



Recommendation 86-4

The Split-Enforcement Model for Agency Adjudication

(Adopted December 4, 1986)

Separation of functions in administrative adjudication has usually been achieved through internal barriers within the agency which separate and insulate those employees who judge from those who investigate and prosecute. The chains of command, however, come together at the top in the person of the head or heads of the agency, who, through subordinates, are responsible for all three functions. Internal separation of functions is sanctioned and contemplated by the Administrative Procedure Act. When combined with the protections accorded to administrative law judges who preside over adjudicatory hearings, it appears, on the whole, to have worked satisfactorily in providing fair and impartial factfinding, while permitting the agency to speak with a single voice on matters of law and policy. Yet the experience with internal separation of functions has never entirely silenced the critics who argue that it is impossible to achieve evenhanded justice when enforcement and adjudicative functions are lodged in the same agency.

Congress has, therefore, on a number of occasions sought to carry separation of functions a step further. In the Occupational Safety and Health Act of 1970, an agency in the Department of Labor, the Occupational Safety and Health Administration (OSHA), was assigned the responsibility for promulgating industrial health and safety standards and for enforcing these standards through inspections and the filing of complaints against employers. The responsibility for adjudicating such complaints, however, was assigned to a wholly independent three-member agency, the Occupational Safety and Health Review Commission (OSHRC), which employs administrative law judges to hear enforcement cases brought by OSHA and to issue initial decisions subject to commission review. A similar division of responsibilities was created in the area of mine safety and health in the Federal Mine Safety and Health Amendments Act of 1977. This statute assigned rulemaking and enforcement to the Mine Safety and Health Administration in the Department of Labor and adjudication to the independent Federal Mine Safety and Health Review Commission (FMSHRC).¹

¹ The system for enforcing certain provisions of the Federal Aviation Act also conforms generally to this model but was not part of the study. See 49, App. U.S.C. § 1903(a)(9).



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An Administrative Conference study of the experience with the "split-enforcement model" used in the occupational safety and mine safety legislation was unable to conclude whether this model achieves greater fairness in adjudication than does the traditional structural model. Fairness is an important but an unquantifiable and subjective value. Therefore, the Conference takes no position on whether the split-enforcement model is preferable to a structure in which responsibilities for rulemaking, enforcement and adjudication are combined within a single agency. Our study did reveal, however, that because Congress, in enacting the Occupational Safety and Health Act, did not specify clearly the respective responsibilities of OSHA and OSHRC in resolving questions of law and policy, unnecessary conflicts have arisen between the agencies and there has been confusion expressed by reviewing courts over which agency's views were entitled to the greater deference. For a variety of reasons these conflicts and confusion have been largely avoided in the later enacted mine safety legislation.

Recommendation

1. Where Congress establishes an enforcement scheme in which rulemaking and prosecution are assigned to one agency and adjudication to another agency, it should make clear in which agency it intends to place programmatic responsibility and direct the courts to look to that agency for authoritative expressions of law or policy. Congress should also attempt to foresee other areas of potential conflict, such as control over litigation and settlements, and should so far as possible specify the respective responsibilities of each agency and the procedures for resolving disagreements.

2. Generally speaking, Congress should provide that in adjudicatory challenges to standards promulgated pursuant to agency statutory authority, the adjudicatory agency must accept the rulemaking agency's interpretation of the standard unless it can be shown that the rulemaking agency's interpretation is arbitrary, capricious, or otherwise not in accordance with the law. So far as is practical, the rulemaking agency should provide notice to the affected public concerning the administrative interpretation of its rules and regulations, the policies that they represent, and their intended implementation in enforcement.

3. Where uncertainties exist with regard to the responsibilities of agencies already implementing split-enforcement schemes, Congress should act to resolve those uncertainties consistent with the foregoing, if the agencies are unable to do so.



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Citations:

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