

1973-74 REPORT  
ADMINISTRATIVE  
CONFERENCE  
OF THE UNITED STATES  
SEPTEMBER 1974

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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 1973-74 Report of the Administrative Conference of the United States, covering the significant activities of the agency for the 12-month period from July 1, 1973 through June 30, 1974.

Respectfully,

ANTONIN SCALIA,  
*Chairman.*

## **COUNCIL MEMBERS**

ANTONIN SCALIA

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

RICHARD E. WILEY, Chairman, Federal Communications Commission.

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

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

DALE W. HARDIN, Commissioner, Interstate Commerce Commission.

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

## 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 July 1, 1974:

ROBERT F. ADAMS, lawyer, Mobile, Alabama.  
CHARLES E. ALLEN, General Counsel, Federal Home Loan Bank Board.  
WILLIAM H. ALLEN, lawyer, Washington, D.C.  
RICHARD S. ARNOLD, lawyer, Texarkana, Arkansas.  
H. GREGORY AUSTIN, General Counsel, Small Business Administration.  
FRANK A. BARTIMO, Assistant General Counsel, Department of Defense.  
CLARK BYSE, Professor, Harvard University Law School, Cambridge, Mass.  
DONALD A. CAMPBELL, Judicial Officer, Department of Agriculture.  
CHARLES L. CLAPP, Commissioner, Interstate Commerce Commission.  
MANUEL COHEN, lawyer, Washington, D.C.  
CALVIN J. COLLIER, General Counsel, Federal Trade Commission.  
H. DALE COOK, Director, Bureau of Hearing & Appeals, Social Security Administration.  
JOHN J. CORCORAN, General Counsel, Veterans Administration.  
LOUIS A. COX, General Counsel, United States Postal Service.  
KENNETH CULP DAVIS, Professor, University of Chicago Law School, Chicago, Ill.  
RONALD M. DIETRICH, lawyer, Washington, D.C.  
WILLIAM O. DOUB, Commissioner, Atomic Energy Commission.  
BERNARD DUNAU, lawyer, Washington, D.C.  
STANLEY EBNER, General Counsel, Office of Management and Budget.  
ROBERT ELLIOTT, General Counsel, Department of Housing & Urban Development.  
RODNEY E. EYSTER, General Counsel, Department of Transportation.  
JOHN H. FANNING, Member, National Labor Relations Board.  
BEN C. FISHER, lawyer, Washington, D.C.  
JAMES F. FLUG, lawyer, Washington, D.C.  
RONALD B. FRANKUM, lawyer, Del Mar, California 92074  
WARNER W. GARDNER, lawyer, Washington, D.C.  
WHITNEY GILLILLAND, Commissioner, Civil Aeronautics Board.  
JACK GREENBERG, lawyer, New York, New York.  
RICHARD L. GRIFFITH, lawyer, Honolulu, Hawaii.  
WOLF HABER, Assistant General Counsel, Department of the Treasury.  
DANIEL T. HANSCOM, Chief Administrative Law Judge, Federal Trade Commission.  
ASHTON R. HARDY, General Counsel, Federal Communications Commission.  
GEOFFREY C. HAZARD, JR., Professor, Yale Law School, New Haven, Connecticut.  
GEORGE H. HEARN, Commissioner, Federal Maritime Commission.

RAGAN A. HENRY, lawyer, Philadelphia, Pennsylvania.  
S. NEIL HOSENBALL, Deputy General Counsel, National Aeronautics & Space Administration.  
SAMUEL C. JACKSON, lawyer, Washington, D.C.  
CORNELIUS B. KENNEDY, lawyer, Washington, D.C.  
WILLIAM J. KILBERG, Solicitor, Department of Labor.  
EARL W. KINTNER, lawyer, Washington, D.C.  
JOHN A. KNEBEL, General Counsel, Department of Agriculture.  
VICTOR H. KRAMER, Professor, Georgetown University Law Center, Washington, D.C.  
GEORGE A. LEMAISTRE, Director, Federal Deposit Insurance Corporation.  
SOL LINDENBAUM, Executive Assistant to the Attorney General, Department of Justice.  
DAVID E. LINDGREN, Deputy Solicitor, Department of the Interior.  
PHILLIP A. LOOMIS, JR., Commissioner, Securities & Exchange Commission.  
K. E. MALMBORG, Assistant Legal Adviser for Management & Consular Affairs, Department of State.  
MALCOLM MASON, Office of General Counsel, Department of Health, Education, and Welfare.  
ALFRED MEISNER, Assistant General Counsel for Administration, Department of Commerce.  
IRA M. MILLSTEIN, lawyer, New York, New York.  
ANTHONY L. MONDELLO, General Counsel, U.S. Civil Service Commission.  
JOHN N. NASSIKAS, Chairman, Federal Power Commission.  
WILLIAM A. NELSON, lawyer, Miami, Florida.  
CONSTANCE B. NEWMAN, Commissioner, Consumer Product Safety Commission.  
LEONARD NIEDERLEHNER, Deputy General Counsel, Department of Defense.  
THOMAS J. O'CONNELL, General Counsel, Board of Governors, Federal Reserve System.  
OWEN OLPIN, Professor, University of Utah Law School, Salt Lake City, Utah.  
MAX D. PAGLIN, Permanent Member, Atomic Safety and Licensing Board Panel, Atomic Energy Commission.  
JOHN W. PETTIT, lawyer, Washington, D.C.  
RICHARD W. POGUE, lawyer, Cleveland, Ohio.  
JOHN H. POWELL, JR., Chairman, Equal Employment Opportunity Commission.  
MARTIN F. RICHMAN, lawyer, New York, New York.  
OTIS M. SMITH, lawyer, Detroit, Michigan.  
PENELOPE H. THUNBERG, economist, Washington, D.C.  
HAROLD S. TRIMMER, General Counsel, General Services Administration.  
PETER F. TUFO, lawyer, New York, New York.  
HARRY H. VOIGT, lawyer, Washington, D.C.  
JOHN P. VUKASIN, JR., lawyer, San Francisco, California.  
CHARLES A. WEBB, lawyer, Washington, D.C.  
JAMES E. WESNER, lawyer, Washington, D.C.  
MEADE WHITAKER, Chief Counsel, Internal Revenue Service.  
HENRY N. WILLIAMS, Deputy General Counsel, Selective Service System.  
JERRE S. WILLIAMS, Professor, University of Texas Law School, Austin, Texas.  
ROBERT H. YOUNG, lawyer, Philadelphia, Pennsylvania.  
ROBERT V. ZENER, Deputy General Counsel, Environmental Protection Agency.  
JOSEPH ZWERDLING, Chief Administrative Law Judge, Federal Power Commission.

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.

- CARL A. AUERBACH, Dean, University of Minnesota Law School, Minneapolis, Minn.
- ST. JOHN BARRETT, Deputy General Counsel, Department of Health, Education, and Welfare.
- 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.
- WILLIAM E. CASSELMAN, II, General Counsel, General Services Administration.
- ELDON H. CROWELL, lawyer, Washington, D.C.
- DAVID S. DENNISON, Commissioner, Federal Trade Commission.
- ROBERT C. GRESHAM, Commissioner, Interstate Commerce Commission.
- CARLA HILLS, lawyer, Los Angeles, Calif.
- RICHARD H. KEATINGE, lawyer, Los Angeles, Calif.
- ALAN G. KIRK, Deputy General Counsel, Environmental Protection Agency.
- ARTHUR LEFF, Associate Chief Administrative Law Judge, National Labor Relations Board.
- CHARLOTTE TUTTLE LLOYD, Assistant General Counsel, Department of the Treasury.
- LEE LOEVINGER, lawyer, Washington, D.C.
- ROBERT L. MCCARTY, lawyer, Washington, D.C.
- JAMES MITCHELL, General Counsel, Department of Housing & Urban Development.
- C. ROGER NELSON, lawyer, Washington, D.C.
- L. CLAIR NELSON, lawyer, New York, N.Y.
- NATHAN OSTROFF, Chairman, Appeals Board, Department of Commerce.
- DAVID PREVIANT, lawyer, Milwaukee, Wis.
- EDWIN F. RAINS, Deputy Commissioner of Customs, Department of the Treasury.
- JAMES T. RAMEY, Commissioner, U.S. Atomic Energy Commission.
- 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.
- RICHARD E. STEWART, lawyer, New York, N.Y.
- EARL J. THOMAS, Director, Office of Inspection, Department of the Interior.
- FRANK WILLE, Chairman, Federal Deposit Insurance Corp.

**STAFF OF THE CHAIRMAN'S OFFICE**

**JOHN F. CUSHMAN**  
Executive Director

**RICHARD K. BERG**  
Executive Secretary  
**WILLIAM F. MURPHY**  
Staff Attorney  
**GEORGE P. SMITH, III**  
Staff Attorney

**ROBERT W. HAMILTON**  
Research Director  
**WILLIAM R. SHAW**  
Staff Attorney  
**LYNDA S. ZENGERLE**  
Staff Attorney

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## CHAIRMAN'S FOREWORD

Fiscal 1974 represented, I believe, the beginning of a new phase in the existence of the Administrative Conference. Thanks to the passage in October 1972 of a statutory amendment substantially raising our appropriations ceiling, the level of funds made available in Fiscal 1974 for the first time enabled the Conference to conduct several major, long-term projects in addition to the relatively short-term and narrowly focused inquiries which in the past have formed almost the entirety of our activities. I refer to the project for developing standardized statistical data on all formal agency proceedings and to the study of various procedures of the Internal Revenue Service; both are described at length later in this Report. I believe that the work program of the Conference in the future will regularly consist of two or more such major studies in addition to the more limited inquiries regularly handled by consultants to the committees and by the staff of the Chairman's Office. The latter type of inquiry can of course not be slighted, for in administrative law it is more often the trees than the forest that is overlooked; but at the same time there are neglected areas of broad inquiry which we now have the ability to pursue.

While the capacity of the Conference is increasing, the need for its efforts is increasing as well. Improvement of administrative procedure in the past was sometimes impeded by the fact that the subject did not attract enough attention; there was insufficient awareness of its importance to sound government. We may now be in a period in which the drought of unconcern has been replaced by a flood of attention, which has its own dangers. Coinciding with a newly awakened consciousness of the machinery of law on the part of the society as a whole, there has developed a keen Congressional awareness of the power of administrative procedures to affect the substance of government programs. Major Federal regulatory legislation is being passed with a frequency not seen since the days of the New Deal; and the procedural portions of that legislation are extraordinarily diverse, detailed and sometimes hotly contested. At the time this is written, one of the most controversial legislative proposals under consideration is a bill which may be viewed as almost

entirely procedural—the Consumer Protection Act, creating a new agency not to regulate, but to set right what its proponents consider an inadequacy of representation in the administrative processes of all the existing agencies.

Obviously, in such an era that portion of the Conference's advice-giving function which pertains to the Congress is of increased importance. This is reflected in the extraordinary frequency of testimony, written comment, and informal consultation with Congressional committees and committee staffs conducted by the Chairman's Office during the past year. It is also reflected in the Conference's Seminar on the Administrative Procedure Act, conducted for the first time on Capitol Hill for the benefit of Congressional staff.

There is much more that must be done. The consultant's report pertaining to Recommendation 72-5, Procedures for the Adoption of Rules of General Applicability, noted the recent tendency of the Congress to provide a variety of procedures in addition to or in variation of those set forth in the APA. That trend is still accelerating and extends well beyond merely the rulemaking field. It sometimes appears that Congress has lost confidence in the judgments it made in 1946, and feels obliged to reconsider the question of what constitutes fair and efficient procedure each time it writes new legislation. This is a major challenge facing the Conference in the years ahead: To prevent the balkanization of administrative law, by either re-establishing the validity of the general dispositions made in the Administrative Procedure Act or by achieving such fundamental changes in that Act as may be necessary to satisfy more recent standards of fairness and efficiency. Unless this is done, I fear that repeated Congressional attention to administrative procedure as a mere subsidiary issue in the context of more important substantive controversies will lead to an administrative process that is pointlessly diverse and frequently unsound.

\* \* \*

In June of 1974 the terms of all our public members expired, and pursuant to our Bylaws and our normal rotation process many members have not been reappointed. I wish to express the Conference's appreciation to all those departing colleagues who have given so generously of their scarce time and abundant talent to further the agency's work.

## 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 set forth, *infra* pp. 68-73. 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. He is a member of the faculty of the University of Virginia Law School, and came to



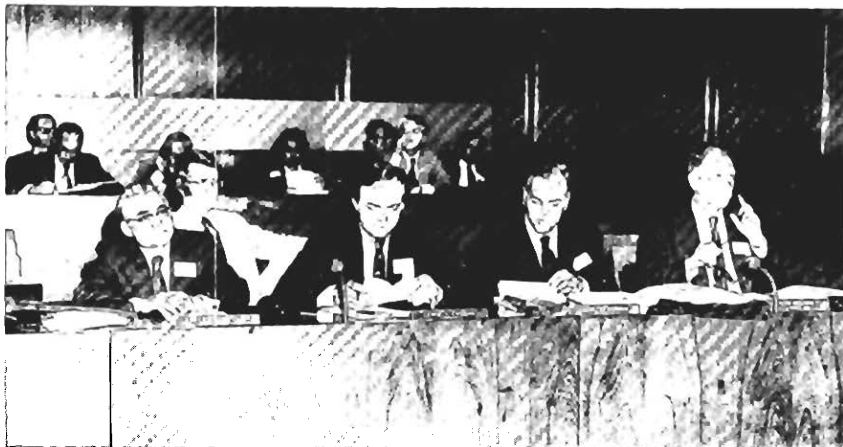
*Chairman Antonin Scalia reporting on recent activities of the Conference at the Eleventh Plenary Session.*

the Conference from his post as General Counsel of the Office of Telecommunications Policy, Executive Office of the President.

As this report goes to press, Mr. Scalia has been confirmed as Assistant Attorney General, Office of Legal Counsel, Department of Justice; Professor Robert A. Anthony, a member of the faculty of Cornell University Law School and former General Counsel and Director of the Office of Foreign Direct Investment, Department of Commerce, has been confirmed as the new Chairman of the Administrative Conference.

#### 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



*Members of the Council: Above, from left to right: Robert G. Dixon, Jr.; Lewis A. Engman; John W. Barnum; Walter Gellhorn. Below, from left to right: Richard E. Wiley; Richard C. Van Dusen; Richard B. Smith; Marion Edwyn Harrison; Harold L. Russell.*



and consider reports and recommendations before they are considered by the Assembly, and to exercise general budgetary and policy supervision.

Three vacancies occurred in the Government membership of the Council during the year, attributable to the departure from Government service of Edward L. Morgan (Vice Chairman of the Conference) and Charles D. Ablard, and the completion of the term of Dale W. Hardin. To fill these vacancies the President appointed as Vice Chairman of the Conference, Leonard Garment, Counsel to the President; Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, Department of Justice; and Lewis A. Engman, Chairman, Federal Trade Commission.

Three public members of the Council whose terms expired in 1974 were reappointed: Harold L. Russell, Esq., of Atlanta, Georgia; Professor Walter Gellhorn of Columbia University Law School; and Marion Edwyn Harrison, Esq., of Washington, D.C.

#### 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 91 members. The Chairman and the other members of the Council account for 11 of this number; the remaining 80 fall into the following groups:



*Attorney General William B. Saxbe addressing the Eleventh Plenary Session. Seated from left to right: Chairman Antonin Scalia; John F. Cushman, Executive Director; Richard K. Berg, Executive Secretary.*

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. 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 .....                                    | 2  |
| (includes Administrative Law Judge)                                  |    |
| 9. Federal Trade Commission .....                                    | 2  |
| (includes Administrative Law Judge)                                  |    |
| 10. Interstate Commerce Commission .....                             | 1  |
| 11. National Labor Relations Board .....                             | 1  |
| 12. Securities and Exchange Commission .....                         | 1  |
|  | 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 additional members, as follows:

|  |    |
|--|----|
| 1. Department of State .....   | 1  |
| 2. Department of the Treasury .....  | 2  |
| (includes Internal Revenue Service)  |    |
| 3. Department of Defense .....   | 2  |
| 4. Department of Justice .....   | 1  |
| 5. Department of the Interior .....  | 1  |
| 6. Department of Agriculture .....   | 2  |
| 7. Department of Commerce .....  | 1  |
| 8. Department of Labor .....   | 1  |
| 9. Department of Health, Education, and Welfare .....                      | 3  |
| (includes Social Security Administration and Food and Drug Administration) |    |
| 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 |

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\*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 36. On June 30, 1974, the two-year terms of the non-government members of the Conference expired. Nineteen members were reappointed and sixteen new members were appointed, all for two-year terms to expire June 30, 1976. These changes and the full list of all present members appear in the membership lists, *supra*, pp. iii-vii.

The Assembly, which has ultimate authority over all activities of the Conference, operates much like a legislative body. It has adopted Bylaws 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 ..... | Anthony L. Mondello.    |
| 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 .....      | Cornelius B. Kennedy.   |

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 50 recommendations, of which seven were adopted during the period covered by this Report. The Assembly has also approved a number of statements expressing the views of the Conference, including three with respect to the Resolutions of the American Bar Association calling for amendment of the Administrative Procedure Act.

Volumes I and II of the Recommendations and Reports of the Administrative Conference of the United States, published in June 1970 and June 1973, respectively, contain the official text of the recommendations and statements adopted by the Assembly during the period January 8, 1968-December 31, 1972. These volumes also contain the full text of the research reports which support the recommendations 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, statements and supporting research reports since December 1972 will be published in Volume III of the Recommendations and Reports of the Conference which should be available early in 1975. The recommendations and statements of the Conference are also published in the Annual Reports of the Conference, in the Federal Register (38 F.R. 16839; 39 F.R. 4846; and 39 F.R. 23041), and those of a continuing interest in the Code of Federal Regulations, Title I, Part 305.

## ACTIONS OF THE ASSEMBLY

At the Conference's Tenth Plenary Session, December 18-19, 1973, three recommendations and a formal statement concerning the ABA proposal to amend the definition of "Rule" in the



*Members of the Assembly considering proposed recommendations. Above at desk, from left to right: Judge Arthur Leff; Roger C. Nelson, Chairman, Committee on Compliance and Enforcement; Kenneth Culp Davis; Cornelius B. Kennedy, Chairman, Committee on Rulemaking and Public Information; Constance B. Newman. Below at desk, from left to right: Victor H. Kramer; William H. Allen, Chairman, Committee on Judicial Review; Ben C. Fisher, Chairman, Committee on Licenses and Authorizations; Calvin J. Collier.*



Administrative Procedure Act were adopted; at the Eleventh Plenary Session, May 30-31, 1974, four recommendations and a formal statement concerning the ABA proposal with respect to the role of presiding officers were adopted. A brief description of these actions follows; the full texts appear at pp. 36-63, *infra*.

SUMMARY OF RECOMMENDATION 73-4  
ADMINISTRATION OF THE ANTI-DUMPING LAW BY THE  
DEPARTMENT OF THE TREASURY

The Conference recommends changes both in the statute and in the procedures used by the Treasury Department in administering the anti-dumping law. This provides for the imposition of an equalizing duty when it has been determined that foreign manufacturers are selling their products in the United States at prices less than those charged abroad ("less than fair value"), and that such price discrimination injures domestic competitors.

The four principal administrative changes called for would:

(1) provide an opportunity for any interested party to confer with the Customs Representative prior to completion of the field investigation to ascertain how he is compiling and verifying data and to make suggestions for possible additions and refinements;

(2) exclude from the Finding of Dumping those exporters whose sales have been subjected to the standard sampling and as to whom no "less than fair value" sales have been found;

(3) make available at cost of reproduction the tentative decision of the Commissioner of Customs, including all supporting non-confidential documents which are transmitted to the Assistant Secretary of the Treasury; and

(4) require that all tentative and final decisions contain a more detailed statement of findings and conclusions on all material issues of fact or law.

The recommendation notes that the anti-dumping law requires unnecessary and inefficient procedures, including a rigid bifurcation of the decisional process between Treasury and the Tariff Commission. Statutory amendments are called for to enable Treasury and the Tariff Commission to coordinate their efforts so that the injury investigation by the Commission may be conducted either prior to, or simultaneously with, the less than fair value investigation at Treasury; also to allow appeal to the courts immediately after issuance of the Finding of Dumping, rather than only when the duty has been assessed.

SUMMARY OF RECOMMENDATION 73-5  
ELIMINATION OF THE "MILITARY OR FOREIGN AFFAIRS FUNCTION"  
EXEMPTION FROM APA RULEMAKING REQUIREMENTS

This recommendation calls for an amendment to Section 553(a) of the Administrative Procedure Act to eliminate as unnecessarily broad and unwarranted the categorical exemption from public rulemaking procedures of matters which involve a "military or foreign affairs function of the United States." As amended, however, the statute would retain modified exemptive provisions for rulemaking involving matters specifically required by Executive order to be kept secret in the interest of national defense or foreign policy. Moreover, the proposed amendment would clarify the agencies' power to prescribe by rule narrowly drawn categories of rulemaking to be exempt from public rulemaking procedure where the agency finds for stated reasons that notice and public procedures are impracticable, unnecessary or contrary to the public interest (including military or foreign affairs interests).

As with the earlier Conference recommendation addressed to the elimination of the exemptions from public rulemaking for matters "relating to public property, loans, grants, benefits or contracts" (Recommendation 69-8, October 22, 1969), Recommendation 73-5 calls upon agencies to use public procedures voluntarily, where appropriate, even though not now required to do so by the statute. No change would be made in the authority of agencies to omit public procedures by proper determination on a case-by-case basis. Nor is the recommendation intended to diminish the power of agencies to omit APA rulemaking procedures where other exemptions are applicable, such as those for "general statements of policy" or for rules relating to "agency management or personnel."

SUMMARY OF RECOMMENDATION 73-6  
PROCEDURES FOR RESOLUTION OF ENVIRONMENTAL ISSUES  
IN LICENSING PROCEEDINGS

New legislation, especially the National Environmental Policy Act, has imposed on Federal licensing agencies responsibility to consider the effect of licensed activities upon environmental values. The Conference concluded that the nature, complexity and sheer number of the environmental issues to be considered make it important where possible to avoid repeated litigation of the same issue in successive licensing proceedings; and the wide public interest in environmental matters makes it desirable that

the environmental issues of broad applicability be treated comprehensively, in a visible and widely noticed proceeding.

The recommendation calls upon each licensing agency to analyze the activities subject to its jurisdiction to identify environmental issues common to more than one application and appropriate for across-the-board treatment. Issues so identified should be disposed of in "generic" proceedings, pursuant to procedures which will ordinarily enable the conclusions to be binding in subsequent cases barring special local conditions or changed circumstances. In such generic proceedings, the opportunity should be afforded for the presentation of oral testimony and cross-examination where required by law or where the agency considers it desirable. Special care should be taken to insure that persons likely to be affected by future licenses or who have exhibited an interest in related problems are given adequate notice.

It should be standard practice for agencies and applicants to disclose and make available to the public at the earliest practicable date all relevant studies, reports and documents, not excepted by law or privileged against disclosure. Environmental statements should be drafted in terms understandable to laymen and regulations for license applications should stress as a major goal provision of information to the public on environmental questions.

#### SUMMARY OF RECOMMENDATION 74-1 SUBPENA POWER IN FORMAL RULEMAKING AND FORMAL ADJUDICATION

In its June, 1973 statement regarding the American Bar Association's proposals for revising the Administrative Procedure Act, the Conference endorsed an amendment which would make agency subpoenas available to the parties in all adjudications subject to 5 U.S.C. §§ 554, 556 and 557. Recommendation 74-1 applies and somewhat expands upon this statement by proposing specific statutory language.

The recommendation calls for a new subsection to section 556 making agency subpoenas available in all proceedings, *both adjudication and rulemaking*, governed by that section. In the event of failure or refusal of a witness to obey a subpoena, the agency would be authorized to seek judicial enforcement in the appropriate United States District Court. This grant of subpoena power would be in addition to and not in limitation of any existing statutory authority of the agency to issue and enforce subpoenas, and is intended to deal with situations in which subpoena authority is presently lacking or inadequate. It is believed that the Postal Service, Food and Drug Administration, and the Depart-

ment of Interior would be principally affected by this proposed amendment.

The recommendation also proposes an amendment to section 555(d) of the Administrative Procedure Act specifying that agencies must delegate to presiding officers authority to sign and issue subpoenas in proceedings governed by section 556. Such delegation is probably required by the present law [§ 556(c) (2)], and has been effected in nearly all agencies, but it was thought desirable to remove whatever doubts may exist.

The recommendation speaks only to the issue of subpoena authority in formal adjudication and rulemaking under the Administrative Procedure Act; it is not intended to express any judgment on the need for grants of subpoena authority in other proceedings or in investigations.

#### SUMMARY OF RECOMMENDATION 74-2 PROCEDURES FOR DISCRETIONARY DISTRIBUTION OF FEDERAL ASSISTANCE

This recommendation applies to all domestic programs involving discretionary distribution of Federal assistance, not merely in the form of grants but in all forms other than personal services (including, for example, loans and guarantees). It urges agencies to state publicly the specific results sought to be achieved by their assistance programs and to articulate the criteria guiding their actions in making awards. Whenever possible such criteria should provide for the award of aid either on an entitlement basis, to all who meet specific requirements, or on a competitive basis, to those who best satisfy stated selection factors. (It is acknowledged, however, that in research, demonstration, developmental and experimental programs, the specification of criteria cannot always be as complete.) Requirements imposed upon recipients of assistance should be clearly stated and, where generally applicable, should be set forth in agency rules rather than as special conditions to particular assistance agreements. Both the criteria and the generally applicable requirements should be developed by public procedure, under the notice-and-comment rulemaking provisions of 5 U.S.C. § 553.

Since awareness of problems and of violations of rules is essential to sound administration, the recommendation urges the establishment of clear and accessible complaint procedures. The specific mechanism for receiving and acting on complaints is left to the agencies' judgment.

The Conference urges that where they have authority to do so agencies require recipients of Federal assistance who redistribute the support to ultimate beneficiaries (*e.g.*, community action

agencies under the Economic Opportunity Act, 42 U.S.C. § 2701, *et seq.*) to adhere to similar policies of articulating objectives, criteria and requirements, and providing for the receipt and consideration of complaints.

SUMMARY OF RECOMMENDATION 74-3  
PROCEDURES OF THE DEPARTMENT OF THE INTERIOR WITH  
RESPECT TO MINING CLAIMS ON PUBLIC LANDS

The Department of the Interior adjudicates mining claims on public lands under the General Mining Law of 1872, which has not been significantly amended since its passage. Under that law, a miner acquires a valid possessory interest only when he discovers a valuable mineral deposit; but he may "stake" a claim without any proof of such discovery, and—under the Department's present procedures—can protect the claim without any filing beyond a metes-and-bounds description in the State courthouse for the county in which the claim is located. When the Department wishes to establish clear Federal title to the land—in order, for example, to establish a new National Park or build a new dam—it conducts a tedious search of county land records; and it provides a formal APA hearing for the claims thus identified, even when the claimant has made no preliminary showing of a mineral discovery.

The Conference recommendation is in three parts. First, it calls for improved procedures for identifying claims. Federal registration of claims should be required, either by legislation or, if possible, by Department rule. Pending the implementation of mandatory registration procedures, the Department should afford facilities for voluntary registration by persons who wish to be assured of personal notice of governmental actions affecting their interests. When title to particular tracts of land must be established, the Department should adopt procedures requiring claimants to identify themselves and their claims, and should assume an obligation to provide personal notice only to those claimants who have registered or otherwise made known to the Department their interest, or whose identity can be readily discovered by visual inspection of the land and by limited inquiry.

The second part of the recommendation is addressed to the Department's procedures for hearing and reviewing claims. Mining claimants have been held entitled to a formal, on-the-record adjudication under the APA. However, the recommendation urges that the Department require a claimant to set forth the facts supporting his claim in order to establish a right to a hearing and that it place upon the claimant the burden of going forward as well as the burden of proof. Administrative law judges should be

authorized to rule from the bench in cases where the issues of fact and law prove so simple that delay to await the transcript and briefs is unnecessary. This part of the recommendation also calls for the Department to adopt measures, now lacking, to coordinate the adjudicative role of the Board of Land Appeals with the policymaking responsibility of the Secretary of the Interior. The Conference also recommends legislation providing improved subpoena authority for the Department's Bureau of Land Management and according judicial review of agency decisions in the Courts of Appeals, with the substantial evidence test applicable to agency findings of facts.

The last part of the recommendation deals with the Department's procedures for rulemaking and public information. It calls for increased opportunity for inspection of and comment upon Government-developed data in connection with notice-and-comment rulemaking. It also recommends that the Department simplify the relevant sources of law by including in published regulations matter presently incorporated in staff manuals and other internal documents, by codifying in regulations policies generated through the adjudicatory process, and by publishing a full description of the BLM's organization and operating procedures.

#### SUMMARY OF RECOMMENDATION 74-4 PREENFORCEMENT JUDICIAL REVIEW OF RULES OF GENERAL APPLICABILITY

In this recommendation, the Conference considered some of the complex and difficult questions that arise when courts review rules adopted through informal procedures before they are applied to particular persons in adjudicative proceedings. Specifically recognizing that its action did not reach several problem areas in which further research is necessary, the Conference—

(1) Described the administrative materials that should be available for the court to review. These include (a) the notice of proposed rulemaking; (b) the written submissions of interested persons; (c) any transcripts of oral presentations; (d) other factual information that was considered by the authority responsible for promulgation of the rule or that is proffered by the agency as pertinent to the rule; (e) reports of any advisory committees; and (f) the agency's concise general statement or final order.

(2) Stated that references to "substantial evidence" in recent statutes providing for judicial review of rulemaking should not, in and of itself, be used as a basis for the conclusion that the agency must provide rulemaking procedures beyond the notice-and-comment requirements of 5 U.S.C. § 553.

(3) Reaffirmed that the proper test for judicial review of rules is the “arbitrary, capricious [or] an abuse of discretion” test of 5 U.S.C. § 706(2)(A). When the factual support for the rule is challenged, this test requires the court to decide whether the agency’s conclusions can be said to be rationally supported on the basis of the information before the Court.

(4) Recommended that future statutes providing for judicial review of informal rulemaking should refer only to the standards for such review established by the APA, 5 U.S.C. § 706. These do not include the “substantial evidence” test of 5 U.S.C. § 706(2)(E), which is inapplicable to informal rulemaking. Existing statutes containing references to the “substantial evidence” test should be construed as establishing a standard comparable to that set forth in 5 U.S.C. § 706(2)(A) unless a contrary legislative intent clearly appears.

STATEMENT OF THE ADMINISTRATIVE CONFERENCE ON ABA  
RESOLUTION NO. 1 PROPOSING TO AMEND THE DEFINITION OF  
“RULE” IN THE ADMINISTRATIVE PROCEDURE ACT.

The Conference adopted a formal statement endorsing Resolution No. 1 of the American Bar Association’s Resolutions concerning amendment of the Administrative Procedure Act. This calls for improved definitions of “rule” and “order” so as to distinguish more clearly between the nature of rulemaking and the nature of adjudication. Specifically, the Conference endorses the recommendation of the ABA that the words “or particular” and the entire second clause be deleted from the definition of “rule” in 5 U.S.C. § 551(4).

This Conference statement was qualified in a number of respects in order to assure that the amendment would not be interpreted to bring about undesired changes in the operative sections of the Act. The statement specifies, for example, that a matter may be considered to be of “general applicability” (and therefore a “rule”) even though it is directly applicable to a class which consists of only one or a few persons, if the class is open in the sense that in the future the number of members of the class may be increased. By the same token a matter may be considered to be of “particular applicability” (and therefore an “order”) even though it is applicable to several persons, if the agency clearly specifies an intention to limit its applicability to the particular persons concerned. Other express understandings deal with the effect of the deletion of the second clause of the definition of “rule”; with technical changes necessary to avoid inadvertent alteration of the procedures applicable to ratemaking; with the precedential value of agency decisions; with informal adjudica-

tion; and with the prospective application of the definitional change.

The recommended change in the definition of rule is not intended to affect a number of prior Conference recommendations which treat with rulemaking, trial-type procedures, and articulation of agency policies (See Conference Recommendations 71-3, 71-6, and 72-5). The statement is a further refinement of the position taken by the Conference in June, 1973, when it addressed itself to this and other ABA Resolutions to amend the APA (Statement printed in 1972-73 Annual Report of the Administrative Conference, pp. 49-53).

**STATEMENT ON ABA RESOLUTION NO. 8 CONCERNING THE ROLE OF PRESIDING OFFICERS IN FORMAL PROCEEDINGS.**

The Conference adopted a revised statement of policy with respect to issues raised by the American Bar Association in its Resolution No. 8 to amend the Administrative Procedure Act.

The statement of policy notes the importance of the role of administrative law judges in formal agency proceedings. It endorses the provision of present law making an intermediate decision by the administrative law judge mandatory in all cases of formal adjudication other than initial licensing, even where there is no material issue of fact. It further asserts that such an intermediate decision is ordinarily highly desirable, even in ratemaking, initial licensing and formal rulemaking, though in those proceedings the agency should (as under present law) have authority to omit it where the need for expedition makes it impractical or when the agency's own tentative decision or the recommended decision of a responsible agency employee might be more helpful. Determinations to omit intermediate decisions should be able to be made either on a case-by-case basis or in advance for a specifically defined category of cases.

The statement also reaffirmed the Conference's view that agencies should be enabled to accord finality to the decisions of their administrative law judges without the necessity of actual agency review in each case. (See Conference Recommendation 68-6).

## 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.

#### *Studies Completed in 1973-74*

ABA Resolution No. 8, concerning amendment of the Administrative Procedure Act (staff assistance: Robert W. Hamilton), resulting in revision of the former Conference Statement on this subject (See 1972-73 Annual Report, pp. 49-53).

#### *Pending*

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).

Role of administrative law judges in the agency hearing process: principles for determining when statutes should require their use. (Consultant: Victor G. Rosenblum, Northwestern University Law School).

### 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 1973-74*

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), no recommendation now contemplated.

Procedures of the Department of Agriculture in administering agricultural production controls (Consultant: Dov M. Grunschlag, University of California Law School, Davis), no recommendation now contemplated.

*Pending*

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

Agency procedures for debarment of government contractors. (Consultant: John M. Steadman, Georgetown University Law Center).

### 3. COMMITTEE ON COMPLIANCE AND ENFORCEMENT PROCEEDINGS

*Chairman* in FY 1974, C. ROGER NELSON; *Present Chairman*, ANTHONY L. MONDELLO

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 1973-74*

Subpena power in formal rulemaking and formal adjudication (staff assistance: Richard K. Berg), resulting in Recommendation 74-1.

Sample statute for administrative imposition of civil money penalties (Consultant: Harvey J. Goldschmid, Columbia University School of Law; staff assistance: Robert W. Hamilton, William R. Shaw), implementing in part Recommendation 72-6.

*Pending*

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

Citizen enforcement of Federal regulatory statutes; the "private attorney general". (Consultant: Jerry L. Mashaw, University of Virginia Law School).

Procedures for ensuring compliance by Federal facilities with Federal environmental standards. (staff assistance: William R. Shaw).

### 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 1973-74*

Procedures for discretionary distribution of Federal assistance. (Consultant: Margaret Gilhooley, University of Colorado School of Law), resulting in Recommendation 74-2.

*Pending*

Effect of representation (by attorneys and others) in disability claims proceedings. (Consultant: William D. Popkin, University of Indiana Law School).

Affirmative action requirements with respect to University hiring under E.O. 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.

*Pending*

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).

Coordinated study of informal decision-making in various agencies. (Consultant: Robert W. Hamilton, University of Texas Law School; staff attorneys; 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 1973-74*

Preenforcement judicial review of rules of general applicability. (Consultant: Paul R. Verkuil, University of North Carolina Law School), resulting in Recommendation 74-4.

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

University of Iowa College of Law), resulting in advice to the Department of Justice.

*Pending*

Forum for judicial review of administrative agency procedures: specialized court vs. District Court vs. Court of Appeals. (Consultants: David P. Currie, University of Chicago Law School; Frank I. Goodman, University of Pennsylvania Law School).

Role of Justice Department in handling Department of Labor litigation. (Consultant: Paul D. Carrington, University of Michigan Law School).

Relations between the administrative agencies and the Department of Justice in connection with litigation. (Consultant: John F. Davis, University of Maryland Law School).

Criteria and techniques for application of the doctrine of primary jurisdiction by Federal courts. (Consultant: Michael H. Botein, Rutgers University School of Law).

Nature and effect of judicially imposed procedures for informal rulemaking beyond those required by 5 U.S.C. §553. (Consultant: Stephen F. Williams, University of Colorado 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.

*Studies Completed in 1973-74*

Procedures for desolution of environmental issues in licensing proceedings. (Consultant: Arthur W. Murphy, Columbia University Law School), resulting in Recommendation 73-6.

Procedures of the Department of the Interior with respect to Mining Claims on Public Lands. (Consultant: Peter L. Strauss, Columbia University Law School), resulting in Recommendation 74-3.

*Pending*

Procedures of Federal Banking regulatory agencies. (Consultant: Kenneth E. Scott, Stanford University Law School).

Procedures of the Food and Drug Administration in evaluating and approving new drugs for marketing. (Consultant: Richard A. Merrill, University of Virginia Law School).

## 8. COMMITTEE ON RATEMAKING AND ECONOMIC REGULATION

*Chairman, WHITNEY GILLILLAND*

This Committee 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.

*Studies Completed in 1973-74*

Administration of the Anti-Dumping Law by the Department of the Treasury (Consultant: Warren F. Schwartz, University of Virginia Law School), resulting in Recommendation 73-4.

*Pending*

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

Efficacy of traditional ratemaking procedures for the resolution of modern issues confronting regulatory agencies. (Consultant: Kenneth W. Dam, University of Chicago Law School).

Treatment of trade secrets and confidential information in agency proceedings (Consultant: Warren F. Schwartz, University of Virginia Law School).

## 9. COMMITTEE ON RULEMAKING AND PUBLIC INFORMATION

*Chairman*, CORNELIUS B. KENNEDY

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 1973-74*

Elimination of the "Military or Foreign Affairs Function" exemption from APA rulemaking requirements. (Consultant: Arthur E. Bonfield, University of Iowa College of Law), resulting in Recommendation 73-5.

ABA Resolution No. 1 proposing to amend the definition of "rule" in the Administrative Procedure Act (staff assistance: Robert W. Hamilton), resulting in a further refinement of the former Conference Statement on this subject (See 1972-73 Annual Report, pp. 49-53).

*Pending*

Transfers of confidential information among Federal agencies. (Consultant: Alexander W. Bell, University of Virginia Law School).

Internal agency procedures for the development of proposed rules. (Consultant: Robert A. Anthony, Cornell University School of Law; staff assistant, George P. Smith, III; Lynda S. Zengerle).

## ACTIVITIES OF THE CHAIRMAN'S OFFICE

### STAFFING AND BUDGET

The full-time permanent staff of the Chairman's Office remained at 14 positions throughout the period of this Report. A total of approximately 20 consultants and contractors continued to provide the Conference with research reports in areas of specialization in support of Conference recommendations; in addition, the staff of the office was augmented on a regular basis through the employment of summer law interns and several part-time attorneys.

The budget for the Conference has been substantially increased. For Fiscal Year 1974 Congress appropriated \$600,000—an increase of one-third above the prior year funding; for Fiscal Year 1975, \$750,000 has been approved. This new level of funding has permitted the Office of the Chairman to expand its research capacity and to undertake major new research which could not be considered in the past for lack of adequate financial support.

### MAJOR PROJECTS

#### 1. STATISTICAL STUDY OF ADMINISTRATIVE PROCEEDINGS

The Office of the Chairman has distributed to all agencies with administrative law judges proposed reporting forms for a government-wide uniform caseload accounting system covering formal APA proceedings. The system was designed by Norbert A. Halloran, a senior management analyst on loan to the Conference from the Administrative Office of the United States Courts. In an initial 3-5 year Trial period, the Conference will develop and publish, for each separate type of formal APA proceeding in each agency, data concerning the number of cases received and disposed of, time spent in pre-judicial, judicial and post-judicial segments of the decisional process, manner of termination and the outcome of appeals. The resulting statistics will be presented wherever possible in graphic form.

The project represents an attempt to apply to formal administrative proceedings statistical techniques that have been used and refined with respect to Federal judicial proceedings over the past

30 years. The number of Federal administrative law judges is now more than double the number of Federal district judges, and there is need for some equivalent information base to assess the requirements and measure the performance of this important component of our legal system. The data developed should be of use both to the agencies and to the Congress in allocating resources and in identifying areas of delay and inefficiency.

The reporting forms for the new system are in the process of final revision. A simple docket form containing critical information on each case will be submitted to the Administrative Conference when the case is assigned to the agency's office of administrative law judges, and again when the case is terminated. Quarterly summaries will also be required, the first of which will be due on November 10, covering the first quarter of FY 1975. It is anticipated that this project will require a sustained effort on the part of the Conference for the next 3-5 years and, if it proves successful, indefinitely thereafter.

## 2. MANUAL FOR ADMINISTRATIVE LAW JUDGES

The Conference has recently published a Manual for Administrative Law Judges prepared for the Conference by Merritt Ruhlen, a former Conference member and former administrative law judge for the Civil Aeronautics Board. Drawing on Judge Ruhlen's long experience and that of many other administrative law judges throughout the Government, with whom he consulted, the Manual seeks to give wider currency to the best procedural devices and techniques used in the various agencies. It contains suggestions for more efficient and effective use of pretrial procedures, exchange and presentation of written evidence, methods of shortening and simplifying formal hearings, treatment of intervenors and non-party participants, techniques of presiding, preparation of written opinions and standards of conduct for presiding officers.

Over 2,000 copies of the Manual have been distributed to Federal administrative law judges, members of boards of contract appeals, members of Atomic Energy Safety and Licensing panels and selected Federal staff personnel. While it is intended primarily for the use of Federal administrative law judges, the Manual should also be helpful to staff and private attorneys who appear before them, and to those who preside or appear in other formal proceedings, at the Federal, State and local levels. Copies of the Manual may be secured from the Government Printing Office (Stock No. 5249-00007; Cost \$1.40).

## 3. STUDY OF PROCEDURES OF INTERNAL REVENUE SERVICE

The Conference has commenced a major study of certain ad-

ministrative procedures of the Internal Revenue Service, including the following:

1. Confidentiality of taxpayer information.
2. Extraordinary collection procedures.
3. Settlement procedures.
4. Use of civil money penalties.
5. Handling of citizen complaints.
6. Devices to assure fairness and consistency in selecting returns to be audited and determining intensiveness of audit.
7. Availability of information to the public.

The study is under supervision of a Steering Committee composed of the Chairman of the Conference and the following individuals:

|   |   |
|---|---|
| Professor Walter J. Blum<br>University of Chicago Law<br>School   | Harry K. Mansfield, Esquire<br>Ropes & Gray, Boston, Mas-<br>sachusetts |
| Sheldon Cohen, Esquire<br>Cohen & Uretz, Washington,<br>D.C.  | Don J. Summa, CPA<br>Arthur Young & Company,<br>New York, New York      |
| Professor Victor H. Kramer<br>Director, Institute for Public<br>Interest Representation,<br>Georgetown University Law<br>School | Dean Bernard Wolfman<br>University of Pennsylvania<br>Law School        |

The Project Director is Professor Charles Davenport of the University of California Law School at Davis, who is taking leave from his academic duties for that purpose. The project has a full-time staff (professional and clerical) of five, with offices in Room 245, 2120 L Street. Some of the work will be undertaken by part-time academic consultants, including William Gifford (Cornell University Law School), Thomas R. White (University of Virginia Law School), Michael R. Asimow (University of California, Los Angeles) and Meade Emory (University of California, Davis).

#### SUPPORT OF COMMITTEE ACTIVITIES

During the past year support of Committee work by the staff of the Chairman's Office has increased substantially, due in part to steps taken to implement the Federal Advisory Committee Act. That Act, which the Council has held applicable to Conference Committees, requires advance public notice of Committee meetings, permits members of the public to attend, and requires the presence of a staff representative to keep detailed minutes. The Conference experience with these procedures has been most

satisfactory; in several instances members of the public have made significant contributions to Committee deliberations.

Other staff assistance to Committees has taken the following form:

- Preparation of Conference position papers on ABA Resolution No. 1 for the Committee on Rulemaking and Public Information and on ABA Resolution No. 8 for the Committee on Agency Organization and Personnel, each resulting in the adoption of an official Conference statement;
- Professor Robert W. Hamilton of the University of Texas Law School, former Research Director of the Conference, is editing for publication selected studies of informal decision-making that have been prepared by Conference staff members and summer interns, under his direction, for the Committee on Informal Action. They include studies on the leasing of office space by GSA, the granting of exempt status under the Interstate Land Sales Full Disclosure Act by HUD, determinations by the Immigration and Naturalization Service and the Department of Labor concerning petitions to admit alien workers for temporary non-agricultural employment, the guarantee of financial obligations of new community developers by HUD, the review and evaluation of air pollution control projects at Federal facilities by EPA, and the assessment of civil money penalties by the FCC.

#### ADVICE AND ASSISTANCE TO THE AGENCIES

A major area of continually growing responsibility for the Chairman's Office is the furnishing of advice and assistance on matters related to administrative procedures to agencies on request. Responses to inquiries, which are received on almost a daily basis, range from informal telephone advice to formal written analysis of novel procedural problems on pending legislative proposals. Out of this steady flow of activity, the following items bear special mention.

- At the request of the Federal Energy Office, assistance in the design of fair and efficient procedures for use in the energy program;
- At the suggestion of the Departments of Justice and Interior, draft of a sample statute for the imposition of civil money penalties, to aid all agencies in the implementation of Conference Recommendation 72-6;
- At the request of the Department of Justice, examination of the appeals procedures of the Board of Immigration Appeals,

with particular emphasis on reducing the current heavy caseload problem;

- Advice and staff assistance to the Attorney General in his study of the organization of the government for the purposes of implementing the Freedom of Information Act;
- Advice and staff assistance to the Civil Service Commission in its study of the utilization of Administrative Law Judges;
- Study of the procedures of the Occupational Safety and Health Review Commission with a view to making suggestions for improvements;
- At the request of the Office of Management and Budget, views on a number of pending legislative proposals, including: a Labor Department suggestion for a civil money penalty provision in the Farm Labor Contractor Registration Act; a bill (H.R. 13867) to provide for review of increases promulgated by the Secretary of the Interior in rates for electric power sold at five Bureau of Reclamation projects; and a draft Department of the Interior bill to amend the Federal Coal Mine Health and Safety Act of 1969.

#### ADVICE AND ASSISTANCE TO CONGRESS

The Chairman's Office serves as the spokesman for the Conference, and as advisor to the Congress, in connection with pending legislation. In this connection, the Chairman testified with respect to the procedural aspects of the following bills:

- S. 2373, a Bill to Regulate Commerce and Protect Consumers from Adulterated Food, Senate Commerce Committee, Subcommittee on Consumer.
- H.R. 6224, the Bureaucratic Accountability Act, House Judiciary Committee, Subcommittee No. 6. This bill would implement major aspects of seven Conference recommendations.

Other assistance to the Congress during the year included:

- Significant written presentations to the Congress concerning pending legislation have included comments to the House on Section 203(a) of H.R. 7917, a bill to amend section 6(g) of the Federal Trade Commission Act, and comments to the Senate on two amendments of the Consumer Protection Agency Act (H.R. 13163) adopted by the House before it approved the committee bill. At the request of Senator Kennedy, the Office of the Chairman will develop a system for compiling the data which would be required from agencies under the pending legislation to amend the Freedom of Information Act (H.R. 12471).

—Drawing on its past experience in conducting seminars on administrative procedures for agency personnel the Chairman's Office conducted a seminar on Capitol Hill for Congressional staff. It focused principally upon those elements of the Administrative Procedure Act that have relevance to the drafting of new legislation, with the object of increasing staff awareness of the most common procedural ambiguities or difficulties that can inadvertently be created. Approximately 50 Congressional staff personnel attended.

#### LIAISON WITH PUBLIC AND PRIVATE ORGANIZATIONS

Another area of responsibility of the Chairman's Office is to foster cooperation between the Federal Government and other knowledgeable groups in considering problems of administrative procedure. In furtherance of this objective, the Chairman has been made an *ex officio* member of the Council of the Section on Administrative Law of the American Bar Association. Participation by the Chairman in the four quarterly meetings of the Section Council has provided a forum for the cooperative consideration of Conference and Section recommendations such as the twelve ABA proposals to amend the Administrative Procedure Act and the Conference statements on these proposals.

The Chairman has also been named, *ex officio*, a member of the Board of Directors of the Center for Administrative Justice, an organization sponsored by the Administrative Law Section and funded by the American Bar Foundation for the purpose of research and education in state and Federal administrative law.

During the year the Chairman testified before the Committee on Revision of the Federal Appellate System, participated in the Administrative Law Judge's Annual Conference, the annual meeting of the New York State Bar Association, a meeting of the ABA Special Committee on Environmental Law, and in cooperation with the Food and Drug Law Institute, sponsored a symposium on 1973 Court Cases Involving Rulemaking: Implications for Federal Regulation (Proceedings published in November and December 1973 issues of *Food-Drug-Cosmetic Law Journal*, Vol. 28, Nos. 11-12).

The Chairman's Office will be preparing the United States portion of a major comparative study on citizen access to government information that will be published under the auspices of the International Institute of Administrative Sciences. The study will include a description of the law of access in (among other countries) Britain, Canada, France, West Germany, Belgium, Sweden, Denmark, Hungary and Yugoslavia. The Chairman participated

in a conference of scholars and governmental officials from various countries to discuss the general form and scope of the project.

#### IMPLEMENTATION OF RECOMMENDATIONS

One of the most important functions of the Office of the Chairman is to secure implementation of the recommendations adopted by the Conference. Under the supervision of the Executive Director of the Conference, John F. Cushman, the Conference staff is conducting an intensive review of the extent and the effect of agency implementation of all recommendations adopted by the Conference since its establishment. In the past, personnel limitations have made it necessary, after initial implementation efforts, to rely almost entirely upon written descriptions provided by the agencies themselves concerning the extent of their compliance. The pending study will seek to obtain more detail than these provide, and will in addition seek to gauge whether the effect of implementation has been as desirable as anticipated.

The 1971-1972 Annual Report contains a comprehensive section on implementation of recommendations. The 1972-1973 Annual Report describes the progress on implementation of the thirteen recommendations adopted during the period December 1971 through December 1972 (Recommendations 71-5 through 72-8). Set forth below is a description of implementation progress on recommendations adopted by the Conference since June 1973, the Ninth Plenary Session.

##### *Recommendation 73-1: Adverse Agency Publicity*

This recommendation calls upon agencies to adopt regulations setting forth minimum standards and structured practices governing the issuance of publicity which directs attention to agency action or policy which may adversely affect identified persons. Such publicity should be factual in content and accurate in description; normally it should issue only where immediate public notice is necessary to meet a significant risk to health, safety or of economic harm, where publicity is required to bring notice of pending adjudication to affected persons, or where the investigation or proceeding will in any event receive media attention and agency publicity will foster efficiency, public understanding or accuracy. Agencies are encouraged to give respondents advance notice of publicity which may be adverse and to afford an opportunity to prepare a response in advance; erroneous or misleading publicity should be retracted or corrected.

This recommendation was brought to the attention of all member departments and agencies; by-and-large the responses indicate that current agency practices are in conformity with the

principles enunciated in the recommendation. A number of agencies have indicated their intention to implement the recommendation either through the issuance of internal instructions or the promulgation of rules or policy statements. Included in this category are: the Department of Health, Education and Welfare, Food and Drug Administration, Social Security Administration, Health Services Administration; the Department of Interior; the Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, the Internal Revenue Service; The Postal Service; the Environmental Protection Agency; the Consumer Product Safety Commission; and the Small Business Administration. Most agencies, however, have indicated that their practices with respect to publicity are in accord with the recommendation and see no need for the issuances of formal regulations. (Included in this category are the Departments of Agriculture, Commerce and Labor, NASA, the National Labor Relations Board, and most of the regulatory boards and commissions).

*Recommendation 73-2: Labor Certification of Immigrant Aliens*

This recommendation calls for refinement of the Department of Labor's procedures governing application for labor certification by immigrant aliens seeking permanent residence. In its principal points, the recommendation urges publication of the Department's Guidelines and supplemental memoranda; provision directly to the alien of notice of denial of certification and of the right to appeal; greater specificity in the record of the reasons for grant or denial of certification; and full access to the record by the alien who chooses to appeal.

This recommendation has largely been implemented. The Manpower Administration of the Department of Labor issued a Field Memorandum in December 1973 containing operating instructions to assist regional offices in implementing the recommendation. The substance of this internal memorandum, as well as additional material further to perfect the Department's immigrant labor certification process, will be included in revisions to regulations at 29 CFR Part 60.

*Recommendation 73-3: Quality Assurance Systems in the Adjudication of Claims of Entitlement to Benefits or Compensation*

This recommendation calls upon Federal agencies responsible for large-volume benefit and compensation programs—like Social Security, workmen's compensation and welfare—to maintain 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 per-

formance. Such systems are necessary to assure overall accuracy, timeliness and fairness in programs where the small size of individual claims and the limited resources of claimants make the pursuit of appeal and adversarial representation inadequate.

This recommendation has received widespread acceptance by those agencies which administer programs to which the proposal has application; indeed, most already have programs, although many of them lack some of the key features called for by the proposal. The Social Security Administration and the Social and Rehabilitation Services of HEW have systems which comport fully with the recommendation and the procedures will be utilized as the Basic Educational Opportunity Grant program grows in size. The Veterans Administration, the Department of Agriculture with respect to its Food Stamp Program, the Army, the Air Corps, and the Civil Service Commission all have quality assurance programs that substantially comply with the recommendation. The Railroad Retirement Board's system contains many of the recommended features and its practices will be reviewed following a pending reorganization; the Department of Labor has the proposal under active study with a view toward evaluating the costs and associated benefits with respect to its Federal Employees' and Workmen's Compensation programs.

*Recommendation 73-4: Administration of the Antidumping Law  
by the Department of the Treasury*

This recommendation calls for changes both in the statute and in the procedures used by the Treasury Department in administering the anti-dumping law which provides for the imposition of an equalizing duty when it has been determined that foreign manufacturers are selling their products in the United States at prices less than those charged abroad, and that such price discrimination injures domestic competitors. The statutory amendments would eliminate unnecessary and inefficient procedures, principally a rigid bifurcation of the decisional process between Treasury and the Tariff Commission. The recommendations for administrative changes would increase the fairness of the procedures by permitting interested parties to make suggestions to the Customs Representative prior to the completion of the field investigation, make the tentative decision of the Commissioner of Customs available to interested parties, and require a more detailed statement of findings and conclusions in all tentative and final decisions. The recommendation would also exclude from the official Finding of Dumping those exporters whose sales have been subjected to the standard sampling and as to whom no less than fair value sales have been found.

The legislative aspects of the recommendation have been called to the attention of appropriate Congressional committees. The Department of the Treasury was fully consulted during the period when the research was being conducted and cooperated fully in the investigation; it now has the recommendation under active study. The Tariff Commission has determined not to furnish views at this time.

*Recommendation 73-5: Elimination of the "Military or Foreign Affairs Function" Exemption From APA Rulemaking Requirements.*

This recommendation calls for an amendment to Section 553 (a) of the Administrative Procedure Act to eliminate as unnecessarily broad and unwarranted the categorical exemption from public rulemaking procedures of matters which involve a "military or foreign affairs function of the United States." It would retain, however, exemptive provisions for matters required to be kept secret by Executive Order and would permit narrowly drawn categories of rules to be exempt from public procedures. Affected agencies are also called upon to use public procedures voluntarily, even though not required to do so by the statute.

Agency responses to this recommendation have been most encouraging. Some affected agencies, such as the Department of Transportation (including the Coast Guard) and the Civil Aeronautics Board have never used the exemption and have no plans to do so. Others, such as the Departments of State, Treasury, Defense and Commerce and the Atomic Energy Commission, have stated their intention voluntarily to conduct public rulemaking procedures in all but most limited circumstances. The Department of State, for example, in a Memorandum from the Deputy Secretary to the Deputy Under Secretary for Management expressed its policy as follows: "While the exclusion of the public from rulemaking involving foreign affairs functions is permissible, it is not required. I am convinced that such exclusion is not necessary in many cases and that, as a matter of policy, we should not exercise our statutory authority to its full extent.

\*\*\* The publication of substantive Department rules in the Federal Register without prior notice and opportunity for comment should be approved only in the case of individual rules or categories of rules, where, upon request of the interested office or bureau, you have determined that such a procedure is justified and is clearly in the public interest." And the Department of Defense has advised that "Secretary Schlesinger has directed that a regulation be drafted to insure the substantial voluntary im-

plementation throughout the Department of Defense of Recommendation 73-5.”

The proposed amendment to the APA has been brought to the attention of the appropriate Congressional committees for consideration with other proposed amendments to that Act.

*Recommendation 73-6: Procedures for Resolution of Environmental Issues in Licensing Proceedings.*

The recommendation calls upon each licensing agency to identify environmental issues common to more than one application and appropriate for across-the-board treatment. Issues so identified should be disposed of in “generic” proceedings, pursuant to procedures which will ordinarily enable the conclusions to be binding in subsequent cases barring special local conditions or changed circumstances. The recommendation also urges that the standard practice of agencies should be to disclose at the earliest practicable date all relevant reports and documents and to draft environmental statements in terms readily understandable by the public.

Almost all of the licensing agencies to whom this recommendation was sent are either using some form of generic proceeding in order to help prevent repetitious litigation over environmental issues or are in the process of developing appropriate procedures. Among the agencies now using generic proceedings are the Environmental Protection Agency, the Department of Interior (oil shale and coal mine leases), the Corps of Engineers (Alaskan pipeline, dredging projects), and the Atomic Energy Commission. Agencies in the process of implementing the recommendation include the Department of Health, Education and Welfare (particularly the Food and Drug Administration), the Civil Aeronautics Board and the Federal Communications Commission (draft regulations prepared for public comment).

*Recommendations Adopted at the Eleventh Plenary Session*

Four recommendations were adopted at the Eleventh Plenary Session, May 30-31, 1974: Subpena Power in Formal Rulemaking and Formal Adjudication (74-1); Procedures for Discretionary Distribution of Federal Assistance (74-2); Procedures of the Department of the Interior with Respect to Mining Claims on Public Lands (74-3); and Preenforcement Judicial Review of Rules of General Applicability (74-4). Information on efforts to implement these recommendations is currently being sought.

USE OF CONFERENCE WORK BY THE COURTS

Two recent cases exemplify the value of the Conference's work to the courts. The majority and dissenting opinions of the

Supreme Court in *Arnett v. Kennedy*, 94 S. Ct. 1633 (1974) reveal extensive use of the Conference recommendation and the report of its consultant, Professor Richard A. Merrill of the University of Virginia Law School, with respect to adverse actions against Federal employees (Recommendation 72-8). The Seventh Circuit Court of Appeals decision in *King v. United States*, 492 F.2d 1337 (7th Cir. 1974) makes extensive use of Conference work concerning procedures of the United States Board of Parole (Recommendation 72-3 and supporting report by Professor Phillip E. Johnson of the University of California Law School, Berkeley).

## TEXTS OF ASSEMBLY ACTIONS

### RECOMMENDATION 73-4 ADMINISTRATION OF THE ANTIDUMPING LAW BY THE DEPARTMENT OF THE TREASURY

(Adopted December 18, 1973)

The antidumping law (19 U.S.C. § 160, et. seq. (1971)) is designed to prevent foreign manufacturers from selling their products in the United States market at prices less than those charged abroad—at “less than fair value” (LTFV)—if such price discrimination “injures” domestic competitors. Whenever LTFV sales and resulting injury appear, the antidumping law requires the imposition of a duty equal to the amount of the price discrimination.

#### 1. *The Decisional Process.*

(a) *Field Investigation.* When Treasury receives credible information that a foreign manufacturer is engaged in LTFV sales injuring domestic industry, it initiates an investigation to determine whether such sales are in fact occurring in the United States market. The information is given to a case handler of the United States Customs Service in Washington. He in turn refers it to a Customs representative with jurisdiction over the country whose producers are being investigated, for inquiry into the prices at which the items in question are being sold in the home market, and in the United States. This Customs representative—along with all other officials involved in the administration of the antidumping law—is an impartial investigator, rather than a prosecutor seeking to establish that a violation has occurred. Although much relevant information must be kept confidential, the present practice denies the American producers even the opportunity of learning from the Customs representative the manner in which the investigation is being conducted and offering suggestions for additional inquiry.

Present Treasury practice is to institute a country-wide foreign investigation of the subject product, even when the information as to possible dumping pertains only to a single exporter in that country. In this investigation, a substantial sample of the

sales of those firms responsible for sixty percent of the exporting country's shipments of that product to the United States is examined. If sufficient LTFV sales are found (and if injury has resulted to domestic producers) a Finding of Dumping will issue which is applicable to all manufacturers of the specified product in the exporting country, except those who bear the considerable burden of showing that they have made no LTFV sales whatever. The effect of this finding is to require assessment of an antidumping duty on LTFV sales.

(b) *Agency review and decision.* The information assembled in the field investigation is transmitted to the case handler in Washington. He holds informal meetings with each of the interested parties separately, in which he discloses relevant, non-confidential information, as well as his own tentative views of the merits. Both during and after the meeting, each party may present argument and evidence to the case handler. The case handler then prepares a detailed report, which includes a proposed tentative decision for publication in the Federal Register by the Assistant Secretary for Enforcement, Tariff and Trade Affairs, and Operations. This report is forwarded (sometimes with changes made by the case handler's superiors) to the Commissioner of Customs. On the basis of the report, the Commissioner of Customs prepares a Memorandum for the Assistant Secretary recommending a tentative decision, with supporting documents that include a background paper which is what might be termed the final "institutional" version of the case handler's report. After reviewing the Memorandum, the Assistant Secretary causes a tentative decision embodying his views to be published in the Federal Register. This tentative decision may take one of three forms: a "Withholding of Appraisalment Notice," a "Notice of Tentative Negative Determination," or a "Notice of Tentative Discontinuance of Antidumping Investigation." Only the "Withholding of Appraisalment Notice" is a tentative affirmative decision; while it does not stop shipments from entering the United States, it renders all subsequent shipments subject to an antidumping duty should a Finding of Dumping issue. Thereafter, interested parties have an opportunity for briefing and argument before the Assistant Secretary. Treasury then issues its final decision on whether LTFV sales have occurred.\*

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\*A "Withholding of Appraisalment Notice" expires three months after publication in the Federal Register. During this period, the matter is considered by the Tariff Commission, and a final Finding of Dumping will issue if injury is found. However, the foreign exporters may agree to an extension of time of up to three additional months. See 19 C.F.R. §153.34(b) (1973). In these instances, the matter is not immediately referred to the Tariff Commission upon publication of the "Withholding of Appraisalment Notice." Rather, the procedures described in that text are followed. An extension of time is agreed to in the overwhelming majority of cases. (Continued on next page)

The Commissioner's Memorandum to the Assistant Secretary is currently unobtainable. Moreover, both the tentative and the final decision are extremely general and provide neither a meaningful explanation of the basis of the determination nor usable precedent. Parties' knowledge of the disposition of material issues comes mainly from informal discussions with the case handler.

2. *Role of the Tariff Commission.* The current statutory scheme requires that Treasury complete its investigation and render an affirmative LTFV determination before the Tariff Commission can consider the other issue relevant to a dumping finding—whether domestic producers have been, or are likely to be, injured. In the recent past, the Tariff Commission frequently has found no injury despite the presence of LTFV sales, thereby rendering Treasury's considerable expenditures in resolving the LTFV issue unproductive. In many of those instances, the dispositive issue of injury (left until last) was much the simpler of the two. There is also some factual overlap between the two issues. This rigid statutory bifurcation of the decisional process between Treasury and the Tariff Commission causes inefficient utilization of valuable agency resources, and prevents a preliminary injury determination by the Tariff Commission that may be desirable.

3. *Judicial Review.* Before a Finding of Dumping can issue, there must have been determinations both that LTFV sales by foreign manufacturers were occurring, and that American competitors have been, or are likely to be, injured thereby. However, judicial review of the Finding of Dumping, and of the underlying affirmative determinations of LTFV sales and injury, is not specifically authorized by statute until after assessment of an antidumping duty on a particular shipment of the affected product. 19 U.S.C. § 169 (1971). The assessment itself may raise complicated issues, but generally these are not directly related to the LTFV and injury determinations. Despite active cooperation of Customs officials to expedite the assessment, the delay in obtaining judicial review of the Finding of Dumping sometimes has proven quite extended.

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Because the Tariff Commission, in the absence of an agreement to an extension of time, must act within three months of publication of the "Withholding of Appraisal Notice," and cannot act until a final LTFV determination is on the record, the final affirmative LTFV decision is issued simultaneously with the "Withholding of Appraisal Notice" when no extension has been agreed upon, even though the hearing before the Assistant Secretary remains to be held. See 19 C.F.R. §§153.34(a), .35, & .37 (1973). In such circumstances, what is at issue in the hearing is the withdrawal of the "final" affirmative LTFV decision. Thus, for purposes of this recommendation, a "final decision" issued under the three-month procedure is considered a "tentative decision." As indicated, this procedure is rarely used.

### *Recommendation*

A. Any interested party should be given an opportunity to confer with the Customs representative, in the presence of the foreign exporters under investigation if they choose to attend. This conference normally should be held in the foreign country prior to the completion of the representative's report. He should apprise the participants of the methods he has employed to compile and verify data, and should receive suggestions for possible additions and refinements.

B. Those exporters whose sales have been subjected to the standard sampling, and as to whom no LTFV sales have been found, should be specifically excluded from the Finding of Dumping.

C. Upon publication of the tentative decision in the Federal Register, the Memorandum of the Commissioner of Customs to the Assistant Secretary for Enforcement, Tariff and Trade Affairs, and Operations, including all supporting documents, should be made available at cost of reproduction, subject to deletion of confidential material and its replacement by a non-confidential summary where feasible. This will allow more precise focusing on contested issues in later proceedings before the Assistant Secretary.

D. Both the tentative and the final decision should contain a statement of findings and conclusions and the reasons or bases therefor, on all material issues of fact or law presented. A more revealing tentative decision will greatly facilitate each party's presentation before the Assistant Secretary for Enforcement, Tariff and Trade Affairs, and Operations. Both decisions, if so detailed, will provide a reviewing court with authoritative documents enumerating the bases of the determination from which appeal is taken, and will constitute a body of precedent on the subject.

E. The present bifurcation of the decisional process between the Department of the Treasury and the Tariff Commission, established in 1954, is, from the standpoint of administrative procedure, unnecessary and inefficient. At a minimum, section 160 of Title 19, United States Code, should be amended to enable Treasury and the Commission to coordinate their efforts, so that the injury investigation may be conducted either prior to, or simultaneously with, the LTFV investigation, as the circumstances warrant. Such amendment would enable the Tariff Commission to make a preliminary determination of likelihood of injury before issuance of a Withholding of Appraisement Notice by Treasury.

F. Section 169 of Title 19, United States Code, should be

amended so as to allow appeal to the courts immediately after issuance of the Finding of Dumping.

### **Separate Statement of Malcolm S. Mason**

It is disappointing that, apparently on grounds of convenience in administration, the Conference approves as it does in paragraph B of this Recommendation, the imposition of a sanction on four exporters who are not shown to have violated the rule against dumping (and indeed may be victims of dumping by competing exporters in their own country) merely because six strangers of the same nationality have violated. Realistically, this imposes a discriminatory presumption that remains a heavy economic burden even though dumping duties may in fact still be avoided. It is not generally, and should not be, our legal practice to impute guilt by nationality this way without proof of conspiracy or other stronger grounds.

### **RECOMMENDATION 73-5**

#### **ELIMINATION OF THE "MILITARY OR FOREIGN AFFAIRS FUNCTION" EXEMPTION FROM APA RULEMAKING REQUIREMENTS**

(Adopted December 18, 1973)

The basic principle of the rulemaking provisions of the Administrative Procedure Act—that an opportunity for public participation fosters the fair and informed exercise of rulemaking authority—is undercut by various categorical exemptions in 5 U.S.C. § 553 (a). More than 25 years' experience with rulemaking under the APA has shown some of these broad exemptions to be neither necessary nor desirable. The Administrative Conference has previously recommended elimination of the exemptions for matters "relating to public property, loans, grants, benefits, or contracts" (Recommendation 69-8, October 22, 1969). Since rules on those subjects may bear heavily on nongovernmental interests, the Conference concluded that their categorical exemption from generally applicable procedural requirements was unwise. For similar reasons, the breadth of the present exemption for all rules which involve a "military or foreign affairs function" is unwarranted.

As with the earlier Recommendation, elimination of the categorical exemption for military or foreign affairs functions would not diminish the power of the agencies to omit APA rulemaking procedures when their observance is found to be impracticable, unnecessary, or contrary to the public interest, or when other exemptions contained in Section 553 are applicable, such as

those for "general statements of policy" or for rules relating to "agency management or personnel." In addition, the present Recommendation would retain limited exemptive provisions specially directed to the needs of military and foreign affairs rule-making.

### *Recommendation*

(1) The APA's categorical exemption for "military or foreign affairs function" rulemaking should be eliminated.

(2) Two aspects of special concern in the military and foreign affairs areas should be dealt with by modified exemptive provisions in place of the present categorical one:

(a) Rulemaking in which the usual procedures are inappropriate because of a need for secrecy in the interest of national defense or foreign policy should be exempted on the same basis now applied in the freedom of information provision, 5 U.S.C. § 552(b)(1). That is, Section 553(a) should contain an exemption for rulemaking involving matters specifically required by Executive order to be kept secret in the interest of national defense or foreign policy.

(b) Some of the agencies affected by elimination of the categorical exemption issue numerous rules for which public procedures would be inappropriate or unnecessary. Such agencies would find it burdensome to make case-by-case findings that the usual procedures are "impracticable, unnecessary, or contrary to the public interest" under Section 553(b)(B). Repeal of the categorical exemption for "military or foreign affairs functions" should not be construed to discourage use of the implicit power to apply the Section 553(b)(B) exemption on an advance basis to narrowly drawn classes of military or foreign affairs rulemaking. It is therefore recommended that repeal of the exemption be accompanied by statutory clarification of the agencies' power to prescribe by rule specified categories of rulemakings exempt by reason of Section 553(b)(B), provided that the appropriate finding and a brief statement of reasons are set forth with respect to each category. Though it would not be mandatory, agencies should consider using notice-and-comment procedures for adoption of the exemptive rule itself. Statutory amendment should also amplify the existing Section 553(b)(B) standards for exemption by including specific reference to the national interest in the military-foreign affairs area.\*

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\*An Appendix to this recommendation sets forth suggested language to effect the changes recommended by paragraph (2).

(3) Wholly without statutory amendment, agencies already have the authority to use the generally applicable APA procedures for rulemaking when formulating rules of the exempt types. They are urged to do so, wherever appropriate, in matters now excluded by the "military or foreign affairs function" exemption.

## Appendix

Section 553(a) and the relevant part of 553(b), amended in accordance with this recommendation, might read as follows: "§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a matter pertaining to a military or foreign affairs function of the United States specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy; or

(2) a matter relating to agency management or personnel [or to public property, loans, grants, benefits, or contracts].\*

(b) \*\*\*

Except when notice or hearing is required by statute, this subsection does not apply—

\* \* \*

(B) when the agency for good cause finds that notice and public procedure thereon would be impracticable, unnecessary, or contrary to the public interest (including national interest factors if a military or foreign affairs function is involved). The agency shall incorporate in each rule issued in reliance upon this provision either (i) the finding and a brief statement of reasons therefor, or (ii) a statement that the rule is within a category of rules established by a specified rule which has been previously published and for which the finding and statement of reasons have been made.

## RECOMMENDATION 73-6

### PROCEDURES FOR RESOLUTION OF ENVIRONMENTAL ISSUES IN LICENSING PROCEEDINGS

(Adopted December 19, 1973)

The new environmental legislation, especially the National Environmental Policy Act, has imposed on licensing agencies re-

\*Recommendation 69-8 proposes the deletion of the bracketed phrase.

sponsibility to consider environmental values in licensing that involves major Federal action significantly affecting the environment. The new responsibility has created new difficulties and has exacerbated old problems for the agencies.

The nature, complexity and sheer number of the issues to be considered make it desirable that the agencies, in appropriate cases, treat generically issues common to more than one proceeding. In addition to promoting agency efficiency, such treatment will permit more effective presentations by interested organizations which may lack the necessary resources for appearances in all the individual cases in which the same generic issue is present. It is especially important, given the wide public interest in environmental issues, that the public be given adequate notice of the generic proceeding and of the issues being considered.

### *Recommendation*

#### *A. Generic Proceedings*

1. Each licensing agency should analyze the activities subject to its jurisdiction to identify environmental issues common to more than one application and appropriate for across-the-board treatment. Issues so identified should be made the subject of "generic" proceedings, with the conclusions published and binding in subsequent cases, subject to departure or reexamination only in accordance with paragraph 3.

2. Each licensing agency should exercise discretion consistent with its governing statute to define the format of such a generic proceeding. Opportunity should be afforded for the presentation of oral testimony and cross-examination where required by law or where the agency considers it desirable for the development of an adequate record relevant to the particular issues.

3. Each licensing agency should select such form of procedure as will enable it ordinarily to apply generic decisions in subsequent licensing proceedings (a) without departure except where special local circumstances justify individualized treatment, and (b) without reexamination except where changed circumstances, e.g., material information not previously available to the agency, or a change in applicable law, raise a substantial question as to the continuing validity of the decision. Where the agency determines to reexamine the generic decision in whole or in part, it should consider the advisability of suspending final disposition of the licensing proceeding pending the conclusion of a new generic proceeding, and should, in any event, provide to affected interests adequate notice and opportunity to participate in the reexamination.

4. The agency should recognize a duty to reexamine generic

decisions from time to time, as, for example, where technology is changing, or where currently available information indicates the need for modification.

5. The giving of binding effect to generic decisions creates potentially serious problems for the general public, who will not ordinarily be aware of the existence of a proceeding. Accordingly, the agency must be careful to structure requirements of notice in such a way as to ensure that persons in areas likely to be affected by future licenses and environmental groups who have exhibited interest in related problems receive adequate notice.

#### *B. Public Information*

1. Each licensing agency should make it a standard practice to disclose and make available to the public at the earliest practicable date all of the basic studies, reports and other documents, not excepted by law or privileged against disclosure, upon which the application or any recommendation or position of the agency or its staff is based and which the agency may reasonably anticipate will be sought to be obtained during the proceeding; and the agency should require applicants to follow a similar practice at the time an application is filed.

2. Environmental statements should be drafted in terms understandable to laymen and regulations for license applications should stress as a major goal provision of information to the public on environmental questions.

#### **Separate Statement of Kenneth Culp Davis**

Recommendation 73-6 may be the least distinguished recommendation the Administrative Conference has adopted. It tells agencies what their practices should be, without a report of what those practices are or why they are what they are. It is unsupported by a factual study either of the subject matter of the recommendation or of a representative portion of that subject matter.

Even though the provisions of 73-6 that I regarded as most objectionable were deleted from the proposal during the plenary session, I should like to explain why I joined a substantial minority of the Conference in voting against the adopted version. My principal reason is that each of the three main provisions is based on uniformed thinking in the abstract rather than on a careful study of the relevant facts and the relevant law, as I shall now show.

One main thrust of 73-6 is toward more rulemaking ("generic proceedings") under the National Environmental Policy Act. Yet the Conference had no information whatsoever about the extent

of rulemaking under NEPA. For all that the Conference knew, the rulemaking might in fact be excessive instead of deficient. If the Conference had known how far the agencies have responded to the prodding of the Council on Environmental Quality to engage in more rulemaking (see CEQ 1972 Ann. Rep., page 228), its recommendation might have been the opposite: It might have commended the agencies for doing more rulemaking under NEPA than they have done apart from NEPA. At all events, the recommendation was based on factual guesses and not on information about agencies' practices.

Without facts about hearings, lack of hearings, or kinds of hearings under NEPA, the Conference favors "oral testimony and cross-examination." The push is indeed gentle, but it is unmistakably *for* such procedure and not against it. Yet the only factual report the Conference had before it was about the Atomic Energy Commission, whose procedure is governed by a unique statute requiring trial-type hearings even in absence of issues of fact or of policy. If the Conference had had facts about licensing procedures for housing projects, oilwell drilling, pipelines, grazing, waterway structures, and use of national forests, its mild push might have been in the opposite direction: It might have quoted with approval from Professor Walter Gellhorn, 48 A.B.A.J. 243, that "some of this country's gravest administrative deficiencies stem from lawyer-induced overreliance on courtroom methods to cope with problems for which they are unsuited." With no information as to whether hearings are held in 95% of NEPA cases or in only 5%, and with no information as to whether hearings that are held are public meetings or involve oral testimony and cross-examination, the Conference has thrown its weight on the side of trial procedures, *whether or not the governing statute requires a hearing*. The position is quite the opposite of that of the courts, as the Conference did not know but should have known. The courts generally hold in NEPA cases that public meetings suffice, without oral testimony subject to cross-examination, *even when a statute requires a hearing*. E.g., *Citizens Airport Committee v. Volpe*, 351 F. Supp. 52 (E.D.Va. 1972) (airport approval); *Keith v. Volpe*, 352 F. Supp. 1324 (C.D. Calif. 1972) (highway approval). See ch. 28, on "The National Environmental Policy Act," and more particularly § C, on "Procedural Problems Relating to Party Participation and Right to Be Heard," in K. Davis, *Administrative Law Cases-Text-Problems* (5th ed. 1973) 598-602.

The recommendation that in subsequent licensing proceedings an agency should "ordinarily" neither depart from nor reexamine its "generic decisions" seems directly contrary to the holding

in Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission, 449 F.2d 1109 (D.C. Cir. 1971), that an AEC rule could not govern a licensing proceeding because "NEPA mandates a case-by-case balancing judgment on the part of federal agencies." 449 F.2d at 1123. The law of the Calvert Cliffs case may "ordinarily" apply; the Conference had before it no legal analysis to the contrary. Nor did the Conference have before it any study of such relevant legal questions as (a) whether an agency may make "generic decisions" binding even when they are not binding under the law of res judicata, (b) what agencies that are subject to NEPA lack a statutory grant of power to make rules having force of law, (c) whether an agency lacking such a statutory grant of power may legally refuse in a subsequent proceeding to reexamine a "generic decision," or (d) what procedure, *if any*, an agency may use in a "generic proceeding" that will allow it to refuse to reexamine its conclusions in a subsequent proceeding. Acting without studies of such questions seems to me to be a headlong jump into the darkness.

My principal assertion is not that the positions the Conference has taken in 73-6 are unsound but that they are unsupported by needed studies of the facts and the law. Of the 45 recommendations the Conference has made in its first six years, I have voted for almost all, and this is the only one that has seemed to me to be based on insufficient understanding. A record of 44 out of 45 is fairly good, but are my standards too high if I insist that 45 out of 45 should be based on studies of the relevant facts and the relevant law?

#### **Separate Statement of David Sive**

During several of the meetings of the Committee on Licenses and Authorizations at which we considered the matters involved in Recommendation 73-6, I indicated my disagreement with several details of both the Recommendation itself and the Committee's supporting statement.

It is my view that:

1. The re-examination permitted of agency generic decisions should be less restricted than the Recommendation suggests;
2. The Recommendation should more clearly mandate—as it did in an earlier Committee draft—earliest possible disclosure by the concerned agency of environmental reports. On the other hand, I want to emphasize my agreement with the substance of each principal aspect of the Recommendation. Some comments were made in the plenary session debate to the effect that certain aspects of the Recommendation should have received longer and deeper study, and that consideration by the Com-

mittee might have been too heavily based upon Professor Murphy's excellent study of the licensing activities of the Atomic Energy Commission. It is, of course, correct that the subject matter of Recommendation 73-6 could have received longer study. It is also true that any matter of the nature of those which come before the Conference or any of its Committees can be studied for three, five or even ten years without enabling the Conference, the Committee or its consultants to state definitively at the end of such period: "This concludes all helpful study of the subject matter."

Recommendation 73-6 was considered thoroughly and at length by the Conference Committee, whose membership reflected broad agency representation and considerable experience in dealing with environmental problems. The Recommendation was circulated for comment to all agencies likely to be affected, and comments from nearly all those agencies were received and considered. While several of the agencies expressed doubt that generic proceedings would be helpful in their licensing proceedings, there was sufficient favorable response to the major points of the Recommendation to justify our conclusion that the Recommendation was broadly pertinent to federal licensing activities which affect the environment. Of course, nothing in the Recommendation calls for any agency to employ generic proceedings where in the agency's judgment such proceedings are inappropriate.

We must bear in mind that environmental law is a rapidly evolving field. The National Environmental Policy Act is itself a relatively new statute, and the problems it poses for many agencies cannot await post mortem analysis. I think it is no ground for criticism that this Recommendation attempts to extrapolate from an admittedly limited body of experience in order to provide guidance for agencies in dealing with these problems in the future. The Administrative Conference was created to provide an advisory body whose membership is "specially informed by knowledge and experience with respect to Federal administrative procedure." 5 U.S.C. § 573(b)(6). The members are entitled and expect to rely on their knowledge and experience in evaluating any proposal before them and did so in this case. It seems to me that by using such expertise to act with a promptness that permits affected agencies to profit from the recommendation instead of from their own mistakes, the Conference is doing precisely what its statutory charter intended.

## RECOMMENDATION 74-1

### SUBPENA POWER IN FORMAL RULEMAKING AND FORMAL ADJUDICATION

(Adopted May 30-31, 1974)

The present recommendation implements, and somewhat expands, the statement of principle adopted by the Conference in June 1973 with respect to the American Bar Association's Resolution No. 10 concerning proposed amendments to the Administrative Procedure Act. It speaks only to the issue of subpoena authority in formal proceedings under the Administrative Procedure Act, and does not reflect any judgment as to the need for general or specific grants of subpoena authority in other situations.

#### *Recommendation*

The Administrative Procedure Act should be amended (1) to make agency subpoenas available in all agency proceedings, both rulemaking and adjudication, which are subject to sections 556 and 557 of title 5, United States Code, and (2) to make clear that the power to issue subpoenas in such proceedings shall be delegated to presiding officers.

We propose the following amendments to implement this recommendation:

1. Amend section 555(d) of title 5, United States Code to read as follows:

(d) Agency subpoenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought. Each agency shall designate by rule the officers, who shall include the presiding officer in all proceedings subject to section 556 of this title, authorized to sign and issue subpoenas. On contest, the court shall sustain the subpoena or similar process or demand to the extent that it is found to be in accordance with law. In a proceeding for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

2. Amend section 556 of title 5, United States Code to add the words "subpoena authority;" in the heading after the words "powers and duties;"; to delete the words "authorized by law" in subparagraph (c)(2), to redesignate subsections (d) and (e) as

(e) and (f) respectively, and to add the following subsection (d):

(d) In any proceeding subject to the provisions of this section, the agency is authorized to require by subpoena any person to appear and testify or to appear and produce books, papers, documents or tangible things, or both, at a hearing or deposition at any designated place. Subpoenas shall be issued and enforced in accordance with the procedures set forth in section 555(d) of this title. In case of failure or refusal of any person to obey a subpoena, the agency, through the Attorney General unless otherwise authorized by law, may invoke the aid of the district court of the United States for any district in which such person is found or resides or transacts business in requiring the attendance and testimony of such person and the production by him of books, papers, documents or tangible things. The authority granted by this subsection is in addition to and not in limitation of any other statutory authority for the issuance of agency subpoenas and for the judicial enforcement thereof.

#### RECOMMENDATION 74-2

##### PROCEDURES FOR DISCRETIONARY DISTRIBUTION OF FEDERAL ASSISTANCE

(Adopted May 30-31, 1974)

The provision of assistance by the Government has a major impact upon the general public, as well as upon those who seek aid and those who particularly benefit from it. As with any other governmental activity of similar importance, in dispensing assistance agencies should not be free to act completely within their own discretion, *ad hoc*, unguided by standards and insulated from the complaints of those who dispute the propriety of agency decisions. Such unchannelled discretion not only creates the occasion for arbitrary action, but also prevents the agencies from giving their programs the effective policy direction essential for the achievement of statutory aims.

This Recommendation calls upon each agency which has discretion in the distribution of assistance under a domestic program to identify publicly the specific results it expects the assistance to achieve; to develop criteria based on that formulation for awarding aid; and to utilize public procedures for developing and enforcing the program's criteria and other requirements. The adoption of these measures has advantages for all concerned. For the agencies, it promotes the rationality of decision-making

by creating a stimulus towards analysis and specification of program aims. Applicants and recipients benefit from more consistent and predictable assistance terms, and from the open opportunity to seek an award. The affected public can monitor compliance in a way that promotes program purposes. And agency actions become more comprehensible to all involved.

The Conference has previously adopted two recommendations directed to particular categories of assistance programs covered by the present Recommendation and urging, with respect to those categories, some of the same measures here proposed. Moreover, those earlier recommendations, since they were more narrowly focused, set forth procedures in addition to those here proposed, useful for the particular types of assistance programs they covered. Recommendation 71-4, dealing only with discretionary grant programs, urges, as does the present Recommendation, the development of criteria by rulemaking and sets forth particularized public notice and applicant notification procedures appropriate for that type of Federal assistance. Similarly, Recommendation 71-9, directed only to grant-in-aid programs, describes in some detail complaint procedures and information systems particularly applicable to that type of Federal assistance. The present Recommendation is not meant to supersede those earlier proposals; but where it suggests additional procedures not there described, it is intended to supplement them.

### *Recommendation*

#### A. SCOPE OF THE RECOMMENDATION

In its broadest sense, Federal assistance includes any expenditure made by the Government to provide goods or services to the public, whatever the form of transfer; thus it includes money grants and benefits, in-kind aid, financing, insurance, and the permitted use of public goods. This Recommendation is directed to domestic programs for the provision of all forms of assistance except services (where personnel considerations must be given special account). Since, however, the purpose of the Recommendation is to regularize agency exercise of discretion in the distribution of assistance, its provisions do not apply to programs in which no such discretion exists (e.g., "benefit" and "formula" programs in which aid is distributed on the basis of statutory entitlement); nor do they apply to contractual agreements covered by the Government's procurement regulations and its system of award and dispute procedures.

#### B. ARTICULATION OF OBJECTIVES, CRITERIA AND REQUIREMENTS.

1. *Statement of Objectives and Criteria.* Each agency that has discretionary authority to determine the recipients under an as-

sistance program, and the terms, amounts and purposes of awards, should publicly state the specific results which it expects the assistance to achieve. The agency should also identify any major technical obstacles hindering the achievement of these objectives, describe its strategy for overcoming them and make this statement public where doing so would not frustrate accomplishment of the program's goals. On the basis of such formulation, the agency should articulate the criteria guiding its actions in making awards. Periodically, the agency should review the adequacy of its program objectives and assistance criteria in light of the results achieved and changes in the public need.

2. *Nature of Assistance Criteria.* To ensure performance-related, impartial choice in selection of recipients, whenever possible the agency's assistance criteria should provide for the award of aid either on an entitlement basis, to all who meet specified requirements, or on a competitive basis, to those who best satisfy stated selection factors. While considerable judgment may be left to the decision-maker in their application, the criteria should provide sufficient guidance to enable determinations to be made on a rational and justifiable basis.

In research, demonstration, developmental and other experimental programs, however, an agency will not always be able to specify its assistance criteria fully because of uncertainty about the results to be sought and the means of their achievement. To a corresponding degree, the choice of a recipient will involve greater judgment and in many instances subjective choice. Nevertheless, at each stage of program development, the agency should refine its selection basis and provide as equal an opportunity to compete as it can.

3. *Requirements Imposed on Recipients.* The agency should state clearly any specific results it expects the recipient to achieve. Where possible it should promulgate these and any other requirements it imposes on the operation or fiscal administration of assisted programs in the form of generally applicable rules, in preference to attaching such requirements as special conditions to particular assistance agreements.

4. *Degree of Specificity.* Agencies should state their objectives, criteria and requirements with as much specificity as practicable, and with clear indication of their purpose. Since, however, flexibility in the actual operation of assistance programs is useful, and diversity of approach often necessary, requirements relating to the manner of operation of recipients should be only as detailed and specific as is necessary to realize the program objective.

5. *Procedures for Development.* Agencies should develop their

assistance criteria and generally applicable requirements through a procedure involving public participation, by following the notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. § 553.

### C. COMPLAINT PROCEDURES

1. *Establishment of Complaint Procedures.* Agencies benefit by encouraging affected persons to report instances in which, in their belief, Federal standards (including the criteria for distribution of aid and any statutory or regulatory requirements) are not being observed in program administration. Such reports provide a source of information concerning operational problems and successes, supplementing whatever audits and field inspections the agency may conduct. Assertions that standards are being disregarded are indicative of program problems that the Federal agency must solve, by revising its own operations, by invoking sanctions for non-compliance or by re-examining the adequacy and appropriateness of the requirements themselves. Consequently assistance agencies should make procedures available by which persons may formally report that Federal standards intended to benefit or protect them are being violated.

2. *Nature of Procedures.* Agencies should permit dissatisfied persons a suitable opportunity to submit information and argument in support of their assertions. The agency should specify the complaint procedure or procedures applicable to each of the programs it administers.

### D. APPLICATION TO DELEGATED PROGRAMS

In some programs, assistance recipients have been delegated an administrative role like that of Federal agencies in discretionary programs: the delegate-recipient agency dispenses assistance and exercises some discretionary power to decide who will receive aid, in what amounts, on what terms, and for what purposes. An example is the role of community action agencies under the Economic Opportunity Act, 42 U.S.C. §§ 2701, et seq. In such programs, if it has the power to do so, the Federal agency should direct such recipients to observe Part B of this Recommendation, and to adopt procedures in accordance with Part C for receiving reports alleging violation by the recipient of its own established objectives, criteria and requirements. Reports alleging that the recipient's objectives, criteria and requirements do not accord with Federal standards should be entertained at the Federal agency level.

**Separate Statement of Malcolm S. Mason**

Although this is an important Recommendation which takes a broad and sound view of the need for structured administration and discretion in an area where structure is largely absent, it is not sound in its present form as applied to new and creative programs.

If this Recommendation in its present form had been adopted ten years ago and had been honored, there would have been no Head Start. Programs that require decisive action and the unleashing of enthusiasms that have been suppressed, of courage hidden in unexpected places, would be talked to death, analyzed to death, bureaucratized to death.

As applied to that kind of program, this Recommendation, instead of promoting rationality of decision making, would promote rationalization and jargonization of decision making. By creating painful consequences for those who may have the right goals and the right approach but have articulated them less self-defensively than others, they would not counteract, they would encourage, the tendency to avoid risks inherent in making decisions.

In the case of Head Start, which I take only as an example sufficiently familiar to be recognized, those who thought they were improving cognitive achievement as a primary objective and those who recognized that as a spurious goal but felt they were achieving family solidarity and dignity, through participation in the children's education, as a primary objective, and several other factions, would have debated endlessly and the program would never have started. Because, under this Recommendation, a stated objective carries consequences, they would have been forced to fight on the statement of objectives or to compromise and water down the program.

The Recommendation should have been adopted only after excluding expressly the Head Start kind of program and only after deleting the gratuitously inappropriate reference under Part D to the Community Action Program as one that should specifically be subject to this Recommendation. The Conference should have explicitly undertaken, and I hope it will now undertake, separate fresh thought to the kind and extent of structural discretion that is appropriate for the sort of program typified by Head Start.

## RECOMMENDATION 74-3

### PROCEDURES OF THE DEPARTMENT OF THE INTERIOR WITH RESPECT TO MINING CLAIMS ON PUBLIC LANDS

(Adopted May 30-31, 1974)

Although largely unknown to lawyers outside the West, the Department of the Interior's disposition of mining claims on public lands is a significant field of Federal administrative activity and an important element in planning rational use of the public lands.

The procedures for establishing or "locating" mining claims are set out by the General Mining Law of 1872, which has not been significantly amended since its passage. A claim is located by marking the corners of the acreage claimed, posting a notice on the land, and, if state law requires, performing specified work. Notice is then filed in the county courthouse. No valuable mineral need have been found, nor is the prospector under any obligation to reveal what mineral he believes to be present in order to exclude possible rivals from the land. A valid possessory interest is acquired against the United States, however, only if a "valuable" mineral deposit has been "discovered." If certain formalities are then complied with, the prospector may convert this possessory interest into full title, or "patent," for a modest sum; the possessory interest in a demonstrably valid claim is so secure, however, that such purchases are rarely sought. Claims are neither registered with the Federal Government nor paid for unless a patent is sought; nor need any discovery of valuable mineral be formally recorded anywhere in advance of a possible application for patent.

In the view of the Department of the Interior, a claim may be valid even if inactive; all claims are regarded as potential clouds on the Government's title. Thus, when a dam is to be built or a National Park secured, obtaining clear title to the land requires the Government to identify claims for which patent applications have not been made. This currently requires Bureau of Land Management employees to make a painstaking search of disorganized and ancient county records for each possibly valid claim and for evidence for its descent. Part A of the present recommendation urges the elimination of this wasteful and uncertain system by establishment of a registration process, and suggests interim measures which the Department may take until that legislation is enacted.

Once the identity of existing claimants is known, the present system provides for testing the validity of their claims by formal

administrative adjudications in which, although the burden of persuasion is upon the claimant, the Government must first establish prima facie that no "discovery" of any "valuable" mineral has been made. It must do this without the benefit of subpoena power, or even of any requirement that the claimant define his claim (e.g., by stating the nature of the minerals discovered) before the Government puts on its case. The practical effect of these hearing procedures is that a mineral examiner must be sent to inspect every claim that may be asserted. Adjudication is performed by administrative law judges in the Department's Office of Hearings and Appeals, subject to *de novo* review by the Board of Land Appeals in the same Office. Although the Department has full rulemaking authority, it has typically used case adjudication to develop positions on such central issues as what constitutes the "discovery" necessary to render a claim valid against the Government. To the extent cases are decided on the basis of interpretations or policy that a court would find within the Secretary's discretion, the Department's Office of Hearings and Appeals exercises important policy-making functions; yet at present no provision is made for Secretarial review of its conclusions. Judicial review of these adjudicatory determinations can be obtained only in United States District Court, in accordance with the so-called "nonstatutory review" provisions of 5 U.S.C. § 703. The "substantial evidence" standard of 5 U.S.C. § 706(2) (E) is of course applicable, but some confusion remains as a result of early cases treating the Department's findings of fact as near-conclusive. Part B of the present Recommendation seeks to rationalize the Department's adjudicatory system by providing fairer and more efficient hearing procedures, bringing the Department's case law more closely within a unified policy-making structure, and establishing judicial review provisions in appellate rather than trial-level federal courts, with explicit affirmation of the APA standard of review.

Although not required to do so by statute, the Department of the Interior commendably makes use of notice-and-comment rulemaking procedure, both for adoption of regulations to be codified in the Code of Federal Regulations and for actions withdrawing public lands from use under the various public land laws, including the mining laws. Public participation in such rulemaking, however, is substantially impaired by the lack of ready access to geologic data and other Government-developed data and views relating to rulemaking proposals. Moreover, other information important to the public, pertaining to matters of law, policy, procedure and Departmental organization, is not available as readily, or in as comprehensible a form, as it should be. Part C

of the present Recommendation suggests requirements to render the Department's rulemaking process more effective and to facilitate citizen receipt of needed information.

### *Recommendation*

#### A. IDENTIFICATION OF CLAIMS

1. Whether it is achieved separately or in conjunction with more general mining law reform, mandatory Federal registration of claims and records of required assessment work is important for sound management of the public domain. The Congress should enact legislation to impose that requirement; and the Department should consider whether it may impose such a requirement under its existing rulemaking powers and management authority over the public lands.

2. Pending the implementation of mandatory registration procedures, the Department should afford facilities for voluntary federal registration of claims by persons who wish to be assured personal notice of governmental actions possibly affecting their interests. Moreover, when clear title must be established for particular tracts of public domain during this period, fairness permits and efficiency demands that the Department adopt procedures which require the unknown owners of the claims, or the holders of unknown claims, to identify themselves and their claims before any more formal government action can be called for. Procedures for identifying claims, modeled on those specified in the Multiple Mineral Use Act of 1954 and the Surface Resources Act of 1955, should include the following:

- a) The search for claims and claimants should be limited to what can be readily discovered by visual inspection of the land, by limited inquiry in the vicinity, by listing in tract indexes, and by reference to the Department's own records and knowledge.
- b) Personal notice should be given only to those claimants thus discovered; otherwise, notice may be effected by posting the land and by appropriate publication.
- c) All persons wishing to assert the validity of claims affecting the lands in question should be required to file verified statements with the Department precisely identifying themselves, their claims, and other parties in interest.
- d) Claims not asserted within a reasonable period of time should be deemed abandoned.

#### B. HEARING AND REVIEW PROCEDURES

1. The Department should by rule require that once the Gov-

ernment initiates proceedings to determine the validity of mining claims located on particular tracts of public land, claimants must specify all matters necessary to establish this validity—in particular, what discovery of valuable mineral is claimed, with supporting geological and economic information. Until such matters are specified, the claimant has not established a basis for a fact-finding hearing; failure to make adequate specification should subject the claim to summary judgment declaring its invalidity. In the administration of this rule, the Department should take measures to protect the interests of smaller prospectors, acting in good faith, who may not be financially able to provide full technical data regarding their claims. Such measures might include joint inspection and assay using government experts (once the nature and points of discovery asserted are identified and adequately defined), and reliance upon the resulting reports as adequate to support summary judgment in accordance with their conclusions of fact.

2. Because the nature and quality of his claim is a matter uniquely within his knowledge, the claimant should be made to bear the burden of going forward as well as the burden of proof in any fact-finding hearings. Moreover, the Department should make clear by rule that where such hearings prove brief and the issues of fact or law involved prove simple, the presiding administrative law judge has the authority to decide the case immediately from the bench upon conclusion of the hearing and receipt of argument, without need to await the transcript or written briefs.

3. Effectively conferring final decision-making authority upon the Board of Land Appeals risks a bifurcation of the Department's policymaking function. The Department should adopt measures that will reconcile the appropriate adjudicative role of the Board with the Secretary's policymaking responsibility.

4. The Congress should enact legislation which would help to bring the adjudicative procedures of the Department into line with usual administrative practice:

- a) by conferring on the Bureau of Land Management discovery authority commensurate with that enjoyed by most federal agencies; and
- b) by explicitly providing for review of the final agency decision in adjudicated cases in the appropriate Court of Appeals under the Administrative Procedure Act, with "substantial evidence" review of findings of fact.

### C. RULEMAKING PROCEDURES—PUBLIC INFORMATION

1. The Department's rulemaking procedures should be improved

and the availability of its information to the public increased by various means, including:

- a) Adoption of procedures providing interested parties adequate opportunity to inspect and to comment upon geologic data and other Government-developed data or views relating to a pending rulemaking proposal and otherwise available under the Freedom of Information Act, 5 U.S.C. § 552. This may require extension of the ordinary comment period.
- b) Reduction of the number and complexity of law-sources which must be consulted to determine governing law and authority within the Department. Matters substantially affecting the public, but now incorporated in staff manuals or other internal documents, should be included in the published regulations, and policies generated through the adjudicatory process should be codified in regulations periodically. In addition, the Bureau of Land Management should publish regularly, in the Code of Federal Regulations and in pamphlet form, a full and current description of its central and field organization, showing lines of authority, and a full and current description of its operating procedures for dealing with mining matters, including the full requirements for patent applications.

#### RECOMMENDATION 74-4

##### PREENFORCEMENT JUDICIAL REVIEW OF RULES OF GENERAL APPLICABILITY

(Adopted May 30-31, 1974)

With increasing frequency, rules of general applicability adopted by agencies informally pursuant to 5 U.S.C. § 553 are being reviewed by the courts directly, before they are applied to particular persons in adjudicative proceedings. Such review may be by courts of appeals under statutes, mostly older statutes, providing generally for judicial review of orders of specific agencies, or under recent statutes providing specifically for the direct review of rules issued by new agencies or by newly created authority. The district courts also review rules directly in the exercise of their power under the Administrative Procedure Act to review agency action not otherwise reviewable.

The trend toward immediate review of agency rules has been accompanied by confusion over the appropriate scope and standard of review. In particular, conceptual and practical difficulties have arisen from the use by Congress and the courts of phrases such as "hearing" "record" and "substantial evidence on the record as

a whole," traditionally associated with review of orders entered after a formal evidentiary hearing, in the new and different context of preenforcement review of agency rules adopted informally.

This recommendation, addressed to Congress, the Judicial Conference and the agencies, seeks to dispel the confusion by (1) stating what administrative materials should be included in the record on review and (2) clarifying the standards for reviewing the adequacy of the factual basis and rationality of rules. The recommendation accepts the present pattern of preenforcement review of rules and does not call for either more or less of such review. Nor does it suggest that any particular procedures should be followed by agencies in adopting rules.

### *Recommendation*

1. In the absence of a specific statutory requirement to the contrary, the following are the administrative materials that should be before a court for its use in evaluating, on preenforcement judicial review, the factual basis for rules adopted pursuant to informal procedures prescribed in 5 U.S.C. § 553: (1) the notice of proposed rulemaking and any documents referred to therein; (2) comments and other documents submitted by interested persons; (3) any transcripts of oral presentations made in the course of the rulemaking; (4) factual information not included in the foregoing that was considered by the authority responsible for promulgation of the rule or that is proffered by the agency as pertinent to the rule; (5) reports of any advisory committees; and (6) the agency's concise general statement or final order and any documents referred to therein.\* References to the "record" or "whole record" in statutes pertaining to judicial review of rules adopted under Section 553 should be construed as references to the foregoing in the absence of a legislative intent to the contrary. The Conference does not assume that the reviewing court should invariably be confined to the foregoing materials in evaluating the factual basis for the rule.

2. The term "substantial evidence on the record as a whole," or comparable language, in statutes authorizing judicial review should not, in and of itself, be taken by agencies or courts as implying that any particular procedures must be followed by the agency whose actions are subject to the statute and, in particular, should not be taken as a legislative prescription that in rulemak-

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\*The court may of course limit its consideration to those materials that parties cite. Whether the agency may withhold from the parties to the judicial review proceeding or the court on the ground of confidentiality any materials otherwise called for is left by the recommendation to be decided under existing law.

ing agencies must follow procedures in addition to those specified in 5 U.S.C. § 553.

3. The appropriate standard for determining whether a rule of general applicability adopted after informal rulemaking rests on an adequate foundation is stated in 5 U.S.C. § 706 (2) (A), which provides that a reviewing court must set aside action found to be "arbitrary, capricious [or] an abuse of discretion." Where such a rule is attacked on the ground that an asserted factual basis does not support it or that a necessary factual foundation is lacking, this standard requires a reviewing court to decide, in light of the information before it (including the administrative materials described in paragraph 1), whether the agency's conclusions concerning the significance of factual information can be said to be rationally supported.

4. Statutes providing for judicial review of rules adopted after informal rulemaking should refer only to the standards for review of such rules set forth in 5 U.S.C. § 706, including the "arbitrary, capricious, [or] abuse of discretion" standard of Section 706(2) (A) (but not including the "substantial evidence" standard of Section 706 (2) (E), which by its terms is inapplicable to such rules). Properly applied, those standards are adequate to ensure appropriate judicial scrutiny of rules adopted informally. Judicial review statutes that speak in terms of review according to the standard of "substantial evidence" should be construed as establishing a standard of review over informal rulemaking comparable to that set forth in Section 706 (2) (A), unless a contrary intent clearly appears.

#### RECOMMENDATION 74-4

##### **Separate Statement of Malcolm S. Mason**

The debate on this Recommendation demonstrates that there are large differences of fundamental approach on many inter-related underlying issues. Under these circumstances, Professor Verkuil's paper, the Committee study, and the Conference debate have served a useful purpose in calling attention, in this influential forum, to the need for further thought on these matters. They do not, however, lay a rational foundation for a specific, formal, intricately constructed Recommendation, which purports to carry the authority of the Administrative Conference. Here the real disagreements have been hidden by the parliamentary process; that can only be harmful. This kind of rush to recommend is something I think the Conference should scrupulously avoid.

STATEMENT OF THE ADMINISTRATIVE CONFERENCE ON  
ABA RESOLUTION NO. 1 PROPOSING TO AMEND THE DEFINITION  
OF "RULE" IN THE ADMINISTRATIVE PROCEDURE ACT\*

(Adopted December 19, 1973)

The Conference agrees with Resolution No. 1 calling for improved definitions of "rule" and "order" so as to distinguish more clearly between the nature of rulemaking and the nature of adjudication; it endorses the recommendation of the ABA that the words "or particular" and the entire second clause be deleted from the definition of "rule" in the Administrative Procedure Act. The Conference endorses this proposal upon the express understanding that—

(1) A matter may be considered to be of "general applicability" even though it is directly applicable to a class which consists of only one or a few persons if the class is open in the sense that in the future the number of members of the class may be increased. Thus, for example, smoke emission standards for a particular area are of general applicability even though at the time of their issuance they may, as a practical matter, be applicable to only one plant. On the other hand, a rate established for a single company on the basis of the capital requirements and credit rating of that company, and applicable only to that company, would be a matter of particular applicability and an order rather than a rule.

(2) A matter may be of "particular applicability" (and therefore an order) even though it is applicable to several persons, if the agency clearly specifies an intention to limit its applicability to the particular persons concerned.

(3) The deletion of the second clause does not imply a determination that the agency statements therein listed are not rules, but rather that they may be either rules or orders, depending upon their applicability and effect. If such statements become orders under the revised definition and are required by statute to be determined on the record after opportunity for agency hearing, the Conference believes that in the absence of a specific determination by Congress to the contrary they should be treated in the same manner as suggested for ratemaking in the next to last paragraph of this Recommendation, and that amendments of the Act necessary to achieve these results should accompany the proposed redefinition of "rule."

(4) The proposed change in the definition of "rule" does not affect the precedential value of an agency's decision in a matter of

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\*For the original Conference action on this and other ABA Resolutions to amend the APA, see 1972-73 Report of the Administrative Conference of the United States, pp. 49-53.

particular applicability if the agency decides to proceed on a case-by-case basis rather than by rulemaking.

(5) This change is not intended to affect recommendations previously made which urge—

(a) The use of notice-and-comment procedures when considering issues of general applicability that may arise in the context of an adjudicatory proceeding (Recommendation 71-6);

(b) The use of trial-type or similar procedures when considering issues of specific fact in the context of a rulemaking proceeding (Recommendation 72-5); and

(c) Articulation and continual review of agency policies through rules, precedents and policy statements (Recommendation 71-3).

In endorsing the proposed redefinition, the Conference does not imply that a formal proceeding fixing the permissible rates of a specific enterprise—the agency activity principally affected—should be treated in all respects like other formal adjudication. To the contrary, we believe that ratemaking, like initial licensing, should receive special treatment with respect to the separation of functions requirements of 5 U.S.C. § 554 (d), as set forth in the Conference Statement concerning ABA Resolution No. 3; that ratemaking should not be subject to the mandatory initial decision requirement of 5 U.S.C. § 557 (b) and should continue to be governed by the provision of 5 U.S.C. § 556(d) authorizing agencies to require that evidence be submitted in writing. Amendments of the Act necessary to achieve these results should accompany the proposed redefinition of “rule.”

The question of appropriate procedures for informal adjudication is a subject deserving further study. Meanwhile, we recommend that agencies continue, despite the reclassification, to give informal action of particular applicability and future effect at least the same procedural protections that are now in fact accorded.

The principal purpose of the suggested changes is definitional and prospective rather than operational and retrospective. That is, they are intended to provide a clearer definitional structure that will facilitate proper allocation of procedures with respect to legislation adopted in the future or new activities undertaken under existing law; they are not aimed at the correction of what are thought to be existing abuses. Accordingly, to the extent any agency believes that activities currently conducted as rulemaking would be adversely affected by the conversion which the ABA proposal would effect, it would not be inconsistent with the Conference's Statement to propose special procedural provisions there-

fore, so long as the integrity of the definition of "rule" (as here set forth) is not affected.

STATEMENT ON ABA RESOLUTION NO. 8 CONCERNING THE ROLE OF  
PRESIDING OFFICERS IN FORMAL PROCEEDINGS

(Adopted May 30-31, 1974)

The previously approved statement of the Conference on ABA Resolution No. 8, 38 Fed. Reg. 16839, 16841 (1973) is withdrawn and the following substituted:

*Resolution No. 8*

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

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

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

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

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

# BYLAWS OF THE ADMINISTRATIVE CONFERENCE

As Revised May 31, 1974

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## SECTION 1. ESTABLISHMENT AND OBJECTIVE

The Administrative Conference Act, U.S.C. §§ 571 *et seq.* (1970), 78 Stat. 615 (1964), authorized the establishment of the Administrative Conference of the United States as a permanent, independent agency of the Federal Government. The purpose of the Administrative Conference is to improve the administrative procedure of Federal agencies to the end that they may fairly and expeditiously carry out their responsibilities to protect private rights and the public interest. The Administrative Conference Act provides for the membership, organization, powers and duties of the Conference.

## SECTION 2. MEMBERSHIP

### (A) GENERAL

Each member is expected to participate in all respects according to his own views and not necessarily as a representative of any agency or other group or organization, public or private. Each member (other than a member of the Council) shall be appointed to one of the standing committees of the Conference.

### (B) TERMS OF NON-GOVERNMENT MEMBERS

The terms of non-Government members, who are appointed by the Chairman with the approval of the Council, shall terminate at 2-year intervals from June 30, 1970. No more than ten percent of such members shall at any time be in continuous service beyond a third term.

### (C) ELIGIBILITY AND REPLACEMENTS

(1) A member (other than a member of the Council) who is

designated by a Federal agency shall become ineligible to continue as a member of the Conference in that capacity or under that designation if he leaves the service of the agency or department. Designations and re-designations of members shall be filed with the Chairman promptly, but not less than 30 days prior to the first session of the Conference at which such member shall sit, except that in exceptional circumstances the Council may permit a newly designated or re-designated member to participate in any session.

(2) A person appointed as a non-Government member shall become ineligible to continue in that capacity if he enters full-time Government service. In the event a non-Government member of the Conference resigns or becomes ineligible to continue as a member, the appointing authority shall appoint a successor for the remainder of the term.

#### (D) ALTERNATES

Members may not act through alternates at plenary sessions of the Conference. Where circumstances justify, an alternate may be permitted, with the approval of a committee, to participate for a member in a meeting of the committee, but such alternate shall not have the privilege of a vote in respect to any action of the committee.

### SECTION 3. COMMITTEES

The following shall constitute the standing committees of the Conference:

1. Committee on Agency Organization and Personnel;
2. Committee on Claims Adjudications;
3. Committee on Compliance and Enforcement Proceedings;
4. Committee on Grant and Benefit Programs;
5. Committee on Informal Action;
6. Committee on Judicial Review;
7. Committee on Licenses and Authorizations;
8. Committee on Ratemaking and Economic Regulation; and
9. Committee on Rulemaking and Public Information.

The activities of the committees shall not be limited to the areas described in their titles, and the Chairman may redefine the responsibilities of the committees and assign new or additional projects to them. With the approval of the Council, the Chairman may establish special ad hoc committees and assign special projects to such committees. The Chairman shall coordinate the activities of all committees to avoid duplication of effort and conflict in their activities.

## SECTION 4. LIAISON ARRANGEMENTS

The Chairman, with the approval of the Council, may make liaison arrangements with representatives of the Congress, the judiciary, and Federal agencies which are not represented on the Conference. Persons appointed under these arrangements may participate in the activities of a designated committee without vote; and may participate in the deliberations of the Conference with privileges of the floor, but without vote.

## SECTION 5. GENERAL

### (A) MEETINGS

All sessions of the Assembly shall be public. Privileges of the floor, however, extend only to: (1) members of the Conference, (2) persons appointed pursuant to section 4, (3) consultants and staff members insofar as matters on which they have been engaged are under consideration, and (4) persons who, prior to the commencement of the meeting, have obtained the approval of the Chairman and who speak with the unanimous consent of the Assembly.

### (B) QUORUMS

A majority of the members of the Conference shall constitute a quorum of the Assembly; a majority of the Council shall constitute a quorum of the Council.

### (C) SEPARATE STATEMENTS

(1) A member who disagrees in whole or in part with a recommendation adopted by the Assembly is entitled to enter a separate statement in the record of the Conference proceedings and to have it set forth with the official publication of the recommendation in the Federal Register. A member's failure to file or join in such a separate statement does not necessarily indicate his agreement with the recommendation.

(2) Notification of intention to file a separate statement must be given to the Executive Secretary not later than the last day of the plenary session at which the recommendation is adopted. Members may, without giving such notification, join in a separate statement for which proper notification has been given.

(3) Separate statements must be filed within 10 days after the close of the session, but the Chairman may extend this deadline for good cause

(D) AMENDMENT OF BYLAWS

The Conference may amend the bylaws provided that 30 days' notice of the proposed amendment shall be given to all members of the Assembly by the Chairman.

(E) PROCEDURE

Robert's Rules of Order shall govern the proceedings of the Assembly to the extent appropriate.

## THE ADMINISTRATIVE CONFERENCE ACT

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[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 information potentially useful in improving administrative procedure; and

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

### § 575 Organization of the Conference.

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

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

(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, devices, 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.

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