

1970-71 REPORT
ADMINISTRATIVE
CONFERENCE
OF THE UNITED STATES
JULY 1971

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June 30, 1971

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LETTER OF TRANSMITTAL

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Washington, D.C.

TO THE PRESIDENT AND THE CONGRESS OF THE UNITED STATES:

I have the honor to transmit herewith the Report of the Administrative Conference of the United States for 1970-1971.

This report covers the significant activities of the agency for the eighteen-month period from January, 1970 through June 30, 1971.

Respectfully,
ROGER C. CRAMTON.
Chairman

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*From February 16, 1970 to February 27, 1971, Emory N. Ellis, Jr. now in private practice in Washington, D.C., occupied this position.

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REPORT OF THE CHAIRMAN*

We are in a period of dramatic and rapid change in the fundamentals of administrative law. The basic outlines of modern administrative law were largely developed during the first half of this century. The codification of many of these principles in the Administrative Procedure Act in 1946 represented the culmination of several generations of gradual evolution. There have been some changes along the periphery, but the major outlines have remained unchallenged until the last few years.

Many of the orthodox principles of the formative years are now under severe challenge. One such area involves the problem of the so-called "captive agency"—the widespread belief that agencies created to protect the public interest have instead become the captives of the industries they are supposed to regulate. The result has been a growing demand for more effective means of permitting public participation in the administrative process. Meanwhile, long-standing limitations on the availability of judicial review, such as the doctrines of standing and ripeness, are undergoing dramatic modification, if not complete abandonment.

These examples of the changing environment and content of administrative law are not necessarily the most important of the many changes that are "blowing in the wind." They are merely illustrative of a general climate in which old moorings are slipping away, and there is a search—sometimes frantic—for new certitudes.

It is a time that offers special opportunities for the Administrative Conference as well as imposing special responsibilities. The zeal for change, with concomitant reopening of basic questions, provides opportunities for the Conference to lead the way in channeling the forces of change along constructive lines. And, in an era in which good ideas are not always distinguished from bad and when change is sometimes sought merely for change's sake, the Conference has a special responsibility to safeguard effective, representative government against proposals that would imperil or cripple its ability to meet the demands for service that the citizenry needs and requires.

A good example of an area in which the Conference is in a position to channel change along constructive lines relates to the growing demands for public access to and participation in the

*Delivered at the Fifth Plenary Session, May 7-8, 1971.

formal administrative process. The Administrative Conference has undertaken a broad study of the range of issues involved in this question: standing to intervene; the power of agencies to control repetitious and duplicative participation; the mundane but extremely practical restrictions on public participation found in requirements for filing multiple copies, transcript costs, fees, and reproduction charges imposed by many agencies; and finally, the extraordinarily difficult issues raised by the cost of retaining counsel and expert witnesses in proceedings in which the agency in theory is supposed to represent the general public, but in fact has not always done so effectively.

The increased tempo of social change requires that the Conference be prepared to respond in a short time to a host of activities and new developments relating to agency procedures. For example, the Conference must have the capability to present views promptly on important legislative proposals which have procedural aspects relevant to the work of the Conference. I testified before a Subcommittee of the House Committee on Government Operations on four bills to establish a consumer advocate empowered to intervene in proceedings before other Federal agencies, a matter that is related to the Conference recommendation on the Poor People's Counsel as well as to the ongoing study of public participation to which I have just referred. The Chairman's office is increasingly being asked by the Executive Branch and by Congressional Committees to express views on the administrative process implications of important new legislation. In my opinion, "preventive law" of this form is highly desirable. If sound procedures are included in new legislation, the Conference will not be required to recommend their amendment at a later date.

The effort that we have mounted—and completed—concerning the Ash Council proposals to reorganize a number of regulatory agencies illustrates our new ability to move rapidly and well on timely and important subjects. See pp. 60-64, *infra*. I believe that our efforts, completed in a few months, have substantially advanced public understanding of the important issues raised by the Ash Council report.

While the Conference will continue to direct attention to generalized questions of administrative law arising out of formal trial-type adjudications—the recent interlocutory appeals recommendation is a good example of useful work of this kind—I believe that the Conference increasingly should direct its attention to those many dark corners of the administrative process that are rarely illuminated by other private or public groups. We must avoid the lawyers' usual preoccupation with the finer points

of appellate judicial opinions—and their administrative analog—which in turn has led to an almost total neglect of the less visible parts of the legal system. What officials do and how they administer largely discretionary administrative programs—“law in action”—affect far more rights and far more people than do the adjudicatory decisions of courts and agencies.

The Administrative Conference is an institution that is uniquely well-qualified to study and evaluate the procedural systems that are in operation in many areas of the Federal government but which are rarely if ever the object of the attention of Congressional committees, the organized bar, scholars, and public and private interest groups. The informal administrative process—the exercise of discretion by low-level officials in a bureaucratic setting—provides a vast opportunity for improving the quality and efficiency of the administrative process.

A good example of what I have in mind is the ongoing study of the Committee on Informal Action of the exercise of discretion by the Immigration and Naturalization Service in so-called “§ 245 change-of-status applications.” It is already apparent that the humaneness of that process can be vastly improved and many tax dollars saved at the same time. Similarly, some of the older functions of Executive Departments involving land management, government procurement and the like; the distribution of grants and benefits on a large scale; and some of the newer functions in the health, safety, and environmental fields cry out for attention and study precisely because they have been so long overlooked by others.

The prevention of improper action has always attracted attention. Much of the past work of the Administrative Conference has been concerned with putting additional *brakes* on governmental agencies by adding new procedural safeguards or strengthening old ones. Much of this effort, of course, is highly desirable. But at the same time I believe we should be as much concerned, if not more, with studying the ingredients of successful performance, seeking to apply them elsewhere, and devising procedures that can release useful or necessary *motive power*. If Government is to carry on the many activities that citizens appear to desire, it must have the tools of effective performance.

Can some governmental functions in fact be fairly—but more effectively performed—with less formality and less red tape? For example, are formal trial-type hearings really essential for all of the governmental decision-making to which such requirements are now applicable? Must retention of a lawyer be a prerequisite to assure the protection of an individual’s claim? Should we establish an administrative equivalent of the small claims court or

experiment with other innovations in summary procedure? Have we, in sum, over-judicialized what was designed to be a system that would be rapid, fair and inexpensive?

The Conference should seek out areas where due process has gone so far that it has become the disease of "due processitis" rather than a cure for social conflict. A number of our recommendations point in this direction of eliminating unnecessary or unduly burdensome requirements: the greater use of summary judgments, a severe restriction on interlocutory appeals, and the elimination of a number of procedural blockages that stand in the way of judicial review—the jurisdictional amount requirement, and the intricacies of the law of parties defendant and of sovereign immunity. But much more needs to be done.

Finally, the recommendations of the Conference must have a larger impact on the day-by-day performance of government. It is important, of course, that an organization like the Administrative Conference engage in scholarly studies that enrich the literature with their depth and perception. There is great satisfaction in completing a project that results in a sound, well-reasoned recommendation. But the Conference must resist the tendency to move on to something else without first asking whether anyone is paying any attention to what the Conference has already done. The Conference has now adopted 26 recommendations. But recommendations that stand unimplemented or largely ignored are ineffectual.

The task of securing implementation is the special responsibility of the Office of the Chairman. We are now moving with vigor in this area and I am pleased with the progress to date. Let me cite a few illustrations.

- A number of agencies, notably the Departments of Health, Education, and Welfare, Housing and Urban Development, and Interior, now permit public participation in rulemakings of general applicability, notwithstanding the exemption in the Administrative Procedure Act of matters relating to "public property, loans, grants, benefits, or contracts" (Recommendation No. 16).
- The Securities and Exchange Commission now releases substantial information regarding its precedential decisions on "no action letters" (Recommendation No. 19).
- The Federal Communications Commission has issued a rule which provides for summary decision in appropriate cases (Recommendation No. 20).

In addition, legislation has been introduced to implement Conference recommendations involving judicial review of Interstate Commerce Commission orders (Recommendation No. 8), the

sovereign immunity package (Recommendations 7, 9 and 18), enforcement of National Labor Relations Board orders (Recommendation No. 10), the elimination of certain exemptions from APA rulemaking requirements (Recommendation No. 16), and the establishment of a Federal Administrative Justice Center (Recommendation No. 17). I am hopeful that several of these bills will be enacted in the current session of Congress.

I share fully the high expectations of this and prior Administrations, the Congress, the agencies, the practicing bar, and many others knowledgeable in the field of administrative law, that the Conference has the potential of becoming a major force in improving the processes through which the government serves the public and protects the rights and interests of its citizens. I left the enjoyments of academic life to undertake the challenge of channeling the efforts of the Administrative Conference into activities that would justify the confidence reposed in it. In the few short months that I have been here, I have become satisfied that we are well on that road.

The Conference is on the move. Thanks to the efforts of our predecessors and of the present members, it is beginning to cast a shadow. With the continued support of Congress and the excellent cooperation we are receiving from the agencies and the practicing bar, I am confident that it will play an increasingly important role in improving the processes of government which vitally affect the rights of citizens and the well-being of the economy.

GENERAL ACTIVITIES OF THE CONFERENCE

The Administrative Conference Act, 5 U.S.C. §§ 571-76, provides that the Administrative Conference shall consist of not more than 91 nor less than 75 members, of whom not more than 36 may be appointed by the Chairman with the approval of the Council. The Chairman is appointed by the President for a five-year term, with Senate confirmation; he is the only member who serves on a full-time, compensated basis.

Professor Roger C. Cramton of the University of Michigan Law School became the second Chairman of the Administrative Conference when he was sworn in on December 9, 1970. He succeeded Professor Jerre S. Williams, who returned to the University of Texas School of Law to occupy the newly created John B. Connally Chair of Civil Jurisprudence.

Prior to becoming Chairman, Professor Cramton taught for fourteen years, first at the University of Chicago Law School, and since 1961 at Michigan. He was a consultant to the temporary Administrative Conference of 1962 and served in a similar capacity with the present Conference until he was named a member in July, 1970.

Congressional recognition of the need for more adequate funding of the Conference has resulted in a budget of \$380,000 for fiscal year 1971. This is an increase of \$130,000 over prior years and has made it possible for the Conference to broaden its research activities across the board.

The permanent full-time staff of the Chairman's office now consists of six lawyers and four secretaries. Within a few months, this will increase to the authorized level of seven lawyers, including the Chairman, and five secretaries. With this increase in staff, the Chairman's office will have a substantially enlarged capability for providing greater administrative staff support to the standing committees of the Conference, assisting consultants and contractors, and undertaking itself a substantial number of significant projects.

An experimental summer internship program in 1971 will provide the assistance of five law clerks, each of whom will serve a tour of ten to twelve weeks in the Office of the Chairman. These highly qualified law students were selected on a merit basis from four leading law schools.



Chairman Roger C. Cramton delivering his Report on the Activities of the Conference at the Fifth Plenary Session.

The increased budget also provides funds for employing a greater number of part-time experts, almost all of whom are leading law professors. These consultants and contractors now number approximately 35 and provide the main source of research for the Conference. The Conference has derived great benefit from their knowledge, research capacity, and diligence. A current list of consultants and contractors is included at pp. 37-38, *infra*.

In June of 1970 the two-year terms of the non-Government members of the Conference expired. Sixteen members were re-appointed for a second two-year term and 16 new members were appointed. These changes and the changes in the Government representation are reflected in the membership lists, *infra*, pp. 32-36.



Seated from left to right, Council members Charles B. Ablard, G. Harrold Carswell, Walter Gellhorn, and Harold L. Russell.

In addition, the President, at the request of the Council, designated the newly created Environmental Protection Agency for membership in the Conference. This brings to thirty-four the number of agencies having representation in the Conference. Since several agencies have been accorded two representatives, the total Government membership now stands at forty, exclusive of the Chairman and the ten other members of the Council. The total membership, including the non-Government members, is 83.

Since its activation in January 1968, the Administrative Conference has adopted a total of 26 formal recommendations, some calling for legislation, and the remainder calling for action on the part of the affected agencies. Nine of these recommendations were adopted during the period of this report. They are summarized in the next section, and the full text of each is set forth at pp. 39-59, *infra*. A number of the 26 recommendations have been implemented in full, and others are in the process of implementation. In addition, Conference investigation of problems has led in several instances to immediate acceptance of procedural improvements by affected agencies, without the necessity of a formal recommendation.

SUMMARY OF RECOMMENDATIONS NOS. 18-26

The Administrative Conference held its Fourth Plenary Session on June 2-3, 1970 and its Fifth Plenary Session on May 7-8, 1971. The Assembly considered and adopted five recommendations at the Fourth session and four at the last session. A brief description of the nine recommendations, 18-26, and the purpose sought to be achieved by each follows.

RECOMMENDATION NO. 18

PARTIES DEFENDANT

This is part of a package of three recommendations, all treating with different aspects of judicial review. (See also Recommendations No. 7 and No. 9.) Here the Conference addressed itself to the hardship which has resulted when a meritorious claim against the Government is dismissed on the technical ground that the plaintiff has failed to name or join a proper party defendant. With the Government as large and complex as it is, it is often most difficult for a claimant to comply with all the technicalities of the law in this area. As a result, many just claims have not been considered.

This recommendation calls upon the Department of Justice to request the court to substitute parties or make other necessary amendments in the style of the pleadings to cure an otherwise fatal but purely technical defect in the case.

RECOMMENDATION NO. 19

SEC NO-ACTION LETTERS UNDER SECTION 4 OF THE SECURITIES ACT OF 1933

One of the most useful kinds of activities which Government can engage in is to provide informal advice to guide the public so its activities will not be in violation of law. The practice of the SEC of advising stockholders whether proposed sales of unregistered stock might violate the 1933 Securities Act is an outstanding example of such a service. The Conference concluded, however, that the public was being deprived of many of the best aspects of the "no-action letter" process because the Commission

did not make public even its precedential interpretative rulings and the reasoning in support thereof.

In this recommendation, the Commission is called upon to state its general policies and standards in rules, and where this is not feasible to make publicly available through releases its important rulings, both past and future, subject to the deletion of confidential material.

RECOMMENDATION NO. 20

SUMMARY DECISION IN AGENCY ADJUDICATION

A major concern of the Conference is the widespread delays encountered in many administrative proceedings. This is particularly true, although not exclusively, of agencies with large caseloads.

The use of the summary judgment procedure has a long and fruitful history in civil litigation but has found little acceptance in administrative proceedings. As a result, full evidentiary hearings have sometimes been held when there were no genuine issues of material fact to be tried. The view of the Conference, as expressed in this recommendation, is that summary decisions can be utilized to dispose of many administrative proceedings, thereby curtailing costs and delay without any loss of fairness to the parties. The recommendation contains a model rule.

RECOMMENDATION NO. 21

DISCOVERY

One of the recommendations of the 1962 Temporary Administrative Conference was that agencies should adopt for their adjudicatory proceedings as much of the discovery procedure of the Federal Rules of Civil Procedure as was appropriate. These rules have served a highly useful purpose in curtailing the length of civil litigation and in making a better record. There is no reason to suppose that similar benefits would not accrue from the use of discovery in administrative proceedings.

A recent study revealed that only three agencies had adopted broad rules of discovery: the Federal Trade Commission, the Federal Communications Commission, and the Federal Maritime Commission. This recommendation urges other agencies to adopt discovery procedures meeting detailed minimum standards relating to such matters as pre-hearing conferences, depositions, prior or narrative statements of witnesses, written interrogatories, requests for admission, and the like. To guard against the abuse of discovery procedures for the purpose of causing delay, the

recommendation also urges that the presiding officer be given broad discretion to control its use and timing.

RECOMMENDATION NO. 22

PRACTICES AND PROCEDURES UNDER THE RENEGOTIATION ACT OF 1951

The Renegotiation Board is authorized under general statutory provisions to eliminate excessive profits realized by any contractor whose government contracts exceed one million dollars a year. However, it was found that the Board did not publicize the standards applied in determining excess profits; its statements of facts and reasons underlying determinations were often most summary and inadequate; and contractors had not been given access to contract performance reports furnished by the agencies to be used by the Board in making its determinations. This lack of information concerning Board practices and procedures imposed hardships on contractors and often prolonged what otherwise might have been fairly routine proceedings.

The Conference recommended that the Board publish its criteria for determinations, give greater elaboration in its statements of facts and reasons in support of its decision, and make performance reports available to contractors (with classified or confidential information deleted). The Assembly also adopted a resolution suggesting that the Committee on Claims Adjudications accept an invitation from the Tax Court to discuss revision of its procedures in cases where the court redetermines the amount of excess profit.

RECOMMENDATION NO. 23

INTERLOCUTORY APPEAL PROCEDURES

Agency review procedures of hearing examiners' rulings must balance the advantages of immediate correction of an erroneous ruling against interruption of the hearing process and other costs of piecemeal review. This recommendation seeks to strike the proper balance by having a hearing examiner rule on all procedural questions initially. Normally, appellate review would then be permitted only when the presiding officer certifies that an important and novel question of law or policy is involved, and an immediate appeal will materially advance the ultimate termination of proceedings or subsequent review will be inadequate. A review without certification should be restricted to exceptional situations involving vital interests that might otherwise be im-

paired and where the review authority has not previously developed adequate standards. A stay of a proceeding pending an interlocutory appeal should be granted only in extraordinary circumstances.

RECOMMENDATION NO. 24

PRINCIPLES AND GUIDELINES FOR IMPLEMENTATION OF THE FREEDOM OF INFORMATION ACT

This recommendation, which is in three parts, is designed to make public information more readily available. It first sets forth in Part A five general principles that agencies should conform to in handling requests for information. These include timely action on requests, a narrow interpretation of the exemptions set forth in the Freedom of Information Act, disclosure of all but confidential parts of documents, a statement of reasons for refusing to disclose information, and a minimum charge for providing information, which may be waived in appropriate cases.

To assist agencies in developing procedures, Part B of the recommendation sets forth detailed guidelines as a model of the kinds of procedures that are appropriate to effectuate the principles. The publication of directories indicating where and from whom information may be obtained, how to handle categorical requests, normal time periods for acting on requests, procedures to be followed on refusal to disclose information, and intra-agency appeals, are among the matters discussed in detail.

Finally, the recommendation proposes the establishment of a committee composed of representatives from the Office of Management and Budget, the Department of Justice, and the General Services Administration to establish criteria for determining fair and equitable fee schedules for the provision of information.

RECOMMENDATION NO. 25

ARTICULATION OF AGENCY POLICIES

This recommendation seeks greater implementation of the fundamental principle that agency policies which affect the public should be articulated and made known to the public. It calls upon each agency which takes actions affecting substantial public or private rights to state the standards that will guide its determinations, and to make them public, either through published decisions, general rules or policy statements. When rulemaking is used for this purpose, the extent and manner of public participation should be set forth in published procedures.

RECOMMENDATION NO. 26

MINIMUM PROCEDURES FOR AGENCIES ADMINISTERING DISCRETIONARY GRANT PROGRAMS

Agencies that administer discretionary grant programs employ disparate and sometimes inadequate procedures to notify applicants of available programs or funds, to announce their policies for awarding grants or to inform applicants of the actions taken on their applications. Agencies are called on by this recommendation to publicize the availability of funds under grant programs in the Federal Register or other more widely-read publications; to issue regulations, following rulemaking, stating the procedures, criteria, standards and priorities for the selection of grantees, and to give notice to applicants as to the disposition of their applications, stating the grounds for such action, and this notification should be available for public inspection, subject to appropriate legal limitations.

The agencies are also called on to review their use of advisory committees in making discretionary grants for consistency with existing conflict of interest laws and regulations. The recommendation does not apply to Federal grant-in-aid programs that are wholly mandatory, that is, where grants are dispensed in accordance with a statutory formula which leaves no discretion in the agency.

IMPLEMENTATION OF RECOMMENDATIONS

One measure of the effectiveness of the Administrative Conference is the extent to which its recommendations have been voluntarily implemented or necessary legislative reforms are in the process of enactment. The Conference recognizes that some of its recommendations will never be fully implemented. Some call for a continuing examination of procedures. Others may be adopted piecemeal. Still others are hortatory in character.

Of the 26 recommendations adopted by the Conference, however, 22 are now a year or more old. It can fairly be said that the process of securing voluntary agency implementation is moving ahead, and considerable progress has been made in the area of legislation.

1. Availability of Information to the Public.

A significant effort to bring to public attention matters of general interest is contained in the recently adopted recommendations which set forth model procedures to help agencies comply with the Freedom of Information Act (Recommendation No. 24), call upon agencies to articulate and publish their general policies (Recommendation No. 25), and to provide more information concerning discretionary grant programs, the procedures to be followed by applicants thereunder and the grounds for the ultimate disposition of the application (Recommendation No. 26). Agencies have been requested to consider these recommendations and report on their applicability and the steps taken to implement them by October 1971.

Another group of recommendations deals with improving the quality and usefulness of a number of Federal publications of an informational nature. Steps have been taken to implement all these recommendations. A number of agencies have revised their statements in the U.S. Government Organization Manual, and a box has been added in all instances to indicate where further information can be obtained (Recommendation No. 2). Most agencies have updated their parallel citations to statutes and rules in the Code of Federal Regulations, and several have added special analytical indexes (Recommendations No. 3, 11). The proposal to begin publishing a Guide to Federal Reporting Requirements, which would be similar in nature to the document



Members of the Conference debating proposed recommendations at the Fifth Plenary Session. Above, Professor Kenneth Culp Davis, Member of the Committee on Informal Action; below, Earl W. Kintner, Chairman of the Committee on Personnel.



entitled "Record Retention Requirements," is under study by the General Services Administration. Funds have not yet been made available, however, for its publication (Recommendation No. 12). And it is contemplated that in the process of publishing their current Annual Reports, a number of agencies will publish more detailed compilations of statistics dealing with their activities, caseloads and time for processing applications (Recommendation No. 14).

Conference Recommendation No. 4 for a Consumer Bulletin was fully implemented on April 1, 1971 by the publication of the first issue of "Consumer News" by the Office of Consumer Affairs in the Executive Office of the President. Earlier, the office of the Federal Register took an important step in the same area when it revised the format of the Federal Register to include at the outset a summary statement of *Highlights* of items contained in each issue.

2. Judicial Review.

Five recommendations deal with varying aspects of judicial review of agency orders. All require the enactment of legislation.

The judicial review procedures for Interstate Commerce Commission orders (Recommendation No. 8) would have been brought more into line with those of similar agencies by legislation introduced in the 91st Congress (H.R. 16479; S.3597). Differences which evolved during the hearings have now been resolved, and a revised bill will be introduced shortly. Hopefully, it will receive Congressional approval in this Congress.

Section 2 of H.R. 7152, 92d Congress, would make orders of the National Labor Relations Board enforceable without further action 45 days after their entry unless an opposition is filed (Recommendation No. 10). Hearings on this proposal were held during May 1971.

Three recommendations respecting jurisdictional amount, sovereign immunity and parties defendant (Recommendations Nos. 7, 9, and 18) were combined into a single bill and introduced as S. 3568 in the 91st Congress. Hearings were held in June 1970, but the bill was not reported. It has been reintroduced in the 92nd Congress as S. 598.

3. Specific Agency Procedures.

Three recommendations are addressed to particular practices of specific agencies. All have been implemented in part or in whole.

Recommendation No. 13 to eliminate duplicative hearings being conducted by the Federal Aviation Agency and the National Transportation Safety Board has been fully implemented. By

Federal Aviation Regulation Amendment 13-8, April 2, 1970, the FAA terminated, effective May 1, 1970, its procedures to conduct a formal hearing before a Hearing Officer in license suspension and revocation cases. A pilot is still entitled to seek a full evidentiary hearing before the NTSB.

Recommendation No. 19 called upon the Securities and Exchange Commission to make public its policies, standards and important precedential rulings contained in its "no-action letters." In October 1970, the Commission issued a notice of proposed rule-making on the subject (35 Fed.Reg. 11703) which became final December 1, 1970 (35 Fed.Reg. 11779). Subject to certain restrictions for the purposes of safeguarding confidentiality, these new rules treat as public records all requests for no-action letters (unless withdrawn) and the agency's response. In addition, the SEC will publish from time to time a "News Digest" containing summaries of selected letters. This action fulfills several of the objectives of the recommendation.

The Conference recommendation concerning the practices and procedures of the Renegotiation Board (Recommendation No. 22) has been partially implemented. By rules published February 27, 1971 (36 Fed.Reg. 3807-8), the Board has provided that contractors will be furnished with copies of performance reports which are received from procurement agencies and that a number of documents, such as agreements and orders determining excessive profits, statements of facts and reasons, and letters not to proceed will be available for public inspection.

Legislation to shift review of orders of the Renegotiation Board from the Tax Court to the Court of Claims has recently been approved by the House Ways and Means Committee (H.R. 19909). This has resulted in the deferral of previously scheduled Conferences with members of the Tax Court respecting its procedures for review of Board orders.

4. Hearing Examiners

Several recommendations seek to strengthen the role of hearing examiners, the status of the examiner corps, and the dignity of the surroundings in which administrative proceedings are held. Considerable progress has been made toward the objectives of the Conference in these areas.

The General Services Administration now maintains a nationwide inventory of available hearing rooms, classified in accordance with Recommendation No. 1. Agencies having frequent need for facilities, particularly in the field, can now ensure the availability of adequate space in advance of the hearing.

The Conference proposed (Recommendation No. 6) that

agencies with a substantial caseload should either establish an intermediate appeal board to review hearing examiner decisions, with discretionary review by the agency, or that agencies should make hearing examiners' decisions final, subject only to discretionary review by the agency. Since the adoption of this recommendation, the Atomic Energy Commission has established a review board and Section 1 of H.R. 7152, 92d Cong., would authorize the National Labor Relations Board to provide that decisions of its hearing examiners shall be final unless two members of the Board vote to review. Full implementation of this recommendation, however, will require either legislation of general or specific applicability or the approval of reorganization plans.

The Civil Service Commission has modified its qualification requirements for hearing examiner positions to recognize prior general trial experience in lieu of prior administrative practice in order to qualify. Thus, lawyers without any previous government service or practice can now become eligible for appointment as hearing examiners. The Commission is also considering the adoption of experimental recruiting procedures which will give less emphasis to selective certification, thus broadening the base of those eligible for appointments to certain agencies. And legislation will be reintroduced in both the House and the Senate which would establish a Federal Administrative Justice Center to provide continuing education for all Government lawyers, including hearing examiners. All of the foregoing would carry out specific aspects of Conference Recommendation No. 17.

5. Public Access to Proceedings.

The Conference has recommended the establishment of a "People's Counsel" to represent the interests of the poor in agency rulemaking of direct consequence to them (Recommendation No. 5). A number of pending bills, such as those to create a consumer protection advocate or for even broader legal representation for the indigent would, if enacted, partially carry out the major objectives of the Conference proposal.

The Conference recommendation that agencies establish procedures to assure appropriate consideration of alternatives in licensing proceedings has now been followed by several major agencies (Recommendation No. 15). The recommendation reflects the principle laid down in the *Scenic Hudson* case that licensing agencies cannot ignore ecological or other factors that may be presented by public interest groups. Another important recommendation urges agencies to permit public participation in rule-making proceedings involving public property, grants, benefits,

loans and public contracts though not required to do so by the Administrative Procedure Act (Recommendation No. 16). Several agencies, including the Departments of Health, Education, and Welfare, Housing and Urban Development, and Interior, have already voluntarily complied with this proposal. At the same time, legislation to delete the exemptions from the statute and thus require public notice and opportunity to comment is pending in the Congress (S. 1413).

6. Hearing Procedures.

Finally, three Conference recommendations deal with expediting the trial of formal adjudications. These involve the greater use of summary judgments (Recommendation No. 20) and discovery (Recommendation No. 21); and a substantial reduction in the use of interlocutory appeals (Recommendation No. 23). The FCC has already adopted the substance of the interlocutory appeals recommendation and is preparing to adopt the summary decision recommendation. The Atomic Energy Commission has recently revised its discovery rules to incorporate a number of the procedures contained in the Conference recommendation and the Interstate Commerce Commission is in the midst of a rule-making proceeding which, if adopted, would incorporate many of the features of the model rule on discovery.

SUMMARY OF VIEWS ON THE PRESIDENT'S ADVISORY COUNCIL "REPORT ON SELECTED REGULATORY AGENCIES"

On February 11, 1971, the President released a report of his Advisory Council on Executive Organization (the "Ash Council") entitled "A New Regulatory Framework—A Report on Selected Independent Regulatory Agencies." The report recommends far-reaching changes in the structure and regulatory responsibilities of six independent regulatory agencies—the Civil Aeronautics Board, Federal Maritime Commission, Federal Power Commission, Federal Trade Commission, Interstate Commerce Commission, and the Securities and Exchange Commission. It also recommends a reduction in the size of the membership of the Federal Communications Commission. The President's statement urged vigorous public discussion of the Ash Council's report and early submission of comments from interested public and private groups.

The Administrative Conference gave careful consideration to the Report at its Fifth Plenary Session. On May 7, 1971, it adopted and transmitted to the President views on those aspects of the report that raise general issues of administrative organization and procedure and of judicial review of administrative action. The full text of the Conference statement is printed at pp. 60-64, *infra*.

With respect to the Ash Council recommendation to transform the transportation, power, securities and consumer protection agencies into executive agencies headed by a single administrator responsible to the President, the Administrative Conference stated that a persuasive case had not been made for such a "fundamental alteration in structure." It concluded that "structural alteration in itself offers only possibilities for limited improvement in regulatory performance," that whether an existing regulatory framework should or should not be continued is largely dependent upon "substantive rather than organizational considerations" and that "further study . . . is required." The Conference went on to say that if a decision were made to eliminate various substantive restraints affecting the transportation industry, the remaining regulatory controls might be vested in a new and differently



Professor Walter Gellhorn (standing) with Richard K. Berg, Executive Secretary, present the Council's views on the Ash Council Report on Selected Regulatory Agencies.

structured agency. The Conference also concluded that, if the collegial form is retained, its advantages can best be achieved "with a limited number of members, ordinarily no more than five" and through greater delegation of responsibilities for internal management to the Chairman and key subordinate officials.

With respect to the Ash Council proposal to have a single administrator review initial decisions of hearing examiners within 30 days for consistency with agency policy, the Conference noted that prior experience with inflexible time periods as a device to expedite decisions in complex matters has proved to be "unsatisfactory" and that it is "undesirable" and "unfair" to cut off the decision-maker from party participation in the consideration of an appeal. It urged adoption of alternative procedures, such as development of policy through rulemaking and according greater finality to Examiners' decision.

Finally, the Administrative Conference did not favor the establishment at this time of a specialized appellate court, staffed by other than regular judges, to hear appeals from the restructured transportation, power and securities agencies. It found that such a tribunal would not be justified by workload, could not be expected to contribute to uniformity in administrative law, and might become or give the appearance of becoming identified with the agency or industry point of view.

COMMITTEE PROJECTS

The largest part of the work of the Conference is performed, as in Congress, through a Committee structure. There are ten standing Committees and normally each will have at least two substantial projects under study. Detailed research is performed by the employment of part-time consultants, by contractors, by the professional staff of the Chairman's office, and sometimes by a combination of all three. Once a study has been completed and a recommendation approved by the Committee, it is transmitted to the Council for consideration. It then goes to the Assembly for final action unless it is agreed that further study and refinement by the Committee would be desirable or that the recommendation is otherwise deficient.

Each of the Committees has a generally prescribed field of inquiry which is suggested by its title. In order to permit latitude, however, the jurisdictional lines are intentionally broad. Since many studies are often relevant to the interests of two or more Committees, it is the responsibility of the Office of the Chairman to prevent duplication of effort by coordinating the activities of the Committees.

1. Committee on Agency Organization and Procedure

Chairman, Max D. Paglin

The major functions of this committee are to conduct studies and make recommendations in the field of the assignment and delegation of responsibilities and authority within agencies, including the adequacy of procedures to review internal delegations, the need for greater delegations, and the desirability for procedural reforms in the area of separation of functions.

The Committee, assisted by Professor Ernest A. E. Gellhorn of the University of Virginia Law School, completed work on two proposals which have been adopted by the Conference: the recommendation for the greater use of summary decisions in agency adjudication (Recommendation No. 20) and the recommendation to restrict the use of interlocutory appeals from hearing examiner rulings in adjudicatory cases (Recommendation No. 23).

Professor Glen O. Robinson of the University of Minnesota School of Law prepared a valuable study on the reorganization of

the independent agencies. This document played a major role in the development of Committee and ultimately Conference views on the Ash Council report.

The Committee has commenced work on a project of major proportions—the procedural and related questions which arise from public access to and participation in formal administrative proceedings. The study is being undertaken by Professor Ernest Gellhorn and members of the Chairman's staff. It will look into such areas as the cost of participation and the impact of intervention by multiple parties on the orderly and timely dispatch of agency proceedings.

The Committee is also planning to look into the allocation of authority between the Chairmen and the other members of independent regulatory agencies. Professor Norman Thomas, Department of Political Science, Duke University, has agreed to assist the Committee.

2. Committee on Claims Adjudications

Chairman, S. Neil Hosenball who succeeded Clark Byse

The bylaws of the Conference confer upon this committee responsibility to study procedures for the administrative determination of claims against the Government for money or property, including such matters as procurement contract procedures, reparations, and proceedings arising because of damage to persons or property.

Recommendation No. 22 respecting the practices and procedures under the Renegotiation Act of 1951 originated with this Committee and was based on extensive research conducted by Professor Dennis S. Aronowitz, Boston University School of Law.

A study of Government civilian boards of contract appeals is being held in abeyance pending the completion of a similar study by the government Procurement Law Commission. The consultant who had been working on this project, Richard E. Speidel of the University of Virginia Law School, has been asked by the Committee to consider a study of the problems which may arise because of *Scanwell Laboratories v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970). This case involved a suit against a government agency by an unsuccessful low bidder on a government contract.

The Committee has also asked Professor Aronowitz to undertake a study of the administration and coverage of the Federal Torts Claims Act. In addition, Professors Reid P. Chambers and Monroe E. Price, both of the University of California Law School (Los Angeles), will undertake a broad study of the procedures of the Department of the Interior as they affect the natural resources

claimed by Indians and Indian Tribes. The desirability of establishing an independent entity authorized to represent Indian Tribes in disputes with Federal agencies is also under consideration by the Committee.

3. Committee on Compliance and Enforcement Proceedings

Chairman, C. Roger Nelson

This committee conducts studies relating to compliance and enforcement policies, techniques, and procedures, including the issuance of cease and desist orders, the imposition of fines and penalties, and the application of other sanctions to assure compliance with applicable government regulations.

A recommendation of the Fourth Plenary Session of the Conference in June 1970 on the subject of discovery in agency adjudication was proposed by this Committee (Recommendation No. 21). Based in part on a 1962 Conference recommendation which had received only very modest acceptance by agencies, Professor Edward A. Tomlinson of the University of Maryland School of Law prepared a substantial research report in support of the proposition that greater use of discovery would be beneficial to both the Government and to the parties in adjudicatory proceedings.

The Committee has pending before it two studies, both prepared by Professor Tomlinson, and which are largely complete. One involves the duration of agency orders and injunctions—problems which may arise from broadly framed orders of unlimited duration. The second concerns the availability of appropriate procedures to assure compliance by all governmental units, state and local, with Federal standards in grant-in-aid programs.

Two other studies are underway. Professor James O. Freedman, University of Pennsylvania School of Law, is looking into the question of summary administrative action—*e.g.*, seizure, suspension, condemnation—prior to a formal trial-type hearing. Professor Harvey J. Goldschmid, Columbia University Law School, is engaged in a comprehensive study of the administrative use of money penalties as a sanction.

4. Committee on Grant and Benefit Programs

Chairman, James B. Minor who succeeded St. John Barrett

The primary responsibility of this Committee is to conduct investigations and make recommendations respecting the procedures by which agencies administer Federal loan, grant, and benefit programs, including procedures for the award or termina-

tion of any such form of financial assistance.

The Fifth Plenary Session of the Conference adopted Recommendation No. 26 which sets forth minimum procedures for agencies administering discretionary grant programs. Mr. Stephen Kurzman, a Washington attorney, assisted the Committee with its research.

Professor Robert G. Dixon, George Washington University Law Center, is undertaking a study for the Committee on the handling of disability benefit claims by the Social Security Administration; and Professor Jerry L. Mashaw of the University of Virginia School of Law has begun research on the procedures to enforce Federal standards in the Aid to Dependent Children Program administered by the Department of Health, Education and Welfare.

5. Committee on Informal Action

Chairman, Warner W. Gardner

This committee has a wide mandate to investigate procedures employed in the large number of administrative programs where formal hearings are uncommon and broad discretion is the norm. A formal hearing is not an essential feature of fair procedure in all cases, and the committee accordingly strives to recommend the procedure most suitable to each program it investigates.

With the assistance of Professor William J. Lockhart of the University of Utah College of Law, the Committee undertook an extensive study of the informal procedures of the Securities and Exchange Commission in issuing "no-action letters" under Section 4 of the Securities Act of 1933. Its recommendations for improving the process are incorporated in Conference Recommendation No. 19, adopted in June 1970.

While several research projects currently being studied by consultants working under the supervision of the office of the Chairman will be referred to the Committee on Informal Action for review later in the year, the Committee has two studies already well underway.

An in-depth study of aliens' "change-of-status" applications to the Immigration and Naturalization Service is being conducted in New York City by Professor Abraham D. Sofaer of the Columbia University Law School.

Since so many important public programs are carried out through informal actions, the Committee has been engaged in a long-range project of attempting to develop a set of general guidelines against which the efficacy of the procedures used in these programs may be tested. A working draft has now been prepared,

and Professor Lockhart will use these guidelines during an investigation of several selected programs this year.

6. Committee on Information, Education, and Reports

Chairman, Thomas H. Wall

The jurisdiction of this committee relates to the availability and dissemination of public information on administrative procedures, policies, and actions, and to the appropriateness of reporting requirements imposed upon private activities.

Conference Recommendation No. 24, which sets forth principles and detailed guidelines to assist agencies in implementing the Freedom of Information Act, was developed by this Committee. The supporting memorandum was prepared by Professor Donald A. Giannella, Villanova University School of Law.

The Committee has two pending studies. Professor Victor G. Rosenblum, Northwestern University School of Law, is considering the handling of citizens' grievances and complaints by Federal agencies. Professor Robert W. Bennett, Northwestern University School of Law, will study the desirability of permitting radio and television coverage of formal administrative proceedings in cases of broad public interest such as the safety and location of new atomic energy plants or television license revocation and renewal proceedings.

7. Committee on Judicial Review

Chairman, Edwin F. Rains who succeeded Ashley Sellers

The Committee on Judicial Review occupies a unique role in the Conference. It is contemplated that a great many recommendations will have some predictable impact on the caseload of the Federal judicial system. Thus, in addition to studying judicial review problems generally, including greater uniformity in statutory judicial review provisions, the Committee is also called upon to consider the changes in the workload of the courts which might be caused by the implementation of recommendations from other committees of the Conference.

Recommendation No. 18, designed to ease the technical requirement respecting the proper designation of defendants in suits against officers or agencies of the United States was prepared by the Committee with the assistance of Roger C. Cramton, then Professor of Law at the University of Michigan and Committee Consultant.

The Committee's consideration of the judicial review aspects

of the Ash Council report on selected independent regulatory agencies was assisted by a valuable paper on this subject by Professor Nathaniel Nathanson of the Northwestern University School of Law.

The Committee has three current projects underway. A comprehensive study of pre-enforcement judicial review of agency statements or positions which may adversely affect private rights or interests if left unchallenged has been undertaken by Professor G. Joseph Vining of the University of Michigan Law School. Professor Francis X. Beytagh, Notre Dame Law School, is studying the question of pre-induction judicial review of Selective Service determinations. And Professor John M. Steadman of the University of Pennsylvania School of Law is looking into procedures for resolving property disputes between the United States and private persons.

8. Committee on Licenses and Authorizations

Chairman, Ben C. Fisher who succeeded James T. Ramey

This Committee is charged with the responsibility to study procedures for the grant, denial, transfer, modification, suspension, or termination of licenses or certificates to engage in activity which requires Government authorization. Its functions include the study of such matters as the imposition of special conditions upon licensees and procedures applicable to a proposed abandonment of licensed activities.

The enactment of the National Environmental Policy Act of 1969, the creation of the Council on Environmental Quality and the establishment of the Environmental Protection Agency have imposed on the Government major new and enlarged responsibilities, particularly in the formulation of standards to protect the environment from further pollution.

The Licensing Committee has begun two important studies related to new programs in this area. One involves the procedure for the development and use of environmental impact statements. Professor Preble Stolz of the University of California Law School (Berkeley) is undertaking the research. Another will consider the handling of environmental issues in the licensing of power facilities. Professor Arthur W. Murphy of the Columbia University Law School is serving as consultant on this latter subject.

A study of the procedures used in processing mutually-exclusive comparative broadcast license applications by the Federal Communications Commission has been largely completed by Professor Robert A. Anthony, on sabbatical leave from the Cornell University Law School until the 1971 Fall semester.

9. Committee on Personnel

Chairman, Earl W. Kintner who succeeded Dale W. Hardin

The scope of this committee's function is to seek means to enhance the competence, professionalism, and effectiveness of Federal hearing examiners, lawyers, and other personnel involved in the conduct of administrative proceedings. This includes such areas as recruitment, qualifications, appointment, training, compensation, tenure, and ethical standards.

Professor Norman Thomas of the Department of Political Science, Duke University, prepared a valuable paper as background for the Committee's consideration of aspects of the Ash Council report on the independent regulatory agencies.

A study of the feasibility of establishing a pool of hearing examiners at the Civil Service Commission to be available for loan to new agencies or to existing agencies having a special short-term requirement for additional hearing officers has been largely completed by former Professor Antonin Scalia and Professor Richard A. Merrill, both of the University of Virginia School of Law. The views of interested groups, including the Civil Service Commission and the Federal Trial Examiners Conference, are being sought.

Professor Merrill will now undertake a new study, probably—of the adverse action procedures used by agencies and the Civil Service Commission for the discipline or removal of Federal employees.

10. Committee on Rulemaking

Chairman, Martin F. Richman who succeeded Howard C. Westwood

The Committee on Rulemaking has a mandate to look into the appropriate definition of rulemaking, proper areas for its use, and the scope and form of procedures employed. It is charged especially with reviewing the method by which the views of the general public can be presented in rulemaking proceedings.

Recommendation No. 24, which was adopted by the Conference at its Fifth Plenary Session, and which calls upon agencies to articulate and publish the general policies and standards which guide their actions and determinations, originated with this Committee. The research underlying the recommendation was undertaken in part by Mr. Brice Claggett of Mr. Westwood's law firm and completed by the present Chairman.

A major current project of the Committee is a comprehensive review of Federal proceedings in which rulemaking is required

to be carried out by means of evidentiary hearings. Professor Robert W. Hamilton of the University of Texas Law School has completed a substantial study of this "rulemaking-on-a-record" by the Food and Drug Administration. His report is now available for comment by interested persons and agencies. Professor Hamilton will now extend his study to comparable procedures of other Federal agencies.

The Committee is also looking into the impact of rate-making on regulated industries as it may be affected by agency negotiations, proposals for settlement, or the suspension of tariffs or proposed rates. Professor Ralph S. Spritzer, University of Pennsylvania Law School has been engaged to undertake the research.

ACTIVITIES OF THE CHAIRMAN'S OFFICE

The increase in the budget of the Conference has resulted in enlarging the staff of the Chairman's Office and the employment of more consultants and contractors to engage in research projects under the supervision of the Chairman. The result is reflected in a substantial increase in the activities being handled by the Office.

Studies being conducted by academic consultants include:

- *The Availability of Advisory Opinions from Federal Agencies*: Professor Michael R. Asimow, University of California School of Law (Los Angeles).

- *The Commitment and Release Procedures for Psychiatric Patients in Veterans Administration Hospitals*: Professors Robert A. Burt and David L. Chambers, University of Michigan Law School.

- *A Comparative Study of the Handling of Disability Claims by the Veterans Administration and the Social Security Administration of the Department of Health, Education, and Welfare*: Professor Paul D. Carrington, University of Michigan Law School.

- *The Parole Procedures of the Federal Parole Board, Department of Justice*: Professor Phillip E. Johnson, University of California School of Law (Berkeley).

- *Prosecutorial Discretion in Enforcement by the Department of Justice of Criminal Sanctions Under Federal Regulatory Statutes*: Professor Robert L. Rabin, Stanford University Law School.

- *Procedures Available to Losing Bidders for Government Contracts*: Professor Richard E. Speidel, University of Virginia School of Law.

- *Discipline of Attorneys Practicing Before Federal Agencies*: Professor Donald T. Weckstein, University of Connecticut School of Law.

Projects which are either completed or under study by the staff include:

- *Public Access to and Participation in Formal Administrative Proceedings*. This study is being coordinated with the Committee

on Agency Organization and Procedure; Mr. Berg, Mr. Johnston; Miss Gilhooley. Professor Daniel J. Baum, Osgoode Hall Law School, York University (Toronto) is engaged in a related study of the public participation procedures at the Federal Trade Commission.

- *Discretionary Review Procedure at the Civil Aeronautics Board.* This study, prepared by Emory N. Ellis, Jr., former Executive Secretary, completed the research which the Conference requested in support of *Recommendation No. 6—Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency.*

- *Preparation of a Handbook of Recommended Procedures to be Used in Complex Administrative Adjudications.* Mr. Cushman. This project would complete a draft prepared by the 1962 Administrative Conference.

- *Procedures of the Atomic Energy Commission in Licensing Nuclear Power Plants.* Mr. Ellis and Mr. Johnston. A comprehensive draft discussing procedures and possible recommendations has been completed and referred to the Committee on Licenses and Authorizations.

- *Compliance with the Administrative Practice Act.* Mrs. Clarkson. This short-range study of 5 U.S.C. 500(f) examined the procedures at the Departments of State, Justice, and Labor for providing service of documents on attorneys who represent aliens. Based on complaints from several practicing attorneys, it was concluded that non-compliance with the statutory provision was inadvertent and not widespread.

Views were presented on several legislative proposals having a bearing on Conference Recommendations or administrative procedure more generally. The Chairman testified in support of Sections 1 and 2 of H.R. 7152, a bill to amend the Labor-Management Relations Act of 1947. Extensive views were also presented by Chairman Cramton on H.R. 14, H.R. 15, H.R. 16 and H.R. 3809, bills to establish a Consumer Protection Agency and an Office of Consumer Affairs.

MEMBERS OF THE CONFERENCE

The following list contains the names and present affiliation of all members of the Conference (other than members of the Council) as of June 1, 1971.

CARL A. AUERBACH, Professor of Law, University of Minnesota Law School, Minneapolis, Minnesota.

ST. JOHN BARRETT, Deputy General Counsel, Department of Health, Education, and Welfare.

FRANK A. BARTIMO, Assistant General Counsel (M&RA), Department of Defense.

JAMES A. BISTLINE, Assistant Vice President—General Counsel, Southern Railway System, Washington, D.C.

CHARLES F. BRANNAN, General Counsel, National Farmers Union, Denver, Colorado.

THEODORE F. BROPHY, Executive Vice President, General Telephone and Electronics Corporation, New York, New York.

WILLIAM H. BROWN, III, Chairman, Equal Employment Opportunity Commission.

CHARLES W. BUCY, Assistant General Counsel, Department of Agriculture.

JACK K. BUSBY, President, Pennsylvania Power & Light Co., Allentown, Pennsylvania.

CLARK BYSE, Professor of Law, Harvard Law School, Cambridge, Mass.

JEAN CAMPER CAHN, lawyer, Urban Law Institute, Washington, D.C.

JOHN A. CARVER, JR., Commissioner, Federal Power Commission.

ANTHONY G. CHASE, Deputy Administrator, Small Business Administration.

ARTHUR H. COURSHON, Chairman of Board, Washington Federal Savings & Loan Association of Miami Beach, Miami Beach, Fla.

WILLIAM J. CURTIN, lawyer, Washington, D.C.

KENNETH CULP DAVIS, John P. Wilson Professor of Law, University of Chicago Law School, Chicago, Ill.

DAVID S. DENNISON, Commissioner, Federal Trade Commission.

JOHN H. FANNING, Member, National Labor Relations Board.

BEN C. FISHER, lawyer, Washington, D.C.

THOMAS J. FLAVIN, Judicial Officer, Department of Agriculture.

ARTHUR B. FOCKE, General Counsel, Office of Management and Budget.

WARNER W. GARDNER, lawyer, Washington, D.C.

WHITNEY GILLILLAND, Commissioner, Civil Aeronautics Board.

RICHARD H. GIMER, lawyer, Washington, D.C.

HOWARD A. GLICKSTEIN, Staff Director, Commission on Civil Rights.

GEORGE A. GRAHAM, Executive Director, National Academy of Public Administration, Washington, D.C.

ROBERT W. GRAHAM, lawyer, Seattle, Wash.

ROBERT C. GRESHAM, Commissioner, Interstate Commerce Commission.

PATRICIA HARRIS, lawyer, Washington, D.C.

THOMAS E. HARRIS, Associate General Counsel, AFL-CIO, Washington, D.C.

GEOFFREY C. HAZARD, JR., Professor of Law, Yale Law School, New Haven, Connecticut.

GEORGE H. HEARN, Commissioner, Federal Maritime Commission.

ARTHUR E. HESS, Deputy Commissioner, Social Security Administration.

S. NEIL HOSENBALL, Deputy General Counsel, National Aeronautics and Space Administration.

RICHARD H. KEATINGE, lawyer, Los Angeles, Calif.

EARL W. KINTNER, lawyer, Washington, D.C.

ALAN G. KIRK, Deputy General Counsel, Environmental Protection Agency.

ARTHUR W. LEIBOLD, JR., General Counsel, Federal Home Loan Bank Board.

SOL LINDENBAUM, Executive Assistant to the Attorney General, Department of Justice.

CHARLOTTE TUTTLE LLOYD, Assistant General Counsel, Department of the Treasury.

PHILIP A. LOOMIS, JR., General Counsel, Securities & Exchange Commission.

J. EDWARD LYERLY, Deputy Legal Adviser for Administration, Department of State.

ROSS L. MALONE, Vice President & General Counsel, General Motors Corporation, New York, N.Y.

HART T. MANKIN, General Counsel, General Services Administration.

MALCOLM MASON, Associate General Counsel, Office of Economic Opportunity.

DAVID O. MAXWELL, General Counsel, Department of Housing and Urban Development.

MITCHELL MELICH, Solicitor, Department of the Interior.

WILLIAM MING, lawyer, Chicago, Illinois.

JAMES B. MINOR, Assistant General Counsel for Regulation, Department of Transportation.

ANTHONY L. MONDELLO, General Counsel, U.S. Civil Service Commission.

GERALD MORGAN, lawyer, Washington, D.C.

WALTER H. MORSE, General Counsel, Selective Service System.

PETER G. NASH, Solicitor, Department of Labor.

C. ROGER NELSON, lawyer, Washington, D.C.

DAVID A. NELSON, General Counsel, U.S. Postal Service.

LEONARD NIEDERLEHNER, Acting General Counsel, Department of Defense.

THOMAS J. O'CONNELL, General Counsel, Board of Governors of the Federal Reserve System.

NATHAN OSTROFF, Chairman, Appeals Board, Department of Commerce.

MAX D. PAGLIN, Special Assistant for Administrative Procedure, Federal Communications Commission.

EDWIN F. RAINS, Deputy Commissioner of Customs, Department of the Treasury.

JAMES T. RAMEY, Commissioner, U.S. Atomic Energy Commission.

FRED B. RHODES, Deputy Administrator of Veterans Affairs, Veterans Administration.

CHARLES S. RHYNE, lawyer, Washington, D.C.

MARTIN F. RICHMAN, lawyer, New York, N.Y.

F. VINSON ROACH, Vice President & General Counsel, Northern Natural Gas Company, Omaha, Nebraska.

CHARLES R. ROSS, lawyer, Shelburne, Vermont.

MERRITT RUHLEN, Hearing Examiner, Civil Aeronautics Board.

BERNARD G. SEGAL, lawyer, Philadelphia, Pennsylvania.

ASHLEY SELLERS, lawyer, Washington, D.C.

RICHARD E. STEWART, Senior Vice President & General Counsel, First National City Bank, New York, N.Y.

EARL J. THOMAS, Director, Office of Inspection, Department of the Interior.

THOMAS H. WALL, lawyer, Washington, D.C.

FORMER MEMBERS OF THE CONFERENCE

The following list contains the names of former members who served during the period of this report with their affiliation at the time of membership.

CAROLYN E. AGGER, lawyer, Washington, D.C.

C. PAUL BARKER, lawyer, New Orleans, La.

J. W. BULLION, lawyer, Dallas, Tex.

JOHN T. CHADWELL, lawyer, Chicago, Ill.

HAROLD J. COHEN, General Attorney, American Telephone & Telegraph Co., New York, N.Y.

DONALD C. COOK, lawyer, President, American Electric Power Co., Inc., New York, N.Y.

PAUL RAND DIXON, member and former Chairman, Federal Trade Commission.

DAVID C. EBERHART, Director of the Federal Register, General Services Administration.

PHILIP ELMAN, Commissioner, Federal Trade Commission.

NORMAN A. FLANINGAM, lawyer, Washington, D.C.

JEFFERSON B. FORDHAM, Dean, University of Pennsylvania Law School, Philadelphia, Pa.

WILLIAM T. GENNETTI, Deputy General Counsel, Small Business Administration.

FERREL HEADY, President, University of New Mexico, Albuquerque, N. Mex.

LEWIS B. HERSHEY, (General) Director, Selective Service System.

MILES W. KIRKPATRICK, Chairman, Federal Trade Commission.

JOHN T. KOEHLER, lawyer, Washington, D.C.

JIM C. LANGDON, Chairman, Texas Railroad Commission, Austin, Tex.

FRANK W. MCCULLOCH, Chairman, National Labor Relations Board.

WILSON MATTHEWS, Director, Hearing Examiners Office, Civil Service Commission.

EDWARD B. MILLER, Chairman, National Labor Relations Board.

JOHN N. NASSIKAS, Chairman, Federal Power Commission.

NATHANIEL L. NATHANSON, Professor of Law, Northwestern University, Chicago, Ill.

SAMUEL R. PIERCE, JR., lawyer, New York, N.Y.

EMMETTE S. REDFORD, Ashbel Smith Professor of Government, University of Texas, Austin, Tex.

GEORGE ROBINSON, Deputy Assistant Secretary for Administration, Department of the Interior.

HOWARD SCHNOOR, Director, Government Organization Staff, Bureau of Management and Budget.

LAURENCE H. SILBERMAN, Solicitor, Department of Labor.

CURTIS W. TARR, Director, Selective Service System.

STARR THOMAS, Vice President-Law, Santa Fe Railway, Chicago, Ill.

SHERMAN UNGER, General Counsel, Department of Housing and Urban Development.

HOWARD C. WESTWOOD, lawyer, Washington, D.C.

CONSULTANTS TO THE CONFERENCE

ROBERT A. ANTHONY, Professor, Cornell University Law School.

DENNIS S. ARONOWITZ, Professor, Boston University School of Law.

MICHAEL R. ASIMOW, Professor, University of California School of Law (Los Angeles).

DANIEL BAUM, Professor, York University, Toronto.

ROBERT W. BENNETT, Assistant Professor, Northwestern University School of Law.

FRANCIS X. BEYTAGH, JR., Professor, Notre Dame Law School.

ARTHUR EARL BONFIELD, Professor, University of Iowa College of Law.

ROBERT A. BURT, Associate Professor, University of Michigan Law School.

PAUL D. CARRINGTON, Professor, University of Michigan Law School.

DAVID L. CHAMBERS, Assistant Professor, University of Michigan Law School.

REID P. CHAMBERS, Acting Professor, University of California School of Law (Los Angeles).

ROBERT G. DIXON, JR., Acting Professor, George Washington University National Law Center.

JAMES O. FREDMAN, Professor, University of Pennsylvania Law School.

ERNEST A. E. GELLHORN, Professor, University of Virginia School of Law.

DONALD A. GIANNELLA, Professor, Villanova University School of Law.

HARVEY J. GOLDSCHMID, Assistant Professor, Columbia University School of Law.

ROBERT W. HAMILTON, Professor, University of Texas School of Law.

PHILLIP E. JOHNSON, Acting Professor, University of California School of Law (Berkeley).

STEPHEN KURZMAN, Attorney, Washington, D.C.

WILLIAM J. LOCKHART, Professor, University of Utah College of Law.

JERRY L. MASHAW, Associate Professor, University of Virginia School of Law.

RICHARD A. MERRILL, Associate Professor, University of Virginia School of Law.

ARTHUR W. MURPHY, Professor, Columbia University School of Law.

NATHANIEL L. NATHANSON, Professor, Northwestern University School of Law.

MONROE E. PRICE, Professor, University of California School of Law (Los Angeles).

ROBERT L. RABIN, Professor, Stanford University Law School.

GLEN O. ROBINSON, Associate Professor, University of Minnesota Law School.

VICTOR G. ROSENBLUM, Professor, Northwestern University School of Law.

ABRAHAM D. SOFAER, Professor, Columbia University School of Law.

RICHARD E. SPEIDEL, Professor, University of Virginia School of Law.

RALPH S. SPRITZER, Professor, University of Pennsylvania Law School.

JOHN M. STEADMAN, Professor, University of Pennsylvania Law School.

PREBLE STOLZ, Professor, University of California School of Law (Berkeley).

NORMAN THOMAS, Professor, Department of Political Science, Duke University.

EDWARD A. TOMLINSON, Associate Professor, University of Maryland School of Law.

G. JOSEPH VINING, Assistant Professor, University of Michigan Law School.

DONALD T. WECKSTEIN, Professor, University of Connecticut School of Law.

TEXT OF RECOMMENDATIONS NOS. 18-26 OF THE ADMINISTRATIVE CONFERENCE

RECOMMENDATION NO. 18 PARTIES DEFENDANT¹

The size and complexity of the Federal Government, coupled with the intricate and technical law concerning official capacity and parties defendant, have given rise to innumerable cases in which a plaintiff's claim has been dismissed because the United States or one of its agencies or officers lacked capacity to be sued, was improperly identified, or could not be joined as a defendant. The ends of justice are not served when dismissal on these technical grounds prevents a determination on the merits of what may be just claims. Three attempts to cure the deficiencies of the law of parties defendant have achieved only partial success and further changes are required to eliminate remaining technicalities concerning the identification, naming, capacity, and joinder of parties defendant in actions challenging federal administrative action.

RECOMMENDATION

1. The Federal Rules of Civil Procedure contain liberal provisions for substitution of parties and for amendment of pleadings and correction of defects as to parties defendant. The Department of Justice should instruct its lawyers and United States Attorneys to call the attention of the court to these provisions in cases involving technical defects with respect to the naming of parties defendant in any situation in which the plaintiff's complaint provides fair notice of the nature of the claim and the summons and complaint were properly served on a United States Attorney, the Attorney General, or an officer or agency which would have been a proper party if named. The Department of Justice should be responsible for determining who within our complex federal establishment is responsible for the alleged wrong and should take the initiative in seeking correction of pleadings or adding of proper parties. Since the Department of Justice has acquiesced in the substance of this

¹ Recommendations Nos. 18-22 were adopted June 2-3, 1970.

recommendation, it would also be appropriate for the Department of Justice and the Administrative Conference of the United States to seek an amendment of the Federal Rules of Civil Procedure to provide that the Attorney General shall have the responsibility to correct such deficiencies.

2. Congress should enact legislation:

(a) Amending section 703 of title 5 to allow the plaintiff to name as defendant in judicial review proceedings the United States, the agency by its official title, the appropriate officer, or any combination of them.

(b) Amending section 1391 (e) of title 28 to include within its coverage actions challenging federal administrative action in which the United States is named as a party defendant, without affecting special venue provisions which govern other types of actions against the United States.

(c) Amending section 1391 (e) of title 28 to allow a plaintiff to utilize that section's broadened venue and extraterritorial service of process in actions in which non-federal defendants who can be served in accordance with the normal rules governing service of process are joined with federal defendants.

RECOMMENDATION NO. 19

SEC NO-ACTION LETTERS UNDER SECTION 4 OF THE SECURITIES ACT OF 1933

The following recommendations concern the process by which the Division of Corporation Finance of the Securities and Exchange Commission (the "Division") advises stockholders whether proposed sales of unregistered stock might involve a violation of the Securities Act of 1933 for which the Division would recommend Commission enforcement action. This no-action process is an outstanding example of administrative accessibility and pragmatism, enabling stockholders readily to determine whether a contemplated sales transaction may be consummated without registration. The recommendations are intended to enable the public and individual stockholders to be more fully advised of the interpretations, policies and precedents which guide the conclusions of the Commission and the staff, and to encourage the Commission to relieve its staff of the burden of routine no-action requests.

RECOMMENDATION

1. *Rule-Making.* The Commission acting under 5 U.S.C. § 553,

should to the maximum feasible extent state in the form of rules the legal interpretations, the policies, and the standards guiding discretion which it and the Division staff apply in determining registration obligations in the no-action process. Where generalized rules are not feasible, the Commission should consider making rules limited to illustrative cases (involving either real or hypothetical facts) with an explanation of the reasons for their disposition. Existing summaries of past no-action letters, minutes of the Commission's disposition of those no-action requests which are brought before it, and related memoranda, insofar as they reflect current interpretative positions, should afford a strong and readily available foundation for such rule-making.

2. *Interpretative Releases.* Where the formal rulemaking recommended above may not be feasible, the Commission should to the maximum extent feasible make publicly available by the means of public releases its legal interpretations and policies, and standards guiding discretionary determinations.

3. *Past Interpretations.* On questions of law or policy which are not answered in formal rules or releases, a selected group of the more important past no-action letters which may have continuing significance should be summarized and made publicly available.

4. *Routine Inquiries.* As the Commission's rules, releases and particular interpretations become publicly available, the Commission should consider instructing its staff to discontinue giving no-action letters on routine questions adequately answered by publicly available materials.

5. *Future No-Action Letters.* The Commission and its staff should continue to issue no-action letters not excluded as routine under the limitation, suggested in No. 4. Each non-routine letter should, in detail or in summary form as deemed appropriate, state the facts and the reasons for the conclusion. Each letter should be made publicly available, subject to safeguards deemed appropriate under No. 6.

6. *Confidentiality and Time of Publication.* The Commission in making no-action letters publicly available should protect confidential information by the most effective and feasible means, including deletion, preparation of a "public" version of the letter, or reasonable delay in making the letter public. However, those letters which reflect significant developments in legal interpretation, policy or standards guiding discretion; should be published promptly, subject to the necessary protection of confidentiality.

7. *Procedural Regulations.* The present procedural regulations do not fully describe the no-action process and should be expanded to cover each step of the process.

Separate statement of Malcolm S. Mason

Government needs the art of making practical compromises between conflicting goals. There is a regrettable tendency to hold up administrative agencies to Olympian standards based on a theoretical pure strategy when a mixed strategy is called for. This operates to defeat the purpose of administrative procedure and the values to the public of administrative action. The Conference is hurrying too fast the process towards formalism which destroys both effectiveness and fairness. Every generation needs not only a measure of rational consistency but also the principle of Equity that stare decisis kills.

The Securities and Exchange Commission no-action letter is an outstanding creation in the field of administrative procedure by an agency that has been outstanding in its efforts to communicate its views to the public affected. The Conference believes that the Commission can do better and I agree it can, but the conference has proposed a solution which in my view makes sure that it will do worse.

The recommendation of the Conference if carried out will destroy the no-action letter for the valuable purpose for which it was created: quick, helpful, trustworthy guidance. If advice on particular matters must be accompanied by a public statement containing facts and reasons (as required by the Conference Recommendation, paragraph 5) and will be used as precedent, cautious statement and careful qualification is needed. The result will be that the staff will no longer dare to give the quick and informal advice and assurance that they are now authorized to give. The people who need the assistance will no longer get it. A new piece of bureaucratic red tape will be created. An existing effective and valuable informal procedure will be hurt. None of those who supported the recommendation intended this, but it will be the result. The Conference Recommendation does not reflect realistic consideration of how the no-action letter has operated in the past and how it will be likely to operate in the future.

RECOMMENDATION NO. 20

SUMMARY DECISION IN AGENCY ADJUDICATION

Delays in the administrative process can be avoided by eliminating unnecessary evidentiary hearings where no genuine issue of material fact exists. Each agency having a substantial caseload of formal adjudications should adopt procedures providing for summary judgment or decision, patterned after the following model rule in suitable cases and with appropriate modifications to meet the needs of its own hearings:

RECOMMENDATION

§ 1. Any party to an adjudicatory or rulemaking proceeding required by statute to be determined on the record after opportunity for agency hearing may, after commencement of the proceeding and at least _____ days before the date fixed for the hearing, move with or without supporting affidavits for a summary decision in his favor of all or any part of the proceeding. Any other party may, within _____ days after service of the motion, serve opposing affidavits or countermove for summary decision. The presiding officer may, in his discretion, set the matter for argument and call for the submission of briefs.

§ 2. The presiding officer may grant such motion if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed, show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.

§ 3. Affidavits shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. When a motion for summary decision is made and supported as provided in this rule, a party opposing the motion may not rest upon the mere allegations or denials of his pleading; his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue of fact for the hearing.

§ 4. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the presiding officer may deny the motion for summary decision or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

§ 5. The denial of all or any part of a motion for summary decision by the presiding officer shall not be subject to interlocutory appeal to the (*review authority*) unless (a) the presiding officer certifies in writing (i) that the ruling involves an important question of law or policy as to which there is substantial ground for difference of opinion and (ii) that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation; or (b) if the presiding officer declines so to certify, a designee of the (*review authority*) so certifies upon appropriate application. The allowance of such an interlocutory appeal shall not stay the proceeding before the presiding officer unless the (*review authority*) shall so order.

RECOMMENDATION NO. 21

DISCOVERY IN AGENCY ADJUDICATION

Prehearing discovery in agency adjudication insures that the parties to the proceeding have access to all relevant, unprivileged information prior to the hearing. Its primary objectives include the more expeditious conduct of the hearing itself, the encouragement of settlement between the parties, and greater fairness in adjudication. Agencies that conduct adjudicatory proceedings generally enjoy broad investigatory powers, and fairness requires that private parties have equal access to all relevant, unprivileged information at some point prior to the hearing.

RECOMMENDATION

It is therefore recommended that each agency recognize the following minimum standards for discovery in adjudicatory proceedings subject to sections 5, 7 and 8 of the Administrative Procedure Act, now codified as 5 U.S.C. 554, 556 and 557. Individual agencies may permit additional discovery where appropriate and may tailor the recommended standards to meet the needs of particular types of proceedings where special or less elaborate discovery procedures will accomplish the same basic objectives or where the protective measures here recommended will be inadequate to achieve the ends sought. Each agency should undertake to train its hearing examiners in the application of the rules it promulgates to implement these standards. This training should draw upon the experience of other agencies, the Federal Courts, private practitioners, and bar associations.

The recommended minimum standards include the following procedures:

1. *Prehearing Conferences*

The presiding officer should have the authority to hold one or more prehearing conferences during the course of the proceeding on his own motion or at the request of a party to the proceeding. The presiding officer should normally hold at least one prehearing conference in proceedings where the issues are complex or where it appears likely that the hearing will last a considerable period of time. The presiding officer at a prehearing conference should have the authority to direct the parties to exchange their evidentiary exhibits and witness lists prior to the hearing. Where good cause exists, the parties should have the right at any time to amend, by deletion or supplementation, their evidentiary exhibits and witness lists.

2. *Depositions*

A party to the proceeding should be able to take depositions of witnesses upon oral examination or written questions for purposes of discovering relevant, unprivileged information, subject to the following conditions:

(1) the taking of depositions should normally be deferred until there has been at least one prehearing conference;

(2) the party seeking to take a deposition should apply to the presiding officer for an order to do so;

(3) the party seeking to take a deposition should serve copies of the application on the other party or parties to the proceeding, who should be given an opportunity, along with the deponent, to notify the presiding officer of any objections to the taking of the deposition;

(4) the presiding officer should not grant an application to take a deposition if he finds that the taking of the deposition would result in undue delay;

(5) the presiding officer should otherwise grant an application to take a deposition unless he finds that there is not good cause for doing so; and

(6) the deposing of an agency employee should only be allowed upon an order of the presiding officer based on a specific finding that the party applying to take the deposition is seeking significant, unprivileged information not discoverable by alternative means. Any such order should be subject to an interlocutory appeal to the agency.

An order to take a deposition should be enforceable through the issuance of a subpoena ad testificandum.

3. *Witnesses*

(a) *Prior Statements*—At the prehearing conference or at some other reasonable time prior to the hearing the attorney or employee appearing on behalf of the agency in the proceeding should make available to the other parties to the proceeding any prior statements of agency witnesses which are in the possession of the agency or obtainable by it from any other Federal agency and which relate to the subject matter of the expected testimony. "Statement" is defined to include only a written statement signed or adopted by the witness or a recording or transcription which is a substantially verbatim recital of an oral statement made by the witness to an agent of the Federal government.

(b) *Narrative Summaries of Expected Testimony*—At the prehearing conference or at some other reasonable time prior to the hearing each party to the proceeding should make available to the other parties to the proceeding the names of the witnesses he

expects to call and a narrative summary of their expected testimony. The attorney or employee appearing on behalf of the agency in the proceeding should have the authority to designate any prior statement or statements of an agency witness which he makes available to the other parties under Recommendation 3(a) as all or part of the narrative summary of that witness' expected testimony. Where good cause exists, the parties should have the right at any time to amend, by deletion or supplementation, the list of names of the witnesses they plan to call and the narrative summaries of the expected testimony of those witnesses.

4. *Written Interrogatories to Parties*

(a) *Availability*—A party to the proceeding should be able to serve written interrogatories upon any other party for purposes of discovering relevant, unprivileged information. A party served with interrogatories should be able, before he must answer the interrogatories, to apply to the presiding officer for the holding of a prehearing conference for the mutual exchange of evidentiary exhibits and other information. Each interrogatory which requests information not previously supplied at a prehearing conference should be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for the objection should be stated in lieu of answer. The party upon whom the interrogatories have been served should serve a copy of the answers and objections within a reasonable time upon the party submitting the interrogatories. The party submitting the interrogatories may move the presiding officer for an order compelling an answer to an interrogatory or interrogatories to which there has been an objection or other failure to answer.

(b) *Interrogatories Directed to the Agency*—Each agency should designate an appropriate official on whom other parties to the proceeding may serve written interrogatories directed to the agency. That official should arrange for agency personnel with knowledge of the facts to answer and sign the interrogatories on behalf of the agency. The attorney or employee appearing on behalf of the agency in the proceeding should have the authority to make and sign objections to interrogatories served upon the agency. Interrogatories directed to the agency which seek information available only from the agency head, member, or members should only be allowed upon an order of the agency based on a specific finding that the interrogating party is seeking significant, unprivileged information not discoverable by alternative means.

5. *Requests for Admissions*

(a) *Availability*—A party to the proceeding should be able

to serve upon any other party a written request for the admission, for purposes of the pending proceeding, of any relevant, unprivileged facts, including the genuineness of any document described in the request.

(b) *Requests Directed to the Agency*—Each agency should designate an appropriate official on whom other parties to the proceeding may serve requests for admissions directed to the agency. That official should arrange for agency personnel with knowledge of the facts to respond to the requests on behalf of the agency. The attorney or employee appearing on behalf of the agency in the proceeding should have the authority to make and sign objections to requests for admissions served upon the agency. Requests directed to the agency which seek admissions obtainable only from the agency head, member or members should only be allowed upon an order of the agency based on a specific finding that the requesting party is seeking significant, unprivileged information not discoverable by alternative means.

6. *Production of Documents and Tangible Things*

(a) *From Non-Parties*—A party to the proceeding should be able to obtain in accordance with agency rules a subpoena duces tecum requiring a non-party to produce relevant designated documents and tangible things, not privileged, at a prehearing conference, at the taking of the non-party's deposition, or at any other specific time and place designated by the issuing officer.

(b) *From Parties*—A party to the proceeding should be able to apply to the presiding officer for an order requiring any other party to produce and to make available for inspection, copying or photographing, at a prehearing conference or other specific time and place, any designated documents and tangible things, not privileged, which constitute or contain relevant evidence. The party seeking production should serve copies of the application on the other party or parties to the proceeding, who should be given an opportunity to notify the presiding officer of any objections. The presiding officer should order the production of such designated documents and tangible things unless he finds that there is not good cause for doing so.

(c) *From the Agency*—For the purposes of paragraph 6, the agency conducting the proceeding should be considered a party to the proceeding whether or not the agency staff participates as a party to the proceeding.

7. *Role of the Presiding Officer*

(a) *Control over Discovery*—The presiding officer should have the authority to impose schedules on the parties to the proceed-

ing specifying the periods of time during which the parties may pursue each means of discovery available to them under the rules of the agency. Such schedules and time periods should be set with a view to accelerating disposition of the case to the fullest extent consistent with fairness.

(b) *Interlocutory Appeals*—Except as provided by paragraph 2(6) above, an interlocutory appeal from a ruling of the presiding officer on discovery should be allowed only upon certification by the presiding officer that the ruling involves an important question of law or policy which should be resolved at that time by the appropriate review authority. Notwithstanding the presiding officer's certification, the review authority should have the authority to dismiss summarily the interlocutory appeal if it should appear that the certification was improvident. An interlocutory appeal should not result in a stay of the proceedings except in extraordinary circumstances.

8. *Protective Orders*

(a) *Authority of Presiding Officer in General*—The presiding officer should have the authority, upon motion by a party or by the person from whom discovery is sought, and for good cause shown, to make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the presiding officer; (6) that a deposition after being sealed be opened only by order of the presiding officer; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the presiding officer.

(b) *Names of Witnesses*—The presiding officer should have the authority upon motion by a party or other person, and for good cause shown, by order (a) to restrict or defer disclosure by a party of the name of a witness, a narrative summary of the expected testimony of a witness or, in the case of an agency witness, any prior statement of the witness, and (b) to prescribe other

appropriate measures to protect a witness. Any party affected by any such action should have an adequate opportunity, once he learns the name of a witness and obtains the narrative summary of his expected testimony or, in the case of an agency witness, his prior statement or statements, to prepare for cross-examination and for the presentation of his case.

(c) *In Camera Proceedings*—The presiding officer should have the authority to permit a party or person seeking a protective order to make all of part of the showing of good cause in camera. A record should be made of such in camera proceedings. If the presiding officer enters a protective order following a showing in camera, the record of such showing should be sealed and preserved and made available to the agency or court in the event of an appeal.

9. *Subpoenas*

The presiding officer should have the power to issue subpoenas ad testificandum and duces tecum at any time during the course of the proceeding. Agencies affected by this Recommendation that do not have the statutory authority to issue subpoenas should seek to obtain any necessary authority from the Congress.

RECOMMENDATION NO. 22

PRACTICES AND PROCEDURES UNDER THE RENEGOTIATION ACT OF 1951

RECOMMENDATION

1. *Criteria for Determining Excessive Profits*

The Renegotiation Board should publish in an appropriate form specific information describing the manner in which it applies each of the statutory factors. In the case of statutory factors for which the Board applies quantitative norms, a guide or statement specifically describing those norms should be published. In the case of statutory factors for which quantitative norms are not ordinarily applied, the Board should publish complete descriptions of the specific matters it has taken into account in its application of these statutory factors and the relative importance it has given to such matters. In both cases, the information to be provided should, insofar as practicable, be categorized by industry or other relevant grouping.

2. *Summaries of Facts and Reasons; Statements of Facts and Reasons*

The Renegotiation Board should improve the caliber of the

Summary of Facts and Reasons and the Statement of Facts and Reasons furnished to a contractor. The Summary or Statement should contain a complete analysis and explanation of the manner in which the Board arrived at its determination and should reflect the data in the Board's files upon which it has relied. This could be readily accomplished if Summaries and Statements were principally based upon the internal reports and memoranda contained in the Board's files in each case. Information concerning third parties which otherwise would be privileged or confidential upon which the Board has relied in reaching a determination should be included in a Summary or Statement of Facts and Reasons if the information can be disclosed without impairing its proprietary value or identifying its source.

3. *Performance Reports*

The Renegotiation Board should make available, upon request of a contractor, all reports it has received from procurement agencies and other parties relating to the contractor's performance under contracts subject to renegotiation for the fiscal year under consideration. The Board should delete from such performance reports only those parts which either: (a) have been classified by the originating agency for reasons of national defense or foreign policy; or (b) contain information pertaining to third persons which is privileged or confidential and which federal law prohibits from being disclosed.

RECOMMENDATION NO. 23

INTERLOCUTORY APPEAL PROCEDURES²

Interlocutory appeal procedures for agency review of rulings by presiding officers must balance the advantages derived from immediate correction of an erroneous ruling against interruption of the hearing process and other costs of piecemeal review. Striking an appropriate balance between these competing concerns requires that the exercise of discretion in individual cases be carefully circumscribed. Procedures that delegate the responsibility for allowing interlocutory appeals to presiding officers, with a reserved power in the agency to handle exceptional situations, have proven most satisfactory.

RECOMMENDATION³

Each agency which handles a substantial volume of cases that

² Recommendations Nos. 23-26 were adopted May 7-8, 1971.

³ This recommendation supersedes section 5 of Recommendation 20 and paragraphs 2(6) and 7(b) of Recommendation 21, adopted June 2-3, 1970, insofar as they deal with interlocutory appeals.

are decided on the basis of a record should adopt interlocutory appeal procedures based on the following principles:

1. Presiding officers should be authorized to rule initially on all questions raised in the proceeding. A ruling by the presiding officer, supported by a reasoned statement, usually should precede interlocutory review of the question raised.

2. In general, interlocutory appeal from a ruling of the presiding officer should be allowed only when the presiding officer certifies that (a) the ruling involves an important question of law or policy concerning which there is substantial ground for difference of opinion; and (b) an immediate appeal from the ruling will materially advance the ultimate termination of the proceeding or subsequent review will be an inadequate remedy.

3. Allowance of an interlocutory appeal should not stay the proceeding unless the presiding officer determines that extraordinary circumstances require a postponement. A stay of more than 30 days must be approved by the review authority.

4. If the number of interlocutory appeals in an agency is substantial, the authority to affirm, modify, or reverse the presiding officer's interlocutory ruling should be delegated, to the extent permitted by law, to a review authority designated by the agency.

5. Unless the review authority orders otherwise in the particular case, the review authority should decide the interlocutory appeal on the record and briefs submitted to the presiding officer without further briefs or oral argument. The review authority should summarily dismiss an interlocutory appeal whenever it determines that the presiding officer's certification was improvidently granted or that consideration of the appeal is unnecessary. If the review authority does not specify otherwise within 30 days after the certification or allowance of the interlocutory appeal, leave to appeal from the presiding officer's interlocutory ruling should be deemed to be denied.

6. Interlocutory review by petition to the review authority without certification by the presiding officer should be restricted to exceptional situations in which (a) vital public or private interests might otherwise be seriously impaired, and (b) the review authority has not had an opportunity to develop standards which the presiding officer can apply in determining whether interlocutory review is appropriate.

RECOMMENDATION NO. 24

PRINCIPLES AND GUIDELINES FOR IMPLEMENTATION OF THE FREEDOM OF INFORMATION ACT

The Freedom of Information Act, 5 U.S.C. § 552, expresses

important policies with respect to the availability to the public of records of Federal agencies. To achieve free access to and prompt production of identifiable government records in accordance with the terms and policies of the Act, each agency⁴ should conform to the statutory policy encouraging disclosure, adopt procedural regulations for the expeditious handling of information requests, and review the fees charged for providing information.

RECOMMENDATION

A. General Principles

Agencies should conform to the following principles in handling requests for information:

1. Each agency should resolve questions under the Freedom of Information Act with a view to providing the utmost information. The exemptions authorizing non-disclosure should be interpreted restrictively.
2. Each agency should make certain that its rules provide the fullest assistance to inquirers, including information relating to where requests may be filed. It should provide the most timely possible action on requests for information.
3. When requested information is partially exempt from disclosure the agency should, to the fullest extent possible, supply that portion of the information which is not exempt.
4. If it is necessary for an agency to deny a request, the denial should be promptly made and the agency should specify the reason for the denial. Procedures for review of denials within the agency should be specified and any such review should be promptly made.
5. Fees for the provision of information should be held to the minimum consistent with the reimbursement of the cost of providing the information. Provision should be made for waiver of fees when this is in the public interest.

B. Guidelines for Handling of Information Request

Each agency should adopt procedural rules to effectuate the principles stated in Part A. To assist in this task the following guidelines are set forth as a model of the kinds of procedures that are appropriate and would accomplish this purpose.

1. *Agency assistance in making request for records.*

Each agency should publish a directory designating names or titles and addresses of the particular officers and employees in

⁴ The term agency as used herein denotes an agency, executive department, or a separate administration or bureau within a department which has adopted its own administrative structure for handling requests for records.

its Washington office and in its various regional and field offices to whom requests for information and records should be sent. Appropriate means should be used to make the directory available to members of the public who would be interested in requesting information or records.

Each agency should direct one or more members of its staff to take primary responsibility for assisting the public in framing requests for identifiable records containing the information that they seek. The names or titles and addresses of these staff members should be included in the public directory referred to above.

2. *Form of request.*

a. *No standard form.*

No agency should require the use of standard forms for making requests. Any written request that identifies a record sufficiently for the purpose of finding it should be acceptable. A standard form may be offered as an optional aid.

b. *Categorical requests.*

i. Requests calling for all records falling within a reasonably specific category should be regarded as conforming to the statutory requirement of "identifiable records" if the agency would be reasonably able to determine which particular records come within the request and to search for and collect them without unduly burdening or interfering with agency operations because of the staff time consumed or the resulting disruption of files.

ii. If an agency responds to a categorical request by stating that compliance would unduly burden or interfere with its operations, it should do so in writing, specifying the reasons why and the extent to which compliance would burden or interfere with agency operations. In the case of such a response the agency should extend to the requester an opportunity to confer with it in an attempt to reduce the request to manageable proportions by reformulation and by outlining an orderly procedure for the production of documents.

3. *Partial disclosure of exempt records and files.*

Where a requested file or record contains exempt information that the agency wishes to maintain confidential, it should offer to make available the file or a copy of the record with appropriate deletions if this can be done without revealing the exempt information.

4. *Time for reply to request.*

Every agency should either comply with or deny a request for records within ten working days of its receipt unless additional

time is required for one of the following reasons:

a. The requested records are stored in whole or part at other locations than the office having charge of the records requested.

b. The request requires the collection of a substantial number of specified records.

c. The request is couched in categorical terms and requires an extensive search for the records responsive to it.

d. The requested records have not been located in the course of a routine search and additional efforts are being made to locate them.

e. The requested records require examination and evaluation by personnel having the necessary competence and discretion to determine if they are: a) exempt from disclosure under the Freedom of Information Act and b) should be withheld as a matter of sound policy, or revealed only with appropriate deletions.

When additional time is required for one of the above reasons, the agency should acknowledge the request in writing within the ten-day period and should include a brief notation of the reason for the delay and an indication of the date on which the records would be made available or a denial would be forthcoming.

The ten-day time period specified above should begin to run on the day that the request is received at that office of the agency having charge of the records. When a request is received at an office not having charge of the records, it should promptly forward the request to the proper office and notify the requester of the action taken.

If an agency does not reply to or acknowledge a request within the ten-day period, the requester may petition the officer handling appeals from denials of records for appropriate action on the request. If an agency does not act on a request within an extended deadline adopted for one of the reasons set forth above, the requester may petition the officer handling appeals from denials of records for action on the request without additional delay. If an agency adopts an unreasonably long extended deadline for one of the reasons set forth above, the requester may petition the officer handling appeals from denials of records for action on the request within a reasonable period of time from acknowledgment.

An extended deadline adopted for one of the reasons set forth above would be considered reasonable in all cases if it does not exceed ten additional working days. An agency may adopt an extended deadline in excess of the ten additional working days (i.e. a deadline in excess of twenty working days from the time of initial receipt of the request) where special circumstances would reasonably warrant the more extended deadline and they are stated in the written notice of the extension.

5. *Initial denials of requests.*

a. *Form of denial.*

A reply denying a written request for a record should be in writing and should include:

i. A reference to the specific exemption under the Freedom of Information Act authorizing the withholding of the record and a brief explanation of how the exemption applies to the record withheld.

ii. An outline of the appeal procedure within the agency and of the ultimate availability of judicial review in either the district in which the requester resides or has a principal place of business, or in which the agency records are situated.

If the requester indicates to the agency that he wishes to have a brief written statement of the reasons why the exempt record is being withheld as a matter of discretion where neither a statute nor an executive order requires denial, he will be given such a statement.

b. *Collection of denials.*

A copy of all denial letters and all written statements explaining why exempt records have been withheld should be collected in a single central-office file.

c. *Denials; protection of privacy.*

Where the identity of a requester, or other identifying details related to a request, would constitute an unwarranted invasion of personal privacy if made generally available, as in the case of a request to examine one's own medical files, the agency should delete identifying details from copies of the request and written responses to it that are made available to requesting members of the public.

6. *Intra-agency appeals.*

a. *Designation of officer for appeals.*

Each agency should publicly designate an officer to whom a requester can take an appeal from a denial of records.

b. *Time for action on appeals.*

There should be only one level of intra-agency appeal. Final action should be taken within twenty working days from the time of filing the appeal. Where novel and very complicated questions have been raised, the agency may extend the time for final action for a reasonable period beyond twenty working days upon notifying the requester of the reasons for the extended deadline and the date on which a final response will be forthcoming.

c. Action on appeals.

The grant or denial of an appeal should be in writing and set forth the exemption relied on, how it applies to the record withheld, and the reasons for asserting it. Copies of both grants and denials on appeal should be collected in one file open to the public and should be indexed according to the exemptions asserted and, to the extent feasible, according to the type of records requested.

d. Necessity for prompt action on petitions complaining of delay.

Where a petition to an appeals officer complaining of an agency's failure to respond to a request or to meet an extended deadline for responding to a request does not elicit an appropriate response within ten days, the requester may treat his request as denied and file an appeal. Where a petition to an appeals officer complaining of the agency's imposition of an unreasonably long deadline to consider assertion of an exemption does not bring about a properly revised deadline, the requester may treat his request as denied after a reasonable period of time has elapsed from his initial request and he may then file an appeal.

C. Fees for the Provision of Information

Each agency should establish a fair and equitable fee schedule relating to the provision of information. To assist the agencies in this endeavor, a committee composed of representatives from the Office of Management and Budget, the Department of Justice and the General Services Administration, should establish uniform criteria for determining a fair and equitable fee schedule relating to requests for records that would take into account, pursuant to 31 U.S.C. § 483a (1964), the costs incurred by the agency, the value received by the requester and the public interest in making the information freely and generally available. The Committee should also review agency fees to determine if they comply with the enunciated criteria. These criteria might include the following:

1. *Fees for copying documents.* In view of the public interest in making government information freely available, the fee charged for reproducing documents in written, typewritten, printed or other form that permits copying by duplicating processes, should be uniform and not exceed the going commercial rate, even where such a charge would not cover all costs incurred by particular agencies.

2. *No fee for routine search.* In view of the public interest in making government held information freely available, no charge

should be made for the search time and other incidental costs involved in the routine handling of a request for a specific document.

3. *No fee for screening out exempt records.* As a rule, no charge should be made for the time involved in examining and evaluating records for the purpose of determining whether they are exempt from disclosure under the Freedom of Information Act and should be withheld as a matter of sound policy. Where a broad request requires qualified agency personnel to devote a substantial amount of time to screening out exempt records and considering whether they should be made available, the agency in its discretion may include in its fee a charge for the time so consumed. An important factor in exercising this discretion and determining the fee should be whether the intended use of the requested records will be of general public interest and benefit or whether it will be of primary value to the requester.

RECOMMENDATION NO. 25

ARTICULATION OF AGENCY POLICIES

Agencies of the Federal Government should strive to act on the basis of articulated policies and standards. Concerns of good government and efficient management support this general principle, as do the developing views of the Federal courts.

RECOMMENDATION

Agency policies which affect the public should be articulated and made known to the public to the greatest extent feasible. To this end, each agency which takes actions affecting substantial public or private interests, whether after hearing or through informal action, should, as far as is feasible in the circumstances, state the standards that will guide its determinations in various types of agency action, either through published decisions, general rules or policy statements other than rules. Each such agency from time to time should review its precedents, rules and policy statements to assure that they accurately reflect the agency's developing experience. If rulemaking is used for these purposes, each agency should establish and publish general or particular procedures (whether or not such procedures are required by statute) that define the extent and manner of public participation appropriate in the circumstances.

RECOMMENDATION NO. 26
MINIMUM PROCEDURES FOR
AGENCIES ADMINISTERING DISCRETIONARY GRANT
PROGRAMS

Agencies that administer grant programs employ disparate and sometimes inadequate procedures in notifying applicants of available funds, stating policies for award of grants, informing applicants of actions taken on applications, and other matters. Adoption of more uniform, minimum procedures would be helpful to the agencies and would assist applicants, who often must deal with a number of different agencies. The recommendation applies to all grant programs which involve the exercise of some discretion in their administration. It is not intended to apply to Federal grant-in-aid programs that are wholly mandatory, *i.e.*, dispensed in accordance with a statutory formula without any discretion on the part of the agency.

RECOMMENDATION

Agencies should examine and revise their grant procedures to achieve to the maximum extent practicable the following objectives:

1. *Public Notice.* Agencies should publish a notice in the Federal Register (or in other publications that, in the judgment of the agency, have wider distribution among potential grantees) of the availability of grant funds at the outset of a new grant program, each time additional funds become available, and each time a deadline is established for submission of applications for funds. When an agency elects to publish elsewhere than in the Federal Register, it should publish in the Federal Register a statement specifying the other publication or publications in which it will publish.
2. *Development of Criteria by Rulemaking.* Unless otherwise provided by statute, agencies should issue regulations, pursuant to the notice and opportunity to comment provisions of the Administrative Procedure Act (5 U.S.C. § 553), specifying: (a) the procedures to be followed by applicants, and (b) criteria or standards, and priorities among criteria or standards, for the selection of grantees under each grant program. Agencies should review and, when appropriate, reissue such regulations at least once every five years.
3. *Avoidance of Conflict of Interest.* Agencies should review their practices regarding utilization of advisory committees to ensure that they are in full compliance with existing conflict-of-interest requirements.

4. *Notification of Applicants.* Agencies should notify applicants in writing of the award, rejection, modification, non-renewal or termination of grants, or the disallowance of expenditures under grants, specifying the grounds for such action. A more detailed statement of reasons should be made available upon request by the applicant.

5. *Public Information.* Unless otherwise provided by statute and subject to the exemptions contained in the Freedom of Information Act, 5 U.S.C. § 552(b), agencies should maintain and make available to public inspection the notifications specified in paragraph 4.

FULL STATEMENT OF VIEWS OF THE ADMINISTRATIVE CONFERENCE ON THE "REPORT ON SELECTED INDEPENDENT REGULATORY AGENCIES" OF THE PRESIDENT'S ADVISORY COUNCIL ON EXECUTIVE ORGANIZATION¹

A. AGENCY STRUCTURE

The Ash Council recommends that the independent regulatory commissions in the transportation, power, securities and consumer protection fields be transformed into executive agencies headed by single administrators responsible to the President.

The Conference is not persuaded that a case has been made for general application of such a fundamental alteration in structure.

1. The status of the regulatory commissions raises complex issues of political theory and practice that cannot be evaluated solely in terms of managerial efficiency. Those uses may be grouped for convenience under the headings of "independence" and "collegiality" (or multi-membership as distinct from a single chief officer). "Independence"—a matter of degree and in part a state of mind—has both positive and negative aspects. Detachment from external influences in making particularized decisions is generally considered to be desirable. Diffusion of responsibility that may produce hesitant or uncoordinated governmental policies is generally regarded as undesirable. Whether or not an agency is independent in these respects, however, is not exclusively determined by whether the agency is located within or outside the Executive Branch. Persuasive evidence has not yet been adduced to show that the independent commissions, to a significantly greater degree than executive agencies, have achieved the desired detachment or produced the weak or discordant policies.

As for collegiality, consideration must be given to values inherent in an official body that is not dominated by a single will. Among those values are diversity of background and experience, an open decisional process, and a tendency toward moderation in policy.

Further study, including empirical examination of the relative

¹ Adopted by the Conference May 7, 1971.

effectiveness of independent commissions and executive agencies performing comparable regulatory functions, is required before it may be concluded that either form is generally the more desirable.

2. The deficiencies of regulation by collegial bodies cannot be attributed solely or primarily to faulty structure; the same deficiencies may be observed in regulatory agencies headed by single administrators responsible to the President. The view that substitution of a single administrator would solve regulatory problems is simplistic, unsupported by empirical data, and overlooks other plausible explanations of regulatory ills, especially the inherent difficulties of regulating activities having a vast impact on the economy and the absence in many areas of legislative definition of regulatory goals. Structural alteration in itself offers only possibilities for limited improvement in regulatory performance; it is no substitute for a thorough and critical reexamination of the statutory framework in which the agencies operate and of the policies they are directed to carry out.

3. We believe, as does the Ash Council, that formulating regulatory policies by rules or other pronouncements of broad applicability rather than by the slow method of case-by-case adjudication is often desirable. The collegial structure of an agency need not, in our opinion, significantly diminish its capability to anticipate problems or to announce conclusions concerning them. Recommendations of the Administrative Conference have pointed the way toward fair and effective use of agencies' policy-making power.

4. While the Conference is not persuaded that the proposed form of agency organization—a single administrator responsible to the President—is generally superior to the collegial form, it may offer advantages in specific areas of regulation, particularly where vigorous departures from existing regulatory techniques are called for. Whether an existing regulatory framework should or should not be continued is largely dependent upon substantive rather than organizational considerations. If a decision were made, for example, to eliminate various restraints that now affect the various modes of transportation, the remaining regulatory controls might practicably be vested in a new agency structured differently from those now in existence. With respect to the other regulatory agencies, a major realignment of regulatory responsibilities is not proposed and a convincing case has not as yet been made for replacement of the collegial form with a single administrator.

5. Prior experience suggests that the quality of personnel in federal regulatory agencies, whether headed by a single administrator or by a collegial body, is highly variable from agency to agency

and from time to time. Other factors appear to have a greater influence than agency structure on personnel quality.

6. One traditional ground of attack on the independent regulatory commission, particularly applied to enforcement functions of such agencies as the Federal Trade Commission, is the charge that unfairness to respondents may result when agency heads exercise prosecutory and rulemaking functions along with that of adjudication. Whatever the merits of this charge as a general matter, the concentration of regulatory authority in a single administrator increases at least the appearance, though not necessarily the reality, of a merger of inconsistent functions.

7. The advantages of the collegial form, if it is to be retained, can best be achieved with a limited number of members, ordinarily no more than five. A larger complement of members should require an affirmative demonstration of functional advantage and not be justified merely on the basis of tradition.

8. Improved management of the independent regulatory commissions will result from the expansion of present policies that delegate responsibilities for internal agency management to the chairmen and to key subordinate officials of the respective agencies.

B. AGENCY DECISIONAL PROCESS

The Ash Council recommends that agency review of initial decisions of hearing examiners be limited in scope and in time. The agency head or heads would review cases primarily for consistency with agency policy and would be required to take final action within a period of 30 days, stating reasons for modification or reversal of the hearing examiner. Even if a case were remanded for further action at a lower level, a final decision would have to be made within a further period of not more than 45 days.

The Conference believes that the underlying objectives of the proposed review procedure can be obtained by alternative procedures without the sacrifice of decisional quality and procedural fairness that the proposed procedure would entail.

1. Prior experience with inflexible time periods as a device to expedite decisions in complex matters has proved unsatisfactory. Rigid time limitations of broad application, unrelated to the complexity of individual cases or of types of cases, are likely to be unworkable. The desirability of time limitations tailored to the requirements of particular types of proceedings, however, will be investigated further by the Administrative Conference.

2. Limitation of party participation to the period prior to an initial decision is undesirable as well as unfair. Wise decisions in

complex regulatory cases are largely dependent upon the illuminating and sharpening of issues which are most suitably provided by the parties, including agency staff who have functioned as parties in the particular proceeding. Parties who are denied participation in the final decision-making through public procedures may be tempted to influence the agency through *ex parte* means.

3. Other procedural devices, such as development of policy through rulemaking rather than adjudication, provision that decisions by hearing examiners are final unless the agency determines that review is desirable, reduction of interlocutory appeals, and use of employee review boards to relieve agency heads of routine cases, have expedited the decisional process, enhanced the status of hearing examiners, prevented repetitious consideration of routine matters, and allowed agency heads to concentrate on important questions of policy. The often imperative need to improve agency functioning calls for sustained efforts to encourage procedural advances like those suggested above. (See Administrative Conference Recommendation No. 6—Delegation of final decisional authority subject to discretionary review by the agency.)

C. JUDICIAL REVIEW

The Ash Council recommends the creation of a specialized, non-Article III appellate court to hear appeals from the restructured transportation, power, and securities agencies. The new tribunal presumably would perform the same function that is now performed by the various United States Courts of Appeals (and by special three-judge district courts in the case of orders of the Interstate Commerce Commission).

The Conference does not favor the substitution of this new appellate tribunal for the regular courts at this time.

1. The proposed new tribunal would not relieve the regular courts of a substantial burden; less than three percent of the cases making up the current workload of the present reviewing courts would be affected. It is highly doubtful whether such a small caseload justifies the creation of a new tribunal. Moreover, if the courts of appeals must be relieved of some of their present workload, it would be a questionable choice of priorities to relieve them of regulatory cases rather than of other categories of cases, such as diversity litigation, which do not involve significant questions of federal law. Finally, a new tribunal with review authority over the decisions of only a small minority of agencies cannot be expected to make the contributions to uniformity in administrative law which the Ash Council sees as one of the advantages of its establishment.

2. A traditional justification of limited judicial review of regulatory decisions suggests the appropriateness of a non-specialized court of general jurisdiction. Regulatory agencies have a tendency to become preoccupied narrowly with a limited set of policies and concerns; review of the legality of their actions in the light of the broader perspective of the norms and values of the total legal system may outweigh any benefits from specialization. The function of judicial review, in this view, is not to provide a better expert, but to subject the agency's action to independent scrutiny as to its fairness and consistency with statutory and constitutional norms. The contrary position emphasizes the necessity for expert knowledge and specialized judgment in order to perform a meaningful review function in highly complex regulatory cases. If a specialized reviewing court is desired, a number of other methods of organizing and staffing such a court may be preferable and should be considered. The court, however, should be a constitutional (Article III) court and should have a jurisdiction broader than only a few industries.

3. There is a danger that a narrowly specialized reviewing court, concerned with the actions of only a few agencies and the problems of only a few industries, might become or give the appearance of becoming identified with the agency or industry point of view. Appointments to such a court could pose a special problem, because, while of vital importance to the regulated industry, they would be less subject to broad professional and public scrutiny than appointments to the courts of appeals.

4. The Ash Council proposal for a specialized reviewing court bears no resemblance to earlier proposals for an administrative trial court to absorb the adjudicatory functions performed by some agencies, particularly in the tax, labor and unfair trade fields. Evaluation of such proposals involves very different considerations from those discussed here, and we express no opinion with respect to such proposals at this time.

5. It is impossible to foresee what effects adoption of the other Ash Council recommendations would have on judicial review, although it seems likely that they would be in the direction of enlarging the number of cases in which review was sought. Establishment of a specialized reviewing court is separable from the other Ash Council proposals and, if the latter were to be adopted, it could then be considered on the basis of experience under the new system.

THE ADMINISTRATIVE CONFERENCE ACT

[Public Law 88-499, August 30, 1964, 78 Stat. 615; as Codified by Public Law 89-554, September 6, 1966, 80 Stat. 388 in Title 5 U.S.C., Chapter 5, Subchapter III, Sections 571 through 576.]

§ 571 Purpose.

It is the purpose of this subchapter to provide suitable arrangements through which Federal agencies, assisted by outside experts, may cooperatively study mutual problems, exchange information, and develop recommendations for action by proper authorities to the end that private rights may be fully protected and regulatory activities and other Federal responsibilities may be carried out expeditiously in the public interest.

§ 572 Definitions.

For the purpose of this subchapter—

(1) “administrative program” includes a Federal function which involves protection of the public interest and the determination of rights, privileges, and obligations of private persons through rule making, adjudication, licensing, or investigation, as those terms are used in subchapter II of this chapter, except that it does not include a military or foreign affairs function of the United States;

(2) “administrative agency” means an authority as defined by section 551(1) of this title; and

(3) “administrative procedure” means procedure used in carrying out an administrative program and is to be broadly construed to include any aspect of agency organization, procedure, or management which may affect the equitable consideration of public and private interests, the fairness of agency decisions, the speed of agency action, and the relationship of operating methods to later judicial review, but does not include the scope of agency responsibility as established by law or matters of substantive policy committed by law to agency discretion.

§ 573 Administrative Conference of the United States.

(a) The Administrative Conference of the United States consists of not more than 91 nor less than 75 members appointed as set forth in subsection (b) of this section.

(b) The Conference is composed of—

(1) a full-time Chairman appointed for a 5-year term by the President, by and with the advice and consent of the Senate. The

Chairman is entitled to pay at the highest rate established by statute for the chairman of an independent regulatory board or commission, and may continue to serve until his successor is appointed and has qualified;

(2) the chairman of each independent regulatory board or commission or an individual designated by the board or commission;

(3) the head of each Executive department or other administrative agency which is designated by the President, or an individual designated by the head of the department or agency;

(4) when authorized by the Council referred to in section 575(b) of this title, one or more appointees from a board, commission, department, or agency referred to in this subsection, designated by the head thereof with, in the case of a board or commission, the approval of the board or commission;

(5) individuals appointed by the President to membership on the Council who are not otherwise members of the Conference; and

(6) not more than 36 other members appointed by the Chairman, with the approval of the Council, for terms of 2 years, except that the number of members appointed by the Chairman may at no time be less than one-third nor more than two-fifths of the total number of members. The Chairman shall select the members in a manner which will provide broad representation of the views of private citizens and utilize diverse experience. The members shall be members of the practicing bar, scholars in the field of administrative law or government, or others specially informed by knowledge and experience with respect to Federal administrative procedure.

(c) Members of the Conference, except the Chairman, are not entitled to pay for service. Members appointed from outside the Federal Government are entitled to travel expenses, including per diem instead of subsistence, as authorized by section 5703 of this title for individuals serving without pay.

§ 574 Powers and duties of the Conference.

To carry out the purpose of this subchapter, the Administrative Conference of the United States may—

(1) study the efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies in carrying out administrative programs, and make recommendations to administrative agencies, collectively or individually, and to the President, Congress, or the Judicial Conference of the United States, in connection therewith, as it considers appropriate;

(2) arrange for interchange among administrative agencies of

information potentially useful in improving administrative procedure; and

(3) collect information and statistics from administrative agencies and publish such reports as it considers useful for evaluating and improving administrative procedure.

§ 575 Organization of the Conference.

(a) The membership of the Administrative Conference of the United States meeting in plenary session constitutes the Assembly of the Conference. The Assembly has ultimate authority over all activities of the Conference. Specifically, it has the power to—

(1) adopt such recommendations as it considers appropriate for improving administrative procedure. A member who disagrees with a recommendation adopted by the Assembly is entitled to enter a dissenting opinion and an alternate proposal in the record of the Conference proceedings, and the opinion and proposal so entered shall accompany the Conference recommendation in a publication or distribution thereof; and

(2) adopt bylaws and regulations not inconsistent with this subchapter for carrying out the functions of the Conference, including the creation of such committees as it considers necessary for the conduct of studies and the development of recommendations for consideration by the Assembly.

(b) The Conference includes a Council composed of the Chairman of the Conference, who is Chairman of the Council, and 10 other members appointed by the President, of whom not more than one-half shall be employees of Federal regulatory agencies or Executive departments. The President may designate a member of the Council as Vice Chairman. During the absence or incapacity of the Chairman, or when that office is vacant, the Vice Chairman shall serve as Chairman. The term of each member, except the Chairman, is 3 years. When the term of a member ends, he may continue to serve until a successor is appointed. However, the service of any member ends when a change in his employment status would make him ineligible for Council membership under the conditions of his original appointment. The Council has the power to—

(1) determine the time and place of plenary sessions of the Conference and the agenda for the sessions. The Council shall call at least one plenary session each year;

(2) propose bylaws and regulations, including rules of procedure and committee organization, for adoption by the Assembly;

(3) make recommendations to the Conference or its committees on a subject germane to the purpose of the Conference;

(4) receive and consider reports and recommendations of com-

mittees of the Conference and send them to members of the Conference with the views and recommendations of the Council;

(5) designate a member of the Council to preside at meetings of the Council in the absence or incapacity of the Chairman and Vice Chairman;

(6) designate such additional officers of the Conference as it considers desirable;

(7) approve or revise the budgetary proposals of the Chairman; and

(8) exercise such other powers as may be delegated to it by the Assembly.

(c) The Chairman is the chief executive of the Conference. In that capacity he has the power to—

(1) make inquiries into matters he considers important for Conference consideration, including matters proposed by individuals inside or outside the Federal Government;

(2) be the official spokesman for the Conference in relations with the several branches and agencies of the Federal Government and with interested organizations and individuals outside the Government, including responsibility for encouraging Federal agencies to carry out the recommendations of the Conference;

(3) request agency heads to provide information needed by the Conference, which information shall be supplied to the extent permitted by law;

(4) recommend to the Council appropriate subjects for action by the Conference;

(5) appoint, with the approval of the Council, members of committees authorized by the bylaws and regulations of the Conference;

(6) prepare, for approval of the Council, estimates of the budgetary requirements of the Conference;

(7) appoint and fix the pay of employees, define their duties and responsibilities, and direct and supervise their activities;

(8) rent office space in the District of Columbia;

(9) provide necessary services for the Assembly, the Council, and the committees of the Conference;

(10) organize and direct studies ordered by the Assembly or the Council, using from time to time, as appropriate, experts and consultants who may be employed under section 3109 of this title, but at rates for individuals not in excess of \$100 a day;

(11) on request of the head of an agency, furnish assistance and advice on matters of administrative procedure; and

(12) exercise such additional authority as the Council or Assembly delegates to him.

The Chairman shall preside at meetings of the Council and at each plenary session of the Conference, to which he shall make a full report concerning the affairs of the Conference since the last preceding plenary session. The Chairman, on behalf of the Conference, shall transmit to the President and Congress an annual report and such interim reports as he considers desirable.

§ 576 Appropriations.

There are authorized to be appropriate sums necessary, not in excess of \$450,000 to carry out the purpose of this subchapter.

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