenas, to argue that that commission has no "authority to act with respect to the matters later defined" seems perverse.

True Exemptions

Are any agencies, then, exempt from the APA? Yes, because under Section 2(a) "agency" does not include "Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia." Those words presumably cover congressional committees, administrative officials of the courts, and a host of bureaucrats in the District of Columbia, Guam, and elsewhere. There may be doubt as to some borderline groups like the General Accounting Office.¹⁹ But, "the term 'agency' includes the President, cabinet members, and other executive officers. It includes even the military. . . ."²⁰

The only other general exemptions are these; and by section 2(a), they are *not* excluded from section 3, which deals with "public information":²¹

- (1) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;
- (2) courts martial and military commissions;
- (3) military or naval authority exercised in the field in time of war or in occupied territory; or
- (4) functions which by law expired on the termination of World War II hostilities, within any fixed period thereafter, or before July 1, 1947, and the functions conferred by several named statutes.²²

18 "That a person compelled to appear and testify or produce papers is thereby deprived of his liberty and his property is so clear as to need no demonstration." Lilienthal, *The Power of Governmental Agencies to Compel Testimony*, 39 HARV. L. REV. 694, 708 (1926); cf. United States v. Morton Salt Co., 338 U.S. 632, 651 (1950) ("the 'right to be let alone — the most comprehensive of rights and the right most valued by civilized men' . . . extends to the orderly taking under compulsion of process").

19 See *Survey and Study of Administrative Organization, Procedure, and Practice in the Federal Agencies* by the House Committee on Government Operations: *Agency Response to Questionnaire* (Com. Print Dec. 1957) Part 11B, p. 1569. I think it is preposterous to argue that the GAO is "Congress" and that in 1946 — had the question been raised — those congressmen who quarter-backed the APA would have said, for example, "Yes, we are willing to exempt the GAO from the requirement that regulations be published in the *Federal Register*."

Is the Parole Board included among "the courts," or otherwise exempt? I would say not. *But see* *Hiatt v. Compagna*, 178 F.2d 42, 46 (5th Cir. 1949), *aff'd per curiam* by an equally divided Court, 340 U.S. 880 (1950); cf. *Lesser v. Humphrey*, 89 F. Supp. 474 (M.D. Pa. 1950) (Good Time Board); *Kennedy Name Plate Co. v. Comm'r*, 170 F.2d 196 (9th Cir. 1948) (Tax Court).

20 4 DAVIS, ADMINISTRATIVE LAW TREATISE 81 (1958); and see *Parker, The President as the Head of the Executive-Administrative Hierarchy: A Survey*, 8 J. Pub. L. 437 (1959); *Kam Koon Wan v. E.E. Black, Ltd.*, 75 F. Supp. 553, 561 (D. Ha. 1948).

21 Unhappily, and notwithstanding the care of Congress in listing the all-but-Section 3 exemptions, some agencies believe they can hoist themselves into this category by inference. See *House Committee Survey* cited *supra* note 19, Part 11C, p. 1732 (FHA); Part 11D, p. 2015 (Small Business Administration); p. 2049 (Tariff Commission); cf. p. 2035 (U.S. Information Agency); Part 11A, p. 1203 (Export-Import Bank).

22 Among these are the Contract Settlement Act of 1944, Surplus Property Act of 1944, Veterans' Emergency Housing Act of 1946, Housing and Rent Act of 1947, Second Decontrol Act of 1947, Rubber Act of 1948 (subject to § 10 of APA as well as § 3), Export Control

Does It Matter Whether the Civil Rights Commission Is Exempt from the APA?

The Supreme Court ruled in *Hannah v. Larche* that the Civil Rights Commission was not governed by section 7 of the APA.²³ The ruling patently is correct because section 7 applies to determinations "required by statute to be made on the record after opportunity for an agency hearing," and the Commission does not make that kind of determination.

There are other provisions of the APA that do govern the Commission. By full compliance with those provisions the Commission would not hamper its functions and might even enhance its repute. To illustrate: Is there any persuasive reason why its procedural rules and statements of general policy should not be published in the *Federal Register*?²⁴ Should it ignore the requirement that, "so far as the orderly conduct of public business permits, any interested person may appear . . . for the presentation, adjustment, or determination of any issue, request, or controversy . . .?"

Further, by its presumed exemption the commission avoids some difficult interpretive questions that perhaps should be met and resolved. Those arise out of section 6 of the APA and words there that differ from words of similar aim in section 102 of the Civil Rights Act of 1957. Under section 102(c), for example, "witnesses at the hearings may be accompanied by their own counsel for the purpose of advising them concerning their constitutional rights." Did Congress thereby intend to limit this more complete guarantee of APA section 6(a): "Any person compelled to appear in person . . . shall be accorded the right to be accompanied, represented, and advised by counsel . . .?" The question is not an easy one when we take into account the command of APA section 12 that "no subsequent legislation shall be held to supersede or modify the provisions of this Act, except to the extent that such legislation shall do so expressly."²⁵ Similarly, what is the relation between section 102(i) of the Civil Rights Act ("a witness may obtain a transcript copy of his testimony . . . given at an executive session, when authorized by the Commission") and APA section 6(b) ("in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript")? Could the right to inspect the transcript of one's own testimony at an executive session lawfully be denied?

It is hoped that the commission may heed these words and revise its course in the minor ways proposed. It is hoped too that the Department of Justice, much more importantly, will forego its search for niggardly interpretations

Act of 1949, International Wheat Agreement Act of 1949 (subject to § 10 of APA as well as § 3), Defense Production Act of 1950, Renegotiation Act of 1951, Alteration of Bridges Act of 1952, Universal Military Training and Service Act, Federal Coal Mine Safety Act, and an act providing reimbursement for losses resulting from construction of military installations; *cf.* Federal Civil Defense Act of 1950; §§ 108 and 181 of the Atomic Energy Act of 1954; and see generally, HOOVER COMMISSION REPORT, *supra* note 3.

23 363 U.S. 420, 452 (1960); *cf.* note 5 *supra*. The LAWYER writer states, "The APA . . . exempts from its procedural requirements such matters as are subject to a later trial *de novo*." He cites § 5. 35 NOTRE DAME LAWYER 440, 441 (1960). That exemption covers only §§ 5, 7, and 8; and many other procedural requirements of the Act are not affected. *Cf.* Parker v. Lester, 227 F.2d 708, 715 n.12 (9th Cir. 1955).

24 For a sample statement of general policy see *Hannah v. Larche*, 363 U.S. 420, 424 (1960).

25 See *Marcello v. Bonds*, 349 U.S. 302, 310 (1955).