

**First Report
of the
Conference on Administrative
Procedure**

**Called by the
President of the United States
on
April 29, 1953**



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**First Report of the
Conference on Administrative Procedure
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FOREWORD

The President of the United States, on April 29, 1953, at the instance of the Chief Justice of the United States in his capacity as Chairman of the Judicial Conference of the United States, called a conference concerning unnecessary delay, expense and volume of records in some adjudicatory and rule-making proceedings in the Executive Departments and Administrative Agencies. To this Conference the Attorney General invited representatives of 56 departments and agencies having adjudicatory and rule-making functions; and at the request of the President, members of the Federal Judiciary, Federal Trial Examiners and members of the Bar participated.

The Conference was directed to study the problems above described, to exchange information, experience and suggestions, and to evolve by cooperative effort principles which may be applied and steps which may be taken severally by the departments and agencies toward the end that the administrative process may be improved to the benefit of all. It was not contemplated that the Conference would attempt to impose rules upon the departments, agencies or litigants.

The results of the studies made thus far by the Conference of the problems giving rise to unnecessary delay, expense and volume of records in adjudicatory and rule-making proceedings in the Executive Departments and Administrative Agencies are contained in the following

first Report. For the convenience of all, the Conference has formulated certain specific recommendations which are placed in the forefront of the Report. Some of these recommendations are addressed to the President of the United States, some to the Judicial Conference of the United States, some to the several Executive Departments and Administrative Agencies having these functions. They are not designed for universal and uniform adoption by all of the departments and agencies, but for such selection and variation as, taking into consideration the particular functions, organization and procedures of each department or agency, may best contribute to the reduction of delay and expense, or of the volume of records, incident to adjudicatory and rule-making proceedings* in so far as consistent with the requirements of justice.

* The usage in these recommendations and in the comments which follow conforms to the definitions contained in Section 2 of the Administrative Procedure Act of June 11, 1946 (5 U.S.C. 1001), subject to the limitations contained in the foreword. Thus the word "agency" includes all authorities, whether Department, Agency or Commission, having adjudicatory or rule-making proceedings which are subject to judicial review.

I

RECOMMENDATIONS ADOPTED
BY THE CONFERENCE ON
NOVEMBER 23-24, 1953

A. The Conference recommends to the President of the United States:

OFFICE OF ADMINISTRATIVE PROCEDURE. The Conference recommends to the President of the United States the establishment of an Office of Administrative Procedure, and that provision be made:

1. That the Office perform the following functions:
 - (a) carry on continuous studies of the adequacy of the procedures by which Federal agencies determine the rights, duties, and privileges of persons;
 - (b) initiate cooperative effort among the agencies and their respective bars to develop and adopt as far as practicable, uniform rules of practice and procedure;
 - (c) collect and publish facts and statistics concerning the procedures of the agencies;
 - (d) assist agencies and this Conference in the formulation and improvement of their administrative procedures.
2. That the Office be established in the Department of Justice under the supervision of the Attorney General.
3. That the Office consist of a Director and a staff.
4. That the Director be appointed for an indefinite term.

5. That the Director make appropriate arrangements for securing the advice of representatives of the agencies, the bar, and other interested persons, in connection with the performance of his duties.
6. That it be the duty of each agency promptly to furnish to the Director all information on its administrative procedures which he may request and to assist him by all appropriate means.

B. The Conference recommends to the Judicial Conference of the United States:

- 1. EXCLUSION OF EVIDENCE. That the United States Courts be urged to encourage hearing officers and agencies in formal administrative proceedings to exclude irrelevant, immaterial and repetitious evidence.**
- 2. CERTIFICATION AND FILING OF RECORD. That the several United States Courts of Appeals be urged to adopt a uniform rule providing, in all cases where a petition to review an order of an agency of the Federal Government has been filed:**
 - (a) the time within which the certified record is to be filed;**
 - (b) that except where the applicable statute otherwise requires, the record certified may be shortened or abbreviated**
 - (i) as the petitioner and the agency involved may by written stipulation designate, or**
 - (ii) as the court on motion of any party or on its own motion may order,****to encompass only that part of the record before the agency which is necessary to enable the court to pass upon the questions and issues raised by the appeal;**
 - (c) that a supplemental record may be certified**
 - (i) as the petitioner and the agency involved may by written stipulation designate, or**
 - (ii) as the court on motion of any party or on its own motion may order.**
- 3. FILING OF BRIEFS PRIOR TO PRINTING OF RECORD. That the several United States Courts of Appeals be urged to adopt a uniform rule providing in all cases where a petition to review an order of an agency of the Federal Government has been filed:**

- (a) that there may be filed in the case on stipulation of petitioner and respondent agency, or on order of the court on motion of any party or on its own motion, a joint printed appendix containing the matters of record relied on by the parties in their briefs and which the parties desire the court to read, such joint printed appendix to be filed within the time provided in paragraph (e) hereof;**
- (b) that when the petitioner or petitioners and the respondent agency so stipulate to the use of the procedure provided in (a) above, or when the court requires its use, such procedure shall be binding on all parties to the proceeding;**
- (c) that responsibility for the printing of the joint printed appendix shall be upon petitioner, but such petitioner shall have no responsibility to include in the joint printed appendix any part of the record on behalf of any other party when such other party fails or neglects to supply to petitioner, not later than five days after the time prescribed by paragraph (e) hereof for the filing of the final brief in the cause in question, a clear and specific designation of the record to be printed on behalf of such other party; provided, however, that nothing in this rule shall be interpreted as altering any rule or practice with respect to costs;**
- (d) that the joint printed appendix shall be so indexed and paged as to make ready reference to the certified record accurate and clear;**
- (e) that the time for filing briefs and the joint printed appendix under this rule, except as**

otherwise permitted by the court, shall be as follows: petitioner's brief, within 40 days after the filing of the transcript of record with the court; respondent's brief, within 30 days after the filing of the brief for petitioner; petitioner's reply brief, within 15 days after filing of the brief for respondent; and the joint printed appendix, not later than 10 days prior to the time set for oral argument in the case;

- (f) that when the above practice is not agreed to by the parties, the court's rules, otherwise applicable, shall govern.**



C. The Conference recommends to the agencies:

- 1. ELIMINATION OF UNNECESSARY DELAY, EXPENSE AND VOLUME OF RECORDS. That every agency consider unnecessary delay, expense, and volume of records in adjudicatory and rule-making proceedings to be detrimental to the public interest.**
- 2. STUDY OF PROCEDURE. That every agency having adjudicatory or rule-making functions make a comprehensive and intensive study of its own procedure in order to discover and eliminate any unnecessary delay, expense, or volume of records which may presently occur in its proceedings.**
- 3. STATUS OF AGENCY COUNSEL. That the agencies define by rule the status of agency counsel in the following respects:**
 - (a) the authority of agency counsel to participate in the proceedings;**
 - (b) whether such participation is to be mandatory or permissive;**
 - (c) whether, and under what circumstances, agency counsel need be served with any notices or other papers;**
 - (d) the extent to which agency counsel may or should take an advocate position or should confine himself to development of relevant materials;**
 - (e) the authority of agency counsel to stipulate as to facts or testimony; and**
 - (f) the authority of agency counsel to settle controversies or transmit offers of settlement to the agency or its authorized officials.**
- 4. DEFINITION OF ISSUES BEFORE HEARING. That the agencies require that in all proceedings the issues to be adjudicated be made initially as pre-**

cise as possible, in order that hearing officers may proceed promptly to conduct the hearings on relevant and material matter only. Particularity should be required in complaints, answers, applications for rules or licenses, and petitions to intervene. In proceedings in which there is only one interested party besides the agency, the orders setting hearings should clearly specify the issues to be heard.

5. **PREHEARING AND OTHER CONFERENCES.** That the agencies encourage hearing officers to call and conduct prehearing conferences and other conferences during hearings, with a view to the simplification, clarification, and disposition of the issues involved, and with a further view to the shortening of the proof on the issues.
6. **PREHEARING CONFERENCE RULE.** That the agencies adopt the following rule or one of similar import:

In any proceeding the agency or its designated hearing officer upon its or his own motion, or upon the motion of one of the parties or their qualified representatives, may in its or his discretion direct the parties or their qualified representatives to appear at a specified time and place for a conference to consider

- (a) the simplification of the issues;
- (b) the necessity of amendments to the pleadings;
- (c) the possibility of obtaining stipulations, admissions of facts and of documents;
- (d) the limitation of the number of expert witnesses;

- (e) such other matters as may aid in the disposition of the proceeding.

The agency or its designated hearing officer shall make an order which recites the action taken at the Conference, the amendments allowed to the pleadings and the agreements made by the parties or their qualified representatives as to any of the matters considered, and which limits the issues for hearing to those not disposed of by admissions or agreements; and such order shall control the subsequent course of the proceeding unless modified for good cause by subsequent order.

7. SUBMISSION OF DOCUMENTARY EVIDENCE IN ADVANCE. That the agencies require with respect to all classes of proceedings in which it is practicable:

- (a) that all documentary evidence which is to be offered during the taking of evidence be submitted to the hearing examiner and to the other parties to the proceeding sufficiently in advance of such taking of evidence to permit study and preparation of cross-examination and rebuttal evidence;
- (b) that documentary evidence not submitted in advance in accordance with the requirement of paragraph (a) be not received in evidence in the absence of a clear showing that the offering party had good cause for his failure to produce the evidence sooner;
- (c) that the authenticity of all documents submitted in advance in a proceeding in which such submission is required, be deemed admitted unless written objection thereto is

filed prior to the hearing, except that a party will be permitted to challenge such authenticity at a later time upon a clear showing of good cause for failure to have filed such written objection.

8. EXCERPTS FROM DOCUMENTARY EVIDENCE. That the agencies adopt the following rule or one of similar import:

When portions only of a document are to be relied upon, the offering party shall prepare the pertinent excerpts, adequately identified, and shall supply copies of such excerpts, together with a statement indicating the purpose for which such materials will be offered, to the hearing examiner and to the other parties. Only the excerpts, so prepared and submitted, shall be received in the record. However, the whole of the original document should be made available for examination and for use by opposing counsel for purposes of cross-examination.

9. TRIAL BRIEFS. That the agencies require agency counsel to prepare in advance of hearing adequate detailed trial briefs in appropriate cases.

10. INTERLOCUTORY MATTERS AND INTERLOCUTORY APPEALS. That the agencies adopt the following practice:

- (a) broad authority should be granted hearing officers to rule upon interlocutory matters which arise during the course of hearings, and interlocutory appeals from rulings should be reduced to a minimum;
- (b) interlocutory appeals which the agency may entertain should be disposed of promptly.

11. INDEXING OF RECORDS. That the agencies adopt the following practice:
 - (a) In any formal proceeding in which it is anticipated that the record will exceed 2,500 pages, provision should be made either through counsel for the parties or the staff of the agency for a daily or current index of the record which will be available to the hearing officer and all counsel;
 - (b) The index should be topical (not a digest), and as a minimum, each topic of testimony should be the heading of a card on which the name of each witness who testified upon the topic should be entered, the page of the record where each portion of his testimony appeared, and the number of each exhibit relating to the topic. The index should contain, on separate cards, the name of each witness and the topics on which he testified.
12. ATTORNEYS' MANUAL. That the agencies maintain an adequate and detailed attorneys' manual for the guidance of agency counsel.
13. IN-SERVICE TRAINING. That the agencies establish in-service training for agency counsel, including systematic regular instruction for newly-hired attorneys over a definite period of time and periodic, recurrent "refresher" courses or "trial clinics" for more experienced trial attorneys.
14. PRACTICE MANUALS. That the agencies publish for the use of practitioners before the agency, practice manuals of an advisory nature, detailing the procedural steps involved in all types of proceedings had under each statute administered by the agency, together with customary forms.

- 15. LAWYERS' INSTITUTES.** That the agencies cooperate in all feasible ways with universities and local or national bar associations undertaking to conduct practicing lawyers' institutes or courses in specialized fields of administrative law.
- 16. CONFERENCES WITH AGENCY BAR.** That the agencies sponsor, arrange and conduct more or less informal meetings or conferences on a local, regional or national basis between responsible officials and members of the agency bar as an exercise of good public relations and to facilitate the creation of an atmosphere of understanding and cooperation.

II

COMMENTS ON THE RECOMMENDATIONS

The following comments were prepared by the working committees of the Conference, and have not been considered by the Conference as a whole.

COMMENT ON RECOMMENDATION A.

Office of Administrative Procedure

This recommendation urges the creation of an Office of Administrative Procedure to carry on continuous studies for the improvement of Federal administrative procedures. This is not a new idea. It has been advocated by every group which has made a careful study of administrative procedure. In 1941, the Attorney General's Committee on Administrative Procedure recommended the establishment of such an Office which, in addition to procedural studies, would have carried on the functions with respect to the appointment, compensation, and tenure of hearing examiners which are now vested in the Civil Service Commission by Section 11 of the Administrative Procedure Act. The Commission on Organization of the Executive Branch of the Government recommended in 1949 that such "continuous and painstaking effort" to improve Federal administrative procedures be carried on in the Bureau of the Budget. In 1942, Benjamin recommended the creation of such an office to work for the improvement of New York administrative procedures, while California has actually established a Division of Administrative Procedure following the recommendation of the California Judicial Council in 1942.

The fruitful work of the Administrative Office of the United States Courts and some of the state judicial councils in improving judicial procedures suggests that a

similar continuous study of administrative procedures in action will produce worthwhile results. Much discussion of the administrative process in action suffers from a lack of precise and up-to-date factual information as to how various procedures currently operate. Due to the limitations of time and of other demands, busy administrators and practicing lawyers rarely undertake continuous or comparative study of even a single aspect of procedure. Specific studies, such as those of the Attorney General's Committee on Administrative Procedure in 1939-1941, tend to become obsolete with changed conditions—such as changes in substantive procedural law, increased work loads and agency reorganizations.

The Office of Administrative Procedure should not be empowered to dictate to the administrative agencies on procedural matters. Rather, through continuing studies of the various agency procedures, it will be able to make constructive suggestions for improvement which the agencies will be free to adopt or reject. Perhaps more important, the analysis of problems by statistical and other methods will provide the basis from which administrators and the bar can devise improvements in procedure. It is contemplated that such an office will do much of its work upon a mutually cooperative basis and in conjunction with advisory groups representing the agencies and the bar. Clearly, it can accomplish little without their understanding and support.

The recommendation does not contemplate the transfer to an Office of Administrative Procedure of the functions with respect to hearing examiners which the Civil Service Commission now performs under Section 11 of the Administrative Procedure Act. Since the Conference has not yet formulated its conclusions with respect to the status of hearing examiners, the recommendation for an Office of Administrative Procedure reflects the opinion of the

Conference that such an office should be created and should commence its procedural studies without regard to any future disposition of the controversial hearing examiner functions.

Under these circumstances, the Conference recommendation contemplates an Office with a very small organization limited to research and advisory functions. It suggests that the office be headed by a single Director and that it be located in the Department of Justice. It thus differs from the recommendation of the Attorney General's Committee which would have created such an office as an independent agency headed by a three-man board—presumably reflecting the fact that the Committee would have vested in such an office broad powers over the appointment, compensation and tenure of hearing examiners. While nothing in the functions of the office would compel its location in the Department of Justice, for reasons of economy it should use the administrative or housekeeping services of an existing agency. Since its activities will be entirely legal in nature, the Attorney General, as the chief law officer of the Government, is a logical officer to assume responsibility for its support and effectiveness.

COMMENT ON RECOMMENDATION B. 1.

Exclusion of Evidence

This Conference concurs in the views expressed by the Judicial Conference when, by adopting the Report of its Advisory Committee on Administrative Procedure on September 24-26, 1951, it stated (on p. 5 of the Report) as follows:

“* * * The tendency on the part of hearing officers to excessive leniency (in admitting irrelevant and immaterial evidence) has been due principally to the atti-

tude of the regulatory agencies themselves and of the Federal courts, which have criticized hearing officers for excluding evidence of doubtful relevancy in unwarrantedly sweeping terms. For example, in *Donnelly Garment Co. v. National Labor Relations Board*, 123 F. 2d 215 (1941,) the court stated:

‘ . . . we expressed the opinion that the practice which should be followed by a trial examiner in taking evidence and ruling upon objections to evidence is that which applies to special masters in equity proceedings, and “that the record should contain all evidence offered by any party in interest, except such as is palpably incompetent. . .” . . . If the record on review contains not only all evidence which was clearly admissible, but also all evidence of doubtful admissibility, the court which is called upon to review the case can usually make an end of it, whereas if evidence was excluded which that court regards as having been admissible, a new trial or rehearing cannot be avoided.’

The resulting reaction on the part of hearing officers has been an unwarranted degree of liberality in the reception of evidence. In fact, many courts, agencies, hearing officers, and members of the Bar, both government and private, have had a fixed attitude against any restriction of evidence in administrative proceedings. That attitude is a prime cause of the conditions (excessive delay and expense and unduly voluminous records) here considered. Without a reversal of that attitude on the part of all concerned, no remedial steps can be effective * * *.”

In the course of this Conference’s work, there has been found confirmation of the marked influence of judicial criticism upon the attitude of hearing officers in admit-

ting evidence. It is believed that much could be accomplished to counteract excessive leniency by the expression of occasional words of encouragement in court opinions directed to the hearing officer who has correctly excluded evidence.

COMMENT ON RECOMMENDATION B. 2.

Certification and Filing of Record

Section (a) of the rule would achieve a desirable uniformity in all circuits. Section (b) of the rule expresses the principal objective of the recommendation. Section (c) would encourage the parties to keep their initial certification to a minimum, as well as make provision for inadvertent omission.

It is believed that the necessity for and desirability of a rule embodying the procedure outlined in the recommendation is fully confirmed by the fact that the Judicial Conference of the United States, reaching independently the same objective sought to be attained by this recommendation, has recommended such a rule, and a majority of the Courts of Appeals of the United States have already adopted rules with like provisions. Such courts include the Court of Appeals for the District of Columbia Circuit, Rule 38(g); First Circuit, Rule 16(7); Third Circuit, Rule 18(7); Fourth Circuit, Rule 27(7); Seventh Circuit, Rule 28(7); Eighth Circuit, Rule 27; and Tenth Circuit, Rule 34(7).

A rather full survey of the present practices of the various administrative agencies likewise confirms the necessity and desirability of the recommended procedure. The survey disclosed that, particularly with respect to the large regulatory agencies such as the Federal Power Commission and Federal Communications Commission, with functions resulting in voluminous records and nu-

merous exhibits, the requirement of certification and filing of the entire record often imposes serious burdens of time, effort and expense. Actual experience on the part of such agencies has demonstrated that filing a shortened record with the court can save considerable time and expense in appropriate cases.

Certain agencies, however, report that in connection with their distinctive type of proceedings, the benefits of the procedure in their opinion are outweighed by possible disadvantages. In light of this fact, the recommendation makes the use of the procedure permissive with the petitioner and agency involved, it being contemplated that its use over the objection of any such party would be ordered by the court in the exercise of its discretion only in relatively exceptional circumstances.

Although the filing of an abbreviated record is permitted by certain statutes governing particular agencies (*e.g.*, the Judicial Review Act of 1950, 5 U.S.C. 1036, applicable, *inter alia*, to a number of Federal Communications Commission orders), other statutes are silent in this connection (*e. g.*, the Natural Gas Act, 15 U.S.C. 717r, and the Federal Power Act, 16 U.S.C. 825l, applicable to certain orders of the Federal Power Commission), while still others expressly preclude any procedure for filing an abbreviated record (*e. g.*, the National Labor Relations Act, 29 U.S.C. 160(f)). Accordingly, it appears that implementing legislative amendments to the various statutes will be necessary to make possible the use of the recommended procedure respecting the filing of abbreviated records in all appropriate cases. In this connection, the Committee on Revision of the Laws of the Judicial Conference of the United States has been studying the problem of the need of such statutory amendment independently of the work of the Conference. This Committee has prepared a pre-

liminary draft of a statute to amend where necessary existing statutes respecting the review and enforcement of orders of administrative agencies, in order to permit the transmission of an abbreviated record when the whole record is not needed and to authorize the use of the original papers in lieu of a transcript, the papers to be returned to the agency upon the completion of the court proceedings. This general subject is under consideration and may form the subject of a future recommendation by the Conference.

COMMENT ON RECOMMENDATION B. 3.

Filing of Briefs Prior to Printing of Record

Necessity for the recommended procedure arises from the generally recognized tendency of the parties as a matter of caution to designate matter not essential to the determination of the case on appeal, particularly under court rules requiring filing of an appendix prior to filing of briefs. Consequently, the printed record may be unnecessarily enlarged, with resulting unnecessary costs to the parties. The procedure set forth in this recommendation is designed to enable the parties to write their briefs and thereafter designate for printing only those matters referred to or relied on therein, instead of designating in advance all parts of the record to which they might possibly have occasion to refer. One Federal agency, the Federal Power Commission, has used the procedure in about a dozen cases, and has found its use to be productive of substantial savings of effort, expense and volume of record. The Judicial Conference of the United States had adopted a resolution approving the procedure.

By Section (a), use of the procedure would be permissive with the petitioner or petitioners and the respondent agency, it being contemplated that its use over the objection of any such party would be ordered by the court

in the exercise of its discretion only in relatively exceptional circumstances. By Section (f), the procedure would be alternative to existing procedures as provided by court rules. Section (b), consistent with the general rule that an intervener takes the case as he finds it, binds all parties to the use of the procedure when petitioner or petitioners and respondent agency stipulate to its use or the court orders its use. Section (c) prescribes responsibility for printing the joint printed appendix, leaving unchanged however existing rules and practice with respect to assessing costs. Section (e) prescribes the time for filing briefs and joint printed appendix, a necessary provision in light of the alternative character of the procedure, and desirable also to achieve uniformity.

Section (d), although referring to the mechanics in the use of the procedure, deserves some comment. Experience in the use of the recommended procedure has demonstrated that the following serves as an efficient and convenient method of citing to the transcript, and paging the joint appendix. The parties in their briefs would cite to the pages of the transcript of record as certified to the court (such transcript pages having been consecutively numbered in the upper right-hand corner of each page of every document contained therein by the agency certifying such record to the court). The joint appendix would be printed with the page number of the record as certified to the court in bold-face type where each new record page begins on the printed page of the joint appendix, and with running heads in bold-face type at the outer top corner of each page of the joint printed appendix, indicating the record pages appearing on that printed page of the joint appendix. In addition, the usual consecutive pagination of the printed joint appendix would be carried in the center of the page in modern (i. e., light-face) type, at the bottom of each printed joint appendix page.

It is believed, on the basis of actual experience in the use of the recommended procedure involving the printing of a joint appendix, reference in the briefs to the page number of the transcript as filed with the court, and filing of the joint printed appendix after all the briefs have been filed, that substantial savings of effort and expense can be achieved in many cases.

COMMENT ON RECOMMENDATION C. 1.

Elimination of Unnecessary Delay, Expense and Volume of Records

This Recommendation is the underlying philosophical declaration by the Conference. It speaks only of delay, expense, etc., which are unnecessary. It speaks in terms of the public interest—not the interest of parties, governmental or private. It presents a reversal of a growing attitude toward these long proceedings. It emphasizes the public importance of efficiency in the administrative process. Many procedural consequences flow from this basic concept.

COMMENT ON RECOMMENDATION C. 2.

Study of Procedure

This is a declaration recognizing the basic nature of the Conference. It is a conference of the agencies. It is for the purposes of exchange of information and formulation by mutual effort of recommendations. The responsibility for improvement of procedure rests upon the agencies, exactly where it has always rested. The combined call of the agencies is for each agency to examine its own situation. The Recommendation reflects the opinion of the Conference upon the course of good government in those respects.

COMMENT ON RECOMMENDATION C. 3.

Status of Agency Counsel

The suggested rule referred to in Recommendation resulted from a study of the status of agency counsel.

This study indicated that, in many instances, there was a lack of understanding as to the status and authority of agency counsel. It was found that in some agencies many days of hearing were consumed in the proof of matters about which there was no dispute merely because agency counsel felt that he had no power to make a stipulation with respect thereto.

It therefore appears that a rule clearly defining the status and authority of agency counsel will be helpful to the agency, its counsel and members of the Bar practicing before said agency.

COMMENT ON RECOMMENDATION C. 4.

Definition of Issues Before Hearing

Any hearing where the subject matter is not well defined is bound to be an inefficient hearing. If the issues are not clear to the hearing officer and to the parties, the hearing must necessarily be time-consuming and expensive and result in a cluttered record. There can be, therefore, no quarrel with the basic proposition that the subject matter of the hearing should be clearly defined as soon as possible.

There are several types of administrative proceedings, and the process of establishing the issues with precision must be tailored to each type of proceeding. In those proceedings which are initiated by a complaint and answer, the allegations and the denials are sometimes broad and vague. Similarly, in many proceedings involving, for example, the granting of licenses, the applications there-

for and the petitions to intervene are indefinite and uncertain. The agencies, therefore, should require as much particularity as is practical in complaints and answers, applications, and petitions. Then when the proceeding goes to hearing, the hearing officer and the parties will be in a better position to conduct the proceeding in an orderly, on-course fashion.

In some proceedings where there is only one interested party in addition to the agency, the hearing is likely to commence with no definite indication whatsoever of the subject matter of the hearing. Many of these cases are applications for permission to engage in some form of business activity. The statutory standards for granting such applications are usually very broad public interest ones. If a hearing is called upon any given application, however, it is almost certain that at that time there are only a certain limited number of matters in question. The hearing officer would be greatly aided if these questions are delineated in the order setting the hearing. Lacking such a specification of issues, it inevitably follows that the hearing officer is not in a position to rule as intelligently as he should and to conduct the further course of the hearing with the expedition that everyone seeks.

In summary, the issues should be sharpened by requiring particularity in the papers that establish the position of the parties, such as complaints, answers, applications, and petitions. In addition, when an agency decides upon a hearing in a single-party case, it is desirable that the order specify the matters to be heard. Caution should be taken against any attempt to define or select issues by any *in camera* process. After the issues are established by the papers of record, the next appropriate time to sharpen the issues is in a prehearing conference with all parties present.

COMMENT ON RECOMMENDATION C. 5.

Prehearing and Other Conferences

The procedure of prehearing conferences has been initiated and developed by several agencies. It is felt that a more general development by all agencies of prehearing conferences, together with conferences during the course of hearings, would result not only in simplification, clarification and possible disposition of many of the issues, but would also aid in the shortening of the record in the trial of the remaining issues.

Agencies' rules vary widely on the matter of prehearing conferences. In some agencies such conferences are mandatory in certain cases. In other agencies, in the absence of request of the parties, conferences apparently can only be called on motion of the agency. In still others, they apparently can be called only at the request of the parties. All agencies, by rule or otherwise, should urge hearing officers to encourage, at every opportunity, round-table meetings of the parties prior to the commencement of hearings, with the view of culling out those issues upon which there is no real controversy, crystalizing, sorting, simplifying and analyzing the others, and defining so far as possible the evidence to be introduced upon each issue and upon each point under each issue.

It is believed that prehearing conferences could be profitably held in most cases. Frank and informal discussion many times dissipates a reticence and reluctance to agree which exist for no good reason other than the absence of a qualified, disinterested mediator. This service the hearing officer can well perform, thereby not only saving the parties time and money but reducing his own work-load to a marked degree.

However, such conferences should be held only after thorough preparation by all concerned, such preparation to include compilation of documents supporting the case-

in-chief, which documents should be exchanged during the conference. Another significant value to be gained by holding prehearing conferences is the formulation of a plan for the efficient conduct of the hearing. A settlement of such matters as the order of presentation of proof, whether evidence shall be introduced in written form or by oral testimony, and other mechanical matters many times pays well for the efforts expended.

In addition, a more generous use of conferences during the course of hearing would aid in the further narrowing of issues and would stimulate stipulations and agreements between the parties, thereby further shortening records.

COMMENT ON RECOMMENDATION C. 6.

Prehearing Conference Rule

The rule is designed to curtail lengthy or protracted hearings by providing a means for compelling parties to give serious consideration, prior to the taking of testimony, to the simplification of issues and the elimination of merely formal proof and cumulative testimony.

This rule is patterned after Rule 16 of the Federal Rules of Civil Procedure with the necessary changes to adapt it to administrative proceedings. Therefore, the body of precedents established in judicial proceedings under Rule 16 are available as a basis of interpretation of the intent, purpose and scope of this rule.

Although under the rule the calling of a pre-hearing conference is discretionary with the presiding officer or the agency, attendance at the conference is mandatory on the parties or their representatives. The presiding officer may dispense with the hearing summarily in the event of a willful disregard of a notice to appear.

The rule is to be construed as authorizing the presiding officer, irrespective of consent of the parties, to enter an order at the conclusion of the pre-hearing conference with

respect to any matter which he is authorized to rule upon during the course of the proceeding, including limiting the issues, stipulations and documents to be admitted and the number of expert witnesses. This order, unless modified for good cause, shall control the proceedings.

In short, the pre-hearing conference is not an empty gesture nor one limited by the will of the contesting parties. It is designed to result in an order with force and effect. Its objective is to reduce needless delays, expense and volume of record.

COMMENT ON RECOMMENDATION C. 7.

Submission of Documentary Evidence in Advance

Recommendation C. 7. has for its essential purpose the improvement of procedures in the handling of documentary evidence in administrative proceedings, particularly those in which there is normally a substantial volume of such evidence. The requirement of advance submission of such evidence will, it is believed, encourage to some extent a reduction in the actual quantity of material submitted for the record in the proceeding. However, greater benefits will be realized from the opportunity thus afforded the other parties to examine the evidence in advance, to organize their cross-examination with respect thereto, and to prepare appropriate rebuttal evidence. Thus this procedure would contribute substantially to a more orderly proceeding, would enable parties to limit cross-examination to material points, thus reducing the size of the transcript and the time consumed in hearing, and would eliminate the necessity of substantial postponements of the hearing in order to afford a reasonable opportunity to examine written material offered by another party. Parties could, in other words, be required to come to the hearing fully prepared to

proceed with cross-examination and the presentation of rebuttal evidence without interruption or delay in the taking of evidence. In addition, even if substantial reduction in the volume of material offered and related cross-examination is not realized, the resulting record will reflect a more effective and intelligent exploration of the factual issues. and the evidence will be in a form better organized for use by counsel, the hearing examiner and the agency itself.

As used in this recommendation, the term "documentary evidence" is intended to encompass all evidence which pursuant to the rules or established practices of the agency, will be submitted in written form during the proceeding. It includes not only documents which, having come into existence for purposes not related to the proceeding, have become relevant and material to the issues therein, but also any material of whatever nature prepared in exhibit form for submission in writing during the taking of evidence. It includes any testimony which the agency requires be reduced to writing. The recommendation does not, however, propose any change in the requirements of the agency as to what it requires to be submitted in written form in its proceedings.

The recommendation proposes that agencies having classes of proceedings in which there is customarily a substantial volume of written evidence adopt the requirement of advance submission of such evidence wherever practicable. It is intended that each agency should examine its various types of proceedings, determine those in which it is feasible to impose such a requirement, and provide for its application in such proceedings with a view to giving it the widest possible application consistent with the protection of the rights of parties and of the public interest.

It was thought that the recommended policy would be uniformly applicable in licensing and rate-making proceedings, and that there would be other classes of proceedings to which such a requirement might be applied. It was recognized, however, that there were other classes of cases, especially certain types of adjudicatory proceedings, in which other factors might be present which would make the use of this rule impractical. In particular, a problem might well be presented in cases instituted by a complaint in which the disclosure of the evidence intended to be relied upon either by the complainant or by the respondent might in some respects unduly jeopardize his case. There may be other situations in which there are overriding factors. Each agency will have to make its determination as to the classes of proceedings to which the requirement should be applied in light of all the circumstances governing its proceedings.

In this connection, it may be noted that this proposed requirement was deemed consistent with the trend toward the elimination of any element of surprise in many classes of proceedings. Such elimination was deemed entirely consistent with administrative proceedings which preserve due process and at the same time afford a better basis for sound decision.

Paragraph (b) of the recommendation provides the necessary sanction to assure observance of the requirement by all parties. Not only will the requirement fail of its purposes if not uniformly observed, but it might work inequities if some parties observed it while others did not. However, it is recognized that undue rigidity in application of the requirement might also on occasion defeat the ends of justice where there was good cause for failure to submit a given piece of documentary evidence in advance. In this context good cause was deemed to include situations in which the party had no reason to anticipate

the need for presenting the documents as part of his own case. For example, good cause would exist in a situation where the only purpose for which a document was to be employed was to impeach a witness. The administration of this sanction is, of course, in substantial part in the discretion of the hearing examiner who may be expected to exercise his discretionary authority in such manner as to achieve substantial compliance with the requirement without working an injustice where circumstances warrant a departure.

Paragraph (c) of the recommendation provides a means whereby a party offering documents in evidence will be relieved of the necessity of producing a witness to establish its authenticity in those cases in which opposing parties have no intention of challenging such authenticity. Authenticity is herein used in its usual sense namely, that the document is what it purports on its face to be. The admission of authenticity pursuant to this rule is in no wise intended to have any bearing on the parties' position as to the relevance or materiality of the document. Provision is made whereby a party may be relieved of his admission of authenticity if by reason of later events, which could not reasonably have been anticipated, it appears that there are good grounds for challenging such authenticity.

COMMENT ON RECOMMENDATION C. 8.

Excerpts from Documentary Evidence

Recommendation C. 8 was designed to impose on a party intending to offer portions of a document in evidence the burden of preparing copies of the portion intended to be relied on and of distributing them to the other parties accompanied by a statement of the purpose for which the excerpt would be offered. This requirement would be

applicable both in situations in which documents were submitted in advance and those in which documentary material was offered for the first time during the hearing. Only the excerpts so prepared would be received in the record, thus eliminating the practice utilized in many instances of offering the entire document in evidence, for incorporation by reference. It is believed that this procedure will require counsel to determine in advance of the offer of evidence exactly which portions of a document are deemed relevant and material with a corresponding reduction in or elimination of the offering of irrelevant or immaterial portions thereof. It will also avoid problems inherent in incorporating the material in the record by reference. Thus, this requirement will contribute to shortening the record and to more orderly procedures, and will have the further benefit of making the relevant materials readily available to the examiner, the agency, and in the event of judicial review, to the court.

This requirement is subject to the safeguard, of course, that the whole document from which the excerpt is taken must be made available at a reasonable time and place in accordance with established practice for such use as may be properly made of it by opposing counsel, which presumably would include preparation of additional excerpts for presentation in evidence and for use in connection with cross-examination.

COMMENT ON RECOMMENDATION C. 10.

Interlocutory Matters and Interlocutory Appeals

It is believed that some of the delay in agency proceedings is caused by the hearing officer's lack of authority, withheld by rule or by custom, to rule upon matters which arise during the course of hearings. Interlocutory motions to enlarge, limit or delete issues, for example,

might well, in some agencies, be directed to and ruled upon by the hearing officer who has been "living with the case." The same is true with respect to motions to intervene. All agencies should explore the feasibility of formulating rules with explicitness of policy sufficient to act as clear guides to hearing officers and then delegating to such officers as broad authority as possible to rule upon interlocutory matters.

Considerable delay is also occasioned by liberality in granting interlocutory appeals from the rulings of hearing officers. Moreover, such liberality, with its overtones speaking a lack of agency confidence in the hearing officer, places him at a psychological disadvantage in making firm rulings. It is felt that the elevation in stature of the hearing officer as expressed in the Administrative Procedure Act is incompatible with a liberal practice of granting appeals from his rulings.

Occasionally, of course, there will arise matters of sufficient importance to warrant interlocutory appeals or certification to the agency by the hearing officer. For example, matters of a substantive nature such as motions which if granted could in effect dispose of the proceedings may fall within this category. In such cases, it is believed that appropriate machinery should be established to insure the expedition of agency decision. In this connection note may be taken of the practice existing at the Federal Trade Commission whereby one member, designated as the Motions Commissioner, has been assigned the duty of considering all interlocutory appeals and presenting them to the full Commission together with recommendations as to whether such appeals are justified under the rules.

COMMENT ON RECOMMENDATION C. 11.

Indexing of Records

Actual experience has clearly demonstrated (*Root Refining Co. v. Universal Oil Products Co.* and the companion case of *American Safety Table Co. v. Singer Sewing Machine Co.*, 169 F. 2d 514), that in long cases a current daily index of the record, available to all parties, permits a more orderly presentation of the case and greatly reduces delay.

Such an index makes possible the prompt preparation of accurate findings and enables counsel to prepare his argument without delay. With such an index, no extended time is needed for a study of the record.

COMMENT ON RECOMMENDATIONS

C. 9. and C. 12. through C. 16.

These recommendations resulted from a study of the question as to how a more adequate preparation of cases could be accomplished and dilatory tactics eliminated or at least reduced to a minimum. It was felt that a case thoroughly prepared and in which a course of procedure was clearly charted in advance of trial would of necessity result in a better record and a shorter presentation and thereby reduce delay, expense and volume of record.

When a case has been carefully and thoroughly prepared in advance, there is usually no occasion for counsel to indulge in dilatory tactics.

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November 23, 1953

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	Federal Maritime Board and Maritime Administration	Assistant General Counsel, Litigation Division
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(Continued)

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**John A. Danaher took his oath of office as Judge of the United States Court of Appeals for the District of Columbia Circuit on November 20, 1953.*

Chairman

**E. Barrett Prettyman
United States Court of Appeals
for the District of Columbia**

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