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**1972-73 REPORT
ADMINISTRATIVE
CONFERENCE
OF THE UNITED STATES
SEPTEMBER 1973**

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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 the 1972-73 Report of the Administrative Conference of the United States, covering the significant activities of the agency for the 12-month period from July 1, 1972 through June 30, 1973.

Respectfully,

ANTONIN SCALIA,
Chairman.

COUNCIL MEMBERS

ANTONIN SCALLA

Chairman

EDWARD L. MORGAN, Vice Chairman, Assistant Secretary of the Treasury.

CHARLES D. ABLARD, Associate Deputy Attorney General, Department of Justice.

***JOHN W. BARNUM**, Under Secretary, Department of Transportation.

WALTER GELLHORN, Professor of Law, Columbia University School of Law.

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MARION EDWYN HARRISON, lawyer, Washington, D.C.

HAROLD L. RUSSELL, lawyer, Atlanta, Ga.

RICHARD B. SMITH, lawyer, New York, N.Y.

***RICHARD C. VAN DUSEN**, lawyer, Detroit, Mich.

***RICHARD E. WILEY**, Commissioner, Federal Communications Commission.

*Appointed July 27, 1973.

FORMER MEMBERS OF THE COUNCIL (who served during the period of this report)

ROGEE C. CRAMTON, Chairman.

RALPH E. ERICKSON, Deputy Attorney General, Department of Justice.

RICHARD C. VAN DUSEN, Under Secretary, Department of Housing & Urban
Development.

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 30, 1973 :

CHARLES E. ALLEN, General Counsel, Federal Home Loan Bank Board.
WILLIAM H. ALLEN, lawyer, Washington, D.C.
CARL A. AUERBACH, Dean, University of Minnesota Law School, Minneapolis, Minn.
H. GREGORY AUSTIN, General Counsel, Small Business Administration.
ST. JOHN BARRETT, Deputy General Counsel, Department of Health, Education, and Welfare.
FRANK A. BARTIMO, Assistant General Counsel, Department of Defense.
CHARLES F. BINGMAN, Chief, Government Organization Branch, Office of Management and Budget.
JAMES A. BISTLINE, Assistant Vice President-General Counsel, Southern Railway System.
WARREN E. BLAIR, Chief Administrative Law Judge, Securities and Exchange Commission.
CHARLES N. BROWER, Deputy Legal Adviser, Department of State.
WILLIAM H. BROWN, III, Chairman, Equal Employment Opportunity Commission.
JACK K. BUSBY, President, Pennsylvania Power & Light Co., Allentown, Pa.
DONALD A. CAMPBELL, Judicial Officer, Department of Agriculture.
WILLIAM E. CASSELMAN, II, General Counsel, General Services Administration.
H. DALE COOK, Director, Bureau of Hearings & Appeals, Social Security Administration.
JOHN J. CORCORAN, General Counsel, Veterans Administration.
LOUIS A. COX, General Counsel, United States Postal Service.
ELDON H. CROWELL, lawyer, Washington, D.C.
KENNETH CULP DAVIS, Professor, 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.
WARNER W. GARDNER, lawyer, Washington, D.C.
WHITNEY GILLILLAND, Vice Chairman, Civil Aeronautics Board.
ROBERT C. GRESHAM, Commissioner, Interstate Commerce Commission.
RICHARD L. GRIFFITH, lawyer, Honolulu, Hawaii.
THOMAS E. HARRIS, General Counsel, AFL-CIO, Washington, D.C.
GEOFFREY C. HAZARD, Jr., Professor, Yale Law School, New Haven, Conn.
GEORGE H. HEARN, Commissioner, Federal Maritime Commission.
RAGAN A. HENRY, lawyer, Philadelphia, Pa.
CARLA HILLS, lawyer, Los Angeles, Calif.
S. NEIL HOSENBALL, Deputy General Counsel, National Aeronautics and Space Administration.
RICHARD H. KEATINGE, lawyer, Los Angeles, Calif.
CORNELIUS B. KENNEDY, lawyer, Washington, D.C.

WILLIAM J. KILBERG, Solicitor, Department of Labor.
EARL W. KINTNER, lawyer, Washington, D.C.
ALAN G. KIRK, Deputy General Counsel, Environmental Protection Agency.
JOHN A. KNEBEL, General Counsel, Department of Agriculture.
VICTOR H. KRAMER, Professor, Georgetown University Law Center, Washington, D.C.
ARTHUR LEFF, Associate Chief Administrative Law Judge, National Labor Relations Board.
SOL LINDENBAUM, Executive Assistant to the Attorney General, Department of Justice.
DAVID E. LINDGREN, Deputy Solicitor, Department of the Interior.
CHARLOTTE TUTTLE LLOYD, Assistant General Counsel, Department of the Treasury.
LEE LOEVINGER, lawyer, Washington, D.C.
PHILLIP A. LOOMIS, Jr., Commissioner, Securities and Exchange Commission.
ROBERT L. MCCARTY, lawyer, Washington, D.C.
MALCOLM MASON, Associate General Counsel, Office of Economic Opportunity.
JAMES MITCHELL, General Counsel, Department of Housing & Urban Development.
ANTHONY L. MONDELLO, General Counsel, U.S. Civil Service Commission.
JOHN N. NASSIKAS, Chairman, Federal Power Commission.
C. ROGER NELSON, lawyer, Washington, D.C.
L. CLAIR NELSON, lawyer, New York, N.Y.
WILLIAM A. NELSON, lawyer, Miami, Fla.
LEONARD NIEDERLEHNER, Acting General Counsel, Department of Defense.
THOMAS J. O'CONNELL, General Counsel, Board of Governors of the Federal Reserve System.
OWEN OLPIN, Professor, University of Utah Law School, Salt Lake City, Utah.
NATHAN OSTROFF, Chairman, Appeals Board, Department of Commerce.
MAX D. PAGLIN, Permanent Member, Atomic Safety and Licensing Board Panel, Atomic Energy Commission.
JOHN W. PETTIT, General Counsel, Federal Communications Commission.
JOHN H. POWELL, Jr., General Counsel, U.S. Commission on Civil Rights.
DAVID PREVARIANT, lawyer, Milwaukee, Wis.
EDWIN F. RAINS, Deputy Commissioner of Customs, Department of the Treasury.
JAMES T. RAMEY, Commissioner, U.S. Atomic Energy Commission.
MARTIN F. RICHMAN, lawyer, New York, N.Y.
CHARLES R. ROSS, lawyer, Hinesburg, Vt.
BERNARD G. SEGAL, lawyer, Philadelphia, Pa.
ASHLEY SELLERS, lawyer, Washington, D.C.
DAVID F. SIVE, lawyer, New York, N.Y.
OTIS M. SMITH, lawyer, Detroit, Mich.
RICHARD E. STEWART, lawyer, New York, N.Y.
EARL J. THOMAS, Director, Office of Inspection, Department of the Interior.
PETER F. TUFO, lawyer, Washington, D.C.
JOHN P. VUKASIN, Jr., Chairman, California Public Utilities Commission, San Francisco, Calif.
CHARLES A. WEBB, lawyer, Washington, D.C.
FRANK WILLE, Chairman, Federal Deposit Insurance Corp.
HENRY N. WILLIAMS, Deputy General Counsel, Selective Service System.
JERRE S. WILLIAMS, Professor, University of Texas School of Law, Austin, Tex.

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.

JOHN A. BUGGS, Acting Staff Director, U.S. Commission on Civil Rights.
WILLIAM T. GENNETTI, Deputy General Counsel, Small Business Administration.
ARTHUR E. HESS, Deputy Commissioner, Social Security Administration.
J. EDWARD LYERLY, Deputy Legal Adviser for Administration, Department of State.
DAVID O. MAXWELL, General Counsel, Department of Housing and Urban Development.
MITCHELL MELICH, Solicitor, Department of the Interior.
RICHARD F. SCHUBERT, Solicitor, Department of Labor.
EDWARD M. SHULMAN, General Counsel, Department of Agriculture.

STAFF OF THE CHAIRMAN'S OFFICE

JOHN F. CUSHMAN
Executive Director

RICHARD K. BERG
Executive Secretary

MARGARET GILHOOLEY
Staff Attorney

FRANK GOODMAN
Research Director

LYNDA S. ZENGERLE
Staff Attorney

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REPORT OF THE CHAIRMAN

(Based on Reports Delivered at the Eighth Plenary Session, Dec. 14–15, 1972 and the Ninth Plenary Session, June 7–8, 1973)

In January, the Administrative Conference of the United States celebrated the 5th anniversary of its establishment. None of the other major commissions established to conduct studies and make recommendations concerning administrative procedure—the Attorney General's Committee of 1939, the first and second Hoover Commissions, the Eisenhower Conference, the Kennedy Conference and the Ash Council—had a life span beyond two years. This difference has important consequences which are only beginning, I think, to be felt. Of course it was intended at the outset that the Conference should be a "permanent" agency; but the advantages of permanence only accrue when continued existence is an established fact rather than a prospect. As the Conference continues into its sixth year, its distinctive capabilities and functions are becoming more and more apparent. They include the following:

1. First, the capacity and continuing responsibility for seeking implementation of the proposals it has made. This is a function which has occupied an increasing proportion of the time of Conference staff and members in recent years—not only because they are always trying to perform it more effectively, but also because they have a larger body of proposals to attend to.

In this area of implementation there have been a number of particularly important developments during the past year—including the Justice Department's almost verbatim adoption of the Conference's guidelines for implementation of the Freedom of Information Act (Recommendation 71-2), the Civil Service Commission's publication of proposals substantially applying the recommendation concerning adverse actions against Federal employees (Recommendation 72-8), and the Board of Parole's indication of its readiness to adopt the Conference proposals concerning parole procedures (Recommendation 72-3). The Conference's legislative successes are, understandably, not as impressive—or perhaps merely not as immediate. But the impact of Conference work is shown by the fact that substantial portions of at least four bills now under consideration in the Congress are based upon (and in some cases are almost verbatim reproductions of) eight Conference recommendations. I anticipate that the

importance of this implementation function will continue to increase—and its effectiveness as well.

2. A second respect in which the years have brought out the differences between this organization and earlier bodies with a similar purpose is in the establishment of continuing useful relationships with the legislative branch. During the early years of the Conference, Chairman Williams gave formal testimony concerning a bill to create an Administrative Ombudsman, and in support of legislation that would have implemented the Conference recommendations on sovereign immunity and a Federal Continuing Legal Education Center. The frequency of Conference testimony progressively increased during the tenure of Chairman Cramton, who became a familiar face before some Committees. It has continued to increase over the past year. During the first six months of the 93rd Congress, I have given testimony on legislation pertaining to the Freedom of Information Act, the procedures of the U.S. Board of Parole and the establishment of a Consumer Protection Agency.

But beyond formal testimony, the Conference has begun to receive informal requests for advice to committees and committee staffs on a wide variety of procedural matters. The increased rate of this kind of activity is an especially convincing indication of a developing Congressional awareness of the Conference's capabilities, and it is the beginning, I hope, of full use of them by the legislative branch.

3. Another change which longevity has effected is the increased frequency with which agencies seek the Conference's informal advice and assistance, particularly in connection with the initiation of a new program or set of procedures. It is obviously preferable to get things started on the right foot than to criticize the deficiencies of a program already in operation.

Over the past year, the staff and consultant resources of the Conference were called upon for advice with respect to several new programs about to be developed. Examples include the Department of Transportation's recently initiated program to facilitate public participation in their rulemaking process, and the Justice Department's Congressionally mandated study into the feasibility of a special court for environmental matters. Especially noteworthy was the study which the Chairman's Office prepared, at the request of the Office of Management and Budget, covering the procedural provisions of the most significant piece of regulatory legislation adopted in recent years—the Consumer Product Safety Act. This was begun and completed before the members of the new agency had yet been named, and is therefore a prime example of the application of the Conference's expertise at the point where it is most useful—before procedures have been adopted and institutional commitments made.

The Conference's function of providing informal advice to the agencies is performed in a variety of ways, ranging from a brief telephone conversation to a lengthy written report. During the year, the Conference initiated what I hope will become a regular mode of advice-giving activity, by conducting, at the request of the General Counsel of the Environmental Protection Agency, a series of six seminars in administrative procedure for all attorneys in that Agency. Emphasis was placed on those aspects of administrative procedure which have special relevance to EPA, but the seminar served as well to refresh recollection of basic administrative law principles for many attorneys who have had no systematic exposure to the field since their law school days. Similar programs are now contemplated for several other agencies.

4. Lastly, the Conference's longevity has enabled it in very recent times to turn from the task of putting out fires and to devote its attention to more fundamental and longer-range studies—which will ultimately have a greater effect on the sound development of the administrative process although they are not directed to a specific urgent need. I refer to such projects as the overall study and categorization of grant and benefit programs now being undertaken by the Grant and Benefit Committee; or the project commenced by the Committee on Informal Action to test the feasibility of generalized standards and criteria for all informal agency action.

As the Conference moves more and more into such fields, it may find that an increasing number of its studies—since they were not addressed to an already identified problem—do not result in an immediate recommendation. They will be useful, and indeed perhaps essential, as the first step in enabling particular administrative functions to be understood and evaluated; and they may be the starting point for more specific studies looking towards particular recommended action; but they will not always produce recommendations in and of themselves. An example of this is the study completed during the past year by the Committee on Informal Action systematically examining, for the first time, the agencies' practices in providing advice to the public. Or the study by the Chairman's Office concerning the various means by which agencies handle citizen complaints. In connection with the latter, the Conference convened in November a seminar in which the officials responsible for citizen complaints in a large number of agencies discussed their respective procedures and techniques, thereby giving the most useful practices wider currency.

This suggests that in the future it will be even more true than in the past, that the value and effectiveness of the Conference cannot be measured exclusively by the number and the quality of its final recommendations. The Conference must not only meet the obvious needs, but also identify the subtle ones, and even anticipate the needs of the fu-

ture. This requires a substantial amount of what the physical scientist would call basic research—which, in some areas at least, this agency alone can effectively perform. Of course the Conference's principal responsibility will always be to meet the pressing, day-to-day needs of the system; but to do that effectively tomorrow, it must today develop the necessary understanding of an evolving and often elusive field.

* * *

I think the farsighted men who conceived the Conference have reason to be pleased at the maturing developments I have discussed above—the process by which this successor of illustrious temporary organizations has found its appropriate and increasingly useful place as a permanent Federal agency.

Perhaps the clearest demonstration of the Conference's success has been the vote of confidence accorded by the Administration and the Congress in amending the Conference's enabling legislation to raise the level of its appropriations ceiling. In the last Annual Report, Chairman Cramton reported the efforts then underway to eliminate the ceiling entirely. That was not accomplished, but the Congress did establish new levels—increasing over the next five years—which will achieve the principal goal of eliminating what had become a genuine budgetary restriction upon needed activities. The authorized level was increased from the previous figure of \$450,000 to \$760,000 for FY 1974, \$805,000 for FY 1975, \$850,000 for FY 1976, \$900,000 for FY 1977 and \$950,000 for FY 1978 and for each fiscal year thereafter. Under this new legislation, the Congress has appropriated \$600,000 for FY 1974—an increase of one-third above present funding. This will permit commencement of several major projects of long standing which have been deferred for lack of funds, including a pilot project for compilation of useful statistics on agency proceedings. It should also enable consolidation and substantial expansion of Conference studies of the informal processes that account for at least 90% of all administrative determinations.

I think these fiscal developments important not only for what they do, but for what they signify. In a year which witnessed a cutback in many Federal programs, the work of the Conference was thought important enough to fund at a substantially increased level. The agency has a heightened obligation to justify that confidence.

ORGANIZATION AND OPERATION OF THE CONFERENCE

The Administrative Conference of the United States was established as a permanent independent Federal agency by the Administrative Conference Act of 1964 (5 U.S.C. §§ 571-576) and was activated by the appointment of its first Chairman in January 1968. Its purpose is to identify the causes of inefficiency, delay and unfairness in administrative proceedings affecting private rights, and to recommend improvements to the President, the agencies, the Congress and the Courts.

The statutory provisions governing the organization and operation of the Conference are based in large part upon the experience of two temporary, experimental Conferences, one established by President Eisenhower in 1953 and the second called by President Kennedy in 1962. The Conference consists of three entities—the Office of the Chairman, the Council, and the Assembly.

THE OFFICE OF THE CHAIRMAN

The Chairman of the Administrative Conference is appointed by the President, with the advice and consent of the Senate, for a term of five years. He is the chief executive of the Conference and its only full-time compensated member.

The Chairman, with the approval of the Council, appoints the public members of the Conference. He presides at plenary sessions of the Assembly and at Council meetings. He is the official spokesman for the Conference in relations with the President, the Congress, the Judiciary, the agencies and the public. He has authority to investigate matters brought to his attention by individuals inside and outside Government, to recommend subjects for Conference study and to seek implementation of Conference recommendations. The Chairman is served by a small permanent staff whose principal duties are to furnish administrative and research support to the Assembly and Committees of the Conference, to follow and assist in the work of consultants, and to help the Chairman in securing implementation of recommendations and in providing advice and assistance to the agencies and to Committees of the Congress.

Antonin Scalia became the third Chairman of the Administrative Conference on September 29, 1972, succeeding Roger C. Cramton. He is a member of the faculty of the University of Virginia Law School, and came to the Conference from his post as General Counsel of the Office of Telecommunications Policy, Executive Office of the President.

THE COUNCIL

The Council consists of the Chairman and 10 other members who are appointed by the President for three-year terms, of whom not more than one-half may be drawn from Federal agencies. Its functions are similar to those of a corporate board of directors. It has authority to call plenary sessions of the Conference and fix their agenda, to recommend subjects for study, to receive and consider reports and recommendations before they are considered by the Assembly, and to exercise general budgetary and policy supervision.

On July 27, 1973 the President made two new government appointments to the Council: John W. Barnum, Under Secretary, Department of Transportation and Richard E. Wiley, Commissioner, Federal Communications Commission. At the same time, the President appointed Richard C. Van Dusen of Detroit as a non-government member; Mr. Van Dusen had previously been a government member, as Under Secretary of the Department of Housing and Urban Development.



Chairman Antonin Scalia reporting on the activities of the Conference at the Ninth Plenary Session.



The Chairman, with senior members of his staff, participating in Conference debate on a proposed recommendation. From left to right, Chairman Scalia; John F. Cushman, Executive Director; Richard K. Berg, Executive Secretary; and Frank Goodman, Research Director.



A portion of the Council, displaying diversity of opinion during a vote. From left to right, Walter Gellhorn, Harold L. Russell, and Marion Edwyn Harrison.

THE ASSEMBLY

The Assembly of the Conference is composed of the entire membership, which by statute may not be less than 75 members nor more than 91. The Conference at present has 90 members. The Chairman and the other members of the Council account for 11 of this number; the remaining 79 fall into the following groups:

First, the Act confers membership upon the Chairman of each independent regulatory board or commission, or an individual designated by the board or commission (5 U.S.C. § 573(b)(2)). Under this provision, twelve boards and commissions have statutory members, the most recent addition being the newly-established Consumer Product Safety Commission. In addition, pursuant to 5 U.S.C. § 573(b)(4), three of these agencies have been allotted a second member by the Council for the purpose of permitting the designation of two administrative law judges and the permanent member of an Atomic Safety and Licensing Board Panel. The agencies in this category, with the number of members, are:

1. Atomic Energy Commission.....	2
(includes Permanent Member, Atomic Safety and Licensing Board Panel)	
2. Board of Governors of the Federal Reserve System.....	1
3. Civil Aeronautics Board.....	1
4. Consumer Product Safety Commission.....	1
5. Federal Communications Commission.....	1
6. Federal Home Loan Bank Board.....	1
7. Federal Maritime Commission.....	1
8. Federal Power Commission.....	1
9. Federal Trade Commission.....	1
10. Interstate Commerce Commission.....	1
11. National Labor Relations Board.....	2
(includes Administrative Law Judge)	
12. Securities and Exchange Commission.....	2
(includes Administrative Law Judge)	

15

Second, the Act grants membership to the head of each Executive Department or other administrative agency (or his designee) which is named by the President (5 U.S.C. § 573(b)(3)). Acting under this authority, the President has designated all eleven Cabinet departments for membership, and the Council has acted to provide some of them second members, as follows:

1. Department of State.....	1
2. Department of the Treasury.....	2
3. Department of Defense.....	2
4. Department of Justice.....	1
5. Department of the Interior.....	2
6. Department of Agriculture.....	2
7. Department of Commerce.....	1
8. Department of Labor.....	1

9. Department of Health, Education, and Welfare-----	2
10. Department of Housing and Urban Development-----	1
11. Department of Transportation-----	1
	16

The other administrative agencies designated for membership by the President are as follows:

1. Environmental Protection Agency-----	1
2. Federal Deposit Insurance Corporation-----	1
3. Equal Employment Opportunity Commission-----	1
4. General Services Administration-----	1
5. National Aeronautics and Space Administration-----	1
6. Office of Economic Opportunity-----	1
7. Office of Management and Budget-----	1
8. Selective Service System-----	1
9. Small Business Administration-----	1
10. United States Commission on Civil Rights-----	1
11. United States Civil Service Commission-----	1
12. United States Postal Service*-----	1
13. Veterans Administration-----	1
	13

*Designation made at the time the United States Postal Service, formerly the Post Office Department, was a Cabinet Department.

The final group consists of the public members appointed by the Chairman with the approval of the Council for 2-year terms. These members, who must comprise not less than one-third nor more than two-fifths of the total membership, are selected in such a manner as to provide broad representation of the views of private citizens of diverse experience. They are chosen from among members of the practicing bar, scholars in the field of administrative law or government, and others specially informed by knowledge and experience with respect to Federal administrative procedure. They are reimbursed for travel expenses but otherwise serve without compensation. At present, the public members number 35.

The Assembly, which has ultimate authority over all activities of the Conference, operates much like a legislative body. It has adopted By-laws establishing nine standing committees currently chaired by the following members:

- | | |
|--|-------------------------|
| 1. Agency Organization and Personnel----- | Max D. Paglin. |
| 2. Claims Adjudications----- | S. Neil Hosenball. |
| 3. Compliance and Enforcement Proceedings----- | C. Roger Nelson. |
| 4. Grant and Benefit Programs----- | Geoffrey C. Hazard, Jr. |
| 5. Informal Action----- | Warner W. Gardner. |
| 6. Judicial Review----- | William H. Allen. |
| 7. Licenses and Authorizations----- | Ben C. Fisher. |
| 8. Ratemaking and Economic Regulation----- | Whitney Gilliland. |
| 9. Rulemaking and Public Information----- | Martin F. Richman. |

These committees meet periodically to direct and supervise research by academic consultants and by the Conference's professional staff, and on the basis of that research to frame proposals for consideration by the Assembly. When a study and tentative recommendation have been prepared, they are circulated to the affected agencies for comment and reexamined by the committee in light of the replies. After final committee approval, a proposed recommendation is transmitted to the Council and then to the Assembly for final action in plenary session. The Assembly may adopt the recommendation in the form proposed, amend it, refer it back to the committee, or reject it entirely.

Since January 1968 the Assembly of the Conference has adopted a total of 42 recommendations. In its December 1972 plenary session, the Assembly approved a new system of numbering these, so as to indicate the year of adoption. Recommendations previously numbered consecutively through 35 will in the future be identified as follows:

1 to 8	68-1 to 68-8
9 to 17	69-1 to 69-9
18 to 22	70-1 to 70-5
23 to 31	71-1 to 71-9
32 to 35	72-1 to 72-4

Volume II of the Recommendations and Reports of the Administrative Conference of the United States, published in June 1973, contains the official texts of the recommendations adopted by the Assembly during the period July 1, 1970-December 31, 1972, the supporting research reports and a bibliography of other reports prepared under the auspices of the Conference. (Copies may be obtained from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C.). The texts of recommendations adopted in June 1973 have been published in the Federal Register (38 F.R. 16839). The texts of earlier recommendations that have general and continuing interest have been published in the Federal Register (38 F.R. 19782) and will appear in the Code of Federal Regulations, Title I, Part 305.

ACTIONS OF THE ASSEMBLY

At the Conference's Eighth Plenary Session, December 14-15, 1972, the Assembly adopted four recommendations; at the Ninth Plenary Session, June 7-8, 1973, it adopted three recommendations and a formal statement concerning the ABA proposals to amend the Administrative Procedure Act. A brief description of these actions follows; the full texts appear at pp. 32-53 *infra*.

SUMMARY OF RECOMMENDATION 72-5: PROCEDURES FOR THE ADOPTION OF RULES OF GENERAL APPLICABILITY

In future legislation, Congress is urged ordinarily not to impose mandatory procedural requirements on informal rulemaking beyond those contained in the Administrative Procedure Act, 5 U.S.C. § 553 (1970). In specific circumstances, however, it may be appropriate to require opportunity for oral argument, agency consultation with an advisory committee, or trial-type hearing on issues of specific fact; but trial-type procedures should never be required to resolve questions of policy or of broad or general fact.

Agencies should decide in the light of the circumstances of particular proceedings whether to provide procedural protections going beyond the "notice and comment" procedures required by Section 553, and should consider the feasibility of revising existing statutes that require trial-type procedures for rulemaking of general applicability. Section 701(e) of the Federal Food, Drug and Cosmetic Act should be amended to make clear that it does not require the Food and Drug Administration to conduct trial-type hearings except on issues of specific fact.

SUMMARY OF RECOMMENDATION 72-6: CIVIL MONEY PENALTIES AS A SANCTION

Federal agencies with regulatory and enforcement responsibilities are requested to consider (1) the benefits of civil money penalties as an enforcement tool, especially when used to supplement or replace criminal penalties or more drastic civil sanctions such as license revocation; and (2) the desirability, for enforcement programs containing certain specified characteristics, of imposing civil penalties through adjudicative proceedings at the administrative level instead of through *de novo* suits in the district courts.



Members of the Assembly at the Ninth Plenary Session. In foreground, John P. Vukasin, Jr. commenting on the pending proposal; seated to his right, William A. Nelson, and Whitney Gilliland, Chairman, Committee on Ratemaking and Economic Regulation.

In the proposal, the Conference does not address itself to particular programs or agencies, but asks each agency to consider the proper application of the principles of the recommendation to its own enforcement practices and needs. Where use of civil money penalties or their administrative imposition is appropriate and legislative authority is required, agencies are urged to seek such legislation.

SUMMARY OF RECOMMENDATION 72-7:
PREINDUCTION REVIEW OF SELECTIVE SERVICE CLASSIFICATION
ORDERS AND RELATED PROCEDURAL MATTERS

The Conference recommends amendment of the Military Selective Service Act to authorize preinduction judicial review of draft classification determinations. (Classification is continuing despite termination of the draft.) The Act should also provide for the referral of contested and difficult conscientious objector claims to the appropriate State Director's office for an advisory opinion.

In its non-legislative aspects, this recommendation urges the Selective Service System to amend its procedural regulations (1) to allow registrants to have the benefit of counsel or other authorized representative at local and appeal board appearances, (2) to provide for the preparation of suitable transcripts of proceedings, and (3) to enlarge the staff of the National Appeal Board and expand its jurisdiction to

include discretionary review of any registrant's claim regardless of unanimity below.

**SUMMARY OF RECOMMENDATION 72-8:
ADVERSE ACTIONS AGAINST FEDERAL EMPLOYEES**

The Conference calls for a substantial revision of existing agency and Civil Service Commission procedures in adverse action cases. Multi-level review by the employing agency should be abandoned in favor of a system providing for (1) an evidentiary hearing before a qualified hearing officer assigned by the Civil Service Commission, (2) a single review of that officer's findings and proposed decision by an official of the employing agency, and (3) review of the employing agency's decision by an appellate authority at the Civil Service Commission on the basis of the record compiled at the agency.

In its other principal points, the recommendation calls for issuance of regulations elaborating the statutory standard of "efficiency of the service"; public availability of agency and Commission decisions in adverse action cases, with editing to protect privacy; open hearings, at the employee's option, except in rare cases; retention of the employee in pay status until final action by the employing agency, except where delay is attributable to the employee himself; and reinforcement of the independence and power of the Commission's appellate authority.

**SUMMARY OF RECOMMENDATION 73-1:
ADVERSE AGENCY PUBLICITY**

The Conference recommends the adoption of agency rules setting forth minimum standards and structured practices governing the issuance of publicity which directs attention to agency action or policy and which may adversely affect identified persons.

Agencies are urged to insure that adverse publicity is factual in content and accurate in description. Adverse agency publicity relating to regulatory investigations of specifically identified persons or pending agency trial-type proceedings should issue only in the following circumstances:

(1) Where immediate public notice is necessary to meet a significant risk to health or safety or a significant risk of economic harm. (When, however, such risk can be avoided by immediate discontinuance of the offending practice, the respondent should be given an opportunity, where feasible, to cease the practice, pending a legal test, in lieu of issuance of the publicity).

(2) Where publicity is required to bring notice of pending adjudication to persons likely to be desirous of participating or likely to be affected.

(3) Where the investigation or proceeding is in any event likely to receive media attention and agency publicity is necessary to

foster agency efficiency, public understanding or the accuracy of news coverage.

Adverse agency publicity relating to matters other than regulatory investigations of specifically identified persons or pending trial-type proceedings should issue only after reasonable precautions to assure that the information stated is accurate and fulfills an authorized purpose.

Where information in adverse agency publicity has a limited basis—for example, allegations subject to later agency adjudication—that fact should be prominently disclosed. Agencies are encouraged, where it is practicable, to give a respondent or prospective respondent in an agency proceeding advance notice of adverse publicity and an opportunity to prepare a response in advance. Publicity shown to be erroneous or misleading should be retracted or corrected, where requested, in a manner as close as possible to that by which it was originally disseminated.

SUMMARY OF RECOMMENDATION 73-2: LABOR CERTIFICATION OF IMMIGRANT ALIENS

The Conference calls for refinement of the Department of Labor's procedures governing application for labor certification by immigrant aliens seeking permanent residence in the United States. In its principal points, the recommendation urges publication of the Department of Labor's Guidelines and supplemental memoranda; provision to the alien of notice of denial of certification directly, rather than through the Immigration and Naturalization Service or the alien's prospective employer; notification, along with the denial of certification, of the right to appeal; full access to the record by the alien who chooses to appeal; and greater specificity within the record upon which certification is granted or denied.

SUMMARY OF RECOMMENDATION 73-3: QUALITY ASSURANCE SYSTEMS IN THE ADJUDICATION OF CLAIMS OF ENTITLEMENT TO BENEFITS OF COMPENSATION

Federal agencies responsible for large-volume benefit and compensation programs—like Social Security, workmen's compensation and welfare—are urged in this recommendation to establish statistical reporting systems that monitor caseload and decisional patterns, and to use the information thus obtained as part of a continuous process of evaluating and improving adjudicatory performance.

The size of such claims programs and the limited resources of claimants make the ordinary devices of appeal and adversarial representation inadequate by themselves to assure overall accuracy, timeliness and fairness. To achieve these goals at all stages of claims processing, the agencies themselves must recognize their positive re-

sponsibility for quality assurance and should develop reporting systems along the lines proposed.

The recommendation outlines for consideration by the agencies the types of needed information the systems can be designed to provide. When instituted, the quality assurance program should be administered at such a level within the agency structure as to foster its objectivity and assure its actual use in policy formation and operational control.

SUMMARY OF STATEMENT CONCERNING ABA PROPOSALS TO AMEND THE ADMINISTRATIVE PROCEDURE ACT

The Conference statement which was adopted at the Ninth Plenary Session is addressed to the twelve Resolutions for amending the Administrative Procedure Act adopted by the House of Delegates of the American Bar Association in August 1970. In some respects the statement goes beyond the bare text of the Resolutions and addresses itself to the further elaboration contained in the implementing Recommendations subsequently adopted by the Administrative Law Section of the ABA.

The Conference endorsed those proposals that would eliminate certain exceptions to the present statutory procedural requirements for rulemaking; extend to rulemaking, ratemaking and initial licensing the existing statutory provision barring agency personnel who engage in investigation or litigation of a case from participating or advising in its decision; authorize agencies to delegate final decisional authority to administrative law judges or appellate boards, subject to discretionary agency review; encourage agencies to provide by rule for pre-hearing conferences; and grant agencies authority to make subpoenas generally available in formal adjudicatory proceedings.

The Conference approved in principle, but recommended further study concerning the means of implementing, those ABA proposals calling for improved definitions of "rule" and "order"; prohibition of *ex parte* communications between agency members and interested persons outside the agency on any fact at issue in a pending case; greater authority for administrative law judges in the conduct of adjudicatory proceedings; and the adoption of rules prescribing procedures for use in cases of informal adjudication. The Conference disapproved legislative proposals that would require the Conference to prescribe uniform procedural rules for all federal agencies; authorize agencies to provide by rule abridged hearing procedures for use by unanimous consent of the parties; and amend the Administrative Procedure Act to deal with agency issuance of prejudicial publicity.

Certain members filed a separate statement, the substance of which was to disagree with the Conference's approval of extending separation-of-functions requirements to rulemaking of general applicability.

ACTIVITIES OF COMMITTEES

The quality of Conference studies and recommendations depends largely upon the work of the nine standing committees into which the membership is divided.

1. COMMITTEE ON AGENCY ORGANIZATION AND PERSONNEL

Chairman, MAX D. PAGLIN

This Committee is concerned with (1) the distribution of responsibility and authority within agencies, including the adequacy of procedures to review internal delegations and to assure separation of functions; (2) personnel practices which bear upon the competence, professionalism and effectiveness of personnel involved in the conduct of administrative proceedings; and (3) administrative procedures which affect the hiring, compensation and tenure of Federal employees.



Committee on Agency Organization and Personnel, defending its views on the ABA proposals to amend the Administrative Procedure Act. From left to right: Anthony L. Mondello, John H. Powell, Jr., Chairman Max D. Paglin, Earl W. Kintner, Warren E. Blair, and Carl A. Auerbach.

Studies Completed in 1972-73

Procedures for adverse actions against Federal employees (Consultant: Richard A. Merrill, University of Virginia Law School), resulting in Recommendation 72-8.

ABA Resolutions 1, 3, 4, 6, 7, 8 and 9 concerning amendment of the Administrative Procedure Act (Consultant: Neil N. Bernstein, Washington University Law School; staff assistance: Frank Goodman, Richard K. Berg and Barry Boyer), resulting in portions of Conference Statement dealing with those Resolutions.

Pending

Study of the role of the chairman in the Independent Regulatory Agencies, comparing powers, staff support and mode of operation under varying legislation and practice (Consultant: David M. Welborn, University of Tennessee).

2. COMMITTEE ON CLAIMS ADJUDICATIONS

Chairman, S. NEIL HOSENBALL

This Committee has as its responsibility the study of 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.

Studies Completed in 1972-73

Settlement procedures and operations under the Federal Tort Claims Act (Consultant: Dennis S. Aronowitz, Boston University Law School); no recommendation now contemplated.

Pending

Procedures of the Department of the Interior with respect to leasing of Indian Lands (Consultant: Reid P. Chambers, University of California Law School, Los Angeles).

Procedures of the Department of Agriculture in administering agricultural production controls (Consultant: Dov M. Grunschlag, University of California Law School, Davis).

Procedures for resolution of post-award disputes in Government contracts (Consultant: Richard E. Speidel, University of Virginia Law School).

3. COMMITTEE ON COMPLIANCE AND ENFORCEMENT PROCEEDINGS

Chairman, C. ROGER NELSON

This Committee examines administrative policies, techniques and procedures for assuring compliance with Federal laws and regulations, including the issuance of cease and desist orders, the imposition of fines and penalties, and the application of other sanctions.

Studies Completed in 1972-73

Administrative use of money penalties as a sanction (Consultant: Harvey J. Goldschmid, Columbia University Law School), resulting in Recommendation 72-6.

Adverse agency publicity (Consultant: Ernest A. E. Gellhorn, University of Virginia Law School), resulting in Recommendation 73-1.

Summary administrative action—such as seizure, suspension or condemnation—taken prior to a formal-type hearing (Consultant: James O. Freedman, University of Pennsylvania Law School); no recommendation now contemplated.

ABA Resolutions 10 and 12 concerning amendment of the Administrative Procedure Act (Consultant: Ernest A. E. Gellhorn, University of Virginia Law School; staff assistance: Richard K. Berg), resulting in portions of Conference Statement dealing with those Resolutions.

Pending

Conciliation procedures at the Equal Employment Opportunity Commission (Consultant: James O. Freedman, University of Pennsylvania Law School).

4. COMMITTEE ON GRANT AND BENEFIT PROGRAMS *Chairman, GEOFFREY C. HAZARD, JR.*

This Committee considers the procedures by which agencies administer Federal loan, grant and benefit programs, including procedures for the award or termination of financial assistance.

Studies Completed in 1972-73

Quality assurance systems in Federal programs involving adjudications in high volume with respect to small claims (Consultant: Jerry L. Mashaw, University of Virginia Law School), resulting in Recommendation 73-3.

Pending

Representation in disability claims adjudication (Consultant: William Popkin, University of Indiana Law School).

Desirability of regularized procedures in Federal assistance programs (Consultant: Margaret Gilhooley, University of Colorado Law School).

Procedures in administering affirmative action programs for Federal grants and contracts under Executive Order 11246 (Consultant: Jan Vetter, University of California Law School, Berkeley).

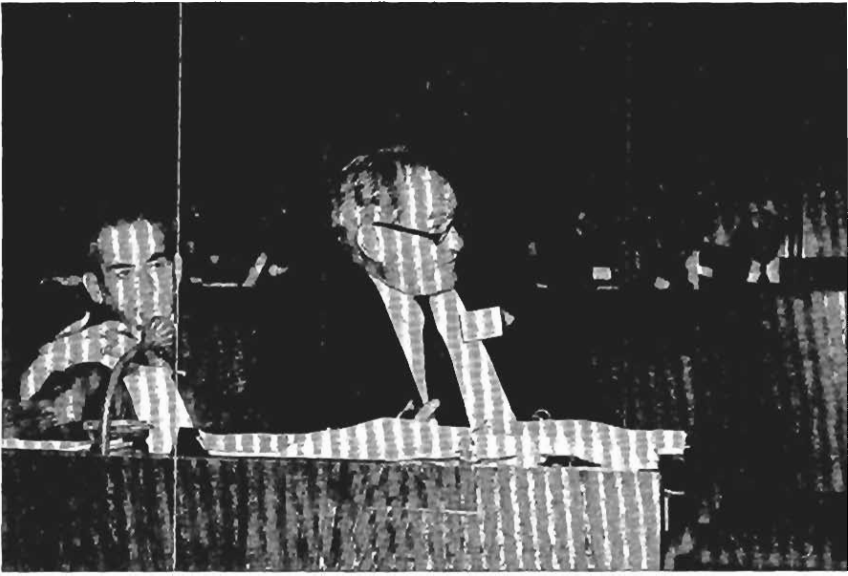
5. COMMITTEE ON INFORMAL ACTION *Chairman, WARNER W. GARDNER*

This committee has a wide mandate to investigate agency action affecting private rights that does not involve formal, structured proceedings. This comprises, quantitatively, the vast bulk of all agency action, and is characterized by particularly broad scope of agency discretion.

Studies Completed in 1972-73

Procedures of the Department of Labor for granting labor certificates to immigrant aliens (staff assistance: Lynda S. Zengerle), resulting in Recommendation 73-2.

ABA Resolution 11, concerning amendment of the Administrative Procedure Act (Chairman Gardner), resulting in portion of Conference Statement dealing with that Resolution.



Warner W. Gardner, Chairman, Committee on Informal Action, preparing to respond to a question. On the left, Sol Lindenbaum, a member of the Committee.

Pending

Federal prison grievance procedures (Consultant: Howard Lesnick, University of Pennsylvania Law School).

Procedures for the commitment and release of the mentally ill in Federal institutions (Consultant: Barbara D. Underwood, Yale University Law School).

Exercise of discretion in the institution of enforcement proceedings by the Food and Drug Administration (Consultant: William J. Lockhart, University of Utah Law School).

Empirical study of representative informal agency proceedings to ascertain whether general procedural principles can be developed (Consultant: Robert W. Hamilton, University of Texas Law School; staff assistance: Lynda S. Zengerle and summer law interns).

6. COMMITTEE ON JUDICIAL REVIEW

Chairman, WILLIAM H. ALLEN

The responsibility of this Committee is to examine provisions concerning judicial review of administrative action, and those aspects of administrative procedure that have particular effect upon the availability or effectiveness of judicial review. While these matters are studied primarily from the perspective of the agencies, the Committee necessarily considers the effect of existing dispositions and of new proposals upon the functioning of the courts themselves.

Studies Completed in 1972-73

Preinduction judicial review of selective service classification orders and related procedural matters (Consultant: Francis X. Beytagh, Jr., University of Notre Dame Law School), resulting in Recommendation 72-7.
Adverse agency publicity (views of Committee submitted during development of Recommendation 73-1).

Pending

Rationalization of the forum for judicial review: court of appeals vs. district court (Consultant: Frank X. Beytagh, Jr., University of Notre Dame Law School).

Judicial review of informal rulemaking (Consultant: Paul Verkuil, University of North Carolina Law School).

Feasibility of a special environmental court (Consultants: Nathaniel L. Nathanson, Northwestern University Law School; N. William Hines, University of Iowa College of Law).

Control of agency litigation by the Department of Justice (Consultant: Paul D. Carrington, University of Michigan Law School).

7. COMMITTEE ON LICENSES AND AUTHORIZATIONS

Chairman, BEN C. FISHER

This Committee examines the process of licensing or certification to engage in activities which require Federal Government authorization. It is concerned with all aspects of that process, including grant, denial, transfer, modification, suspension and termination.

Pending

Effects of the National Environmental Policy Act on the licensing of power facilities (Consultant: Arthur W. Murphy, Columbia University Law School).

This study resulted in a recommendation considered at the June Plenary Session and referred back to the Committee for additional agency comment.

Procedures of the Department of Interior regarding mining claims on public lands under the Hard Rock Minerals Permit Program (Consultant: Peter L. Strauss, Columbia University Law School).

Licensing procedures of Federal banking agencies (Consultant: Kenneth E. Scott, Stanford University Law School).

8. COMMITTEE ON RATEMAKING AND ECONOMIC REGULATION

Chairman, WHITNEY GILLILLAND

This Committee, newly formed in 1972, studies the procedures employed by the regulatory agencies in establishing rates, prices and other charges for regulated industries. It also examines procedures of all agencies with respect to activities that have the effect of economic regulation though not directed specifically towards regulated industries—such as the determination of subsidies, tariffs and quotas.

Pending

Treasury Department procedures for enforcing anti-dumping and countervailing duty legislation (Consultant: Warren Schwartz, University of Virginia Law School).

Role of economic analysis in the regulatory agencies (Consultants: Stephen G. Breyer, Harvard Law School; Ernest A. E. Gellhorn, University of Virginia Law School).

9. COMMITTEE ON RULEMAKING AND PUBLIC INFORMATION

Chairman, MARTIN F. RICHMAN

This Committee identifies the areas of administrative activity appropriate for the conduct of rulemaking, and studies the procedures employed. As a separate but related charge, it looks to the public availability and dissemination of information on agency procedures, policies and actions.

Studies Completed in 1972-73

Procedures for the adoption of rules of general applicability (Consultant: Robert W. Hamilton, University of Texas Law School), resulting in Recommendation 72-5.

ABA Resolutions 1 and 2 concerning amendment of the Administrative Procedure Act (Consultant: Arthur Bonfield, University of Iowa College of Law; staff assistance: Frank Goodman), resulting in portions of Conference Statement dealing with those Resolutions.

Pending

Study of the military or foreign affairs exemption from APA rulemaking requirements (Consultant: Arthur Bonfield, University of Iowa College of Law).

Interagency transfers of information—the Government's handling of confidential data on individuals and businesses (Consultant: Alexander W. Bell, University of Virginia Law School).

ABA Resolution No. 1, involving improved definitions of "Rule" and "Order." (Consultant: Robert W. Hamilton, University of Texas Law School).

ACTIVITIES OF THE CHAIRMAN'S OFFICE

SUPPORT OF COMMITTEE ACTIVITIES

During the past year the Chairman's Office support of Committee work included several discrete projects of some length. Consideration of the ABA's twelve proposals for amendment of the Administrative Procedure Act occupied more of the Conference's attention than any other single project in its history. Almost all of the research underlying the Conference's Statement on this subject was undertaken by the Conference staff, which produced for the cognizant committees intensive analyses of the proposals on definition of rule and order, separation of functions, ex parte contacts, uniform rules, intermediate decision process, abridged hearing procedures and subpoena power. The product was summarized in a background paper distributed to the membership and later published in the Administrative Law Journal.

One more of the formal actions taken by the Conference was supported exclusively by in-house research. The study on labor certification of immigrant aliens was conducted in the Chairman's Office under supervision of the Committee on Informal Action, whence it emerged as the proposed Recommendation 73-2.

ADVICE AND ASSISTANCE TO THE AGENCIES

In addition to its function of supporting the work of the Committees, the Council and the Assembly, the Chairman's Office has the separate responsibility of providing continuing advice and assistance to the agencies upon request. As the Chairman's Report indicates, this activity increased sharply during the past year, ranging from informal discussions of novel procedural problems to written analysis of proposed legislation for the Office of Management and Budget. Out of this steady flow of activity, the following items bear special mention:

- Consultation with the Office of Administrative Law Judges of the Civil Service Commission concerning a proposed government-wide study of the needs of Administrative Law Judges.
- The conduct of a series of seminars in administrative procedure for the legal staff of the Environmental Protection Agency.

- A detailed analysis of the procedural aspects of the new Consumer Product Safety Act, prepared for the Office of Management and Budget for submission to the Chairman-designate (later printed in the House budget hearings for the new agency).
- Consultation with the Department of Justice concerning the procedural aspects of contemplated legislation pertaining to offshore port facilities.
- Participation in the Civil Service Commission's regular program of seminars for Administrative Law Judges.
- Consultation with the White House concerning procedural aspects of the contemplated Trade Bill.
- Study of Federal agency procedures and practices in handling citizen-initiated complaints (Consultant: Victor G. Rosenblum, Northwestern University Law School).

ADVICE AND ASSISTANCE TO THE CONGRESS

The Chairman's Office also serves as the spokesman for the Conference, and as advisor to the Congress, in connection with pending legislation. In this connection, the Chairman testified on several groups of legislative proposals that have Government-wide impact upon administrative procedure:

**Two sets of proposals to amend the Freedom of Information Act (H.R. 4938, H.R. 5983 and H.R. 6438, regarding executive privilege, and H.R. 5425 and H.R. 4960, regarding the public information provisions of the Act) before the Subcommittee on Foreign Operations and Government Information of the House Committee on Government Operations;

**Bills to establish a Consumer Protection Agency (S. 707 and S. 1160) before the Subcommittee on Executive Reorganization and Government Research of the Senate Committee on Government Operations.

Testimony was also given before Subcommittee No. 3 of the House Committee on the Judiciary on H.R. 1598, concerning the United States Board of Parole. The Chairman reported that he had not yet been successful in persuading the Parole Board voluntarily to adopt the procedural reforms proposed in Recommendation 72-3 and urged the Committee to report a bill which would carry out the Conference proposals.

In addition to such formal appearances, the staff of the Chairman's Office has had frequent conferences with Congressional staff members concerning procedural provisions of legislation in preparation or under consideration. Numerous written comments on pending legis-

lation were submitted to Congressional Committees and to the Office of Management and Budget.

LIAISON WITH THE PRIVATE SECTOR

One of the objectives of the Chairman's Office has been to foster cooperation between the Federal Government and knowledgeable private groups in addressing the problems of administrative procedure, and to assist in coordination of their efforts. During the past year the Chairman was named, ex officio, a member of the Board of Directors of the Center for Administrative Justice, an organization sponsored by the Administrative Law Section of the American Bar Association and funded by the American Bar Foundation for the purpose of research and education in state and Federal administrative law.

In his Consumer message in February 1971 the President asked the Chairman of the Administrative Conference "to join with other interested citizens representing a broad spectrum of society to undertake a thorough study of the adequacy of existing procedures for resolving disputes arising out of consumer transactions." In compliance with that request, Chairman Cramton helped to establish the National Institute for Consumer Justice; Chairman Scalia succeeded to his position as a Director of that body. Its final report is anticipated in September 1973.

IMPLEMENTATION OF RECOMMENDATIONS

The permanent character of the Administrative Conference is important in part because it permits a continuing and sustained effort to secure implementation of its recommendations. This is one of the responsibilities of the Office of the Chairman. The last Annual Report described implementation progress on all recommendations adopted through the June 1971 Plenary Session. Set forth below is a description of implementation progress on recommendations adopted by the Conference since December 1971, the Sixth Plenary Session.

Recommendation 71-5: Procedures of the Immigration and Naturalization Service in Respect to Change-of-Status Applications

This recommendation seeks to improve the procedures by which the Immigration and Naturalization Service processes applications of aliens who seek to change their status to that of persons lawfully admitted for permanent residence. It calls upon the Service to develop rules and standards of decision, to issue and make public its precedential rulings and to give wider publicity to its operating instructions and procedures for review of orders denying relief.

A number of the consultant's proposals for improvement were adopted by the Service prior to the Conference's formal action. These included the suggestion that the examiner be impressed with the need to assist the alien by pointing out grounds for relief which may have been overlooked, and that the form advising of adverse action indicate the available avenues of appeal (see fn. 1 to recommendation). With respect to the recommendation proper, the Service has agreed to prepare reasoned decisions in grant as well as denial cases, to correct the public file in order to show where decisions have subsequently been reversed on appeal, to make available to the public much of its Operations Instructions and to publish a simply worded pamphlet describing procedures for obtaining administrative review of adverse decisions. The Service has declined, however, to implement what is perhaps the most important aspect of the recommendation—that calling for the promulgation of rules and standards to control the exercise of discretion.

Recommendation 71-6: Public Participation in Administrative Hearings

This recommendation is designated to make public participation by private individuals and citizen organizations in Federal administrative hearings more effective and more economical without impairing the agency's ability to perform its statutory obligations. It deals with the selection of intervenors, the scope of participation to be allowed, methods of informing the public about proceedings in which participation may be desired, and the cost of transcripts.

Most of the provisions of this recommendation have met with acceptance by those agencies to which it applies. A significant exception is the provision that transcripts be furnished at reproduction cost, which some agencies refused to accept because it involved substantial expenditures not covered by existing budgets. The Federal Advisory Committee Act of 1972 overrode such objections, requiring agencies to make available to any person, "at actual cost of duplication, copies of transcripts of agency proceedings . . ." Section 11 of P.L. 92-463, October 6, 1972.

Recommendation 71-7: Rulemaking on a Record by the Food and Drug Administration

This recommendation calls upon the Food and Drug Administration to make more effective use of a number of procedural devices, such as prehearing conferences and discovery, in order to expedite the trial of its protracted cases. Procedural safeguards relating to internal separation of functions and the prohibition of certain ex parte communications are also recommended.

The Food and Drug Administration has implemented those provisions dealing with separation of functions and ex parte communications; it has indicated its intention to implement the remaining provisions.

Recommendation 71-8: Modification and Dissolution of Orders and Injunctions

The subject of this recommendation is the unconsidered and sometimes burdensome continuation of cease-and-desist orders and injunctions beyond the period in which they serve a useful purpose. Agencies which issue a significant number of orders of this kind are called upon to adopt procedures whereby persons adversely affected may seek their modification or vacation, and, where appropriate, to support such persons in seeking court relief.

While this recommendation is of limited application, it has been implemented by two agencies, the Civil Aeronautics Board and the Federal Home Loan Bank Board. Six other agencies have indicated that their procedures are in substantial compliance with the objectives of the recommendation. Several agencies, notably the Department of Labor with respect to Fair Labor Standards Act proceedings and the National Labor Relations Board with respect to unfair labor practice and representation proceedings, have maintained that little useful purpose would be served by permitting reconsideration of large numbers of narrowly drawn orders which merely require compliance with the law.

Recommendation 71-9: Enforcement of Standards in Federal Grant-in-Aid Programs

This recommendation urges agencies having substantial grant programs to set up an administrative complaint procedure enabling interested members of the public and private groups to question grantee compliance with the conditions of the grant, and it seeks administrative provision of a range of sanctions to secure compliance short of total cut-off of funds.

Agencies such as the Department of Health, Education and Welfare, the Department of Housing and Urban Development, and the Department of Transportation which have major grant programs have advised that this recommendation is under study, but implementation has generally not been achieved. Enactment of Title IV of S. 1421 and H.R. 6667, identical bills now pending in Congress, would compel adoption of major features of this recommendation.

Recommendation 72-1: Broadcast of Agency Proceedings

This recommendation calls upon agencies to announce policies with respect to the broadcast of their proceedings. It encourages broadcast

coverage of proceedings involving issues of broad public interest, subject to appropriate limitations and controls for the purpose of preventing disruption and protecting witnesses. It further provides that audiovisual coverage should be excluded in adjudicatory proceedings involving past culpable conduct where the person involved objects.

Agency response to this proposal has been widely varied, due in part to the diverse nature of the proceedings affected and in part to lack of experience in handling requests for broadcast permission. The Department of Labor, the Department of Housing and Urban Development and the Federal Communications Commission have all published rules which achieve substantial implementation. By far the largest number of agencies, however, while indicating agreement with the broadcasting standards of the proposal, have declined to embody them in rules but instead propose to apply them on a case-by-case basis. In many instances this reluctance to go to rulemaking is laid to the infrequency (or even nonexistence) of previous broadcast requests. No agency has flatly rejected the broadcasting standards of the recommendation, but several have expressed strong reservations. Among these are the Atomic Energy Commission, which has indicated a willingness to experiment in several selected proceedings, the Department of Interior, the Interstate Commerce Commission, and the Veterans Administration. The Environmental Protection Agency initially decided to permit broadcast of a pesticide proceeding, was persuaded not to do so by the parties, and is now expressly barred from broadcasting such cases by a 1972 amendment to its Statute. (P.L. 92-516, Oct. 21, 1972.)

Recommendation 72-2: Conflict of Interest Problems in Dealing with Natural Resources of Indian Tribes

Disputes concerning land and water rights of American Indians have resulted in serious conflict-of-interest problems for the agencies charged with the dual responsibility of acting as trustees for Indian property and of carrying out Federal programs involving the lease or other use of the property. The recommendation is in two parts: first, it calls for legislation to provide independent legal counsel to protect Indian claims to natural resources; second, it urges the Departments of Justice and Interior to lessen conflict-of-interest problems through administrative action until legislation is enacted.

Through an exchange of correspondence between the White House, the Secretary of the Interior and the Attorney General, administrative procedures have been adopted which implement the second part of this recommendation. The understanding provides that the Department of Justice will advise the Department of the Interior of cases involving Indian rights, and that upon the request of the Secretary

or his Solicitor, the Justice Department brief will include views with respect to Indian natural resource trust interests.

Legislation to implement the first part of the recommendation by establishing an Indian Trust Counsel Authority was introduced in the 92d Congress (S. 2035; H.R. 8797). Hearings were held at which the Departments of Justice and Interior and the Chairman of the Conference, among others, testified in support of the bill. The legislation has been reintroduced in the 93rd Congress (S. 1339).

Recommendation 72-3: Procedures of the U.S. Board of Parole

Determinations of the U.S. Board of Parole involving the grant, deferral or revocation of parole, control more than two-thirds of the time served under Federal prison sentences. This recommendation seeks to assure greater fairness and consistency in Board decisions through a number of changes in procedures, including publication of the standards and criteria by which parole determinations are made, permitting prisoners the assistance of counsel or other representative at the parole interview, allowing prisoners to see the contents of their prison files (subject to reasonable limitations), and providing a written statement of reasons in support of orders denying parole.

The Board of Parole has initiated a pilot project, involving six institutions, in which it is seeking to apply most of the proposals contained in the Conference recommendation. The principal exception is that the inmate is not permitted access to his file. It is also not clear that the articulated standards are sufficiently informative to accord with the Conference's proposal. The Board reports that experience with this program has been "very encouraging"; it plans to continue the project with the aim of refining the procedures and ultimately making them generally applicable.

Hearings on legislation which would, among other things, implement the Conference recommendation were held in June 1973 by Subcommittee No. 3 of the House Judiciary Committee. The Chairman presented the Conference's views. The Board supported in principle all those portions of the bill based on the Conference recommendation, but argued that the changes should be brought about administratively. It expressed its willingness to comply with respect to all major points except access to the file, where it asserted there was first to be resolved the difficulty that large portions of the file (*e.g.*, presentencing reports) are not the Board's property to grant or withhold.

Recommendation 72-4: Suspension and Negotiation of Rate Proposals by Federal Regulatory Agencies

This recommendation is directed (1) to the procedures by which the Civil Aeronautics Board, the Federal Communications Commission,

the Federal Power Commission and the Interstate Commerce Commission suspend and investigate newly filed rate proposals, and (2) to the manner in which rate proposals are disposed of by means of negotiation or settlement.

The recommendation is under study by the four agencies to which it is directed. The CAB and the FCC have expressed agreement with its objective, and are seeking to bring their procedures into compliance. The ICC is likewise in accord although it has noted problems of implementation in view of the large volume of proceedings involved—in excess of 4,000 annually. The Conference will continue to evaluate implementation action, particularly the extent to which there may be a need for authorizing legislation.

Recommendation 72-5: Procedures for Adoption of Rules of General Applicability

This recommendation primarily concerns future legislation. It urges Congress, in the absence of special circumstances, not to impose upon rulemaking of general applicability mandatory requirements beyond those contained in the Administrative Procedure Act. Agencies are requested to adhere to this policy in new legislation which they propose, and to consider revision of existing statutes that violate it. In the latter category, the recommendation singles out Section 701(e) of the Federal Food, Drug and Cosmetic Act, and urges that it be amended to make clear that trial-type procedures should be used only for issues of specific fact.

Responses to inquiries concerning this recommendation have been received from over 30 agencies, indicating their intention to be guided by its principles. The great majority of agencies have already examined their statutes and have found no need to propose amendments. Several agencies have noted that the recommendation has been useful in connection with pending legislative proposals. The Food and Drug Administration has under consideration draft legislation to revise Section 701(e) in accordance with the recommendation.

Recommendation 72-6: Civil Money Penalties as a Sanction

In this recommendation agencies are requested to review their regulatory and enforcement powers to determine whether civil money penalties might advantageously be used to supplement or replace criminal penalties and more drastic civil sanctions; and whether such civil money penalties for particular classes of offenses might desirably be imposed in formal adjudicative proceedings at the administrative level, rather than in the courts. They are urged to seek the legislation necessary to apply their conclusions.

The recommendation has already received widespread and active support. Ten agencies have pending or in preparation legislation which

applies its principles. This includes legislation to provide civil penalties under the Interstate Land Sales Full Disclosure Act (HUD); to provide civil penalties for violation of rules under Parts I and II of the Interstate Commerce Act (ICC); to permit administrative assessment of penalties in Hazardous Materials and Motor Carrier Safety proceedings (DOT); to provide civil penalties under the Small Business Investment Company program (SBA); and to permit administrative assessment of penalties under the Federal Aviation Act (CAB).

Recommendation 72-7: Preinduction Review of Selective Service Classification Orders and Related Procedural Matters

This recommendation calls for legislation to authorize preinduction judicial review of draft classification orders and for referral of contested conscientious objector claims to the State Director level for an advisory opinion. It also calls upon the Selective Service to amend its regulations by allowing registrants to have the benefit of counsel at local and appeal board hearings, to provide suitable transcripts of hearings, and to enlarge the staff and jurisdiction of the National Appeal Board.

At the time of adoption of this recommendation the Conference was aware that substantial alterations in the draft program would take effect in July 1973; it believed that its proposals should be applied even during a period of "stand-by" classification. The Selective Service System has taken a different view, reporting that no efforts will be undertaken to implement either the legislative or administrative aspects of this recommendation at this time.

Recommendation 72-8: Adverse Actions Against Federal Employees

This recommendation calls for major revisions in adverse action proceedings by agencies and by the Civil Service Commission. It provides for an evidentiary hearing at the agency before a qualified hearing officer appointed by the Civil Service Commission, a single review of that decision by the agency or its designee, direct review by an appellate board in the Commission, and discretionary review by the Commission itself. Other major aspects are open hearings at the employee's option, and adoption of procedures to permit reassignment of an employee or retention on administrative leave with pay for a reasonable period pending final action by the employing agency.

The Civil Service Commission has published for agency and public comments proposed revisions to its rules which would implement much of the Conference recommendation—and all of it that requires Commission action. The revisions do not include the provision that an employee be retained in pay status pending final agency action; that will remain a point to be raised by the Conference with individual

hiring agencies. The Commission will announce its new rules in the Fall of 1973 and plans to implement them by July 1974.

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Recommendations Adopted at the Ninth Plenary Session

Three recommendations were adopted at the Ninth Plenary Session, June 7-8, 1973—Adverse Agency Publicity (73-1); Labor Certification of Immigrant Aliens (73-2); and Quality Assurance Systems in the Adjudication of Claims of Entitlement to Benefits or Compensation (73-3). They were brought to the attention of the heads of Departments and agencies to which they apply, with a request for information by October 1, 1973 concerning proposed implementation.

TEXTS OF ASSEMBLY ACTIONS

RECOMMENDATION 72-5

PROCEDURES FOR ADOPTION OF RULES OF GENERAL APPLICABILITY

(Adopted Dec. 14, 1972)

The Administrative Procedure Act, 5 U.S.C. § 553 (1970), provides simple, flexible and efficient procedure for rulemaking, including publication of a notice of proposed rulemaking in the Federal Register, opportunity for submission of written comments, and opportunity in the discretion of the agency for oral presentation. This notice-and-comment rulemaking procedure is extensively used and on the whole has worked well. Each agency is of course free to provide additional procedural protection to private parties in any proceeding.

There are statutes that require procedures in addition to those required by § 553. Some require opportunity for oral argument, some require agency consultation with advisory committees, and some require trial-type procedure.

The Administrative Conference believes that statutory requirements going beyond those of § 553 should not be imposed in absence of special reasons for doing so, because the propriety of additional procedures is usually best determined by the agency in the light of the needs of particular rulemaking proceedings. The Administrative Conference emphatically believes that trial-type procedures should never be required for rulemaking except to resolve issues of specific fact.

Recommendation

1. This recommendation applies only to rules of general applicability and not to rules of particular applicability, only to substantive rules and not to procedural rules, only to legislative rules and not to interpretative rules, and only to rulemaking governed by § 553 and not to rulemaking excepted from the requirements of § 553.

2. In future grants of rulemaking authority to administrative agencies, Congress ordinarily should not impose mandatory procedural requirements other than those required by 5 U.S.C. § 553, except that when it has special reason to do so, it may appropriately require opportunity for oral argument, agency consultation with an advisory committee or trial-type hearings on issues of specific fact.

3. Congress should never require trial-type procedures for resolving questions of policy or of broad or general fact. Ordinarily it should not require such procedures for making rules of general applicability, except that it may sometimes appropriately require such procedures for resolving issues of specific fact. Existing statutes imposing a requirement of trial-type procedures for rulemaking of general applicability should be reexamined in light of these principles.

4. A study of proceedings conducted by the Food and Drug Administration pursuant to § 701(e) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 371(e) (1970), has demonstrated that that section should be amended so as to make clear that trial-type hearings are not required except on issues of specific fact.

5. Each agency should decide in the light of the circumstances of particular proceedings whether or not to provide procedural protections going beyond those of § 553, such as opportunity for oral argument, agency consultation with an advisory committee, opportunity for parties to comment on each other's written or oral submissions, a public-meeting type of hearing, or trial-type hearing for issues of specific fact.

RECOMMENDATION 72-6

CIVIL MONEY PENALTIES AS A SANCTION

(Adopted Dec. 14, 1972)

Federal administrative agencies enforce many statutory provisions and administrative regulations for violation of which fixed or variable civil money penalties may be imposed.¹ During Fiscal 1971, seven executive departments and thirteen independent agencies collected well in excess of \$10 million, in over 15,000 cases; all evidence points to a doubling or tripling dollar magnitude and substantially increasing caseload within the next few years.

Increased use of civil money penalties is an important and salutary trend. When civil money penalties are not available, agency administrators often voice frustration at having to render harsh "all-or-nothing decisions" (*e.g.*, in license revocation proceedings), sometimes adversely affecting innocent third parties, in cases in which enforcement purposes could better be served by a more precise measurement of culpability and a more flexible response. In many areas of increased concern (*e.g.*, health and safety, the environment, consumer protec-

¹ For purposes of this recommendation, no distinction has been drawn between sanctions denominated "money penalties" and sanctions denominated "forfeitures" (*e.g.*, in FCC legislation) and "fines" (*e.g.*, in Postal Service legislation) so long as (1) the sanction is classified as *civil* and (2) *money* is, in fact, subject to collection by an agency or a court. Excluded are situations involving penalties or liquidated damages assessed pursuant to the terms of a government contract or sums withheld or recovered for failure to comply with the terms of a government grant.

tion) availability of civil money penalties might significantly enhance an agency's ability to achieve its statutory goals.

In developing a range of sanctions adequate to meet enforcement needs, Congress and agencies must often determine whether a "criminal fine" or a "civil money penalty," or both, should be applied to a given regulatory offense. The choice they make has large consequences. Criminal penalties expose an offender to the disgrace and disabilities associated with "convictions"; they require special procedural and other protections; and they cannot be imposed administratively. These factors make it appropriate to consider whether criminal sanctions should not be supplemented or replaced by civil money penalties.

Under most money penalty statutes, the penalty cannot be imposed until the agency has succeeded in a *de novo* adjudication in federal district court, whether or not an administrative proceeding has been held previously. The already critical overburdening of the courts argues against flooding them with controversies of this type which generally have small precedential significance.

Because of such factors as considerations of equity, mitigating circumstances, and the substantial time, effort and expertise such litigation often requires in cases usually involving relatively small sums (an average of less than \$1,000 per case), agencies settle well over 90% of their cases by means of compromise, remission or mitigation. Settlements are not wrong *per se*, but the quality of the settlements under the present system is a matter of concern. Regulatory needs are sometimes sacrificed for what is collectible. On the other hand, those accused sometimes charge that they are being denied procedural protections and an impartial forum and that they are often forced to acquiesce in unfair settlements because of the lack of a prompt and economical procedure for judicial resolution. Moreover, several agency administrators warn that some of the worst offenders, who will not settle and cannot feasibly be brought to trial, are escaping penalties altogether.

This recommendation is intended to meet the problems posed above.

Recommendation

A. DESIRABILITY OF CIVIL MONEY PENALTIES AS A SANCTION

1. Federal administrative agencies should evaluate the benefits which may be derived from the use (or increased use) of civil money penalties as a sanction. Such penalties should not be adopted as a means of supplanting or curtailing other private or public civil remedies.

2. Civil money penalties are often particularly valuable, and generally should be sought, to supplement those more potent sanctions already available to an agency—such as license suspension or revoca-

tion—whose use may prove (a) unduly harsh for relatively minor offenses; or (b) infeasible because, for example, the offender provides services which cannot be disrupted without serious harm to the public.

3. Each federal agency which administers laws that provide for criminal sanctions should review its experience with such sanctions to determine whether authorizing civil money penalties as another or substitute sanction would be in the public interest. Such authority for civil money penalties would be particularly appropriate, and generally should be sought, where offending behavior is not of a type readily recognizable as likely to warrant imprisonment.

B. ADJUDICATION OF CIVIL MONEY PENALTY CASES IN AN ADMINISTRATIVE IMPOSITION SYSTEM

1. In some circumstances it is desirable to commit the imposition of civil money penalties to agencies themselves, without subjecting agency determinations to *de novo* judicial review. Agencies should consider asking Congress to grant them such authority.²

Factors whose presence tends to commend such a course with respect to a particular penalty provision include the following:

- (a) a large volume of cases likely to be processed annually;
- (b) the availability to the agency of more potent sanctions with the resulting likelihood that civil money penalties will be used to moderate an otherwise too harsh response;
- (c) the importance to the enforcement scheme of speedy adjudications;
- (d) the need for specialized knowledge and agency expertise in the resolution of disputed issues;
- (e) the relative rarity of issues of law (*e.g.*, statutory interpretation) which require judicial resolution;
- (f) the importance of greater consistency of outcome (particularly as to the penalties imposed) which could result from agency, as opposed to district court, adjudications; and
- (g) the likelihood that an agency (or a group of agencies in combination) will establish an impartial forum in which cases can be efficiently and fairly decided.

Considerations such as those set forth above should be weighed heavily in favor of administrative imposition when the usual monetary penalty for an offense or a related series of offenses would be relatively small, and should normally be decisive when the penalty would be unlikely to exceed \$5,000. However, the benefits to be derived from civil money penalties, and the administrative imposition thereof, should also be considered when the penalties may be relatively large.

² Due to the special procedures and status of the United States Tax Court, the rationale for administrative imposition may have only limited applicability to civil money penalties administered by the Internal Revenue Service.

2. An administrative imposition system should provide:
 - (a) for an adjudication on the record pursuant to the Administrative Procedure Act, 5 U.S.C., §§ 554-57 (1970) at the option of the alleged offender or the agency;
 - (b) for finality of an agency's decision unless appealed within a specified period of time;
 - (c) that, if the person on whom the penalty is imposed appeals, an agency's decision will be reviewed in United States Courts of Appeals under the substantial evidence rule in accordance with the Administrative Procedure Act, 5 U.S.C. § 706(e);
 - (d) that issues made final by reason of (b) above and issues which were raised, or might have been raised, in a proceeding for review under (c) above may not be raised as a defense to a suit by the United States for collection of the penalty.

Agencies should adopt rules of practice which will enable just, inexpensive and speedy determinations. They should provide procedures for settlement by means of remission, mitigation or compromise.

RECOMMENDATION 72-7

PREINDUCTION REVIEW OF SELECTIVE SERVICE CLASSIFICATION ORDERS AND RELATED PROCEDURAL MATTERS

(Adopted Dec. 15, 1972)

Section 10(b)(3) of the Military Selective Service Act, 50 U.S.C. App. § 460(b)(3) (1970), in terms forbids judicial review of administrative determinations relating to the classification and processing of Selective Service registrants, except as incident to criminal prosecutions. In fact, the writ of habeas corpus is available to a registrant who submits to induction and wishes to challenge the classification resulting in his induction, and the Supreme Court has held that Section 10(b)(3) does not preclude preinduction judicial review in those cases where it is alleged that a classification or other Selective Service administrative action is clearly contrary to statute. Discretionary determinations based upon the facts of particular cases remain subject to the Section 10(b)(3) proscription of preinduction review. Almost the only such discretionary determinations today that are likely to be litigated are those involving claims of conscientious objector status. Amendments to the Act in 1971 reduced the number and kinds of discretionary determinations made by Selective Service officials. Those same amendments and consequent amendments of regulations have established new procedural protections for registrants that reduce the

pressure for judicial review of Selective Service determinations and at the same time facilitate review in cases where it is had.

Principles of fairness and efficiency strongly urge that preinduction judicial review should be available generally in Selective Service cases, subject to certain qualifications. In addition, there should be established a procedure whereby local draft boards and appeal boards may obtain expert advice on conscientious objector claims, the resolution of which is among the most difficult problems known to our legal system. Finally, the Selective Service System should be encouraged to make additional reforms in its procedures in specific respects in order further to reduce the need for and facilitate judicial review. The present Recommendation is addressed to all of these concerns.

Recommendation

A. PREINDUCTION JUDICIAL REVIEW

Section 10(b)(3) of the Military Selective Service Act, 50 U.S.C. App. § 460(b)(3) (1970), should be amended to delete the nominal prohibition of judicial review of administrative determinations relating to the classification and processing of registrants, except as a defense to a criminal prosecution. In lieu thereof the Act should expressly authorize preinduction judicial review at the behest of any registrant seeking to challenge his classification through a suit for declaratory and injunctive relief brought in a federal district court. Elements of, and conditions upon, such a suit should include the following:

(1) Reasonable restrictions would be imposed with respect to the timing of the suit. These would be related to the Selective Service System's procedure for designating registrants likely to be drafted considerably in advance of their scheduled induction date and would authorize preinduction suits within a limited period, *e.g.*, 30 days, after physical examinations had been taken and administrative remedies exhausted.¹

(2) The mere pendency of a suit would not operate as a stay of induction. If it appeared that a suit could not be finally determined before a scheduled induction, any request for a stay of induction would be ruled upon according to the traditional standards governing interlocutory injunctive relief.

(3) A determination on preinduction judicial review that the registrant's classification was lawful would be conclusive in any subsequent criminal prosecution.

(4) The President would be empowered to suspend the availability

¹ The views of the Selective Service System and of the Judicial Conference should be taken into account in the prescription of the period of the limitation.

of preinduction review during any period of declared war or national emergency.

(5) The ordinary requirement of exhaustion of administrative remedies would not be affected.

B. REFERRAL OF CONSCIENTIOUS OBJECTOR CLAIMS

The Military Selective Service Act should be amended by the addition to Section 6(j), 50 U.S.C. App. § 456(j) (1970), of a provision for the referral of contested and difficult conscientious objector claims to the appropriate State Director's office for advice. Such referral would be available at the instance of a local board or an appeal board or upon the request of a registrant appealing the denial of a conscientious objector claim by his local board. Consideration of such claims by the State Director's office should be completed within a specified and limited period (e.g., 60 or 90 days) unless exceptional circumstances are presented. The response by the State Director's office in such cases should take the form of an advisory opinion or recommendation that would be part of the administrative record to be considered by a reviewing court, but would not be binding on the local board or the appeal board.

C. FURTHER PROCEDURAL REFORMS

The Selective Service System is encouraged to amend its procedural regulations in the following respects:

(1) To allow registrants to be accompanied, represented and advised by counsel or other authorized representatives at local and appeal board appearances.

(2) To provide for the preparation of suitable transcripts of local board and appeal board proceedings involving appearances by registrants.²

(3) To provide a permanent staff for the National Appeal Board and to expand the Board's jurisdiction to include discretionary review of any registrant's claim regardless of whether the appeal board considering the case had been unanimous.

Separate Statement of Henry N. Williams

In accord with 5 U.S.C. § 575(a)(1) (1970), and the first clause of section 2(a) of the Bylaws of the Conference, I record my dissent to this recommendation.

The Assembly, in making this recommendation, requests the Congress to reconsider important and sound recent judgments and urges the Director of Selective Service to accomplish by regulation that

² Transcripts initially could simply take the form of tape recordings, which would be prepared in typewritten form only if necessary for subsequent review.

which the Congress has repeatedly and wisely declined to do by legislation. A majority of the members of the Assembly have committed the prestige of the Conference to a recommendation that, at best, can only be characterized as most unfortunate.

Were the principal features of this recommendation to be implemented our courts would be further burdened, "informal and expeditious processing which is required in selective service cases" would be impossible, and great unfairness to the overwhelming majority of registrants of the Selective Service System would inevitably result without substantial compensating benefits.

RECOMMENDATION 72-8

ADVERSE ACTIONS AGAINST FEDERAL EMPLOYEES

(Adopted Dec. 15, 1972)

A critical part of the mission of the Administrative Conference is to study the processes of government to assure the full protection of the rights of private citizens, including the rights of federal employees. At the same time, the Conference is equally concerned about assisting government agencies to devise and implement efficient administrative procedures that will facilitate accomplishment of their varied programs.

The Civil Service Commission and other government agencies each year conduct a large number of formal personnel action proceedings that involve charges of personal misconduct, poor job performance, or other behavior which reflects adversely on the individual employee. Each year several thousand adverse personnel action appeals are decided throughout the Government; the Civil Service Commission alone adjudicates well over 1200 appeals annually. The nature of these cases and the size of the caseload make it imperative both that proceedings be conducted with scrupulous fairness, and that procedures be neither too costly nor time-consuming. While existing adverse action procedures have attempted to meet these objectives, the Conference believes that implementation of this recommendation will yield substantial improvements in many highly significant respects.

This recommendation is intended to apply only to those classes of federal civilian employment currently entitled to adverse action procedures, as identified in Subchapter S2 of Federal Personnel Manual Supplement 752-1.

A. DEFINITIONS AND STANDARDS

1. *Adverse Action.*—In all cases in which an employing agency takes a personnel action adversely affecting an employee on the basis of his conduct or performance, the employee should be afforded an

opportunity for an evidentiary hearing and his case should be decided on the basis of the record made at the hearing.

Such procedures are inappropriate, however, for use in situations in which an agency action made on the basis of broad managerial considerations of agency structure or resource allocation (*e.g.*, change in job classification, reduction in force) has incidental adverse effects on certain agency employees. The Civil Service Commission should seek legislation redefining the category of "adverse action" to exclude therefrom personnel actions not based on the individual employee's conduct or performance. However, in any proceeding to effect a personnel action assertedly based on managerial considerations, the employee should retain the right to challenge the bona fides of the agency's action.

2. *Efficiency of the Service.*—The Civil Service Commission should publish regulations or interpretive rules elaborating in as much detail as practicable the statutory standard of "efficiency of the service."

B. PROCEDURES FOR AGENCY HEARINGS

1. All employing agencies should establish procedures for personally advising an employee who has received a letter of proposed adverse action about the consequences of the action proposed and the procedures available for contesting it, which should continue to include the right to respond to the employing agency's charges prior to an evidentiary hearing.

2. An employee against whom an adverse action is proposed should have an opportunity for a prompt evidentiary hearing before the action becomes effective. However, if the employing agency determines that retention of the employee in his current duty assignment will adversely affect the ability of his office or installation to perform its functions, the employing agency should be able, pending its final decision (a) to reassign the employee; (b) to place the employee on administrative leave with pay; and (c) if, for a cause attributable to the employee, the hearing is not commenced within 30 days after the agency notifies him of its readiness to proceed or has not resulted in a final agency decision within 60 days after such notification, to place the employee on leave without pay.

3. Except in extremely rare cases where an employing agency can establish good cause for keeping the hearing closed, an employee subject to adverse action should have a right to elect a hearing that is open to the public. An employee is entitled to a private hearing, however, at which he may be accompanied by an observer of his choosing, in addition to any representative. This recommendation is not intended to limit the hearing officer's traditional authority to exclude other witnesses during the taking of testimony, or to maintain order and decorum.

4. The Civil Service Commission should assign the hearing officers to conduct hearings before employing agencies. A hearing officer should be suitably equipped by training and experience to conduct such personnel hearings, and, unless he is an administrative law judge, should not be an employee of the charging agency. Ordinarily, hearing officers should be drawn from a pool established and employed by the Civil Service Commission, but when appropriate the Commission should be able to assign as hearing officers other persons with the prescribed qualifications.

5 Civil Service Commission regulations should make clear that at any hearing the employing agency has both the burden of coming forward with evidence and the burden of persuasion.

6. The hearing officer should use a pre-hearing conference or other means to identify and limit the hearing to the trial of material issues of fact as to which the parties genuinely disagree. The hearing officer should also be authorized to resolve summarily those material issues of fact as to which he is satisfied there is no genuine disagreement.

7. The hearing officer should be authorized to order an employing agency to produce witnesses in its employ or documentary evidence that he believes may be relevant to an employee's case. He should be free to call witnesses himself, to question witnesses for both parties, and to provide guidance to employees who are not represented. With the completion of the hearing, the evidentiary record should be considered closed for purposes of the employing agency's decision and any appeal by the employee to the Civil Service Commission.

8. The hearing officer should make factual findings and prepare a proposed decision, which would be submitted to the official designated by the employing agency to make the agency decision and made available to the parties along with the transcript of the hearing. The parties should have an opportunity (e.g., ten days) in which to submit written argument, including objections to the proposed decision, to the deciding agency official. If the deciding official does not accept the hearing officer's proposed decision, he should prepare a formal agency decision that, among other things, states specifically the reasons for rejecting the hearing officer's findings or recommended disposition. The employing agency should be able to make its personnel action fully effective upon the issuance of its decision, and any subsequent appeal should not have the effect of postponing such effectiveness unless the employing agency otherwise directs.

C. PROCEDURES FOR APPEALS FROM AGENCY DECISIONS

1. Employing agency appeals systems, apart from that required by paragraph B(8) (*i.e.*, a final agency decision following the hearing at a level higher than that proposing the action) should be abolished.

2. An employee against whom adverse action is taken should have

an opportunity for a single appeal outside his agency, to a central appellate authority within the Civil Service Commission.

3. The Civil Service Commission's appellate authority should customarily be limited in its review to the record compiled at the employing agency. Upon the motion of an employee, however, the authority should be able to admit, or remand to the hearing officer for the admission of, evidence that the employee could not reasonably have produced at the original hearing, subject to the employing agency's right to respond or rebut.

4. The Commission's appellate authority should have authority to affirm, or to reverse, or to modify the employing agency's disciplinary action in any appeal.

5. The Commission's appellate authority should assign cases for decision by lot or by rotation so far as practicable, and permit announcement of dissenting and concurring views.

6. The Civil Service Commissioners should retain discretionary authority to reopen and decide exceptional cases upon the petition of either the employing agency or the employee.

7. Employing agency and Commission decisions in adverse action cases should be publicly available after minimum editing necessary to protect employee privacy.

D. EX PARTE COMMUNICATIONS

1. (a) At no time should officials of the Civil Service Commission who participate in or are responsible for the disposition of employee appeals provide advice to either party or to the hearing officer on the initiation, processing, or disposition of any adverse action.

(b) Other Civil Service Commission officials should not advise or consult with either party, or their representatives, regarding the merits of any case that has been formalized by the issuance of a letter of proposed adverse action.

2. Hearing officers who conduct agency hearings and Civil Service Commission officials who participate in or are responsible for deciding employee appeals should be free from all *ex parte* influence or advice—including communications from employing agencies, employee representatives and other Commission employees—relating to the factual issues or appropriate disposition of any adverse action or appeal. Expert professional advice on the facts or disposition of a case (such as the evaluation of a job classification specialist) should only be received on the record, subject to the right of both parties to respond.

E. ROLE OF THE CIVIL SERVICE COMMISSION

With the additional safeguards of the independence of the Civil Service Commission's appellate authority, proposed under C and D

above, it is not necessary to establish a new, independent agency to adjudicate adverse action appeals.

F. EFFECT ON EMPLOYEE GRIEVANCE PROCEDURES

The provisions of this recommendation are not intended to supplant or preclude provision for employee grievance procedures in existing or future collective bargaining agreements.

RECOMMENDATION 73-1

ADVERSE AGENCY PUBLICITY

(Adopted June 8, 1973)

Adverse agency publicity—that is, statements made by an agency or its personnel which invite public attention to an agency's action or policy and which may adversely affect persons identified therein*—can cause serious and sometimes unfair injury. Where a reasonable and equally effective alternative is not available, adverse agency publicity is often necessary to warn of a danger to public health or safety or a threat of significant economic harm, or to serve other legitimate public purposes. However, adverse agency publicity is undesirable when it is erroneous, misleading or excessive or it serves no authorized agency purpose.

Agency practices regarding adverse publicity vary widely. Some agencies use adverse publicity as the primary method of enforcement; for some others it is merely action incidental to formal sanctions. Agency rules seldom establish procedures or standards for the use of adverse agency publicity, and it is almost never subject to effective judicial review.

In meeting these concerns, this recommendation addresses agency use of adverse publicity in connection with investigatory, rulemaking and agency adjudicatory processes as well as informal agency actions. It recommends the adoption of agency rules containing minimum standards and structured practices governing the issuance of publicity.

Recommendation

Each agency should state in its published rules the procedures and policies to be followed in publicizing agency action or policy, and internal operating practices should assure compliance. In the adoption of such procedures and policies, each agency should balance the need for adequately serving the public interest and the need for ade-

*Publicity as used here is distinguished from the mere decision to make records available to the public rather than preserve their confidentiality. That decision is governed by separate criteria set forth in the Freedom of Information Act (5 U.S.C. § 552) and is not within the scope of this recommendation.

quately protecting persons affected by adverse agency publicity in accordance with the following standards:

1. All adverse agency publicity should be factual in content and accurate in description. Disparaging terminology should be avoided.

2. Adverse agency publicity relating to regulatory investigations of specifically identified persons or pending agency trial-type proceedings should issue only in limited circumstances in accordance with the criteria outlined below.

a. Where an agency determines that there is a significant risk the public health or safety may be impaired or substantial economic harm may occur unless the public is immediately notified, it may use publicity as one of the means of speedily and accurately notifying the affected public. However, where public harm can be avoided by immediate discontinuance of an offending practice, a respondent should be allowed an opportunity, where feasible, to cease the practice (pending a legal test) in lieu of adverse agency publicity.

b. Where it is required in order to bring notice of pending agency adjudication to persons likely to be desirous of participating therein or likely to be affected by that or a related adjudication, the agency should rely on publicity to the extent necessary to provide such notice even though it may be adverse to a respondent.

c. Where information concerning adverse agency action is available to the public regardless of agency publicity measures and is likely to result in media publicity, adverse agency publicity should be issued only to the extent necessary to foster agency efficiency, public understanding, or the accuracy of news coverage.

3. Adverse agency publicity not included in paragraph 2 above should issue only after the agency has taken reasonable precautions to assure that the information stated is accurate and that the publicity fulfills an authorized purpose.

4. Where information in adverse agency publicity has a limited basis—for example, allegations subject to subsequent agency adjudication—that fact should be prominently disclosed. Any respondent or prospective respondent in an agency proceeding should, if practicable and consistent with the nature of the proceeding, be given advance notice of adverse agency publicity relating to the proceeding and a reasonable opportunity to prepare in advance a response to such publicity.

5. Where adverse agency publicity is shown to be erroneous or misleading and any person named therein requests a retraction or correction, the agency should issue the retraction or correction in the same manner (or as close thereto as feasible) as that by which the original publicity was disseminated.

RECOMMENDATION 73-2

LABOR CERTIFICATION OF IMMIGRANT ALIENS

(Adopted June 8, 1973)

Under the 1965 amendments to the Immigration and Nationality Act aliens seeking permanent residence for the purpose of employment must obtain a certification from the Secretary of Labor that, in essence, there are no suitable workers available in the United States and that their employment will not adversely affect wages and working conditions. 8 U.S.C. § 1182(a) (14). The labor certifications are made by the regional offices of the Manpower Administration of the Department of Labor.

This recommendation, like the underlying study, is confined to labor certification for permanent residence and does not reach to the certification either of temporary workers or of seasonal or daily commuters. In FY 1972 about 60,000 applications for permanent labor certifications were received and about 30,000 were granted. Aliens in the professions, sciences and arts [PSA] generally make their own applications for employment; all other applications are made by the employer for a particular employment [job-offer].

The procedures and standards for certification and review are outlined in the regulations. 29 C.F.R. §§ 60.2-60.4. Except for two lists of employments where certification is automatic and where it is precluded, the regulations are sparse in detail. They are supplemented by 14 pages of Guidelines, which in turn are supplemented by memoranda from the national office of the Manpower Administration. Some regions hold these supplemental materials confidential, while others make them publicly available.

The initial decision by the certifying officer is made without hearing, incorporating information either gathered (in writing or by telephone) from the state employment service or independently developed by the officer; the underlying information is often vague and formless in nature. Notice of grant or denial is given to the Immigration Service or the consular office which submitted the application, in the case of a PSA applicant, or to the employer in the case of a job-offer applicant, but not to the alien himself. Ninety days are allowed in which either the alien or the employer may appeal a denial; a considerable part of that period may expire before the alien himself has received notice of denial. The Department does not include with its notice of denial any advice as to the right of appeal. The Immigration Service has since February 1972 been advising the PSA applicant of his right to appeal when it forwards the notice.

Review is conducted by a reviewing officer in a regional office. He is free to go outside the record made by the certifying officer. The stated policy is to make the material before the certifying officer available to

the alien or his employer, but the practicing bar denies that that policy is carried out and finds in any case that the information is often uninformative. There is no procedure for access by the applicant to any new material developed by the reviewing officer before final administrative decision. The decisions on review are ordinarily written and adequately informative.

One district court has twice afforded judicial review of a denial of certification, and has in each case reversed the denial with a sharply critical opinion.

Recommendation

A. PROCEDURES AND STANDARDS FOR DECISION

The Guidelines and appropriate supplemental memoranda should be made available to the public as required by the Freedom of Information Act. Copies should be maintained in each regional office. The published regulations should, at such time as this is feasible, be expanded to include the appropriate parts of this supplemental material.

B. THE RECORD FOR DECISION

The national office of the Manpower Administration should in its regulations develop standards which would improve the quality and degree of specificity of the record upon which certification is granted or denied.

C. TAKING AN APPEAL

1. Notice of denial of certification should be sent by the certifying officer directly to the alien who is a PSA applicant as well as to the Immigration Service and the consular office. Notice of denial should be sent the alien job-offer applicant as well as the employer; to avoid consequent confusion the regulations might appropriately be changed to provide that only the employer can appeal denial of a job-offer certification.

2. A notice of the right of appeal should accompany each denial of certification, in conformity with the recent practice of the Immigration Service when it forwards notice of denial to a PSA applicant.

3. In cases where the applicant shows that circumstances beyond his control have prevented timely completion of his material on appeal, the reviewing officer should allow a protective appeal, to be supplemented within a prescribed time.

D. DECISION ON REVIEW

1. The regulations should provide that an applicant on appeal has full access to the record upon which the certifying officer bases his denial.

2. The regulation should state the circumstances in which the reviewing officer may appropriately develop new information, and should provide for advice to, and opportunity for comment by, the applicant if the new information has an effect adverse to his interests.

RECOMMENDATION 73-3

QUALITY ASSURANCE SYSTEMS IN THE ADJUDICATION OF CLAIMS OF ENTITLEMENT TO BENEFITS OR COMPENSATION

(Adopted June 8, 1973)

The Federal Government is engaged in either the direct administration or the funding of a substantial number of programs which involve the adjudication of claims of entitlement to benefits or compensation. Examples include veterans' benefits; the basic Social Security (OASDI) programs; Medicare and Medicaid; public employee retirement benefits; federal employees' and longshoremen's and harbor workers' compensation programs; and programs of categorical public assistance for the aged, blind and disabled and for dependent children.

In many of these programs the number of claims per year is very large while at the same time the determinations of fact and law involved in adjudicating an individual claim may be quite complex and difficult. Moreover, claimants under these programs often lack the personal resources or access to technical assistance necessary to prepare claims material adequately and to pursue hearing or administrative appeal procedures should their claims be denied. These factors give rise to a particular concern with the quality of the adjudication process and product at all levels of the administrative process in programs which make determinations concerning large numbers of claims of entitlement to individual benefits or compensation.

As a part of a continuous effort to provide the highest possible degree of accuracy, timeliness and fairness in the adjudication of claims, the following recommendation should be adopted by agencies which directly administer benefit and compensation programs and by agencies which have a capacity and a responsibility to assure the quality of claims adjudication by grantees of federal funds.

Recommendation

1. Positive caseload management should be recognized as essential to the accurate, timely and fair adjudication of claims of entitlement to benefits or compensation. A positive caseload management system should include three connected operations: (1) the development of standards and methods for measuring the accuracy, timeliness and fairness of agency adjudications; (2) the continuous evaluation of agency adjudications through the application of those standards and

methods; and (3) the use of the information gathered in the course of such evaluation to identify needed improvements in adjudicative performance.

2. As part of their positive caseload management program, agencies should begin immediately to explore, develop and implement statistical quality assurance reporting systems that will indicate the accuracy, timeliness and fairness of claims processing. In designing such systems, agencies should consider the need for information of a type that:

- (a) Reflects differences in the types of cases and types of issues adjudicated and the stages of the administrative process involved;
- (b) Identifies the management unit or, where appropriate, the individual adjudicator involved in order that effective action may be taken to reinforce success and to improve performance;
- (c) Permits separate evaluation of (1) substantive decision-making, (2) case development effort and (3) procedural regularity;
- (d) Enables separate evaluation of particular functions of the decision process (*e.g.*, issue statement or evaluation of evidence in substantive decision-making).

3. Agencies should employ such other techniques for gathering information on their adjudication process, including field investigations and special studies, as are required for the evaluation of accuracy, timeliness and fairness. Agencies should be particularly sensitive to the need for better information on the extent to which claimants' personal resources, social status and access to representation or other assistance may affect the adjudication of claims.

4. The positive caseload management program should facilitate not only objective evaluation of the agency's case processing operation, but also the effective utilization of quality assurance information in policy formation and operational control.

STATEMENT OF THE ADMINISTRATIVE CONFERENCE ON THE ABA
PROPOSALS TO AMEND THE ADMINISTRATIVE PROCEDURE ACT

(Adopted June 7-8, 1973)

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

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

Resolution No. 1

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

Resolution No. 2

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

Resolution No. 3

Resolution No. 3 would extend the existing provisions regarding separation of functions in 5 U.S.C. § 554(d) to all formal proceedings, both adjudicatory and rulemaking; the existing exceptions for rate-making, initial licensing and formal rulemaking generally would be

eliminated. With respect to such formal proceedings, the Conference approves this proposal insofar as it applies to agency staff who have actually engaged in investigative or prosecutorial functions in the particular proceeding, including persons who have actually exercised supervisory authority over such functions once the formal phase of the proceeding has commenced. We do not believe, however, that agency officials having general organizational or supervisory responsibility for such functions should, solely by virtue of that responsibility, be barred from performing their customary function of advising agency members in proceedings not presently covered by 5 U.S.C. § 554(d).

Resolution No. 4

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

Resolution No. 5

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

Resolution No. 6

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

Resolution No. 7

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

Resolution No. 8

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

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

Resolution No. 9

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

Resolution No. 10

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

Resolution No. 11

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

Resolution No. 12

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

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

The above-named members of the Committee on Agency Organization and Personnel are of the opinion, for the reasons set forth in the

Staff report accompanying the proposed Recommendation, that the Conference's position on Resolution No. 3 of the ABA Proposals (Separation of Functions) should be in the form and language originally submitted by the Council and various committees, to wit:

Resolution No. 3

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

Separate Statement of Malcolm S. Mason

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

THE ADMINISTRATIVE CONFERENCE ACT

[Public Law 89-554, September 6, 1966, 80 Stat. 388, as amended by Public Law 92-526 October 21, 1972, 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 in-

formation 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 proposals 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 commit-

tees 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, to contract for the performance of such studies with any public or private persons, firm, association, corporation, or institution under title III of the Federal Property and Administrative Services Act of 1949, as amended (41 U.S.C. 251-260), and to use from time to time, as appropriate, experts and consultants who may be employed in accordance with section 3109 of this title at rates not in excess of the maximum rate of pay for grade GS-15 as provided in section 5332 of this title ;

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(11) utilize, with their consent, the services and facilities of Federal agencies and of State and private agencies and instrumentalities with or without reimbursement;

(12) accept, hold, administer, and utilize gifts, devises, and bequests of property, both real and personal, for the purpose of aiding and facilitating the work of the Conference. Gifts and bequests of money and proceeds from sales of other property received as gifts, devises, or bequests shall be deposited in the Treasury and shall be disbursed upon the order of the Chairman. Property accepted pursuant to this section, and the proceeds thereof, shall be used as nearly as possible in accordance with the terms of the gifts, devises, or bequests. For purposes of Federal income, estate, or gift taxes property accepted under this section shall be considered as a gift, devise, or bequest to the United States;

(13) accept voluntary and uncompensated services, notwithstanding the provisions of section 3679(b) of the Revised Statutes (31 U.S.C. 665(b));

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

(15) 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 appropriated sums necessary not in excess of \$760,000 for the fiscal year ending June 30, 1974, \$805,000 for the fiscal year ending June 30, 1975, \$850,000 for the fiscal year ending June 30, 1976, \$900,000 for the fiscal year ending June 30, 1977, and \$950,000 for the fiscal year ending June 30, 1978, and for each fiscal year thereafter, to carry out the purposes of this subchapter.

