The Influence of the Federal Administrative Procedure Act on California's New Administrative Procedure Act

Michael Asimow
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The Federal Administrative Procedure Act ("APA"),¹ celebrating its fiftieth birthday in this symposium, dominates the field of administrative law. Like the Federal Rules of Civil or Criminal Procedure, the APA prescribes the manner in which countless thousands of federal adjudicatory and rulemaking proceedings are conducted each year. In that sense, the APA has achieved quasi-constitutional status. The Act has been the subject of innumerable judicial decisions and vast quantities of scholarship.

A reformer who sets out to modernize a state’s APA necessarily turns first to what is most familiar: the Federal APA. The pathways of that statute are embedded in every administrative lawyer’s mental map. If a federal provision seems to have worked well, that provision is the logical starting point in drafting a state law. If a provision has generated major problems in application, that lesson should also be taken to heart.

On October 15, 1995, Governor Pete Wilson signed Senate Bill 523 ("S.B. 523"), California’s new Administrative Procedure Act, into law.² This was a happy day for quite a few people, including the author of this article who served as consultant for the California Law Revision Commission ("Commission") in its seven-year effort to propose and enact a new APA.³ The Tulsa

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3. The California Law Revision Commission is an independent state agency charged with recommending reforms of state law. The Commission has considerable credibility with the legislature which was of great assistance in getting the new APA passed. In addition to a small paid staff, the members of the Commission are volunteer lawyers, judges, legislators and legislative staff members. Commission members convene for one-day or two-day meetings several times a year to review studies and recommend legislation on a wide
Law Journal's invitation to contribute an article to this symposium provided a welcome opportunity to reflect on the lengthy law reform process that culminated in enactment of S.B. 523. In particular, the invitation prompted an inquiry about the influence of the Federal APA on California's S.B. 523.

I. CALIFORNIA'S APA AND S.B. 523

California's original APA was a pioneering effort. It was proposed by the California Judicial Council whose report cited the report of the Federal Attorney General's Committee on Administrative Procedure on nearly every page. Enacted in 1945, a year before the Federal APA, California's APA was the first state administrative procedure statute of any consequence. The Act flew in the face of the conclusion of New York's Benjamin Commission that a state APA was inadvisable.

In many respects California's 1945 legislation was far ahead of its time. For example, it created a central panel of independent hearing officers—an idea that is only now spreading throughout the states and has yet to be adopted by the federal government. But as the decades passed, the defects in the 1945 statute became apparent. The most significant shortcoming was that the 1945 APA applied only to occupational licensing agencies and a few others. Per-
haps 95% of the adjudicatory proceedings conducted by state agencies were not covered by the APA at all.

Starting in 1989, the Law Revision Commission began studying administrative law in the hope that it could recommend a new statute to the legislature.1 The project was complex and difficult, far more controversial than the relatively non-political law reforms usually tackled by the Commission. Yet the Commission has no independent political base in the legislature; its recommendations stand little chance of passage unless they command broad bipartisan consensus. In 1994-95, the legislative environment was particularly difficult because of intense partisan squabbling over the speakership of the Assembly.

The Commission split the administrative law project into three parts—adjudication, judicial review, and rulemaking. This was shrewd political strategy because each of the three parts was likely to attract a different set of opponents. Taking each part separately at least minimized the chances that a strong coalition would emerge to kill the entire bill in the legislature or persuade the governor to veto it. In addition, each of the three reforms were quite complex and each presented many points of controversy as well as difficult drafting problems, even for the nonpareil draftspersons employed by the Law Revision Commission. After seven years, the Commission had only finished with adjudication, although the judicial review project was far advanced.12 It made sense to complete one discrete part of the package and take it to the legislature before consuming any more time and without creating even more complexity and confusion.

The Commission's objective was to produce a good bill that would command as close to consensus as possible. Yet there were numerous players before

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The Council's proposed judicial review provisions covered all state and local agencies. See Cal. CIV. PROC. CODE § 1094.5 (West Supp. 1996). Over the years, the APA adjudication sections were expanded to cover a few non-licensing agencies engaged in prosecutorial activity such as the Fair Employment and Housing Commission and the Fair Political Practices Commission. It also covers certain personnel decisions of local school boards and community colleges. For a handy though somewhat outdated list of agency hearing requirements, see CAL. CONTINUING EDUC. OF THE BAR, CALIFORNIA ADMINISTRATIVE HEARING PRACTICE 287-370 (1984).

11. The administrative law study was authorized by the legislature. See Res. ch. 47(24), 1987 Cal. Stat. 5897, 5899. The author prepared four studies on administrative adjudication and three studies on judicial review. These studies are as follows:

2. "Appeals Within the Agency" (1990)


12. Discussion of the judicial review bill is beyond the scope of this article. Among many other provisions, that bill will abolish California's baroque system of judicial review through various forms of the writ of mandamus and will limit or abolish California's idiosyncratic system of judicial independent judgment of agency fact findings. See Asimow, Scope of Review, supra note 11; Studies 5, 6 and 7, supra note 11. The study of rulemaking is on the drawing board but has not yet begun.
the Commission, in the legislature, and in the governor's office. Many agencies
tenaciously represented their perceived interests during the Commission's delib-
erations. The Attorney General, the Office of Administrative Law, private prac-
titioners, Bar associations, administrative law judges, and regulated parties all
had their own axes to grind. Some factions vigorously opposed portions of the
Commission's original proposals. The members of the Commission themselves
approached the issues with sharply differing points of view toward government
regulation and toward the differences between adjudication in court and before
agencies. That nearly all the players could ultimately join together in support of
a single bill was a fairly miraculous event. Possibly, the seven year deliberative
process exhausted everyone.

Because of the need to attract consensus, truly radical changes in adminis-
trative adjudication were never seriously considered. For example, early in the
process, there were calls from Bar groups and ALJs for an external separation
of prosecutorial and adjudicatory functions, especially in licensing cases. These
proposals would have stripped agency heads of their adjudicatory powers,
either by empowering ALJs to make final agency decisions or by creating ap-
pellate tribunals to make the final agency decisions. This sort of change was
never in the cards. Even if it was a good idea, and I had deep reservations
about applying external separation across the board, it would have been polit-
ically impossible. Similarly, calls to expand California's system of independent
ALJs to new domains (remember, California's APA applies now only to occu-
pational licensing agencies and a few other areas) also foundered; the merits of
separating in-house ALJs from their agencies seemed problematic and the
opposition was intense. Nor was any attempt made to prescribe administrative
procedure for the vast and diverse array of local government agencies.

The dire fiscal condition of California government was an ever-present
backdrop for Commission and legislative consideration of S.B. 523. The reces-
sion of the early 1990's hit California hard and triggered a series of harrowing
budget crises. The budgets of state agencies were cut to the bone. Staffs were
sharply pared. Yet these cuts were seldom accompanied by any diminution in
regulatory responsibility. As a result of all this, it was an accepted constraint
that APA reform could not cost very much, if anything.

Therefore, the Commission decided early on not to disturb the basic and
familiar pattern of California administrative adjudication. Most cases would

13. The term "administrative law judges" (and the abbreviation ALJs) is used herein to refer to the
whole panoply of California administrative trial judges and hearing officers. It includes but is not limited to
central panel ALJs.
14. In reality, large portions of administrative adjudication are already subject to an external separation
of functions. Workers' compensation, unemployment compensation, state personnel, attorney discipline, alco-
holic beverage licensing, worker safety, and welfare cases are all adjudicated by tribunals separated from
agencies responsible for law enforcement, prosecution, and advocacy. However, numerous important agencies,
including those responsible for professional licensing, exercise combined functions.
15. See Asimow, Adjudication Fundamentals, supra note 11, at 1152-65.
16. See id. at 1181-91.
17. See CAL. GOV'T CODE §§ 11410.30, 11410.40 (West Supp. 1996) (allowing local agencies to volun-
tarily adopt the Act or any of its provisions.)
continue to be heard by ALJs who would prepare proposed decisions; the final agency decision would remain the responsibility of the agency heads. ALJs who were in-house would remain in-house. The challenge to the Commission was to craft a set of modest procedural protections for private sector litigants consistent with these political and economic constraints while also seeking ways to make agency adjudication less costly, formal and adversarial.

The Commission conducted innumerable public hearings. Always open to input from the public and private sectors and always in search of consensus, the Commission struck countless compromises along the way. By the time S.B. 523 reached the legislature, there was little left to fight about. The ultimate product was less ambitious than the one I envisioned in my studies for the Commission and less ambitious than what I would have preferred, but it was probably the most far reaching legislation that had any chance of passage.

II. THE STRUCTURE OF THE NEW CALIFORNIA APA

The attempt to revamp the adjudication provisions of California’s APA was bedeviled from the start by a difficult structural problem. California administrative adjudication has two tiers. Tier 1, to which the adjudication provisions of the existing APA apply, covers some sixty-three agencies, most of which handle occupational licensing (I refer to these as the “licensing agencies,” although that is not completely accurate). Hearings in licensing cases are conducted by a panel of approximately forty ALJs employed by the Office of Administrative Hearings (“OAH”) and assigned to the various agencies as needed. The law governing Tier 1 works reasonably well; although some tinkering was desirable, the existing Act did not require wholesale revision.

However, the adjudication provisions of the existing APA cover less than 5% of the total number of state-level adjudications. As a result, there is a huge Tier 2 which includes major state adjudicating agencies, such as those deciding workers’ compensation, unemployment compensation, welfare, personnel, labor

18. Only two significant amendments of the Bill occurred during the legislative process. The State Board of Equalization’s successful effort to get out of the bill is described in text at notes 47-50. The second was a classic example of special interest politics. The present APA calls for all adjudicatory proceedings to be transcribed; the consent of both parties is necessary in order to dispense with a stenographic reporter and to tape the proceedings. See Cal. Gov’t Code § 11512(d) (West 1992). The bill that went to the legislature would have allowed a central-panel ALJ discretion to dispense with the reporter in licensing cases. This would have resulted in a clear and obvious cost saving. In the vast majority of cases, the agency heads accept the ALJ’s proposed decision (or accept it and lower the penalty) without calling for a transcript and the case is never judicially reviewed. In those cases, paying a reporter to take down the proceedings is a sheer waste of money. In numerous non-APA cases, taping is already employed without any significant technical problems. See “The Adjudication Process,” supra note 11, at 104-06. But political realities overwhelmed common sense. The shorthand reporters are well organized; their trade association had the Senate Government Operations Committee wired. That committee gave the proponents the choice of deleting the taping provision or deferring consideration of the bill. Hearing on S.B. 523 Before the Senate Gov’t Ops. Comm., 1995-1996 Reg. Sess. (Cal. 1995). That was the end of taped licensing hearings.

relations, and environmental cases. Additionally, numerous minor adjudicating agencies are not covered by the existing Act. Each Tier 2 agency has its own procedural statute and regulations, its own stable of in-house ALJs, and its own uncodified hearing practices and customs.

Maintaining and improving the two-tier system, within the political and economic constraints already described, presented a difficult drafting problem. The drafters wanted to maintain the high level of procedural protection provided in Tier 1 licensing cases. They also wanted to achieve some base-line procedural projections for Tier 2 cases, but without significantly increasing the cost and formality of the process. It was infeasible to transplant the minutely-detailed procedures required under Tier 1 into all Tier 2 cases because of cost concerns and because Tier 2 cases vary enormously. Tier 2 cases run the gamut from the twenty minute hearings provided in unemployment cases to complex and time consuming labor and environmental adjudication. Obviously, the same procedures cannot be appropriate for all Tier 2 agencies. For example, the carefully wrought discovery provisions applicable under Tier 1 could not possibly be extended without major modification to the vast array of Tier 2 adjudications. Finally, to compound the drafting problem, the Commission wanted to enact a set of procedural reforms applicable to both Tier 1 and Tier 2 adjudication that would encourage alternate dispute resolution ("ADR") and would make adjudication less formal and costly.

Therefore, the legislation somehow had to embody three APAs within one: 1) one APA would insure a fundamental level of procedural protection in both Tier 1 and 2 adjudications; 2) a second APA would provide modest reforms in Tier 1 cases covered by the existing APA; 3) a third APA would provide for ADR and authorize other flexibility and informality-promoting practices in both tiers. This structural problem of having three APAs within one made the resulting legislative product complex to draft and the final legislation difficult to explain.

My original solution was to enact some modifications to the existing APA, then apply that existing APA (as modified) to all Tier 2 agencies, with most provisions functioning as defaults. Then the Tier 2 agencies would be invited to adopt regulations to change or delete the default provisions. For example, the Tier 2 agencies would be required to provide the same scheme of discovery as Tier 1 agencies unless they chose to adopt regulations modifying or totally deleting the discovery provisions. The provisions applying ADR and informality would apply across-the-board. This came to be known as the "big bang" approach to adjudication reform.

In my opinion, the rulemaking process called for by the big bang approach would have been a healthy one. It would have provided the impetus for agen-

22. Some licensing cases are not covered by Tier 1. See Asimow, Adjudication Fundamentals, supra note 11, at 1073 n.12. These fall into Tier 2.
23. See "The Adjudication Process," supra note 11, at 2-3. Provisions representing due process fundamentals, such as the ban on ex parte contacts, could not be altered or dispensed with by regulation.
cies to examine all of their procedures, often for the first time in many years, and would have resulted in an updated and comprehensive procedural code. Members of the public and regulated industries would have been involved in this reconsideration and the viewpoints of commentators would have been considered in making final rules.

However, the big bang approach provoked a firestorm of criticism. The Attorney General was the leading critic. While the Attorney General conceded that some provisions of the big bang proposal were desirable, he argued that no case had been made for root and branch reform. In particular, the Attorney General noted that big bang required all Tier 2 agencies to engage in rulemaking to adapt the default provisions of the Act to their own special situations. Yet the fiscal austerity confronting virtually all agencies powerfully militated against any new chores or new costs. The California rulemaking provisions are exacting and costly to comply with; the rulemaking path bristles with time-consuming hurdles. As a consequence, agencies complained that they would have to go through a complex and costly rulemaking proceeding — for which they lacked the personnel and budget — to get back to where they were in the first place.

The Attorney General’s criticism led to a creative compromise that avoided the rulemaking imbroglio and satisfied all sides — the “little bang” approach. Under little bang, the three-in-one structure of S.B. 523 emerged: 1) an administrative adjudication bill of rights, setting forth basic fundamentals of administrative justice and applicable to both Tier 1 and 2 agencies; 2) a modest set of improvements applicable only to Tier 1 agencies; and 3) a set of flexibility enhancing provisions applicable to both Tier 1 and Tier 2 agencies.

III. CRITICAL ISSUES IN S.B. 523 AND THE IMPACT OF THE FEDERAL APA

This section will provide an overview of a number of the most important policy decisions embodied in S.B. 523. The objective is not to discuss these provisions in any detail but instead to explain their background. Was a provision inspired by the Federal APA, by the various amendments to the Federal APA, or by the 1981 Model State APA (“Model Act”)? Or can a provision be explained by a desire to depart from the model of the Federal APA or the Model Act? Did a provision emerge from a political compromise or was it the product of an exercise of political power? Can it be explained by some exist-

30. See supra note 18 and infra text accompanying notes 47-50.
ing peculiarity of California law or government? Or by the desire to conserve budgetary resources?

As already mentioned, there is no doubt that the federal experience was a significant factor in shaping the various provisions in S.B. 523. I am steeped in the Federal APA; my original studies that led to the Commission’s recommendations discussed the federal statute and case law at every point. The federal model fits California well because California’s bureaucratic apparatus rivals that of many nations. Its agencies have large, well-trained staffs and a heavy caseload. They administer an enormous range of regulatory statutes and adjudicate cases ranging from simple, mostly pro se hearings to lengthy and complex cases with specialized counsel. Many agencies are headed by full-time members. Thus, federal models may be more appropriate in California than in smaller states.

The 1981 Model Act was also an important guidance document for the drafters of the California Act. The Model Act represents a recent, carefully considered, state-of-the-art approach to state administrative law that is just now beginning to be adopted by the states. It is much more sophisticated and ambitious than its predecessors (the 1948 and 1961 Model Acts). It was obviously desirable for California to capitalize on the enormous investment made by the scholars, draftsmen, and members of the National Commissioners on Uniform State Laws. Indeed, the Model Act was frequently the starting point for Commission consideration. However, as the Commission was compelled to make compromises and face the inevitable tradeoffs, many of the more ambitious ideas in the Model Act fell by the wayside.

A. What Agencies Should Be Covered?

As already explained, S.B. 523 contains three acts in one: an administrative adjudication bill of rights, a flexibility-enhancing package, and a set of relatively minor improvements for licensing agencies. Ideally, the bill of rights and flexibility-enhancers should apply across the board to adjudicatory hearings of all Tier 2 agencies. In fact, the objective of “universal coverage” came close to being met. Numerous agencies tried to persuade the Commission to exclude all or part of their functions from the new APA. For the most part, the Commission stoutly resisted these blandishments. Instead, it designed statutory exceptions to deal

31. See supra text following note 1.
33. See Asimow, Adjudication Fundamentals, supra note 11, at 1079-80.
34. See supra text accompanying notes 19-28.
35. See Asimow, Adjudication Fundamentals, supra note 11, at 1073-79.
36. See CAL. GOV'T CODE § 11405.30 (West Supp. 1996) which defines “agency” comprehensively, and § 11410.20(a) which provides: “[e]xcept as otherwise expressly provided by statute: (a) This chapter applies to all agencies of the state. (b) This chapter does not apply to the Legislature, the courts or judicial branch, or the Governor or office of the Governor.”
with particular problems presented by particular regulatory schemes rather than entirely excluding agencies or regulatory schemes.

Universal coverage was the objective of the 1981 Model Act, which includes all adjudication of every agency.\(^{37}\) On the surface, this is also the approach taken by the Federal APA. Provided that some other statute requires a hearing on the record,\(^{38}\) the Federal APA covers the adjudications of every federal agency.\(^ {39}\) However, the reality at the federal level is entirely different from the surface appearance. Congress has repeatedly excluded new adjudicating schemes from the Federal APA, largely to escape the rigidity of the ALJ hiring and performance evaluation provisions of the Act. As a result, there is a vast amount of non-APA federal adjudication.\(^ {40}\) As a practical matter, the adjudication provisions of the Federal APA now apply to Social Security disputes, plus cases in a few traditional agencies such as the NLRB.\(^ {41}\) The rest of the federal adjudication universe is a motley collection guided by no overarching procedural limitations other than due process.

California's new APA has done much better than the federal government in imposing universal coverage for the bill of rights and flexibility enhancers. Nevertheless, the Commission and the legislature fell short of imposing universal coverage for all California adjudications in which hearings are required by either statutes or due process.\(^ {42}\)

1. The California Public Utilities Commission ("CPUC")

The CPUC persuaded the Commission to exclude it from S.B. 523.\(^ {43}\) The CPUC engages in considerable adjudication, including individualized public utility ratemaking and a wide variety of licensing and penalty cases.\(^ {44}\) Nevertheless, the CPUC engaged in a tenacious and ultimately successful campaign to win an exemption from the new APA. The CPUC's representative showed up at every Commission meeting, arguing that ratemaking should be treated as rulemaking rather than adjudication. He argued persistently that whatever spe-

\[\text{RAW Text} \]
cific provision was under discussion, it would not work at the CPUC and would have to be extensively modified to take account of the CPUC's eccentric practices. For a while, the Commission tried to accommodate the CPUC, but the result was a series of narrowly focussed provisions that complicated and dis tended the Act. Finally, the Commission relented and completely excluded the CPUC from the Act. The CPUC's lobbying campaign was a stellar success.

2. Regents of the University of California ("Regents of U.C.")

The Regents of U.C. conduct a large amount of adjudication — for example, student disciplinary proceedings and personnel disputes. However, early in the process the Regents of U.C. were excluded from the Act on the ground of their constitutional immunity from regulation. Thus, the ironic result is that adjudication relating to students or employees that is conducted by the California State University and College System is covered by the APA, but similar proceedings conducted by the Regents of U.C. are not.

3. State Board of Equalization ("SBE")

The SBE is California's tax adjudication agency. It administers the business taxes (such as the sales tax) and adjudicates disputes under those taxes. In addition, it adjudicates income tax disputes, but does not administer the income tax statute. The members of the SBE are elected by popular vote. They tend to view themselves more as politicians with responsibility to their constituents than as adjudicators or rulemakers.

SBE's system of adjudication is primitive. For example, the 5-member Board hears every income tax case en banc. It has a rudimentary system of hearing officers who hear business tax cases; however, it has staunchly rejected classification of these hearing officers as ALJs (apparently because reclassification would give them a pay increase). Ex parte contact between taxpayers and Board members is said to be commonplace, because Board members view such contacts as a legitimate constituent service. Additionally, Board members decide cases of persons who have contributed to their campaigns, and separation of

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45. Two such provisions survived elimination of the CPUC from the Act. Section 11430.70(b) allows ex parte contact with an agency head in individualized ratemaking proceedings if the content of the communication is disclosed on the record and all parties have an opportunity to comment on it. See Asimow, *Adjudication Fundamentals*, supra note 11, at 1130-34. Section 11430.30(c)(1) allows adversary staff members to advise decisionmakers concerning a technical issue in a nonprosecutorial matter, where the advice is needed by and not otherwise reasonably available to the presiding officer. See CAL. GOV'T CODE § 11430.30(c)(1) (West Supp. 1996). Again such advice must be disclosed on the record and an opportunity to comment provided.


47. See Asimow, *Adjudication Fundamentals*, supra note 11, at 1165 n.334 (describing California's tax adjudication system as a patchwork based on historic accidents or, less charitably, as a mess).

48. Under § 15626(c), a Board member is disqualified from deciding or influencing a case in which "the member knows or has reason to know that he or she received a contribution of $250 or more from a taxpayer within the preceding 12 months." CAL. GOV'T CODE § 15626(d) (West 1992). This provision obviously places a premium on making the contribution more than 12 months before the matter comes on for decli-
functions is largely ignored. The SBE believes in a true institutional method: its advocates engage in off-record discussions with both hearing officers and Board members about specific cases.

Thus, the Bill of Rights provisions relating to separation of functions, pecuniary bias, and ex parte contact would have fundamentally changed the way the SBE functions. After a few initial submissions, the SBE remained silent during Commission deliberations. But once S.B. 523 reached the legislature, the SBE conducted an all-out lobbying campaign to win exclusion from the Act. Several Board members were former legislators; they contacted the present legislators with their concerns. The California Taxpayers Association ("CTA"), which represents the largest corporate taxpayers, lobbied vigorously to exclude SBE, even though the reforms in the Bill were primarily pro-taxpayer. But CTA persuaded the Republican caucus that the bill was "unfriendly to taxpayers." These largest taxpayers, evidently, wanted to maintain their backdoor access to decisionmakers and their ability to influence decisions through making strategic campaign contributions.

In a dramatic confrontation before the Assembly Consumer Protection, Governmental Efficiency, and Economic Development Committee, the SBE won exclusion from the bill on a 7-6 party line vote. All Republicans voted for exclusion, following the recommendation of their caucus; all Democrats voted to keep SBE in the bill. To the author of this article, this Committee decision was the biggest single disappointment of the entire process.

B. What Proceedings Should Be Covered?

The decision as to precisely which adjudications should be covered by the new APA presented thorny policy problems. The original California APA applied only to hearings that were specifically required by statute to be covered by the APA. As already noted, this meant largely licensing cases (and some of them were excluded as well). The scope of the Federal APA is broader; it applies to "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." The federal formulation may, but probably does not, include hearings required by procedural due pro-

49. Memorandum from Assembly Republican Caucus to members of the Assembly Consumer Protection, Governmental Efficiency, and Economic Development Committee (June 20, 1995) (on file with the author). The memorandum disingenuously argued that the bill of rights would lead to costly formalization of SBE procedures, ignoring the provisions in the bill for informal hearings.

50. S. B. 523, § 54, enacts CAL. GOV'T CODE § 15609.5, excluding SBE from the provisions of the APA; § 87 amends CAL. REV. & TAX CODE § 19044 (West Supp. 1996) to exclude Franchise Tax Board hearings.


cess. The 1981 Model Act, like several modern state statutes, takes a different tack: it covers all adjudications, regardless of whether any external source (statutory or constitutional) requires an on-the-record hearing. As will be explained, S.B. 523 struck a compromise between the federal and Model Act approaches. The Model Act approach proved to be too broad, but the federal approach was judged to be too narrow. This critical provision in the California statute, therefore, reflects a determination that the Federal APA is seriously flawed.

My original opinion was in favor of the 1981 Model Act approach. The Federal APA approach is unsatisfactory because it is often unclear whether a particular external source actually calls for an on-the-record hearing that would fall under the APA as opposed to some kind of informal hearing that would not be covered. This uncertainty has led to quite a disparity in case law. The federal approach also encounters the due process enigma: when, if ever, should hearings required by due process, but not a statute, fall under the APA? In the end, why should it matter whether another statute requires a hearing on the record? Should not the default rule be that the APA applies to all important adjudications? A departure from that default rule should require clear legislation. These arguments made the 1981 Model Act provision seem attractive.

In an early Commission decision, however, the 1981 Model Act approach was rejected in favor of the federal approach. Essentially, the Model Act approach was subjected to death by ridicule. One Commission member asked — would the 1981 Model Act approach really require application of the APA to: the decision by a state high school to select cheerleaders; imposition of a library fine; a state forest ranger's decision in allocating campsites; every decision affecting a state prisoner that the prisoner dislikes; a decision not to hire some-

53. See Wong Yang Sung v. McGrath, 339 U.S. 33, 50-51 (1950). The Supreme Court held that the APA applied to deportation cases where a hearing was required by due process. In the Court's view, Congress would have desired the least level of protection in cases where a hearing was mandated by the constitution as in cases where the hearing was mandated by a mere statute. However, this decision is unlikely to be followed today and is widely ignored. Since due process requires hearings in mass justice situations, it is inappropriate to require full-fledged formal APA adjudication procedure in every such case. See, e.g., Chemical Waste Mgmt., Inc. v. EPA, 873 F.2d 1477, 1483-85 (D.C. Cir. 1989) (holding the APA not applicable even though due process applies); Clardy v. Levi, 545 F.2d 1241, 1246 (9th Cir. 1976) (holding the APA inapplicable to prison hearings required by due process); Robert E. Zahler, Note, The Requirement of Formal Adjudication under Section 5 of the Administrative Procedure Act, 12 HARV. J. ON LEGIS. 194, 218-41 (1975).

54. See Asimow, Adjudication Fundamentals, supra note 11, at 1090 n.70 (referring to statutes in Delaware, Florida, Indiana, Oklahoma, and Wisconsin).

55. See MODEL STATE ADMIN. PROCEDURE ACT OF 1981 § 1-102(5), 15 U.L.A. 11 (1990) ("order means an agency action of particular applicability"); § 4-101(a) ("agency shall conduct adjudicative proceeding as the process for formulating ... an order").

56. See Asimow, Adjudication Fundamentals, supra note 11, at 1081-94.

57. Compare City of West Chicago v. NRC, 701 F.2d 632, 641-45 (7th Cir. 1983) ("hearing" in nuclear licensing case does not mean "hearing on the record") with Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 877-79 (1st Cir. 1978) (contra). More recent decisions have left this interpretive question to the agency under the Chevron doctrine. See, e.g., Chemical Waste Mgmt., Inc. v. EPA, 873 F.2d 1477, 1480-83 (D.C. Cir. 1989). This author finds it disturbing that an agency should be allowed to decide whether or not its hearings should comply with the APA.

58. See supra note 53.
one for a low-level state job or to buy a computer from vendor A rather than B?

The answer was — well yes, but hearings in relatively trivial state/private encounters could be provided through an informal summary hearing procedure. But what if the summary hearing procedure statute left out a category of relatively trivial cases? Would some of the categories be mushy? What if the agency neglected to adopt a rule providing for summary procedure for a particular category? And what if even the truncated summary procedure was too much procedure for some relatively trivial encounter? The Commission thought it would be laughed out of town if it proposed a statute requiring any sort of procedure in such trivial matters.

I now believe the Commission's decision was correct. The 1981 Model Act approach is overambitious. It would be a mistake to attempt to prescribe procedures — any procedures — for the infinite range of relatively trivial interactions between government and the public. One recent Florida case illustrates the point well. The Florida APA applies "in all proceedings in which the substantial interests of a party are determined by an agency." The court held that the denial of admission to the University of Florida College of Law did not "rise to the level of a 'substantial interest.'" Of course, to the disappointed applicant, the denial of admission to this professional school was a very substantial interest indeed. However, the court stated:

If such hopes and aspirations were deemed substantial interests, all unsuccessful applicants for admission to a state university would be entitled to a formal hearing upon the denial of their applications. While this scenario is not the basis for our denial of Metsch's claim, we cannot ignore the repercussions that would flow from granting the relief which he seeks.

59. See Model State Admin. Procedure Act of 1981 §§ 4-502 to 4-506. Summary procedure applies to "any matter having only trivial potential impact upon the affected parties" which presumably takes in the campsite case and arguably covers the cheerleader. It applies to "a reprimand, warning, disciplinary report, or other purely verbal sanction without continuing impact against a prisoner." Id. §§ 4-502(3)(ii), (viii). It includes monetary sanctions up to $100 (which covers the library fine) and "denial of an application for admission to an educational institution or for employment" (which covers the job hypo), and "the acquisition . . . of property or the procurement of goods or services by contract" (which covers the computer hypo). Id. § 4-502(3).

60. Consider the case of the cheerleader supra note 59.

61. Model Act § 4-502(3) requires that an agency rule provide for summary procedure.

62. Summary procedure requires that a presiding officer (that is, anyone exercising authority over the matter) allow "each party an opportunity to be informed of the agency's view of the matter and to explain the party's view of the matter." Model State Admin. Procedure Act of 1981 § 4-503(b)(1). The presiding officer must furnish "a brief statement of findings of fact, conclusions of law, and policy reasons for the decision if it is an exercise of agency discretion, . . . and a notice of any available administrative review." Id. § 4-503(b)(2). These explanations can be oral unless a monetary sanction is involved. See id. § 4-503(c). The agency must review the order resulting from a summary hearing if any party requests a review. See id. § 4-504. A "reviewing officer [must] give each party an opportunity to explain the party's view of the matter." Id. § 4-505(3).


65. Metsch, 550 So. 2d at 1151. In an alternative ground, the court held that the applicant fell within an exception for "any proceeding in which the substantial interests of a student are determined by the State University System." Id.

66. Id. at 1150-51.
Clearly the Florida court was apprehensive that many of the thousands of disappointed applicants to various Florida institutions of higher learning would demand time-and-resource-consuming hearings. The court understandably drew back from this abyss. Granted, Florida law did not contain a summary hearing procedure, but even that procedure — any procedure — might not be worth the bother in cases of disappointed applicants for the limited number of slots in educational institutions. The same is true of many of the disputes that seem to fall under the 1981 Model Act summary procedure provision.

In our litigation-oriented society (and perhaps California is even more litigious than other states), a few people who resent being denied admission to a university or being turned down for a job, a contract, or whatever, are going to litigate the question of whether the procedure they received met the requirements of the summary procedure statute. The near certainty of this sort of pointless litigation was enough to persuade the Commission to jettison the all-inclusive Model Act approach to defining the scope of the Act.

California struck a compromise between the Federal APA approach and the 1981 Model Act approach. The bill of rights and flexibility enhancers apply "to a decision by an agency if, under the federal or state Constitution or a federal or state statute, an evidentiary hearing for determination of facts is required for formulation and issuance of the decision." This provision is considerably more inclusive than the federal approach. First, the provision explicitly applies to cases in which a hearing is required by either the federal or state constitution. As previously noted, the federal statute probably does not apply when a hearing is required by due process, although the point remains unclear. As a result, under federal law when a court determines that individualized government action has deprived a person of liberty or property, it is often necessary to apply the utilitarian, case-specific balancing test of Mathews v. Eldridge to custom tailor the necessary elements of a hearing and its timing.

The array of cases in which a hearing is required by California due process is much broader than under the U. S. Constitution. California has rejected Board of Regents v. Roth. California law requires a hearing in many situations in which a person lacks an entitlement to a state benefit, because freedom from arbitrary procedure is itself a liberty interest protected by due process. The process that is due is determined not only by the three-factor Mathews v. Eldridge test but, by weighing a fourth factor — the dignitary interest of the person seeking the hearing.

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67. CAL. GOV'T CODE § 11410.10 (West Supp. 1996). This language was drawn from California's unique provision for administrative mandamus. See CAL. CIV. PROC. CODE § 1094.5 (West Supp. 1996).
68. See supra note 53.
70. See Asimow, Adjudication Fundamentals, supra note 11, at 1084-87.
71. 408 U.S. 564, 576-78 (1972).
The Commission thought it would be useful to have a framework in place for situations in which federal or state due process calls for a trial-type hearing. As discussed below, the flexibility-enhancing provisions of S.B. 523 authorize an "informal hearing" which falls far short of a formal adversarial trial. The informal hearing consists of the presentation of written evidence plus oral argument with a minimum of live testimony and cross examination. All provisions of the bill of rights apply to informal hearings. The statute explicitly makes the informal hearing procedure available when an evidentiary hearing is required by due process, even though the agency has not previously provided for its use by regulations. The informal hearing satisfies due process in many situations in which full-fledged courtroom theatrics are not required.

Granted, there will still be cases in which it is unclear whether due process is satisfied by an informal hearing. Nevertheless, it seemed constructive and helpful to put an informal procedure in place that will satisfy due process demands most of the time. This is particularly true of the cases of discretionary government action in which the California Constitution but not the Federal Constitution requires a hearing.

Second, the California formulation avoids the need for the talismanic words "on the record" which some federal cases say is needed to invoke the adjudication provisions of the Federal APA. Chances are, if another statute calls for a "hearing" or uses similar language, the APA will kick in. That other statute will probably be read as calling for an "evidentiary hearing for determination of facts . . . required for formulation and issuance of the decision." This formulation was drawn from existing language in the administrative mandamus statute which provides review of adjudicatory agency decisions. Administrative mandate cases have liberally classified all sorts of individualized administrative proceedings as sufficiently adjudicatory in nature to trigger the provision. Thus California's default rule is that the bill of rights and flexibility enhancing provisions in the new APA will apply to all state/private interactions in which an external statute calls upon the agency to conduct some sort

73. See infra text accompanying notes 133-47.
75. See id. § 11445.20(d). Under § 11445.10(b)(1), "[t]he Legislature finds and declares the following:
(1) The informal hearing procedure is intended to satisfy due process and public policy requirements in a manner that is simpler and more expeditious than hearing procedures otherwise required by statute, for use in appropriate circumstances."
76. Of course, if due process requires oral testimony and cross examination, the informal hearing procedure is not appropriate. Section 11445.20 begins "an agency may use an informal hearing procedure in any of the following proceedings, if in the circumstances its use does not violate another statute or the federal or state Constitution."
78. See supra note 57.
80. See CAL. CIV. PROC. CODE § 1094.5(a) (West Supp. 1996).
81. See CAL. GOV'T CODE § 11410.10 cmt. (West 1992) (citing many of the cases); Asimow, Adjudication Fundamentals, supra note 11, at 1083 n.45. For example, if a statute provides a "right of appeal," this will probably be considered a provision that calls for an evidentiary hearing and thus would be sufficient to trigger the APA. See Eureka Teachers Ass'n v. Board of Educ., 244 Cal. Rptr. 240, 243-45 (Ct. App. 1988).
of administrative fact-finding evaluation in the nature of a hearing. If the legislature does not intend that the APA should apply, it must explicitly say so. That seems clearly superior to the federal approach, which requires Congress to affirmatively provide that a hearing be "on the record" before the APA will apply. Such a measure is also superior to the overbroad Model Act approach that sweeps every state/private interaction under the APA regardless of any external requirement that a hearing be held.

C. Provisions In the Bill of Rights

The bill of rights extends various fundamental due process projections to all Tier 1 and Tier 2 adjudications. The most important rights relate to the prohibition on ex parte contact and the requirement of separation of functions. Here the Federal APA provides a useful signpost, because its across-the-board provisions on ex parte contact and separation of functions have proved to be practical and useful. The successful federal provisions inspired the drafters of the 1981 Model Act to go further. California's new APA builds on these models.

1. Ex parte communications

By the term "ex parte communication," I mean communications between interested outsiders and agency adjudicators. All APAs limit or prohibit outsider ex parte communications, since such contacts are deeply antithetical to an adversary system. The original California APA contained no provision prohibiting ex parte contact. In 1986, the APA was amended to prohibit ex parte contact with ALJs (though not agency heads) in Tier 1 agencies. Anecdotal evidence available to the author indicated that agency heads occasionally engage in ex parte contact. A couple of recently enacted statutes and regula-

82. The bill of rights thus covers all adjudications in which a statute or constitution requires an evidentiary hearing except in the few agencies excluded from the Act.
84. See id. §§ 11425.30, 11430.10, 11430.30.
87. See supra notes 83-84.
88. There are two different kinds of problematic off-record communications with adjudicators: i) by outside "interested parties" and ii) by inside agency staff members. These two types of communication present quite different considerations. I refer only to the first as "ex parte contact." I consider the second type as part of the problem of "separation of functions." The two types of communication are treated separately in the Federal APA. See 5 U.S.C. §§ 554(d), 557(d).
89. The Commission originally treated the two kinds of communications separately, but these provisions proved unwieldy. Ultimately, the Commission found it easier from a drafting perspective to describe both kinds of communications as ex parte communications while designing special exceptions for staff communications. See CAL. GOV'T CODE §§ 11430.10-11430.80 (West Supp. 1996). This approach is also employed in the 1981 Model Act. See MODEL STATE ADMIN. PROCEDURE ACT OF 1981 § 4-213(a).
89. See Asimow, Adjudication Fundamentals, supra note 11, at 1127-28.
90. See CAL. GOV'T CODE § 11513.5 (West 1992), repealed by S.B. 523 § 41; Asimow, Adjudication Fundamentals, supra note 11, at 1128.
91. See Asimow, Adjudication Fundamentals, supra note 11, at 1130-31.
tions have prohibited or limited ex parte contact in specific agencies, suggesting an emerging consensus that such contact is improper.92

The originally enacted Federal APA also contained no prohibition on ex parte contact. However, as the result of some notorious instances of ex parte contacts, especially by television license applicants with agency heads,93 in 1976 Congress prohibited such contacts.94 Similarly, the 1981 Model Act broadly prohibits ex parte contacts.95 The federal provision seems to have worked well and has been resoundingly enforced by several well-known court decisions.96

The federal and Model Act provisions establish that it is both feasible and desirable to force all significant communications between interested outsiders and agency adjudicators97 out of the office and onto the record. There are no important exceptions to this principle in the Federal Act98 and there are none in California’s adjudicatory bill of rights.99

92. The Public Utilities Commission had long tolerated ex parte contact and resisted attempts to limit it. CPUC capitulated by adopting a regulation that does not prohibit ex parte communication but requires disclosure of the content of the communications. See id. at 1130-34. The legislature required disclosure of ex parte contact in connection with Coastal Commission determinations. See CAL. PUB. RES. CODE §§ 30322-30324 (West Supp. 1996).
94. See 5 U.S.C. § 557(d) (1994), added by the Government in the Sunshine Act, Pub. L. No. 94-409, § 4(a), 90 Stat. 1241, 1246 (1976) (prohibiting “[a]n interested person outside the agency” from making “an ex parte communication relevant to the merits of the proceeding” to any “employee who is or may reasonably be expected to be involved in the decisional process”).
97. The California statute uses the term “presiding officers” to cover adjudicators. This term includes the agency head or heads, an administrative law judge, hearing officer, or other person who presides in an adjudicatory hearing. See CAL. GOV’T CODE §§ 11405.80, 11430.70(a) (West Supp. 1996). The term “presiding officer” is also used in the 1981 Model Act, but it is never defined. Therefore, it is unclear whether the ban on ex parte contact includes agency heads as well as hearing officers. In context, however, Model Act § 4-216(d) indicates that “presiding officer” probably does include agency heads.
99. In one respect, the California provision is narrower than both its federal and Model Act counterparts. It does not prohibit ex parte contacts with adjudicatory advisers unless such contacts are part of an indirect attempt to influence the adjudicators. See CAL. GOV’T CODE § 11430.10 (West Supp. 1996). Compare 5 U.S.C. § 557(d)(1)(A); MODEL STATE ADMIN. PROCEDURE ACT OF 1981 § 4-213(b)(i). The Commission feared that a blanket ban on ex parte contact with advisers (especially ones not yet tapped as advisers at the time of the contact) might cause serious practical problems, especially in difficult economic, technical, or environmental cases. See Michael Asimow, When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies, 81 COLUM. L. REV. 759, 762 (1981) [hereinafter Asimow, When the Curtain Falls]. There are some insignificant exceptions which are consistent with federal law. For example, ex parte contact is permitted concerning “a matter of procedure or practice, including a request for a continuance, that is not in controversy.” This reflects a comment in Model Act § 4-214, and federal law. See Texas v. United States, 866 F.2d 1546, 1555 (5th Cir. 1989) (holding that letters concerning noncontroversial procedural question did not prohibit ex parte communication because they did not concern merits). Also § 11430.70(b) of the California Government Code contains a narrow exception for ratemaking. Communications with agency heads are not prohibited but must be disclosed. See CAL. GOV’T CODE § 11430.70(b) (West Supp. 1996).
2. Separation of functions

A historic administrative law dilemma concerns the combination of conflicting functions within the same agency. Many agencies adopt regulations, investigate violations of statute or regulations, prosecute alleged violators, adjudicate the issue of whether a violation occurred and prescribe the appropriate penalty. Combining all these functions in the same agency may well serve the causes of efficiency and accuracy, but regulated parties generally find the combination unfair and objectionable.100

In California, the inherent problem of combining functions is often solved by an external separation; different agencies handle the conflicting roles.101 Nevertheless, a number of California agencies combine functions, especially those engaged in professional licensing.102 Most agencies that incorporate combined functions create an internal separation of functions, meaning that: i) agency staff members or members of the Attorney General’s staff who have played adversary roles in a particular case (such as investigation, prosecution, or advocacy) cannot play adjudicatory roles in that same case, and ii) adversaries in a case cannot furnish ex parte advice to adjudicators in that case.103 However, anecdotal evidence available to me suggests that the principle has sometimes been ignored or fudged, especially in understaffed agencies, in agencies where informal procedures prevail, or in nonaccusatory cases involving utility regulation, tax, environmental, and land-use issues.104

In my view, a system of internal separation of functions is imperative, given the adversarial nature of administrative dispute settlement.105 In most situations, existing California law does not mandate internal separation of functions.106 In 1986, the legislature amended the California APA to prohibit contact between a central panel ALJ and an employee of the agency that filed an accusation.107 However, this provision covers only Tier 1 agencies and appears to apply only at the ALJ level, not the agency head level.108 Some particularly egregious cases of combined functions violate state or federal due pro-

100. See Asimow, Adjudication Fundamentals, supra note 11, at 1154-68.
101. See supra note 14.
102. See Asimow, Adjudication Fundamentals, supra note 11 at 1148, 1153.
103. As previously noted, the State Board of Equalization, California’s tax adjudicating agency, does not observe internal separation of functions. See supra text accompanying notes 47-48.
104. See Asimow, Adjudication Fundamentals, supra note 11, at 1150.
105. For a theoretical defense of this proposition, see Asimow, When the Curtain Falls, supra note 99, at 788-97.
106. See Asimow, Adjudication Fundamentals, supra note 11, at 1168-70.
107. See CAL. GOV’T CODE § 11513.5(a) (West 1992), repealed by S. B. 523, § 41. The Assembly bill that produced § 11513.5 contained a broader separation of functions provision but it was struck out of the version that passed the Senate, probably because of strong agency opposition. See Asimow, Adjudication Fundamentals, supra note 11, at 1168 n.342.
108. See Asimow, Adjudication Fundamentals, supra note 11, at 1128 n.194.
cess, but the contours of the constitutional separation of functions doctrine are unclear.

Here again, the Federal APA has lighted the way. From the beginning, it has mandated internal separation of functions. This provision appears to work well, causes few practical problems, and is seldom litigated. Federal agencies customarily require internal separation, often in ways that go beyond what is required by statute. Following the Federal Act and the 1981 Model Act, the bill of rights mandates separation of adjudicatory functions from adversarial functions such as prosecution, investigation, and advocacy. It prohibits persons who have played adversarial roles in a case from functioning as adjudicators in the same case. It also prohibits adversary staff members from making off-record contacts with adjudicators, for example by furnishing advice.

Of equal importance, the Act permits ex parte communication to adjudicators from staff members who have not played adversary roles in the proceeding. In my view, it is imperative that agency decisionmakers (particularly at the agency head level) in complex, unusually important, or unusually difficult cases have the ability to draw on agency staff experts for legal, technical, or policy advice. These are cases that involve substantial stakes for the parties and for the public interest. The decisionmakers need the richest possible mix of

109. See Asimow, When the Curtain Falls, supra note 99, at 779-88; Asimow, Adjudication Fundamentals, supra note 11, at 1165-66 (federal cases), 1169 (California). By "particularly egregious," I mean a mixture of functions in a particular individual below the level of agency heads which i) presents a high risk of erroneous deprivation of a constitutionally-protected interest and ii) which lacks a convincing practical justification. Id. at 1166. For example, the Court of Appeal held that the County Counsel could advise an adjudicative board even though a deputy county counsel had been an adversary in the same case, but only if the County Counsel were screened from any prior communications about the case with the deputy. See Howitt v. Superior Court, 5 Cal. Rptr. 2d 196, 203-04 (Ct. App. 1992).


111. But see William F. Pedersen, Jr., The Decline of Separation of Functions in Regulatory Agencies, 64 VA. L. REV. 991, 1014-15 (1978) (suggesting a rollback in separation of functions practice in non-prosecutorial cases such as environmental protection).

112. See Asimow, When the Curtain Falls, supra note 99, at 804-20.


114. See CAL. GOV'T CODE § 11425.30 (West Supp. 1996). This provision also disqualifies a person from serving as an adjudicative decisionmaker if that person is subject to the supervision of one who has served as an adversary in the same case. Section 11425.30 does not apply to drivers' license adjudications because of the budgetary problems inherent in separating functions at the Department of Motor Vehicles. See CAL. VEH. CODE § 14112 (West Supp. 1996).

Participation in a determination of probable cause or other equivalent preliminary determination does not disqualify a person from serving as an adjudicator. See CAL. GOV'T CODE § 11425.30(b)(2). This provision follows the Model Act § 4-214(c) and federal case law. See Asimow, When the Curtain Falls, supra note 99, at 767-68, 770-72. Thus agency heads can participate in the decision whether to investigate a particular person or to issue a complaint against that person, then subsequently adjudicate the case. Often this preliminary exercise of prosecutorial discretion is the most important decision in the case, since the person is likely to settle if the agency proceeds against him. Nevertheless, such discussions inevitably expose decisionmakers to ex parte information about the case and it may be better practice to avoid agency head involvement even at preliminary stages, at least in prosecutorial cases. See id. at 767-68.

115. See CAL. GOV'T CODE §§ 11430.10(a), 11430.30(a) (West Supp. 1996).

116. See id. § 11430.30(a). This provision allows a communication for the purpose of assistance and advice to the presiding officer from a staff member who is not an adversary in the particular case. The "assistant or adviser may evaluate the evidence in the record but shall not furnish, augment, diminish or modify the evidence in the record." Id.
Separation of functions must be defined and administered in ways that permit decisionmakers access to needed staff advice except in cases where the adviser has significant adversarial involvement in the case under decision. The separation of functions provision in the Federal APA contains an “agency heads” exemption. The meaning of the agency head exemption remains obscure to this day. The exemption apparently is intended to allow agency heads to personally engage in combined functions; for example, an agency head could both investigate, advocate the agency’s side, then adjudicate the case. Although this is obviously not an ideal situation from the point of view of fairness, it may be supported by the principle of necessity, especially in a small, understaffed agency. However, the agency head exception probably does not allow staff adversaries to advise the agency heads ex parte; the statute permits only non-adversaries to give advice.

Neither the 1981 Model Act nor the new California statute contains an agency head exception. This omission reflects a policy decision that if an agency must embody combined functions, all adjudicators — up to and including the heads of the agency — should steer clear of adversary involvement and must be advised only by non-adversaries. Administrative law has evolved substantially in the 50 years since the federal act was passed. At least in a state like California with relatively large agency staffs, there is no persuasive argument that justifies allowing agency heads to take a personal role in investigation, prosecution, or advocacy and then adjudicate the same case, or that justifies allowing staff adversaries to give off-record advice.

117. See Asimow, When the Curtain Falls, supra note 99, at 764, 775-76, 800-03.
118. The drafters of the California provision wanted to minimize some of the efficiency costs of an overly strict system of separation of functions. Therefore, the Act prohibits ex parte communications to adjudicators from outsiders and staff adversaries but not communications from adjudicators to outsiders or staff adversaries. See CAL. GOV'T CODE § 11430.10(a) (West Supp. 1996). Compare 5 U.S.C. § 557(d)(1)(B) (1994) with MODEL STATE ADMIN. PROCEDURE ACT OF 1981 § 4-213(a).

The provision was drafted this way to order to allow agency heads to impose management controls over the way in which the staff conducts difficult or complex cases. See Asimow, When the Curtain Falls, supra note 99, at 802-03. The Comment to § 11430.10 explains: “Thus [the section] would not prohibit an agency head from communicating to an adversary that a particular case should be settled or dismissed. However, a presiding officer should give assistance or advice with caution, since there may be an appearance of unfairness if assistance or advice is given to some parties but not others.” CAL. GOV'T CODE § 11430.10 cmt. (West Supp. 1996).

In addition, the California Act allows certain adversary/adjudicator communications concerning technical issues in non-prosecutorial cases provided that the advice is disclosed on the record. See id. § 11430.30(c)(1). And to avoid disturbing existing decisionmaking patterns in statewide land use planning agencies, such communications are allowed in several agencies. See id. § 11430(c)(2).

119. “This subsection [section 554(d)] does not apply . . . (c) to the agency or a member of members of the body comprising the agency.” 5 U.S.C. § 554(d)(C).
120. See Asimow, When the Curtain Falls, supra note 99, at 766-67.
121. See Asimow, Adjudication Fundamentals, supra note 11, at 1177-78. For similar reasons, the California act has no exceptions that correspond to the federal exceptions for initial licensing or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers. See 5 U.S.C. § 554(d)(A), (B).
CALIFORNIA'S NEW APA

3. ALJ credibility determinations

Under long-standing California law and practice, an ALJ's proposed decision counted for nothing if it was rejected by the agency heads. Agency heads were free to substitute their own findings about witness credibility for those of the ALJ, even though they did so without seeing or hearing the witnesses. As a result, agency heads who disagreed with the result reached by the ALJ could readily reach a different result by substituting their own credibility findings.

Under existing law, reviewing courts that apply the substantial evidence test consider only the findings of the agency heads, not those of the ALJ. Under California's unique independent judgment test, applicable in cases where an agency decision deprives a private party of a vested, fundamental right, the fact findings of neither the ALJ nor the agency heads have any legal effect. The reviewing court makes its own credibility determinations from the cold record.

One important goal of the Federal APA was to upgrade the status of administrative hearing officers. The famous Universal Camera decision helped to achieve that objective. In Universal Camera, the Supreme Court emphasized that on judicial review, courts review the decision of the agency heads, not the decision of the ALJ. Nevertheless, the Court held that where an ALJ's credibility findings differ from those of the agency heads, these differences detract from the substantiality of the evidence supporting the agency's decision. As a practical matter, therefore, federal agency heads seldom overturn the credibility determinations of their ALJs, since doing so invites a reviewing court to overturn the agency's decision.

Senate Bill 523 is concerned with agency adjudication, not judicial review. Nevertheless, the bill of rights adopts the Universal Camera principle in California, although with a substantial refinement: the court must give great

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122. See Asimow, Adjudication Fundamentals, supra note 11, at 1113-15. In workers' compensation cases, however, reviewing courts gave "great weight" to the findings of Workers' Compensation Judges. See id. at 1116.
124. Review by appellate courts of trial court fact findings under the independent judgment test is extremely narrow. See id. at 1168-69.
125. It did so by sharply restricting agency authority to hire, supervise, monitor, and discharge its hearing officers (later renamed ALJs). See generally, ACUS REPORT, supra note 40, at 803 passim.
127. See id. at 494-97.
128. See id. at 496.
129. See, e.g., Penasquitos Village, Inc. v. NLRB, 565 F.2d 1074 (9th Cir. 1977).
130. Section 11425.50(b) provides: "If the factual basis for the decision includes a determination based substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination, and on judicial review the court shall give great weight to the determination to the extent the determination identifies the observed demeanor, manner, or attitude of the witness that supports it." CAL. GOV'T CODE § 11425.50(b) (West Supp. 1996).

The comment to this provision (omitted from the 1996 pocket part of West's California Government Code) explicitly states that § 11425.50(b) adopts Universal Camera and codifies the prior workers' compensation practice.
weight to credibility findings\(^{131}\) only to the extent that the statement of factual basis for the decision identifies specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination.\(^{132}\) Thus, when the bill of rights goes into effect in 1997, a court in a substantial evidence case must downgrade the substantiality of evidence supporting the agency heads’ decision if the agency heads differ from the ALJ on a credibility issue, assuming the ALJ made the appropriate findings. In an independent judgment case, the court must give great weight to the ALJ’s credibility findings, thus significantly decreasing the court’s power to impose its own determinations.

In my view, enactment of the *Universal Camera* principle in California is a landmark achievement. It tends to mute complaints from the private bar that agency heads, especially in agencies with combined functions, can carry out their political agendas by substituting their own credibility findings for those of the judge who actually heard the witnesses. It enhances the status of administrative judges; they are trained, experienced, professional fact finders who have lived with a case and whose determinations about who is telling the truth should not be negated by agency heads who did not hear the witnesses, who may have spent relatively little time on the case, and who may or may not have read the transcript.\(^{133}\)

This provision was staunchly opposed by several agencies and questioned by the Attorney General. Nevertheless, the Commission stuck to its guns and the provision was ultimately enacted. The federal model was enormously significant in helping to secure enactment of the provision. When people questioned what the “great weight” provision meant or argued that it improperly derogated from agency head authority, the effective response was: the federal courts do it and everyone at the federal level understands it. It works smoothly, without causing much apparent problem for reviewing courts. Without the powerful *Universal Camera* precedent, the principle would never have survived the opposition of agencies and the Attorney General.

D. Flexibility Enhancing Provisions

The bill of rights provides a list of baseline due process requirements. These constraints are balanced by a set of provisions designed to give agencies additional flexibility and to make adjudication less formal, costly, and adversarial. In my view, these provisions are more important in the long run than

\(^{131}\) “Nothing in subdivision (b) precludes the agency head or court from overturning a credibility determination of the presiding officer, after giving the observational elements of the credibility determination great weight, whether on the basis of nonobservational elements of credibility or otherwise . . . nor does it preclude the agency head from overturning a factual finding based on the presiding officer’s assessment of expert witness testimony.” *Id.* § 11425.50 cmt.

\(^{132}\) As the comment to § 11425.50 explains, this provision was derived from Washington law. See *Wash. Rev. Code Ann.* §§ 34.05.461(3), 34.05.464(4) (West 1990 & Supp. 1996); Asimow, *Adjudication Fundamentals, supra* note 11, at 1118.

\(^{133}\) See Asimow, *Adjudication Fundamentals,* supra note 11, at 1114-16.
the bill of rights because they will initiate the creation of a new adjudicatory culture in California.

1. Alternate dispute resolution

In both civil litigation and in all facets of administrative law, the alternative dispute resolution ("ADR") movement has won powerful support.\(^\text{134}\) Virtually everyone agrees that mechanisms should be in place to facilitate and encourage dispute settlement without formal adjudication. In most situations, a negotiated settlement is preferable to the costly, slow, and emotionally exhausting process of adjudication and judicial review. In this era of backlogged dockets, staggering private and public litigation costs, and diminishing resources available to agencies, ADR takes on enhanced importance. Agencies and private attorneys cannot be compelled to develop a culture that favors settlement over adversary struggle, but an APA can help by legitimizing various ADR techniques (so that their legality cannot be questioned) and encouraging agencies to put in place settlement-facilitating mechanisms.

In 1990, Congress amended the Federal APA in order to require agencies to explore and utilize ADR techniques in all agency functions, including adjudication and rulemaking.\(^\text{135}\) The Federal APA now empowers a presiding officer to use ADR techniques and to require the attendance of parties at settlement conferences. It also provides that the presiding officer may inform the parties as to the availability of ADR techniques and to encourage their use.\(^\text{136}\) The statute authorizes and encourages agencies to use the whole range of ADR techniques: settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration.\(^\text{137}\) The statute makes clear that these techniques are voluntary and not always appropriate (for example, where an authoritative resolution of a matter is required to establish a precedent).\(^\text{138}\)

Prior to enactment of California's new APA, the legality and propriety of the use of ADR techniques in administrative law was open to doubt in California. Some agencies employed settlement judges to facilitate negotiated settlement but this procedure was often not available or was pursued half heartedly.

\(^{134}\) Section 465(d) of the California Business and Professions Code declares "[c]ourts, prosecuting authorities, law enforcement agencies, and administrative agencies should encourage greater use of alternative dispute resolution techniques whenever the administration of justice will be improved." CAL. BUS. & PROF. CODE § 465(d) (West 1990).


\(^{137}\) See id. §§ 574-80. The most detailed provisions concern arbitration. See id. To allay constitutional concerns, the head of an agency is authorized to terminate an arbitration proceeding after the arbitrator makes an award but before it becomes final. See id.

\(^{138}\) See id. § 572(b).
Mediation and arbitration were seldom, if ever, employed as substitutes for formal adjudication.

The new APA broadly validates ADR in administrative adjudication. First it provides for settlements on any terms the parties determine are appropriate. In general, settlement can occur before or after issuance of an agency pleading. Agency heads can delegate the power to approve a settlement to lower level officials. Second, the Act strongly validates all other ADR methods, assuming both parties agree. It specifically empowers agencies to engage in mediation and either binding or non-binding arbitration.

These ADR-validating provisions are of enormous importance in changing the culture of administrative law. The Commission's proposals for ADR ran into an uneasy reaction from agencies and the Attorney General. It is doubtful if these provisions would have survived the lengthy process of Commission consideration had there not been such a strong federal precedent.

2. Informal hearings

The prior California APA and the Federal APA provide for only one kind of hearing — formal trial-type adjudication. This procedure has virtually all the formalities of a trial in court. However, this approach is appropriate.

139. See CAL. GOVT'T CODE § 11415.60(a) (West Supp. 1996). "[T]he settlement may include sanctions the agency would otherwise lack power to impose." Id. § 11415.60(c). This provision confirms the decision in Rich Vision Centers, Inc. v. Board of Medical Examiners, 192 Cal. Rptr. 455 (Ct. App. 1983). The Rich decision holds that a licensing agency has implied power to settle cases, including an agreement that imposes the agency's litigation and investigation costs on the licensee. See id.

140. See CAL. GOVT'T CODE § 11415.60(b) (West Supp. 1996). However, in a "proceeding to determine whether an occupational license should be revoked, suspended, limited or conditioned, a settlement may not be made before issuance of the agency pleading." Id. This exception reflected concern that an agency might be viewed as covering up violations if it settled cases prior to issuing a complaint. The issue was unclear under prior law. See Richard H. Cooper, Resolving Real Estate Disciplinary Matters Prior to Hearing, 47 CAL. ST. B.J. 330, 363-64 (1972).

However, the exception is unfortunate; if a case can be settled prior to issuance of a complaint to the satisfaction of the agency staff and the respondent, it seems unnecessary and counterproductive to first issue a complaint. If the staff believes that issuance of a complaint is necessary as a matter of consumer protection, obviously it can insist on that as a condition of settlement.

141. See CAL. GOVT'T CODE § 11415.60(c) (West Supp. 1996). Under prior law and practice, a significant deterrent to settlement of cases was that only the agency heads had the authority to approve a settlement; a deal negotiated by the parties, perhaps with the help of a settlement judge, could not be finalized until it was passed on by the agency heads. Yet in many cases, the heads meet infrequently and this entailed substantial delay and uncertainty. The general consensus was that agency heads lacked power to delegate this authority. Hopefully, the new provision will encourage such delegations.

142. See id. § 11420.10. The Act also provides for confidentiality of communications made during the ADR process. See id. § 11420.30. It empowers OAH to adopt model ADR regulations relating to selection of mediators or arbitrators, their qualifications, and confidentiality. See id. § 11420.20. The Commission was not impressed by arguments that binding arbitration represented an invalid delegation of adjudicatory power. Since the decision to enter into binding arbitration must be voluntarily made on a case-by-case basis by both the agency and the outside party, it is difficult to see how any important constitutional principle could be jeopardized. Here the California act departs from the federal model which does not provide for truly binding arbitration. See supra note 138.

143. See CAL. GOVT'T CODE §§ 11500-11529 (West 1992), especially § 11513.


145. This generalization is not strictly true of the Federal APA which authorizes various short-cuts from formal adjudicatory procedure in specific types of cases. See, e.g., 5 U.S.C. § 556(d) (determining claims for benefits or initial licenses, agency can adopt procedure for submission of evidence in written form where
for many agency adjudications, particularly those that are prosecutorial in nature, many other proceedings do not require such costly formality. An informal, less adversarial approach would be cheaper, quicker, and less emotionally exhausting to the participants, yet it would not sacrifice any necessary protections for the litigants.

Recently some state laws have institutionalized informal hearings\(^{146}\) and the 1981 Model Act followed suit with its provision for conference hearings.\(^{147}\) A conference hearing is one that dispenses with direct and cross examination and instead resolves issues through written submission and oral argument.\(^{148}\) California’s new APA provides for an “informal hearing” model that approximates the Model Act’s conference hearing.\(^{149}\)

Under the California approach, the informal hearing model can be used without adoption of an authorizing rule\(^{150}\) in cases involving no disputed issue of material fact\(^{151}\) or, if facts are disputed, a relatively trivial impact on the private party,\(^{152}\) or in cases where due process, but no statute, calls for a hearing.\(^{153}\) In addition, the informal approach can be used in any other type of case where the agency has authorized its use by regulation.\(^{154}\)

An informal hearing includes all of the protective provisions of the bill of rights — for example, prohibition on ex parte contact, protection against biased adjudicators, separation of functions, proper notice, and a statement of findings and reasons.\(^{155}\) The officer who presides over an informal hearing must permit


\(^{147}\) See MODEL STATE ADMIN. PROCEDURE ACT OF 1981 §§ 4-401 to 4-403, 15 U.L.A. 100-03 (1990). This provision was adopted in Kansas. See KAN. STAT. ANN. § 77-533 (1989).

\(^{148}\) See MODEL STATE ADMIN. PROCEDURE ACT OF 1981 § 4-402.

\(^{149}\) See CAL. GOV’T CODE §§ 11445.10-11445.60 (West Supp. 1996). In § 11445.10, the legislature declared:

1. The informal hearing procedure is intended to satisfy due process and public policy requirements in a manner that is simpler and more expeditious than hearing procedures otherwise required by statute, for use in appropriate circumstances.

2. The informal hearing procedure provides a forum in the nature of a conference in which a party has an opportunity to be heard by the presiding officer.

3. The informal hearing procedure provides a forum that may accommodate a hearing where by regulation or statute a member of the public may participate without appearing or intervening as a party.

\(^{150}\) The Model Act requires that conference hearings be authorized by an agency rule. See MODEL STATE ADMIN. PROCEDURE ACT OF 1981 § 4-401. California does not require that an authorizing rule be adopted in cases where there is no disputed issue of material fact or in which the sanction is relatively trivial. California rulemaking is burdensome and costly and the Commission sought to avoid unnecessary rulemaking requirements. In addition, a requirement of advance rulemaking would surely operate to prevent use of informal hearings in many situations where they would be useful, either because the agency has not gotten around to adopting a rule or because rules already adopted overlooked particular situations in which informal hearings would be appropriate.

\(^{151}\) See CAL. GOV’T CODE § 11445.20(a) (West Supp. 1996).

\(^{152}\) These include cases that involve a monetary amount of not more than $1000; a student disciplinary sanction short of expulsion or suspension for more than ten days; an employee sanction that does not involve discharge, demotion, or suspension for more than five days; a licensee sanction that does not involve revocation or suspension for more than five days. See id. § 11445.20(b).

\(^{153}\) See id. § 11445.20(d); see also supra notes 73-76.

\(^{154}\) Obviously, this provision could not apply where a formal hearing is required by some other statute or by state or federal due process. See id. § 11445.20 cmt.

\(^{155}\) The bill of rights applies to all adjudicative proceedings. See id. §§ 11425.10(a), 11445.10 cmt.
the parties, and may permit others, to offer written or oral comments on the issues. However, "the presiding officer may limit the use of witnesses, testimony, evidence and argument, and may limit or eliminate the use of pleadings, intervention, discovery, prehearing conferences, and rebuttal."

The informal hearing procedure is an important innovation in administrative law. The Model Act provisions are carefully thought out and provided a useful starting point in drafting the California act. In this respect, the Federal Act has lagged badly behind state law innovation. It calls for more formality than is needed in many cases, thus needlessly increasing the costs, delays, and adversarialness of proceedings. Moreover, the rigidity of the Federal Act has produced a very negative consequence. Because the Federal Act provides only for formal hearings, presided over exclusively by ALJs whose hiring and retention are heavily regulated by statute, Congress has increasingly circumvented the APA entirely when it provides for new systems of regulation. Thus the Federal Act applies to a declining share of the total universe of federal adjudicatory proceedings. This was an instance in which federal practice provided a model that California wisely chose to avoid.

IV. CONCLUSION

California's new APA represents a sharp break with the past. For the first time, most significant adjudication by California state agencies is subject to a firm set of baseline provisions requiring fair adjudication. And for the first time, those agencies have discretion to conduct their adjudication in ways that may be less formal, costly, and adversarial than in the past. In this process, the Commission drew on the experience of both state and federal governments. The Federal APA provided a fixed star that the Commission could steer by. Often it followed the star, as in the case of the provisions relating to ex parte contact, separation of functions, deference to ALJ credibility decisions, and ADR. Sometimes it steered away, as in the case of the provision defining which adjudicatory proceedings would be covered and in the case of informal hearings. And sometimes, peculiarities of California law, practice, or politics determined

156. In this respect, California departs from the Model Act which allows only the parties to participate. See MODEL STATE ADMIN. PROCEDURE ACT OF 1981 § 4-402(3), 15 U.L.A. 102 (1990). The draftsmen believed that the informal approach might be very useful in cases involving substantial non-party participation such as environmental and land use planning disputes. 157. See CAL. GOV'T CODE § 11445.50 (West Supp. 1996). The presiding officer may permit cross-examination in an informal hearing, provided that the delay, burden or complication due to allowing it will be minimal; if the burden would be more than minimal, the case should be converted to a formal hearing. See id. § 11445.50(a). The "[a]gency, by regulation, may specify categories of cases in which cross-examination is deemed not necessary . . . under the informal hearing procedure . . . [b]ut the] presiding officer may allow cross-examination notwithstanding . . . [a] regulation if it appears . . . necessary." Id. § 11445.50(b). And the presiding officer's actions in deciding to permit cross-examination, or in converting the proceeding to a formal procedure in order to allow more cross examination, are not subject to judicial review. See id. § 11445.50(c).

158. Id. § 11445.40(b).

159. See supra text accompanying note 40.
the outcome, as in the case of the special treatment of licensing agencies and the exclusion from the Act of the Public Utilities Commission and State Board of Equalization.

Fifty years of experience under the Federal APA has validated the wisdom and prescience of its draftsmen. Their work has endured while the world of federal regulation changed in ways they could scarcely have imagined. This gold mine of experience and precedent is of incalculable value to anyone who sets out on the task of updating a state’s APA. It is a tribute to the Federal APA, now in its fifty-first year of existence, that so much of the new California act was inspired by its provisions.