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CHAIRMAN'S MESSAGE

Separation of Functions: Obscurity Preserved



ANTONIN SCALIA

At its December, 1981 Plenary Session, the Administrative Conference of the United States (ACUS) rejected by a close vote a Proposed Recommendation from its Committee on Agency Decisional Processes entitled “Separation of Functions and Staff Communications with Decisionmakers in Agency Proceedings,” thereby abandoning a project that had been several years in gestation. That action was contrary to the hopes of the Section of Administrative Law, which had endorsed the general approach of the Draft Recommendation at its Summer, 1981 Council Meeting.¹ Since the proposal in its final form does not appear in any published source,² I am using these pages to record it, with the hope that it may prove useful to those who must grapple with separation-of-functions problems in the future—particularly agency lawyers who must make the difficult separation decisions. In addition, I want to unburden myself of a few thoughts concerning the significance of the Conference rejection.

The statutory provisions of the Administrative Procedure Act (APA) governing separation of functions have the great virtue of conciseness—and the corresponding vice of uncertain application. Section 554(d) provides that an employee “engaged in the performance of investigative or prosecuting functions for an agency in any case may not, in that or a factually related case, participate or advise in the

¹The Draft Recommendation presented to the Section Council was not identical to that later presented to the ACUS Assembly; several relatively minor changes were made at the instance of the ACUS Council. Nor was the proposal presented to the Section Council identical to the last published ACUS Committee Draft, which appeared at 46 Fed. Reg. 26487 (May 13, 1981), a few subsequent changes having been made by the Committee.

²Earlier proposals were published for public comment at 45 Fed. Reg. 68949 (Oct. 17, 1980) and 46 Fed. Reg. 26487 (May 13, 1981).

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decision, recommended decision, or agency review . . . except as witness or counsel in public proceedings.”³ Two obvious deficiencies of the provision are apparent: (1) It applies only to formal *adjudication*⁴ (i.e., adjudication conducted pursuant to the procedures set forth in sections 556–57 of the APA)—and not even to *all* formal adjudication, since initial licensing and adjudication involving rates, facilities or practices of public utilities and carriers are specifically exempted.⁵ (2) It applies only to adjudication that is *required* to be formal by the terms of the statute itself—so that if an agency should voluntarily apply sections 556–57 procedures where they are not technically required, the separation-of-functions requirement would not automatically be invoked. The Proposed Recommendation addressed these problems by specifying that the principle of separation of functions should be applied “in any proceeding set by an agency for disposition as a formal proceeding, whether or not it is governed by section 554(d) of the Administrative Procedure Act.” Thus, the separation requirement would apply to formal rulemaking and formal initial licensing as well as to other formal adjudication;⁶ and it would apply to all proceedings which the agency directs to be conducted pursuant to sections 556–57, whether or not compliance with those provisions is statutorily required.⁷

So much of the proposal was uncontroversial. Most of the other problems it addresses are more difficult. Essentially they relate to the meaning that should be given the key statutory terms:

• “*engaged in performance.*” This obviously includes personal performance. But does it include actual supervision of one who performs? Supervisory authority over one who performs, without actual supervision? Subordinate relationship to one who performs?

• “*of investigative or prosecuting functions.*” Does this include participation by a commission staff member in the decision whether to designate a matter for hearing? Response by a technical expert to a question posed by the prosecuting staff? Testimony by a technical

³5 U.S.C. § 554(d). For obvious reasons of necessity, agency heads are explicitly exempted from the prohibition. 5 U.S.C. § 554(d)(C).

⁴See 5 U.S.C. § 554(a).

⁵5 U.S.C. § 554(d)(A) & (B).

⁶This reaffirms an earlier ACUS recommendation. Resolution No. 3, 1 C.F.R. § 310.2 (1973).

⁷The agency would remain free, however, to use formal procedures without specific reference to §§ 556–57, thereby avoiding any separation-of-functions requirement. See Note 3 of the Proposed Recommendation. It was thought necessary to leave this option available lest the mandatory imposition of separation requirements in cases where they would not be feasible deter voluntary adoption of desirable formal procedures.

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expert? Briefing and argument by the agency's general counsel in connection with judicial review of a factually related case?

• “*may not . . . participate or advise in the decision, recommended decision, or agency review.*” Does this include staff consultation with the agency heads regarding the decision whether to launch an investigation? Issue a complaint? Designate a matter for hearing? Add new parties to a pending case? Reopen a closed case? Specify issues for adjudicative resolution? Terminate, narrow or expand a pending case? Resolve procedural issues?

The great virtue of the Proposed Recommendation is that it approaches these questions with the circumspection and flexibility they require. It sets forth the general principle that an “adversary” is subject to the separation-of-functions prohibitions (§ B(1)(a)); but its only categorical designation of who does or does not constitute an “adversary” is the specification that the term includes “a staff member who at any time participates personally as an investigator or in planning, developing or presenting evidence,” and does not include “one who as presiding officer or assistant to the presiding officer helps to develop the record in a proceeding” (§ B(1)(b)). Beyond that, the definition of “adversary” and the specification of disqualified staff members are not hard and fast, but must vary according to “the nature of the proceeding and the issues in dispute as well as the nature and the degree of participation by the staff members in question” (§ B(1)(c)).⁸ For as the committee report points out, the nature of the proceeding and the nature of the staff member's participation vitally affect not only the appearance of fairness but also the formation of that “will to win” which is the touchstone of adversariness. This is the crux of the proposal: a rejection of the notion that a unitary description of disqualified personnel can be applied across the board to the multitude of formal agency proceedings—from civil penalty hearings to ratemaking, from license revocation to formal rulemaking—and without regard to the varying degrees of staff participation.

Paragraph B(2) elaborates upon this flexible approach, specifying those activities that “ordinarily” should not be disqualifying. And para-

⁸The earlier version of paragraph B(1)(c) had specified that the remaining subparagraphs of paragraph B were meant as guidelines in giving further content to the word “adversary.” See 46 Fed. Reg. 26487 (May 13, 1981). This was changed at the instance of the ACUS Council to its present form, which recites that the succeeding subparagraphs are guidelines with regard to disqualification for “less direct participation or association”—presumably less direct than that described in the limited definition of “adversary” in paragraph B(1)(b). Personally, I prefer the earlier version, which was that presented to the Section Council.

graphs B(3) and B(4) make a distinction between “non-accusatory cases” and “accusatory cases or other like proceedings which involve the imposition of sanctions or allegations of conduct bearing on a party’s fitness to acquire or retain a valuable privilege.” As to the former, the proposal sets forth activities that “ordinarily” should not be disqualifying; as to the latter, it describes staff members who “ordinarily should be disqualified.” Mere supervisory relationship to an adversary, for example, ordinarily would disqualify in an accusatory case but not in a non-accusatory proceeding.⁹

Beyond highlighting this essential element of flexibility, I will let the Proposed Recommendation speak for itself. I will indulge in a few musings, however, concerning the significance of the Conference’s action on this item—and concerning the perplexing disagreement between the Conference and the Section of Administrative Law.

The reader will note that the portions of the Proposed Recommendation that have the most “bite”—subparagraphs 2 through 5 of paragraph B—apply only “to advice from staff members to agency heads, and do not apply to contacts between staff members and other agency decisionmakers.” To those unfamiliar with the history of the proposal, this limitation may seem to be merely the acknowledgment of yet another important variable. The ACUS committee evidently thought that administrative law judges (ALJs) require a somewhat higher degree of insulation—or, to put the point the other way round, that the doctrine of necessity justifies more liberal rules for contact with agency heads—so that the specification of permissible and impermissible contacts at lower levels within the agency was left for another day. Unfortunately, that would be an inaccurate speculation. The fact is that the committee proposal originally extended to *all* agency decisionmakers.¹⁰ The limitation to agency heads was adopted only after the inclusion of ALJs provoked vigorous and overwhelming opposition at the Conference’s December, 1980 Plenary Session, resulting in recommitment of the committee proposal. And that successful operation (judging from the floor debate) rested not upon the need for subtle refinement and differentiation but upon antagonism towards all off-the-record consultation between lower-level decisionmakers (ALJs in particular) and agency staff.

⁹The major reason the Section of Administrative Law endorsed only the basic thrust of the Proposed Recommendation, and not the precise text, was disagreement over the adequacy of the terminology “accusatory” and “non-accusatory” to delineate the categories of proceedings that require fundamentally different treatment.

¹⁰See 45 Fed. Reg. 68949 (Oct. 17, 1980).

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This is, I think, a noteworthy phenomenon, demonstrating how far the consensus has changed in recent years regarding the institutional nature of the ALJ's decision. It represents the continuation and perhaps the completion of trend observed (and opposed) by the original Administrative Conference in 1962:

The complex nature of many rate proceedings makes it necessary for an initial decision to reflect understanding of accounting procedures, engineering terms, and statistical data. Even if a hearing examiner is able over a period of years to acquire expertness in these varied disciplines, the days required to perform detailed analysis of exhibits or elaborate computations is often an ill-use of such an examiner's time. If the examiner lacks these skills, depriving him of any opportunity to consult on an informal basis with someone who has them results in an initial decision which is less informed and useful than it might be. Instead of reflecting the examiner's independent judgment, it reflects his ignorance. Use of specialists to aid in analyzing the record, to serve as a sounding board for ideas of the hearing examiner, to prepare schedules or data in support of conclusions already reached, or the like, is not an invasion of the examiner's prerogative or a departure from the parties' desire to have an initial decision reflecting the examiner's independent judgment.

We emphasize the need for assistance and consultation because an attitude has grown up in recent years of considering anything other than complete isolation of the hearing examiner as somehow improper. The exaggerated concern with *ex parte* communications engendered by a few flagrant instances of wrongdoing and by repeated discussion has created a climate in which many examiners are hesitant to talk over the problems they are wrestling with in their cases even with one another. Practices which are everyday occurrences with many of our ablest judges (*e.g.*, researching a point in the library to supply facts and argument relating to a policy choice; utilizing a disinterested person for an abstract discussion of ideas relating to a question of law presented in a case; using a law clerk or other subordinate as a sounding board for ideas or as eyes-and-ears in carrying out detailed research; etc.) are avoided not because the hearing examiner feels he would not benefit by them but solely because they might expose him to foolish or unreasonable criticism. The intelligent and informed participation of a hearing examiner cannot be produced by cutting him off from his prior experience, his daily contacts, the insights sometimes available in the library, or the opportunity to exchange views with disinterested persons. The prevailing climate which induces hearing examiners to operate in an intellectual vacuum can and must be changed.¹¹

The view criticized in that excerpt now apparently holds sway—or at least cannot be effectively opposed—within the Conference itself, a body in which agency officials hold a 60% voting majority.

¹¹Report of the Committee on Rulemaking to the [Temporary] Administrative Conference, S. Doc. No. 24, 88th Cong., 1st Sess. 104–05 (1962).

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The other point of interest is the disagreement between the Conference and the Section of Administrative Law regarding the desirability of the final proposal. To the extent that any proposal for sound administration may be said to favor one side rather than the other, this one would appear to be a net benefit to the *agencies* rather than private practitioners. To be sure, it does not permit intra-agency contacts that the law now forbids, and perhaps even excludes some intra-agency contacts that are not strictly forbidden. But its major purpose and effect is simply to eliminate uncertainty; and, as the ACUS consultant's report suggests, the victims of that uncertainty are primarily the agencies—which, to avoid possible impairment of lengthy proceedings, apply prophylactic restrictions upon intra-agency contacts.

How, then, to explain the fact that our Section of Administrative Law, composed predominately of private practitioners, approved the basic thrust of the proposal, while the Administrative Conference, where agency officials are in the majority, rejected it? That result certainly does credit to the disinterestedness of both bodies — unless (as Voltaire once said when asked why it was he always spoke flatteringly of a certain fellow who had nothing but criticism for him) we may both have been mistaken. As Chairman of the Section I must assume, *ex officio*, that the Section was both disinterested and correct, and that the fault must lie with the Conference. Perhaps the new Reagan administration officials in the Conference, fresh from the private sector, underestimated the strain which prophylactic separation places upon agency resources. Or perhaps they overestimated the degree to which the proposal would impose constraints not strictly required by law. Or perhaps they and the private-sector members of the Conference alike simply preferred the known devil of uncertainty to the unknown devil of the Proposed Recommendation. Or perhaps one should abandon all attempt at detailed analysis and rest content with Dr. Johnson's pithy explanation of an error in his Dictionary.¹²

In any case, the ill fated ACUS proposal is set forth below. Those who desire a more intensive exploration of the problems to which it is addressed, and a description of the case law it reflects, should read the excellent study prepared by the committee's consultant, Prof. Michael Asimow, which appears in 81 *Col. L. Rev.* 759 (1981).

¹²"Ignorance, madam, pure ignorance."

PROPOSED RECOMMENDATION
SEPARATION OF FUNCTIONS AND STAFF
COMMUNICATIONS WITH DECISIONMAKERS IN
AGENCY PROCEEDINGS

Preamble

Separation of functions is a principle of administrative law which seeks to protect the independence and the objectivity of the adjudicative function by restricting its combination with inconsistent functions, such as prosecution, investigation, or advocacy.

This principle is implemented in the Administrative Procedure Act by section 554(d), which precludes agency prosecutors or investigators in a case from participating in the decision in that case, either as decisionmaker or as off-the-record adviser.¹ Although section 554(d) is applicable only to certain formal adjudications, agencies observe its principles in virtually all proceedings where the record is developed through formal hearing procedures.

In formal proceedings, separation of functions serves to insulate decisionmakers from off-the-record communications from agency staff members whose personal involvement in the proceeding is likely to impair their ability to give objective advice. This insulation of the decisionmaker also serves to enhance the parties' confidence in the impartiality of the decisionmaker and in the overall fairness of the proceeding. However, separation of functions is not free of costs. It precludes agency decisionmakers from obtaining advice from the best qualified staff adviser if that expert is considered to have been involved as an adversary in the proceeding, and it can interfere with the ability of agency heads to set the general policy of the agency and to become aware of emerging problems. It also has the potential to cause serious delays, costly duplication of staff, and confusion about what communications are permissible, and to interfere with other collateral agency functions.

The principle of separation of functions need not be applied on an all-or-nothing basis in formal proceedings. Distinctions can be drawn between the different roles of staff members and the types and stages of proceedings for the purpose of establishing a framework for decision which provides basic fairness to the participants without imposing unnecessary costs on the regulatory process. This recommendation provides guidance as to the kinds of activities which should be deemed inconsistent with later participation in the decision-making process and as to the kinds of contacts between agency decisionmakers and staff adversaries which should be permissible under agency practice.

¹Section 554(d) also requires that officers who preside over adjudications subject to that section not be responsible to or subject to the supervision or direction of the prosecuting or investigative staff of the agency. Analytically this requirement is also an implementation of the principle of separation of functions. However, we are not aware of any dissatisfaction with the present institutional arrangements for carrying out this requirement, and it is beyond the scope of this recommendation.

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In informal rulemaking proceedings different considerations apply. In such proceedings the purpose of requiring public notice and opportunity to comment is to guarantee to the public at large an opportunity to submit views for agency consideration. The agency has an affirmative obligation to consider all relevant matter presented in the proceeding. This obligation can be especially weighty when the proposed rule has occasioned widespread interest since this usually results in a large record, with complex facts and policy issues and many affected participants. In this context the value of according to each participant the procedural protections common to formal proceedings is outweighed by the nature of the proceeding and the agency's need to avail itself fully of staff expertise. The Conference therefore recommends that agencies ordinarily not employ separation of functions in informal rulemaking proceedings.

However, the opportunity for the public to comment in informal rulemaking requires that information considered to be significant by the agency in the proceeding be made public, including information introduced by staff.²

Recommendation

A. The principle of separation of functions should be applied in any proceeding set by an agency for disposition as a formal proceeding³ whether or not it is governed by section 554(d) of the Administrative Procedure Act.

B. The following principles should govern the application of separation of functions in proceedings covered by paragraph A:

1. A staff member who is an "adversary" in such a proceeding should not participate or advise in the decision, except through an on-the-record presentation.

- a) An "adversary" in a proceeding for purposes of separation of functions is a staff member whose role in that proceeding or a factually related proceeding is likely to cause him to identify with or against the interest of one of the parties.
- b) The term "adversary" includes a staff member who at any time participates personally as an investigator or in planning, developing or presenting evidence in that proceeding or a factually related proceeding (but not one who as presiding officer or assistant to the presiding officer helps to develop the record in a proceeding).

²See ACUS Recommendations 76-3, 77-3.

³The Administrative Conference has recommended that the APA be amended to extend the principles of section 554(d) to all formal proceedings. Resolution No. 3, 1 C.F.R. Section 310.2 (1973). The Conference believes the guidelines set forth in this Recommendation to be consistent with the requirements of the APA. The term "formal proceeding," as used in this recommendation, means any proceeding governed by sections 556 and 557 of the APA, as well as any proceeding, either rulemaking or adjudication, which the agency, by regulation or order, requires to be conducted in conformity with those sections. This recommendation does not address the question of the desirability of formal proceedings for any particular category of agency determination. For example, see ACUS Recommendation 72-5.

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- c) Agencies may also disqualify staff members because of less direct participation or association in the matter under consideration but, in deciding whether to disqualify such staff members, agencies should consider the nature of the proceeding and the issues in dispute as well as the nature and the degree of participation by the staff members in question.

The guidelines in the following paragraphs are intended to assist agencies in applying paragraph B(1)(c) to advice from staff members to agency heads, and do not apply to contacts between staff members and other agency decisionmakers.

2. A staff member ordinarily should not be disqualified from advising agency heads solely by reason of: (a) assisting the agency in deciding whether to investigate a matter, start a proceeding, or set a case for formal hearing, or in framing the issue to be considered at the hearing; or (b) assisting the agency in preparing for or conducting collateral matters such as informal public meetings, budget planning, informal rulemaking, or Congressional testimony.

3. In non-accusatory cases, including those rulemaking, ratemaking, licensing, and other like proceedings which do not involve the imposition of sanctions or allegations of conduct bearing on a party's fitness to acquire or retain a valuable privilege, a staff member ordinarily should not be disqualified from advising agency heads solely by reason of:

- a) organizational relationship, as a supervisor, colleague or subordinate, of an adversary;
- b) occasionally furnishing technical information or technical advice to an adversary, and
- c) participating on behalf of the agency in the same or a related judicial proceeding.

4. In accusatory cases or other like proceedings which involve the imposition of sanctions or allegations of conduct bearing on a party's fitness to acquire or retain a valuable privilege, agencies should expand the category of staff members who are disqualified from advising agency heads. In particular, the following staff members ordinarily should be disqualified:

- a) The subordinates and the immediate supervisors of those who are considered adversaries by reason of their having actively engaged in planning, developing or presenting the case;
- b) a staff member who participates on behalf of the agency in a related judicial proceeding involving the merits of the administrative proceeding, other than a proceeding to review agency action on the basis of the administrative record;
- c) a staff member who provides technical information or technical advice to an adversary, and
- d) a staff member who participates as a witness.

5. A staff member who is an adversary should be available to advise the agency on predesignation matters (such as those mentioned in 2(a) and collateral matters (such as those mentioned in 2(b)).

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C. Separation of functions should not prevent agency heads from informing themselves of problems related to agency management and policy which arise in or affect particular proceedings.

D. An agency should not ordinarily apply separation of functions in rule-making unless the proceeding is governed by sections 556 and 557 of the APA or set by the agency for disposition as a formal proceeding.