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# Administrative Conference of the United States

REPORT OF THE FOURTH PLENARY SESSION

June 29, 1962

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# Administrative Conference of the United States

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Director, Office of Administrative Procedure  
Department of Justice, Washington 25, D.C.

Bulletin No. 7

July 2, 1962

## REPORT OF THE FOURTH PLENARY SESSION JUNE 29, 1962

### Recommendations Adopted at the Fourth Plenary Session

#### RECOMMENDATION NO. 14

##### IT IS RECOMMENDED THAT:

There be transmitted to the Interstate Commerce Commission for its further consideration the following proposals relating to licensing of truck operations:

1. That summaries of truck applications be published in the Federal Register as soon as possible after initial filing; and that assignment for processing under oral-hearing or no-oral-hearing procedures be postponed until protests are received and evaluated.

2. That direct evidence of applicants and protestants concerning their own operations, services and proposals be submitted in affidavit form at the time of filing of applications and protests respectively; but that disclosure of the identity of supporting shippers be postponed until the hearing on the merits.

3. That procedures be adopted to assure that applications are not filed without such shipper support as may be necessary, perhaps employing one of the following alternatives:

(a) Requiring that all applications be accompanied by either (1) a statement or affidavit of the applicant's attorney or representative stating that he has in his possession correspondence or statements from shippers promising necessary support of the application, or that shipper support is unnecessary and no supporting shippers will be called, or that, for stated reasons, the documents cannot be obtained; or (2) a similar affidavit from any applicant proceeding without an attorney or representative, with supporting documents transmitted for confidential retention by the Commission; or

(b) Requiring that all applications be accompanied by evidence of shipper support in affidavit form, for confidential retention by the Commission until the oral hearing on the application or until the application is acted upon without oral hearing.

4. That the shipper statements said to be possessed by the attorney or representative, pursuant to recommendation 3(a), be required to be produced if the application is withdrawn after assignment for hearing or if no supporting shippers are called to testify at the hearing; and that any failure to produce such statements result in disciplinary action against the attorney or representative.

5. That prospective protestants be permitted, with the consent of applicants, to file notices of pending negotiations in lieu of protests.

6. That responsibility be conferred upon a unit within the Commission to supervise more closely the processing of truck applications. Such a unit might be a Control Committee, consisting of personal assistants of the three Commissioners of Division One and the Director of the Bureau of Operating Rights, or it might be the Director of the Bureau and his aides. In either case, the responsibilities of the unit should include:

- (a) Assuring compliance with rules pertaining to applications and protests;
- (b) Rejecting inadequate protests and assigning resulting unprotested applications for decision without oral hearing;
- (c) Identifying and devising special handling for troublesome, related or important cases, and making initial determinations on consolidation;
- (d) Channeling appeals from examiner decisions either to employee boards or Division One, and inviting industry participation where appropriate.

7. That examiners be empowered to render decisions on the merits in advance of the conclusion of the parties' presentation and issue definitive orders after pre-hearing conferences.

8. That interlocutory review of examiner rulings be limited to matters certified for review either by the examiner or the unit controlling the processing of truck applications (the Control Committee or Bureau Director).

9. That a decision upon review of an initial decision should state either that (1) the findings in the initial decision are adopted in their entirety, or (2) are adopted to the extent they are specifically identified by the review decision, or (3) new and specific findings are substituted for those embodied in the initial decision. A review decision should not state in general terms that the findings below are adopted except to the extent they are inconsistent with the review decision.

RECOMMENDATION NO. 15

IT IS RECOMMENDED THAT:

1. Each agency subject to the Administrative Procedure Act re-examine its rules and practice with regard to the provision in Section 6(a) of the Act that "Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel," to ensure conformity with the following standards as a minimum in all agency actions and proceedings, including both public and non-public investigations.

a. The right to be "accompanied" by counsel means the right of any person compelled to appear before any agency or agency representative to have counsel present with him during any proceeding or investigation.

b. The right to be "advised" by counsel means that any person compelled to appear in person shall be entitled to the advice in confidence of counsel before, during, and after the conclusion of any agency proceeding or investigation for which his presence is compelled.

c. The right to be "represented" by counsel means as a minimum that counsel for any person compelled to appear in person shall be permitted to make objections on the record and to argue briefly the basis for such objections in connection with any examination of his client.

d. In addition, each agency is urged to re-examine its rules and practice and to effect appropriate changes therein to the extent that it determines that it can properly permit persons compelled to appear in person in any agency proceeding or investigation to be examined further for the record by their own counsel following other questioning.

IT IS RECOMMENDED THAT:

2. The right to counsel be interpreted with a view to preserving the highest concept of administrative fairness and as generously as reasonable administrative efficiency permits. Agencies should recognize that the right to counsel, including, to the extent appropriate, opportunity for cross-examination and production of limited rebuttal testimony or documentary evidence, is particularly important to any person involved in a public investigation where implications of wrongdoing by that person are made a part of the public record.

RECOMMENDATION NO. 16

IT IS RECOMMENDED THAT:

The Administrative Conference deems it essential that the administrative process should be protected from improper influences and that the agencies should take certain action to help achieve these objectives.

Accordingly, the Conference recommends that each agency should promulgate a code of behavior governing ex parte contacts between persons outside and persons inside the agency which should be based upon the principles set forth below.

The Conference recognizes that it may not be practical for all agencies to adopt a uniform code embodying its recommendations. Some agencies may find it advisable to add to the recommended prohibitions and requirements, while others may find it inadvisable to accept all the recommendations in connection with particular kinds of proceedings conducted by them. The Conference expects that each agency will seek to effectuate the general recommendations in light of the specific considerations of fairness and administrative necessity applicable to each of the proceedings conducted by it.

1. The agency code should prohibit any person who is a party to, or an agent of a party to, or who intercedes in an on-the-record proceeding in any agency, from making an unauthorized ex parte communication about the proceeding to any agency member, hearing officer, or agency employee participating in the decision in the proceeding.

a. The term "on the record proceeding" should be defined as any proceeding required by statute or constitution or by the agency in a published rule or in an order in the particular case to be decided solely on the basis of an agency hearing, and any other proceeding which the agency designates by published rule or by order in the particular case as subject to these prohibitions.

By published rule or order in the particular case, each agency should specify which of its proceedings will be governed by the prohibitions against ex parte communications.

b. The prohibitions should apply from the time the agency notices an on-the-record proceeding for hearing or from such earlier time as the agency may fix by published rule, or order in the particular case.

c. Except as provided in d. below, the "ex parte communications" prohibited should include:

(1) Any written communication of any kind about an on-the-record proceeding, if copies thereof are not served by the communicator upon all the parties to the proceeding in accordance with agency rules. Each agency should promulgate rules specifying the manner and time of service.

(2) Any oral communication of any kind about an on-the-record proceeding (i) if advance notice that it will be made is not given by the communicator to all the parties to the proceeding, or (ii) if its contents are not disclosed by the communicator to all the parties at the time of its presentation or promptly thereafter, in accordance with agency rules. Each agency should promulgate rules specifying the manner and time of disclosure.

d. The following classes of "ex parte communications" should not be prohibited.

(1) Any oral or written communication which relates solely to matters which the hearing officer, agency member, or agency employee is authorized by law to dispose of on an ex parte basis.

(2) Any oral or written request for information solely with respect to the status of a proceeding.

(3) Any oral or written communication which all the parties to the proceeding agree, or which the agency or hearing officer formally rules, may be made on an ex parte basis.

(4) Any oral or written communication of facts or contentions which have general significance for an industry subject to regulation if the communicator cannot reasonably be expected to know that the facts or contentions are material to a substantive or procedural issue in a pending on-the-record proceeding in which he is interested.

(5) Any oral or written communication made pursuant to an agency practice which is generally known and under which the content of the communication (by way of transcript or otherwise) is promptly available to any person who is a party to a pending on-the-record proceeding which involves any substantive or procedural issue to which the communication may be relevant or who can otherwise show an interest in the communication.

e. The "person who is a party" to whom the prohibitions apply should include any individual outside the agency conducting the proceeding (whether in public or private life), partnership, corporation, association, or other agency, who is named or admitted as a party or who seeks admission as a party.

f. The "person who intercedes in" the proceeding, to whom the prohibitions apply, should include any individual outside the agency conducting the proceeding (whether in public or private life), partnership, corporation, association, or other agency, other than a party, or an agent of a party, who volunteers a communication, which he may be expected to know may advance or adversely affect the interests of a particular party to the proceeding, whether or not he acts with the knowledge or consent of any party or any party's agent.

g. The "agency employee participating in the decision" should include all employees of the agency who themselves make or recommend decisions or who are specifically designated by the agency to assist agency members, hearing officers, or other employees in making or recommending decisions.

Each agency should identify the employees, or classes of employees, who will so participate in the decision in a rule or order published at or before the time when the prohibitions against unauthorized ex parte communications begin to apply to a particular proceeding or class of proceedings or with respect to a particular employee or class of employees.

2. The agency code should prohibit any agency member, hearing officer, or agency employee participating in the decision in an on-the-record proceeding in any agency from (a) requesting or entertaining any unauthorized ex parte communication; and (b) making an unauthorized ex parte communication about the proceeding to any party to the proceeding, any agent of any party, or any other person who he has reason to know may transmit the communication to a party or a party's agent.

3. The agency code should prohibit any person from soliciting any other person to make an ex parte communication which the solicitor has reason to know is unauthorized.

4. The agency code should require an agency member, hearing officer, or employee participating in the decision, who receives a written communication which he knows is unauthorized, or which he concludes should, in fairness, be brought to the attention of all parties to the proceeding, to transmit the communication promptly to the Secretary of the agency, together with a written statement of the circumstances under which it was made, if they are not apparent from the communication itself. The Secretary should be required promptly to place the communication and the statement in the public file of the agency, to send copies of the communication to all parties to the proceeding with respect to which it was made, and to notify the communicator of the agency code and any other applicable rules or principles of practice.

If the communications are from persons other than parties to the proceeding or their agents and the recipient determines that (a) the communications are either so voluminous or of such borderline relevance to the issues in the proceeding, or (b) the parties to the proceeding are so numerous, that it would be too burdensome to

send copies of the communications to all the parties, the Secretary may, instead, notify the parties that the communications have been received and placed in the public file where they are available for examination by the parties.

5. The agency code should require an agency member, hearing officer, or employee participating in the decision, who receives an oral communication which he knows, at the time it is received, is unauthorized, or which he concludes should, in fairness, be brought to the attention of all parties to the proceeding, to put the substance of the communication in writing and transmit the writing promptly to the Secretary of the agency, together with a written statement of the circumstances under which it was made. The Secretary should be required promptly to place the writing and the statement in the public file of the agency, to send copies of the writing to all parties to the proceeding with respect to which it was made, and to notify the communicator of the agency code and any other applicable rules or principles of practice.

If the communications are from persons other than parties to the proceeding or their agents and the recipient determines that (a) the communications are either so voluminous or of such borderline relevance to the issues in the proceeding, or (b) the parties to the proceeding are so numerous, that it would be too burdensome to send copies of the writings containing the substance of the communications to all the parties, the Secretary may, instead, notify the parties that the communications have been received and writings containing their substance placed in the public file where they are available for examination by the parties.

6. The agency code should permit all parties to an on-the-record proceeding to request an opportunity to rebut, on the record, any facts or contentions contained in an unauthorized ex parte communication or in any other ex parte communication which the agency official receiving the communication brought to the attention of all the parties in accordance with Recommendation 4 or Recommendation 5 above. The code should provide that the agency will grant such a request whenever it determines that the dictates of fairness so require.

7. The agency code should provide that an agency may censure, or suspend or revoke the privilege to practice before the agency, of any person who makes, or solicits the making of, an unauthorized ex parte communication.

8. To the extent permitted by applicable law, the agency code should provide that any relief, benefit or license sought by a party to a proceeding may be denied if the party, or an agent of the party, makes, or solicits the making of, an unauthorized ex parte communication.

9. The agency code should provide that an agency may censure, suspend, or dismiss, or institute proceedings for the suspension or dismissal, of any agency employee who violates the prohibitions or requirements of the code.

RECOMMENDATION NO. 17

IT IS RECOMMENDED THAT:

The Conference, acting pursuant to Section 8 of Executive Order 10934, request the executive departments and administrative agencies which conduct administrative proceedings for the determination of private rights, privileges, and obligations to furnish to the Conference (addressing the Chairman of the Committee on Statistics and Reports) information regarding such proceedings in fiscal year 1962. The specific information required will be delineated in a revision of the report form approved under Recommendation No. 1 of the Plenary Session of December 5, 1961. The Conference further directs that the Committee on Statistics and Reports have prepared on the basis of the data received pursuant to this request a second statistical report for distribution to the members of the Conference and the reporting departments and agencies in the same manner as the first statistical report based on the information received under Recommendation No. 1 of the Plenary Session of December 5, 1961.

Parliamentarian for the Session

The Chairman announced Council authorization to designate Fred M. Vinson, Jr. as parliamentarian for this session due to the regular parliamentarian's inability to attend this session.

Order of Business for the Fourth Plenary Session

Mr. Paglin next read the resolution as to the order of business for the Fourth Plenary Session and moved its adoption. The resolution was adopted without discussion.

Budget Report

Mr. Hutchinson's report on the budget as he indicated was necessarily brief due to the uncertainty of the availability of funds for future expenditures.

The Administrative Conference had available to it for the fiscal year which ended on June 30, 1962 an appropriation of \$150,000 plus a working fund of \$30,000 the major part of which was contributed by participating agencies before an appropriation became available.

Through June 22, 1962 obligations against these funds totaled \$94,044.97, excluding amounts for which papers had not yet been processed such as compensation of Committee Staff Directors and other research personnel during the month of June as well as travel and other items incident to the Fourth Plenary Session.

Mr. Hutchinson pointed out that over the next three months the costs of committee studies will increase as the time of research personnel becomes more readily available and as the Conference approaches its December 31, 1962 report, all activities and costs will accelerate.

Accordingly the Council had requested from the Congress the appropriation of an amount based on experience to cover the cost of operation of the Conference during the first half of fiscal year 1963.

COMMITTEE REPORTS

Committee on Judicial Review

Dean Robert Kramer, Staff Director, made the Committee's report on Section 1(b) of Recommendation No. 9 which was sent to this Committee for study and report. Dean Kramer then summarized a written report the text of which is as follows:

"Special Report of Committee on Judicial Review

SUBJECT: Paragraph 1(b) of Recommendation No. 9 to the Administrative Conference

"1. At the Third Plenary Session of the Administrative Conference, held 3 April 1962, Recommendation No. 9, concerning Senate Bill 1734 as revised, was offered by the Committee on Internal Organization and Procedure. The recommendation related to the finality to be accorded decisions of hearing examiners in agencies which are under a statutory duty to promulgate rules or adjudicate cases on the record after a hearing. This was to be accomplished by amendment to Section 8 of the Administrative Procedure Act.

"This recommendation was passed by the Conference after it had been agreed, in a very close vote, to delete Section 1(b) thereof. The deleted paragraph reads as follows:

b. If a party seeks judicial review of agency action upholding, in whole or in part, the initial decision rendered by the officer who presided at the hearing (or by any other officer authorized by law to make it) in a case in which the agency confined its administrative review to the alleged errors in the initial decision, and the portions of the record supporting the allegations of error, which were specified by the party with the particularity prescribed by the agency, only such alleged errors and portions of the record (or any alleged errors appearing in the agency decision which the party did not have an opportunity to specify to the agency) may be considered by the reviewing court.

"The motion to delete that paragraph reads as follows:

'Mr. Beelar: 'In view of the interrelationship of discretionary agency review to the problem of judicial review and the procedural difficulties and uncertainties upon raising points before the agency, I move, for that reason, to refer the subject matter of 1(b) to the Committee on Judicial Review.'

"\* \* \*

'The Chairman: . . . .

'The 'ayes' seem to have it.

'The 'ayes' have it. That's so done.' '

"(Transcript, Third Plenary Session, Administrative Conference of the United States, April 3, 1962, at p. 97.)

"2. The Problem. Paragraph 1(b) provides that a court, reviewing agency action (as set out in S. 1734), may consider only those errors and portions of the record which the party seeking review specified in administrative review of a hearing examiner's decision. The only exception to that provision is for alleged errors which the party did not have an opportunity to specify to the agency. There seem to be two main aspects to this problem: (a) the limitation to the specified alleged errors in the initial decision; and (b) the limitation to the portions of the record specified as supporting the alleged errors. This memorandum will cover both aspects.

"3. Analysis of the Problem. (a). Section 1(b) must be considered in light of the entire Recommendation No. 9, Section 1(a) of which provides that agencies under statutory duties to promulgate rules or adjudicate cases on the record after a hearing may require a party seeking administrative review of a decision of a hearing examiner to specify alleged errors in the initial decision and portions of the record supporting the allegations of error, with such particularity as the agencies may prescribe; and may confine their review to the specified errors and supporting portions of the record.

"This language is permissive. Accordingly, the

problems raised by Section 1(b) will occur only when an agency elects to follow Section 1(a).

"Section 2(c) of Recommendation No. 9 also refers to judicial review. Under it an agency decision to accord or not to accord administrative finality to a hearing examiner's decision, shall not itself be subject to judicial review. This section goes on to indicate that, in accordance with existing law, the hearing examiner's decision will be subject to judicial review if the petition for administrative review of that decision is denied or if that decision is affirmed summarily. In either of these events, the decision of the hearing examiner becomes the decision of the agency. Since this part of Recommendation No. 9 has been adopted by the Conference, this memorandum does not refer to it. (Nor, for that matter, does it refer to any questions of judicial review other than those raised by Section 1(b)).

"(b). As to the first aspect of the problem--that the party seeking judicial review must specify alleged errors-- Professor Kenneth C. Davis concludes as follows:

The idea that a court will refuse to consider issues not first passed upon by the agency has strong support in the case law, although the rule is flexible enough to yield to apparent needs of justice in special circumstances, and although an exception is usually recognized for lack of administrative jurisdiction. 3 Davis, Administrative Law Treatise §20.10 (1958).

According to Professor Davis, 'the rule is not rigid but flexible; it is clearly susceptible of judicial manipulation to take account of needs of justice in special circumstances' (ibid., §20.06). The leading case, one in which the Supreme Court in a 7-2 decision stated its 'general rule' as follows, seems to be United States v. L. A. Tucker Truck Lines, 344 U.S. 33, 37 (1952):

Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.

To the same effect, Unemployment Compensation Commission of Alaska v. Aragon, 329 U.S. 143, 155 (1946); Blair v. Oesterlein Mach. Co., 275 U.S. 220, 226 (1927); Adams v. Mills, 286 U.S. 397, 416 (1932); FPC v. Colorado Interstate Gas Co., 348 U.S. 492 (1955); NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 350 (1953); Marshall-Field & Co. v. NLRB, 318 U.S. 253 (1943); NLRB v. Cheney Cal. Lumber Co., 327 U.S. 385 (1946); NLRB v. District 50, United Mine Workers of America, 355 U.S. 453, 464 (1958); Sun-Ray Mid-Continent Oil Co. v. FPC, 364 U.S. 137, 157 (1960). But cf. United States ex rel Johnson v. Shaughnessy, 336 U.S. 806, 818 (1949); NLRB v. Bradford Dyeing Ass'n., 310 U.S. 318, 341 (1940); May Dept. Stores v. NLRB, 326 U.S. 376, 386-87 (1945).

"In the course of the Court's opinion in Tucker, it was indicated that the majority considered the defect at issue not to be one 'which deprives the Commission of power or jurisdiction, so that even in the absence of timely objection its order should be set aside as a nullity' (344 U.S. at 38). This apparently is the principal basis for the assertion by Professor Davis that 'an exception' to the general rule 'is usually recognized for lack of administrative jurisdiction.'

"No cases have been found since the Tucker decision which would vary the pronouncement made there by the Supreme Court. Accordingly, it would seem to be the general rule that, in the absence of special circumstances, a party seeking judicial review of an agency decision must have raised the alleged errors before the agency. Actually, in the Tucker case, even an error which the party did not have the opportunity to specify to the agency did not alter the Court's adherence to its general rule.

"This does not indicate what Davis terms the 'apparent needs of justice in special circumstances' might be. Nor does he cite any cases in which the Court actually adhered to 'lack of administrative jurisdiction' as a basis for permitting review. It is evident that a criterion such as the 'apparent needs of justice' does not provide any definitive way to delineate the law; nor does that of 'special circumstances.' For present purposes, however, such an effort need not be made. It is sufficient to point out that the Supreme Court on occasion, despite the lack of timely objection, has held that administrative decisions 'not in accordance with law

should be modified, reversed or reversed and remanded 'as justice may require'. 'There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below.' Hormel v. Helvering, 312 U.S. 552, 557, 559 (1941). See also: NLRB v. Bradford Dyeing Ass'n., 310 U.S. 318, 341 (1940); May Dept. Stores v. NLRB, 326 U.S. 376, 386-87 (1945); Johnson v. Shaughnessy, 336 U.S. 806, 818 (1949). The Court is particularly apt to find an exception when reliance is placed upon events occurring after the agency proceedings have ended. But cf. the Tucker case supra.

"Our conclusion on this point is that Professor Davis is correct. Accordingly, in our judgment Section 1(b) does not precisely state existing law. As written, Section 1(b) is mandatory on the courts; it does not provide expressly for the exception of 'the needs of justice in special circumstances,' (other than as this point may be included in the provision for relief for alleged errors which the party did not have an opportunity to specify to the agency). Furthermore, it does not provide for the exception of 'the lack of administrative jurisdiction.' Whether the courts might read these two exceptions into even the present language of Section 1(b) raises problems which we do not consider.

"We are cognizant of the fact that statutory provisions may alter the conclusion just stated, depending upon the nature of the statute. Illustrative examples, which themselves indicate no uniformity of provision and some of which embody the conclusion just reached, follow:

The National Labor Relations Act, 49 Stat. 453 (1935), 29 U.S.C.A. §160(e), provides that 'No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.'

The Natural Gas Act, 52 Stat. 831 (1938), 15 U.S.C.A. §717r (b), provides that 'No objection to the order of the Commission shall be considered by

the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure to do so.'

The Securities Exchange Act, 48 Stat. 901 (1934), 15 U.S.C.A. §78y (a), provides that 'No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission.'

"(c). On the second aspect of the problem--that the party seeking review is also limited to specified portions of the record--Professor Davis is silent. No cases have been found dealing with this matter. The situation with respect to the analogous matter of judicial review of lower court decisions, is equally unclear. Apparently, this part of Section 1(b) is an attempt to write new law, for there appears to be nothing in present statutes relating to it.

"There is law, however, relating to the task of a reviewing court on any question of judicial review of administrative action. The Administrative Procedure Act provides in Section 10(e) that the court 'shall review the whole record or such portions thereof as may be cited by any party.' The legislative history further affirms this proposition. 'The requirement of review upon 'the whole record' means that courts may not look only to the case presented by one party, since other evidence may weaken or even indisputably destroy that case.' (Senate Document No. 248, 79th Cong., 2d Sess. at 214, 280 (1946)). And the Supreme Court has also made it clear that it takes the words of the statute and the legislative history to mean what they say in plain language. The leading case is Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951): 'The substantiality of evidence must take into account whatever in the record fairly detracts from its weight' (340 U.S. at 488).

"As Section 1(b) now reads, it appears to limit the scrutiny of a reviewing court to just that part of the record supporting the allegations of error made by the party seeking review. Whether this would meet with judicial approval seems doubtful. Furthermore, whether it would meet with agency approval would seem also to be doubtful, for would agency

personnel desire to leave that degree of control over judicial review in the hands of the party seeking review? It would appear that such a clearcut limitation on the power of a reviewing court to look to all parts of the record, in order to determine whether or not error was committed, raises questions as to desirability. Furthermore, questions are raised as to whether or not Section 1(b) conflicts, at least in part, with that part of Section 10(e) of the APA that calls for court scrutiny of 'the whole record' or the portions cited by any party. Section 10(e) of the APA reads in part: '...the reviewing court...shall review the whole record or such portions thereof as may be cited by any party....'

"Our conclusion is that that part of Section 1(b) that limits judicial power to only those portions of the record as are designated by the party seeking review does not reflect present law.

"4. Policy Considerations. Present law aside--and we emphasize that it is not so clear and undeviating as not to permit contrary arguments--what are the arguments which have been, or might be, advanced for and against Section 1(b)?

"(a). First, we direct attention to the arguments raised on the floor during the Third Plenary Session. These will be identified by the name of the speaker. They include:

"(1). Mr. J. D. Bond maintained that he found no reason that Section 1(b) should amend Section 8 of the Administrative Procedure Act 'when Section 8...does not mention judicial review' (Transcript p. 35 and p. 56).

"Mr. Bond's statement raises a valid technical point. Since Section 10 of the APA is devoted to judicial review, it would seem that more properly any APA amendment dealing with judicial review should be directed toward Section 10. Furthermore, we go beyond Mr. Bond's point and call attention to the fact that certain portions of Section 10, as presently in force, seem to be relevant to Section 1(b). As noted above (paragraph 3), Section 10(e) of the APA states that the court 'shall review the whole record or such portions thereof as may be cited by any party.' In addition, a proposal relating to judicial review should, in our judgment, also take into consideration the provisions set out in statutes

concerning specific agencies; for example, as noted above, the statutes relating to the NLRB, SEC, and FPC inter alia have provisions limiting judicial review to objections raised before the agency. The question we pose is whether any recommendation to change the APA should not also refer to these organic acts as well, insofar as they contain specific provisions relevant to the recommendation being made.

"There is also the question whether any amendment to the APA should be recommended without a comprehensive analysis of its over-all impact upon all agencies covered by the APA. Rather than making one relatively minor alteration in Section 10(e), would it not be better to include paragraph 1(b) of Recommendation No. 9 in a thorough scrutiny of the judicial review provisions of the APA?

"(2). Mr. Ashley Sellers stated that the law was not so clear as had been asserted in justification of the proposal (Transcript pp. 41-44). As we have indicated above, the law in fact is not so clear-cut as some who spoke at the Third Plenary Session appeared to believe.

"(3). Mr. Howard Westwood asserted that something might occur after the agency proceedings which a party seeking review should be able to allege as error (Transcript p. 52). In our opinion, this objection is taken care of by the second parenthetical statement in Section 1(b) which permits an exception for alleged errors which the party did not have an opportunity to specify to the agency. The Tucker case, supra, would possibly be contrary; but an amendment to the APA would presumably prevail over Tucker--provided that the amendment was sufficiently general. As noted above, we are not certain that Section 1(b) is that broad.

"(b). There are, in addition, arguments that Section 1(b) does not reflect existing law insofar as it does not call for an exception for the 'interests of justice' or for jurisdiction of the agency (see above). And considerable doubt would seem to exist as to the desirability of limiting judicial scrutiny to only those parts of the record as are designated by the party seeking review (this, too, has been discussed above).

"(c). The arguments in favor of Section 1(b) generally may be summarized as being two-fold: (1) the argument that

this states existing law (see the statements by Mr. Ferber and Professor Gellhorn, Transcript pp. 29, 48); and (2) that it would eliminate some delay.

"(d). In our opinion, whether Section 1(b) is desirable or not should be evaluated against the following criteria: Whether it would further the purpose of the Administrative Conference, as set out in Executive Order 10934, dated 13 April 1961, that the Conference should inquire into the 'efficiency, adequacy, and fairness' of administrative procedures by which agencies 'protect the public interest and determine the rights, privileges and obligations of private persons.'

"5. Conclusions and Recommendations: In the light of the foregoing and without attempting to evaluate with empirical data the impact that Section 1(b) would make on the efficiency, adequacy and fairness of administrative procedures, we conclude as follows:

"Any consideration of Section 1(b) should be a part of a more comprehensive scrutiny by the Committee on Judicial Review, or by a similar group in a permanent Conference, of the nature and extent of the scope of review (as presently set out in Section 10(e) of the APA). Furthermore, any amendment to the APA that is proposed should be carefully evaluated for its impact upon all agencies subject to the APA. Therefore, we recommend that no action be taken at this time on this matter by the Conference."

#### Committee on Information and Education

James McI. Henderson, Chairman, reported that the Information and Education Committee had arranged to hold a symposium which will involve a discussion of the progress and functions of the Administrative Conference. It is to be held at the time of the meeting of the American Bar Association in San Francisco.

The program will be a discussion of the objectives, functioning and progress of the Conference. It will not be directed towards whether it is a beneficial organization or whether it should continue.

Mr. Henderson then turned the floor to Professor Priest who reported on the Committee's first draft of their report on the "Recommended Procedures for the Trial of Protracted Cases Before Administrative Tribunals."

Professor Priest emphasized that this first draft is nothing more than that. This report was prepared after careful study of the hearings before the Senate of last Summer and after examination of much of the material which had been circulated to Conference members together with a thorough painstaking examination of the Judicial Conference Handbook on the Trial of Protracted Cases. It was the understanding of the Committee that their memorandum would be based primarily on that handbook.

Professor Priest stated that not more than a third of the first draft is original, and that probably more than two thirds represents an attempted direct adaptation of the Judicial Conference Handbook for use in administrative proceedings.

Professor Priest realized that much of the material will be controversial and that it deals in fairly large measure with the role of trial examiners.

If the procedures are adopted and put into practical use their effect, he said, will be to elevate the status of trial examiners to one only a little lower than that of Federal District Court Judges; and it is the hope of the Committee, he continued, that some of the trial examiners will rise to the challenge presented to them by the suggested procedures.

Professor Priest stated that he is aware that these proposals will be subject to many excisions, additions and emendations, but he hopes that there is some trial examiner who has the courage, character and competence to give these proposals a trial. He feels they may prove useful and might well serve the best interests of the parties, of counsel and of the tribunal.

The Chairman of the Conference then added that he believes this is one area where the Conference can show some concrete accomplishment and he therefore expressed the hope

that every member of the Conference would study this draft and be generous with his comments, criticisms for additions and deletions so the draft will receive the full attention of the members of the Conference.

### Committee on Personnel

Emmette S. Redford, Chairman, reported that the Committee on Personnel met for two days in May to discuss the recommendations made in two reports that had been prepared by the Reporter, one on the remuneration and grades for examiners, and the other on a career service for lawyers.

The Committee again met in June to discuss a report on the Agency to Administer the Hearing Examiner Program and to discuss further improvements which might be made in the process of selection, and so forth, of examiners.

These meetings have clarified and frozen the issues; have led to some tentative conclusions in the Committee; and have indicated to the Committee Reporter the items on which the Committee desires further study.

Professor Redford then stated that the Committee Reporter has been on full-time teaching duty during the year and is therefore under great pressure to complete the projects undertaken. The Committee is to meet in each of the next two or three months and hopes to have solid and complete reports, with a considerable number of recommendations for the Conference to consider at the October meeting.

### Discussion of Recommendation No. 14

(The submission to the Interstate Commerce Commission of certain proposals relating to the licensing of truck operations, for study and consideration.)

After a reading of the proposed recommendation by Mr. Maxson, Mr. Gilliland, the Chairman of the Committee on Licenses and Authorizations, speaking for the Committee amended the proposed recommendation so that the proposed recommendation as offered by the Committee to the Conference

read as follows:

Recommendation No. 14

IT IS RECOMMENDED THAT:

There be transmitted to the Interstate Commerce Commission for its further consideration the following proposals relating to licensing of truck operations:

1. That summaries of truck applications be published in the Federal Register as soon as possible after initial filing; and that assignment for processing under oral-hearing or no-oral-hearing procedures be postponed until protests are received and evaluated.

2. That direct evidence of applicants and protestants concerning their own operations, services and proposals be submitted in affidavit form at the time of filing of applications and protests respectively; but that disclosure of the identity of supporting shippers be postponed until the hearing on the merits.

3. That procedures be adopted to assure that applications are not filed without such shipper support as may be necessary, perhaps employing one of the following alternatives:

(a) Requiring that all applications be accompanied by either (1) a statement or affidavit of the applicant's attorney or representative stating that he has in his possession correspondence or statements from shippers promising necessary support of the application, or that shipper support is unnecessary and no supporting shippers will be called, or that, for stated reasons, the documents cannot be obtained; or (2) a similar affidavit from any applicant proceeding without an attorney or representative, with supporting documents transmitted for confidential retention by the Commission; or

(b) Requiring that all applications be accompanied by evidence of shipper support in affidavit form, for confidential retention by the Commission until the oral

hearing on the application or until the application is acted upon without oral hearing.

4. That the shipper statements said to be possessed by the attorney or representative, pursuant to recommendation 3(a), be required to be produced if the application is withdrawn after assignment for hearing or if no supporting shippers are called to testify at the hearing; and that any failure to produce such statements result in disciplinary action against the attorney or representative.

5. That prospective protestants be permitted, with the consent of applicants, to file notices of pending negotiations in lieu of protests.

6. That responsibility be conferred upon a unit within the Commission to supervise more closely the processing of truck applications. Such a unit might be a Control Committee, consisting of personal assistants of the three Commissioners of Division One and the Director of the Bureau of Operating Rights, or it might be the Director of the Bureau and his aides. In either case, the responsibilities of the unit should include:

- (a) Assuring compliance with rules pertaining to applications and protests;
- (b) Rejecting inadequate protests and assigning resulting unprotected applications for decision without oral hearing;
- (c) Identifying and devising special handling for troublesome, related or important cases, and making initial determinations on consolidation;
- (d) Channeling appeals from examiner decisions either to employee boards or Division One, and inviting industry participation where appropriate.

7. That examiners be empowered to render decisions on the merits in advance of the conclusion of the parties'

presentation and issue definitive orders after pre-hearing conferences.

8. That interlocutory review of examiner rulings be limited to matters certified for review either by the examiner or the unit controlling the processing of truck applications (the Control Committee or Bureau Director).

9. That a decision upon review of an initial decision should state either that (1) the findings in the initial decision are adopted in their entirety, or (2) are adopted to the extent they are specifically identified by the review decision, or (3) new and specific findings are substituted for those embodied in the initial decision. A review decision should not state in general terms that the findings below are adopted except to the extent they are inconsistent with the review decision.

Mr. Gilliland then indicated that his Committee has been engaged in a study of the procedures of the principal agencies concerned with competitive licensing for the purpose of identifying problems common to all, and in the hope that a recommendation could be made to the Conference which would tend toward their solution.

In so doing, he pointed out that they have not been blind to problems peculiar to one agency. Indeed the Committee could hardly do so for it could not be very well ascertained whether problems are peculiar or common until they have been identified. He feels the results of the Committee's studies should not be lost merely because individual agencies are involved. On the other hand, the Committee recognizes that in such cases the agencies themselves are much better fitted to the task of evaluation than they are. That might not be the case if several agencies were affected.

This recommendation is not to the effect that the Committee proposals be adopted, but rather that they be transmitted to the I.C.C. for evaluation.

By way of illustration, Mr. Gilliland pointed out that an applicant to the I.C.C. for a trucking license may request either no-oral-hearing or oral-hearing procedure. If he

elects the no-oral-hearing procedures, notice is then published in the Federal Register and, providing no objection develops, the application is promptly processed under the no-oral-hearing procedures. An applicant may hesitate to elect the no-oral-hearing procedures, for if he does, he must document his case at the outset with the information necessary to its no-hearing determination, including the nature and extent of shipper support. That may be difficult to do on the part of an applicant with a weak case, who hopes to slide through with no opposition and a minimum of proof.

On the other hand, Mr. Gilliland continued, if the applicant's case is strong, he is faced with the danger that disclosure of shipper support at the outset may facilitate its alienation or encourage competitive filings of others hoping to take advantage of his proof.

Therefore, many cases find their way into the hearing procedures where in fact no hearings are ever held, or which at the outset are uncontested. In such cases notice is not published until they have been scheduled for hearing in the field. No opposition develops in many of these cases. Others are withdrawn either before or after opposition has manifested itself.

Detailed protests are not required to be filed, but only notice of protests or participation at a pre-hearing conference. It is frequently difficult to evaluate the extent and seriousness of the opposition until the hearing. Protests may be withdrawn. Applicants or protestants may fail to appear. All of this involves disruption to the hearing schedules, delay and waste motion.

These and other problems which the Committee's proposals seek to reach have been the cause of much concern to the I.C.C. There has been a constant search for ways and means to solve them. Many methods have been tried, including some which are here proposed. The Committee, as explained by Mr. Gilliland, does not claim to have the answers. However, they do project a plan which is worthy of study and consideration by the I.C.C. and he moved that these proposals be submitted to the I.C.C. for that purpose.

Mr. Bond stated that he thinks the Committee has done an excellent job, but questions the sending of these recommendations to an agency. He is under the impression that the responsibility of the Conference is to make recommendations to the President and therefore questions whether this should be in the form of a recommendation or whether it should be in the form of a resolution, and also whether adoption of this recommendation means that this Conference believes that these principles should be adopted by the I.C.C.

Mr. Gilliland then stated that in answer to the second question his answer was "no" and as to the recommendation's being made to the President maybe the recommendation involved here is merely as stated, that there be transmitted to the Interstate Commerce Commission for its consideration, these proposals.

The recommendation was adopted without debate.

Discussion of Recommendation No. 15

(That agency rules with regard to the right of counsel be conformed to certain specified standards.)

The Chairman announced that Mr. Fortas, a member of the Conference, as a matter of personal privilege, for personal reasons, had requested that the record show that he would not participate in the discussion or debate on this recommendation.

The Chairman then recognized Commissioner Hyde of the Federal Communications Commission, Chairman of the Committee on Compliance and Enforcement Proceedings, for the presentation of Recommendation No. 15. Mr. Hyde noted that he had received a communication from Mr. Beelar suggesting that the Committee consider in connection with Recommendation No. 15 a recommendation which would require agencies to recognize attorneys, his view being that the right to counsel might be defeated if the agencies fail to give proper notice to counsel. Commissioner Hyde stated that the Committee had not had an opportunity to consider this suggestion, but that it appeared that this was more appropriately a matter of internal procedure and was not essential to the Committee's recommendation. Commissioner Hyde expressed the hope that any agency accepting the principle of right to counsel, as defined by the Committee's recommendation, would carry out the necessary function of notification of attorneys wherever necessary.

Mr. John T. Chadwell of Chicago was recognized and proposed an amendment to Footnote 1 which had been added to the recommendation by the Council. Footnote 1, as added by the Council, reads as follows: "'Qualified counsel of his choice,' as used throughout this recommendation, is not intended to foreclose agency determination, by appropriate rule, of the qualifications required of counsel to practice before the agency, or to foreclose agency adoption of special rules authorizing disqualification of counsel from representing more than one person in the same proceeding or investigation." Mr. Chadwell, speaking for himself and not for the Committee, proposed that Footnote 1 be amended by changing

the comma after the word "agency" as it appears in the phrase "of the qualifications required of counsel to practice before the agency," to a period and striking out the remainder of the footnote. He explained that the footnote, as amended, would preserve the agency's right to prescribe by appropriate rule the qualifications required of counsel, but would delete what would amount to an implied approval by the Conference of an agency regulation which would have the effect of deciding a matter, which, in his opinion, should be decided only by counsel or by the client. He added that he knew of no instance where a court presumed to suggest to counsel that he should not have the right to represent two parties in interest in a lawsuit or, indeed, a witness and a party. Whether a conflict of interest exists, or whether there might be other reasons why counsel should not represent more than one party, is a question that a lawyer should be permitted to decide, subject to appropriate supervision or review by an agency or a court.

Mr. Chadwell stated that he was informed that the reason for the provision in the footnote, which he proposes to delete, was to reserve to the SEC the right to determine whether there is a conflict of interest in any representation by counsel of a witness or a party, while counsel is representing another party and involves such questions as whether counsel representing a corporation which is a party in an investigation or agency proceeding can properly represent a corporation official who is called as a witness. In his opinion these matters should be determined by counsel employed by the corporation, or by a party to the case. The attorney should be permitted to decide whether there is a conflict of interest, and, if he thinks there is, of course, he should not represent both parties. If he thinks there is not and both parties wish him to represent them both, he should be permitted to do so. In fact, it would be a denial of the right to be represented by counsel of one's choice to forbid such a thing. Concluding his remarks, Mr. Chadwell moved the adoption of his amendment.

Mr. Robert Benjamin of New York, observed that the Backer case, referred to on page 6 of Professor McKay's report in support of the Committee's recommendations, shows that this very question has been before the courts and that in the Backer case, the Court of Appeals for the Fifth

Circuit held that such a rule of the Internal Revenue Service was invalid under Section 6(a) of the Administrative Procedure Act and that the decision in this case supports the amendment proposed by Mr. Chadwell.

Mr. David Ferber, of the Securities and Exchange Commission, was then recognized and spoke in opposition to the amendment. Mr. Ferber felt that the approach to the problem which the amendment takes, indicates an attitude, on the part of the Conference, of distrust of administrative agencies.

The agencies were set up in part to have functions similar to those of a grand jury and the courts have repeatedly stated this. In appearances before a grand jury, he said, one is not entitled to be accompanied by counsel, yet the SEC has always permitted an individual to be accompanied by counsel.

Still, the SEC has the duty of ferreting out what might be very complex and questionable schemes, in some of which the agency has found that members of the Bar were the ones who were active in working out such schemes. The suggestion that an agency must conform its investigation to the lowest ethics of any member of the Bar, as he believed the amendment to the footnote would require, would have an exceedingly hampering effect on an agency.

Mr. Ferber then pointed out specifically the types of problems with which the SEC is faced. The simplest type is a so-called "boiler-room" operation in which an individual runs a broker-dealer establishment with a group of salesmen who attempt to sell worthless securities over the phone to people throughout the country. Upon investigation by the SEC, the normal defense of the salesmen to any charge of misrepresentation is "I believed everything I said. I was just passing on what the boss told me." The usual defense of the man who runs the place is "I told my salesmen the facts. They went overboard and went much beyond what they were authorized to say." When the attorney for the boss comes in and states he will represent both the salesmen and the individual who owns the concern, Mr. Ferber said, there is an obvious conflict of interest to the SEC.

Also there have been cases where lawyers acting in good faith have not realized that there was a conflict of interest in their representation of more than one party or witness in a proceeding. Mr. Ferber felt that the matter of a conflict of interest is not one which a court would overlook and there have been cases which one could find through a little research where courts have suggested a conflict of interest to counsel.

Mr. Ferber then mentioned another situation that had come up recently in an SEC regional office in which an attorney for one of the witnesses was to be called as a witness himself, as it was suspected that the attorney was more deeply involved in the matter than the witness he was to represent. This, explained Mr. Ferber, tends to bring out the larger problem which is the situation where there is a conspiracy and the time-honored way of finding out about a conspiracy is to examine witnesses privately. Even in open court hearings, the rule is usually or frequently invoked whereby witnesses who are going to testify later may not hear prior testimony.

This, he added, has an obvious purpose - if people are going to perjure themselves, it is a lot tougher to do if they don't know all of the details. It is for this reason that the grand jury does not permit anyone but the individual witness to appear at a time. These are serious crimes that are involved and there are those who might feel that the risk of perjury is a slight one when compared to conviction for other crimes, so it is extremely difficult to find out all the facts and details except by interviewing these persons separately.

Mr. Ferber concluded by stating that he agreed that in administrative proceedings witnesses should have the right to counsel, any counsel in the whole world they want, except someone who is counseling, and, it is hoped, not coaching some other witness.

Mr. Chadwell responded to Mr. Ferber's statement by pointing out that the canons of ethics contain many prohibitions in addition to the prohibition against representing conflicting interests and that the Conference had as

much business inserting in a recommendation the prohibition against representing conflicting interests as it would of adding all the other provisions of the canons of ethics. He suggested that the appropriate procedure for the Conference to follow in a matter such as this is to adopt the broad general provision giving the agency the right which it should have by appropriate rule of determining the qualifications of counsel appearing before it, leaving specific matters of this kind to individual cases as they arise. Also he did not believe that what had been said is generally the point of view of lawyers - that they either don't know or don't inquire into, or willfully refuse to recognize conflicts of interest. If an agency has reason to believe that a conflict of interest does exist, it should, of course, bring the matter to the attention of the lawyer who would appear for the two parties and the agency's suggestion, he believed, would be respected in every instance.

Mr. Rains of the Department of the Treasury expressed doubt as to the implications of Mr. Chadwell's amendment from the point of view of the Treasury Department, where, by statute, the Secretary of the Treasury is given the right to determine both the qualifications, professional and ethical, of people who practice before the Treasury Department. Mr. Rains explained that all of these persons are not necessarily lawyers, but some may be certified public accountants, or other accountants or even custom house brokers and under the present statutory authority, the Secretary is obligated to and does look into questions relating to the ethical conduct of people who want to appear before the Treasury Department in its various branches. Mr. Rains expressed the fear that the adoption of Mr. Chadwell's amendment might lead to the belief that the Conference is on record as taking the view that this authority, which he believes is necessary, should be deleted, or perhaps that the statute either be amended or disregarded.

Professor Walter Gellhorn of Columbia University Law School explained that when the recommendation came before the Council, a question was raised as to what was meant by the term "qualified counsel of his choice." The Council was informed that the Committee had considered the type of question which has been raised by Mr. Chadwell and that the

Committee had chosen not to take a position on it; that there was no intention to advocate, or to preclude a restriction on an attorney's opportunity to represent more than one person involved in some phase of an administrative investigation.

Thus, the footnote was intended to do no more than clarify what the Committee said. He now felt, in the light of the discussion, that the footnote was defective and suggested that the Conference consider whether it would not be more desirable to have the footnote dedrafted as follows:

"The term 'qualified counsel of his choice' as used throughout this recommendation has no technical or accepted signification. In employing that term the Administrative Conference does not pass on the question of an agency's power to determine the qualifications of attorneys who may practice before that agency. Nor does it determine whether an agency can or should restrict an attorney's right to represent more than one person involved in a particular investigation as, for example, the person under investigation and simultaneously a person whose testimony is sought in that investigation. The present recommendations leave those matters as they now stand."

Prof. Gellhorn stated that he believed this language accurately reflects the intent of the Committee's recommendation which the Council had no desire to change, but merely to clarify.

Dean James M. Landis of New York, expressed the opinion that the entire footnote ought to be deleted, together with the word "qualified" in the paragraph to which it applied. Dean Landis stated that he disagreed with the practice of agencies setting up particular qualifications for individuals to practice before them other than that they be accredited members of the Bar and cited as an example that it seemed odd that to practice before the Patent Office one needed special qualifications, but to take a patent case into court, with all its ramifications, required only membership in the Bar. However, he did not care at

this time to interfere with that practice, but that the problem under consideration is somewhat different in that these cases are not initiated by private counsel but are initiated by the agencies. It is understandable, he said, for an agency to require counsel who initiates a proceeding to know something about the agency's procedures, but in those cases where the agency initiates the action, why should an individual be limited in his right to counsel of his choice?

Mr. Landis then proposed the deletion of Footnote 1 in its entirety, plus the deletion of the word "qualified" as it appears in paragraph 1a of the recommendation.

The proposal was placed in the form of a motion and duly seconded.

Mr. Joseph Zwerdling, of the Federal Power Commission examiner staff, inquired whether an agency having a rule such as the SEC, which appears in Footnote 20 on page 6 of Professor McKay's report, would not be complying with the Conference recommendation if it continued to have such a rule.

Mr. Chadwell responded by saying that in his view these conflict of interest matters should be for the individual attorney to decide and that he felt that the SEC's view was wrong and that they should not have such a rule.

Mr. Zwerdling stated that if this were the effect of the amendment, he would be opposed to it because he did not feel that the Administrative Conference should recommend that an agency not use such a rule without a far more careful study of the matter than has been made.

Mr. Chadwell commented that he did not believe the Conference should approve by implication a rule of this kind, which he felt it would be doing by adopting Footnote 1.

Mr. Landis then noted that a suggestion made by Commissioner Cohen might resolve the entire controversy, and that would be to change the prior motion (of Mr. Landis) so as to delete from paragraphs 1a and 1b of Recommendation No. 15, the words "qualified" and "of his choice" and also to delete Footnote 1.

Mr. Ferber noted his acceptance of this motion and stated that he hoped he would not be misinterpreted as being critical of members of the Bar in general, but that he did desire to point out that such violations of ethical standards do occur as evidenced by the disbarment proceedings brought from time to time by local bar associations.

Mr. Joseph A. Fanelli of Washington, D. C. moved to amend Dean Landis' substitute motion by eliminating from that motion the references to the words "qualified" and "of his choice." The motion failed for want of a second.

Mr. Ferber then asked what situations the Committee had found where people had been prejudiced by not having the right to counsel, and why they felt there was a need for the Conference to adopt this proposal.

Professor Robert B. McKay, Staff Director of the Committee on Compliance and Enforcement Proceedings, responded that the discussion in the Report was based largely on the few court cases on the subject. Specifically, the Backer case, which seems to reflect adversely on the practice of the Internal Revenue Service, and the Committee is satisfied that other agencies have similar rules. Section 6(a) of the Administrative Procedure Act, as presently worded, he said, precludes that kind of agency determination and there are other agencies, such as the SEC, which have similar rules and others which continue the practice with or without such rules.

Mr. Landis suggested that the Committee consider, in the future, the possibility of imposing some sanction where the right to counsel in investigatory proceedings is not provided, such as a prohibition against the use of the individual's testimony if he is not accorded the right of being represented by counsel.

Mr. Kintner commented that he believed the courts could impose appropriate sanctions depending on the particular situation, on the ground that the refusal to accord a right to counsel would be a deprivation of due process of law.

Mr. Ferber stated that Professor McKay's response to his question did not in any way show the need for this recommendation. All that has been shown, he said, is that in one

case, Judge Tuttle indicated that he felt the Internal Revenue Service could not prohibit by rule the type of restriction on representation by counsel which has been discussed, but which the proponents of Mr. Landis' amendment feel should not be passed upon by the Conference. Mr. Ferber continued that he recognized, of course, that in public investigations it is necessary to allow a person to give his side of the story and not be pilloried. But, one must distinguish between public investigations and between the private run-of-the-mill investigations that every enforcement agency and the Department of Justice must conduct, and then, it will become obvious that these are two entirely different situations. The idea that agencies should revise their rules so that in private investigations counsel for a party or a witness should have the right to examine other witnesses would take this thing to a point where investigation would be impossible. While he was not suggesting that the amendment went quite that far, he said some of the material in the report would indicate a desire that it be taken that far and without a need for it having been shown. Mr. Ferber stated that people are not complaining that they are not receiving due process of law in investigations nor has anyone impugned the grand jury system which allows only one witness to be heard at a time and without benefit of counsel. While the Administrative Procedure Act authorizes the witness to be accompanied by counsel and the SEC always permits it, unless there is something wrong with the practice of placing some limitation on the right to representation, he said he could see no reason to hinder the agencies. Mr. Ferber stated he had recently read an FBI report where a person asked to come in and tell his story and be accompanied by his lawyer, but was told that he could not do so if he brought his lawyer. He offered this as an example of a large government agency which possibly has some reason for this practice. It would be wrong, he said, for the Conference to adopt these platitudes which might interfere with certain enforcement functions without further exploration of the problem.

A vote was then taken on Dean Landis' substitute motion to strike out Footnote 1 and the words "qualified" and "of his choice" from paragraphs a and b of section 1 of Recommendation No. 15. Upon a voice vote the motion carried.

Professor Nathaniel L. Nathanson of Northwestern University Law School stated that he did not believe Professor McKay construed Mr. Ferber's question broadly enough and did not mean to say that the only information which the Committee had before it relating to the general scope of the recommendations happened to be the two court cases which he had mentioned. There was considerable discussion in the Committee with respect to various agency practices with regard to exactly what representation by counsel includes. The recommendation is intended to reflect the views of the Committee at least as to the minimum requirements with respect to representation by counsel. It was intended that the recommendation be more than a platitude and have some specific application.

Mr. Earl Kintner of Washington, D. C. commented on the use of the word "platitude" in connection with the recommendation. The recommendation was designed to help maintain the integrity of the administrative process by insuring the maximum standards of due process; something which is absolutely necessary if the administrative process is to enjoy the continued confidence of the public and the Bar. Indeed, he said, there have been problems raised in recent months concerning the failure of agencies to conform to these minimum standards of due process.

Mr. Ferber asked if anyone could cite an example of a case where an individual had been deprived of due process of law, which the Conference is told exists, and what agencies are involved.

In response to Mr. Ferber's question, Professor McKay explained the nature of the recommendation and why it was adopted. Recommendation No. 15 is divided into four parts.

Part 1 was not intended to change the Administrative Procedure Act in any respect but was designed to clarify what seems to have been the intention of the first sentence of Section 6(a). Thus the intent of the Committee was to make clear what seems to be at least a minimum right to counsel, which in some instances is specifically denied by agency rules, and, in many instances, is denied by agency practice.

The difficulty appears to be that agencies, in the long run, have made a distinction in their rules and in their practice between adjudicatory proceedings in general, and investigatory proceedings, according full right of counsel to parties in adjudicatory proceedings, but according only such rights to counsel to parties or witnesses in investigatory proceedings as the agencies choose, which sometimes are substantial and sometimes not very substantial at all.

The first sentence of Section 6(a) of the Administrative Procedure Act, by its language and by its legislative history, clearly intended to provide the right to counsel, based upon whether the witness is compelled to appear or compelled to submit documents or whether he appears voluntarily or in response to a committee or agency request.

A number of agency rules - and the report deals with instances of that at the present time - do not draw a distinction in accordance with the requirements of Section 6(a) as the Committee interprets it. Thus, part 1 was simply designed to call attention to those inadequacies of present rules and practice, and to define somewhat more specifically than has ever been available before what a minimum right to counsel means. It was not intended to suggest that an agency could not go further in providing the right to counsel, as some agencies do at the present time.

The second part of the recommendation affects the Administrative Procedure Act through the addition of only two words - "or permitted" in the first sentence of Section 6(a). The idea here is that the right to counsel accorded by Section 6(a) to compelled witnesses, as defined by the Committee in part 1, should be extended to witnesses who appear voluntarily or in response to an agency request. The Committee found there was no significant difference between the interest of a compelled witness and a witness who appeared voluntarily, and therefore recommends the amendment of the Administrative Procedure Act in this respect.

Part 3 provides that pending such amendment, the agencies be urged to conform their rules and practice to the recommended change.

Part 4 of the recommendation would come more nearly to being what Mr. Ferber probably thinks of the entire series of recommendations, that is, a platitude. It is laudatory in nature, but the Committee felt this too was important, and wished to emphasize that there are a number of instances in which the right to counsel becomes particularly significant because of the nature of the proceeding. That would be in particular the public investigations, and especially so, as they tend to have a quasi-adjudicatory or quasi-accusatory classification.

As for specific cases, about which Mr. Ferber asked, there are suggestions throughout the report and, more specifically, Footnote 28, on page 12, indicates some cases that are very much in litigation at the present time, involving quite specifically all the issues that are before the Conference on the right to counsel. Some would bear upon parts 1 and 2 and others would bear upon part 4 of the recommendations. The Committee believed that there was considerable departure from existing statutes to justify part 1 and that there should be no differentiation between compelled and voluntary witnesses, and, therefore, parts 2 and 3 were included; and, finally, that there are particular abuses, or at least situations, in which an agency practice could be improved, thus justifying part 4.

Mr. Donald C. Beelar of Washington, D. C. noted that the proposal under discussion called for an amendment to the Administrative Procedure Act and also recommended that the agencies amend their present rules and that the recommendation was not limited to a certain type of proceeding or to certain agencies, but applied across the board. He then invited the Conference's attention to a related matter, namely the problem of recognition of counsel by the agencies.

Mr. Beelar stated he was informed from attorneys around the country that in some cases some agencies had not acknowledged the filing of a pleading nor informed the attorney of the action taken on the pleading. Also he has heard of instances where an attorney contacts an agency by letter and the agency replies to the client and not the lawyer. Sometimes attorneys outside of Washington are not advised of matters which they brought to the attention of the agency.

Also, with respect to attorneys in Washington, there are occasions where the action on a particular matter filed by an attorney is handled by advising the out-of-town client without indicating that there is any copy or information to the Washington attorney, and the client naturally believes that his Washington lawyer knows what is going on, and this may not be so.

Mr. Beelar told of a case a few years ago where an agency took action on a hearing matter, and sent the copy of the action to the party involved in one of the States without informing the attorney in Washington. The particular matter required a response within 20 days and before the client knew what happened, the 20 days had expired and he lost his rights. So it is very important when considering the right of counsel on an across-the-board basis with agency rules generally, that some consideration be given to the other side of the coin, namely agency regulations which would provide for the recognition of counsel in matters where he is attorney of record before the agency.

Mr. Beelar quoted a rule proposed in 1957 by the Office of Legal Counsel of the Department of Justice which relates to this problem:

"When any participant in any matter before an agency is represented by an attorney at law and that fact has been made known in writing to the agency, any reply or other written communication required or permitted to be given to or by such participant shall be given to or by such attorney. Where any other method of service is specifically provided by statute, service shall also be made as so provided. If a participant is represented by more than one attorney, service by or upon any one of such attorneys shall be sufficient."

Mr. Beelar again pointed out that most of the statutes provide for a notice of service upon a party and many agency staff personnel read this literally and deal with the party and not his lawyer. Also, in some agencies there is a deliberate disposition to avoid lawyers if possible and deal with the parties. Mr. Beelar stated he did not request the pending recommendation to be amended but wanted to have the matter referred to the Committee for study.

Mr. Howard C. Westwood of Washington, D. C. requested that the first paragraph on the top of page 2 of the Committee report be withdrawn. Mr. Westwood stated that while he was aware that the report itself was not before the Conference for consideration, he was troubled by this portion of the report because it does not have a bearing on the recommendation and is not a correct statement of the law. The case of Chandler v. Freitag cited in its support has nothing whatever to do with the statement made in the Committee report, but deals with an entirely different problem. He indicated the possibility that in the next year in the District of Columbia there will be a strong challenge to the proposition stated in this paragraph and he was concerned that this might be misconstrued and relied upon as an authoritative statement by a committee of the Conference as to what the law is and would present another hurdle in an argument which is going to be made in the future to extend the benefits of legal aid to indigent persons and again requested that the paragraph be withdrawn.

Mr. Robert L. Stern of Chicago, Consultant to the Committee on Judicial Review, raised another point, that part 2 of the recommendation, if given a literal interpretation, may go much farther than the Conference intends. Referring to the phrase ". . . or permitted to appear in person before any agency or representative . . .", he noted that the report and the discussion on the floor appeared to refer to an investigation by way of a hearing; either a public hearing or possibly just a public investigation, but at least an investigation by way of hearing where testimony is taken. Mr. Stern then asked the question: Was this provision intended to cover the situation in which an agency asks somebody to come in privately and talk to them; for example, was it intended to cover the usual FBI situation, where the FBI does not have any subpoena power and cannot compel anyone to talk to them? Mr. Stern said he did not understand this type of situation to be covered by the Committee's recommendation and, if this is correct, the recommendation should be amended to make clear what is intended. However, if it was the intention of the Committee to cover this type of situation, there are numerous problems raised which have not been considered.

Professor McKay replied that while the Committee was primarily concerned with the type of investigation Mr. Stern suggests, that is, one in which a hearing is held, the Committee was also concerned with types of investigations and that the recommendation was intended to have the broad interpretation which he suggests and would apply, for example, to inquiries of aliens by the Immigration and Naturalization Service and other such proceedings.

Mr. Thomas J. Donegan of the Subversive Activities Control Board inquired whether this would be broad enough to include FBI investigations.

The Chairman noted that this part of the recommendation was proposed as an amendment to the Administrative Procedure Act and would be limited to the scope of that Act. Mr. Donegan stated that he was in agreement with the recommendation as it applies to administrative agencies in performing their judicial functions, but, if this was meant to apply to investigations by the FBI, he felt the Conference was going too far afield.

Mr. Charles W. Bucy of the Department of Agriculture stated that the real question was whether the recommendation applied only to proceedings subject to the Administrative Procedure Act. It is not just a matter of the agency being subject to the Act, but a question of whether it is supposed to apply to proceedings, or investigations, that are not subject to the Act.

Mr. Chadwell commented that the Administrative Procedure Act applied to both adjudicatory and investigative proceedings and that the suggested addition of the words "or permitted" was to make the Act apply to witnesses permitted to appear and to accord to them the same rights the Act gives to those compelled to appear.

Mr. Bucy added that while witnesses are ordinarily compelled to appear in formal proceedings, the language goes further than the voluntary witness in a formal proceeding and applies to any person in any appearance before an agency.

Mr. Hyde announced that the Committee had agreed to withdraw the first paragraph at the top of page 2 of the report.

Professor Gellhorn expressed regret over the withdrawal and hoped it would not set a precedent. He felt that if each member of the Conference began selecting from the reports, statements that cause some concern because they might have a hearing on a particular case in which a member is interested, or because it runs counter to someone's beliefs, the Conference would be so busily engaged in having the committees rewrite their reports on the floor, the Conference would not have time to consider the recommendations.

Referring to parts 2 and 3 of the recommendation, Professor Clark Byse of Harvard Law School stated that the answer to Mr. Stern's question would be that if the Administrative Procedure Act were to be amended as the Committee suggests, then the FBI and SEC investigations would be included. He felt the FBI was subject to the Administrative Procedure Act as it is an agency of the government as defined in Section 2 of that Act. Professor Byse thought it was inadvisable for the Conference to recommend to the Congress, on the basis of the very scanty evidence presented, that anyone who appears voluntarily before any agency representative shall be accorded the right to be accompanied, represented, and advised by counsel. Therefore, he moved that parts 2 and 3 be deleted from the recommendation.

Mr. Foster suggested that the problem might be clarified by a substitute for Professor Byse's motion which would add the words "as a witness" after the word "appear" in part 2 of the recommendation. Mr. Foster felt this might remove the doubt with regard to informal discussions between agency representatives and possible future witnesses.

Mr. Hyde stated that the recommendation had been carefully considered by the Committee and they had found no reason to make a distinction between a witness who is compelled to testify and one who responds to a request, or volunteers. It was the Committee's belief that this would be a contribution to fairness in administrative proceedings, and goes to the protection of the rights of individuals. Mr. Hyde speaking for the Committee strongly urged the Conference to reject the amendment.

Mr. Donegan stated that the confusion is caused by the doubt as to whether the Administrative Procedure Act applies to a purely investigative agency, which he doubted, but if it is not clear, then it is essential to have the amendment and not venture into an area that has not been fully explored.

Professor Gellhorn suggested that the objection might be removed if the language were rephrased as follows: "Any person who appears in person before any agency or representative thereof upon the agency's request shall be accorded the right . . ." Thus, no differentiation would be made if a witness appears in response to a letter instead of a subpoena. Professor Gellhorn doubted that there was any problem about people asking if they can appear to discuss a matter of concern to them, and being told they won't be received with or without their lawyers.

Mr. Benjamin pointed out that the difficulty here related to the question of whether this would apply to the FBI or some other police agency in their investigations. It would be a great mistake to drop an entire proposal for some application of the right to counsel idea on voluntary appearance just because there has been no solution offered to this comparatively narrow problem. What the Committee had in mind was that in some respects it is not entirely proper for a person to be recalcitrant and refuse to appear voluntarily in various proceedings, including not only adjudicatory proceedings but also formal investigatory proceedings where he can obtain the right to counsel only by appearing reluctant and uncooperative. It was to meet that situation that the Committee thought that the right ought to apply equally on behalf of witnesses who appear voluntarily. Mr. Benjamin suggested that if no solution is found, the matter should be referred back to the Committee rather than stricken altogether.

Professor Stanley D. Metzger, Staff Director of the Committee on Claims Adjudication, endorsed Mr. Benjamin's suggestion. The problem is that when a change is made from compulsion to permission, there is presented the question of whether to differentiate between formal proceedings, semi-formal investigative proceedings or informal proceedings. If the matter is referred back to the Committee with instructions to focus on this differentiation, the major problems could be solved.

Mr. Bucy agreed that the matter should be referred to the Committee for reconsideration and possible redrafting of this particular provision, and emphasized that the Committee should do the redrafting and not the Conference.

Mr. Ferber stated that he was in entire agreement with the proposition that in public hearings or investigations, or to investigations that might be made public, that the right to counsel is important. As for the area of private investigations, Mr. Ferber said he still did not feel his previous questions had been adequately answered and until the Committee could support its recommendation with instances showing where individuals had been unfairly deprived of right to counsel, it would be premature for the Conference to vote on this matter.

Mr. Nathaniel H. Goodrich of the Federal Aviation Agency offered the comment that, as he read Section 6(a) in its entirety, there was no basis for making a distinction between the first sentence in that subsection and the remainder of the subsection, since the remainder deals with agency proceedings which are defined in Section 2(g) of the Act and includes only those proceedings defined in subsections (c), (d), and (e) of Section 2. This would indicate that Recommendation No. 15 would not apply to the FBI type of investigation.

Professor Byse, with the concurrence of Mr. Bucy, who seconded his motion, withdrew his original motion and then moved to refer parts 2 and 3 of Recommendation No. 15 back to the Committee for further study.

Mr. Donegan suggested that the Committee also consider the scope of the Administrative Procedure Act and attempt to determine its application to purely investigatory proceedings where an administrative agency, as commonly known, is not involved.

Mr. Byse's motion that parts 2 and 3 of Recommendation No. 15 be referred back to the Committee for further study was passed by a voice vote.

The Chairman announced that the recommendation, as amended by the deletion of Footnote 1 and the deletion of the words "qualified" and "of his choice" from paragraphs a and b of part 1 of the recommendation, was now before the Conference for a vote. Upon a voice vote, Recommendation No. 15 was approved as amended.

Discussion of Recommendation No. 17

(That the Conference authorize the Committee on Statistics and Reports to prepare a statistical report on volume, backlog and time study data on administrative proceedings conducted in FY 1962 and to request such information from the administrative agencies and departments as may be necessary for such report.)

Mr. Bucy, Chairman of the Committee on Statistics and Reports, presented the Committee's recommendation. It is necessary for the Conference to act on this recommendation because the Executive order establishing the Conference placed the authority for requesting information of the agencies in the Conference and that authority has not been delegated to the Council or the Committee.

In response to the action of the Conference at the December plenary session, the Committee requested reports from 62 agencies in the Federal Government. Reports were received from all but two of the agencies. Some agencies reported that they did not conduct the type of proceedings about which information was requested.

Mr. Bucy pointed out that the members of the Conference have received the report with the blue cover which gives the time study data and a directory of proceedings and also the report with the yellow cover which contains the volume and backlog data. With respect to the time study report, he cautioned, it should be kept in mind that the information is limited to oral hearings where there was a verbatim record of the evidence, which resulted in a determination of private rights and that it included hearings regardless of whether the Administrative Procedure Act was applicable. Also it is important to remember that all this information applies to matters that were pending or disposed of in FY 1961.

With respect to the directory of proceedings, the agencies were asked to furnish the statutory authority, the nature of the proceeding, and the common name designation. However, he said, the directory needs improvement. It is necessary to get better cooperation from the agencies in giving a more meaningful description of the types of proceedings and it is hoped that the next time, it will be divided into categories so that there will be licensing proceedings in one group, rate proceedings in another, etc.

The yellow report contains the volume data and backlog data. It shows how many proceedings were pending at the beginning of the fiscal year, how many cases were disposed of and the nature of the disposition of the cases and how many cases were pending at the end of the fiscal year.

Part 3 is limited to those types of proceedings of which an agency had five or more cases during the reporting period, FY 1961. If someone is interested in a particular proceeding which is not reported it may be that the reason it is not reported is because the agency had less than five cases during FY 1961. The Committee feels that this may have been an area where it was too restrictive and where it should have asked for information on these cases even though an agency had less than five, so that the directory would be more complete, and so that the time study data would be more complete.

Mr. Bucy then referred to page 66, motor carrier finance proceedings of the ICC, to explain the time study information. The information shows every step from the start of the proceeding through the final decision, and shows the number of days elapsed between steps and the percentage of the time taken in each particular step to the total time taken for the disposition of the case. The right-hand side of the time study page is divided by a dark line so as to indicate that those columns on the right are combinations of steps. For example, Column R gives the breakdown from the start of the proceeding to the time it was ready for preliminary decision. It was broken down into this particular category because this is a period when the attorneys in the proceeding have a substantial impact on the time elapsed. The next column, S, takes the period from the date when it is ready for preliminary to the final decision. This is an area

where the agency has primary control. The other breakdowns are of a similar nature and are for the purpose of showing the time elapsed between the different steps in a proceeding.

Mr. Bucy noted that the report is the Committee's first report and that anyone using it should realize that it is raw data and cannot alone serve as a basis for any final conclusions, but is merely an aid to those doing research in other phases of administrative law as a supplement to their studies. The information in the report does not purport to provide answers but hopes to raise red flags to indicate areas where members of the Conference and the committees feel there may be a need for further research to arrive at any solutions.

Also, the Committee hopes that this may lead in the direction of a serious consideration of increasing the availability of information from agencies by pointing out the possibilities available in the area of central data recordation and the utilization of automatic data processing equipment.

Mr. Bucy stated that the volume data was printed in a supplemental volume because in the first report volume data was provided only for those types of proceedings of which an agency had more than five and for which time study data was available. The yellow book provides volume data on all of the 211 proceedings reported, with some exceptions.

Mr. Bucy expressed the hope that the agencies will, in response to future requests, provide a more meaningful description of their proceedings. The Committee is interested in the nature of the issues and also type of agency action which results from the proceeding.

He said the Committee welcomed suggestions from the agencies and members of the Conference. The Committee realized that there were many other factors bearing on the total elapsed time which would be valuable to have, but that it is essential that the request for information be kept as simple as possible so that the Committee will be able to receive the initial raw data from the agencies within a reasonable period of time and have it processed and printed in time to make it available for the use of the Conference committees.

Mr. Bucy noted that the Committee has received reports and correspondence from agencies indicating that they found this information very useful to them in pinpointing areas of delay. The Committee is not asking in this recommendation for a free charter to request anything and everything from the agencies but it does need the authority to revise its questionnaire to conform with some of the suggestions. The Committee merely wants the breadth of discretion so that it can do a better job the next time.

Judge Prettyman urged each member of the Conference to select one page from the volume of time study data and follow it through very carefully. He felt that if the members of the Conference would take a little time to find out what the data means and how to use it, they would find it to be very useful in providing a basis for studying backlogs and weak spots in procedure which add to unnecessary delay.

Concluding the discussion on the recommendation, Mr. Bucy expressed the Committee's appreciation to Mr. Maxson, and his staff, and the Committee's Consultant, Mr. Thomas A. Chittenden for the work they had done in getting the material processed and ready for distribution to the Conference.

Recommendation No. 17 was then voted upon and adopted.

At 12:30 p.m., the Conference recessed for lunch until 1:45 p.m.

Discussion of Recommendation No. 16

RECOMMENDATION NO. 16

(As submitted to the Conference for its consideration.)

The Committee on Internal Organization and Procedure submits the following recommendations for adoption by the Conference.

IT IS RECOMMENDED THAT:

The Administrative Conference deems it essential that the administrative process should be protected from improper influences, and that the public should be assured that every feasible effort to do so is being made. The Conference has concluded that the agencies themselves should take certain action to help achieve these objectives.

Accordingly, the Conference recommends that each agency should promulgate a code of behavior governing ex parte contacts between persons outside and persons inside the agency which should be based upon the principles set forth below.

The Conference recognizes that it may not be practical for all agencies to adopt a uniform code embodying its recommendations. Some agencies may find it advisable to add to the recommended prohibitions and requirements, while others may find it inadvisable to accept all the recommendations in connection with particular kinds of proceedings conducted by them. The Conference expects that each agency will seek to effectuate the general recommendations in light of the specific considerations of fairness and administrative necessity applicable to each of the proceedings conducted by it.

1. The agency code should prohibit any person who is a party to, or an agent of a party to, or who intercedes in an on-the-record proceeding in any agency, from making an unauthorized ex parte communication about the proceeding to any agency member, hearing officer, or agency employee participating in the decision in the proceeding.

a. The prohibitions should apply to every "on-the-record proceeding" conducted by any agency of the Federal Government - i.e., to every proceeding required by statute, or by published agency rule or order in the particular case, to be decided solely on the basis of the record of an agency hearing - except proceedings involving (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to Section 11 of the Administrative Procedure Act; (3) decisions which rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives.

By published rule or order in the particular case, each agency should specify which of its proceedings will be governed by the prohibitions against ex parte communications.

b. The prohibitions should apply from the time the agency notices an on-the-record proceeding for hearing or from such earlier time as the agency may fix by published rule or order in the particular case.

c. Except as provided in d. below, the "ex parte communications" prohibited should include:

(1) Any written communication of any kind about an on-the-record proceeding, if copies thereof are not served by the communicator upon all the parties to the proceeding in accordance with agency rules. Each agency should promulgate rules specifying the manner and time of service.

(2) Any oral communication of any kind about an on-the-record proceeding (i) if advance notice that it will be made is not given by the communicator to all the parties to the proceeding, or (ii) if its contents are not disclosed by the communicator to all the parties at the time of its presentation or promptly thereafter, in accordance with agency rules. Each agency should promulgate rules specifying the manner and time of disclosure.

d. The following classes of "ex parte communications" should not be prohibited.

(1) Any oral or written communication which relates solely to matters which the hearing officer, agency member, or agency employee is authorized by law to dispose of on an ex parte basis.

(2) Any oral or written request for information with respect to the status of a proceeding, but only if the request is directed to the Secretary of the agency or other official designated by agency rule to receive it.

(3) Any oral or written communication which all the parties to the proceeding agree, or which the agency or hearing officer formally rules, may be made on an ex parte basis.

(4) Any oral or written communication of facts or contentions which have general significance for an industry subject to regulation if the communicator cannot reasonably be expected to know that the facts or contentions are material to a substantive or procedural issue in a pending on-the-record proceeding in which he is interested.

(5) Any oral or written communication made pursuant to an agency practice which is generally known and under which the content of the communication (by way of transcript or otherwise) is promptly available to any person who is a party to a pending on-the-record proceeding which involves any substantive or procedural issue to which the communication may be relevant or who can otherwise show an interest in the communications.

e. The "person who is a party" to whom the prohibitions apply should include any individual outside the agency conducting the proceeding (whether in public or private life), partnership, corporation, association, or other agency, who is named or admitted as a party or who seeks admission as a party.

f. The "person who intercedes in" the proceeding, to whom the prohibitions apply, should include any individual outside the agency conducting the proceeding (whether in public or private life), partnership, corporation, association, or other agency, other than a party or an agent of a party, who volunteers a communication, which he may be

expected to know may advance or adversely affect the interests of a particular party to the proceeding, whether or not he acts with the knowledge or consent of any party or any party's agent.

g. The "agency employee participating in the decision" should include all employees of the agency who themselves make or recommend decisions or who are specifically designated by the agency to assist agency members, hearing officers, or other employees in making or recommending decisions.

Each agency should identify the employees, or classes of employees, who will so participate in the decision in a rule or order published at or before the time when the prohibitions against unauthorized ex parte communications begin to apply to a particular proceeding or class of proceedings or with respect to a particular employee or class of employees.

2. The agency code should prohibit any agency member, hearing officer, or agency employee participating in the decision in an on-the-record proceeding in any agency from (a) requesting or entertaining any unauthorized ex parte communication; and (b) making an unauthorized ex parte communication about the proceeding to any party to the proceeding, any agent of any party, or any other person who he has reason to know may transmit the communication to a party or a party's agent.

3. The agency code should prohibit any person from soliciting any other person to make an ex parte communication which the solicitor has reason to know is unauthorized.

4. The agency code should require an agency member, hearing officer, or employee participating in the decision, who receives a written communication which he knows is unauthorized, or which he concludes should, in fairness, be brought to the attention of all parties to the proceeding, to transmit the communication promptly to the Secretary of the agency, together with a written statement of the circumstances under which it was made, if they are not apparent from the communication itself. The Secretary should be required promptly to place the communication and the statement

in the public file of the agency, to send copies of the communication to all parties to the proceeding with respect to which it was made, and to notify the communicator of the agency code and any other applicable rules or principles of practice.

If the communications are from persons other than parties to the proceeding or their agents and the recipient determines that they are either so voluminous or of such borderline relevance to the issues in the proceeding that it would be too burdensome to send copies of the communications to all the parties to the proceeding, the Secretary may, instead, notify the parties that the communications have been received and placed in the public file and are available for examination by the parties.

5. The agency code should require an agency member, hearing officer, or employee participating in the decision, who receives an oral communication which he knows, at the time it is received, is unauthorized, or which he concludes should, in fairness, be brought to the attention of all parties to the proceeding, to put the substance of the communication in writing and transmit the writing promptly to the Secretary of the agency, together with a written statement of the circumstances under which it was made. The Secretary should be required promptly to place the writing and the statement in the public file of the agency, to send copies of the writing to all parties to the proceeding with respect to which it was made, and to notify the communicator of the agency code and any other applicable rules or principles of practice.

If the communications are from persons other than parties to the proceeding or their agents and the recipient determines that they are either so voluminous or of such borderline relevance to the issues in the proceeding that it would be too burdensome to send copies of the writings containing the substance of the communications to all the parties to the proceeding, the Secretary may, instead, notify the parties that the communications have been received and writings containing their substance placed in the public file where they are available for examination by the parties.

6. The agency code should permit all parties to an on-the-record proceeding to request an opportunity to rebut, on the record, any facts or contentions contained in an unauthorized ex parte communication or in any other ex parte communication which the agency official receiving the communication brought to the attention of all the parties in accordance with Recommendation 4 or Recommendation 5 above. The code should provide that the agency will grant such a request whenever it determines that the dictates of fairness so require.

7. The agency code should provide for the suspension or revocation of the privilege to practice before the agency of any person who makes, or solicits the making of, an unauthorized ex parte communication.

8. To the extent permitted by applicable law, the agency code should provide that any relief, benefit or license sought by a party to a proceeding may be denied if the party, or an agent of the party, makes, or solicits the making of, an unauthorized ex parte communication.

9. The agency code should provide for the suspension or dismissal, or the institution of proceedings for the suspension or dismissal, of any agency employee who violates the prohibitions or requirements of the code.

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Mr. Borchardt, representing Congressman Oren Harris, Chairman of the House Committee on Interstate and Foreign Commerce, was recognized for the purpose of presenting to the Conference the views of the Congressman with respect to the subject matter of Recommendation No. 16. Congressman Harris, the Conference was advised, was in wholehearted agreement with the recommendation of the Committee on Internal Organization and Procedure that the Conference adopt general prohibitions against ex parte communications to guide the agencies in formulating their own individual codes. The Congressman had become convinced in the course of consideration by his Committee of H. R. 14, 87th Congress, which deals with the matter of ex parte influence, that the diversity of needs of the various agencies renders impracticable a single code applicable to all agencies. Congressman Harris had expressed the hope that the Conference would follow the approach taken by the Committee on Internal Organization and Procedure.

Mr. Mason, speaking on behalf of the Committee on Internal Organization and Procedure, noted that the Committee, having been asked by the Council, pursuant to request by Congressman Harris, to consider H. R. 14, had enjoyed the benefit of material developed during the hearings on that and related bills.

Turning to the recommendation at hand, Mr. Mason noted that there were some differences between the text thereof as read to the Conference by the Executive Secretary and the text as contained in the Committee report. He advised, however, that the changes incorporated in the former were minor and were accepted by the Committee. Mr. Mason thereupon moved the adoption by the Conference of Recommendation No. 16 as read, noting that consideration thereof would proceed, under the resolution fixing the order of business, in accordance with the following analysis prepared by the Council:

"QUESTIONS PRESENTED BY RECOMMENDATION NO. 16

- "1. Section 1a of the Committee recommendation - In what kinds of proceedings should ex parte communications be prohibited?
- "2. Section 1b - At what point in the conduct of a proceeding should the prohibition become applicable?
- "3. Sections 1c and 1d - What kinds of communications should be prohibited?
- "4. Sections 1e and 1f - What persons should be prohibited from communicating ex parte with agency officials?
- "5. Section 1g - What agency officials should be insulated from ex parte communications by the prohibition?
- "6. Section 2 - What provision should be made prohibiting agency officials from receiving improper ex parte communications?
- "7. Section 3 - What provision should be made against soliciting another person to make an unauthorized ex parte communication?
- "8. Sections 4 and 5 - What procedures should be established for the handling of improper communications in the event of violation of the prohibition?
- "9. Section 6 - Should opportunity be afforded for rebuttal, on the record, of unauthorized ex parte representations?
- "10. Sections 7, 8, and 9 - What sanctions should be provided?
- "11. Introduction on the first page of the recommendation - Should the Conference recommend a statutory prohibition, or should it recommend that the subject be dealt with by agency rules?"

The Chairman noted that under the said resolution as to the order of business, consideration of the various sections of the recommendation would proceed seriatim in accordance with the foregoing analysis, but that action as to acceptance or non-acceptance would await completion of debate on the last portion to be considered.

Discussion of Item 1 - Section 1a

The Chairman then called for discussion of Item 1, being Section 1a of the recommendation. Mr. Mason, speaking on behalf of his Committee, moved the deletion of the language excepting from the prohibitions the six classes of cases there listed, in order to permit an agency discretion to apply the prohibitions even in those cases. There being no objection, the motion was considered accepted as a Committee amendment.

Mr. Bond then moved the substitution of the word "law" for the word "statute" in the phrase "every proceeding required by statute . . . to be decided solely on the basis of the record . . .", the purpose of the motion being to include within that class of cases to which the prohibitions would apply those proceedings required by the Constitution, as well as those required by statute, to be decided solely on the record. Mr. Beelar seconded the motion.

Professor Auerbach, the Staff Director of the Committee on Internal Organization and Procedure, rose to speak against the motion, on the ground that it would generate problems under the Sangamon doctrine. He did express the belief that the Committee would not object to the addition of the words "or Constitution" after the word "statute," but noted that the recommendation as drafted would in any event permit the agency to make the prohibitions applicable to cases other than those required by statute to be decided solely on the record.

Mr. Bond thereupon moved the addition of the words "or Constitution" in lieu of his prior motion, and this substitute was accepted by Professor Auerbach on behalf of the Committee. Subsequently, a vote was taken and the substitute motion was carried.

Professor Fuchs then moved an amendment to the paragraph introducing "a," in order to make it clear that an agency may specify a proceeding other than an on-the-record proceeding as one to which the prohibitions would apply. Although Professor Auerbach opined that the second paragraph in "a" accomplished this purpose, he stated that the Committee would have no objection to clarifying language, the Committee being in accord with the idea that Professor Fuchs' amendment expressed. It was agreed that discussion of the matter would be suspended pending a conference between Professor Fuchs and Professor Auerbach to reach mutually agreeable language to effectuate the already mutual intent.

Discussion of Item 2 - Section 1b

The Chairman proceeded to call for discussion of Item 2, being paragraph 1b of the recommendation. Professor Auerbach summarized the recommendation as calling for applicability of the prohibitions from the time an agency notices a proceeding for hearing, but still permitting the agency in its discretion to fix an earlier time therefor.

Mr. Stern expressed the view that in many cases the greatest issue is whether or not, or in any event when, a proceeding will be noticed for hearing, the period preceding such noticing being a fruitful one for ex parte communications; and he accordingly opined that it is at least arguable that the prohibitions should apply during such earlier time. There followed a motion by an unidentified member of the Conference to amend the recommendation to make the prohibitions applicable from "the time the application is filed," which motion was interpreted by the Chairman, with the consent of the moving member, as calling for applicability of the prohibitions "from the time the proceeding is initiated." There followed a discussion from the floor, during which the view was expressed that under the proposed amendment, if a communication were made after, say, a license application was filed but prior to intervention by other parties, notification of other parties would be impossible and hence unnecessary. It was also noted that new parties frequently intervene even after the time noticed for hearing.

Later Mr. Landis, in support of the Committee formulation, noted that it is sometimes difficult to determine how or when certain matters are initiated, and voiced the opinion that it would be impractical for the Conference to go beyond the Committee recommendation.

Professor Auerbach noted that under the Committee's recommendation, the prohibitions become applicable at the time a proceeding is noticed for hearing, or at such earlier time as the agency shall in its discretion set. But, he stated, the recommendation contained no requirement that the agency exercise its discretion so as to make the prohibitions applicable prior to noticing for hearing even though it had sooner become apparent that a given proceeding would be an adversary one. Nor did the Committee recommendation, he continued, attempt to identify any earlier time at which an agency ought to exercise its discretion. It was the Committee's purpose, he maintained, to permit the agency leeway and flexibility in this regard.

Professor Fuchs then inquired whether or not it was the Committee's intent, in using the language ". . . from such earlier time as the agency may fix by published rule or order in the particular case," that an agency might fix such earlier time by either promulgating a general regulation for a certain type of case or entering a special order in a particular case. Professor Auerbach assured the Conference that it was indeed the intent of the Committee to provide that the agency could follow either course in fixing an earlier time. Professor Auerbach noted that there appeared to be some confusion as to what words were modified by the phrase "in the particular case." He suggested that, in order to clarify the matter, the language be changed to read ". . . by published rule or by published order in the particular case," explaining that it was felt to be desirable to require publication of the order, albeit not necessarily in the Federal Register, for the reason that the prohibitions are applicable to some non-parties and that there would be no way in which the agency could know the identity of all persons to whom the prohibitions would run. Mr. Bond moved to adopt Professor Auerbach's suggestion, and the motion was duly seconded. There was a substitute motion to amend the language to read ". . . by published rule, or in a particular case by order."

There followed a discussion during which Mr. Foster, speaking for the Committee stated that the recommendation was not addressed to the problem of determining the point at which it might be reversible error for an agency to permit ex parte communications, judicial review for denial of due process remaining available in any event; rather, he stated, the recommendation was addressed to the problem of determining the point at which relatively drastic sanctions ought to apply to one engaging in prohibited communications.

The Conference proceeded to reject the three motions before the house. A further motion was made, by Professor Bernstein, that a comma be inserted in subsection "b" between the words "rule" and "or," so that the phrase would read ". . . from such earlier time as the agency may fix by published rule, or order in the particular case." The motion was seconded and carried.

#### Discussion of Item 3 - Sections 1c and 1d

The Chairman then called for a discussion of Item 3, being sections 1c and 1d of the recommendation.

Mr. Ginnane rose to move an amendment of Section 1c so as to restrict the prohibitions to communications relating to the merits of a proceeding. He asserted that a failure to so restrict the prohibitions would amount to an attempt to totally isolate agency members and other decision-making personnel from so much as a status request by a Member of Congress, and that any such attempt would be doomed to failure unless the agency ". . . stops reading the newspapers, the trade press, and the Congressional Record." He opined that the section, as recommended by the Committee, would be misleading as to the scope of the ex parte communications which would, or could, be prohibited by agency rule. Affirming the need for isolation of decision-making personnel from ex parte communications addressed to the merits of a proceeding, and recognizing that "status requests" are often more than they purport to be, he asserted that nonetheless it would be unwise and unworkable to attempt to legislate a substitute for independence of judgment and "backbone."

Mr. Hutchinson rose to second Mr. Ginnane's motion, and to state his view that application of the prohibitions to communications not relating to the merits of a proceeding would cast a tremendous burden upon the agencies, particularly the ICC. Also alluding particularly to the ICC, Mr. Stillwell remarked that the prohibitions, were they to apply to communications not relating to the merits, would make it almost impossible for an agency with a large caseload to operate in an orderly fashion. Affirming the need for a rule directed against communications going to the merits, he nevertheless contended that a rule encompassing purely procedural matters as well is unnecessary, costly, and unworkable.

Professor Auerbach, speaking on behalf of the Committee, pointed out that the recommendation would not prohibit communications made to other than decision-making personnel, and that it would likewise not prohibit communications relating to matters authorized by law to be disposed of on an ex parte basis. Adverting to the matter of Congressional status requests, he opined that one of the best ways to conserve the time of agency members would be to remove them from functions which other officials, such as the agency Secretary, could perform equally as well. He referred to the testimony of ICC Commissioner Arpaia before the Harris Committee on H. R. 14, to the effect that relief from the burden of answering status requests would be a blessing for agency members, and that it would be wholly feasible to do so within the ICC as he, Commissioner Arpaia, knew that agency.

Professor Auerbach noted that all that the Committee recommendation would provide with respect to status inquiries would be that they be directed to the Secretary of an agency if they are to be made on an ex parte basis.

Mr. Bucy asserted that he believed that the testimony of Commissioner Arpaia concerned the feasibility and desirability of a statutory prohibition encompassing status inquiries directed to agency members by Members of Congress, and that he, Mr. Bucy, felt it naive to think that the practice could be effectively stopped by an agency rule. Mr. Bucy further declared the really important matter to be the effective prohibition of communications going to the merits of a proceeding.

Mr. Beelar rose to speak against the amendment, addressing himself to the facileness with which communications going to the merits of a proceeding can be disguised. It was his opinion that to attempt to limit the recommendation to communications involving the merits would be to render the prohibitions virtually meaningless.

Mr. Landis, while expressing sympathy with Mr. Ginnane's approach, emphasized the difficulty of giving meaning to the phrase, "dealing with the merits."

The Vice-Chairman inquired of Professor Auerbach whether or not the recommendation was intended to impose a separation of functions between the agency staff and decision-making personnel, where such a separation is not now required by the Administrative Procedure Act. Professor Auerbach replied that the Committee recommendation as it then stood did not deal with any aspect of the problem of intra-agency communication; and that while a proceeding in which the only formal participants were a single private party on the one hand, and agency staff on the other, would be included within the scope of the recommendation, the effect of the inclusion would be to bar ex parte communication from persons outside the agency to decision-making personnel inside the agency.

The Conference proceeded to vote on the motion to have section 1c redrafted so as to limit the prohibitions to communications pertaining to the merits of a proceeding, and the motion was defeated.

Mr. Landis moved to insert a period after the word "proceeding" in d(2) and to strike the remainder of the sentence. His proposed amendment was changed to insert the word "solely" after the word "information" so that d(2) would read:

"Any oral or written request for information solely with respect to the status of a proceeding."

Mr. Horowitz inquired of the Committee what was meant by "the status of a case."

Professor Auerbach responded by saying that this includes such inquiries as: What is happening to the case? At

what stage is it under the agency rules? Why is it taking so long? Why isn't the application expedited? or Why isn't it delayed? and other questions of this nature.

Mr. Beelar, a member of the Committee, expressed his disagreement with the definition given by Professor Auerbach.

In response to the question of whether the Committee had considered restricting status requests to inquiries by the parties or their counsel, Professor Auerbach replied that it had not.

The amendment to subsection d(2) was then voted upon and adopted.

#### Discussion of Item 4 - Sections 1e and 1f

Professor Auerbach offered a short explanation of these provisions. These are prohibitions against outsiders as well as insiders. The outsiders who are covered fall into three categories: parties to the proceeding who are defined substantially as the Administrative Procedure Act now defines them; agents of parties; and persons who are neither parties nor agents of parties, and who are described as interceders. These are the only classes of persons, outsiders that is, from whom and between whom ex parte communications are prohibited. The importance of these three classes being, that there is another class of persons who are neither parties, nor agents, nor interceders, from whom ex parte communications would not be prohibited.

Inside the agency the only class of persons to whom and from whom ex parte communications are prohibited is the class of decision-making personnel. They are defined as those persons who make or recommend decisions themselves, and all other persons whom the agency, by published rule, which would apply either to a general class of proceedings or by order in a particular case, designates as assisting in the making or recommending of decisions. Agency members and hearing examiners would be covered.

Mr. Paglin inquired whether it was the intent of the

Committee to preclude an agency member from seeking information from an outsider or someone in another agency; that is, would a communication be prohibited if it was made in response to a specific request from an agency member or someone in the decision-making process?

Professor Auerbach replied that such a communication would not be prohibited. The person making the communication would not be an interceder because the concept of an interceder as adopted by the Committee refers to persons who volunteer information on their own. In the case in which an agency makes a request of an interceder for information, there would be no prohibition imposed upon that person from complying with the request. He pointed out that the Committee emphasizes very strongly in a subsequent recommendation, that where agency personnel receiving such communications feel that the dictates of fairness require that the contents of the communication be disclosed to all of the parties to the proceeding, then such disclosure should be made.

Mr. Bond requested clarification on whether under this particular provision, it is appropriate not to prohibit an agency member from conferring with persons in other Government agencies.

Professor Auerbach stated that the Committee felt it was appropriate unless the other agency is a party to the proceeding. Also, he said, the agency member could call and confer with a professor or other expert, and so long as the professor or other expert had not volunteered his advice he would not be an interceder as defined by the recommendation. At this point it rests solely on the ideas of fairness of the agency member as to whether to make the information or substance of the discussion available to all parties.

Mr. Bond felt that in view of this, the Conference was proceeding in the opposite direction of what he thought was its purpose, that is to reduce rather than enlarge the areas of ex parte communications.

There was no discussion of Sections 1(g), 2 and 3 which were placed before the Conference as Items 5, 6 and 7.

Item 8 - Sections 4 and 5

Professor Auerbach briefly discussed these sections in answer to a question which had been raised earlier. The Committee was conscious of the problem of imposing undue burdens on the agencies and included in these sections provisions which should alleviate some of the burden. While the Committee would require communications from parties or agents of parties be given to all other parties, this requirement is relaxed in the area of communications from persons other than parties or agents of parties. In such a case, he said, with regard to both oral and written communications, it is provided that if the agency decides that the communications in a particular proceeding are either so voluminous or so tangential to the real issues in the case, then there is no requirement that the agency send copies of the communications to all of the parties to the proceeding. Instead, the agency may merely transmit these communications to the Secretary to place in a public file where they will be available to anyone who may be interested in looking at them. It is also required that the Secretary notify the parties that such communications have been received and have been placed in the file where they are available for examination.

Mr. Landis inquired whether the recommendations provide some procedure so that a person who makes an oral communication and believes that the substance of his communication was misquoted, would have an opportunity to have it corrected.

Professor Auerbach stated that the recommendations themselves do not deal with this and that the Committee felt that rather than make any particular recommendation on the subject, it would be preferable to leave it to the agency to determine whether the particular matter is sufficiently important to justify a reopening of the record for the purpose of making such corrections.

Mr. Healey asked why in Section 5 the determination of what is to be transmitted to the Secretary of the agency, and made generally available, is left entirely to the subjective judgment of the agency personnel.

Mr. Ferber responded that it was left to the subjective

determination of the agency personnel so that they would not have to make a determination of law that it was improper.

Mr. Roger S. Foster of Pittsburgh, a consultant to the Committee on Internal Organization and Procedure, commented that agencies have a difficult time in dealing with Members of Congress and rather than place an agency member or employee in the position of having to tell a Congressman that he has violated the code of ethics and possibly getting involved in a controversy, the Committee felt that the way to avoid the problem was to require that the communication be placed in the public file.

Mr. Paglin felt that the Committee may be imposing what may be in some instances an almost intolerable burden on some agencies, particularly in rule-making cases. In such cases, the proposed rule is published for comments and it is not unusual for an agency to receive responses which run into the hundreds. If an agency were required to provide copies of written or oral communications to these hundreds of parties, it would be an intolerable burden. The exceptions provided in Sections 4 and 5 refer to what is commonly called "fan mail," that is, letters from public-spirited citizens and the like. These do not present a problem to the agency. The problem is presented when a single communication is received from the mayor of a city or from some public organization. In such instances the requirement recommended by the Committee would present a considerable burden. Mr. Paglin suggested that the Committee consider some procedure whereby the communication would be placed in the public file and a public notice published that the communication has been received.

Professor Byse asked why there was a difference in the provisions in Sections 4 and 5 with respect to written and oral communications and why the words "at the time it is received" were inserted with respect to oral but not to written communications.

Professor Auerbach replied that this distinction was made at the suggestion of Mr. Gilliland. It was felt that a written communication could be perused at the recipient's

leisure and the recipient has time to seek advice as to whether it is authorized or unauthorized under the particular agency code. However, with respect to oral communications, it would impose a very great burden on the agency personnel to require them to make a determination as to whether the communication related to some pending on-the-record proceeding. Therefore, in order to minimize the burden on the recipients of oral communications, the Committee decided that notice of such communications need only be given in those instances where the recipient immediately recognizes that the communication is unauthorized or where he concludes that in all fairness the matter should be brought to the attention of all parties.

In response to a question regarding the monitoring of telephone conversations by a secretary, Mr. Ferber stated that the Committee had in mind that the recipient himself would take notes during the conversation, but that they had taken no position on the matter of telephone monitoring.

Mr. Foster offered the suggestion that one practical solution would be to tell the caller that the agency rules required a memorandum of the call to be made and to eliminate the possibility of being misquoted, request the caller to write a letter to the agency.

Judge Reva Beck Bosone of the Post Office Department expressed disagreement with the entire approach of the Committee and felt that these recommendations cast an aspersion on the good sense and integrity of Government officials.

There was no discussion of Section 6, which was presented to the Conference as Item 9.

Item 10 - Sections 7, 8 and 9

Mr. Landis moved to amend Section 7 to include the word "censure," so that in a case where the violation is of slight gravity a light penalty might be imposed. The Committee accepted the suggestion and the Section was reworded as follows:

"The agency code should provide that an agency

may censure, or suspend or revoke the privilege to practice before the agency, of any person who makes, or solicits the making of, an unauthorized ex parte communication."

Mr. Landis then moved to strike all of Section 8. It was his opinion that a cause should not be penalized because of the misconduct of an attorney or some other individual. For example, he said, it would not be fair to penalize the stockholders of a corporation for some act of a corporation official, nor should a client's cause be jeopardized by the misconduct of an attorney or some other zealous person. The penalty should attach to the individual who has committed the wrongdoing and the merits of the controversy should not be affected because of an unauthorized communication.

The Committee was asked what was meant by the phrase "to the extent permitted by applicable law" in Section 8. Professor Auerbach explained that the Committee did not feel that it should try to interpret the various agency statutes to see whether they permit the denial of some privilege or benefit because of a violation of the proposed agency code. Therefore, the Committee felt it would be more appropriate to provide that the agency may deny the benefit or privilege to the extent that applicable law permits it to do so. Professor Auerbach also thought that this answered the question which Mr. Landis brought up. Section 8 does not require an agency to deny a benefit or a license for the relief sought in every case in which there has been a violation of the proposed code. It is an authorization which the agency should employ with good sense in particular cases as the sanction seems appropriate.

Mr. Paglin agreed with Professor Auerbach that this is an area where the agency should be given discretion to act. He noted that in some recent cases, it had been stated that in a situation where attempts have been made to compromise the integrity of the agency and its adjudicatory process, the parties involved would indeed be fortunate if all they lost was the license they sought.

Mr. Landis commented that he realized that this provision was not mandatory, but was concerned with the possibility of this sanction's being unduly extended. Also, he

said, the cases referred to involved the question of whether the decisions had been influenced by the ex parte communications and had not been decided on their merits, and were not concerned with the problem of penalizing a party for the misconduct of someone associated with that party.

Mr. Healey moved that Sections 7 and 8 be amended by inserting the word "knowingly" before the words "makes, or solicits the making of."

Mr. Bond opposed the amendment for the reason that this appeared to inject an element of criminal law into the matter and would impose a tremendous burden on the agency of establishing criminal intent before the sanction could be applied.

Mr. Healey stated that these are very heavy sanctions and if a license is to be revoked or some benefit denied because of this prohibited activity, then the agency should carry this burden.

Mr. Stern raised a question as to the meaning of the word "knowingly"--would it mean knowledge of the communication or knowledge that the communication is illegal? If it means the latter, it would be a most difficult thing to prove and he urged that any change along these lines be seriously considered.

Mr. Kintner spoke in support of Mr. Landis' motion to strike Section 8. He felt that such a sanction might often frustrate the public interest which is often involved and the public should not be deprived of its interest simply because of an improper communication made by some agent of the applicant.

Mr. Paglin responded to this by saying that the existing case law indicates the public interest is one factor to be considered and since the sanction is not mandatory the public interest would still be an important consideration. The reason for the code in the first place is to notify the public not to tamper with the processes of an agency and this provision would be one of warning as to the possible sanctions which could be imposed for a violation of the code.

Professor Byse asked if anyone could answer the question posed by Mr. Stern as to what the word "knowingly" means.

Mr. Healey responded that the meaning of the word "knowingly" is the same as that used in statutes dealing with criminal sanctions and should be understood in that context.

Upon a voice vote, the motion to amend Sections 7 and 8 by inserting therein the word "knowingly" was defeated.

The Conference then voted upon and rejected the motion to strike Section 8.

The motion to amend Section 7 as reworded so as to include the word "censure," was then placed before the Conference and adopted.

Mr. Stillwell moved that Section 9 be amended to insert after the word "who" the words "knowingly and wilfully" so that it would read, "of any agency employee who knowingly and wilfully violates the prohibitions or requirements of the code."

Mr. Beelar stated that he was concerned about the philosophy of the sanctions on Government officials. He felt the thrust of the action should not be one of criminal prohibition, but rather should be on the nondisclosure of documents which should be disclosed, and only the nondisclosure should be subject to censure. Also it was not clear to him whether the violation of the code would be the receiving of a prohibited ex parte communication or the failure to disclose such a communication.

Mr. Landis asked whether it was not also a violation of the code if agency members themselves made ex parte communications which are unauthorized.

Mr. Beelar replied that he thought it was, and that the prohibitions would also apply to an official who is on the receiving end of the communication. However, it was not clear to him whether by disclosing such communication, the official would be absolved of any violation.

Professor Nathanson felt that the subject of this particular Section was more appropriately a matter of Civil Service procedure, rather than agency procedure and should be stricken.

Mr. Ferber stated that the provisions were optional with each agency and that it was not intended that the agency code would provide that in each case of a violation there would have to be a suspension, dismissal or censure.

Mr. Healey noted that in comparison with Sections 7 and 8 which contain permissive terms, Section 9 appears to be mandatory.

Professor Auerbach stated that it would be a simple matter to clarify this intent. Also, with reference to Professor Nathanson's objection, he said that Section 9 does provide that where there is a Civil Service matter involved, the obligation which the agency may assume is to institute proceedings for the suspension or dismissal of the employee. The purpose of the code is to serve as a deterrent and all of its provisions are directed to that end. It was felt that to be complete, the code should also cover agency employees. Section 9 is not intended to cover agency members, and the report clearly indicates that only the President can take action with respect to any misbehavior of an agency member.

Professor Nathanson said he still felt that it would be more appropriate for the code merely to state the activities of agency personnel which are prohibited and leave any sanctions to other applicable laws and Civil Service Commission rules. Accordingly, he moved to strike Section 9.

Mr. Sidney Kingsley of the Atomic Energy Commission felt that to include such sanctions would help accomplish the purpose of the code which is to eliminate unauthorized ex parte communications, by providing the agency personnel with a stronger reason for not accepting ex parte communications or making them, as they would be subject to some penalty for doing so.

Mr. Bond asked for an explanation of an earlier question

which was, what constitutes a violation?

Professor Auerbach replied that Section 9 refers to a violation either of the prohibitions or requirements of the code. Those which would be applicable to agency personnel are set forth in Section 2 primarily and also in Sections 4 and 5 and are not restricted to disclosure requirements.

Mr. Healey moved to amend Sections 7 and 9 to read as follows:

"7. The agency code should provide that an agency may censure, or suspend or revoke the privilege to practice before the agency, of any person who makes, or solicits the making of, an unauthorized ex parte communication."

"9. The agency code should provide that an agency may censure, suspend, or dismiss, or institute proceedings for the suspension or dismissal, of any agency employee who violates the prohibitions or requirements of the code."

The motion was voted upon and adopted. The Conference then voted upon and rejected the motion to strike Section 9.

The next motion before the Conference was to amend Section 9 to insert the words "knowingly and wilfully" after the word "who" in that Section. The motion was adopted.

Discussion of Item 11

The Chairman then called for discussion of Item 11, covering the introductory portion of the recommendation and being the question, should the Conference recommend a statutory prohibition against ex parte communications or should it recommend that the subject be dealt with by agency rules.

Mr. Beelar, a member of the Committee on Internal Organization and Procedure, stated that it was his belief that the subject could not be effectively dealt with except by legislation. He conceded, however, that the substantive recommendations of the Committee would be likely to produce substantial benefits within the limitations he felt were imposed by handling the matter by agency code. He accordingly suggested that the position of the Conference ought to be that the matter should be handled initially by agency code. He accordingly suggested that the position of the Conference ought to be that the matter should be handled initially by agency code, but that this should not constitute a recommendation against legislation. To this end, he moved to table Item 11.

Mr. Bond seconded the motion to table, which was defeated.

Thereupon, however, Commissioner Hutchinson, referring to the Special Message of the President of April 28, 1961, noted that the President had recommended that the Congress enact legislation in this area. Commissioner Hutchinson expressed the view that perhaps the Conference need not take any position on the statutory-prohibition-vs.-agency-rule question.

The Vice-Chairman, in response, noted that subsequent to the President's Special Message of April 28, 1961, efforts had been made to obtain legislation but to no avail. He called attention to Congressman Harris' message to the Conference, which message scored the difficulties of meeting the problem by a single statute and which concurred in the agency-rule approach taken by the Committee on Internal Organization and Procedure.

Professor Gellhorn expressed the view that there was nothing in Recommendation No. 16 which in any event would express a view on the desirability of legislation.

Mr. Landis, in order to make it clear that Recommendation No. 16 was not a recommendation against legislation, moved the insertion of a period after the word "influences" in the first paragraph of the recommendation, and the deletion of the remainder of that paragraph.

Mr. Bond thereupon offered a substitute motion that a period be inserted after the word "influences" in the first paragraph of the recommendation, that the remainder of that paragraph be deleted, that the word "should" and the phrase "should be based upon" be deleted from the second paragraph of the recommendation and that the word "includes" be substituted in place of the latter phrase, and that the third paragraph of the recommendation be deleted. The motion was seconded by Mr. Beelar.

Mr. Ferber expressed objection to the deletion of the third paragraph of the recommendation and to what he called the "mandatory language" of the substitute motion. He maintained that it was the intent of the Committee to preserve to the agencies' discretion to adapt the recommendations to their own needs, and that the substitute motion would interfere with this intended flexibility. Mr. Bucky, Vice-Chairman Paglin and Mr. Kintner also spoke in favor of the preservation of agency discretion, noting the differing requirements of various agencies. In response to a question of Mr. Zwerdling as to how much discretion the Conference desired be left to the agencies, the Vice-Chairman stated that agency discretion to reject the substantive recommendations of the Committee would in any event be subject to the Sangamon doctrine.

Mr. Beelar stated that in seconding the substitute motion, he had not intended that agencies be denied discretion, but that he did desire that the emphasis of the action of the Conference be on uniformity rather than on diversity.

A vote was taken in turn on the substitute motion and on the original motion, and both were defeated.

Mr. Bond then moved that the word "themselves" be deleted from the first paragraph of the recommendation, maintaining that such deletion would remove an implication that legislation was undesirable. The motion was seconded by Mr.

Beelar. Thereupon, it was offered as a substitute motion that it be resolved that the adoption of Recommendation No. 16 would not place the Conference on record as to the desirability of legislation at any later date. Mr. Bond accepted the substitute.

At this point, Mr. Cohen offered a motion that the first paragraph of the recommendation be amended to read as follows:

"The Administrative Conference deems it essential that the administrative process should be protected from improper influences, and that the agencies should take certain action to help achieve these objectives."

Mr. Landis seconded the motion, and it was carried.

At this point, Mr. Healey asked unanimous consent to move reconsideration of Sections 7 and 8 of the recommendation, inasmuch as the Conference had adopted a "knowingly and willfully" standard with respect to the imposition of sanctions against agency employees under Section 9, but had failed to do so under Sections 7 and 8 with respect to the imposition of sanctions against parties and practitioners.

Professor Nathanson refused unanimous consent, but moved reconsideration of the adoption of the "knowingly and willfully" standard under Section 9. The motion to reconsider was carried, and, on reconsideration of the original motion to amend Section 9, that motion was rejected and the "knowingly and willfully" standard was deleted.

Mr. Ferber then moved reconsideration of Section 1(d)(2) of the recommendation, suggesting that if the motion were carried he would offer, on behalf of his Committee and by way of compromise, an amendment which would result in the following text for the said section:

"Any oral or written request solely for information with respect to the status of a proceeding, but only if the request is referred by the recipient for reply to the Secretary of the agency, or other official designated by the agency for this purpose."

The Vice-Chairman commented in favor of the adoption of the substitute proposed by Mr. Ferber, and the motion to reconsider was carried.

Thereupon, Mr. Ferber formally moved the above amendment, accepting the Chairman's suggestion that the wording thereof should be transposed for grammatical correctness so that it would read ". . . referred to the Secretary . . . ."

Mr. Kingsley raised the point that the amendment would make the validity of a communication dependent upon a condition subsequent - referral thereof by the recipient.

Mr. Bucy raised the objection that the amendment would create a needless burden, inasmuch as status requests can frequently be answered by the recipient without any real need for referral. Mr. Hale spoke in agreement with Mr. Bucy's comments. Mr. Landis also spoke against the amendment, opining that it represented an impractical attempt to go too far in protection of agency personnel from ex parte influence.

An unidentified member of the Conference took a position contrary to that of Mr. Landis, maintaining that if a Congressman personally made a status request, the implication would be clear that he, the Congressman, was interested in the substantive result, and that protection of agency personnel from this kind of ex parte influence is desirable.

Mr. Bucy countered that if the agency personnel were going to be influenced, it would be at the time of receipt of the Congressman's communication and not at the time a reply was made.

Professor Auerbach stated that the amendment before the house was in the nature of a compromise, and that while it did not go as far as the original recommendation - which in effect prohibited a Congressman from making a status request directed to decision-making personnel - it did at least preserve an unmistakable aura of disapproval of such communications.

Professor Gellhorn characterized as ridiculous the proposed codal formulation under which the permissibility of a communication is made to depend upon the action by the recipient with respect thereto.

In view of the criticism of the amendment by Professor Gellhorn and Mr. Kingsley, Mr. Ferber, on behalf of his Committee, withdrew the motion to amend. A vote was taken on the motion to reconsider and the prior action of the Conference was affirmed.

The Vice-Chairman, having been advised of the Committee's willingness to amend Sections 4 and 5 of the recommendation in accordance with his earlier remarks with respect thereto, moved that the said sections be amended so as to relieve the agencies from the burden of making direct communications to numerous parties, particularly in rule-making proceedings. The motion to amend was carried.

#### Resumption of Discussion of Item 1 - Section 1a

The Chairman then called upon Professor Fuchs to state his amendment to Section 1a, discussion of which had been suspended. Professor Fuchs, stating that during the recess he had had the benefit of several informal suggestions, moved that the first paragraph of 1a of the recommendation be amended to read as follows:

"'On-the-record proceeding' should be defined as any proceeding required by statute or constitution, or by an agency in a published rule or by order in the particular case to be decided solely on the record of an agency hearing, and any other proceeding which the agency designates by published rule or by order in the particular case as subject to these prohibitions."

The motion was seconded by Mr. Bond.

Professor Auerbach suggested that there might still be some difficulty with the proposed language, in that there might conceivably be some proceedings not required by statute or the Constitution to be decided solely on the record, but which the agency might nonetheless wish to be subject to the prohibitions against ex parte communications.

Professor Fuchs replied that his proposal was not subject to Professor Auerbach's suggestion inasmuch as it constituted what he called "a professional definition of the term 'on-the-record proceeding,'" which would so define any

proceeding which the agency designated by published rule or by order in the particular case as being subject to the prohibitions against ex parte communications.

A vote was taken and the motion was carried.

At this point, a vote was taken on the original motion of Mr. Mason that Recommendation No. 16 be adopted. The recommendation, as amended in the course of the session, was adopted.

