



Recommendation 80-4

Decisional Officials' Participation in Rulemaking Proceedings

(Adopted June 5-6, 1980)

Several recent lawsuits have challenged the propriety of an official's participation in rulemaking proceedings. In those cases, efforts were made to force the "disqualification" of persons whose judgment might shape an agency's regulations, much as disqualification might have been sought in an adjudicatory proceeding allegedly tainted by the adjudicator's bias.

The concepts of bias (real or supposed) pertinent to the fairness of a judicial trial or an administrative adjudicatory hearing have limited applicability to rulemaking proceedings. The political, legislative, and institutional aspects of the rulemaking function and the frequency with which persons selected for policymaking responsibilities are selected precisely because they have previously declared their beliefs make direct application of a judicial test for disqualification inappropriate. Moreover, the determinants of a "fair hearing" that are implicit in the due process clause are inapplicable in proceedings of an essentially legislative nature, whose procedures are controlled by statutory rather than constitutional provisions.

Nevertheless, the acceptability of regulations and, indeed, the repute of the administrative process may be seriously impaired if the judgment of agency officials who can determine the content of rules is considered to have been tainted by a conflict of interest, by an inflexible prejudgment of pertinent factual propositions, or by indecorous manifestations of hostility. Each administrative agency that possesses power to promulgate regulations should adopt procedures and standards that define whether an official should abstain (or, if need be, be barred by the agency) from participating in a particular rulemaking proceeding.

The recommendation that follows proposes minimum standards of propriety. More exacting standards may be formulated by an agency for the conduct of its affairs or may be self-imposed by an official who on his own motion chooses not to participate in a particular proceeding. The basic proposition underlying the recommendation is that unimpaired capacity to exercise a fully informed judgment, as well as freedom from personal, private interest in the outcome of particular matters, is implicitly demanded of those to whom Congress has granted power to formulate rules for the future.



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The standards sketched here are consonant with those embodied in statutes that govern government employees' behavior, in statutory procedures that have generally been provided for rulemakings, and in the six precepts of ethical employee behavior formulated by the Office of Personnel Management.¹

The following recommendation is directed toward agencies that conduct rulemaking proceedings under the informal procedures of the Administrative Procedure Act, 5 U.S.C. 553, or particular statutes defining rulemaking procedures other than formal, on-the-record rulemaking. The recommendation relates solely to agency personnel with decisional responsibilities in the rulemaking process. Definition will perform vary from agency to agency because of differences in internal organization and allocation of responsibility. No suggestion is made here that every public employee who, at one stage or another, may contribute in one manner or another to rulemaking proceedings is to be subjected to interminable tests of probity and objectivity before the ultimately responsible "decisional personnel" can act.

Recommendation

A. Procedures. 1. Each rulemaking agency should promulgate procedures by means of which persons who desire to participate in a rulemaking proceeding (or who may be affected by its outcome) can challenge the suitability of participation by particular decisional personnel in that proceeding. The procedures should identify the factors that bear on suitability and should indicate the appropriate time, place, and means of making challenges, along with an indication of opportunity for intra-agency review if one be available.

2. The procedures should also make plain that a decisional official, whether or not challenged, may voluntarily abstain from participating in a particular proceeding.

B. Conflict of Interests. 1. A decisional official whose financial interests or those of whose immediate family may be distinctively favored by choices to be made in a particular

¹ 5 CFR § 735.201a:

"An employee shall avoid any action, whether or not specifically prohibited by this subpart, which might result in, or create the appearance of:

- (a) Using public office for private gain;
- (b) Giving preferential treatment to any person;
- (c) Impeding Government efficiency or economy;
- (d) Losing complete independence or impartiality;
- (e) Making a Government decision outside official channels; or
- (f) Affecting adversely the confidence of the public in the integrity of the Government."



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rulemaking proceeding should voluntarily abstain (or be required by the agency to abstain) from participation in that proceeding, subject to publicly stated and applied agency exception for *de minimis* holdings.

2. New agency officials should be subjected to "cooling off" periods of variable duration, during which their participation in a rulemaking proceeding would presumably be inappropriate if

- (i) The proceeding specifically affects the financial interests of an immediately prior employer or client; or
- (ii) The official's immediately prior employer or client is a participant in the proceeding; or
- (iii) The official has participated in the proceeding before becoming a public employee.

An agency's application of a "cooling off" requirement should not, however, reflect absolutes. It should take into account the following factors, singly or in combination:

- (a) The extent of the official's participation in a prior private capacity in the pending rulemaking proceeding;
- (b) The elapse of time between the prior involvement and the official's present activity as a public employee;
- (c) The nature and magnitude of the rulemaking's possible impact on the interests of the prior employer;
- (d) The generality or specificity of the rulemaking's scope;
- (e) The extent of the prior employer's participation;
- (f) Applicable professional standards;
- (g) Senatorial consideration, during the confirmation process, of the official's prior relationships and activities.

3. An official's non-financial interests, associations, or activities (whether or not related to past employment) may in some instances suggest the desirability of recusal or, if need be, a direction to the official to abstain from participating in a particular proceeding. If the official's



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appointment has been confirmed by the Senate with knowledge of the appointee's past interests and activities, a required cooling off period would ordinarily be inappropriate. As to officials of lesser prominence, however, agencies may suitably utilize in respect of non-financial interests the procedures sketched above, related to financial conflict of interests or to cooling off periods. The question of precluding participation should arise only when an identifiable interest is significant in relation to the proceeding and is likely to be substantially affected by its outcome. Mere membership in an association would not ordinarily be a ground for disqualification or recusal.

4. Finally, agency conflict of interests rules should make emphatically plain that they are in aid of the agency's self-management; that they are measures in furtherance of its own quality control rather than in amplification of judicial control; and that they are agency declarations for guidance of its own staff concerning decorum. An agency that is insensitive or lax in fulfilling its declared expectations will no doubt be of concern to the Congress or to the Executive, but an agency's heightened attentiveness to the qualities of decisional personnel should plainly not expand the occasions for or the scope of review of rulemaking proceedings.

C. Prejudgment of Fact. 1. Disqualification for prejudgment in rulemaking should be limited to prejudgments of particular "adjudicative" or "specific" facts, where it may be inferred from the particular statutory framework, agency procedural choices, or other special circumstances that the agency's determination of those facts is to be based on the evidentiary record developed in the proceeding. Cause for disqualification can appropriately be decided by the agency only after it is established in the proceeding that such facts will be materially at issue in the proceeding. Such disqualification is inappropriate for factual judgments that are the consequence of earlier stages of the proceeding, or for prejudgments of policy.

2. To avoid undue interference with the legislative, policymaking aspect of the rulemaking process and other agency functions, disqualification for prejudgment of fact should be considered by the agency only after it has determined that critical "adjudicative" or "specific" facts require resolution on the evidentiary record developed in the proceeding, and should require at least a preponderant showing that an agency member or decisional employee has a closed mind regarding those facts.

D. Decorum and Expression of Views. A rulemaking proceeding should be conducted with decorum and respect for the interests of all concerned. Agency officials should therefore conscientiously avoid intemperate expression or other behavior suggestive of an irrevocable commitment to a predetermined outcome of the proceeding. This does not mean, however,



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that agency officials may not express factual judgments based on previous experience or on information received during a proceeding; nor does it suggest that officials may not act upon or voice opinions concerning underlying issues of policy. Expressing those opinions in interchanges with committees of the Congress, other administrative bodies, the public, and regulated groups is a desirable normality of administration, rather than an abnormality to be shunned, and is not a basis on which exclusion from a proceeding may appropriately be suggested.

Citations:

45 FR 46776 (July 11, 1980)

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