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1977 REPORT
ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

JUNE 1978

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LETTER OF TRANSMITTAL

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Washington, D.C.

TO THE PRESIDENT AND THE CONGRESS OF THE UNITED STATES:

I have the honor to transmit herewith the 1977 Report of the Administrative Conference of the United States.

This report covers the significant activities of the agency for the 12-month period from January 1, 1977, through December 31, 1977.

Respectfully,

ROBERT A. ANTHONY
Chairman

COUNCIL MEMBERS

ROBERT A. ANTHONY

CHAIRMAN

WALTER GELLHORN, Professor of Law, Columbia University School of Law.
MARION EDWYN HARRISON, lawyer, Washington, D.C.
BETTY SOUTHARD MURPHY, Member, National Labor Relations Board.
EDWARD C. SCHMULTS, lawyer, New York, N.Y.
RICHARD C. VAN DUSEN, lawyer, Detroit, Michigan.
EDWIN M. ZIMMERMAN, lawyer, Washington, D.C.

FORMER MEMBERS OF THE COUNCIL
Who Served During the Period of this Report

JOHN W. BARNUM, Deputy Secretary, Department of Transportation.
PHILIP W. BUCHEN, Counsel to the President.
HAROLD R. TYLER, JR., Vice Chairman, Deputy Attorney General.
RICHARD E. WILEY, Chairman, Federal Communications Commission.

MEMBERS OF THE CONFERENCE

The following list contains the names and affiliations of all members of the Conference (other than members of the Council) as of December 31, 1977:

WILLIAM H. ALLEN, lawyer, Washington, D.C.
ROBERT C. BAMFORD, Chief Administrative Law Judge, Interstate Commerce Commission
JOAN Z. BERNSTEIN, General Counsel, Environmental Protection Agency.
JOHN A. BUGGS, Staff Director, United States Commission on Civil Rights.
CLARK BYSE, professor of law, Harvard Law School.
HAROLD M. CARTER, Assistant General Counsel, Department of Agriculture.
BETTY JO CHRISTIAN, Commissioner, Interstate Commerce Commission.
CARIN A. CLAUSS, Solicitor of Labor, Department of Labor.
TIMOTHY F. CLEARY, Chairman, Occupational Safety and Health Review Commission.
SHELDON S. COHEN, lawyer, Washington, D.C.
JOHN H. CONLIN, Administrative Law Judge, Federal Communications Commission.
JEROME A. COOPER, lawyer, Birmingham, Alabama.
RICHARD M. COOPER, Chief Counsel, Food and Drug Administration.
LOUIS A. COX, General Counsel, United States Postal Service.
CHARLES B. CURTIS, Chairman, Federal Energy Regulatory Commission.
KENNETH CULP DAVIS, professor of law, University of San Diego School of Law.
THOMAS M. DEBEVOISE, Dean, Vermont Law School.
RONALD M. DIETRICH, Vice President, Consolidated Rail Corp., Philadelphia, Pennsylvania.
ROBERT G. DIXON, JR., professor of law, Washington University School of Law, St. Louis, Missouri.
HARRY T. EDWARDS, professor of law, University of Michigan Law School.
FREDERICK N. FERGUSON, Deputy Solicitor, Department of the Interior.
BETTY B. FLETCHER, lawyer, Seattle, Washington.
JAMES F. FLUG, Counsel, Energy Action Committee, Washington, D.C.
RONALD B. FRANKUM, lawyer, Del Mar, California.
HERSCHEL H. FRIDAY, lawyer, Little Rock, Arkansas.
THEODORE J. GARRISH, General Counsel, Consumer Product Safety Commission.
WILLIAM T. GENNETTI, General Counsel, Small Business Administration.
ROBERT L. GILLIAT, Assistant General Counsel, Department of Defense.
JACK GREENBERG, Director-Counsel, NAACP Legal Defense and Educational Fund, New York, New York.
RICHARD L. GRIFFITH, lawyer, Honolulu, Hawaii.
WOLF HABER, Assistant General Counsel, Department of the Treasury.
JOHN M. HARMON, Assistant Attorney General, Department of Justice.
THOMAS E. HARRIS, Chairman, Federal Election Commission.
LAWRENCE W. HAYES, Assistant General Counsel, Federal Home Loan Bank Board.
GEOFFREY C. HAZARD, JR., professor of law, Yale Law School.
S. NEIL HOSENBALL, General Counsel, National Aeronautics & Space Administration.

HOWARD JENKINS, JR., Member, National Labor Relations Board.
RHODA H. KARPATKIN, Executive Director, Comsumers Union, Mt. Vernon, New York.
LINDA HELLER KAMM, General Counsel, Department of Transportation.
CORNELIUS B. KENNEDY, lawyer, Washington, D.C.
VICTOR H. KRAMER, professor of law, Georgetown University Law Center.
ALLIE B. LATIMER, General Counsel, General Services Administration.
PHILIP A. LOOMIS, JR. Commissioner, Securities & Exchange Commission.
K. E. MALMBORG, Assistant Legal Advisor, Department of State.
MALCOLM S. MASON, Chairman, Grant Appeals Board, Department of Health, Education and Welfare.
TURNER H. MCBAINE, lawyer, San Francisco, California.
GUY H. MC MICHAEL III, General Counsel, Veterans Administration.
ALFRED MEISNER, Assistant General Counsel, Department of Commerce.
IRA M. MILLSTEIN, lawyer, New York, New York.
ANTHONY L. MONDELLO, lawyer, Bethesda, Maryland.
CLARENCE MORSE, Commissioner-Vice Chairman, Federal Maritime Commission.
CANTWELL F. MUCKENFUSS III, Counsel to the Chairman, Federal Deposit Insurance Corporation.
WILLIAM M. NICHOLS, General Counsel, Office of Management and Budget.
ELEANOR HOLMES NORTON, Chair, Equal Employment Opportunity Commission.
THOMAS J. O'CONNELL, Counsel to the Chairman, Board of Governors, Federal Reserve System.
OWEN OLPIN, lawyer, Los Angeles, California.
CLARK H. ONSTAD, Chief Counsel, Federal Aviation Administration.
JOHN W. PETTIT, lawyer, Washington, D.C.
RICHARD W. POGUE, lawyer, Cleveland, Ohio.
RUTH T. PROKOP, General Counsel, Department of Housing and Urban Development.
JOHN V. RAINBOLT II, Commissioner, Commodity Futures Trading Commission.
RAUL N. RODRIGUEZ, Executive Director, Colorado Department of Regulatory Agencies, Denver, Colorado.
KATHERINE E. SASSEVILLE, Commissioner, Minnesota Public Service Commission, St. Paul, Minnesota.
STUART E. SEIGEL, Chief Counsel, Internal Revenue Service.
J. CLAY SMITH, JR., Associate General Counsel, Federal Communications Commission.
OTIS M. SMITH, Vice President & General Counsel, General Motors Corporation, Detroit, Michigan.
MICHAEL N. SOHN, General Counsel, Federal Trade Commission.
H. PATRICK SWYGERT, General Counsel, U.S. Civil Service Commission.
ROBERT THOMAS THOMPSON, lawyer, Greenville, South Carolina.
PENELOPE H. THUNBERG, Director for Economic Research, Center for Strategic and International Studies, Georgetown University.
ROBERT L. TRACHTENBERG, Director, Bureau of Hearings and Appeals, Social Security Administration.
HARRY H. VOIGT, lawyer, Washington, D.C.
JAMES E. WESNER, lawyer, Washington, D.C.
LEE R. WEST, Member, Civil Aeronautics Board.
JERRE S. WILLIAMS, professor of law, University of Texas Law School.
FRANK M. WOZENCRAFT, lawyer, Houston, Texas.
ROBERT H. YOUNG, lawyer, Philadelphia, Pennsylvania.

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

FRANK R. BARNAKO, Chairman, Occupational Safety and Health Review Commission.
MICHAEL A. BROWN, General Counsel, Consumer Product Safety Commission.

TYRONE BROWN, lawyer, Washington, D.C.
MICHAEL F. BUTLER, General Counsel, Federal Energy Administration.
CHARLES L. CLAPP, Commissioner, Interstate Commerce Commission.
MANUEL COHEN, lawyer, Washington, D.C. (Deceased)
JOHN J. CORCORAN, General Counsel, Veterans Administration.
ROBERT ELLIOTT, General Counsel, Department of Housing and Urban Development.
JOHN H. FANNING, Member, National Labor Relations Board.
G. WILLIAM FRICK, General Counsel, Environmental Protection Agency.
HUGH C. GARNER, Deputy Solicitor, Department of the Interior.
CARL F. GOODMAN, General Counsel, U.S. Civil Service Commission.
BERT Z. GOODWIN, Chief Counsel, Federal Aviation Administration.
WERNER K. HARTENBERGER, General Counsel, Federal Communications Commission.
JOHN H. HOLLOMAN III, Vice Chairman, Federal Power Commission.
JAMES D. KEAST, General Counsel, Department of Agriculture.
WILLIAM J. KILBERG, Solicitor, Department of Labor.
DAVID M. F. LAMBERT, General Counsel, Small Business Administration.
REX E. LEE, Assistant Attorney General, Department of Justice.
GEORGE A. LEMAISTRE, Director, Federal Deposit Insurance Corporation.
ROBERT J. LEWIS, General Counsel, Federal Trade Commission.
RICHARD A. MERRILL, Chief Counsel, Food and Drug Administration.
LEONARD NIEDERLEHNER, Deputy General Counsel, Department of Defense.
ERSA HINES POSTON, Commissioner, New York State Department of Civil Service.
PETER L. STRAUSS, General Counsel, Nuclear Regulatory Commission.
MEADE WHITAKER, Chief Counsel, Internal Revenue Service.
DONALD P. YOUNG, General Counsel, General Services Administration.

STAFF OF THE CHAIRMAN'S OFFICE

RICHARD K. BERG
Executive Secretary

JOSEPH B. SCOTT
Executive Director

DAVID B.H. MARTIN
Research Director

JEFFREY S. LUBBERS
Staff Attorney

DAVID M. PRITZKER
Staff Attorney

STEPHEN H. KLITZMAN
Staff Attorney

KATHERINE E. KLEIN
Administrative Assistant to the Chairman

NORMA B. SMITH
Administrative Officer

SUE J. BOLEY
Librarian and Information Officer

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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.

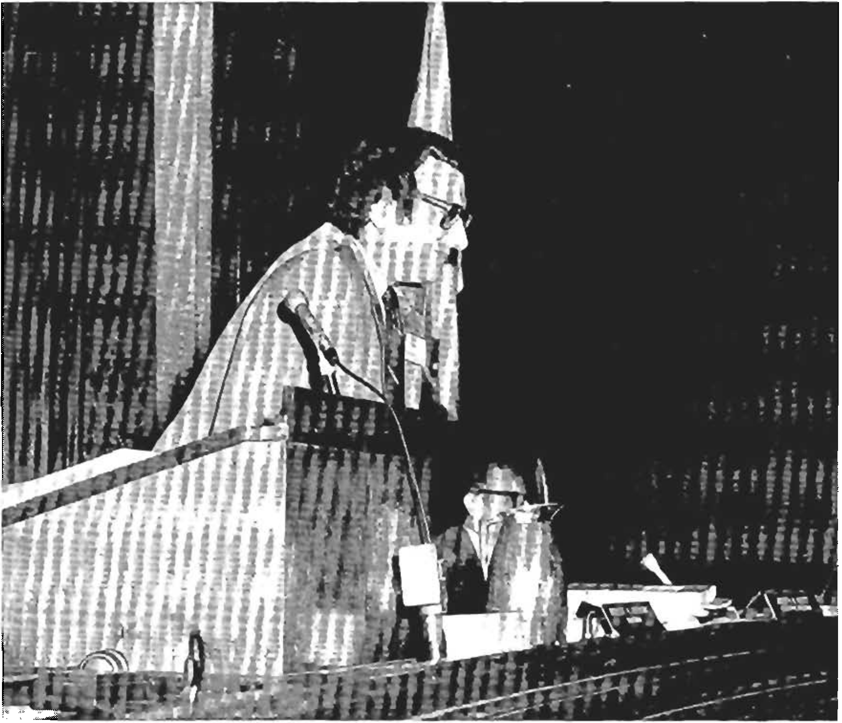
The statutory provisions governing the organization and operation of the Conference are set forth at the end of this report. The Conference consists of three entities—the Office of the Chairman, the Council, and the Assembly.

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 5 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 offical 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 designate 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.

Robert A. Anthony, the fourth Chairman of the Administrative Conference, was appointed by President Ford on August 23, 1974.



Chairman Robert A. Anthony presiding at the Sixteenth Plenary Session. To the right, Executive Secretary Richard K. Berg.

THE COUNCIL

The Council consists of the Chairman and 10 other members who are appointed by the President for 3-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 agendas, to recommend subjects for study, to receive and consider reports and recommendations before they are considered by the Assembly, and to exercise general budgetary and policy supervision.

During 1977 one new member joined the Council. In January 1977 Edward C. Schmults of New York was appointed to a three-year term, succeeding Harold T. Russell of Atlanta, who had been a member of the Council since the inception of the Conference in 1968.

Four government members resigned from the Council concurrently with their departure from Government on the occasion of the change of administration. They were Vice Chairman Harold R. Tyler, Phillip W. Buchen, John W. Barnum, and Richard E. Wiley.

Council Members Marion Edwyn Harrison, Walter Gellhorn, Edwin M. Zimmerman, Richard E. Wiley, Richard C. Van Dusen.

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 89 members. The Chairman and the other members of the Council account for 11 of this number. The remaining 77 fall into the following groups:

First, the act confers membership upon the Chairman of each independent regulatory board or commission, or an individual designated by the board or commission (5 U.S.C. § 573 (b)(2)). Under this provision 14 boards and commissions have statutory members. In addition, pursuant to 5 U.S.C. § 573(b)(4), two of these agencies have been allotted a second member by the Council for the purpose of permitting the designation of two administrative law judges. The agencies in this category, with the number of members are:

	Agency	Members
1.	Board of Governors of the Federal Reserve System	1
2.	Civil Aeronautics Board	1
3.	Commodity Futures Trading Commission	1
4.	Consumer Product Safety Commission	1
5.	Federal Communications Commission (Includes Administrative Law Judge)	2
6.	Federal Election Commission	1
7.	Federal Home Loan Bank Board	1
8.	Federal Maritime Commission	1
9.	Federal Power Commission	1
10.	Federal Trade Commission	1
11.	Interstate Commerce Commission (Includes Administrative Law Judge)	2
12.	National Labor Relations Board	1
13.	Nuclear Regulatory Commission	1
14.	Securities and Exchange Commission	1
	Total	16

Second, the act grants membership to the head (or his designee) of each executive department or other administrative agency designated for this purpose by the President (5 U.S.C. § 573(b)(3)). Acting under this authority, the President has designated all 11 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 (Includes Internal Revenue Service)	2
3.	Department of Defense	1
4.	Department of Justice	1
5.	Department of the Interior	1
6.	Department of Agriculture	1
7.	Department of Commerce	1
8.	Department of Labor	1
9.	Department of Health, Education, and Welfare (Includes Social Security Administration and Food and Drug Administration)	3
10.	Department of Housing and Urban Development	1
11.	Department of Transportation (Includes Federal Aviation Administration)	2
	Total	15

Designation of the Department of Energy is pending.

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 Management and Budget	1
7.	Occupational Safety and Health Review Commission	1
8.	Small Business Administration	1
9.	U.S. Commission on Civil Rights	1
10.	U.S. Civil Service Commission	1
11.	U.S. Postal Service	1
12.	Veterans Administration	1
	Total	12

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 with respect to Federal administrative procedure. They are reimbursed for travel expenses but otherwise serve without compensation. At present, the public memberships number 36, of which two are vacant. The terms of all incumbent public members expire on June 30, at which time the Chairman, with the approval of the Council will reappoint members and designate new members for 2-year terms, to serve until June 30, 1980.

In addition, pursuant to section 4 of the bylaws, the Chairman, with the approval of the Council, may make liaison arrangements with representatives of the Congress, the Judiciary, Federal agencies, and professional associations not represented on the Conference. Individuals who serve in such a capacity participate in the deliberations of the Conference with privileges of the floor but do not vote. Currently, eight liaison arrangements are in effect.

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 Decisional Processes...... James E. Wesner.
2. Agency Organization and Personnel Otis M. Smith.
3. Compliance and Enforcement Proceedings .... Anthony L. Mondello.
4. Grants, Benefits and Contracts.... Geoffrey C. Hazard, Jr.
5. Informal Action .... Clark Byse.
6. Judicial Review .... William H. Allen.
7. Licenses and Authorizations...... Owen Olpin.
8. Ratemaking and Economic Regulation .... Ira M. Millstein.
9. Rulemaking and Public Information Cornelius B. Kennedy.

These committees meet periodically to plan and guide research by academic consultants and by the Conference's professional staff, and on the basis of such research to frame proposed recommendations 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 committee or reject it entirely.

Since January 1968 the Assembly of the Conference has adopted a total of 67 recommendations, many with multiple parts, of which 3 were adopted during the period covered by this report.

Volumes I, II, and III of the recommendations and reports of the Administrative Conference of the United States, published in June 1970, June 1973, and June 1975, respectively, contain the official texts of the recommendations and statements adopted by the Assembly during the period January 8, 1968, to June 30, 1974. A fourth volume, covering the period from July 1, 1974 through December 31, 1977, is now in the process of being printed; an index to Volumes I-IV has also been prepared. These volumes also contain the full texts of the research reports that 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 recommendations and statements of the Conference, including those adopted since the publication of volume III of the Conference's recommendations and reports, are also published in the annual reports of the Conference; in the Federal Register (38 F.R. 16839, 39 F.R. 4846, 39 F.R. 23041, 40 F.R. 27925, 41 F.R. 3982, 41F.R. 29653, 41 F.R. 30319, 41 F.R. 56767, 42 F.R. 54251); and in the Code of Federal Regulations, title I, parts 305 and 310.

ACTIONS OF THE ASSEMBLY

The Sixteenth Plenary Session was held in Washington September 15-16, 1977. The Assembly adopted three recommendations. The full texts of the statement and recommendations appear at page 27 below. A summary of each follows:

SUMMARY OF RECOMMENDATION 77-1 LEGISLATIVE VETO OF ADMINISTRATIVE REGULATIONS

The recommendation is addressed to legislative proposals to require that before taking effect agency substantive rules issued pursuant to the notice-and-comment procedures of 5 U.S.C. § 553 be required to lie before Congress for a specified period and be subject to a resolution of disapproval. In the preamble of the recommendation the Conference expresses the belief that such a legislative veto procedure would bring about undesirable changes in the rulemaking process and in relationships among the agencies, Congress, and the courts. The preamble goes on to describe such undesirable effects. These include unreasonable delays in the taking effect of agency rules, decrease in the importance of public participation in rulemaking at the agency level, a substantial increase in the workload of Congress, and possibly an unintended narrowing of the scope of judicial review.

The preamble also states that the objectives of a generic requirement of legislative review of administrative rules can be realized by careful delineations of basic Congressional policy, by particularized statutes addressed to specific issues, and by Congressional hearings focused on review of agency policy rather than on details. Careful attention to appointments and appropriations constitutes a further effective means of maintaining Congressional oversight of agencies' use of delegated power.

The substance of the recommendation, therefore, is that Congress should not, in general legislation or as a routine practice in the formulation of specific legislation, provide for prior submission of agency rules for Congressional review and possible veto.

Although the recommendation is addressed to the Congress, its provisions are also intended to guide the executive departments and

agencies in their formulation of and comments upon new legislation and to stimulate their reevaluation of legislative veto provisions in existing statutes.

Summary of Recommendation 77-2 Judicial Review of Customs Service Actions

This recommendation involves a series of proposals for change concerning the judicial review of actions taken by the United States Customs Service. All but two parts of the recommendation require legislative action. Thus, it is recommended that the Customs Court

At the Sixteenth Plenary Session. Top left: Judicial Review Committee Acting Chairman John W. Pettit. Top right: Consultant Ernest E. A. Gellhorn, Consultant Harold H. Bruff, Rulemaking and Public Information Committee Chairman Cornelius B. Kennedy. Bottom: Standing, Public Member Harry H. Voigt. Seated, foreground, Public Member Raul N. Rodriguez, Securities and Exchange Commission Member Philip A. Loomis, Jr., Public Mmeber Clark Byse; Background, former Public Member Edwin Rains, Federal Deposit Insurance Corporation Member Cantwell F. Muckenfuss, Public Member Frank M. Wozencraft, Treasury Member Wolf Haber.

be permitted to exercise equitable powers under its present jurisdiction, that the court be permitted to hear cases even though administrative remedies had not been fully explored in situations where delay would result in immediate and irreparable injury to an aggrieved party, and that the political party affiliation requirement that now applies to Custom Court appointees be eliminated.

The recommendation also calls for extensive legislative revision of the civil penalty and fraud provisions of Section 592 of the Tariff Act of 1930 to provide for a more rational system of civil money penalties against violators, instead of the existing sanction which empowers the Customs Court to seek forfeiture of the imported merchandise or its face value for any violation.

The recommendation also urges the Customs Service to establish, by regulation, a procedure by which it may detain and seize merchandise allegedly infringing a U.S. trademark or copyright only when it receives a court order to do so. And, more generally, the Customs Service is urged, without awaiting legislative changes, to adopt and publish standards that will guide its determinations under the laws enforced by civil penalties.

SUMMARY OF RECOMMENDATION 77-3 EX PARTE COMMUNICATIONS IN INFORMAL RULEMAKING PROCEEDINGS

This recommendation constitutes a response by the Conference to the questions raised in *Home Box Office Inc.* v. *Federal Communications Commission*, 567 F.2d 9 (D.C. Cir. 1977), *cert. denied*, 98 S.Ct. 111 (1977), regarding the propriety of ex parte communications addressed to agency decisionmaking personnel in the course of informal rulemaking proceedings. By informal rulemaking proceedings are meant those proceedings to which only the notice and comment procedures of 5 U.S.C. § 553 are applicable. In the *Home Box Office* opinion the Court expressed the view that after a notice of proposed rulemaking is issued, agency officials involved in the decisionmaking should refuse to discuss matters relating to the proceeding with interested persons on an ex parte basis, and that if such ex parte contacts nevertheless occur they should be summarized and placed in the rulemaking file so that other interested parties may comment on them.

The recommendation opposes such a general prohibition against receipt of private communications in informal rulemaking. As expressed in Paragraph 1, the Conference believes that such an across-the-board prohibition would deprive agencies of the flexibility needed to fashion rulemaking procedures appropriate to the issues involved. However, the Conference recommends that agencies take certain steps in the conduct of their informal rulemaking proceedings so that, to the extent feasible, the information, comment and argu-

ment addressed to the merits of a proposed rule from sources outside the agency will be reflected in a public rulemaking file and exposed to the give-and-take of the public comment process. To this end Paragraph 2 of the recommendation calls for agencies to place promptly in the public file written communications addressed to the merits of the rule.

Treatment of oral communications presents a more difficult problem, and the Conference was reluctant to recommend an across-the-board solution. However, Paragraph 3 of the recommendation urges agencies to experiment with procedures for promptly disclosing significant information or argument communicated orally to the agency in the course of rulemaking proceedings. Paragraph 4 recognizes that these procedures for disclosure need not apply to information exempt from disclosure under the Freedom of Information Act.

Paragraph 5 recognizes that more severe restrictions on ex parte communications than those contemplated by the recommendation might be appropriate in particular proceedings or limited categories of proceedings in the interests of fairness or the needs of judicial review. The entire recommendation, however, is limited to informal rulemaking proceedings, and does not apply to proceedings in which the rule is required to be made on the record after opportunity for a hearing.

Left, Consultant Nathaniel L. Nathanson. Right, Council Members Richard E. Wiley and Richard C. Van Dusen.

ACTIVITIES OF COMMITTEES

The membership participates actively in the research activities of the Conference through the nine standing committees prescribed by the Bylaws. Each committee has a generally prescribed field of inquiry suggested by its title. Distinctions between committee jurisdictional responsibilities are intentionally fluid in order to permit the members wide latitude of inquiry. Since projects are often pertinent to the concerns of more than one committee, the Office of the Chairman coordinates the committees' activities to prevent conflict or duplication of effort.

1. COMMITTEE ON AGENCY DECISIONAL PROCESSES

Chairman, JAMES E. WESNER, succeeding PETER L. STRAUSS

This is the Conference's newest committee. It was established during 1976 to address certain areas of agency activity that did not naturally fall within the jurisdiction of the previously existing committees of the Administrative Conference. The committee's area of responsibility includes formal adjudicatory procedures, the use of particular kinds of evidence, institutional decisionmaking, techniques of gathering and using information, and generic causes of delay.

Pending Projects

Scientific and technological decisionmaking (Consultant: Michael S. Baram, Franklin Pierce Law Center; David M. Pritzker, staff attorney).

Statutory time limits on agency action (Consultant: Edward A. Tomlinson, University of Maryland School of Law).

Use of surveys in Federal Trade Commission determinations (Consultant: Ernest A. E. Gellhorn, Arizona State University College of Law).

Agency techniques for comprehensive review of their own procedures (Consultant: Max D. Paglin, Esq., District of Columbia Bar)

Use of cost-benefit analysis in Federal energy regulation (Consultant: Michael S. Baram, Franklin Pierce Law Center).

2. COMMITTEE ON AGENCY ORGANIZATION AND PERSONNEL

Chairman, OTIS M. SMITH

This committee is concerned with the distribution of responsibility and authority within agencies, including the adequacy of procedures

to review internal delegations and to assure separation of functions; personnel practices which bear upon the competence, professionalism, and effectiveness of personnel involved in the conduct of administrative proceedings; and administrative procedures which affect the hiring, compensation, and tenure of Federal employees.

Pending Projects

Agency experience under the Federal Advisory Committee Act. (Consultant: Robert E. Park, George Washington University National Law Center).

Emergency economic control programs. (Consultant: Edmund W. Kitch, University of Chicago Law School).

Separation of functions between OSHA and OSHRC. (Consultant: Neil Sullivan, Rutgers University).

3. COMMITTEE ON COMPLIANCE AND ENFORCEMENT PROCEEDINGS

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.

Pending Projects

Disclosure as a Regulatory Technique. (Consultant: Roy A. Schotland, Georgetown University Law Center).

4. COMMITTEE ON GRANTS, BENEFITS AND CONTRACTS

Chairman, GEOFFREY C. HAZARD, JR.

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

Pending Projects

Study of Social Security Administration hearing system (Consultant: Jerry L. Mashaw, Yale Law School).

Procedures used to resolve disputes between Federal and State Governments under the Supplemental Security Income program (Consultant: Peter Martin, Cornell Law School).

5. COMMITTEE ON INFORMAL ACTION

Chairman, CLARK BYSE

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

Pending Projects

Discretion in Food and Drug Administration enforcement proceedings. (Consultant: William J. Lockhart, University of Utah School of Law).

Department of Justice and Federal Trade Commission discretion in investigating and prosecuting civil antitrust cases. (Consultant: Thomas J. Maroney, Syracuse University Law School).

Informal adjudications: procedures for assessment and mitigation of civil money penalties by Federal agencies. (Consultant: Colin Diver, Boston University School of Law).

6. COMMITTEE ON JUDICIAL REVIEW

Chairman, WILLIAM H. ALLEN

This committee examines the law 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 also necessarily considers the effect of relevant case law and of new proposals upon the functioning of the courts themselves.

Pending Projects

Simplified review of small cases: survey of needs (Consultant: Theodore A. Miles, Howard University School of Law).

Challenging validity of regulations in enforcement proceedings (Consultant: Fred Davis, University of Missouri Law School).

7. COMMITTEE ON LICENSES AND AUTHORIZATIONS

Chairman, OWEN OLPIN

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

Pending Projects

Procedures for action upon waiver and exemption applications. (Consultant: Marshall Breger, State University of New York at Buffalo, School of Law).

Criteria and procedures used by four Federal regulatory agencies in regulation of cancer-causing substances (Consultant: Richard A. Merrill, University of Virginia School of Law).

Government use of externally-developed standards in regulations (Consultant: Robert W. Hamilton, University of Texas Law School).

8. COMMITTEE ON RATEMAKING AND ECONOMIC REGULATION

Chairman, IRA MILLSTEIN

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 re-

spect to activities that have the effect of economic regulation, though not directed toward specifically regulated industries—such as the determination of subsidies, tariffs, quotas, and ceilings.

Pending Projects

The nature and sources of delay in ratemaking proceedings. (Consultant: Thomas D. Morgan, University of Illinois School of Law).

9. COMMITTEE ON RULEMAKING AND PUBLIC INFORMATION

Chairman, CORNELIUS B. KENNEDY

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

Pending Projects

Trade regulation rulemaking procedures of the Federal Trade Commission. (Consultant: Barry B. Boyer, State University of New York at Buffalo, School of Law).

Survey of agency prerulemaking procedures (Consultant: Peter Strauss, Columbia University School of Law).

In debate, Public Members Victor H. Kramer, Cornelius B. Kennedy and Jerre S. Williams.

WORK OF THE CHAIRMAN'S OFFICE

BUDGET AND STAFF

The Conference's budget for Fiscal Year 1977 was $880,000. The budget for fiscal year 1978 is $914,000, with a strong likelihood that an additional $21,000 will be provided to cover mandatory pay raise expenses.

The permanent staff of the Conference varied between 15 and 16 during the reporting period. The Office of the Chairman continued the practice in 1977 of supplementing staff resources with part-time consultants and legal interns.

MAJOR ACTIVITIES

1. Relief From Appropriations Ceiling

During the past few years, the Conference has felt with increasing keenness the constraints of the statutory ceiling upon its appropriations, 5 U.S.C. § 576. An amendment enacted in 1972 established authorizations for the five-year period Fiscal 1974 through Fiscal 1978, authorizing $950,000 for Fiscal 1978. These figures have harshly restricted the Conference in the full performance of responsibilities properly expected of it. Since the statutory structure contemplated a review of Conference authorizations in 1977, legislation to relieve the ceiling has been the first priority of the Conference throughout the year.

To counsel in the preparation of the needed presentations to the Office of Management and Budget and to the Congress, Chairman Robert A. Anthony appointed a group of Conference members to a Task Force on Ceiling and Budget, with Ira M. Millstein as Chairman and the following persons as members: Sheldon S. Cohen, Walter Gellhorn, S. Neil Hosenball, Victor H. Kramer, Penelope H. Thunberg, Jerre S. Williams and Edwin M. Zimmerman. The Task Force, as well as staff of the Office of the Chairman, helped devise strategy and positions later presented by Chairman Anthony to OMB and the House and Senate Judiciary Committees in support of a substantial increase in the ceiling. Conference Members Cornelius B. Kennedy and Sheldon S. Cohen and Liaison Member Harold Leventhal also offered testimony before both Committees, while numerous Mem-

bers and friends of the Conference submitted written statements of support to Congress.

Happily, the Conference received warm endorsements and substantial relief from both the Senate and the House. The Senate in November 1977 passed legislation providing authorizations of $1,600,000 in FY 1979, $1,950,000 in FY 1980 and $2,300,000 in FY 1981 (S. 1792). The House subsequently passed a bill (H.R. 7662) authorizing $1,700,000 in FY 1979, $2,000,000 in FY 1980 and $2,300,000 in FY 1981. In the report accompanying the House bill, the House Judiciary Committee concluded: "That the Conference merits and needs a significantly increased authorization ceiling, and one that can be reasonably expected to keep pace with economic developments over the next few years, is in the committee's estimation, not subject to serious question. As is pointed out below, the Conference's record of achievement is clear. Its potential for expanded success through additional research and implementation activities is apparent." It is expected that the slight differences in the two bills will be resolved and that a final authorization will be enacted.

2. UNIFORM CASELOAD ACCOUNTING SYSTEM

In October 1977, the Office of the Chairman released the first report of its Uniform Caseload Accounting System (UCAS). This 277-page book, *Federal Administrative Law Judge Hearings—Statistical Report for 1975*, shows the volume of the many kinds of formal proceedings at all agencies employing administrative law judges in Fiscal Year 1975, and how long it took each agency to carry its cases through various decisional stages. The statistics are annotated with citations to the statutes and regulations under which the cases arose. The report also contains a chapter discussing the role of the administrative law judge. It was prepared under the supervision of Staff Attorney Jeffrey Lubbers.

The Senate Committee on Governmental Affairs made significant use of the statistics generated by UCAS in its comprehensive "Study on Federal Regulation." While the Committee stressed that "[i]ndividual agencies should * * * be encouraged to develop in-house data-collection systems," it also expressed the view that "the Administrative Conference should have the permanent task of insuring that comparable statistics on delay are generated by the various agencies, and that the statistics are brought together and comprehensively explored." See "Study on Federal Regulation," Senate Committee on Governmental Affairs, Vol. IV, p. 150, July 1977. The Committee went on to point out that "[t]he Conference's present efforts to collect uniform statistics from regulatory agencies is a step in the right direction, but needs refinement, enforcement capability, permanence, and adequate funding" *(ibid.)*.

The Office of the Chairman has continued to collect caseload and individual case data from those agencies and departments that employ administrative law judges to preside over formal APA proceedings. Publication of the second report under this system, covering fiscal year 1976 statistics, is planned for the near future.

While the Office of the Chairman is very pleased by the success of this initial effort, at the same time the current system is being reviewed and analyzed so that needed refinements in it can be made. Among other matters, there is appreciation of the limits inherent in a uniform statistical program and of the care that must be taken in performing any comparative analysis on the basis of statistics gathered under such a program.

3. IMPLEMENTATION OF RECOMMENDATIONS

The Conference has no authority to mandate adoption of its recommendations. The Chairman, however, is directed by statute to "encourage" the implementation of the Conference's recommendations through such means as are within his power. In this connection, the Office of Chairman has recently completed an intensive study—as an extraordinary effort of virtually all of the Conference's staff—to determine the extent to which 64 Conference recommendations have been implemented by the agencies, Congress and the courts. A report summarizing the findings of the study will be released in May, 1978. The information that was collected and evaluated is very detailed, and will enable the Conference to target those areas where further implementation efforts are most needed.

The implementation study also lays the groundwork for the very large and expensive task of assessing the impact and cost-effectiveness of various Conference recommendations. The Office of the Chairman plans to run a pilot study of such an impact assessment in FY 1979.

In any event, the report includes complete information with respect to those recommendations that call for legislation and those that have been directed to specific agencies. With respect to recommendations having government-wide applicability, the survey was limited to implementation by the 25 independent agencies. Read together, the data generated by the study makes it clear that the Conference's recommendations have been adopted and implemented in the great majority of cases. While this has long been the understanding, it is reassuring to have the detailed tangible confirmation that the study has provided.

The Conference's three most recently issued recommendations—those adopted at the June 1977 Plenary Session— were not included in the comprehensive implementation review. However, it is planned that the implementation report will be supplemented from

time to time as detailed information about implementation of the more recent recommendations is acquired. In the meantime, however, the following provisional information about implementation of the 1977 recommendations is available (for a description of each 1977 recommendation, see the discussion above at pages 7-10).

Recommendation 77-1 (Legislative Veto)

Since this recommendation requires legislative action, it was directed to the Judiciary Committees of the House and Senate. Additionally, Executive Secretary Richard Berg testified on the subject before the Subcommittee on Energy and Power of the House Interstate and Foreign Commerce Committee, and used the opportunity to explain the Conference views. The recommendation was also transmitted to a number of agencies. The uniform position taken by those agencies that have thus far replied to the Office of the Chairman is one of very strong support for the Conference view that routine legislative veto provisions should be disfavored.

Recommendation 77-2 (Judicial Review of Customs Service Actions)

The major portions of this recommendation require legislative action. There are currently pending in Congress several bills that would substantially effectuate the principal legislative changes that the recommendation seeks. These center around the civil penalty and fraud provisions of Section 592 of the Tariff Act of 1930, and the staff of the Office of the Chairman has written to the pertinent congressional committees expressing support for the various bills and calling attention to the Conference's recent recommendation on the subject.

The Office of the Chairman also wrote to the Customs Service, urging that it take administrative action to implement the two parts of the recommendation that did not require legislation. The Customs Service has replied and has stated its full agreement with the proposal that administrative standards be adopted and published to guide the determinations of the Customs Service under the laws enforced by civil penalties. According to the Commissioner of Customs, such guidelines will soon be published.

The Customs Service was also urged to establish by regulation a procedure by which it may detain and seize merchandise allegedly infringing a U.S. trademark or copyright only when it receives a court order to do so. Customs has concluded, however, that the copyright owner must be given a choice of obtaining a court order or utilizing an administrative remedy without judicial intervention. Accordingly, it does not currently plan to adopt the Conference proposal in this regard.

Since the bulk of the Conference recommendation in this area requires legislative action, and there are now pending several bills that would substantially implement the recommendation, the Office of the

Chairman will continue to monitor the progress of pertinent legislation and take appropriate action to express the position of the Conference.

Recommendation 77-3 (Ex parte contacts)

This recommendation was transmitted to 37 Federal agencies, with a request that the Conference be advised by each agency as to what action, if any, was planned to implement the Conference proposals. The replies that have been received have been very favorable. A number of the agencies advised us that they already have procedures in effect that carried out the recommendations, while a number of others expressed their agreement with the Conference views and explained that they would in the near term adopt effectuating procedures. In a few cases, the Conference was told that the particular agency did not believe that the recommendations had any applicability to it.

The Confeence is currently collecting and reviewing the regulations and other statements that reflect the policies and practices of the various agencies on the question of ex parte contacts in informal rulemaking proceedings. Initial discussions with the agencies demonstrate that there has been a high level of implementation.

4. Advice and Assistance to the Agencies

The Office of the Chairman continued during 1977 to receive and to respond to numerous requests from agencies for guidance and assistance on procedural issues.

Pursuant to its mandate under the Government in the Sunshine Act of 1976, P.L. 94-409, the Office substantially completed its consultative responsibility to advise affected agencies on the preparation of regulations to implement the open meeting provisions of the statute. Based on this consultation, Richard K. Berg, Executive Secretary, and Stephen H. Klitzman, Staff Attorney, wrote *An Interpretive Guide to the Government in the Sunshine Act.* The Office circulated a tentative version of the Guide for comment in May to the agencies and to other interested groups and individuals. The authors then revised and expanded the Guide, which will be released shortly. According to its preface, "the Guide is intended primarily to reflect the consultative work on the Act carried out by this Office and to serve as an informal guide to the agencies, as they continue to adjust their procedures and practices to comply with the open meeting requirements of the statute."

Another staff publication on agency practices completed in 1977 concerns the procedures followed by the Federal Insurance Administration, Department of Housing and Urban Development, in the performance of its functions involving scientific and technical questions.

Prepared by David M. Pritzker, Staff Attorney, and William J. Walsh, law intern, the report is entitled "Scientific and Technical Decision-Making in the National Flood Insurance Program of the Federal Insurance Administration." The study provides a methodological model for a pending ACUS government-wide study of procedures for the determination of scientific and technical controversies.

Staff members of the Office during 1977 also provided procedural advice and assistance to members of the Task Force on Civil Rights Reorganization, Office of Management and Budget, and to the newly formed Department of Energy.

Finally, during 1977, the Office completed a major consultative responsibility contained in the Railroad Revitalization and Regulatory Reform Act of 1976 (Public Law 94-210). The statute provided for fundamental changes in railroad regulation and Interstate Commerce Commission procedures. Among other things, ICC was directed to propose and submit to Congress detailed rules of practice governing adjudicatory and rulemaking proceedings under the Act. The Conference was directed to review the ICC proposals and present its views to Congress and the Commission. The Office's detailed analysis of these important new procedures was completed and submitted in March 1977.

5. ADVICE AND ASSISTANCE TO THE CONGRESS

During 1977 the Office of the Chairman provided both written and oral comment on pending legislation at the request of both Congressional committees and the Office of Management and Budget.

The principal Office testimony in 1977 concerned agency implementation of the Government in the Sunshine Act. On February 23 and November 29, 1977, Executive Secretary Richard K. Berg and Staff Attorney Stephen H. Klitzman testified before the House Judiciary Subcommittee on Administrative Law and Governmental Relations and the Senate Governmental Affairs Subcommittee on Federal Spending Practices and Open Government.

On July 20, 1977, William H. Allen, Chairman of the Committee on Judicial Review, and Professor Peter M. Gerhart, consultant to the Committee, testified before the Subcommittee on Trade of the House Committee on Ways and Means in support of H.R. 8149, a bill to reform Section 592, the civil penalty section of the Trade Act of 1930. The testimony was based on the Judicial Review Committee's recommendations to reform the Customs Service's civil penalty process—later ACUS Recommendation 72-2(E). H.R. 8149 was passed by the House in October 1977 and is awaiting action by the Senate.

At the request of various Congressional committees and subcommittees and the Office of Mangement and Budget, the Office of the Chairman in 1977 submitted written comments on a variety of pro-

posed legislation, including the Department of Energy Organization Act, the Public Participation in Federal Agency Proceedings Act of 1977 (S. 270, H.R. 3361), a draft bill, the "Rulemaking Reform Act", the Federal Mine Safety and Health Amendments of 1977 (S. 717), the Interim Regulatory Reform Act of 1977 (S. 263), the Veterans' Administration Administrative Procedure and Judicial Review Act (S. 364), the Federal Conflict of Interest Act of 1977 (H.R. 2733), the Federal Employees Conflict-of-Interest Disclosure Act (H.R. 3928), the Red Tape Reduction Act of 1977 (H.R. 5880), and a draft bill by the Civil Aeronautics Board "to amend the Federal Aviation Act of 1958 to authorize the Civil Aeronautics Board to assess civil penalties."

The Office of the Chairman also submitted written comments on proposed Executive Orders entitled "Logging of Outside Contacts" and "Improving Government Regulations."

6. Federal Trade Regulation Rulemaking Project

The 1975 Magnuson-Moss Warranty—Federal Trade Commission Improvement Act (P.L. 93-637) established elaborate "hybrid" procedures for developing the FTC's trade regulation rules, and directed the Administrative Conference to study the new rulemaking procedures and report to Congress. (§ 202(d), as amended by P.L. 94-299, § 2). Professor Barry Boyer, Associate Dean of the law school of the State University of New York, heads a consulting team that is conducting the study called for by this legislation. The FTC's pace of hearings and reports under the new procedures is proving far slower than expected, and apparently, few, if any, of these proceedings will be completed until after the statutory reporting date of July 1978. Congress has been asked to extend the reporting deadline to June 30, 1979, since the research design of the study requires several completed rulemaking proceedings under new procedures. More specifically, the goal of the study is to evaluate as precisely as possible each of the major procedural features of the prehearing, hearing and post hearing stages of the rulemaking process that are provided by the Act, or developed by the FTC in implementing it. The study team has been using three basic criteria for evaluation: (1) the accuracy of agency decision-making; (2) the fairness and acceptability of the proceedings; and (3) the efficiency of the proceedings. To get at the various stages of the process and evaluate them against these criteria has required a substantial amount of both empirical and analytical work.

For the most part, the intensive empirical and analytical work of the study team has been directed at a core of seven proposed rules—Ophthalmic Goods, Food Advertising, Protein Supplements, Holder in Due Course Amendment, Care Labeling Amendment, Funeral In-

dustry and Hearing Aids. For example, the Conference's research team has been heavily occupied with reviewing and analyzing the vast amount of material generated during the early stages of these seven proceedings, including over 50,000 pages of hearing testimony (representing about 1,000 witnesses) and 677 multi-page questionnaires that were returned to it by participants in those seven proceedings. Insofar as the seven rules in the intensive data base are concerned, systematic data gathering and analysis for each stage in the process has either been completed or is planned. Additionally, a less detailed observation of the general development of nine other rules that are being considered under Magnuson-Moss procedures is continuing.

Evaluation of the procedural areas which are the focus of the study—including cross-examination of witnesses, pre-hearing procedures to narrow and focus issues, compensation for public participation, and post-hearing use of the rulemaking record and staff reports—depends in large measure on whether these procedural components ultimately contribute to a fair and informed administrative decision. Until there has been an opportunity to observe the final stages of the trade regulation rulemaking procedures across several proceedings, and to analyze the decisions that emerge, judgments about the efficacy of the various procedural stages, must be provisional and tentative at best.

The budgetary burdens that this project has caused over a three year period have not diminished enthusiasm for the study. Both overall and for the particular data and analyses they generate, the Conference's efforts promise to yield great value for the Congress, for other agencies and, more immediately, for the Federal Trade Commission.

7. AD HOC COMMITTEE ON MEMBERS' DISQUALIFICATION

In 1976 the Chairman, with the concurrence of the Council, established a special ad hoc committee, advisory to him, to develop guidelines and procedures for determining questions of apparent conflict of interest and members' disqualification. The Committee, which is chaired by public member Anthony L. Mondello and includes public members William H. Allen, Robert G. Dixon, Jr. and James F. Flug, and Executive Secretary Richard K. Berg, continued to consider these questions throughout the period of this report.

A factor which made difficult any early decision on a course of action was uncertainty as to whether public members of the Conference were "special government employees" within the meaning of the conflict of interest laws, 18 U.S.C. 201-224. In view of the questions raised in this area, the Office of the Chairman wrote to the Department of Justice seeking a ruling on the status of public members, as

well as guidance on the applicability of the conflict of interest laws to the Conference's operations.

The Department of Justice responded to this request with an opinion that all public members are special Government employees. While this is inconsistent with the position the Conference had taken in practice over the years, it was not entirely unexpected given the legislative history of the Administrative Conference Act. In any event, whether or not the Justice view of the law is correct, it creates enough uncertainty with respect to the position of the Conference's public members to require some express attention to the matter in the form of a Conference bylaw.

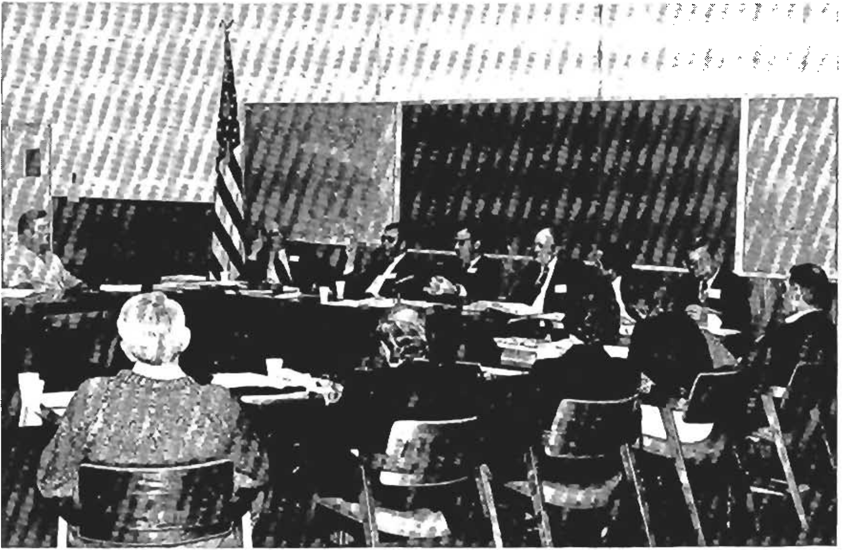
Under the pertinent statutory provisions, the Conference has authority to exempt by rules from recusal and related requirements conflicts which otherwise would fall within the prohibition, on the basis of remoteness of the financial interest involved. An appropriate exemptive bylaw will be presented to the Conference Assembly at its June 1978 Plenary Session. The bylaw would have a broad exemptive effect, based on the fact that the procedural recommendations of the Conference are unlikely to affect the substantive outcomes of pending proceedings. The result of such an exemptive provision would be to make the statutory prescriptions largely inapplicable to the process by which the Conference adopts recommendations.

There is also included in the proposed bylaw a provision for ad hoc exemptions where a member is in doubt as to his or her situation or where a technical but insubstantial conflict of interest exists, notwithstanding the more general exemption that is available.

These and related proposals are drawn with appreciation for the need to avoid any appearance of impropriety or conflict of interest in Conference operations, but also with recognition that the Conference's unique capacity to draw on a broad cross section of views of the administrative law community must be preserved.

8. Regulatory Agency Management Seminar Program

A noteworthy new program that the Conference conducted during 1977 was its Regulatory Agency Management Seminar—RAMS. Fourteen newly appointed chairmen and members of the independent Federal regulatory agencies met in October at the Federal Executive Institute in Charlottesville, Virginia to discuss common issues of agency roles, relationships and management. The program, the first of its kind, was conducted by the Administrative Conference in cooperation with the U.S. Civil Service Commission. Analogous programs have been presented for new federal judges and legislators, and for new Executive Department political appointees, but no programs of a similar nature have been held for new members of the collegial regulatory agencies.



At the Conference's Regulatory Agency Management Seminar in Charlottesville. Facing camera, left to right: Occupational Safety and Health Review Commission Chairman Timothy F. Cleary, Office of Management and Budget Deputy Associate Director Stanley E. Morris, OMB Associate Director for Management and Regulatory Policy Wayne G. Granquist, Chairman Anthony, Civil Service Commission Chairman Alan K. Campbell, Senior Associate Counsel to the President Michael H. Cardozo, Deputy Assistant Attorney General Irving Jaffe. Foreground, left to right: Nuclear Regulatory Commission Chairman Joseph M. Hendrie, former Federal Power Commission Chairman Lee C. White, Securities and Exchange Commissioner Roberta Karmel, Civil Aeronautics Board Member Elizabeth E. Bailey, Federal Home Loan Bank Board Chairman Robert H. McKinney.

The two-and-a-half day program addressed two principal themes: the management of collegial regulatory agencies, and the external relationships of such agencies with other elements of government and with groups in the private sector.

For new members and chairmen of the independent collegial regulatory agencies, the RAMS program constituted the briefing desired by President Carter for his appointees. The new appointees participating in the program were: Alfred E. Kahn, Chairman, Civil Aeronautics Board; Elizabeth E. Bailey, Member, Civil Aeronautics Board; Eleanor Holmes Norton, Chair, Equal Employment Opportunity Commission; Charles D. Ferris, Chairman, Federal Communications Commission; Robert H. McKinney, Chairman, Federal Home Loan Bank Board; Richard J. Daschbach, Chairman, Federal Maritime Commission; George R. Hall, Commissioner-designate, Federal Energy Regulatory Commission; Matthew Holden, Jr., Commissioner-designate, Federal Energy Regulatory Commission; Michael Pertschuk, Chairman, Federal Trade Commission; John C. Truesdale, Member, National Labor Relations Board; Joseph M. Hendrie, Chairman, Nuclear Regulatory Commission; Timothy F. Cleary,

Chairman, Occupational Safety and Health Review Commission; Roberta Karmel, Commissioner, Securities and Exchange Commission; and A. Daniel O'Neal, Chairman, Interstate Commerce Commission.

The program, which was moderated by Conference Chairman Robert A. Anthony, began with keynote remarks by Lee C. White on the role of the independent regulatory agency in Government. Mr. White is former chairman of the Federal Power Commission and former counsel to Presidents Kennedy and Johnson. The initial sessions examined the external relationships of regulatory agencies, including relationships with the White House, OMB, Department of Justice, Civil Service Commission, as well as the Congress, the courts, regulated industries, the public and the press. Thereafter, the program focused upon internal management of collegial regulatory agencies, including such matters as policy planning, budget, personnel, and caseload management. There was also discussion of the roles and collegial relationships of chairmen and members of regulatory agencies.

The discussion leaders were: Robert J. Bamford, Chief Administrative Law Judge, Interstate Commerce Commission; David Burnham, correspondent covering federal regulation, New York Times; Alan K. Campbell, Chairman, United States Civil Service Commission; Michael H. Cardozo, Senior Associate Counsel to the President; Herbert B. Cohn, Chairman Naitonal Association of Electric Companies; Calvin J. Collier, Commissioner and former Chairman, Federal Trade Commission; Wayne Granquist, Associate Director for Management and Regulatory Policy, Office of Management and Budget; Edward J. Heiden, Director, Office of Strategic Planning, Consumer Product Safety Commission; Irving Jaffe, Deputy Assistant Attorney General, Civil Division, Department of Justice; Monte Lazarus, Vice President, United Airlines; Norma Loeser, Professor of Business Administration, George Washington University; and Carl McGowan, United States Circuit Judge, Court of Appeals for the District of Columbia Circuit.

Other discussion leaders included Stanley Morris, Deputy Associate Director for Economics and Government, Office of Management and Budget; Betty Southard Murphy, Member and former Chairman of the National Labor Relations Board; James T. Ramey, Stone & Webster Engineering Corp., Anthony Z. Roisman, Counsel, Natural Resources Defense Council; John Shenefield, Assistant Attorney General, Antitrust Division, Department of Justice; Edward A. Schroer, Budget Director, United States Civil Service Commission; Peter L. Strauss, Professor of Law, Columbia University; Richard A. Wegman, Chief Counsel and Staff Director, Senate Committee on Governmental Affairs; and Richard E. Wiley, former Chairman of the Federal Communications Commission.

Also participating throughout the program were Otis M. Smith,

Chairman of the Conference's Committee on Agency Organization and Personnel, and Max D. Paglin, a former Chairman of that Committee and more recently a consultant to the Conference on development of the RAMS program.

The program was quite valuable in exposing the new leadership of the regulatory agencies to a wide-range of views and experiences, including those of some of their predecessors and representatives of the industries they regulate. While no attempt was made during the program to set forth rigid prescriptions for the governing of agency conduct and activities, various discussion leaders did use the time available, among other purposes, to stress the need for precision, clarity, and fairness in the regulatory programs of the represented agencies. RAMS also proved to be worthwhile in the way it facilitated interchange of ideas and experiences among the new appointees.

9. Liaison With Other Organizations

The Chairman's Office in a variety of ways seeks to foster cooperation between the Conference and other knowledgeable groups in considering problems of administrative procedure. In furtherance of this objective, the Chairman has participated on an ex officio basis in meetings of the Council of the Section of Administrative Law of the American Bar Association, and as a member of the Board of Directors of the National Center for Administrative Justice. During the year he has also participated in meetings of the American Bar Association's Commission on Law and the Economy, and the Judicial Conference of the District of Columbia Circuit.

10. Survey of State Administrative Procedures

The Office of the Chairman has continued its study of State administrative law, which is being directed by L. H. Levinson, Professor of law at Vanderbilt University. The general purpose of the project is to identify specific procedural ideas, drawn from State administrative law, which may be appropriate for adaptation and use in the reform of Federal administrative law. The consultant, working with an advisory group, has identified six areas of special interest. Developments in each of these areas will be examined in several selected states as a basis for considering the useful application of state procedures on the Federal level.

TEXTS OF ASSEMBLY ACTIONS

RECOMMENDATION 77-1

RECOMMENDATION 77-1: LEGISLATIVE VETO OF ADMINISTRATIVE REGULATIONS

(Adopted September 15-16, 1977)

Congress has by statute occasionally required that certain agency actions be subject to Congressional approval or disapproval before they became effective. Several proposals have now been advanced which would apply this procedure to all substantive rules issued pursuant to the notice-and-comment procedures of 5 U.S.C. § 553 (which are not subject to 5 U.S.C. §§ 556 and 557). These proposals typically would provide that if either house of Congress disapproved a proposed rule within a specified period, such as 60 days, it would not take effect.

The Conference believes that this kind of legislative veto would not further the ability of Congress to direct agency policy; moreover, it would bring about undesirable changes in the rulemaking process and in relationships among the agencies, Congress, and the courts.

1. Agencies. Legislative veto proposals contemplate postponing the effective date of most agency rules for two months beyond the present statutory period of thirty days that must elapse between their publication in the Federal Register and their taking effect. This additional period is prescribed so that Congress may have opportunity to exercise the power of review. The volume of existing agency rulemaking and the technical or noncontroversial nature of many rules suggest, however, that few proposed rules would in fact receive specific Congressional attention. Nevertheless the operation of the great mass of rules, whether or not actually considered by Congress, would be postponed without corresponding benefit and often with unfortunate public consequences. In instances when Congress did undertake review, it would risk engaging in piecemeal examination of particular rules, in isolation from an agency's program as a whole, and without benefit of the experience and specialized knowledge that had shaped the elements of that program. Of great concern is the possibility that Congressional review of administrative agencies'

rules would significantly diminish the importance of the procedures now prescribed by law to assure public participation in rulemaking. Rules that survive active legislative review are likely to be based upon negotiations with Congressional units rather than upon the information, expression of opinion, research materials, and background experience that shaped the agency's policy.

2. Congress. Legislative review of substantive rules would increase the workload of Congress substantially. Review of complex, technical rules would be difficult, time consuming, and often impracticable. Yet, in the belief that each agency's work product would have to undergo later scrutiny by Congress or its committee staffs, Congress might be more ready even than at present to delegate power in broad terms and to avoid specificity and precision in formulating legislative policies that guide agency discretion. Piecemeal review, moreover, might create a misleading impression that Congress has endorsed by implication whatever it has not explicitly disapproved. Were that impression to become widespread, Congress might be deemed to have accepted a responsibility of unforeseen dimensions.

3. Courts. A procedure for Congressional review of agency rules may also imply legislative ratification of rules not disapproved by Congress. If legislative approval is inferred from inaction by Congress under the proposed procedure, then the scope of judicial review may be reduced without provision of an adequate substitute. Existing constraints on agency rulemaking discretion would therefore be lessened in a manner not intended by Congress.

The objectives of a generic requirement of legislative review of administrative rules can be realized by careful delineations of basic Congressional policy, by particularized statutes addressed to specific issues, and by Congressional hearings focused on review of agency policy rather than on details. Careful attention to appointments and appropriations constitutes a further effective means of maintaining Congressional oversight of agencies' use of delegated power.

Recommendation

The Conference urges that Congress should not, in general legislation or as a routine practice, provide for prior submission of agency rules for Congressional review and possible veto.

RECOMMENDATION 77-2

JUDICIAL REVIEW OF CUSTOMS SERVICE ACTIONS

(Adopted September 15-16, 1977)

A. Jurisdictions and Powers of the Customs Court

The Customs Court has exclusive jurisdiction to review decisions of the Customs Service (1) denying protests of importers relating to

certain enumerated matters and (2) rejecting petitions of United States manufacturers, producers or wholesalers to challenge certain actions taken with respect to merchandise imported by others. Actions of the Customs Service suspending or revoking customs brokers licenses are reviewable, by statute, in the courts of appeals.[1] There are other actions of the Customs Service that are administratively final but for which no specific statutory provision for review has been made. These include decisions made by the Service to suspend or discontinue permits for immediate delivery of merchandise as well as decisions to exclude certain types of merchandise from entry. Such actions are now reviewable, if at all, in the district courts pursuant to their general or special jurisdiction.

Moreover, the Customs Court does not have power at present to "compel agency action unlawfully withheld or unreasonably delayed," as can district courts under the APA, 5 U.S.C. § 706(1). The Customs Service sometimes fails to act on significant matters for such extended periods that its inaction may amount to agency action, as defined by 5 U.S.C. § 551(13) to include "failure to act." An example is the failure or refusal of the Service to complete the final assessment of duties payable on an importation. Finally the Customs Court has no power at present to provide relief until after the protest or petition process has run its course even though the Customs Service has taken action with such immediate and drastic impact on a person that a district court considering comparable action of another agency would treat it as final for purposes of review. The recommendation would provide for review by the Customs Court of the final actions and failures to act just described.

Decisions to exclude merchandise may be made either by the Customs Service or another agency, such as the Food and Drug Administration. All exclusion decisions pursuant to a customs law (*i.e.*, a law applicable only to imported merchandise, usually codified in Title 19 of the United States Code), whether made by the Customs Service or some other agency, are now reviewable in the Customs Court. This review would be unaffected by the recommendation. Exclusion decisions under a law that is not a customs law are never reviewed in the Customs Court. When such an exclusion decision is made by an agency other than the Customs Service, the Customs Court does not, and under the recommendation would not, review the decision. However, when such an exclusion decision is made by the Customs Service, the recommendation would give the Customs Court exclusive jurisdiction to review it.

The Customs Court has sometimes been said not to have "equity powers." What is meant by this is not clear, but the recommendation

[1] The Conference has not studied the advisability of a change in the reviewing forum for such action. Nor does the Conference intend that the current method of reviewing personnel actions of the Customs Service or its determinations under the Freedom of Information Act or like statutes be disturbed.

would give the Customs Court all powers, injunctive and other, of the district courts.

The Customs Court is unique among Article III courts in being subject to a requirement that not more than five of its nine judges be appointed from the same political party and in having a chief judge selected from time to time by the President. These requirements, appropriate perhaps for multi-member administrative agencies, are not consonant with the Article III judicial role of the Customs Court, especially as that role would be expanded by these recommendations.

1. *Jurisdiction Without a Protest or Petition*

Congress should amend 28 U.S.C. §1582 to broaden the jurisdiction of the Customs Court by giving the court exclusive jurisdiction of any civil action brought to challenge final agency action (as defined in the Administrative Procedure Act) of the Customs Service except (1) action specifically subject to review in another court and (2) action pertaining to the exclusion of merchandise, under a law that is not a customs law, and taken by the Customs Service on the request or at the direction of a court or another federal agency.

2. *Remedial Powers*

Congress should amend 28 U.S.C. § 1581 to confer upon the Customs Court in respect of actions properly pending before it the remedial powers of a United States district court.

3. *Political Affiliation of Court Appointees and Selection of Chief Judge*

Congress should amend 28 U.S.C. § 251 to delete the requirement that not more than five of the nine judges of the Customs Court be appointed from the same political party and to provide that the chief judge is appointed by the President with the advice and consent of the Senate, as in the case of the Court of Claims and the Court of Customs and Patent Appeals.

B. *Standing to Seek Administrative and Judicial Review*

Under Section 516 of the Tariff Act of 1930, 19 U.S.C. § 1516, an "American manufacturer, producer, or wholesaler" may ask for and receive information on the duty imposed on imported merchandise of a kind manufactured, produced or dealt in by him and, thereafter, contest the appriased value of, classification of, or the rate of duty assessed upon, that merchandise by petition to the Customs Service. As stated under heading A, a decision concerning such a petition may be reviewed in the Customs Court. The recommendation is that Congress consider broadening the category of persons entitled to seek this sort of administrative relief and, thereafter, review in the Cus-

toms Court to include all persons adversely affected by an incorrect determination by the Customs Service. The Conference believes that the category of persons eligible to challenge such determinations by the Customs Service should thus conform with modern administrative practice, unless Congress determines that overriding considerations of economic policy make this undesirable.

Only the importer of excluded merchandise may now protest within the Customs Service the exclusion of merchandise and have denial of that protest reviewed by the Customs Court. The recommendation contemplates a broadening of the standing provision to enable any adversely affected person to seek administrative and judicial review of action either to exclude or to admit merchandise (unless the action is taken under a law that is not a customs law upon the request or at the direction of a court or another agency).

Under A(1) final actions of the Customs Service other than the denial of protests or petitions relating to classification, appraisal, duty and admission of merchandise, such as the suspension of immediate delivery permits, would be subject to review in the Customs Court. The recommendation contemplates conferring upon any adversely affected person who has exhausted his administrative remedies standing to seek review of such actions. The recommendation does not specify what procedures must be exhausted.

1. *Decisions Concerning Duties*

Congress should consider amending Section 516 of the Tariff Act of 1930, 19 U.S.C. § 1516, to allow any person adversely affected by an incorrect determination of the appraised value of, classification of, or rate of duty assessed upon, imported merchandise to obtain from the Customs Service information concerning such appraisal, classification or rate to and to petition for a change. Denials of such petitions should be reviewable in the Customs Court.

2. *Exclusion Cases*

Congress should consider enacting a new provision giving any person adversely affected by an action of the Customs Service, concerning merchandise that is, or should be, excluded from entry or delivery, a means of seeking administrative review of such action, with subsequent review in the Customs Court. Such a procedure should not be available to challenge action pertaining to the exclusion of merchandise, under a law that is not a customs law, and taken by the Customs Service on the request or at the direction of a court or another federal agency.

3. *Other Actions*

If Congress broadens the jurisdiction of the Customs Court as recommended in A(1), it should also consider providing that actions

within the broadened jurisdiction may be brought by any adversely affected person who has exhausted his administrative remedies.

C. *Burden of Proof in the Customs Court*

The Customs Court operates under a statute that establishes a presumption that a Customs Service decision under review is correct and places upon a party seeking review the burden of proving the decision incorrect. Trial in the Customs Court is had on a record made in the court although 28 U.S.C. § 2632(f) provides that, upon the service of a summons, the Customs Service is to transmit certain documents underlying the Customs Service decision to the court "as part of the official record of the civil action." The Customs Court and the Court of Customs and Patent Appeals have inferred from the statute a further requirement, that in order to prevail the party seeking review must prove, in addition to the incorrectness of the agency's decision, what the correct decision should be. The recommendation would do away with that unorthodox further requirement and make Customs Court review of Customs Service actions conform in this respect with the review of actions of other agencies by other courts. The mode of review would continue to be a de novo trial (in the sense indicated above), which is considered appropriate because of the high degree of informality of most Customs Service procedures.

1. *Elimination of the Plaintiff's Double Burden*

Congress should amend 28 U.S.C. § 2635(a) to revise the Customs Court's standard of review in the following way: The presumption of correctness of Customs Service decisions and the imposition upon a party challenging a decision the burden of proving otherwise would be retained, but an additional requirement read into the statute by the Customs Court and the Court of Customs and Patent Appeals would be eliminated. The additional requirement is that the challenging party prove not only that the Customs Service was wrong but also what a correct decision would be or risk suffering affirmance of the incorrect adverse decision.

Specifically, the amended statute should provide that, if the Customs Court determines that action taken by the Customs Service is erroneous, the court should modify or set aside such action; if the court is able to determine what action is correct, it should so determine and order that the correct action be taken; if the court, after exhausting its processes and procedures, cannot determine what action is correct, it should remand the case to the Customs Service with instructions to take action consistent with the decision of the court; any redetermination made by the Customs Service pursuant to a remand should be subject to a new protest or petition; a decision by the Customs Court to remand a case should be appealable.

D. *Review of Decisions to Exclude Merchandise*

Exclusion of merchandise is a severe remedy. The recommendation would attempt to ensure expedited review of exclusion decisions and would delete the extraordinary authority of the Customs Service to detain and seize imported merchandise that allegedly infringes a United States trademark or copyright in the absence of the same sort of court order that is required before action may be taken against allegedly infringing domestic merchandise.

1. *Expedited Review*

Congress should amend the statutes giving preference to certain types of cases in the Customs Court, 28 U.S.C. § 2633, and the Court of Customs and Patent Appeals, 28 U.S.C. § 2602, to ensure a similar preference for cases properly before either court involving the exclusion of merchandise from entry or delivery.

2. *The Customs Service's Authority Under the Trademark and Copyright Statutes*

Congress should amend the statutes under which the Customs Service is authorized to detain and seize merchandise that allegedly infringes a United States trademark, 19 U.S.C. § 1526, or copyright, 17 U.S.C. § 603, to provide that the Customs Service may take no such action until after the owner of the trademark or copyright has obtained an order in a United States district court enjoining the importation. Alternatively, Congress should amend the trademark statute, as it has the copyright statute, to authorize the Customs Service to establish by regulation such a condition precedent to its acting to detain and seize allegedly infringing merchandise, and the Customs Service should promulgate such a regulation. In either event, the Customs Service should then adopt express procedures that would enable the owner of a trademark or copyright to identify imported merchandise that may infringe his mark or copyright.

E. *Imposition of Civil Penalties*

The penalty for violations of Section 592 of the Tariff Act of 1930, 19 U.S.C. § 1592, and some other import statutes is forfeiture of imported merchandise or its value. These penalty provisions are unsatisfactory. The statutory forfeiture penalty is likely to be disproportionate to the gravity of the alleged offense. Although the Customs Service is usually prepared to mitigate the penalty, the statures pose the following dilemma: If the alleged violator does not wish to accept the proferred mitigation because he believes he did not violate the statute or because he believes that he is entitled to a greater degree

of mitigation, he is subject to suit in the district court for the full forfeiture value. Moreover, he will lose the benefit of any mitigation if the government can prove a violation, however insignificant, on his part. The recommendation would rationalize penalty procedures.

1. *The Rationalization of Section 592*

Section 592 of the Tariff Act of 1930, 19 U.S.C. § 1592, prohibiting fraudulent or false statements or practices respecting imports, should be revised to make it fairer and more rational in its operation.

a) Section 592 should be amended to provide for civil money penalties against the person violating the statute rather than for forfeiture of the merchandise or the full value thereof. Congress should establish maximum penalties based upon the revenue deficiency, if any, resulting from the violation and upon the degree of culpability of the violator. In any case in which the violation does not result in a revenue deficiency, the maximum penalties should be based upon a percentage of the value of the imported merchandise and upon the degree of culpability of the violator. If the violator is an importer, he should be given the option of surrendering his merchandise in lieu of payment of any penalty assessed.

b) The Customs Service should continue to have the authority to mitigate civil penalties. If an assessment is contested, an action by the government to enforce the penalty should be in the Customs Court. In such an action, the government should have the burden of proving the act or omission constituting a violation and, if so alleged, the intentional nature thereof. The Customs Court should be authorized to determine de novo the amount of the penalty.

c) In order to ensure that those subject to possible penalties under Section 592 know what is expected of them under the laws administered and enforced by the Customs Service, the Service should, to the maximum extent feasible, adopt and publish standards that will guide its determination under such laws.

d. The authority of the Customs Service to seize and hold merchandise under Section 592, other than prohibited or restricted merchandise, should be limited to instances where such seizure and holding are necessary to protect its ability to collect any revenue deficienty or penalty, and the Customs Service should be required to release the merchandise to the owner upon his provision of security for payment of such revenue deficiency or penalty. Where no such release is effected by the owner, the Customs Service should be required to release the merchandise not later than 60 days after seizure unless the government has initiated an action in the Customs Court within that period and obtained an extension for cause from the court. In instances where the Customs Court permits the Service to hold merchandise for sale by the Service to

satisfy any revenue deficiency or penalty determined by the judgment of the court, the net proceeds of such sale, after allowance for the judgment and costs of the sale, should be paid to the owner.

2. *Other Statutes*

Each of the other penalty provisions enforced by the Customs Service should be reviewed and, if appropriate, revised in a manner consistent with the foregoing recommendations for the revision of Section 592.

Top: Standing, Public Member Jerome A. Cooper. Seated, foreground, National Labor Relations Board Member Howard Jenkins, Jr., Interstate Commerce Commission Member Betty Jo Christian. Seated, foreground, NASA Member S. Neil Hosenball, Public Member Frank M. Wozencraft, FAA Member Clark H. Onstad, Public Member Anthony L. Mondello, Federal Election Commission Member Thomas E. Harris. Bottom: Left, Department of Transportation Member Linda Heller Kamm. Right, Federal Reserve Board Member Thomas J. O'Connell.

RECOMMENDATION 77-3

EX PARTE COMMUNICATIONS IN INFORMAL RULEMAKING PROCEEDINGS

(Adopted September 15-16, 1977)

In Recommendation 72-5 the Conference expressed the view that, generally, agency rulemaking is preferably carried out through the simple, flexible and efficient procedures of 5 U.S.C. § 553. That statute requires publication of notice of proposed rulemaking and provision of opportunity for submission of written comments; additional procedures may be utilized by the agencies as they deem necessary or appropriate. Recommendation 72-5 counseled that Congress ordinarily should not impose mandatory procedural requirements going beyond those of § 553 in the absence of special reasons for doing so. In Recommendation 76-3 the Conference amplified its 1972 recommendation by suggesting ways in which agencies might usefully supplement the minimum procedures required by § 553 in appropriate circumstances.

The primary purposes of rulemaking procedures under § 553 are to enhance the agency's knowledge of the subject matter of the proposed rule and to afford all interested persons an adequate opportunity to provide data, views, and arguments with respect to the agency's proposals and any alternative proposals of other interested persons. Section 553 procedures, in some instances, also serve to provide the basis for judicial review. To the extent consistent with all of these purposes, the agencies should have broad discretion to fashion procedures appropriate to the nature and importance of the issues in the proceeding, in order to make rules without undue delay or expense. Informal rulemaking should not be subject to the constraints of the adversary process. Ease of access to information and opinions, whether by recourse to published material, by field research and empirical studies, by consultation with informed persons, or by other means, should not be impaired.

While the foregoing considerations militate against a general prohibition upon ex parte communications in rulemaking subject only to Section 553, certain restraints upon such communications may be desirable. Ex parte communications during the rulemaking process can give rise to three principal types of concerns. First, decision makers may be influenced by communications made privately, thus creating a situation seemingly at odds with the widespread demand for open government; second, significant information may be unavailable to reviewing courts; and third, interested persons may be unable to reply effectively to information, proposals or arguments presented in an ex parte communication. In the context of Section 553 rulemaking,

the first two problems can be alleviated by placing written communications addressed to a rule proposal in a public file, and by disclosure of significant oral communications by means of summaries or other appropriate techniques. The very nature of such rulemaking, however, precludes any simple solution to the third difficulty. The opportunity of interested persons to reply could be fully secured only by converting rulemaking proceedings into a species of adjudication in which such persons were identified as parties, and entitled to be, at least constructively, present when all information and arguments are assembled in a record. In general rulemaking, where there may be thousands of interested persons and where the issues tend to be broad questions of policy with respect to which illumination may come from a vast variety of sources not specifically identifiable, the constraints appropriate for adjudication are neither practicable nor desirable.

Recommendation

In rulemaking proceedings subject only to the procedural requirements of § 553 of the APA:

1. A general prohibition applicable to all agencies against the receipt of private oral or written communications is undesirable, because it would deprive agencies of the flexibility needed to fashion rulemaking procedures appropriate to the issues involved, and would introduce a degree of formality that would, at least in most instances, result in procedures that are unduly complicated, slow and expensive, and, at the same time, perhaps not conducive to developing all relevant information.

2. All written communications addressed to the merits, received after notice of proposed rulemaking and in its course, from outside the agency by an agency or its personnel participating in the decision should be placed promptly in a file available for public inspection.

3. Agencies should experiment in appropriate situations with procedures designed to disclose oral communications from outside the agency of significant information or argument respecting the merits of proposed rules, made to agency personnel participating in the decision on the proposed rule, by means of summaries promptly placed in the public file, meetings which the public may attend, or other techniques appropriate to their circumstances. To the extent that summaries are utilized they ordinarily should identify the source of the communications, but need not do so when the information or argument is cumulative. Except to the extent the agencies expressly provide, the provisions of this paragraph and the preceding paragraph should not be construed to create new rights to oral proceedings or to extensions of the periods for comment on proposed rules.

4. An agency may properly withhold from the public file, and exempt from requirements for making summaries, information exempt

from disclosure under the Freedom of Information Act, 5 U.S.C. § 552.

5. Agencies or the Congress or the courts might conclude of course that restrictions on ex parte communications in particular proceedings or in limited rulemaking categories are necessitated by considerations of fairness or the needs of judicial review arising from special circumstances.

The Conference's first Regulatory Agency Management Seminar, October 1977. Top left: Seated at table, facing the camera, left to right: Civil Aeronautics Board Chairman Alfred E. Kahn, Federal Energy Regulatory Commissioner George Hall, Senate Governmental Affairs Committee Chief Counsel Richard A. Wegman, Federal Trade Commission Chairman Michael Pertschuk. Foreground: Interstate Commerce Commission Chairman A. Daniel O'Neal, Nuclear Regulatory Commission Chairman Joseph M. Hendrie. Top right: former Federal Power Commission Chairman Lee C. White, former Federal Communications Commission Chairman Richard E. Wiley, Federal Energy Regulatory Commissioner Matthew Holden, Jr. Bottom left: Equal Employment Opportunity Commission Chair Eleanor Holmes Norton, Federal Maritime Commission Chairman Richard J. Daschbach, National Labor Relations Board Member John C. Truesdale, Occupational Safety and Health Review Commission Chairman Timothy F. Cleary, New York Times Correspondent David Burnham. Bottom right: United States Circuit Judge Carl McGowan.

BYLAWS OF THE ADMINISTRATIVE CONFERENCE

(As revised June 4, 1976)

SECTION 1. ESTABLISHMENT AND OBJECTIVE

The Administrative Conference Act, 5 U.S.C. §§ 561 *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 repesentative 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 NONGOVERNMENT 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 10 percent of such members shall at any time be in continuous service beyond a third term.

(C) ELIGIBILITY AND REPLACEMENTS

(1) A member 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 redesignations of members shall be filed with the Chairman promptly.

(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 Decisional Processes;
2. Committee on Agency Organization and Personnel;
3. Committee on Compliance and Enforcement Proceedings;
4. Committee on Grants, Benefits and Contracts;
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, Federal agencies, and professional associations 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

[Public Law 88–499, August 30, 1964, 78 Stat. 615, as codified by 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 administra-

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

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

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

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

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

§ 576 Appropriations.

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

☆ U.S. GOVERNMENT PRINTING OFFICE: 1978 O—264-622