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The Agency of the President and Cabinet Members Under the Administrative Procedure Act

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The field of administrative law is almost as old as our Constitutional form of government. From the very beginning of our national history there was evidence that administrative tribunals or commissions would play an important part in the development of our country. The report of the Attorney General's Committee on Administrative Procedure gives us an excellent historical picture:

"...The administrative process is not new. On the contrary it is as old as the Government itself; and its growth has been virtually as steady as that of the Statutes at Large. ...Of the fifty-one administrative agencies in the Federal Government in 1941, no less than eleven trace their beginnings to statutes enacted prior to the Civil War. The first session of the First Congress enacted three statutes conferring important administrative powers, two of which are antecedents of statutes now administered by the Bureau of Customs in the Treasury Department and the third of which initiated the long series of pension laws now in the charge of the Veterans' Administration." 1

James M. Landis pointed out the growing need for administrative agencies in a speech delivered in Philadelphia in 1937:

"...Perhaps the most striking development of the last century in governmental invention for the effectuation of policies is the administrative commission. The history of its origin and development in this country constitutes a most revealing chapter in human affairs. The circumstances that led in 1887 to the creation of the Interstate Commerce Commission are well known. First, there was the realization of the need for regulation arising from the complexity and significance of the development of the railroads, and the abuses which attended this development. ...Secondly, there was the breakdown of the common law procedures as applied to these problems, of which two may be selected as outstanding -- unreasonableness in rates and discrimination between persons and communities. Some continuing supervision over the railroad problem as a whole was demanded, for it had become only too evident that its solution could not be left to the casual and sporadic processes of private litigation.

The nature of this problem was perceived almost instinctively, and it was solved almost instinctively. The administrative agency

came into being not as a single comprehensive philosophical con-
ception but by a process of empirical growth." 2

Recognizing the growing importance of the administrative agency, the
question remains whether the President of the United States and his Cabinet
Members are "agencies" within the meaning of the Administrative Pro-
cedure Act. 3

A short introduction to the Act is in order. As has been pointed out, the
function of administrative tribunals has now become an integral part of our
form of government. The Supreme Court of the United States, through Mister
Justice Frankfurter, observes the "felt need of governmental supervision
over economic enterprise -- a supervision which could effectively be ex-
ercised neither directly through self-executing legislation nor by the judicial
process." 4

The initial outcries and misgivings concerning the administrative process
have now given way to the realization that it is here to stay. All that re-
mained of the old criticism was the complete lack of uniformity in the pro-
cedure of the various agencies. This deficiency was corrected on June 11,
1946, when President Truman approved the law known as the Administrative
Procedure Act. This bill was the final outcome of some ten years of serious
and conscientious study by the American Bar Association, interested scholars,
judges, and the Attorney General's Committee on Administrative Procedure.
All had an important role in the final construction of the bill. The legislative
history of the bill shows:

"...This situation has not been ignored by the Congress of the
United States. For ten years it has been considering legislation.
The difficulty has been the complexity of the subject, the distur-
bances of the times, and the world-shaking events in the inter-
national sphere. In considering the legislative proposals pre-
sented since 1933, the Congress has held many hearings and its
Committees have issued many reports on the subject.

The executive branch also has been concerned. The late Presi-
dent Roosevelt initiated or approved two major investigations on
the subject, both of which resulted in legislative recommendations
of far reaching consequence. Our great Attorney General, the
Honorable Tom Clark, has participated in the drafting of the pres-
ent bill, and he has repeatedly endorsed it." 5

Attorney General Clark summed up the feelings on the subject when he said:

"June, 1946, the date on which the Administrative Procedure Act
was approved by the President, is notable in the history of the
governmental process. The Act sets a pattern designed to achieve
relative uniformity in the administrative machinery of the Federal
Government. It effectuates needed reforms in the administrative
process and at the same time preserves effectiveness of the laws
which are enforced by the administrative agencies of the Govern-
ment." 6

2. Landis, The Development of the Administrative Commission, an address before
the Swarthmore Club of Philadelphia, February 27, 1937.
134, 142 (1940).
What the bill does, in substance, may be stated under four headings: (1) it provides that agencies must issue their rules of procedure; (2) it states the essential forms of administrative proceedings and their limitations; (3) it provides for administrative hearings in specified cases; and (4) it sets forth a simplified statement concerning judicial review. Thus it can be seen that the law as it now stands is an important piece of legislation. How does this new legislation affect the President and members of his Cabinet?

The section of the Act with which this article is most concerned is section 2, subsection (a), which reads as follows:

"Sec. 2 (a) Agency - ‘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. Nothing in this Chapter shall be construed to repeal delegations of authority as provided by law. Except as to the requirements of section 1002 of this title, there shall be excluded from the operation of this Chapter (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 expire on the termination of present hostilities. . ." 7

In any discussion concerning the President, reference must first be made to the Constitution of the United States to ascertain what powers the President has which are supreme in our tripartite form of government. Article II, section 2 establishes that the President is Commander-in-Chief of the Army and Navy, that he can make treaties with the advice and consent of the Senate, and that he may appoint certain officers by and with the consent of the Senate. These powers are so vested in the President that neither the legislature nor the judiciary may interfere with them. Concerning these matters, the President is not, nor can he be, an agency within the meaning of the Administrative Procedure Act. To hold otherwise would be to give to the legislature power which the Constitution never intended to give. It would, in effect, be saying that Congress has the power to pass legislation by which it is able to control the Executive branch of the government in its every function. That each branch within the framework of the Federal Government is supreme in its sphere of influence has been an established and accepted fact from the beginning of our nation’s history. The conclusion must be that where the President acts solely by reason of the authority vested in him under Article I, section 2 of the Constitution none of the provisions of the Act apply to him. The Act itself bears out this conclusion, declaring in Section 2, subsection (a): "Nothing in this Chapter shall be construed to repeal delegations of authority as provided by Law." 8 The interpretation of this statement is that the framers of the Act used this language in order to comply with the law as it now stands. This seems clear and is substantiated by the statement of the Senate Committee which helped draft the bill. 9 One eminent authority makes an observation on this phase of the subject matter:

8. Ibid.
9. See note 5 supra.
“In the light of these realities it seems to me clear that the Act should not be interpreted to modify the operation of some other more specific statute, unless the statutory language is clearly intended to accomplish that result.”

In the case of Springer v. Government of the Philippine Islands, 277 U.S. 189 (1928), Mister Justice Sutherland, at pages 201 and 202, sums up the argument in these words:

“It may be stated then as a general rule inherent in the American constitutional system, that, unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judicial power; the judiciary cannot exercise either executive or legislative power.”

It should be mentioned, however, that where the President issues an order that the agencies which he formulates by reason of his constitutional authority are to comply with the Administrative Procedure Act, the obvious result is that the Act will apply. As the Act has been passed for the public good, such an order by the President would be in complete accord with the best interests of the country as a whole.

Another problem arises, however, when the President acts, not by reason of his constitutional authority, but through legislative delegation. The Administrative Procedure Act makes no reference to this problem. The Congressional hearings concerning the Act make reference to it only once. During the House Judiciary hearings, when Mr. Clyde B. Aitchison, Interstate Commerce Commissioner, was testifying, the following colloquy took place:

“Mr. Walter: May I direct your attention to the definition of 'Agency' made by the Attorney General’s Committee on Page 4 of H.R. 1206, paragraph (a): ‘Agency’ means each office, board commission, independent establishment, authority, corporation, department, bureau, division, or other subdivision or unit of the executive branch of the Federal Government, and means the highest or ultimate authority therein.

Mr. Aitchison: That certainly is more precise than section 2 as we have it in H.R. 1203. Now, I want to ask this and split hairs again; I find the courts are excluded from section 2. Is the President? He makes rules; he makes adjudications of the type which are referred to in this Act. Now that is none of my business; I am just a citizen and throw the question in for whatever it is worth. I do not know what the intent is, of course.

Mr. Jennings: Well, if it operates to forbid the President from operating as a legislative agency, I would say it is good law.”

Referring to this discussion, a member of the New York Bar writes:

“No indication as to whether the President is included within the term ‘agency’ is made. Since both Congress and the courts are

11. See note 5 supra, at 123.
specifically excluded, it may well be inferred that when the President acts in the capacity of an administrative office the Act applies to him." 12

Under these circumstances the President falls under the classification of 'agency' within the meaning of the Act. The Act declares in Section 2, subsection (a) that 'agency' is defined as 'each authority', and that in subsection (b), 'person' includes 'individuals'. 13

Most of the agencies in the Federal Government today were created either expressly or impliedly by Congress.

"As a general rule, administrative agencies are of statutory origin, and their rights, duties, powers, and privileges are expressly or impliedly set forth in the statute creating them. Sometimes, however, the agencies are set up by executive order, but even in cases of this kind the order is promulgated pursuant to a statute. Examples of the latter type of agency are the Farm Credit Administration and the Federal Housing Administration." 14

In these cases the President is directly or indirectly an agency within the meaning of the Act. Consideration of the statute which created the Federal Housing Administration may be in order:

"The President is authorized to create a Federal Housing Administration, all the powers of which shall be exercised by a Federal Housing Administrator . . . who shall be appointed by the President by and with the advice of the Senate, shall hold office for a term of four years and shall be paid compensation at the rate of $15,000 per annum." 15

It is obvious that Congress gave to the President complete power to establish a Federal Housing Administration. The President, by executive order, appointed an administrator to carry out the program as established and desired by the Chief Executive. In this instance, clearly, the President indirectly, and the administrator directly, are agencies with the meaning of the Administrative Procedure Act and must comply with its provisions.

"... (A)gencies, necessarily, cannot be defined by mere form such as departments, boards, etc. If agencies were defined, by form rather than by the criterion of authority, it might result in the unintended inclusion of mere "housekeeping" functions or the exclusion of those who have the real power to act." 16

The above quoted paragraph is strong evidence that the legislators intended the widest possible interpretation of the word "agency" in order to bring all agencies within the purview of the Act. The President has the "authority" to control the Federal Housing Administrator and must be an agency within the meaning of the Act. There is no reason why the President should be given a status different from that of all the other agency heads who fall within its scope. Certainly, it cannot be said that to do so will place upon him any undue

13. See note 5 supra, at 196.
16. See note 5 supra, at 253.
The facts would seem to indicate the opposite conclusion, considering that the late President Roosevelt appointed investigatory committees to delve into the problems of administrative procedure, and that President Truman signed the bill approving the Act. There is little doubt that the Presidents wholeheartedly agreed to conform to its provisions.

By an Act of Congress, passed August 8, 1950, the President is authorized to provide for the performance of certain of his functions by other officers of the government. By this "Delegation Act" he is allowed to "... designate and empower the head of any department or agency in the executive branch or any official thereof. . . ., to perform without approval, ratification, or other action by the President. . . ." any of the functions vested in him by law and similar functions of the officers under him.

What is the effect of this new law with reference to the agency of the President? Does it minimize the application of the Administration Procedure Act to him as an agency? In some respects it does, insofar as he may freely "without approval, ratification, or other action" delegate his powers. The department head receiving the delegated powers becomes directly responsible for conformance with the provisions of the Act. It leaves the President indirectly responsible. It must be pointed out, however, that only by specific grant of authority from the legislature is he vested with this new "power of delegation". It is not derived from his Constitutional authority. It follows, therefore, that he is still an agency within the meaning of the Administrative Procedure Act.

A further question to be answered is whether a Cabinet Member is an agency within the meaning of the Act. To answer this question, the Secretary of Agriculture will be used as an example.

That the Act applies to the Department of Agriculture is pointed out in the Act at Section 2, subsection (a), which defines agency as:

"... 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." 19

The Senate Judiciary Committee, in reference to the problem of agency, while debating the passage of the bill declared:

"It is necessary to define agency as 'authority' rather than by name or form, because of the present system of including one agency within another or of authorizing internal boards or divisions to have final authority. 'Authority' means any officer or board, whether within another agency or not, which by law has authority to take final and binding action with or without appeal to some superior administrative authority. Thus 'divisions' of the Interstate Commerce Commission and of the so-called Schwellenbach Offices of the Department of Agriculture would be 'agencies' within the definition." 20

The Secretary of Agriculture is an agency within the meaning of the Act as long as he can take "full" and "final" action on matters coming before the various agencies established by the Department of Agriculture. Evidence

18. Ibid.
19. See note 7 supra.
that he has such power is indicated in the following example given by the Solicitor of the Department of Agriculture:

"Milk is one of the commodities subject to the provisions of the Act (Agricultural Marketing Agreement) and its marketing is being regulated by orders of the Secretary in twenty-nine milk marketing areas.

The procedure for issuing a milk certificate is as follows: whenever the Secretary believes that the issuance of an order will tend to effectuate the policy of the Act, notices are given of a public hearing on the proposed program and at such hearing all interested persons are given an opportunity to be heard. If the Secretary determines upon the basis of the evidence introduced at the hearing that the issuance of the order will tend to effectuate the purpose of the Act, he makes a finding to that effect. A tentative marketing order is then submitted to the handlers of milk within the area for signature, and the proposed order is submitted to the producers of such milk for such approval. If the handlers of fifty per cent or more of the milk marketed within the area sign the agreement, and if at least two-thirds of the producers or the producers of at least two-thirds of the milk marketed in the area approve the order, it may become effective. The order may also be issued if the necessary approval of the producers is obtained and the Secretary finds, with the approval of the President, that the refusal of the handlers to sign the agreement tends to prevent the effectuation of the policy of the Act and that the issuance of the order is the only practicable means of accomplishing that result." 21

The above example brings out clearly and forcibly the power of the Secretary. He has the "full" and "final" authority to decide whether an order will issue. He is the responsible person, the actor, as it were, or as is stated in the Act itself, the "authority" for issuing marketing orders. It follows that because he has such authority, he comes directly within the provisions of the Administrative Procedure Act as an agency.

F. Trowbridge vom Baur, referring to the Executive department, observes that "... only the officer or group designated constitutes the administrative agency and must discharge its functions independently of duties as a member of the executive department." 22 Clearly, this is authority for concluding that no attempt is being made by the legislature to interfere with the Executive branch of the government as such. "... (T)he (Administrative Procedure) Act quickens our sense of responsibility toward achievements of sound government. In the Department of Agriculture, every effort is being made to conform fully with the letter and spirit of the law." 23

To summarize: (1) Where the President acts under his Constitutional authority, having no reference to any specific or general grant from the legislature, he is not an agency within the meaning of the Administrative Procedure Act; (2) Where the President acts under a general or specific grant of authority from the legislature, he is an agency within the meaning of the Administrative Procedure Act; (3) A Cabinet Member is an agency within the meaning of the Administrative Procedure Act.

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22. vom Baur, 1 Federal Administrative Law 95 (1942).
23. See note 21 supra, at 43.