Recommendation 80-6

Intragovernmental Communications in Informal Rulemaking Proceedings

(Adopted December 12, 1980)

(a) The growing complexity and scope of government regulation resulting from informal rulemaking proceedings have increased the importance of communication and coordination among agencies. Because the President, as the nation's Chief Executive, may be deemed accountable for what agencies do, efforts to achieve policy coordination through Presidential channels have become increasingly significant. In recent years the President has attempted to do this through a variety of analytical and procedural mechanisms, such as the promulgation of Executive Order 12044 and establishment of the Regulatory Analysis Review Group and the Regulatory Council. The exercise of Presidential direction has not been limited to the establishment of general mechanisms, however. The President, his advisers, and units of the Executive Office have also on occasion intervened directly in the formation of policy during particular rulemaking proceedings. This intervention has raised questions by private participants about the manner in which executive influence should be exercised.

(b) This recommendation addresses the appropriate standards for communication to Executive departments and agencies from the President, advisers to the President, units of the Executive Office, and other Executive branch and independent agencies when the recipient agency is making policy decisions through the process of informal rulemaking. It pertains to rulemaking of general applicability, not to proceedings (whether rulemaking or adjudication) that involve the distribution, modification or withdrawal of valuable privileges to identifiable private interests. To some degree it is a corollary to ACUS Recommendation 77-3, which is concerned with restrictions upon private participants' oral and written communications in informal rulemaking. The recommendation is based upon the need to accommodate two competing elements of a good rulemaking process. The first is the desirability of being able to identify a coherent body of factual information upon which the rulemaking agency's decision is based, and to make this information available to all—other participants in the process, the staff of the agency itself, and reviewing courts. The second is the desirability of affording government officials opportunity to engage in uninhibited internal debate over the policy implications of this body of information, subject only to the requirement that the ultimate

conclusion be rational and adequately explained. Both principles are recognized in this recommendation. Units of the government other than the one conducting the rulemaking may have perspectives or expertise not readily available to the rulemaking agency that would enhance the quality of internal debate on the implications of the information in the public file, and their participation should be encouraged. At the same time, rulemaking agencies should not permit, and other units of the government should not request, any opportunity to introduce into the proceeding material factual information (as distinct from indications of governmental policy) not made available to other participants.

(c) The Conference is also concerned with avoiding any possibility that intragovernmental communications from outside the rulemaking agency might serve as undisclosed or inadvertent conduits for new material factual information, and with providing adequate opportunities for other participants to respond to material factual information that is introduced.

(d) The recommendation addresses the degree to which agencies should be free to receive certain kinds of intragovernmental communications in informal rulemaking without having a duty to place them in the public file of the proceeding. It is not intended to suggest any limitation on the discretion of any rulemaking agency to disclose such communications to the public.

Recommendation

1. Any Executive department or agency engaged in informal rulemaking in accordance with the procedural requirements of section 553 of the Administrative Procedure Act should be free to receive written or oral policy advice and recommendations at any time from the President, advisers to the President, the Executive Office of the President, and other administrative bodies, without having a duty to place these intragovernmental communications in the public file of the rulemaking proceeding except to the extent called for in paragraph 2.

2. When the rulemaking agency receives communications from the President, advisers to the President, the Executive Office of the President, or other administrative bodies which contain material factual information (as distinct from indications of governmental policy) pertaining to or affecting a proposed rule, the agency should promptly place copies of the documents, or summaries of any oral communications, in the public file of the rulemaking proceeding. All communications from these sources containing or reflecting comments by

persons outside the government should be so identified and placed in the public file, regardless of their content. A rulemaking agency should consider the importance of giving public participants adequate opportunity to respond if the material presents new and important issues or creates serious conflicts of data.

3. The Administrative Conference takes no position in the present recommendation concerning rulemaking by other than Executive departments and agencies.

Citations:

45 FR 86407 (December 31, 1980)

__ FR _____ (2012)

1980 ACUS 27

Separate Statement of Peter A. Bradford, William A. Butler, Laurence Gold, Charles R. Halpern, Rhoda H. Karpatkin, Alan B. Morrison, Katherine E. Sasseville, and Thomas M. Susman

We oppose this recommendation because we believe that executive branch agencies should be encouraged to disclose, not withhold, all of the factors which may have influenced their decisions in informal rulemaking. The public's right to know the reasons for a decision far outweighs agency decisionmakers' rights to secrecy. We have heard no arguments and are aware of none which convince us that putting written material and summaries of oral comments in the public record created during informal rulemaking will inhibit robust debate in that process. This recommendation takes on added importance given the current trend in administrative law away from cumbersome formal adjudications and towards streamlined informal notice-and-comment rulemaking. Our fear is that this recommendation will invite public cynicism regarding informal administrative rulemaking, and generate contempt for a process where *post hoc* agency rationales carefully selected from the public record are offered as the bases for decisions reached for what may well be quite different, undisclosed and perhaps legally irrelevant reasons. Such a perception of executive branch rulemaking will undermine public confidence in the integrity of agency decisionmaking.

This recommendation extends beyond the President and his closest advisors and allows all executive branch agencies to involve themselves secretly in informal rulemaking. In our view agencies should be encouraged to provide their views during the public comment period so that the public might respond, or at least be aware of the views expressed. The recommendation actually encourages executive branch agencies as well as the White House to wait until the public record is closed before making their views known. At a minimum, we believe a summary of all oral comments and copies of written comments should be placed in the public file as soon as possible, and in no event later than the date when the rule is promulgated.

We also believe that the fact/policy distinction set up by the recommendation is unworkable in practice. "Material factual information" can easily overlap or be intertwined with "policy advice" or "indications of governmental policy." Indeed, agencies often make that precise point in resisting disclosure under the Freedom of Information Act. There will be an inevitable bias in favor of nondisclosure for fear of revealing "policy advice," and there is no means for the public to know that an agency has made a determination that a particular comment will not be disclosed or to seek judicial review of that determination. Further, we do not understand how a recipient agency is to know whether comments from another agency or the White House are ones "containing or reflecting comments from persons outside the government" using their governmental contacts as conduits, or how the recommendation's supposed safeguard in this respect will be policed. We also believe that in any but the most extraordinary circumstances, a rulemaking agency should give public participants "adequate opportunity to respond if the material presents new and important issues or creates serious conflicts of data" and not simply "consider" doing so.

In all likelihood this recommendation will expose agency heads to increased political pressures from either other executive agencies or outside groups who will use those agencies as conduits. Such pressures are likely to include considerations other than those made relevant by the statutes which the particular rulemaking implements. Moreover, the courts will be unable to serve as a check upon consideration of statutorily irrelevant factors since they cannot review that which is not disclosed.

We are not trying to shut off executive branch comment, to impose onerous burdens imported from formal adjudications on informal rulemaking, to prolong or delay government decisionmaking, or to provide procedural opportunities for subsequent litigation. Nor do we doubt that future Presidents must control federal executive branch agencies more effectively,

and ultimately be held accountable for their actions. The dispute here is over whether the recommendation is a fair, or even a necessary, way to achieve these ends.

We simply do not see the reason for promoting secrecy. Disclosure is simple and fair. Policies promoting secrecy over disclosure in rulemaking do not constitute good government. Therefore, we dissent.