



Statement # 2

Statement of the Administrative Conference on the ABA Proposals to Amend the Administrative Procedure Act

(Adopted June 7-8, 1973)

In August 1970, the House of Delegates of the American Bar Association adopted twelve resolutions calling in general terms for amendments to the Administrative Procedure Act. They are a valuable means of focusing the attention of the Administrative Conference, the organized bar, and other interested persons upon revisions and improvements in the APA suggested by a quarter-century of experience.

The Conference has studied the resolutions and the implementing recommendations prepared by the Administrative Law Section of the ABA. The Conference has expressed its views in recommendations previously adopted respecting the subject matter of several of the resolutions. We believe it desirable, however, to state in a single document our views on the resolutions and on those parts of the implementing recommendations which appear to raise issues separate from those posed by the resolutions.

Resolution No. 1 [See Note (1)]

The Conference approves in principle Resolution No. 1, calling for improved definitions of "rule" and "order" so as to distinguish clearly between the nature of rulemaking and the nature of adjudication. The Conference has commenced, and will continue, the further study that is needed to determine how this can most effectively be achieved.

Resolution No. 2

The Conference agrees with Resolution No. 2. We have previously called for eliminating from 5 U.S.C. § 553 the exemption for rules relating to "public property, loans, grants, benefits, or contracts" (Recommendation No. 69-8). We also favor limiting or eliminating the present exemption that applies whenever a military or foreign affairs function is involved, provided that appropriate safeguards can be retained to protect the aspects of those functions that concededly need special treatment. This subject deserves further study, which the Conference has already begun.



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Resolution No. 3

Resolution No. 3 would extend the existing provisions regarding separation of functions in 5 U.S.C. § 554(d) to all formal proceedings, both adjudicatory and rulemaking; the existing exceptions for ratemaking, initial licensing and formal rulemaking generally would be eliminated. With respect to such formal proceedings, the Conference approves this proposal insofar as it applies to agency staff who have actually engaged in investigative or prosecutorial functions in the particular proceeding, including persons who have actually exercised supervisory authority over such functions once the formal phase of the proceeding has commenced. We do not believe, however, that agency officials having general organizational or supervisory responsibility for such functions should, solely by virtue of that responsibility, be barred from performing their customary function of advising agency members in proceedings not presently covered by 5 U.S.C. § 554(d).

Resolution No. 4

The Conference approves the purpose of Resolution No. 4, which seeks the prohibition of *ex parte* communications between agency members and parties or other interested persons outside the agency on any fact in issue in an adjudicatory or rulemaking proceeding subject to 5 U.S.C. §§ 556 and 557. We leave open for further consideration by the Council and cognizant committees whether this objective can most effectively be sought by legislation or by agency rules.

Resolution No. 5

As the numerous Conference recommendations of general applicability indicate, the Conference endorses the principle of uniformity of administrative procedures—including procedures governing the conduct of formal adjudication—where considerations of fairness or expedition do not justify differences. It is extremely difficult to determine, however, where such considerations are widely applicable without an intensive agency-by-agency examination of the particular procedure in question. As a matter of priority, the advantages to be gained by seeking standardization through agency-by-agency examination of a procedure whose only apparent flaw may be its nonuniformity are not always as important as improvement of some procedures whose actual operation has been shown to be defective. The work involved, and hence the opportunity cost, becomes even greater if the uniform procedure is to be not merely recommended but imposed, making it necessary to pass upon exceptions for particular agencies. For these reasons, the Conference would not desire a statutory mandate to enforce



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the single goal of uniformity with respect to particular provisions of administrative law, but would prefer to further, as it has in the past, all the values of sound administrative procedure—including the value of uniformity—by making recommendations in those areas where the need and the utility of Conference action are most apparent.

Resolution No. 6

The Conference has already called for agencies to consider delegating final decisional authority to presiding officers or to intermediate appellate boards, subject to discretionary review by the agency (Recommendation 68-6). ABA Resolution No. 6 and that part of its Recommendation No. 8 which authorizes such delegation are consistent with and would implement the Conference recommendation, and we endorse them.

Resolution No. 7

Resolution No.7 would require agencies "to the extent practicable and useful" to provide by rule for prehearing conferences. The Conference has already endorsed the principal objective of this resolution, which is increased use of prehearing conferences in adjudicatory proceedings (Recommendation 70-4). We agree with the conclusion expressed in ABA Recommendation No.7 that pursuit of this objective is best conducted through the Conference.

Resolution No. 8 [See Note (2)]

The general language of Resolution No. 8 raises a number of considerations, which the Conference speaks to as follows:

a. The Conference agrees that the presiding officer should have substantial authority in the conduct of adjudicatory proceedings. It has already recommended that agencies be authorized, at their discretion, to accord administrative finality to the decisions of administrative law judges (Recommendation 68-6). We endorse the ABA proposal insofar as it would achieve that result.

b. Where final decision is to be made by the agency itself, an intermediate decision to which the parties may file exceptions serves to narrow and focus the issues, whether of fact, law or policy. Moreover, where the case significantly involves questions of fact that hinge upon credibility and demeanor, an intermediate decision by the presiding officer is the only means of obtaining a judgment on these factors. Accordingly, it is ordinarily highly desirable that there be an intermediate decision, even when there is no disputed issue of fact.



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c. In all cases of formal adjudication other than initial licensing, both of the foregoing reasons usually apply with full force, and an intermediate decision by the administrative law judge should, as under present law, be required absent unanimous waiver by the parties.

d. In ratemaking, initial licensing and rulemaking, fact issues turning upon credibility and demeanor are not often central. Since the need for expedition may outweigh the value of an intermediate decision in some such proceedings, agencies should be authorized to omit the intermediate decision, either on a case-by-case basis or by a determination applicable to a specifically defined category of proceedings. In other such proceedings it may be useful for the agency to supply for party comments its own tentative decision or the recommended decision of a responsible agency employee other than the presiding administrative law judge.

Resolution No. 9

Resolution No. 9, as elaborated upon by its implementing recommendation, calls for legislation authorizing agencies to provide by rule for abridged on-the-record procedures for use by unanimous consent of the parties. We do not believe that such legislation would accord the agencies any authority they do not already possess, and it might be construed to invalidate certain procedures at present employed in the absence of unanimous consent. Accordingly, we recommend against implementation of this proposal.

Resolution No. 10

Resolution No. 10 would grant all agencies authority to make subpoenas generally available in adjudicatory proceedings. Those agencies which conduct adjudications subject to 5 U.S.C. §§ 554, 556 and 557 or otherwise determined on the record after hearing should, as a general rule, possess subpoena power, and subpoenas should be available to the parties in such proceedings. We favor an amendment to the Administrative Procedure Act which would achieve this result with respect to adjudications subject to §§ 554, 556 and 557. It is not feasible or desirable, however, to make subpoenas available to either the agencies or the parties in every case of informal adjudication. Thus, amending the Administrative Procedure Act to provide a grant of subpoena power in appropriate cases of informal adjudication will require a definition of the category of proceedings to be covered; since framing a workable definition is exceedingly difficult, it may be found preferable for Congress to make such grants of subpoena power on a less general basis. In any event, we favor retention of that provision of the Administrative Procedure Act (5 U.S.C. § 555(d)) which permits the agencies to require by rule a



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statement or showing of general relevance and reasonable scope of the evidence sought before issuance of a subpoena.

Resolution No. 11

The Conference agrees in principle with the proposal that agencies be required to provide by rule the procedure applicable to cases of informal adjudication. We are convinced that in view of the vast range of informal agency adjudication, more empirical study is necessary before sound procedures of general applicability can be formulated.

Resolution No. 12

The Conference does not favor at this time amending the Administrative Procedure Act to treat agency issuance of prejudicial publicity. We believe that there exists at present an adequate legal remedy for agency publicity which affects the integrity of an on-the-record agency proceeding. We agree with the American Bar Association that agency practices in the issuance of publicity adversely affecting persons in their businesses, property or reputations also present a problem, and we have proposed in our Recommendation 73-1 means of dealing with it.

Citations:

38 FR 16841 (June 27, 1973), as amended at 39 FR 23045 (June 26, 1974)

___ FR _____ (2013)

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Separate Statement of Max D. Paglin, Earl W. Kintner, Anthony L. Mondello, William A. Nelson, Charles F. Bingman and John H. Powell, Jr.

The above-named members of the Committee on Agency Organization and Personnel are of the opinion, for the reasons set forth in the Staff report accompanying the proposed Recommendation, that the Conference's position on Resolution No. 3 of the ABA Proposals (Separation of Functions) should be in the form and language originally submitted by the Council and various committees, to wit:



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Resolution No. 3. Resolution No. 3 would extend the existing provisions regarding separation of functions in 5 U.S.C. § 554(d) to all formal proceedings, both adjudicatory and rulemaking; the existing exceptions for ratemaking, initial licensing, and formal rulemaking generally would be eliminated. With respect to rulemaking of particular applicability, all ratemaking, and initial licensing, the Conference approves this proposal insofar as it applies to agency staff actually engaged in investigative or prosecutorial functions, including the actual exercise of supervisory authority over such functions in a particular case. We do not believe, however, that agency officials having general organizational or supervisory responsibility for such functions should, solely by virtue of that responsibility, be barred from performing their customary function of advising agency members in proceedings not presently covered by 5 U.S.C. § 554(d). With respect to rulemaking of general applicability, the Conference believes there should be no statutory requirement of separation of functions.

Separate Statement of Malcolm S. Mason

I join in the above statement of Max D. Paglin and other named members of the Committee on Agency Organization and Personnel, except that I favor that portion of the Assembly's amendment to the original submission which would permit consultation with staff members whose exercise of supervisory authority occurs prior to commencement of the formal phase of the proceeding. More generally, I am of the view that various portions of the Conference's Statement concerning the ABA proposals overemphasize notions of formal neatness at the expense of realistic examination of the actual problems encountered in actual agencies in various kinds of proceedings.

Notes: (1) See Administrative Conference Statement #3 in connection with Resolution #1.

(2) The views expressed above on Resolution #8, concerning the role of presiding officers in formal proceedings, were adopted by the Administrative Conference on May 30-31, 1974, replacing the following text, which was contained in the Statement adopted on June 7-8, 1973:

The Conference agrees that the presiding officer should have substantial authority in the conduct of adjudicatory proceedings. The Conference has already recommended legislation to authorize agencies, at their discretion, to accord administrative finality to the decisions of administrative law judges (Recommendation 68-6). We endorse the ABA proposal insofar as it would achieve that result.



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The Conference shares the Association's view that an administrative law judge who has presided over the reception of evidence should exercise responsibility for rendering the initial decision, with limited exceptions. The specification of those exceptions and other matters set forth in the ABA's implementing recommendation raise issues which the Chairman's Office of the Conference and the Committee on Agency Organization and Personnel have studied in some depth and discussed with the relevant committee of the Administrative Law Section of the ABA. Since further study and discussion would be fruitful, the Conference takes no position on these matters at the present time.