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A Reply

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and instead bend its efforts toward ensuring full compliance with the APA, educating all agencies as to the uniformities that Congress by the APA aimed to guarantee.²⁶ The legal leaders of the Government owe us no less.

A REPLY

Professor Newman premises his article — *What Agencies Are Exempt from the Administrative Procedure Act?* — with a statement made in a Recent Decision Comment in Volume 35 of the NOTRE DAME LAWYER, which he calls unsupportable and dangerous.¹ This statement was: "The Administrative Procedure Act . . . applies only to agencies which are engaged in rule-making or adjudication; since the Civil Rights Commission does neither, it is not subject to the procedural provisions of the APA."² It is the purpose of this Reply to answer Professor Newman's criticism of the above quotation, and to comment briefly on his thesis that the Civil Rights Commission, contrary to the above quotation, is subject to the Administrative Procedure Act;³ and that, although the Civil Rights Commission is not subject to the adjudication procedures prescribed by the APA, it is subject to section 3 publication requirements and to section 6 safeguards.⁴

The Comment in Volume 35 of the NOTRE DAME LAWYER was an analysis of a 1959 three-judge federal court decision in Louisiana, *Larche v. Hannah*, in which the court issued a permanent injunction restraining the Civil Rights Commission from carrying on its investigations in Louisiana unless it gave subpoenaed witnesses the "traditional rights" of confrontation and cross-examination.⁵ The primary concern of this Comment was not with the Administrative Procedure Act. In fact, the broad statement that the "Civil Rights Commission . . . is not subject to the procedural provisions of the APA" was made in the beginning of the Comment only as a preface to a case-by-case analysis. Subsequently, the Comment focused its attention on the nature of this purely investigative tribunal — the Civil Rights Commission — and the traditional safeguards provided for witnesses before such a tribunal.⁶ Undoubtedly, the statement from this Comment, standing alone and out of context, was too broad, and therefore, unsupportable. The APA does apply to the Civil Rights Commission, as so ably demonstrated by Professor Newman; it does require the publication of the Civil Rights Commission's pro-

26 Indicating that several agencies need education, see the *House Committee Survey supra* note 19, Part 2, pp. 240, 247, and 262 (Patent Office, Commerce Appeals Board, and Foreign Excess Property Office); Part 9, pp. 949, 983, 988, 992 (Office of Munitions Control, Lend-Lease and Surplus Property Division, and Passport Office); Part 11C, p. 1745 (Indian Claims Commission); p. 1833 (NLRB); p. 1845 (NMB); Part 11B, p. 1385 (Fed. Home Loan Bank Board); p. 1565 (Foreign Claims Settlement Commission); p. 1603 (GSA); *cf.* p. 1431 (Federal Mediation and Conciliation Service). *Query* as to the TVA (p. 2031).

1 36 NOTRE DAME LAWYER 320 (1961).

2 Recent Decision, 35 NOTRE DAME LAWYER 440 (1960).

3 36 NOTRE DAME LAWYER 320, 322 (1961).

4 *Id.* at 320-21.

5 *Larche v. Hannah*, 177 F. Supp. 816 (W.D. La. 1959), *rev'd.*, 363 U.S. 420 (1960).

6 Recent Decision, 35 NOTRE DAME LAWYER 440, 441 (1960):

With but few exceptions the courts liken the investigative body to a grand jury. Notably witnesses before investigative bodies are denied the right to counsel, to a transcript of the proceedings, to a public hearing, and to have a personal stenographer present. The right of an individual witness before such bodies to cross-examine adverse witnesses seems never to have been considered; nor has confrontation. . . .

Witnesses before investigative tribunals are accorded the privilege against self-incrimination, where the state constitution provides for it, or where the case involves a substantial possibility of incrimination under a federal statute. In the light of the foregoing discussion, this privilege would seem to be the only protection these witnesses have.

cedural rules under section 3; and it does require certain safeguards for the person appearing voluntarily or under subpoena in agency investigations under section 6. But the LAWYER Comment was concerned with "confrontation" and "cross-examination" procedures which are provided for in the more formal adjudication sections of the APA. From these sections the Comment claimed the Civil Rights Commission was exempted by the APA. With this Professor Newman agrees.⁷ Also, the Comment did not go as far as the Justice Department, which has maintained that the Civil Rights Commission is in no way an "agency" within the meaning of the act.⁸ The Comment in the LAWYER observes that the exceptions in section 5 of the APA would take investigations of the Civil Rights Commission out of the adjudication provisions of sections 5, 7 and 8 of the act, thus indicating that the Civil Rights Commission was assumed to be an "agency" within the meaning of the statute.

Earlier in Volume 35 of the NOTRE DAME LAWYER, a Legislation and Administration Note,⁹ *A Literal Interpretation of the APA As Applied to Purely Investigative Functions*, is in agreement with Professor Newman on the first part of his thesis "that the Civil Rights Commission is subject to the Administrative Procedure Act." The Note deals with nine other agencies besides the Civil Rights Commission and is concerned mostly with the adjudication provisions of the APA — sections 5, 7 and 8. But it, by its own approach, supports Professor Newman's thesis. For example, the Note treats each of the 10 federal agencies studied as an "agency" within the meaning of the APA;¹⁰ each investigative function studied is submitted to the rigors of the definitions of "rule-making" and "adjudication" of section 2 of the APA, to see if any of the investigative functions fall under the adjudication procedure of sections 5, 7 and 8;¹¹ and in its introduction, the Note points out that "the APA requires all federal agencies to publish certain information in the Federal Register as to their own procedure and make public other administrative materials."¹²

In dealing with the investigative functions of the Civil Rights Commission, the Note in the LAWYER agrees impliedly with Professor Newman in the second part of his thesis, to wit, that it does "matter whether the Civil Rights Commission is exempt from the Administrative Procedure Act."¹³ The LAWYER observed: "Of interest is the fact that the commission does not feel bound even by section 3 of the APA, which requires publication by every agency of its rules of practice in the Federal Register."¹⁴

In summary, we submit, Professor Newman is correct in his specific thesis, that the Civil Rights Commission is not entirely exempt from the Administrative Procedure Act. But the value of Professor Newman's constructive criticism lies in a proffered approach to the APA for all agencies. This approach, which Professor Newman never openly advocates,¹⁵ is a careful, literal interpretation of the act, so that it "will be operative 'across the board,'"¹⁶ as Congress intended it should. Many agencies take the view that certain provisions of the APA ought not to apply to some of their particular actions or functions; they rationalize, without looking at the specifics of the act, and they extend this rationalization to a general conclusion that the APA exempts them entirely. This view is what Professor Newman criticizes about the Civil Rights Commission. Under this approach, many agencies

7 36 NOTRE DAME LAWYER 320, 324 (1961).

8 *Ibid.*

9 Note, 35 NOTRE DAME LAWYER 77 (1959).

10 *Id.* at 79.

11 *Id.* at 81.

12 *Id.* at 79.

13 36 NOTRE DAME LAWYER 320, 324 (1961).

14 Note, 35 NOTRE DAME LAWYER 77, 93 (1959).

15 36 NOTRE DAME LAWYER 320, 324-25 (1961).

16 S. Doc. No. 248, 79th Cong., 2d Sess. 250 (1946).

not only ignore the mandate of Congress in enacting an act with minimum, uniform requirements for all federal agencies,¹⁷ but deprive witnesses and parties before the agencies of minimum information and safeguards. The NOTRE DAME LAWYER Note expresses rather pointedly the approach to the APA that Professor Newman hints at throughout his article.

[I]t appears that the drafters of the APA have capably excepted these investigations, which should not be brought under the more formalized procedure of adjudication. . . .

This suggests that a literal interpretation, or strict construction, of the APA will produce a desirable result. Although the literal interpretation of the APA would seem sure to result in a formal procedure for non-adjudicative, non-rule-making investigations, such is not the case. . . .

In general, it is submitted that the APA is not the imperfect and ambiguous act it is often claimed to be.¹⁸

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17 *Ibid.*:

Manifestly the bill does not unduly encroach upon the needs of any legitimate government operation, although it is of course operative according to its terms even if it should cause some administrative inconvenience or changes in procedure. It is brief, but necessarily not oversimplified. Functional classifications and exemptions have been made, but in no part of the bill is any agency exempted by name. . . .

The bill is an outline of minimum essential rights and procedures.

18 Note, 35 NOTRE DAME LAWYER 77, 94-95 (1959).