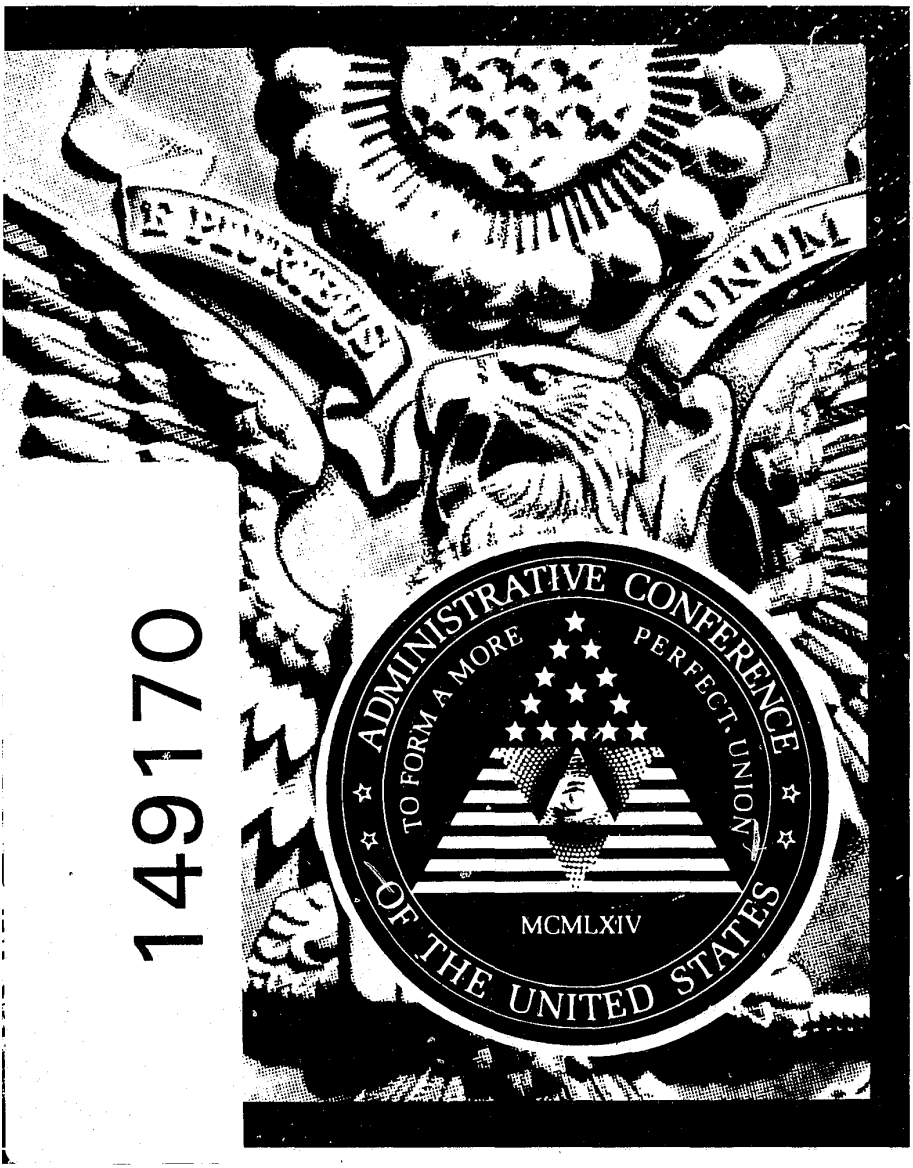

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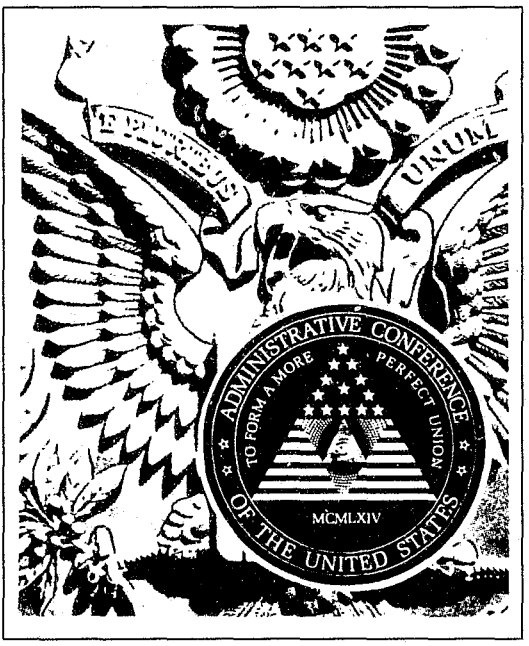
1993 ANNUAL REPORT

Administrative Conference of the United States



LETTER OF TRANSMITTAL

Administrative Conference of the United States
Office of the Chairman
Washington, DC

March 1994

To the President and the Congress of the United States:

I have the honor to transmit herewith the 1993 Annual Report of the Administrative Conference of the United States.

This report describes the significant activities of the Conference for the 12-month period from January 1, 1993 through December 31, 1993.

Respectfully,

Sally Katzen

Sally Katzen
Acting Chairman

CONTENTS

CHAIRMAN'S FOREWORD

As Charles Dickens characterized England and France in 1775, "[i]t was the best of times, it was the worst of times." While somewhat hyperbolic, this is a fairly accurate description of 1993 for the Administrative Conference of the United States.

Recommendations

The Conference continued to make a significant contribution to improving the fairness and efficiency of the administrative process. It issued several important recommendations, including one that involved an extensive review of, and proposed changes to, the government-wide rulemaking process. At the June plenary session, Chairman Ernest Gellhorn of the Committee on Rulemaking presented an integrated set of proposals to make the rulemaking process more effective and less time-consuming. Those proposals, and the ensuing debate over them, were especially timely because the Clinton Administration was in the midst of considering what changes were needed in the way previous administrations had conducted coordinated review of agency rules. Although ACUS did not formally adopt Recommendation 93-4, "Improving the Environment for Agency Rulemaking," until its December plenary session, the early debate was helpful in providing a framework for analysis and presenting thoughtful suggestions on how to improve the process. It was clear that ACUS continued to endorse presidential coordination of agency policymaking but favored a more selective approach to presidential oversight. The Conference encouraged the President to issue a policy statement that promoted early dialogue and coordination between the rulemaking agency and the reviewing organization. Executive Order 12866, issued by President Clinton on September 30, 1993, was broadly consistent with the ACUS recommendations.

Alternative Dispute Resolution

Under the leadership of former Chairman Brian Griffin, the Office of the Chairman gave priority attention to assisting federal agencies in implementing the Administrative Dispute Resolution and Negotiated Rulemaking Acts. ACUS has special responsibilities under both statutes, and these activities occupied approximately half the staff's time during the year. With

the support of ACUS staff and under the direction of a Conference-led coordinating committee, the Office of the Chairman established five inter-agency working groups, composed of representatives of dozens of federal agencies. The working groups share resources, address issues of common concern, and develop programs and joint activities that would be beyond the capability of any single agency. One of the working groups, for instance, publishes a newsletter to assist agencies in implementing the ADR Act.

The Conference issued a mediation primer, in both English and Spanish language versions, on how to identify appropriate matters for mediation, intended principally for federal managers and those who deal with federal agencies. It also produced an 18-minute introductory ADR videotape, in partnership with the Federal Mediation and Conciliation Service, designed for agency managers and program staff who may have had little or no exposure to ADR. The videotape highlights potential benefits of ADR processes and conveys information on how several agencies have taken advantage of the range of alternative dispute resolution techniques. ACUS conducted a series of roundtables for federal agency personnel exploring concrete issues in the use of ADR, such as designing dispute resolution systems and using ADR in the federal equal employment opportunity process. More than 100 agency officials attended each of these programs. (For details of ADR and negotiated rulemaking activities, see page 21.)

Other Interagency Coordination Efforts

Solicitor General Drew Days III was the featured speaker at an ACUS program for agency general counsels and other chief legal officers. More than 40 of the government's top lawyers attended the session, which is part of an ongoing series of programs designed to allow government officials from different agencies to exchange information and ideas on topics of mutual interest. The Model Rules Working Group completed a multi-year project to develop a set of adjudicatory procedure and practice rules that agencies can consider when they are required to amend their own procedural rules or establish a set of rules of practice for new programs. The Office of the Chairman completed work on the third edition of its popular MANUAL FOR ADMINISTRATIVE LAW JUDGES, which will be released early in 1994.

Recognition by the Courts

The courts continued to rely on ACUS scholarship. In *Darby v. Cisneros*, 113 S. Ct. 2539 (1993), and *Lincoln v. Grover Vigil*, 113 S. Ct. 2024 (1993), the Supreme Court expressly referred to ACUS studies. In *Woolsey v. National Transportation Safety Board*, 993 F.2d 516 (1993), the U.S. Court of Appeals for the Fifth Circuit cited Conference Recommendation 86-2, "Use of Federal Rules of Evidence in Federal Agency Adjudications," in support of its conclusion that the threshold for admission of evidence in adjudicatory proceedings under the Administrative Procedure Act need not be the same as under the Federal Rules of Evidence.

International Assistance

ACUS inaugurated the new statutory authority received in 1992, pursuant to Pub. L. No. 102-403, to respond to requests from foreign governments for advice and assistance on administrative law and process. Under the statute, Conference international activities must be conducted on a reimbursable basis and be approved by the Department of State, the Agency for International Development, or the U.S. Information Agency (USIA). ACUS conducted two overseas seminars in 1993, both under the auspices of USIA. The first was conducted in Kiev, Ukraine, at the invitation of the Ukrainian Institute of Public Administration, which is the national academy that offers post-graduate courses in public administration for government officials. More than 200 judges, scholars, and government officials from throughout Ukraine attended the week-long seminar on administrative law and the regulation of a market economy. The program was underwritten by USIA. The second seminar was conducted in Qingdao, People's Republic of China, for officials from various ministries throughout China. The program was requested by the Chinese government and funded jointly by USIA and the United Nations Development Programme.

Financial Problems

In spite of the vitality of ACUS' activities in 1993, it was a difficult year financially. In June the House of Representatives, on the recommendation of the Subcommittee on Treasury, Postal Service and General Government of the Committee on Appropriations, unexpectedly voted to terminate all funding for the Conference, effective September 30, 1993. The subcommittee offered a one-line explanation of its action: "This agency has fully accomplished its mission." Believing strongly that this statement was based on a misunderstanding of ACUS' mission, which had recently been expanded by Congress, ACUS urged the Senate to restore the appropriation to the level requested by the President. The Senate Appropriations Committee restored approximately 80 percent of the President's request, and the Senate figure was eventually adopted by Congress. The reduced funding levels nonetheless required several staff members, including the executive director, to seek and accept employment elsewhere.

One gratifying aspect of the summer appropriations crisis was the strong support the Conference received from the Administration and members of Congress, including the Chairmen and Ranking Minority Members of both the House and Senate Judiciary Committees and the oversight subcommittees, who are familiar with ACUS' work. OMB Director Leon Panetta, in stating the Administration's position regarding the Conference's appropriation, pointed out that a funding level below that requested by the President "would force reductions in critical activities, such as negotiated rulemaking and alternative dispute resolution, that improve the efficiency and effectiveness of the administrative process."

ACUS' Role in Reinventing Government

In the face of its financial uncertainties, the Conference participated in the Vice President's National Performance Review (NPR) with its Research Director Jeffrey Lubbers heading the Improving Regulatory Systems team. The Conference has now begun efforts to implement the procedural aspects of the NPR recommendations and the recently issued presidential directives. I was pleased to participate in a seminar, presented by ACUS in conjunction with OMB's Office of Information and Regulatory Affairs, to acquaint agency officials with the negotiated rulemaking process. The seminar focused on issues that should be considered in responding to the President's Memorandum instructing agencies to select at least one rulemaking initiative for development through negotiation. The Conference was also selected by NPR to undertake a pilot demonstration of the use of electronic mail as a means of enhancing alternative dispute resolution processes. A planned part of the demonstration is an "electronic reg neg" that will allow interactive rule development to occur simultaneously on several technical and policy levels. The demonstration will implicate a range of new and novel administrative law issues. The Administration expects ACUS to play a significant role in efforts to implement aspects of the NPR that involve those areas, such as ADR, negotiated rulemaking, improved public participation in agency proceedings, and the training of agency officials, to which ACUS has historically been committed, and in which ACUS has substantial expertise.

With Administration support, the Conference in June transmitted to Congress its quadrennial request for reauthorization of appropriations. During the year President Clinton made his first three appointments to the Council of the Conference. I was honored to be appointed as Vice Chairman and to preside over the Conference's December plenary session. Joining me as new Council members are John Podesta, Assistant to the President and Staff Secretary, and Jack Quinn, Chief of Staff and Counselor to Vice President Gore. We are pleased to join forces with the rest of the Conference's members in a continuing bipartisan effort to increase the fairness and efficiency of the government's administrative and regulatory processes.

Sally Katzen
Acting Chairman

Acting Chairman Sally Katzen addressing attendees at the December plenary session reception.

INITIATIVES

In keeping with its mission to study issues in administrative law and regulatory procedure, during 1993 the Conference concentrated its efforts in the areas of adjudication and regulation. As an independent federal agency, the Conference plays a vital role as an evaluator, researcher, advisor, and coordinator for programs and activities involving administrative law. As a scholarly institution within the federal government, the Conference often conducts basic research at the request of other government agencies and departments.

ADJUDICATION

APA Hearings in Civil Money Penalty Proceedings

As a follow-on to earlier Conference recommendations on the role of administrative law judges (ALJs) and on the use of administratively imposed civil money penalties, the Conference undertook a study of the use of non-ALJ adjudicators in administrative civil money penalty proceedings. The study was prepared by Professor William Funk of the Lewis and Clark University Law School. The study found that although most statutes authorizing administratively imposed civil money penalties require APA hearings before ALJs, Congress had in a few situations, primarily in the area of environmental regulation, provided for the imposition of civil money penalties in proceedings that require neither a formal hearing under the Administrative Procedure Act nor de novo judicial review.

The Conference, building on Recommendation 92-7 "The Federal Administrative Judiciary," recommended that the APA's provisions on formal adjudications be made applicable in all cases where money penalties may be imposed by administrative agencies. This would mean that hearings before an administrative law judge would uniformly be available in such cases, with the attendant process protections. The Conference also recommended that agencies ensure by regulation that, where non-ALJ hearing officers do preside in civil money penalty proceedings, such officers be protected from undue influence.

Organization of Agency Adjudication Offices

Many Executive departments have struggled with the placement and organization of their adjudicative offices. The Department of Health and Human Services has three different loci of ALJs (SSA, FDA, Departmental Appeals Board). Education and Interior have centralized Offices of Hearings and Appeals without a chief ALJ. The Department of Transportation placed some of its ALJs in the Office of the Secretary and others in the Coast Guard (each office with its own chief ALJ). Similar issues occur with respect to appellate officers (e.g., judicial officers vs. appeal boards). Various problems concerning delegation of authority, separation of functions, supervision, and appeal routes have developed, some of which bear on independence, fairness, and efficiency issues. Professor Russell Weaver of the University of Louisville produced an extensive report describing various approaches to these questions. The Committee on Adjudication reviewed the report and recommended its distribution to relevant departments.

Right to Consult

In Statement 16, "Right to Consult with Counsel in Agency Investigations," the Conference presents issues on the scope of the right to counsel in agency proceedings under Section 555(b) of the Administrative Procedure Act. The report, authored by Professor Ronald F. Wright of Wake Forest University School of Law, studied whether persons queried by agency inspectors during the course of their regular duties are entitled to counsel; whether agencies can exclude counsel for reasons of multiple representation; and whether agencies should regulate the presence of attorneys during testimony given by persons subpoenaed as part of an agency investigation.

Specifically, the statement advises agencies against exercising their discretion to exclude counsel of a party's choosing unless the situation meets the "concrete evidence" standard established in case law that an investigation will be impaired. Thus, the mere fact of multiple representation, an employment relationship between the witness and some other party involved in the investigation, or past dealings between the agency and a particular attorney should not be considered, by themselves, a sufficient basis for excluding the counsel of a witness. In addition, the statement endorses the prevailing practice among federal agencies to allow attorneys reasonable access to auxiliary experts during their representation of a witness or party. Finally, the statement emphasizes the desirability of fostering agency sensitivity to the right to counsel that persons compelled to appear before it are granted under the APA and other statutes. Therefore, in the interest of maintaining an effective working relationship between federal regulatory agencies and regulated parties, agencies should consider when it is appropriate to advise individuals of this right, and whether it is appropriate to conduct a compelled investigative proceeding in the absence of legal counsel when it is apparent that a person is unaware of his or her right to counsel.

ADMINISTRATION

Peer Review of Grants

In June the Conference membership approved Recommendation 93-3, "Peer Review in the Award of Discretionary Grants." The recommendation suggests procedures for federal agencies that employ peer review processes to evaluate proposals for grants in the arts and sciences. In peer review, government agencies allocate sums of money to broad fields of endeavor and invite researchers, artists, or performers to develop creative proposals that are then evaluated by a group of "peers" (usually from the private sector) with expertise in the relevant area. The recommendation is based in large part on a report to the Conference by Professor Thomas O. McGarity of the University of Texas School of Law, which examined peer review programs in the National Institutes of Health, the National Science Foundation, the Environmental Protection Agency, and the National Endowment for the Arts. All of these agencies rely heavily upon the principle of peer review in awarding discretionary grants in an effort to reduce the potential for bias in awards. The Conference's recommendation seeks to draw lessons from the experiences of grantmaking agencies so as to help those agencies promote openness and accountability, minimize conflicts of interest, and reduce the potential for decisional bias.

JUDICIAL REVIEW

Prompt Corrective Action

Recommendation 93-2, "Administrative and Judicial Review of Prompt Corrective Action Decisions by the Federal Banking Regulators," arose out of the Conference's focused consideration of financial services regulation issues. The Federal Deposit Insurance Corporation Improvement Act of 1991 authorizes federal banking agencies to take "prompt corrective action" to prevent the failure or further deterioration of troubled depository institutions they regulate. Under the statute, the severity of the action banking regulators may take against an institution depends on its capital classification, which, in turn, is determined by the application of capital standards or by consideration of whether the institution is in an unsafe or unsound condition.

The recommendation calls for greater procedural protection for depository institutions subject to adverse capital classifications as well as for bank directors or officers who are dismissed as a result of a prompt corrective action decision. The recommendation urges federal banking agencies to adopt rules permitting depository institutions to appeal to a senior official any decision of a bank examiner or regional director that results in an adverse capital classification of the institution. In addition, the recommendation asks Congress to provide for judicial review of adverse capital classifications and

of decisions to dismiss bank officials, as well as of decisions to appoint conservators or receivers for various classes of depository institutions. At the same time, the procedures the Conference recommended recognize and accommodate the banking agencies' need to act expeditiously.

REGULATORY PROCEDURES

Procedures for Regulation of Pesticides

In Recommendation 93-5, "Procedures for Regulation of Pesticides," the Conference calls for the adoption of a more coordinated and strategic procedural framework for the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") involving the creation of multiple and reinforcing incentives for regulatory compliance by pesticide registrants, for timely and accurate decisionmaking by EPA, and for effective public participation. To meet EPA's need for timely and adequate data, the Conference recommends that the agency promulgate and communicate clear data standards and guidance on the data expected from registrants. The recommendation also suggests that Congress authorize EPA to levy administrative civil money penalties upon registrants submitting data that fail to meet previously announced, clear standards. With regard to suspension and cancellation proceedings, which involve scientific data concerning risks and benefits, the Conference urges use of informal procedures by which EPA gives registrants detailed reasons for the agency's actions and then provides registrants with sufficient time to file responsive written comments and supporting documentation. However, an opportunity should be provided to allow affected parties to show cause why oral testimony or cross-examination may be justified. The recommendation also urges Congress to consider giving EPA the authority to use informal procedures to order the phase down of existing pesticides when there are safer, more effective products or practices available.

The Conference's consultant for this project was Professor Donald Hornstein of the University of North Carolina.

RULEMAKING

Improving the Rulemaking Environment

Numerous commentators have suggested that agencies have increasingly been avoiding notice-and-comment rulemaking. The Conference undertook a broad review of rulemaking by federal agencies, seeking to identify causes for this trend. Based on its identification of constraints that arose from a variety of sources, the Conference made a series of recommendations to improve the environment for agency rulemaking by relieving unnecessary pressures and disincentives. Recommendation 93-4, "Improving the Environment for Agency Rulemaking," suggests improvements in all aspects of the regulatory process. It recommends (1) that presidential oversight be more focused, more open, and quicker; (2) that Congress refrain

from making additional requirements to those already a part of the APA's informal rulemaking provisions; (3) that the courts' review of rules reduce burdens on agency rulemaking procedures; (4) that preenforcement review should continue consistent with the Supreme Court's decision in *Abbott Laboratories v. Gardner*; (5) that Congress consider making some amendments designed to update the APA; and (6) that agencies implement several management initiatives to make their internal processes more effective.

OTHER RESEARCH ACTIVITIES

The Conference conducts most of its research by using consultants, typically law professors with a strong interest in administrative law issues. After a consultant completes a commissioned study, the appropriate Conference committee reviews the report and discusses possible recommendations on the subject for consideration by the Assembly of the Conference.

At the end of 1993 approximately 25 research projects were under way. These include the following:

Division of Roles in Joint Federal/State Regulatory Programs: How regulatory federalism works—federal oversight of state implementation of federal programs—is the subject of a study by Professor Errol Meidinger of the State University of New York at Buffalo. Programs under study include the Clean Air Act and the Surface Mining Control and Reclamation Act.

Use of Audited Self-Certification: Industry self-regulation has been used and/or proposed as an alternative or supplement to government regulation in a variety of contexts, including meat and poultry inspection, equal employment opportunity (EEO) contract compliance, environmental controls and, perhaps most often, in the securities and commodities arena. An evaluation of self-regulation to determine when it is effective would contribute greatly to what has been, up to now, mostly a rhetorical debate. The Committee on Regulation is actively considering this study by Professor Douglas Michael of the University of Kentucky.

Interim-Final Rulemaking: Professor Michael Asimow of the University of California at Los Angeles will supplement a report he has already written concerning the Internal Revenue Service's use of the interim-final rulemaking technique, by examining empirically agencies' behavior when they do use it. He will get answers to such questions as: Do agencies eventually issue a final rule? If so, how long after the interim rule?

The Interplay Between Civil and Criminal Enforcement of Regulatory Statues: Agencies' behavior in choosing between civil and criminal sanctions varies widely. The decisionmaking is diffuse, with agency headquarters, field offices, and U.S. attorneys all participating. Moreover, the recent Supreme Court case, *U.S. v. Halper*, 490 U.S. 435 (1989), applied the Double Jeopardy Clause to certain types of civil penalties sought against persons previously convicted criminally for the same offense. The study will examine both horizontal and vertical coordination among enforcement entities. Agencies to be studied include the Securities and Exchange Commission, Nuclear Regulatory Commission, Occupational Safety and

Health Administration, and the Department of Justice. A team consisting of four professors from George Washington University is conducting this study.

Use of No-Action Letters and Letter Rulings by Federal Agencies: One of the Conference's earliest and most influential studies was of the Securities and Exchange Commission's no-action letter procedure. Recommendation 70-2 led to public availability of these letters. In addition to evaluating the practice 20 years later, a new study will encompass the Commodity Futures Trading Commission's use of no-action letters as well the use of similar letter rulings by the Internal Revenue Service, Customs Service, Department of Justice's Antitrust Division, and other agencies. Professor Myles Lynk of the George Washington University is undertaking this study.

Review of Tort Liability of the Federal Government and Its Employees: The evolving standards of governmental tort liability will be comprehensively reviewed, including the operation of the Federal Tort Claims Act (especially its various exceptions, including the discretionary function exemption) and the Federal Employees Liability Reform and Tort Compensation Act of 1988. Professor William P. Kratzke of Memphis State University is conducting this review.

Conflict Management Under the Endangered Species Act: Recent litigation in the Pacific Northwest over the effect of timber harvesting on the habitat of the rare spotted owl has focused attention on the need for better conflict management under the Endangered Species Act. This project examines this case and other case studies and seeks to propose improvements in the Fish and Wildlife Service's ability to deal with conflicts. Professors Julia Wondolleck and Steven Yaffee of the University of Michigan are conducting the study.

Choice of Forum in Government Contract Litigation: Under current law, challengers to government action in contract cases have a multiplicity of forums. In preaward (bid protest) cases, challenges may be filed in a half dozen forums, including district courts, the General Accounting Office, or the General Services Administration Board of Contract Appeals (for computer-related contracts). Professor William Kovacic of the George Mason University School of Law (assisted by Daniel Koch, Esquire) has assumed responsibility for this study.

Rule 11-Type Sanctions in Administrative Proceedings: Under the recent addition to the Federal Rules of Civil Procedure, sanctions can be assessed against attorneys involved in frivolous lawsuits. This provision, while somewhat controversial within the bar, has certainly resulted in some of the intended benefits. Should there be an analog in federal agency proceedings? Professor Carl Tobias of the University of Montana is studying this issue.

Agency Procedures for Distribution and Sale of Government Assets: Professors Jonathan Macey (Cornell University Law School) and Geoffrey Miller (University of Chicago Law School) are conducting a survey and an evaluation of the various agency techniques for auctioning, selling, or distributing government assets, including oil leases, airport landing rights, and "resolved" savings and loans.

Asset Forfeiture, Remission, and Mitigation Procedures: Various federal agencies are empowered to seize or forfeit assets of persons involved in illegal activities. The Immigration and Naturalization Service (INS) is authorized to seize or forfeit conveyances used in violation of the alien smuggling laws. In fiscal year 1989, INS seized almost 25,000 cars, trucks, aircraft, boats, and other vehicles. The burden of proof in such forfeiture proceedings is on the owner to establish a valid defense. Most cases are resolved through petitions for remission or mitigation. This project by Washington lawyer Arnold Leibowitz will examine procedures the INS and other agencies use to handle these cases.

Foreign Trade Zone (FTZ) Procedures: The 1934 Foreign Trade Zones Act was designed to create duty-free areas in the U.S. within which foreign goods may be assembled, repackaged, and joined with domestic goods. In recent years the number of applications has increased dramatically for various reasons, as have objections from domestic industries and unions. The Act gives little guidance concerning procedures the Foreign Trade Zones Board (located within the Department of Commerce) can follow, but the Board has issued regulations for its informal hearing procedures. There is also uncertainty concerning the appropriate locus and scope of judicial review of FTZ decisions. Professor Howard Fenton of Ohio Northern University's Pettit College of Law has completed a report on these issues.

Evaluating the Need for Exemption 8 of FOIA (relating to bank examinations): Exemption 8 of the Freedom of Information Act exempts from disclosure records pertaining to examination of banks and financial institutions by bank regulatory agencies. The creation of a new and comprehensive regulatory structure for such institutions has called into question the need for this particular subject matter exemption. Professor Roy Schotland of the Georgetown University Law Center has provided a report for the Committee on Rulemaking.

Hospital Reimbursement Dispute Resolution by the PRRB: Instead of using the usual ALJ adjudication model (as in social security cases), Congress has created special quasi-independent adjudicatory boards within the Department of Health and Human Services for the review of hospital reimbursement disputes under the Medicare system. This study by Professor Phyllis Bernard of the Oklahoma City University School of Law will focus on the Provider Reimbursement Review Board and the Medicare Geographical Classification Board.

FOIA and Settlement Documents: A persistent difficulty in the crafting and passage of the 199^ Administrative Dispute Resoultion Act concerned the need for confidentiality of some documents generated by ADR proceedings (e.g., mediator's notes) and their availability under FOIA. Legislators indicated that the issue of settlement documents deserved more study. This study by Professor Mark Grunewald of the Washington and Lee University School of Law describes the state of the law, reviews the implications for the success of ADR as well as for openness goals, and evaluates the need for changes in either FOIA or the ADR Act.

Judicial Review of Superfund Disputes: The Superfund law contains a provision [Section 113(h); 42 U.S.C. 9613h] precluding preenforcement challenges to removal or remedial actions. This provision is both criticized as unfair and hailed as necessary to the success of the program. It has produced much litigation as responsible parties seek to find a way to secure judicial review of EPA orders. This study by Professor Michael Healy of the University of Kentucky College of Law will examine the status of this law and review the effectiveness and fairness of the provision.

Debarment and Suspension Procedures: The procedures federal agencies use for debarring or suspending contractors for fraud or other procurement-related misfeasance or crimes have been a source of recurring controversy. Professor Brian Shannon of the Texas Tech University School of Law will study the procedural due process issues inherent in this topic.

Appeals under National Health Care Reform and Medicare Part B: The national health care reform proposal contains numerous requirements for administrative appeals and use of alternative dispute resolution. The existing Medicare program already involves hospital (Part A) and physician (Part B) payment appeals. The prospective payment methodology (newly applicable to physicians) has led to increased Part B cases and new administrative law issues. This project, to be done by Professor Eleanor Kinney, Director of the Center for Law and Health at the University of Indiana (Indianapolis), will examine appellate procedures required under the new legislation and Medicare Part B appeals.

DOJ Control and Supervision of Agency Litigation: Although historically the conduct of government litigation has been reserved to the Department of Justice, Congress has vested some independent litigating authority in 35 other governmental entities and the Attorney General has also entered into "memos of understanding" allowing additional exemptions. This study, by Professor Neal Devins of the College of William and Mary's Marshall-Wythe School of Law, will examine how this allocation of responsibilities is working.

Implementation of the Americans with Disabilities Act: This 1990 law is one of the most far-reaching regulatory statutes ever enacted. The Act seeks to protect more than 43 million people and covers most employers and public accommodations. A half dozen federal agencies are charged with issuing regulations concerning terms like "undue burden" and "reasonable accommodations." Anticipating the development of enforcement disputes under the Act, there is a section encouraging use of ADR (Section 513). This study, by Professor Ann Hodges of the University of Richmond's T.C. Williams School of Law, will evaluate procedural problems relating to the Act's implementation.

INFORMATION INTERCHANGE AND CLEARINGHOUSE

The Conference serves as a valuable resource to Congress, federal agencies, and the public. Staff assist Senators and Representatives in drafting legislation pertaining to issues covered by Conference recommendations. Members and staff of the Conference are also available to work with federal agencies to revise or improve their administrative procedures.

As a clearinghouse for information on administrative law, the Conference maintains a library that contains a substantial collection of legal periodicals and reference guides on administrative law and procedure. The library is open to anyone, federal personnel and private citizens alike.

The Conference is also committed to providing economical and effective education and training on current issues in administrative law. Consequently, it sponsors regular seminars and colloquia on topics covered by its recommendations as well as emerging issues in the regulatory arena. On occasion, the Conference sponsors public hearings on subjects being studied. All Conference programs are designed to educate attendees about developments in administrative practice and procedure.

LEGISLATIVE ACTIVITIES

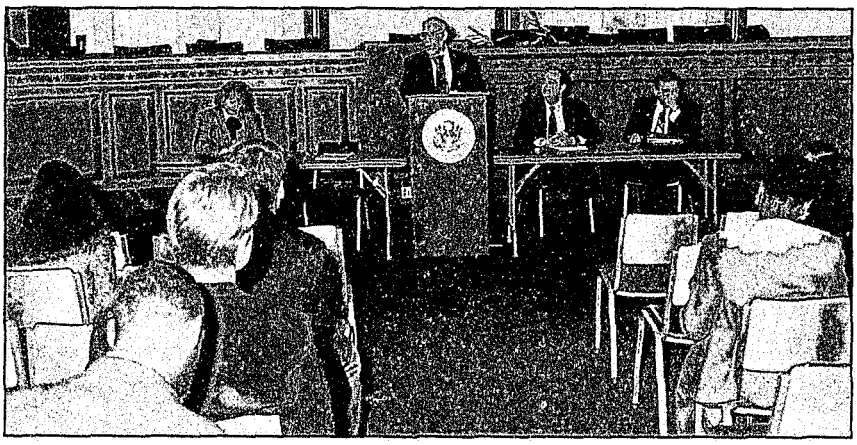
On June 23, 1993 the Conference submitted its quadrennial request for reauthorization of appropriations. The request would extend the authorization period for another 4 years through fiscal year 1998 and raise the ceiling on appropriations.

Committees of Congress continue to ask the Conference to testify on procedure and process issues in pending legislation. At the request of the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee, Research Director Jeffrey Lubbers testified on H.R. 830, a bill to amend the Regulatory Flexibility Act. General Counsel Gary Edles was invited to testify before the Social Security Subcommittee of the House Appropriations Committee on H.R. 3265, a bill to establish a separate court of appeals to hear social security cases. In connection with his testimony, Mr. Edles sent the subcommittee a set of Conference recommendations relating to the Social Security Administration and its disability process that Congressman Andrew Jacobs, the subcommittee chairman, described as "a treasure house of information."

Conference staff provided written comments to the Subcommittee on the Oversight of Government Management of the Senate Governmental Affairs Committee regarding the possible modification or elimination of reports under the Committee's jurisdiction. In addition, the Conference staff responded to dozens of informal requests for information and assistance from congressional staff members and a number of requests from the Office of Management and Budget for views regarding pending bills or agency comments on legislation.

Congress would give the Conference new evaluation responsibilities in connection with proposed alternative dispute resolution programs by the banking agencies if pending banking legislation is passed. H.R. 3474, introduced by Chairman Henry Gonzalez of the House Banking Committee, requires each federal banking agency to establish a program for the voluntary use of alternative means of dispute resolution to resolve disputes by those agencies. The bill, which passed the House of Representatives on November 22, 1993, requires each banking agency to create a pilot program within 18 months and directs the Conference to evaluate the programs and report to Congress within 30 months after enactment of the bill.

The Conference's expertise was also recognized in two other bills introduced during the year. H.R. 2729, a bill to make the equal employment laws applicable to Congress, provides that a newly created office to handle complaints "may consult with the Chairman of the Administrative Conference" regarding the adoption of rules of procedure. H.R. 823, a bill to increase the public disclosure requirements for lobbying activities, provides that the director of a new Office of Lobbying Registration and Public Disclosure shall prescribe regulations, forms, and penalty schedules "after notice and comment and consultation with the Secretary of the Senate, the Clerk of the House, and the Administrative Conference of the United States."



General Counsel Gary Edles welcoming congressional staff at the January 11 seminar as presenters Senior Assistant General Counsel, Chemical Manufacturers Association, Kathy Bailey (left), then-Conference Executive Director, William Olmstead, and Director Ronald W. Drach, Disabled American Veterans National Employment, listen.

On January 11 the Office of the Chairman presented its sixth annual seminar for congressional staff. These half-day programs are designed to familiarize congressional staff with the basic principles of administrative law and the implications of administrative law for drafting legislation. In addition to offering an overview of recurring issues such as the provisions of the Administrative Procedure Act and judicial review of agency action, each year since its inception in 1988 the program has included coverage of a special topic. In 1993 the seminar's special topic was strategies for cooperation among the branches of government.

In July the Conference transmitted its eleventh annual report on attorneys' fees and expenses awarded by agencies pursuant to the Equal Access to Justice Act. The report covered agency activities during fiscal year 1992.

ADVICE AND ASSISTANCE TO AGENCIES

Each year the Conference serves as a clearinghouse of information on administrative practice and procedure so that government agencies can receive the benefit of each other's and the Conference's experience. The activities fulfill the Conference's statutory responsibilities to "arrange for interchange among administrative agencies of information potentially useful in improving administrative procedure" (5 U.S.C. §594(2)).

Pursuant to its mandates in the Administrative Dispute Resolution Act (ADR Act) and the Negotiated Rulemaking Act, the Office of the Chairman continued to give priority attention to working with agencies to stimulate and assist their use of ADR in settling a wide range of administrative disputes (see ADR and Reg Neg Implementation, page 21).

This year the Conference-sponsored Model Rules Working Group completed a multi-year project to develop a set of adjudicatory procedure and practice rules that agencies can consider when they are required to amend their own procedural rules or establish a set of rules of practice for new programs. Also, the Conference continued its seminar series for agency chief legal officers, a program that was initiated in 1992. Solicitor General Drew Days III addressed the group outlining the various roles his office plays in conducting government litigation and providing insights into how government counsel can participate effectively in developing litigation positions.

Conference staff also responded to requests for advice or information from other agencies' employees, such as those related to agency implementation of the Government in the Sunshine Act and the Equal Access to Justice Act, and prepared formal comments and testimony on agencies' proposed rules or other actions.

Conference staff commented on Food and Drug Administration civil penalty rules and the Department of Justice's rules for the radiation compensation program, and provided documentation to the Social Security Administration's (SSA) Disability Process Reengineering Program on the Conference's numerous recommendations pertaining to SSA disability adjudication procedures.

Of particular note is the involvement of the Conference's Research Director, Jeffrey Lubbers, in the Vice President's National Performance Review (NPR). Mr. Lubbers was the leader for the Improving Regulatory Systems team.

ADVICE AND ASSISTANCE TO FOREIGN GOVERNMENTS

The Conference inaugurated its new statutory authority (Pub. L. No. 102-403) to provide administrative law assistance to foreign countries, on a reimbursable basis and with the concurrence of the Department of State, the Agency for International Development, or the U.S. Information Agency (USIA).

The first of two overseas seminars in administrative law was conducted in March in Kiev, Ukraine, at the invitation of the Ukrainian Institute of Public Administration, which is the national academy that offers post-graduate courses in public administration for government officials. More than 200 judges, scholars, and government officials attended the week-long seminar on administrative law and the regulation of a market economy. The program was underwritten by USIA.

Former Chairman Brian Griffin headed the U.S. team that included Conference General Counsel Gary Edles; Professors E. Donald Elliott (Yale Law School) and Harold Bruff (the George Washington University Law School); Linda Wells, Director of the Commercial Law Development Program for Central and Eastern Europe, Office of the General Counsel, Department of Commerce; and Marianne Smythe, then-Director of Investment Management at the Securities and Exchange Commission. Conference staff developed the program curriculum, which addressed general administrative law issues and specific aspects of government regulation, in close consultation with the Institute.

The second seminar was conducted in August in Qingdao, People's Republic of China, for officials from various ministries throughout China. Former Conference Chairman Brian Griffin and D.C. Circuit Court of Appeals Judge Patricia Wald led a six-member delegation. The program, requested by the Chinese government, was funded by the United Nations Development Programme and USIA. Also serving on the delegation were Conference Research Director Jeffrey Lubbers, senior fellows Victor Rosenblum and Thomas Susman, and public member David Vladeck.

The burgeoning economy, expanded international trade, and increasing local autonomy in China have spurred the enactment of a series of new laws including the Administrative Procedure Law of 1990. These developments were reflected in the seminar's curriculum, which focused on administrative adjudication and rulemaking, due process issues, ethics-in-government rules, civil service restrictions, and the need for an independent judiciary.

In October the second phase of the legal exchange took place when, under USIA auspices, Director General Qian led a six-member delegation to the United States for a month-long visit. The Conference helped organize their week-long stay in Washington by hosting and arranging presentations. Conference public member Ernest Gellhorn spoke to the group about the rule of law and Professor Harold Bruff discussed separation of powers and federalism issues.

During the year, the Conference continued to be a source of expertise on administrative law for visitors from several foreign countries.

Chief Justice Alastair Nicholson of the Family Court of Australia visited the Conference to discuss ACUS' experience with selecting and training mediators. The court is part of the Australian federal system and its judges sit, from time to time, as members of the Administrative Appeals Tribunal, reviewing decisions of administrative agencies. Justice Nicholson explored with Conference officials means of expanding the number of available mediators and improving their training.

The Office of the Chairman also hosted a delegation from the Regulation Review Committee of the Parliament of New South Wales, Australia, which included Mr. Adrian J. Cruickshank, Chairman and Member of the Legislative Assembly; the Honorable Stephen B. Mutch of the Legislative Council; Mr. Kimberley M. Yeadon, member of the Legislative Assembly; and Mr. James B. Jefferis, Executive Director. The Review Committee is a nine-member statutory body charged with reviewing regulations according to a "staged repeal" (i.e., sunset schedule).

General Counsel Gary Edles and Research Director Jeffrey Lubbers met with Professor D. A. Lubach of the law faculty of Holland's University of Groningen to discuss the role of independent agencies in the American administrative system. The Netherlands, which enacted a new administrative procedure act last year, is now examining whether to transfer some of its administrative programs from cabinet ministries to independent agencies.

In November former Executive Director William Olmstead and senior staff attorney David Pritzker met with Jiunu-rong Yeh, Professor of Law at National Taiwan University. Professor Yeh is leading a study group on the desirability and feasibility of establishing a centralized government gazette system. He visited the Conference to get its perspective and a deeper understanding of publishing the Federal Register and Code of Federal Regulation. Earlier in the year Professor Yeh had met with Mr. Pritzker and General Counsel Gary Edles to discuss the application and development of negotiated rulemaking in the United States.

PUBLICATIONS

The Conference issues several types of publications that reflect the range of the Conference's research interests. In the past several years it has also released videotapes on various aspects of dispute resolution. The Conference's annual publication, RECOMMENDATIONS AND REPORTS, contains

copies of its formal recommendations and statements and their accompanying reports. Appendix F, page 93, contains a list of the Conference's 1993 publications, reports, and articles.

During 1993 the Conference completed the third edition of its popular MANUAL FOR ADMINISTRATIVE LAW JUDGES, which will be available early in 1994. The MANUAL includes updated discussions of ADR as well as revised sample forms.

The Conference produced two publications as part of its series "Resource Papers in Administrative Law." MEDIATION: A PRIMER FOR FEDERAL AGENCIES was issued mid-year, and a Spanish version, LA MEDIACIÓN CARTILLA PARA AGENCIAS GUBERNAMENTALES, was published in late summer.

In late fall the Conference released "*From Conflict to Cooperation: Alternative Dispute Resolution*," an 18-minute videotape produced in partnership with the Federal Mediation and Conciliation Service. The videotape is designed to introduce ADR processes and their potential benefits to federal managers and program staff.

On occasion the Conference will meet a demand by publishing transcripts from its colloquia. Such was the case with the colloquy on inspectors general. Available from the Conference and the U.S. Department of Labor is INSPECTORS GENERAL: AN INSTITUTION IN NEED OF REFORM?

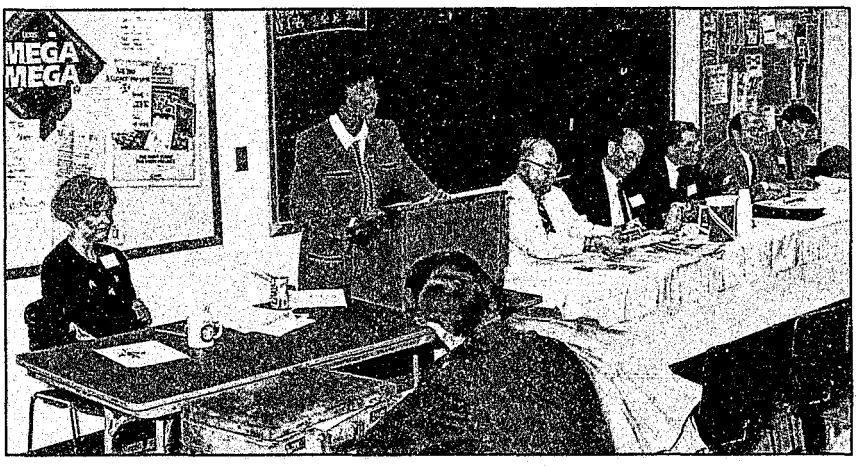
All Conference publications are available through the Federal Depository Library Program. The U.S. Government Printing Office (GPO) sells some of the books. Appendix F identifies those publications available from GPO and provides information for purchasing copies. Archival and interlibrary loan copies are retained in the Conference's library at 2120 L Street NW in Washington, DC. A limited number of copies of recent publications may be available from the Conference on request.

COLLOQUIA

Managing Economic Interdependence

Together with Georgetown University Law Center's JOURNAL OF LAW & POLICY IN INTERNATIONAL BUSINESS, the Conference, on January 29, presented a program on managing international economic interdependence. The program featured four panels—Antitrust: Minimizing Friction Between the Trading Blocks; Banking: Regulation of Foreign Banks' Entry into the United States; Resolving Antidumping and Countervailing Duty Disputes: Defining GATT's Role in an Era of Increasing Conflict; and Securities: SEC Rules as a Barrier to Foreign Issuers' Use of U.S. Markets. The program also included a special presentation on the advantages and limitations of managing economic interdependence by Conference consultant Professor John H. Jackson. The papers were published in the JOURNAL OF LAW & POLICY IN INTERNATIONAL BUSINESS (Volume 24, Issue 4, Summer 1993).

Joel Davidow of Dickstein, Shapiro & Morin, described U.S. laws that were applicable to Japanese "keiretsu", and Joseph Griffin of Morgan, Lewis & Bockius discussed the impact on transnational business of the EC-US Antitrust Cooperation Agreement. At the panel on banking, Deborah



Banking panel moderator Professor Emma Jordan, Georgetown University, introducing Deborah Burand (left), who presented a paper, and discussants William F. Kroener III, Peter J. Wallison, Meyer Eisenberg, Robert Effros, and T.M. Wilkinson Green at the January 29 symposium.

Burand, Senior Attorney, International Section, Board of Governors of the Federal Reserve, suggested that there is a trend towards greater harmonization of global bank regulation. In the discussion of antidumping procedures, N. David Palmeter of Mudge, Rose & Guthrie identified procedural improvements needed to make the GATT process fairer and more effective. Roberta S. Karmel, of Kelley, Drye & Warren, argued that both foreign issuers and U.S. investors urgently need relief from the unduly burdensome requirements imposed by the SEC.

Inspectors General: An Institution in Need of Reform?

Changes to the Inspectors General Act of 1978 and the organization and operation of Offices of Inspector General were discussed at a March 3 colloquy. None of the panelists—representing academic, inspector general, and legislative perspectives—advocated major reforms.

Professor Paul C. Light of the Hubert H. Humphrey Institute of Public Affairs led off the program, summarizing the conclusions in his book, MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY. Professor Light reiterated his view that there is currently too much emphasis on after-the-fact auditing and compliance, and proposed that assistant inspectors general (IGs) for evaluation and inspection be appointed

to help IGs identify vulnerabilities and recommend program improvements before problems occur.

James R. Richards, then inspector general of the Department of the Interior, stated that inspection and evaluation units have been effective at some agencies, such as the Departments of Energy and Health and Human Services. However, he urged the need for more study before any across-the-board changes are made, and he suggested that program evaluation will be ill-suited to some government agencies.

Betty Ann Soiefer, Counsel to the Senate Committee on Governmental Affairs, said she believes that program inspection and evaluation offer an effective approach because rigorous audits take too long to reach Capitol Hill. At the same time, Ms. Soiefer cautioned against adopting a "legislative fix" without further development of the idea, including definition of the function and report standards.

Senate Governmental Affairs Committee Counsel Betty Ann Soiefer, former inspector general at the Department of the Interior James R. Richards, and Professor Paul C. Light at the March 3 colloquy on inspectors general.

ADR AND REG NEG IMPLEMENTATION

The Conference's dispute resolution program was significantly expanded in 1993 through the efforts of five interagency working groups established by the Conference. Conference activities included presenting five roundtables and sponsoring and developing myriad other projects. Most of the Conference's professional staff were involved in an intense effort to assist agencies in carrying out their responsibilities under the Administrative Dispute Resolution and Negotiated Rulemaking Acts, through both the working groups and staff-conducted educational and training programs directed toward specific agencies. (The Conference's statutory duties under these laws were detailed in previous annual reports.) In addition, the Conference actively followed up on the high level support for improved conflict resolution evinced in the report of the Vice President's National Performance Review (NPR) and made plans to become more involved in NPR implementation during the next year.

Outreach

On February 2 the Conference sponsored a day-long program for federal agency officials on practical aspects of designing systems for using alternative dispute resolution. Describing the basic principles of dispute system design were Professor Stephen Goldberg of Northwestern University Law School, Linda R. Singer of the Center for Dispute Settlement, and Cathy Costantino, Director of the ADR Unit at the Federal Deposit Insurance Corporation. The program included a "fishbowl exercise" during which Professor Goldberg and Ms. Singer worked with representatives from the U.S. Air Force's Sacramento Air Logistics Center to improve their efforts to establish an ADR program for contracts cases.

Next in the series of 1993 roundtables was one on standards for qualifications of neutrals, held on June 15, which was co-sponsored with the Society of Professionals in Dispute Resolution. This program was developed in part by the interagency Implementation Working Group and was attended by dispute resolution specialists from a host of federal agencies, federal managers, and providers of ADR services from the private sector. Participants discussed a variety of possible approaches to ensuring the competence of mediators and other ADR neutrals used in government cases and considered

whether standards should be established pertaining to their experience, education and training, substantive knowledge, or past performance.

On September 14 the Conference sponsored a roundtable on evaluating federal agency ADR programs. The day-long program was presented by experts in the evaluation and dispute resolution fields, including Professor Craig McEwen of Bowdoin College, Professor John Daniel of Howard University, and attorney Philip J. Harter. Among the issues discussed were the potential uses and limits of evaluation research, possible ways of structuring and carrying out an evaluation, and the different goals of an ADR program that might be assessed in an evaluation. Professor McEwen conducted two "fishbowl exercises," involving Jim Jones from the Department of Labor and Arlene Edwards from the Defense Logistics Agency, designed to demonstrate some of the preliminary issues that agencies need to address in planning an evaluation.

The Conference, in conjunction with the interagency EEO Working Group, presented a roundtable on October 7 that explored the use of alternative dispute resolution activities in the federal equal employment opportunity process. The program was a response to the growing support among employees and managers in many agencies for using mediation to resolve EEO disputes. Edith Primm, Director of Research and Development at the Justice Center of Atlanta, worked with the Conference to organize the program. The program was designed to educate federal government EEO personnel about using ADR and to address methods of increasing interaction between federal agency dispute resolution specialists appointed under the ADR Act and EEO/civil rights officials.

On November 29 the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) and the Conference jointly presented a program for dispute resolution specialists and other agency managers to help them begin using the negotiated rulemaking process, a method for reaching consensus on the substance of potentially controversial agency regulations, which the Conference has championed for more than a decade. The program was designed to help agencies implement President Clinton's September 30,1993 Memorandum that accompanied Executive Order 12866 on Regulatory Planning and Review. That Presidential directive instructed the head of each executive branch agency to find at least one candidate rule for which a negotiated approach would be tried, and to report the results to OIRA. The November seminar provided specific guidance on selecting candidate rules for which negotiated rulemaking is appropriate and on basic questions about how to get started. Several participants in prior negotiated rulemaking proceedings shared their experiences. Also participating in the program were OIRA Administrator Sally Katzen and Jefferson Hill, Chief of OIRA's Commerce and Lands Branch, who encouraged participants to give serious consideration to using negotiated rulemaking in appropriate cases.

Interagency Working Groups

Creation of five enthusiastic interagency working groups, committed to making ADR work effectively for the government, has enabled the Conference to leverage its small staff's ability to assist a large number of other federal agencies. Members of the working groups come from dozens of agencies across the government. Each group is supported by a Conference staff attorney who acts as liaison to that group. Most working groups typically met once a month during 1993 and they supported subgroups that met as often as necessary to carry out their tasks. Early in the year each of the groups defined its mission and established goals and priority activities. Accomplishments during 1993 include the following.

Systems Design. The purpose of this group is to help federal entities create dispute resolution systems that will be effective, acceptable to potential parties, and appropriate to their contexts. The group's philosophy is a practice-oriented, functional, hands-on approach to developing and collecting operational, organizational, and evaluative methods, processes, and tools.

In February the group assisted the Office of the Chairman in putting on a day-long roundtable to help agency personnel understand the basic

Professors John Daniel, Howard University, and Craig McEwen, Bowdoin College, responding to questions at the September 14 roundtable on evaluating federal ADR programs.

principles of dispute systems design. In the summer the group issued a "Dispute System Design Organizational Checklist," available from the Conference, which contains advice for agencies to help them get started. The group is completing a handbook that addresses ADR operational design issues. The Evaluation Subgroup helped prepare a September roundtable on evaluating ADR programs, produced a document entitled "Performance Indicators for Federal ADR Programs," and is working on a handbook on evaluating the cost-effectiveness of ADR programs.

Training and Education. The goal of this group is to reduce the burden on agencies implementing the Administrative Dispute Resolution and Negotiated Rulemaking Acts by promoting creative use and sharing of ADR training resources; capitalizing on experience and training and educational expertise available government-wide; and developing and implementing ways for agencies to work cooperatively on ADR training and education efforts.

The group put on a prototype 4-day mediation skills training program in July and then worked to develop a set of training materials for use by all agencies that want to offer training in mediation. These materials will be published in the spring of 1994. A subgroup on regional programs assisted an initiative in Seattle involving interagency ADR training and sharing of trained neutrals under Seattle's Federal Executive Board. The working group sponsored several brown bag lunches to allow agencies with active ADR programs to share their experiences.

Implementation. The mission of this group is to assist federal agencies in very concrete ways to implement the Administrative Dispute Resolution Act, including developing a system that allows agencies to share the services of government employees trained as mediators, preparing guidance materials on selecting and contracting for neutrals from the private sector, and developing procedural manuals for agencies.

The group is developing an instruction manual on contracting for neutrals' services, putting on forums on subjects such as overcoming institutional barriers to effective dispute resolution, and working with representatives of the Office of Federal Procurement Policy to mesh ADR with changes, mandated by the National Performance Review, in the way government contracting is carried out. This group assisted in developing a roundtable in June on qualifications of neutrals. Members of the group from the Department of Defense (DoD) are planning to co-sponsor a forum early in 1994 on the status of implementation of ADR in DoD.

Clearinghouse and Outreach. This group is establishing ADR communication systems, including electronic methods of communication designed not only to assist agencies in sharing ADR resources and information, but also to develop methods for reaching the general public and regulated communities who are parties to many disputes involving the federal government.

The group developed and began publishing a newsletter, *ADR Network*, which is expected to be issued four times a year. The group is also helping the Conference establish an ADR library, which currently has more than 1,000 items catalogued, and which will offer its resources to other agencies electronically. At yearend the group had laid the foundation for distributing a wide array of ADR-related resources via E-mail. The Conference's ADR E-mail proposal, prepared with the support of this group, was selected as one of three pilot projects for the National Performance Review's X.400 electronic mail demonstration, known popularly as part of the "information superhighway." The NPR pilot program, which has great

potential to advance the understanding and use of ADR in the federal sector, and thus advance the realization of a "reinvented government," is expected to be fully operational by spring 1994.

Equal Employment Opportunity. The mission of this group, which was established in the summer of 1993, is to enable agencies to share their experiences and to develop sound programs using ADR techniques in EEO disputes.

This group sponsored a roundtable in October on using mediation in civil rights cases and is preparing a video and a "How-To Guide" for EEO officers who want to make greater use of ADR.

Other Related Efforts

During the year the Conference published a primer on use of mediation (in both English and Spanish language versions) and an 18-minute videotape intended to introduce federal officials to ADR and the experiences of several agencies that have employed it with success (see Publications, Appendix F, page 93). The mediation primer is part of a continuing series. Primers on settlement judges and negotiated rulemaking were drafted during 1993 and will be published in 1994. The Conference consulted with the Department of Labor on its preparation of a 26-minute videotape on negotiated rulemaking.

At the end of 1993 the Conference began exploring ways to conduct an electronic negotiated rulemaking as part of the demonstration of its E-mail pilot program. Patterned on pioneering work done in Oregon, a federal agency would demonstrate "on-line" regulatory development incorporating various proposals made during the National Performance Review. These include the National Science Foundation's High Performance Computation, Communications and Information Technology Initiatives and the "Accelerated Regulatory Information System" being developed by NPR staff. Through these activities, cooperation between the public and private sectors could be greatly facilitated.

Also at the end of 1993 the Conference invited the major national dispute resolution organizations, both public and private, to meet to explore ways of working together to promote consensus-based resolution of disputes involving the federal government, given the opportunity presented by recommendations made in the National Performance Review. In its report *From Red Tape to Results: Creating a Government that Works Better & Costs Less*, the Clinton Administration declared that "agencies will make greater use of negotiated rule making"; "agencies will expand their use of alternative dispute resolution techniques," and "all agencies should establish alternative dispute resolution methods and options for the informal disposition of employment disputes." The Conference's initial meeting with major dispute resolution groups, scheduled for early January, is intended to develop joint activities, involving both public and private parties, that will accelerate agencies' abilities to respond to these NPR recommendations.

As one part of what will be an ongoing effort to encourage implementation of the NPR recommendations, the Conference continued to consult with agencies now developing ADR programs. Included among the agencies the Conference assisted in 1993 are the Internal Revenue Service, Federal Deposit Insurance Corporation, Office of Personnel Management, Federal Energy Regulatory Commission, General Services Administration, Small Agency Council, and the Departments of Transportation, Agriculture, Labor, Interior, and Justice. Conference staff devoted considerable time and effort to the Nuclear Regulatory Commission, the Equal Employment Opportunity Commission, and the U.S. Air Force in development of their ADR programs and was actively involved in developing the Department of Justice's Legal Education Institute course on ADR for attorneys in federal agencies.

BUDGET AND AUTHORIZATION

During fiscal year 1993 the Conference's appropriation was $2,314,000.

Dollar Amounts

1993 appropriation	$2,314,000

Appropriation Language

For necessary expenses of the Administrative Conference of the United States, established by the Administrative Conference Act, as amended (5 U.S.C. §§591 et seq.), including not to exceed $1,000 for official reception and representation expenses; [$2,314,000] $2,314,000.

Programmatic Application of Funds (in thousands of dollars)

General Administration	501
Personnel Compensation and Benefits	1,623
Formal Recommendations (research, reports)	130
Implementation and Advisory (agency assistance)	43
Clearinghouse (information interchange)	17
Budget Authority	2,314
Outlays	2,170

Reimbursable Programs

Obligation Authority	183
Outlays	174

Totals: Direct and Reimbursable Programs

Obligation Authority	2,497
Outlays	2,343

Personnel Resources—FTEs: 24

APPENDICES

A. Members of the Administrative Conference

B. Biographical Information

C. Staff of the Office of the Chairman

D. Organization and Operation

E. Recommendations and Statement

F. Conference Publications

G. Bylaws of the Administrative Conference

H. The Administrative Conference Act

APPENDIX A - MEMBERS OF THE ADMINISTRATIVE CONFERENCE

THE COUNCIL

Chairman	BRIAN C. GRIFFIN[1]
Acting Chairman	SALLY KATZEN[2]
Vice Chairman	SALLY KATZEN[2]
	PAUL A. VANDER MYDE[3]
	ROBERT S. ROSS, JR.[4]
Government Members	PHILLIP D. BRADY[5]
	RICHARD C. BREEDEN[5]
	CONSTANCE HORNER[5]
	SALLY KATZEN[2]
	JOHN D. PODESTA[6]
	JACK QUINN[7]
Public Members	SUSAN AU ALLEN
	WALTER GELLHORN
	C. BOYDEN GRAY[8]
	WILLIAM R. NEALE
	PAUL A. VANDER MYDE[3]

GOVERNMENT MEMBERS

Department of Agriculture	JOHN GOLDEN
Department of Commerce	CAROL C. DARR
	WENDELL L. WILLKIE II[5]
Commission on Civil Rights	EMMA MONROIG
Commodity Futures Trading Commission	SHEILA C. BAIR
	WILLIAM P. ALBRECHT[9]
Consumer Product Safety Commission	JERRY G. THORN
Department of Defense	JAMIE S. GORELICK
	ROBERT L. GILLIAT[5]
	DAVID S. ADDINGTON[5]
(Armed Services Board of Contract Appeals)	PAUL E. WILLIAMS[10]
Department of Education	THEODORE SKY

Department of Energy	ERIC J. FYGI
Environmental Protection Agency	GERALD H. YAMADA
	RAYMOND B. LUDWISZEWSKI[5]
Equal Employment	
Opportunity Commission	R. GAULL SILBERMAN
Federal Communications Commission	[VACANT]
Federal Deposit Insurance Corporation	ROGER A. HOOD
Federal Election Commission	LAWRENCE M. NOBLE
Federal Energy Regulatory Commission	DAVID N. COOK
Federal Maritime Commission	THOMAS PANEBIANCO
	CHRISTOPHER L. KOCH[11]
Federal Reserve System	J. VIRGIL MATTINGLY, JR.
Federal Trade Commission	MARY L. AZCUENAGA
General Services Administration	EMILY C. HEWITT
	ALLIE B. LATIMER[5]
	DENNIS MULLINS[5]
Department of Health and Human Services	HARRIET S. RABB
	BEVERLY DENNIS III[5]
	SUSAN K. ZAGAME[5]
(Food and Drug Administration)	MARGARET JANE PORTER
(Social Security Administration)	DANIEL L. SKOLER
Department of Housing and	
Urban Development	GEORGE L. WEIDENFELLER
	FRANK KEATING[5]
(Administrative Law Judge)	ALAN W. HEIFETZ[12]
Department of the Interior	JOHN LESHY
(Inspector General)	JAMES R. RICHARDS[13]
Interstate Commerce Commission	BERYL GORDON
Department of Justice	KEVIN R. JONES
Department of Labor	SETH D. ZINMAN
(Occupational Safety and	
Health Administration)	DAVID C. ZEIGLER
Merit Systems Protection Board	[VACANT]
	DANIEL R. LEVINSON[5]
National Aeronautics and	
Space Administration	EDWARD A. FRANKLE
National Labor Relations Board	JAMES M. STEPHENS
Nuclear Regulatory Commission	WILLIAM C. PARLER
Occupational Safety and	
Health Review Commission	EDWIN G. FOULKE, JR.
Office of Government Ethics	STEPHEN D. POTTS
Office of Management and Budget	CHRISTOPHER EDLEY
	SALLY KATZEN[14]
Office of Personnel Management	LORRAINE PRATTE LEWIS
	JAMES S. GREEN[5]
	ARTHUR TROILO III[9]
Securities and Exchange Commission	PHILLIP D. PARKER

Small Business Administration	JOHN T. SPOTILA
	MICHAEL WYATT[5]
Department of State	CONRAD K. HARPER
	EDWIN D. WILLIAMSON[5]
Department of Transportation	NEIL R. EISNER
(Federal Aviation Administration)	MARK L. GERCHICK
	JOHN H. CASSADY[5]
	KENNETH P. QUINN[5]
Department of the Treasury	JOHN E. BOWMAN
	JEANNE S. ARCHIBALD[5]
(Internal Revenue Service)	JAMES J. KEIGHTLEY
U.S. International Trade Commission	ANNE E. BRUNSDALE
U.S. Postal Service	STEPHEN EBBERT ALPERN
Department of Veterans Affairs	MARY LOU KEENER
	ROBERT E. COY[5]
	JAMES A. ENDICOTT, JR.[5]

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JAMES F. RILL
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MICHAEL M. UHLMANN
DAVID C. VLADECK
MICHAEL B. WALLACE
WILLIAM H. WEBSTER
JONATHAN WEISS
RICHARD S.WILLIAMSON

LIAISON REPRESENTATIVES

ABA Administrative Law Section	ARTHUR L. BURNETT, SR.
ABA National Conference of Administrative Law Judges	NAHUM LITT
Administrative Office of the U.S. Courts	L. RALPH MECHAM
Advisory Commission on Intergovernmental Relations	[VACANT] DAVID E. NETHING[5]
Council on Environmental Quality	DINAH BEAR
Farm Credit Administration	JEAN NOONAN
Federal Administrative Law Judges Conference	STEPHEN L. GROSSMAN
Federal Bar Association	MARVIN H. MORSE
Federal Judicial Center	WILLIAM W. SCHWARZER
Federal Labor Relations Authority	SUSAN D. MCCLUSKEY
Federal Mediation & Conciliation Service	EILEEN B. HOFFMAN
Federal Mine Safety and Health Review Commission	ARLENE HOLEN
General Accounting Office	JAMES F. HINCHMAN
Judicial Conference of the U.S.	STEPHEN G. BREYER STEPHEN F. WILLIAMS
National Transportation Safety Board	DANIEL D. CAMPBELL
Office of the Federal Register	MARTHA L. GIRARD
Office of the Vice President	[VACANT] JACK QUINN[6] JOHN L. HOWARD[5]
Postal Rate Commission	[VACANT] GEORGE W. HALEY[5]
Railroad Retirement Board	GLEN L. BOWER
Selective Service System	HENRY N. WILLIAMS
U. S. Court of Federal Claims	MARIAN BLANK HORN
U. S. Court of Appeals, Federal Circuit	S. JAY PLAGER
U. S. Court of Military Appeals	EUGENE R. SULLIVAN
U.S. Sentencing Commission	ILENE H. NAGEL

SENIOR FELLOWS

WILLIAM H. ALLEN
ROBERT A. ANTHONY
MARSHALL J. BREGER
CLARK BYSE
BETTY JO CHRISTIAN
KENNETH CULP DAVIS
PAUL D. KAMENAR
RICHARD J. LEIGHTON
MALCOLM S. MASON
ALAN B. MORRISON
OWEN OLPIN
MAX D. PAGLIN
SALLYANNE PAYTON
REUBEN B. ROBERTSON III
VICTOR G. ROSENBLUM
HAROLD L. RUSSELL
ANTONIN SCALIA
LOREN A. SMITH
OTIS M. SMITH
PETER L. STRAUSS
THOMAS M. SUSMAN
PAUL R. VERKUIL
EDWARD L WEIDENFELD
JAMES E. WESNER
RICHARD E. WILEY
JERRE S. WILLIAMS[19]
FRANK M. WOZENCRAFT

SPECIAL COUNSELS

JOEL M. FLAUM
PHILIP A. FLEMING
C. BOYDEN GRAY[20]
DARREL J. GRINSTEAD
STANLEY SPORKIN

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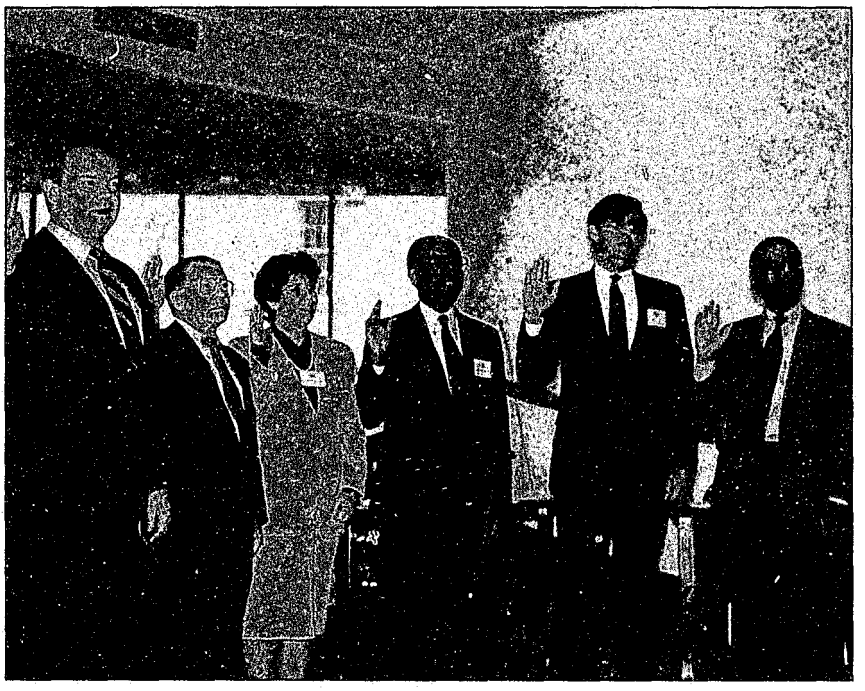
1 Term as Chairman ended November 23, 1993 upon Congress' recess.
2 Designated by President Clinton as Vice Chairman December 2, 1993.
3 Designated by President Bush as Vice Chairman January 11, 1993.
4 Term as Vice Chairman ended January 11, 1993.
5 Term of service ended during 1993.
6 Appointed to the Council November 9, 1993.
7 Appointed to the Council November 9, 1993. Previously served as liaison representative from the Office of the Vice President.
8 Appointed to the Council January 20, 1993. Previously served as special counsel to the Conference.
9 Resigned as government member.
10 Designated Board of Contract Appeals member.
11 Resigned government service.
12 Designated administrative law judge member.
13 Designated inspector general member, retired March 31, 1993.
14 Also served as public member until June 3, 1993. She served as OMB member from June 3-November 8, 1993, and was appointed to the Council November 9, 1993.
15 Resigned as public member November 29, 1993.
16 Resigned as public member November 3, 1993.
17 Designated government member from OMB June 3, 1993.
18 Appointed public member November 22, 1993.
19 Died August 29, 1993.
20 Appointed to the Council January 20, 1993.



John T. Spotila, Judge Marian P. Opala, Lorraine Pratte Lewis, Conrad Harper, Mark Gerchick, and Christopher Edley (from left to right) being sworn in as new members at the December plenary.

Council member Walter Gellhorn commenting at the June plenary as fellow Council member Susan Au Allen observes.

APPENDIX B - BIOGRAPHICAL INFORMATION

MEMBERS*

David S. Addington, General Counsel, Department of Defense, Washington, DC. Government member 1992-93. Committee on Administration.

William P. Albrecht, Acting Chairman, Commodity Futures Trading Commission, Washington, DC. Government member 1989-93. Committee on Adjudication.

Susan Au Allen, Esquire, Member of the law firm of Paul Shearman Allen & Associates, Washington, DC. Council member since 1991. Committee on Judicial Review.

William H. Allen, Esquire, Member of the law firm of Covington & Burling, Washington, DC. Public member 1972-82. Senior fellow since 1982. Committee on Judicial Review.

Stephen Ebbert Alpern, Associate General Counsel for Labor Law, U.S. Postal Service, Washington, DC. Government member since 1988. Committee on Administration.

Robert A. Anthony, Professor of Law, George Mason University School of Law, Arlington, VA. Chairman of the Administrative Conference of the United States 1974-79. Consultant on: comparative proceedings for broadcast licensing (1970-71); confidential information in ITC cases (Recommendation 84-6); judicial deference to agency interpretations (Recommendation 89-5); agency policy statements (Recommendation 92-2). Senior fellow since 1982. Committee on Regulation.

Jeanne S. Archibald, General Counsel, Department of the Treasury, Washington, DC. Government member 1988-93. Committee on Judicial Review.

Mary L. Azcuenaga, Commissioner, Federal Trade Commission, Washington, DC. Government member since 1990. Committee on Administration.

Sheila C. Bair, Commissioner, Commodity Futures Trading Commission, Washington, DC. Appointed government member February 8, 1993. Committee on Adjudication.

Curtis H. Barnette, Chairman and Chief Executive Officer, Bethlehem Steel Corporation, Bethlehem, PA. Council member 1988-89. Public member since 1990. Committee on Governmental Processes.

Dinah Bear, General Counsel, Council on Environmental Quality, Washington, DC. Liaison representative 1986-93. Committee on Administration.

*During calendar year 1993. Affiliations and positions are listed as of December 31, or the date of termination of Conference service if earlier.

Warren Belmar, Esquire, Member of the law firm of Fulbright & Jaworski, Washington, DC. Public member since 1986. Committee on Judicial Review.

Caryl S. Bernstein, Esquire, Senior Counsel at the law firm of Shaw, Pittman, Potts & Trowbridge, Washington, DC. Public member since 1992. Committee on Regulation.

Arthur Earl Bonfield, Professor of Law, University of Iowa College of Law, Iowa City, IA. Consultant on: representation of the poor in federal rulemaking (Recommendation 68-5); rulemaking related to public property, loans, grants, benefits, or contracts (Recommendation 69-8); rulemaking related to military and foreign affairs functions (Recommendation 73-5). Public member since 1990. Committee on Rulemaking.

Glen L. Bower, Chairman, Railroad Retirement Board, Chicago, IL. Liaison representative since 1991. Committee on Adjudication.

John E. Bowman, Assistant General Counsel, Banking and Finance, Department of the Treasury, Washington, DC. Appointed government member June 10, 1993. Committee on Judicial Review.

Thomas M. Boyd, Esquire, Deputy General Counsel, Kemper Corporation, Washington, DC. Public member since 1992. Committee on Governmental Processes.

Phillip D. Brady, Assistant to the President and Staff Secretary, Executive Office of the President, Washington, DC. Council member 1988-93. Committee on Rulemaking.

Elliot Bredhoff, Esquire, Senior Partner in the law firm of Bredhoff & Kaiser, Washington, DC. Public member since 1988. Committee on Adjudication.

Richard C. Breeden, Chairman, Securities and Exchange Commission, Washington, DC. Council member 1989-93. Committee on Adjudication.

Marshall J. Breger, Distinguished Fellow, The Heritage Foundation, Washington, DC. Chairman of the Administrative Conference of the United States 1985-91. Senior fellow since 1991. Committee on Rulemaking.

Stephen G. Breyer, Chief Judge, United States Court of Appeals for the First Circuit, Boston, MA. Liaison representative (Judicial Conference of the U.S.) since 1981. Committee on Adjudication.

Anne E. Brunsdale, Commissioner (formerly Vice Chairman), U.S. International Trade Commission, Washington, DC. Government member since 1990. Committee on Adjudication.

Arthur L. Burnett, Sr., Associate Judge, Superior Court of the District of Columbia, Washington, DC. Liaison representative (ABA Section of Administrative Law and Regulatory Practice) since 1990. Committee on Adjudication.

James H. Burnley IV, Esquire, Member of the law firm of Winston & Strawn, Washington, DC. Council member 1987-88. Public member 1988-93. Committee on Rulemaking.

Clark Byse, Professor Emeritus, Harvard Law School, Cambridge, MA. Public member 1968-82. Senior fellow since 1982. Committee on Administration.

Daniel D. Campbell, General Counsel, National Transportation Safety Board, Washington, DC. Liaison representative since 1990. Committee on Regulation.

Ronald A. Cass, Dean, Boston University School of Law, Boston, MA. Consultant on: review of ALJ decisions (Recommendation 83-3); Federal Tort Claims Act's discretionary function exception (1986-87). Government member (ITC) 1988-90. Public member since 1990. Committee on Adjudication.

John H. Cassady, Acting Chief Counsel, Federal Aviation Administration, Department of Transportation, Washington, DC. Government member March 11-November 8, 1993. Committee on Rulemaking.

Betty Jo Christian, Esquire, Member of the law firm of Steptoe & Johnson, Washington, DC. Government member (ICC) 1977-79; public member 1980-89. Senior fellow since 1989. Committee on Regulation.

James W. Cicconi, Esquire, Member of the law firm of Akin, Gump, Hauer & Feld, Washington, DC. Council member October-December 1990. Public member since 1991. Committee on Adjudication.

David N. Cook, Deputy General Counsel, Federal Energy Regulatory Commission, Department of Energy, Washington, DC. Government member since 1992. Committee on Adjudication.

Charles J. Cooper, Esquire, Member of the law firm of Shaw, Pittman, Potts & Trowbridge, Washington, DC. Public member since 1991. Committee on Administration.

Robert E. Coy, Acting General Counsel, Department of Veterans Affairs, Washington, DC. Government member March 11-June 1, 1993. Served as government member (Veterans Administration) in 1981. Committee on Judicial Review.

Eldon H. Crowell, Esquire, of counsel to the law firm of Crowell & Moring, Washington, DC. Consultant on: use of minitrials in federal contract disputes (1986-87); alternatives for resolving government contract disputes (Recommendation 87-11). Public member since 1986. Committee on Administration (Vice Chairman).

Arthur B. Culvahouse, Jr., Esquire, Member of the law firm of O'Melveny & Myers, Washington, DC. Public member since 1990. Committee on Judicial Review.

Carol C. Darr, Acting General Counsel, Department of Commerce, Washington, DC. Appointed government member March 22, 1993. Committee on Rulemaking.

Kenneth Culp Davis, Professor of Law, University of San Diego School of Law, San Diego, CA. Public member 1968-82. Senior fellow since 1982. Committee on Rulemaking.

Beverly Dennis III, Deputy General Counsel, Department of Health & Human Services, Washington, DC. Government member January 4-December 17, 1993. Committee on Regulation.

Christopher Edley, Associate Director for Economics and Government, Office of Management and Budget, Washington, DC. Appointed government member December 7, 1993. Committee on Regulation.

Neil R. Eisner, Assistant General Counsel, Department of Transportation, Washington, DC. Government member since 1982. Committee on Governmental Processes (Chairman); Model Rules Working Group.

E. Donald Elliott, Professor, Yale Law School, New Haven, CT. Consultant on: study of judicial remands of agency cases (1989-90). Government member (EPA) 1990-91. Public member since 1991. Committee on Regulation.

James A. Endicott, Jr., General Counsel, Department of Veterans Affairs, Washington, DC. Government member 1992-93. Committee on Judicial Review.

Lewis A. Engman, Esquire, President, Generic Pharmaceutical Industry Association, Washington, DC. Council member 1974-75. Public member since 1986. Committee on Governmental Processes.

Fred F. Fielding, Esquire, Senior Partner in the law firm of Wiley, Rein & Fielding, Washington, DC. Special counsel 1981-86. Public member since 1986. Committee on Regulation.

Joel M. Flaum, Circuit Judge, U.S. Court of Appeals for the Seventh Circuit, Chicago, IL. Special counsel since 1991. Committee on Regulation.

Philip A. Fleming, Esquire, Member of the law firm of Crowell & Moring, Washington, DC. Liaison representative (ABA Section of Administrative Law and Regulatory Practice) 1988-90. Special counsel since 1990. Committee on Regulation.

Edwin G. Foulke, Jr., Chairman, Occupational Safety and Health Review Commission, Washington, DC. Government member since 1992. Committee on Judicial Review.

Edward A. Frankle, General Counsel, National Aeronautics and Space Administration, Washington, DC. Government member since 1988. Committee on Administration.

Eric J. Fygi, Acting General Counsel, Department of Energy, Washington, DC. Government member 1988-89, since 1992. Committee on Judicial Review.

Ernest Gellhorn, Esquire, Member of the law firm of Jones, Day, Reavis & Pogue, Washington, DC. Consultant on: summary judgment in administrative adjudication (Recommendation 70-3); interlocutory appeal procedures (Recommendation 71-1); public participation in administrative hearings (Recommendation 71-6); adverse agency publicity (Recommendation 73-1); and legislative veto (Recommendation 77-1). Public member since 1986. Committee on Rulemaking (Chairman).

Walter Gellhorn, Professor Emeritus, Columbia University School of Law, New York, NY. Council member since 1968. Committee on Administration.

Mark L. Gerchick, Chief Counsel, Federal Aviation Administration, Department of Transportation, Washington, DC. Appointed government member November 8, 1993. Committee on Rulemaking.

Robert L. Gilliat, Deputy General Counsel, Department of Defense, Washington, DC. Government member March 5-17, 1993. Served as government member (DoD) 1977-91. Committee on Administration.

Martha L. Girard, Director, Office of the Federal Register, National Archives and Records Administration, Washington, DC. Liaison representative since 1989. Committee on Rulemaking.

Mark H. Gitenstein, Esquire, Member of the law firm of Mayer, Brown & Platt, Washington, DC. Public member since 1992. Committee on Judicial Review.

John Golden, Associate General Counsel, Department of Agriculture, Washington, DC. Government member since 1983. Committee on Regulation (Chairman).

Beryl Gordon, Attorney Advisor to the Chairman, Interstate Commerce Commission, Washington, DC. Appointed government member February 22, 1993. Committee on Adjudication.

Jamie S. Gorelick, General Counsel, Department of Defense, Washington, DC. Appointed government member May 17, 1993. Committee on Administration.

C. Boyden Gray, Esquire, Member of the law firm of Wilmer, Cutler & Pickering, Washington, DC. Former Counsel to President Bush, Washington, DC.

Special counsel 1981-93. Appointed Council member January 20, 1993 by President Bush. Committee on Judicial Review; Committee on Rulemaking.

James S. Green, Deputy General Counsel, Office of Personnel Management, Washington, DC. Government member April 2-October 6, 1993. Committee on Governmental Processes.

Brian C. Griffin, Chairman, Administrative Conference of the United States, Washington, DC, December 23, 1992-November 23,1993.

Darrel J. Grinstead, Associate General Counsel, Department of Health and Human Services, Washington, DC. Government member (HHW) 1979-82, (HHS) 1984-89. Special counsel since 1989. Committee on Administration (Chairman).

Stephen L. Grossman, Administrative Law Judge, Federal Energy Regulatory Commission, Washington, DC. Liaison representative (Federal Administrative Law Judges Conference) since 1990. Committee on Administration.

George W. Haley, Chairman, Postal Rate Commission, Washington, DC. Liaison representative 1990-93. Committee on Rulemaking.

Stephen L. Hammerman, Esquire, Vice Chairman of the Board and General Counsel, Merrill Lynch & Company, Inc., New York, NY. Public member 1992-93. Committee on Rulemaking.

Conrad K. Harper, Legal Adviser, Department of State, Washington, DC. Appointed government member June 19, 1993. Committee on Judicial Review.

Michael D. Hawkins, Esquire, Member of the law firm of Daughton Hawkins Brockelman & Guinan, Phoenix, AZ. Public member since 1988. Committee on Rulemaking.

Alan W. Heifetz, Chief Administrative Law Judge, Department of Housing and Urban Development, Washington, DC. Government member (designated ALJ) since 1986. Committee on Adjudication; Model Rules Working Group (Chairman).

Emily C. Hewitt, General Counsel, General Services Administration, Washington, DC. Appointed government member December 9, 1993. Committee on Administration.

Frederick Wells Hill, Esquire, Executive Director, Government Programs, Westinghouse Electric Corporation, Washington, DC. Public member since 1992. Committee on Governmental Processes.

James F. Hinchman, General Counsel, General Accounting Office, Washington, DC. Liaison representative since 1989. Committee on Administration.

Eileen B. Hoffman, General Counsel, Federal Mediation & Conciliation Service, Washington, DC. Liaison representative since 1991. Committee on Administration.

Arlene Holen, Chairman, Federal Mine Safety and Health Review Commission, Washington, DC. Liaison representative since 1992. Committee on Regulation.

Roger A. Hood, Assistant General Counsel, Federal Deposit Insurance Corporation, Washington, DC. Government member since 1982. Committee on Governmental Processes.

Marian Blank Horn, Judge, United States Court of Federal Claims, Washington, DC. Government member (Interior) 1984-86. Liaison representative since 1986. Committee on Governmental Processes.

Constance Horner, Assistant to the President and Director of Presidential Personnel, The White House, Washington, DC. Council member 1992-93. Committee on Rulemaking.

John L. Howard, Counsel to the Vice President, Washington, DC. Liaison representative (Office of the Vice President) 1991-93. Committee on Rulemaking.

Kevin R. Jones, Deputy Assistant Attorney General, Office of Legal Policy, Department of Justice, Washington, DC. Government member since 1988. Committee on Governmental Processes.

Paul D. Kamenar, Esquire, Director of Litigation, Washington Legal Foundation, Washington, DC. Public member 1982-90. Senior fellow since 1990. Committee on Rulemaking.

Sally Katzen, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC. Named Vice Chairman December 2, 1993. Appointed Council member November 9, 1993. Served as public member September 7, 1988-June 3, 1993, as government member (OMB) June 3-November 8, 1993. Committee on Judicial Review (Chairman).

Robert M. Kaufman, Esquire, Member of the law firm of Proskauer, Rose, Goetz & Mendelsohn, New York, NY. Public member since 1988. Committee on Regulation (Vice Chairman).

Mary Lou Keener, General Counsel, Department of Veterans Affairs, Washington, DC. Appointed government member June 1, 1993. Committee on Judicial Review.

James J. Keightley, Special Counsel (Large Case), Internal Revenue Service, Washington, DC. Government member since 1986. Committee on Regulation.

Frederic Rogers Kellogg, Esquire, Washington, DC. Public member since 1991. Committee on Administration.

William J. Kilberg, Esquire, Member of the law firm of Gibson, Dunn & Crutcher, Washington, DC. Government member (DOL) 1972-77. Special counsel March-May 1990. Public member since May 1990. Committee on Rulemaking.

Christopher L. Koch, Chairman, Federal Maritime Commission, Washington, DC. Government member 1992-93. Committee on Rulemaking.

Allie B. Latimer, General Counsel, General Services Administration, Washington, DC. Government member March 2-December 9, 1993. Served as government member (GSA) 1977-86. Committee on Administration.

Dennis J. Lehr, Esquire, Member of the law firm of Hogan & Hartson, Washington, DC. Special counsel 1987-91. Public member since 1991. Committee on Judicial Review.

Richard J. Leighton, Esquire, Member of the law firm of Leighton & Regnery, Washington, DC. Public member 1983-91. Senior fellow since 1991. Committee on Adjudication (Chairman); Model Rules Working Group.

John Leshy, Solicitor, Department of Labor, Washington, DC. Appointed government member June 10, 1993. Committee on Rulemaking.

Daniel R. Levinson, Chairman, Merit Systems Protection Board, Washington, DC. Government member (OPM) 1984. Liaison representative (MSPB) 1986. Government member (MSPB) 1987-93. Committee on Governmental Processes.

Lorraine Pratte Lewis, General Counsel, Office of Personnel Management, Washington, DC. Appointed government member October 6, 1993. Committee on Governmental Processes.

Nahum Litt, Chief Administrative Law Judge, Department of Labor, Washington, DC. Government member (designated ALJ) 1979-80. Liaison representative (ABA National Conference of Administrative Law Judges) 1984-85, since 1990. Committee on Judicial Review.

Raymond B. Ludwiszewski, Acting General Counsel, Environmental Protection Agency, Washington, DC. Government member 1991-93. Committee on Regulation.

Malcolm S. Mason, Esquire, Washington, DC. Government member (OEO) 1968-73, (HEW) 1973-79. Senior fellow since 1984. Consultant on: handbook for drafting federal grant statutes (1985-89). Committee on Administration.

J. Virgil Mattingly, Jr., General Counsel, Federal Reserve System, Washington, DC. Government member since 1989. Committee on Judicial Review.

Susan D. McCluskey, Chief Counsel, Federal Labor Relations Authority, Washington, DC. Liaison representative since 1992. Committee on Adjudication.

L. Ralph Mecham, Director, Administrative Office of the U.S. Courts, Washington, DC. Liaison representative since 1985. Committee on Adjudication.

James C. Miller III, Distinguished Fellow, Citizens for a Sound Economy, Washington, DC. Council member 1981-88 (Vice Chairman 1987-88). Public member since 1988. Committee on Regulation.

Emma Monroig, Solicitor, U.S. Commission on Civil Rights, Washington, DC. Government member since 1990. Committee on Administration.

Joseph A. Morris, Esquire, Member of the law firm of Morris, Rathnau & De La Rosa, Chicago, IL. Government member (OPM) 1981-85. Liaison representative (USIA) 1986. Special counsel 1987-88. Public member since 1988. Committee on Judicial Review.

Alan B. Morrison, Esquire, Director, Public Citizen Litigation Group, Washington, DC. Public member 1980-89. Senior fellow since 1989. Committee on Adjudication.

Marvin H. Morse, Administrative Law Judge, Office of the Chief Administrative Hearing Officer, Department of Justice, Falls Church, VA. Government member (OPM) 1980-82, (SBA) 1982-84. Liaison representative (ABA National Conference of Administrative Law Judges) 1985-87, (Federal Bar Association) since 1988. Committee on Adjudication.

Dennis Mullins, General Counsel, General Services Administration, Washington, DC. Government member 1992-93. Committee on Administration.

Betty Southard Murphy, Esquire, Member of the law firm of Baker & Hostetler, Washington, DC. Council member 1976-79. Public member since 1991. Committee on Administration.

Ilene H. Nagel, Commissioner, U.S. Sentencing Commission, Washington, DC. Liaison representative since 1992. Committee on Judicial Review.

William R. Neale, Esquire, Member of the law firm of Krieg DeVault Alexander & Capehart, Indianapolis, IN. Council member since 1992. Committee on Regulation.

David E. Nething, Senator, North Dakota State Senate, Jamestown, ND. Liaison representative (Advisory Commission on Intergovernmental Relations) 1983-93. Committee on Regulation.

Lawrence M. Noble, General Counsel, Federal Election Commission, Washington, DC. Government member since 1988. Committee on Judicial Review.

Jean Noonan, General Counsel, Farm Credit Administration, Washington, DC. Liaison representative since 1991. Committee on Rulemaking.

Owen Olpin, Esquire, Member of the law firm of O'Melveny & Myers, Los Angeles, CA. Public member 1972-82. Senior fellow since 1982. Committee on Regulation.

Theodore B. Olson, Esquire, Member of the law firm of Gibson, Dunn & Crutcher, Washington, DC. Public member since 1990. Committee on Administration.

Marian P. Opala, Justice, Supreme Court of Oklahoma, Oklahoma City, OK. Appointed public member November 22, 1993. Committee on Judicial Review.

Max D. Paglin, Esquire, Washington, DC. Government member (FCC) 1968-72, (AEC) 1972-74, (NRC) 1974-75. Consultant on: implementation of ACUS recommendations (1975-76); natural gas shortages (Statement 5 - 1976); management seminars for agency officials (1976); agency procedural review (1977). Public member 1978-82. Senior fellow since 1982. Committee on Judicial Review.

Thomas Paneblanco, Acting Deputy General Counsel, Federal Maritime Commission, Washington, DC. Appointed government member April 15, 1993. Committee on Rulemaking.

Phillip D. Parker, Deputy General Counsel for Legal Policy, Securities and Exchange Commission, Washington, DC. Appointed government member January 7, 1993. Committee on Governmental Processes.

William C. Parler, General Counsel, Nuclear Regulatory Commission, Washington, DC. Government member since 1987. Committee on Rulemaking.

Sallyanne Payton, Professor of Law, University of Michigan School of Law, Ann Arbor, MI. Public member 1980-88. Senior fellow since 1988. Committee on Rulemaking.

Edward J. Philbin, Commissioner (formerly Chairman), Interstate Commerce Commission, Washington, DC. Government member 1990-93. Committee on Adjudication.

S. Jay Plager, Judge, U.S. Court of Appeals for the Federal Circuit, Washington, DC. Government member (OMB) 1988-89. Special counsel 1989-91. Liaison representative since 1991. Committee on Governmental Processes.

John D. Podesta, Assistant to the President and Staff Secretary, The White House, Washington, DC. Appointed Council member November 9, 1993.

Margaret Jane Porter, Chief Counsel, Food and Drug Administration, Department of Health and Human Services, Rockville, MD. Government member since 1992. Committee on Rulemaking.

Stephen D. Potts, Esquire, Director, Office of Government Ethics, Washington, DC. Government member since 1991. Committee on Adjudication.

William T. Quillen, Distinguished Professor of Law, Widener University, Wilmington, DE. Public member 1982-86 and since 1991. Special counsel 1986-91. Committee on Adjudication.

Jack Quinn, Chief of Staff and Counsel to the Vice President, Washington, DC. Appointed Council member November 9, 1993. Formerly served as liaison representative (Office of the Vice President) April 21-November 8, 1993. Committee on Regulation.

Kenneth P. Quinn, Chief Counsel, Federal Aviation Administration, Department of Transportation, Washington, DC. Government member 1991-93. Committee on Rulemaking.

Harriet S. Rabb, General Counsel, Department of Health and Human Services, Washington, DC. Appointed government member December 17, 1993. Committee on Regulation.

James R. Richards, Inspector General, Department of the Interior, Washington, DC. Government member (DOE) 1984-86; designated inspector general member 1987-93. Committee on Governmental Processes.

James F. Rill, Esquire, Member of the law firm of Collier, Shannon, Rill & Scott, Washington, DC. Public member since 1992. Committee on Adjudication.

Reuben B. Robertson III, Esquire, Member of the law firm of Ingersoll & Bloch, Washington, DC. Chairman of the Administrative Conference of the United States 1980-81. Senior fellow since 1982. Committee on Adjudication (Vice Chairman).

Jonathan Rose, Associate Dean and Professor, College of Law, Arizona State University, Tempe, AZ. Consultant on: nonlegal representation before federal agencies (1982-84). Public member since 1989. Committee on Regulation.

Victor G. Rosenblum, Professor of Law, Northwestern University School of Law, Chicago, IL. Consultant on: citizen complaints (1971); ALJ study (1974-76); evaluation of ALJ performance (1979-85). Public member 1982-90. Senior fellow since 1990. Committee on Administration.

Robert S. Ross, Jr., Esquire, Assistant ot the Attorney General, Department of Justice, Washington, DC. Vice Chairman; served as Acting Chairman December 19, 1991-December 23, 1992. Council member 1989-93. Committee on Adjudication.

Harold L. Russell, Esquire, Member of the law firm of Smith, Gambrell & Russell, Atlanta, GA. Council member 1968-76. Senior fellow since 1983. Committee on Judicial Review.

Antonin Scalia, Associate Justice, United States Supreme Court, Washington, DC. Chairman of the Administrative Conference of the United States 1972-74. Public member 1978-82. Senior fellow since 1982.

William W. Schwarzer, Director, Federal Judicial Center, Washington, DC. Liaison representative since 1992. Committee on Judicial Review.

R. Gaull Silberman, Vice Chairman, Equal Employment Opportunity Commission, Washington, DC. Government member since 1988. Committee on Governmental Processes.

Daniel L. Skoler, Associate Commissioner, Social Security Administration, Department of Health & Human Services, Falls Church, VA. Government member since 1991. Committee on Adjudication.

Theodore Sky, Senior Counsel, Department of Education, Washington, DC. Government member since 1991. Committee on Administration.

Loren A. Smith, Chief Judge, United States Court of Federal Claims, Washington, DC. Chairman of the Administrative Conference of the United States 1981-85. Senior fellow since 1985. Committee on Judicial Review.

Otis M. Smith, Esquire, Member of the law firm of Lewis, White & Clay, Detroit, MI. Public member 1972-78. Council member 1978-88. Senior fellow since 1988. Committee on Judicial Review.

Stanley Sporkin, Judge, United States District Court for the District of Columbia, Washington, DC. Liaison representative (CIA) 1982-85. Special counsel since 1986. Committee on Rulemaking.

John T. Spotila, General Counsel, Small Business Administration, Washington, DC. Appointed government member October 28, 1993. Committee on Regulation.

Stuart J. Stein, Esquire, Garden City, NY. Public member since 1990. Committee on Adjudication.

James M. Stephens, Chairman, National Labor Relations Board, Washington, DC. Government member since 1989. Committee on Rulemaking.

Peter L. Strauss, Professor of Law, Columbia University School of Law, New York, NY. Consultant on: mining claims on public lands (Recommendation 74-3); impact of judicial review on rulemaking (1977-78); disqualification of decisional officials (Recommendation 80-4). Government member (NRC) 1976-77, public member 1982-91. Senior fellow since 1991. Committee on Judicial Review.

Eugene R. Sullivan, Chief Judge, U.S. Court of Military Appeals. Liaison representative since 1990. Committee on Governmental Processes.

Thomas M. Susman, Esquire, Member of the law firm of Ropes & Gray, Washington, DC. Public member 1980-89. Senior fellow since 1989. Committee on Governmental Processes.

Jerry G. Thorn, General Counsel, Consumer Product Safety Commission, Bethesda, MD. Government member since 1992. Committee on Governmental Processes.

Arthur Troilo III, General Counsel, Office of Personnel Management, Washington, DC. Government member 1992-93. Committee on Governmental Processes.

Phillip N. Truluck, Executive Vice President, The Heritage Foundation, Washington, DC. Public member since 1986. Committee on Regulation.

Michael M. Uhlmann, Esquire, Member of the law firm of Pepper Hamilton & Scheetz, Washington, DC. Liaison representative (Executive Office of the President) 1982-84. Public member since 1991. Committee on Governmental Processes.

Paul A. Vander Myde, Vice President for Corporate Affairs, VSE Corporation, Alexandria, VA. Vice Chairman January 11-December 2, 1993. Council member since 1992. Committee on Governmental Processes.

Paul R. Verkuil, Esquire, President, American Automobile Association, Heathrow, FL. Consultant on: preenforcement judicial review of rules (Recommendation 74-4); informal adjudication (1975-76); intergovernmental communications in informal rulemaking (Recommendation 80-6); Regulatory Flexibility Act (1981); judicial review of rules in enforcement proceedings (Recommendation 82-7); immigration adjudications (1983-84); co-consultant on the federal administrative judiciary (Recommendation 92-7). Public member 1982-91. Senior fellow since 1991. Committee on Rulemaking.

David C. Vladeck, Esquire, Public Citizen Litigation Group, Washington, DC. Public member since 1990. Committee on Regulation.

Michael B. Wallace, Esquire, Member of the law firm of Phelps Dunbar, Jackson, MS. Public member 1984-86, and since 1987. Committee on Rulemaking.

William H. Webster, Esquire, Member of the law firm of Milbank, Tweed, Hadley & McCloy, Washington, DC. Public member since 1991. Committee on Judicial Review.

Edward L. Weidenfeld, Esquire, Member of the law firm of Weidenfeld & Rooney, Washington, DC. Council member 1981-92. Senior fellow since 1992. Committee on Governmental Processes.

George L. Weidenfeller, Deputy General Counsel (Operations), Department of Housing and Urban Development, Washington, DC. Appointed government member April 1, 1993. Committee on Governmental Processes.

Jonathan A. Weiss, Esquire, Director, Legal Services for the Elderly, New York, NY. Public member since 1987. Committee on Adjudication.

James E. Wesner, General Counsel, University of Cincinnati, Cincinnati, OH. Public member 1974-82. Senior fellow since 1982. Committee on Adjudication.

Richard E. Wiley, Esquire, Senior Partner in the law firm of Wiley, Rein & Fielding, Washington, DC. Council member 1973-77. Public member 1979-84. Senior fellow since 1984. Committee on Governmental Processes.

Henry N. Williams, General Counsel, Selective Service System, Washington, DC. Government member (SSS) 1971-75. Liaison representative since 1975.

Jerre S. Williams, Judge, U.S. Court of Appeals for the Fifth Circuit, Austin, TX. Chairman of the Administrative Conference of the United States 1968-70. Public member 1972-78. Senior fellow 1982-93. Died August 29, 1993. Committee on Judicial Review.

Paul E. Williams, Chairman, Armed Services Board of Contract Appeals, Department of Defense, Falls Church, VA. Government member (designated BCA judge) since 1988. Committee on Administration.

Stephen F. Williams, Judge, U.S. Court of Appeals for the District of Columbia Circuit, Washington, DC. Liaison representative (Judicial Conference of the U.S.) since 1990. Committee on Judicial Review.

Edwin D. Williamson, Legal Adviser, Department of State, Washington, DC. Government member 1991-93. Committee on Judicial Review.

Richard S. Williamson, Esquire, Member of the law firm of Mayer, Brown & Platt, Chicago, IL. Council member 1981-83 (Vice Chairman). Public member since 1989. Committee on Judicial Review.

Wendell L. Willkie II, General Counsel, Department of Commerce, Washington, DC. Government member (Education) 1986-88, (Commerce) 1989-93. Committee on Rulemaking.

Frank M. Wozencraft, Esquire, retired from the law firm of Baker & Botts, Houston, TX. Council member (Vice Chairman) 1968-71. Public member 1975-80. Senior fellow since 1982. Committee on Regulation.

Michael Wyatt, General Counsel, Small Business Administration, Washington, DC. Government member 1991-93. Committee on Regulation.

Gerald H. Yamada, Acting General Counsel, Environmental Protection Agency, Washington, DC. Government member (EPA) 1989-90. Reappointed government member April 19, 1993. Committee on Regulation.

Susan K. Zagame, Acting General Counsel, Department of Health and Human Services, Washington, DC. Government member December 3, 1992-January 4, 1993. Committee on Regulation.

David C. Zeigler, Acting Assistant Secretary, Occupational Safety and Health Administration, Department of Labor, Washington, DC. Appointed government member March 15, 1993. Committee on Regulation.

Seth D. Zinman, Senior Attorney Adviser, Department of Labor, Washington, DC. Government member since 1981. Committee on Judicial Review.

RESEARCH CONSULTANTS

Michael Asimow, Professor of Law, UCLA School of Law, Los Angeles, CA. Consultant on: agency advice to the public (1972-73); IRS civil penalties (Recommendation 75-7); interpretive rulemaking (Recommendation 76-5); separation of functions (1980-81); interim rulemaking.

Lawrence G. Baxter, Professor of Law, Duke University School of Law, Durham, NC. Consultant on: resolution of claims against savings receiverships (Recommendation 88-8); prompt corrective action decisions by banking agencies (Recommendation 93-2).

George A. Bermann, Professor of Law, Columbia University School of Law, New York, NY. Public member of the Administrative Conference of the United States (1986-89). Consultant on: administrative handling of federal tort claims (Recommendation 84-7); U.S. agency participation in foreign regulation (Recommendation 91-1); symposium on international regulation.

Phyllis Bernard, Associate Professor of Law, Oklahoma City University School of Law, Oklahoma City, OK. Consultant on: hospital reimbursement dispute resolution by HHS.

Frank S. Bloch, Professor of Law, Vanderbilt University School of Law, Nashville, TN. Consultant on: use of medically trained deciders in disability cases (Recommendation 89-10); SSA disability appeals process (Recommendation 90-4); comparative study of disability claims processing and appeals in other countries.

Mary M. Cheh, Professor of Law, the George Washington University National Law Center, Washington, DC. Consultant on: interplay between civil and criminal enforcement (with Professors Lupo, Saltzburg, and Schwartz).

Michael P. Cox, Dean, Thomas M. Cooley Law School, Lansing, MI. Consultant on: discipline of attorneys practicing before federal agencies (Statement 8 - 1982); feasibility of a center for state administrative law (1986); model rules of practice for agency adjudication (1993).

John Daniel, Associate Professor of Sociology and Anthropology, Howard University, Washington, DC. Consultant on: evaluation of mediation program at the United States District Court for the District of Columbia.

Neal E. Devins, Associate Professor of Law, College of William and Mary, Marshall-Wythe School of Law, Williamsburg, VA. Consultant on: Department of Justice supervision of agency litigation.

Jonathan L. Entin, Professor of Law, Case Western Reserve University Law School, Cleveland, OH. Consultant on: the Department of Housing and Urban Development's administrative grievance procedures for public housing tenants.

Cynthia R. Farina, Professor of Law, Cornell Law School, Ithaca, NY. Consultant on: evaluation of federal ethics laws (1993).

Howard N. Fenton III, Associate Dean and Professor of Law, Ohio Northern University, Pettit College of Law, Ada, OH. Consultant on: export control proceedings (Recommendation 91-2); foreign trade zone procedures.

William F. Funk, Professor of Law, Lewis and Clark Northwestern School of Law, Portland, OR. Consultant on: the Paperwork Reduction Act (1985-86); non-APA hearing procedures for civil money penalties (Recommendation 93-1).

Mark H. Grunewald, Associate Dean and Professor of Law, Washington and Lee University School of Law, Lexington, VA. Consultant on: resolution of FOIA disputes (Statement 12 - 1987); NLRB rulemaking (Recommendation 91-5); FOIA and settlement documents.

Michael P. Healy, Assistant Professor of Law, University of Kentucky College of Law, Lexington, KY. Consultant on: judicial review of Superfund disputes.

Ann C. Hodges, Associate Professor of Law, University of Richmond, T.C. Williams School of Law, Richmond, VA. Consultant on: implementation of the Americans with Disabilities Act.

Donald T. Hornstein, Associate Professor of Law, University of North Carolina School of Law, Chapel Hill, NC. Consultant on: pesticide registration and cancellation procedures (Recommendation 93-5).

Eleanor D. Kinney, Professor of Law and Director of the Center for Law and Health, Indiana University School of Law, Indianapolis, IN. Consultant on: Medicare Appeals (Recommendation 86-5); national coverage determinations under Medicare (Recommendation 87-8); rulemaking in the Medicaid Program (Recommendation 90-8); appeals under national health care reform and Medicare Part B.

Daniel Koch, Esquire, Doyle and Bachman, Washington, DC. Consultant on: choice of forum in government contract litigation (with Professor Kovacic).

William E. Kovacic, Associate Professor of Law, the George Mason University School of Law, Arlington, VA. Consultant on: choice of forum in government contract litigation (with Daniel Koch).

William P. Kratzke, Professor of Law, Memphis State University, Cecil C. Humphreys School of Law, Memphis, TN. Consultant on: Federal Tort Claims Act.

Arnold H. Leibowitz, Esquire, Washington, DC. Consultant on: immigration reforms in developed countries (1986); asset forfeiture procedures.

Ronald M. Levin, Associate Dean and Professor of Law, Washington University School of Law, St. Louis, MO. Consultant on: judicial review and the Bumpers amendment (Recommendation 79-6); rulemaking reform.

Ira C. Lupo, Professor of Law, the George Washington University National Law Center, Washington, DC. Consultant on: interplay between civil and criminal enforcement (with Professors Cheh, Saltzburg, and Schwartz).

Myles V. Lynk, Scholar in residence, the George Washington University National Law Center, Washington, DC. Consultant on: agency use of no-action letters and letter rulings.

Jonathan R. Macey, Professor of Law, Cornell Law School, Ithaca, NY. Consultant on: regulation of bank failures (1990); procedures for distribution of government assets (with Professor Miller).

Jerry L. Mashaw, Professor of Law, Yale Law School, New Haven, CT. Consultant on: enforcement of standards in federal grant programs (Recommendation 71-9); quality assurance systems in benefit claims adjudication (Recommendation 73-3); citizen suit enforcement (1975); social security disability adjudication (Recommendation 78-2); improving the environment of agency rulemaking (Recommendation 93-4).

Thomas O. McGarity, Professor of Law, University of Texas School of Law, Austin, TX. Consultant on: multi-party forum shopping for appellate review of administrative action (Recommendation 80-5); agency procedures for performing regulatory analysis of rules (Recommendation 85-2); OSHA rulemaking (Recommendations 87-1 and 87-10); peer review in the award of discretionary grants (Recommendation 93-3).

Errol Meidinger, Professor of Law, School of Law, State University of New York at Buffalo, Buffalo, NY. Consultant on: citizen suits under federal

environmental laws (Recommendation 85-3); division of roles in federal/state regulatory programs.

Douglas C. Michael, Associate Professor of Law, University of Kentucky College of Law, Lexington, KY. Consultant on: audited self-regulation as a regulatory technique.

Geoffrey P. Miller, Professor of Law, University of Chicago Law School, Chicago, IL. Consultant on: regulation of bank failures (1990); procedures for distribution of government assets (with Professor Macey).

Morell E. Mullins, Professor of Law, University of Arkansas at Little Rock School of Law, Little Rock, AR. Consultant on: simplified proceedings at OSHRC (Recommendation 90-6); revised MANUAL FOR ADMINISTRATIVE LAW JUDGES.

Stephen A. Saltzburg, Professor of Law, the George Washington University National Law Center, Washington, DC. Consultant on: interplay between civil and criminal enforcement (with Professors Cheh, Lupo, and Schwartz).

Roy A. Schotland, Professor of Law, Georgetown University Law Center, Washington, DC. Consultant on: the exemption in FOIA for bank regulatory reports.

Joshua I. Schwartz, Associate Professor of Law, the George Washington University National Law Center, Washington, DC. Consultant on: interplay between civil and criminal enforcement (with Professors Cheh, Lupo, and Saltzburg).

Brian D. Shannon, Associate Professor of Law, Texas Tech University School of Law, Lubbock, TX. Consultant on: debarment and suspension procedures.

Carl W. Tobias, Professor of Law, University of Montana School of Law, Missoula, MT. Consultant on: Rule 11-type sanctions in administrative proceedings.

Russell L. Weaver, Professor of Law, University of Louisville School of Law, Louisville, KY. Consultant on: organization of agency adjudicative offices (1993).

Julia Wondolleck, Adjunct Professor, School of Natural Resources, University of Michigan, Ann Arbor, MI. Consultant on: Fish and Wildlife Service's approach to conflict management under the Endangered Species Act (with Professor Yaffee).

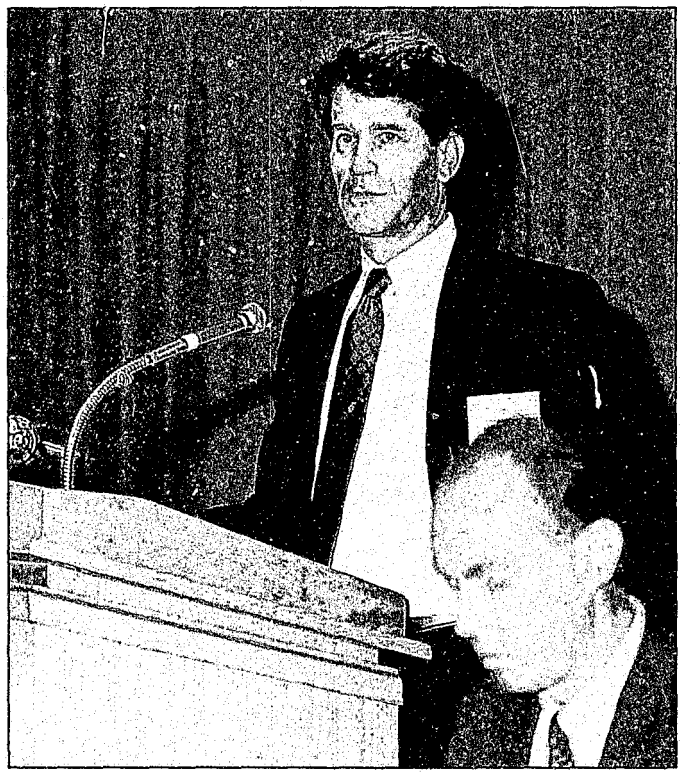
Ronald F. Wright, Jr., Associate Professor of Law, Wake Forest University School of Law, Winston-Salem, NC. Consultant on: right to counsel in agency investigations (Statement 16 - 1993).

Steven L. Yaffee, Professor, School of Natural Resources, University of Michigan, Ann Arbor, MI. Consultant on: Fish and Wildlife Service's approach to conflict management under the Endangered Species Act (with Professor Wondolleck).

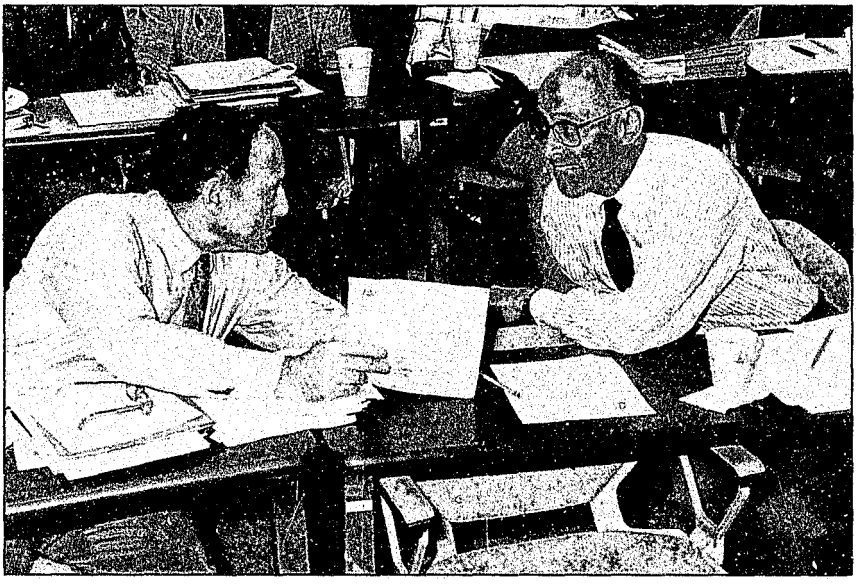
APPENDIX C - STAFF OF THE OFFICE OF THE CHAIRMAN

Chairman	Brian C. Griffin*
Acting Chairman	Sally Katzen**
Assistants to the Chairman	Renée K. Barnow
	Dharmatma Kaur Keil***
	Neil J. Kritz****
Executive Director	William J. Olmstead***
General Counsel	Gary J. Edles
Research Director	Jeffrey S. Lubbers
Deputy Research Director	Michael W. Bowers
Distinguished Visiting Executives	Gary L. Laden
	Sandra H. Shapiro***
Senior Staff Attorneys	Nancy G. Miller
	Charles E. Pou, Jr.
	David M. Pritzker
Staff Attorneys	Mary Candace Fowler
	Kevin L. Jessar***
	Deborah S. Laufer
	Brian C. Murphy*****
Director of Administration	Daniel F. Mann
Administrative Officer	Norma B. Smith
Librarian	Katherine S. Zeigler
Systems Administrator	Gloria J. Coffey
Secretarial Staff	Sharon D. Anderson
	Susan M. Mack
	Lamenthia C. Silver
	Karyn A. Zaayenga***
Receptionist	Theresa Charlene Young
Clerk Typist	B. Clarice Brown
Paralegal Specialists	Jane M. Leamy***
	Nicole L. Reid***

* Service ended November 23, 1993.
** Service began December 2, 1993.
*** Service ended in 1993.
**** Detailed to another agency.
***** Leave of absence on Fulbright Fellowship.



Governmental Processes committee chairman Neil Eisner introducing the issue of right to consult with counsel in agency investigations at the June plenary session while then-Chairman Brian Griffin follows.



Public members Jonathan Rose and Ernest Gellhorn debating a proposed recommendation at the June plenary session.

APPENDIX D - ORGANIZATION AND OPERATION

The Administrative Conference of the United States identifies causes of inefficiency, delay, and unfairness in administrative proceedings affecting private rights and recommends improvements to the President, federal departments and agencies, the Congress, and the courts. Established as a permanent independent federal agency by the Administrative Conference Act of 1964 (5 U.S.C. §§591-596), the Conference was activated by the appointment of its first Chairman in January 1968. The bylaws and statute governing the organization and operation of the Conference appear in Appendices G and H, respectively.

The Conference is a membership organization consisting of three related parts: the Office of the Chairman, the Council, and the Assembly.

THE OFFICE OF THE CHAIRMAN

The Chairman of the Administrative Conference is the chief executive of the Conference and its only compensated member. Appointed by the President, with the advice and consent of the Senate, the Chairman serves for a term of 5 years but may continue to serve until a successor is appointed and is confirmed. Brian C. Griffin served as Chairman from late December 1992, when President Bush named him as a recess appointment, until late November 1993. President Clinton named Sally Katzen to be Vice Chairman December 2, 1993, and in that role she serves as Acting Chairman.

The Chairman, with the approval of the Council, appoints the public members of the Conference for terms of 2 years. The Chairman presides at plenary sessions of the Assembly and at Council meetings, and is the official spokesperson for the Conference in relations with the President, the Congress, the judiciary, the agencies, and the public. The Chairman has authority to investigate matters within the Conference's purview, identified by individuals inside and outside government, and to designate subjects for Conference recommendations. The Chairman is served by a small permanent career staff who furnish administrative and research support to the Assembly and committees of the Conference, provide guidance and assistance to research consultants, and help the Chairman in securing implementation of recommendations and in providing advice and assistance to agencies and to congressional committees.

THE COUNCIL

The Council consists of the Chairman and 10 other members, who are appointed by the President for 3-year terms, not more than one-half of whom may be employees of federal agencies. The Council performs functions similar to those of a corporate board of directors. It calls plenary sessions of the Conference membership and fixes their agendas, authorizes subjects for study, receives and considers reports and recommendations before they are considered by the Assembly, and exercises general budgetary and policy supervision.

In January President Bush named C. Boyden Gray to the Council, and later in the year President Clinton appointed three new members to the Council—Sally Katzen, John Podesta, and Jack Quinn. At the end of 1993 there were eight Council members.

THE ASSEMBLY

Structure of the Assembly

The members of the Conference, when meeting in plenary session, constitute the Assembly of the Conference. The number of members, by statute, may not be fewer than 75 nor more than 101. At the end of 1993 the Conference had 91 members. In addition to the Council, members fall into four groups: (i) agency representatives designated by statute; (ii) representatives of agencies designated by the President; (iii) additional representatives of agencies designated by the Council; and (iv) public members appointed by the Chairman with the approval of the Council. In addition, a number of individuals serve in a nonvoting status as liaison representatives, senior fellows, or special counsels.

Statutory Members

The Administrative Conference Act confers membership upon the chairman of each independent regulatory board or commission or a person designated by the agency (5 U.S.C. §593(b)(2)). The boards and commissions having statutory members are:

Commodity Futures Trading Commission
Consumer Product Safety Commission
Federal Communications Commission
Federal Election Commission
Federal Energy Regulatory Commission
Federal Maritime Commission

Federal Reserve System
Federal Trade Commission
Interstate Commerce Commission
National Labor Relations Board
Nuclear Regulatory Commission
Securities and Exchange Commission

Agencies Designated by the President or the Council

The Administrative Conference Act grants membership to the head (or the designee of the head) of each executive department or other administrative agency designated for this purpose by the President (5 U.S.C. §593(b)(3)). Under this authority, the President has designated all 14 Cabinet departments and several additional executive agencies for membership, and the Council has acted to provide 5 additional memberships from 4 of these departments having subcomponents with special regulatory responsibilities. In addition, in 1993 rotating memberships were held by the Department of Housing and Urban Development for an administrative law judge, the Department of the Interior for an inspector general, the Department of Defense for a member of a board of contract appeals, and the Department of Justice for an administrative judge.

Cabinet departments are:

Department of Agriculture
Department of Commerce
Department of Defense (includes member of Board of Contract Appeals)
Department of Education
Department of Energy
Department of Health and Human Services (includes Food and Drug Administration and Social Security Administration)
Department of Housing and Urban Development (includes administrative law judge)
Department of the Interior (includes inspector general)
Department of Justice (includes administrative judge)
Department of Labor (includes Occupational Safety and Health Administration)
Department of State
Department of Transportation (includes Federal Aviation Administration)
Department of the Treasury (includes Internal Revenue Service)
Department of Veterans Affairs

Administrative agencies are:

Environmental Protection Agency
Equal Employment Opportunity Commission
Federal Deposit Insurance Corporation
General Services Administration
Merit Systems Protection Board
National Aeronautics and Space Administration
Occupational Safety and Health Review Commission
Office of Government Ethics
Office of Management and Budget
Office of Personnel Management
Small Business Administration
U.S. Commission on Civil Rights
U.S. International Trade Commission
U.S. Postal Service

Public Members

This group consists of members appointed for 2-year terms by the Chairman, with the approval of the Council. These "nongovernment" members, who are required by the Administrative Conference Act to comprise not less than one-third nor more than two-fifths of the total membership, are selected 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 the close of 1993 public members numbered 38. Public members are limited to no more than four terms of continuous service (1 CFR §302.2(b)). The bylaws of the Conference provide that the terms of one-half of the public members expire in each calendar year. (See Appendix A, page 33, for a list of public members.)

Liaison Representatives

The Chairman, with the approval of the Council, may make liaison arrangements with representatives of the Congress, the judiciary, federal agencies not otherwise represented in the Conference, and professional associations (1 CFR §302.4). Liaison representatives are assigned to committees and participate in Conference functions, but may not vote at plenary sessions. Although there were 24 organizations with liaison representation—the Judicial Conference of the U.S. has two—at the close of 1993 liaison

representatives numbered 22. (See Appendix A, page 34, for a list of liaison representatives. The organizations with liaison representation are:

Judiciary

Administrative Office of the U.S. Courts
Federal Judicial Center
Judicial Conference of the U.S. (two representatives)
U.S. Court of Appeals for the Federal Circuit
U.S. Court of Federal Claims
U.S. Court of Military Appeals
U.S. Sentencing Commission

Federal Agencies

Advisory Commission on Intergovernmental Relations
Council on Environmental Quality
Farm Credit Administration
Federal Labor Relations Authority
Federal Mediation and Conciliation Service
Federal Mine Safety and Health Review Commission
General Accounting Office
National Transportation Safety Board
Office of the Federal Register
Office of the Vice President
Postal Rate Commission
Railroad Retirement Board
Selective Service System

Professional Associations

ABA National Conference of Administrative Law Judges
ABA Section of Administrative Law and Regulatory Practice
Federal Administrative Law Judges Conference
Federal Bar Association

Senior Fellows

Under section 2(e) of the bylaws (1 CFR §302.2(e)), former chairmen of the Conference and individuals who have served for 8 or more years as members are eligible for 2-year appointments as senior fellows. Senior fellows are assigned to committees and participate in Conference functions, but may not vote at plenary sessions. At the close of 1993, senior fellows numbered 26. (See Appendix A, page 35, for a list of senior fellows.)

Special Counsels

Under section 2 (f) of the bylaws (1 CFR §302.2(f)), from time to time the Chairman may designate individuals to the position of Special Counsel to the Conference. These persons, who do not serve under any of the other official membership designations, advise and assist the membership in areas of their special expertise. They are assigned to committees and participate in Conference functions but may not vote at plenary sessions. At the close of 1993 four special counsel appointments were in effect. (See page 35 of Appendix A for a list of special counsels.)

Operation of the Assembly

The Assembly, which has ultimate authority over all activities of the Conference, operates much like a legislative body. Through the adoption of bylaws, the Assembly has established six standing committees to work on individual Conference projects. In addition, occasionally the Chairman establishes special committees to concentrate on certain timely issues.

THE COMMITTEES

The Conference's six standing committees are the most important component of the process that leads to the adoption of Conference recommendations, because it is at the committee level that consultants' reports are first analyzed and proposed recommendations are formulated.

Committees meet periodically to plan and guide research by academic and professional consultants and by the Chairman's professional staff. On the basis of this research, along with public and agency input through written comments, meetings, and, where appropriate, public hearings, the committees frame proposed recommendations for the Assembly to consider. When a study and tentative recommendations have been prepared, these are circulated to the affected agencies and announced to the public for comment, then 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 consideration in plenary session. The Assembly may either adopt the recommendation in the form proposed by the committee, amend the recommendation, refer it to committee, table it, or reject it entirely.

Since January 1968, the Assembly of the Conference has adopted 182 recommendations. Five recommendations were adopted during 1993. On occasion, the Assembly acts to state its views on a particular matter without making a formal recommendation on the subject. Sixteen of these "statements" have been adopted by the Conference since 1968, including one in 1993. The recommendations and the statement the Conference adopted during 1993 are reprinted in full in Appendix E.

Official actions of the Conference, along with related research reports, are published annually in RECOMMENDATIONS AND REPORTS. Recommendations and statements (but not reports) are also published in the FEDERAL REGISTER, and those of continuing interest in the CODE OF FEDERAL REGULATIONS, Title 1, Parts 305 and 310. Due to a reduced budget for fiscal year 1994, recommendations will not be published in the 1994 edition of the CFR.

Committee Activities

The COMMITTEE ON ADJUDICATION, chaired by Richard J. Leighton, took up a report on the use of nonadministrative law judge hearing officers in civil money penalty proceedings. Consideration of this study, prepared by Professor William Funk, Lewis and Clark University Law School, led to adoption of Recommendation 93-1, "Use of APA Formal Procedures in Civil Money Penalty Proceedings," at the June plenary session. The Conference recommended that Congress provide that the Administrative Procedure Act's formal adjudication provisions should be available in all administratively imposed civil money penalty proceedings.

The COMMITTEE ON ADMINISTRATION, chaired by Darrel J. Grinstead, completed research on one project leading to Conference action in 1993. In June the Committee presented a proposed recommendation concerning procedures that federal agencies employ in peer review processes that evaluate proposals for grants in the arts and sciences. Recommendation 93-3, "Peer Review in the Award of Discretionary Grants," is based in large part on a report written by Professor Thomas O. McGarity of the University of Texas.

The COMMITTEE ON GOVERNMENTAL PROCESSES, chaired by Neil R. Eisner, completed two projects, one of which led to the adoption of Statement 16, "The Right to Consult with Counsel in Agency Investigations." The underlying report, written by Professor Ronald F. Wright of Wake Forest University School of Law, examined procedures implemented by agencies to address questions left unsettled by the Administrative Procedure Act, which only briefly refers to the right to counsel in Section 555(b). Adopted in December 1993, the statement seeks to raise awareness of government officials regarding the role of counsel in agency investigations.

Also in 1993, the Committee began consideration of a report on asset forfeiture, remission, and mitigation procedures, written by attorney Arnold H. Leibowitz. This project examines procedures the Immigration and Naturalization Service, the Customs Service, and other agencies use to handle these cases.

The COMMITTEE ON JUDICIAL REVIEW, chaired by Sally Katzen, focused on procedural aspects of prompt corrective action decisions by federal banking agencies. The committee forwarded to the Assembly in

June a proposed recommendation and a study by Professor Lawrence Baxter of Duke University, which led to adoption of Recommendation 93-2, "Administrative and Judicial Review of Prompt Corrective Action Decisions by the Federal Banking Regulators." The committee also consulted with the Rulemaking Committee on the judicial review aspects of that committee's study of the notice-and-comment rulemaking process.

The COMMITTEE ON REGULATION, chaired by John Golden of the Department of Agriculture, submitted two proposals for consideration by the Assembly in 1993. Recommendation 93-5, "Procedures for Regulation of Pesticides," was the result of a study conducted for the Conference by Professor Donald T. Hornstein of the University of North Carolina. The recommendation suggests steps that may be taken by Congress and the Environmental Protection Agency to create incentives for better compliance with the law and to improve the agency's decisionmaking processes. The committee's second proposal addressed appropriate use of "audited self-regulation" as a regulatory technique. This term refers to a congressional or agency delegation of power to a nongovernmental entity to implement and enforce laws or agency regulations, with powers of review and independent action retained by the agency. This project was returned to the committee for further study, with the expectation that a revised proposal will be on the agenda of the Assembly in 1994. The Conference's consultant for this project is Professor Douglas C. Michael of the University of Kentucky.

The COMMITTEE ON RULEMAKING, chaired by Ernest Gellhorn, completed its work on a large-scale recommendation addressing improvements to the federal agency rulemaking process with adoption in December of Recommendation 93-4, "Improving the Environment for Agency Rulemaking." The Committee used as a starting point for its discussions a paper by Professor Jerry Mashaw of the Yale Law School as well as a number of previous Conference recommendations. The recommendation addresses a broad range of possible modifications to the current informal rulemaking process, aimed at removing constraints that arise from administrative activity, judicial review, presidential oversight, and congressional requirements.

APPENDIX E - RECOMMENDATIONS AND STATEMENT

Recommendations and statements of the Administrative Conference are published in full text in the FEDERAL REGISTER. In 1993 and past years Conference recommendations and statements of continuing interest have also been published in full text in the CODE OF FEDERAL REGULATIONS (1 CFR Parts 305 and 310). Due to a reduced budget for fiscal year 1994, the 1994 CFR volume will contain only a listing of recommendations and statements—not the full texts. Copies of all Conference recommendations and statements, and the research reports on which they are based, may be obtained from the Office of the Chairman of the Administrative Conference. As explained at 1 CFR §304.2, requests for single copies of such documents will be filled at no charge to the extent that supplies on hand permit.

Recommendation 93-1
Use of APA Formal Procedures in Civil Money Penalty Proceedings
(Adopted June 10, 1993)

Since 1972, the Administrative Conference has been encouraging the use of administratively-imposed civil money penalties as an enforcement tool. In Recommendation 72-6, the Conference recommended that Congress provide for such remedies to be imposed after a hearing (usually presided over by an administrative law judge) pursuant to the Administrative Procedure Act's provisions in sections 554, 556 and 557, which govern formal adjudications. Congress has followed that recommendation in hundreds of contexts over the past 20 years, and administrative civil money penalties have become a frequent enforcement mechanism.

Congress has, however, in several recent environmental statutes, authorized the Environmental Protection Agency to impose civil money penalties without a formal APA hearing, without an ALJ, and without de novo judicial review. The Army Corps of Engineers and the United States Coast Guard have been granted similar authority. The amounts of potential liability under these statutory provisions vary from maximums of $5,000 up to as high as $125,000. The issue is whether this trend is a good one.

The Administrative Conference has made a number of recommendations that relate to this topic. In its first recommendation on this subject,

Recommendation 72-6, "Civil Money Penalties as a Sanction," the Conference recommended that systems for administrative imposition of civil money penalties should provide for adjudications on the record after a formal hearing pursuant to the APA. It reiterated that position in Recommendation 79-3, "Agency Assessment and Mitigation of Civil Money Penalties."

In Recommendation 92-7, "The Federal Administrative Judiciary," the Conference considered the issue from a different perspective. In that recommendation, the Conference addressed the proliferation of non-ALJ adjudicators in agency proceedings, and encouraged Congress to return to a more consistent use of ALJs in the types of cases for which their use is most appropriate, so that the uniformity of process and decisionmaker characteristics that the APA envisioned could be reestablished. In proposals that presumed the implementation of recommended changes in the ALJ selection process and mode of performance review, the Conference suggested a set of guidelines that Congress should use in determining when ALJs should be required as presiding officers.[1]

Among the types of cases cited by Recommendation 92-7 in which Congress should consider requiring ALJ hearings are those involving the "imposition of sanctions with substantial economic effect." While this is but one factor Congress is urged to take into account, it would appear to weigh strongly in favor of APA-ALJ proceedings in civil money penalty cases of the type at issue here. While the economic impact of a civil money penalty will vary depending on the respondent's resources, it can reasonably be assumed that a penalty of $25,000 would be substantial to most respondents, and even smaller penalty amounts might be substantial in many situations.

The interest in uniformity also weighs very much in favor of using APA-ALJ hearings in civil money penalty cases. Most administratively-imposed civil money penalty statutes do in fact require APA-ALJ hearings. There does not appear to be anything particularly unusual about the cases engendered by the programs under study that would warrant a different type of hearing. As a matter of good policy, anyone facing a civil money penalty imposed by a federal administrative agency with judicial review on the record of the administrative proceedings should have available the opportunity to have his or her case heard by an ALJ in a formal APA hearing. Where penalties would be small, it is of course less likely that such an opportunity would be taken; where they are large, such an opportunity becomes that much more important.

While neither an APA hearing nor an ALJ as presider may be constitutionally required, there may well be situations where due process would require something very much like an APA-ALJ hearing. An advantage of uniformly requiring the opportunity for ALJ hearings in civil money penalty proceedings is that it alleviates the uncertainty that arises from trying to apply the standards of *Mathews v. Eldridge*[2] in a variety of contexts. That case, which requires a balancing of three different interests in determining what process is due in a particular situation, provides no clear guideposts. Its requirements can only be determined definitively on post-hoc review. In

contrast, the validity of the APA's formal adjudication process is well-established.

The Conference is therefore recommending that, in all cases involving administratively-imposed civil money penalties, the opportunity for a formal adjudication pursuant to the APA's provisions, 5 U.S.C. §§554, 556-558, be available to parties.[3]

Recognizing the current existence of civil money penalty programs where the hearing officers are not protected by the APA's separation-of-functions provisions in section 554(d), the Conference is recommending that agencies with such programs provide for this important protection by regulation. Agencies should ensure that non-ALJ presiding officers and presiding officers in non-APA hearings will not report to, be evaluated by, or consult with prosecuting or investigating officials.[4]

Although the Conference originally recommended use of administrative hearings in civil money penalty cases because of the comparative cumbersomeness and expense of federal district court trials, concerns have been raised that APA-ALJ hearings can also be too slow, expensive and cumbersome, and that some cases should therefore not be required to be adjudicated under the APA. This concern, which extends beyond civil money penalty cases, can, however, be addressed within the ambit of the APA.

The APA provides flexibility with respect to procedures used in formal proceedings. Although 5 U.S.C. §§554, 556-558 contain certain basic requirements (such as proper notice, opportunity to present evidence and rebuttal, at least limited cross-examination, and the chance to submit proposed findings or exceptions), the APA leaves to agency discretion or other statutory provision such issues as the scope of discovery, the existence of time limits, and many evidentiary issues. Agencies should take advantage of such flexibility to issue rules that would encourage expeditious resolutions in ALJ proceedings.[5] For example, agencies could authorize (or require) limitations

Government member Margaret Jane Porter, Chief Counsel, Food and Drug Administration, speaking to members at the June plenary session.

on discovery or the number of pages filed, or could set deadlines for the various stages of the proceeding, including the amount of time to issue a decision. They could also encourage the use of alternative dispute resolution in appropriate cases.[6] Thus, the uniformity provided by the APA does not and should not limit agency or ALJ flexibility in handling civil penalty cases expeditiously and fairly.

RECOMMENDATION

1. Congress should provide that the Administrative Procedure Act's formal adjudication provisions (5 U.S.C. §§554, 556-558) are available to parties whenever money penalties may be imposed by administrative agencies.

2. Agencies should ensure in their regulations that nonadministrative law judge presiding officers in civil money penalty adjudication proceedings not covered by the APA's formal adjudication provisions are protected from undue influence. Specifically, such officers should not report to, be evaluated by, or consult on an ex parte basis with, prosecuting or investigative officials.[7]

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[1]Non-ALJs can, of course, be used by agencies for adjudications not stipulated by Congress to be within the coverage of sections 554, 556 and 557 ("non-APA adjudications"), or in APA adjudications where Congress has specially designated a presiding board or non-ALJ adjudicator. See 5 U.S.C. §556(b). Recommendation 92-7 was intended to address both types of congressional actions.

[2]424 U.S. 319 (1976).

[3]The recommendation that the opportunity for a hearing be afforded is intended to retain flexibility for resolving the case prior to an ALJ hearing, through settlement, alternative dispute resolution processes, or other processes agreed upon by the parties.

[4]As reflected in Recommendation 92-7, "The Federal Administrative Judiciary," the Conference also recognizes that there may be infrequent situations where Congress may wish to specially designate presiding officers with technical or other specialized expertise for APA formal adjudications in civil money penalty programs. See section 556(b) of Title 5. In these situations, the APA mandates a separation of functions.

[5]See, e.g., Recommendation 86-7, "Case Management as a Tool for Improving Agency Adjudication," 1 CFR §305.86-7 (1993).

[6]See Pub. L. No. 101-552, the Administrative Dispute Resolution Act, which amends the APA to provide authorization to use alternative dispute resolution processes. See also Recommendation 86-3, "Agencies' Use of Alternative Means of Dispute Resolution," 1 CFR §305.86-3 (1993).

[7]Recommendation 2 is intended to assure that separation-of-functions protections are included within existing programs. These very important protections would be required by Congress in future programs by Recommendation 1, which urges that all of the APA's adjudication safeguards be made available in new civil money penalty programs. It is unlikely that Congress would consider a civil money penalty adjudication proposal for which it would not be in the public interest to make available the full range of APA safeguards. However, should that unlikely event occur, it is strongly urged that Congress assure that at least separation-of-functions protections of the type described in Recommendation 2 be incorporated in any such program.

Recommendation 93-2
Administrative and Judicial Review of Prompt Corrective Action Decisions by the Federal Banking Regulators
(Adopted June 10, 1993)

In the wake of the recent crises in the banking industry, Congress has passed two major statutes affecting the relationship among the four principal banking regulators (the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, and the Office of Thrift Supervision) and the industries they supervise.[1] In 1989, the Financial Institutions Reform, Recovery and Enforcement Act gave the banking agencies extensive new enforcement powers. The Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA) went further, authorizing the federal banking agencies to take "prompt corrective action to resolve the problems of federally insured depository institutions," and to do so "at the least possible long-term loss to the deposit insurance fund." 12 USC §1831o(a)(1) and (2). Underlying the FDICIA scheme is Congress' belief that by acting quickly at the earliest sign of problems, the banking agencies may be able to prevent the failure or further deterioration of regulated institutions.

FDICIA added a new section 38 to the Federal Deposit Insurance Act, which requires banking regulators to take prompt corrective action (PCA) to preempt the possibility that a bank or savings association will fail or, if failure appears likely, to seize the bank early enough to ensure that there remain assets within the institution sufficient to cover its liabilities. The PCA framework is premised on a "tripwire" approach, under which banking regulators may take increasingly severe action, on a stage-by-stage basis, against a depository institution as the capital and soundness of the institution decline. FDICIA creates a system of five capital classifications, ranging from well capitalized to critically undercapitalized, within which bank regulators place institutions based on the application of capital standards. Downgrading of an institution's capital classification not only subjects it to increasing intervention by regulators, but also automatically triggers certain restrictions on the institution's activities (e.g., loss of authority to accept brokered deposits or to make payments on subordinated debt). In addition to considering capital standards, regulators may reclassify the institution based on a determination that it is in an unsafe or unsound condition or is engaging in an unsafe or unsound practice.

Before passage of FDICIA, the banking agencies took coercive action through the formal enforcement provisions of section 8 of the Federal Deposit Insurance Act, which provides extensive procedural protections. The new section 38, on the other hand, accommodates the need for banking agencies to respond quickly to developing problems by permitting exercise of functionally similar powers outside the formal procedural framework of section 8. Moreover, although FDICIA dramatically increased the importance of capital

classifications, and the standards on which they are based, in the regulatory scheme, the bank examination process in which these determinations are made is very informal, with limited opportunity for review. Specifically, while section 38 makes provision for limited procedural protection for an individual who is dismissed from office as a result of a PCA directive, as well as for an institution subject to a determination that it is in an unsafe or unsound condition, it does not provide for administrative review of PCA decisions, nor does it expressly provide for—or preclude—judicial review of PCA determinations.

The Administrative Conference believes that, in light of the significance of prompt corrective actions, greater procedural protection is appropriate. On the other hand, since time will often be of the essence in meeting FDICIA's goals of avoiding bank failures and minimizing the drain on the bank insurance funds, any procedural requirements must permit expeditious action and must be limited to those situations where agency actions have the severest impact. Moreover, any scheme for expanded review of PCA decisions must take into account the broad discretion Congress has afforded the banking agencies in determining and applying standards in this area.

The Conference believes that administrative review should be available for decisions that have an adverse effect on an institution's capital classification. These decisions, which are ordinarily made in the context of a bank examination rather than in a PCA directive, form the basis for any PCA action that may be taken against an institution. The highly informal and discretionary mechanisms for review of examination decisions that are currently provided by the banking agencies were designed for use in an atmosphere of trust and close working relationships between bankers and examiners. In the current environment, a somewhat more structured administrative review by a higher-level reviewing authority within the agency would promote fairness and more consistent results.

Providing a more effective administrative review mechanism is particularly important here where, because of the broad discretion afforded agencies to interpret fairly general statutory standards and the subjective nature of some of the determinations that must be made in the examination process, judicial review may be of limited effectiveness. Moreover, the proposed review process would provide a more meaningful record for judicial review in those cases where it can be effective. Paragraph 1 of this recommendation proposes a uniform, record-creating appeal process for decisions by all federal banking agencies in which an institution's capital classification is determined or changed. The banking agencies' rules should make clear whether changes in capital classification will ordinarily go into effect while administrative review is pending or will not become final until after administrative review; in either case, agency rules should provide for exceptions from ordinary practice in appropriate circumstances.

In addition, judicial review should be available for some of the most crucial PCA decisions. Institutions that have suffered adverse capital classifications and persons who have been dismissed as a result of PCA directives should be able to seek judicial review of those decisions, and the provisions

governing judicial review in these cases should be made uniform across all the relevant federal banking agencies.

Similarly, any action to appoint a conservator or receiver for an institution should be judicially reviewable. Some such actions are already reviewable under existing law, though section 38 may be interpreted to preclude such review. Congress should clarify that review is available for all such decisions made by every federal banking agency and should provide for uniform standards of review and time limits for review of these decisions. The Conference recognizes the need for flexibility in determining whether an adverse capital classification or prompt corrective action decision should take effect pending judicial review and concludes that stays of agency action should be discretionary rather than automatic.

RECOMMENDATION

I. Administrative Appeals of Classification Decisions

A. In formulating an appeal process for independent internal review of classification decisions, the federal banking agencies should promulgate rules providing for an appeal to a senior official by a depository institution of a decision of an examiner or regional director that results in an adverse capital classification of the institution (including a decision to assign the institution a less-than-satisfactory rating for asset quality, management, earnings, or liquidity).

B. The appeal procedures should provide that:

(1) the affected institution is given immediate notice of its right to appeal;

(2) the institution is provided with a written report stating the reasons, including the factual bases, for the adverse classification or rating;

(3) the institution has an opportunity to supply further facts and information, make written representations, and, in the agency's discretion, present oral testimony and argument; and

(4) the agency's final decision is issued within a specified time.

C. The agencies also should specify in their rules whether or not an adverse capital classification decision will ordinarily be stayed pending completion of the internal appeal process and, in either event, provide for exceptions where special circumstances justify departure from regular practice.

II. Judicial Review of Final Agency Decisions[2]

A. Congress should amend Section 38 of the Federal Deposit Insurance Act, 12 U.S.C. §1831o, to permit a depository institution that has suffered an adverse capital classification, or a person who has been dismissed pursuant to section 38(n) of the Act, 12 U.S.C. §1831o(n), to seek judicial review of the federal banking agency's final decision in a federal district court.

(1) A party affected by an adverse capital classification should be required to seek review within 10 days of receiving notice of the agency's final decision.

(2) The court should review the agency's decision under the standards of judicial review set forth in 5 U.S.C. §706.

(3) Whether the agency's ruling is stayed pending judicial review should be determined by the court under the usual standards for granting stays.

B. Congress should amend Section 38 of the Federal Deposit Insurance Act, 12 U.S.C. §1831o, to clarify that it does not preclude judicial review of decisions to appoint a conservator or receiver under the terms of section 38(h)(3), 12 U.S.C. §1831o(h)(3).

(1) In addition, Congress should amend Section 2 of the National Bank Receivership Act, 12 U.S.C. §191, to provide for judicial review of decisions to appoint receivers for national banks, and Section 11(p) of the Federal Reserve Act, 12 U.S.C. §248(p), to provide for judicial review of decisions by the Board of Governors of the Federal Reserve System to appoint conservators and receivers for state member banks.

(2) Congress should also amend the provisions relating to judicial review of decisions by all the federal banking agencies to appoint conservators and receivers so as to provide for:

(a) a consistent standard of review in accordance with 5 U.S.C. §706; and

(b) consistent time limits within which judicial review must be sought after a conservator or receiver has been appointed.

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[1]The Board of Governors of the Federal Reserve System is an independent federal agency with primary federal responsibility for the regulation of all bank holding companies, state-chartered banks that are members of the Federal Reserve System, and foreign banks. The Federal Deposit Insurance Corporation, also an independent federal agency, administers the Bank Insurance Fund for commercial banks and the Savings Association Insurance Fund for savings and loans, has primary federal responsibility for the regulation of all state-chartered federally insured banks that are not members of the Federal Reserve System, and has secondary regulatory authority over all other federally insured banks and thrifts. The Office of the Comptroller of the Currency, located within the Treasury Department, charters and supervises all national banks. The Office of Thrift Supervision, also located within the Treasury Department, charters all federally chartered savings and loans and supervises all savings and loan holding companies and federally insured savings associations.

[2]In making these recommendations related to judicial review of decisions by federal banking agencies, the Administrative Conference takes no position on whether and to what extent judicial review of these decisions is available under current law.

Recommendation 93-3
Peer Review in the Award of Discretionary Grants
(Adopted June 11, 1993)

Governments in most industrialized nations now play a prominent role in assembling and sustaining a sound scientific and engineering infrastructure and in providing financial support for artistic and other endeavors. Although many procedural vehicles exist for making the difficult scientific and artistic judgments that necessarily arise in apportioning limited resources, the United States government has depended to a large degree upon "peer review" systems in which the agency decisionmaker assembles a group of experts for advice.

Under this peer review model, the government does not attempt to persuade researchers to undertake particular research or artists to create particular kinds of art. Instead, a grantmaking agency allocates sums of money to broad fields of endeavor and invites researchers, artists, or performers to develop creative proposals for projects. A group of "peers" with expertise in the relevant area then evaluates and ranks proposals, leaving the ultimate funding decisions up to the governmental program officials. Peer review is intended to ensure that public funds are awarded objectively to meritorious scientists, artists, eleemosynary institutions, and, increasingly, for-profit entities in a way that renders the system accountable to the public and its elected representatives.

While peer review has proved remarkably durable in the 30 to 40 years during which federal agencies have employed it, the process has not been without controversy. Some critics suggest that peer review is an expensive waste of time; that it diverts creative minds from productive research to writing, reviewing, and discussing proposals; that it rewards huckstering skills at the expense of solid research; that it is sometimes abused by reviewers who breach confidentiality; and that it can be counterproductive in programs designed to explore fresh ideas and innovative approaches. In particular, some peer review systems have been criticized for permitting ad hoc and systematic bias for and against individuals, groups, or new ideas. Decisionmaking bias in the award of discretionary grants can result from favoritism, animus, or conflict of interest. It can stem from the identity of the potential grantee, as, for instance, where an "old boy" network exists or a "halo effect" causes poorly conceived proposals from well-known scientists to be funded, or from conflicts of interest that have to do with the affiliation or position of the decisionmaker. Bias can include personal or professional animus, a lack of regard for those mavericks who challenge conventional views, or a systematic refusal to give sufficient weight to particular criteria relevant to the decision. Finally, ex parte lobbying or even political pressure may occasionally cause an otherwise objective process to become biased for or against particular persons or approaches.

To the extent that bias infects it, the decisionmaking process loses objectivity and, consequently, legitimacy. While the incidence and impact of bias are not susceptible to empirical measurement, the Conference believes that, on balance, the peer review model has worked well[1] and is highly

appropriate for awarding discretionary grants in the arts and sciences.[2] The Conference's recommendation is based largely on a study of programs in the National Institutes of Health, the National Science Foundation, the Environmental Protection Agency, and the National Endowment for the Arts. Although all rely heavily upon the principle of peer review in awarding discretionary grants, these agencies manage the peer review process in diverse ways. None has completely eliminated the potential for bias, though some have made great strides in that direction. Each can learn from the others, and all grantmaking agencies not included in the Conference study can learn from their experiences. These recommendations draw on their experience to suggest reforms that should further reduce the potential for bias at a relatively low cost.

RECOMMENDATION

A. Promoting Openness and Accountability

1. Reviewer Meetings. Agencies that rely upon peer review to evaluate grant proposals should generally assemble the reviewers for a meeting in which each reviewer, in the presence of the other members, has an opportunity to comment upon the evaluations made by other members. Such meetings may also be by telephone conference call.

2. Feedback and Rebuttal. Insofar as practicable, agencies should provide applicants with an opportunity for feedback and rebuttal as follows:

(a) Agencies that rely on peer review should prepare and routinely transmit to all applicants brief summaries of the reasons for evaluation results.

(b) If peer review committees prepare written evaluations of individual applications, agencies should retain these documents for a full funding cycle, and should make available copies of such written evaluations to applicants upon request in a redacted form so that particular evaluations may not be attributed to particular reviewers. Agencies that retain documents prepared by peer reviewers should make them available in redacted form where practicable and where reviewers' candor would not be unduly affected.

(c) Statements and summaries of reasons should be made available to applicants sufficiently far in advance of the agency's final decision so that applicants may review the documents and submit comments for timely consideration by the peer reviewers or agency staff. Where this is not practicable, agencies should maintain an appropriate reconsideration system.

(d) Agencies that rely on peer review should develop guidelines identifying information that will normally be made available to grant applicants relating to their applications and specifying the procedures under which particular kinds of information will be available to different classes of requesters.

3. Applicant Anonymity. While applicant anonymity will often be infeasible and inconsistent with effective application of merit review criteria, agencies should be aware of situations in which not revealing to peer reviewers the identities of applicants for discretionary grants would further objective review. Agencies should consider allowing reviewers to conduct discrete portions of peer reviews under conditions of applicant anonymity in cases in

which complete applicant anonymity is not feasible or consistent with effective application of merit review criteria.

4. Reviewer Anonymity.

(a) The agency should provide that, although the identities of all members of any peer review panels should be made available to applicants and the public, granting agencies should be authorized to refuse to disclose information that would enable applicants to identify the persons who reviewed in detail a particular application.

(b) Agencies that rely on peer review should inform all peer review panelists in writing of their Privacy Act obligations and of the penalties that may flow from a breach of confidence. Agencies should consider sanctions, including instituting debarment or suspension procedures, against any panel reviewer who knowingly breaches confidentiality.

5. Contacts with Peer Reviewers, Staff, and Decisionmakers.

While agencies that rely on peer review should encourage informal contacts between applicants and agency staff for the purpose of conveying general information, they should adopt appropriate statements of policy discouraging all ex parte contacts regarding particular grant proposals with peer reviewers and agency decisionmakers that attempt to influence grantmaking decisions outside the normal decisionmaking process.

B. Participants in the Review Process

1. Composition and Structure of Review Committees.

(a) Agencies that rely on peer review should endeavor to include some reviewers from related professional fields on peer review panels. Agencies should also consider including on the panels individuals who are not peers but who bring to bear perspectives relevant to the decision.

(b) To the extent consistent with agency resources and depending on the size and number of the grants awarded in a program, agencies should provide that the membership of peer review panels change on a regular basis, ensure that the number of persons serving on an individual peer review committee is sufficiently large to dilute the impact of any bias, permit duplicate reviews in two or more subcommittees, or allow multiple committees to perform a tiered review.

2. Conflicts of Interest.

(a) Agencies that rely on peer review should promulgate guidelines that prevent a person from reviewing or sitting on a panel that reviews his or her own grant application or the application of a relative, a close collaborator, a recently graduated former student, an institution by which the person is employed, or an affiliated institution. Insofar as possible, reviewers with a competing or other adverse interest to an application to be considered should not review that application.

(b) Agencies should provide that a reviewer must disclose a conflict of interest or appearance thereof to the agency and, if the reviewer continues to participate, to other members of the review committee.

(c) If necessary, agencies may provide for specific waivers, with disclosure, of the conflict of interest recommendations on a case-by-case basis when there is no other practical means for securing appropriate expert advice on a particular grant application.

(d) Agencies that rely on peer review should ensure that reviewers are informed and observe applicable rules or guidelines on bias and conflict of interest. In particular, agencies should caution persons on peer review panels of the need to protect against panel misuse of confidential information made available to it and should ensure that such information or position is not misused.

3. Opportunity to Object to Reviewers. Agencies that rely on peer review should provide that any applicant may submit a confidential list containing a small number of potential reviewers that the applicant deems objectionable together with a statement of the reasons for the challenges. Agencies should seriously consider such objections and honor those that are meritorious, unless the agency determines that a qualified group of peers cannot be assembled if all such challenges are honored.

4. Scoring Applications. Agencies that rely upon scoring systems for evaluating and ranking discretionary grant proposals should consider developing methodologies for ensuring fairness in scoring applications.

C. Audits for Potential Bias

Agencies that rely on peer review should implement independent reviews of the process for bias and conflict of interest.

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[1]To encourage flexibility, innovation, or a rapid response where warranted, some agencies that ordinarily rely on peer review to evaluate grant proposals (such as the National Science Foundation) have found it useful to set aside a small portion of the available funds for relatively brief, small awards outside the normal channels of peer review.

[2]Especially in the scientific agencies, a recent trend toward greater openness has been noted. This has been prompted in part through enactment of the Freedom of Information Act (FOIA), the Federal Advisory Committee Act (FACA), and the Privacy Act. FOIA requires every federal agency to make available to any person any record in the agency's possession (subject to several exceptions potentially relevant to the peer review process) upon a request by that person that reasonably describes the record. FACA requires federal agencies that rely on recommendations of advisory committees to charter these committees and to run them according to statutory standards of openness. The Privacy Act directs agencies to protect personal information in agency files from unauthorized disclosure and to give individuals an opportunity to review information about themselves and to require that the agency correct inaccuracies. While peer review committees clearly come within FACA's definitions, there have been significant litigation and uncertainty over the effect of these laws.

Recommendation 93-4
Improving the Environment for Agency Rulemaking
(Adopted December 9, 1993)

Informed observers generally agree that the rulemaking process has become both increasingly less effective and more time-consuming. The Administrative Procedure Act does not reflect many of the current realities of rulemaking. The APA's cumbersome "formal rulemaking" procedures are rarely used except in some adjudicative-type rate proceedings. Meanwhile, the APA's simple "informal rulemaking" procedures (set forth in 5 U.S.C. §553) have been overlain with an increasing number of constraints: outside constraints imposed by Congress, the President, and the courts, and internal constraints arising from increasingly complex agency management of the rulemaking process.[1] As a result, many federal agencies, faced with unsatisfactory rulemaking accomplishments in recent years, have turned to alternatives such as less formal policy statements or adjudicative orders to achieve regulatory compliance.[2]

The Conference believes that the environment for agency legislative rulemaking can be improved. This recommendation sets out a coordinated framework of proposals aimed at promoting efficient and effective rulemaking by addressing constraints on the current process that derive from a variety of sources. We present an integrated approach for improving the rulemaking environment in order to relieve agencies of unnecessary pressures and disincentives relating to rulemaking. We also identify desirable revisions of section 553 relating to legislative rulemaking. In doing so, this recommendation both presents new proposals and incorporates previous Conference recommendations.

Presidential Constraints

We continue to support presidential coordination of agency policymaking as beneficial and necessary.[3] We are concerned, however, that, unless properly focused, this additional review may impose unnecessary costs. All recent presidents have undertaken some level of review and coordination of agency rulemaking. Presidential review of rules, as undertaken under various executive orders[4] applied by the Office of Management and Budget and other White House entities, has often required agencies to submit nearly all proposed and final rules to a review process in which the rules are screened and analyzed for consistency with presidential objectives. Some of these objectives have been incorporated into analytical requirements found in separate executive orders. This screening process can unduly slow the entire system of rulemaking;[5] it can inhibit the growth of the promising consensus-based alternative of negotiated rulemaking; and it can create undesirable tensions between the reviewing entities and agency policymakers. While these analytical emphases can be rationalized individually, in the aggregate, they can result in redundant requirements, boilerplate-laden documents, circumvention, delays, and clutter in the *Federal Register*. Although specific presidential review policies have varied among Administrations, these recommendations set forth principles that the Conference believes generally should govern presidential review of rules.

We therefore recommend that presidential oversight and review be reserved for the most important rules and that the agencies be given clear policy guidance in a directive, approved by the President, specifying what is required. In addition, the reviewing or oversight entity should avoid, to the extent possible, extensive delays in the rulemaking process. The review process itself should be open to public scrutiny—following guidelines previously developed by the Administrative Conference.[6] The President's policy should encourage planning and coordination of regulatory initiatives, and early dialogue between agencies and the reviewing entity. To this end, the concept of a unified agenda of regulations is a useful tool and should be preserved. We also believe that additional non-APA analytical requirements should be kept to a minimum. The cumulative impact of such requirements on the rulemaking process should be considered before existing requirements are continued or additional ones imposed. We also believe it is useful to periodically reassess the continued viability and relevance of the various presidential directives.[7]

Legislative Constraints

Congress should similarly review and rationalize legislatively-mandated rulemaking procedures.[8] Specifically, we recommend that it refrain, as it generally has done since the 1970s, from imposing program-specific rulemaking requirements that go beyond the APA's basic notice-and-comment procedures. Statutory "on-the-record" and "hybrid" rulemaking provisions that require adjudicative fact-finding techniques such as cross-examination, or more stringent provisions for judicial review (in particular, use of the "substantial evidence" test instead of the normal "arbitrary and capricious" test), can be unnecessarily burdensome or confusing and should be repealed.[9] Although additional procedures can sometimes be beneficial—see, e.g., §307 of the Clean Air Act (providing additional safeguards for rulemaking with significant economic and competitive effects)[10]—they should be imposed only after careful review and attention by Congress to possible unintended consequences. Otherwise, such additions generally should be left to the discretion of individual agencies.[11]

Similarly, legislatively-imposed time limits on rulemaking, while understandable, can be unrealistic, resulting in either hastily-imposed rules or missed deadlines that undermine respect for the rulemaking process.[12] Legislative deadlines backed by statutory or regulatory "hammers" (mandating, for example, that the proposed rule or some other policy change[13] automatically take effect upon expiration of the deadline) are particularly undesirable and often counter-productive;[14] they are generally less desirable than the alternative of judicial enforcement of deadlines.[15]

Finally, legislation ancillary to the APA that creates additional rulemaking impediments should be reconsidered. Statutes such as the Regulatory Flexibility Act, which requires a special analysis of virtually all rules' effects on small business, may have laudable intentions, but their requirements are often both too broadly applicable and not sufficiently effective in achieving their goals. If such requirements are imposed, Congress should focus them more narrowly, by, for example, confining their application to significant rules or particular categories of rules.

Judicial Constraints

Other constraints on rulemaking that warrant similar reconsideration have been imposed through judicial review. The APA, in section 706, provides that agency rules may be set aside if they are "arbitrary or capricious," represent an "abuse of discretion," or are "otherwise not in accordance with law." The evolving scope of judicial review of agency rules, along with the timing of much such review at the preenforcement stage, has contributed to what is sometimes an overly intrusive inquiry. This, in turn, has led agencies to take defensive measures against such review. While some tension is an inevitable adjunct of the process of judicial review, we believe that steps can be taken to lessen some of the burdens without loss of effective outside scrutiny of agency rules.

The tendency of some courts to require extra-APA procedures in rulemaking was arrested by the Supreme Court's *Vermont Yankee* decision in 1978.[16] Nevertheless, while the prevailing judicial interpretation of the arbitrary and capricious standard of review (which became known as the "hard look doctrine") has promoted reasoned decisionmaking, courts have not infrequently remanded rules on the basis of an agency's failure to respond adequately to comments, consider relevant factors, or explain fully the bases for its rule. Courts should be sensitive not to require greater justification for rules than necessary; a reasoned statement that explains the basis and purpose of the rule and addresses significant issues raised in public comments should be adequate.

Preenforcement review, expanded by the Supreme Court in the 1967 *Abbott Laboratories* cases,[17] endorsed by the Conference in various recommendations,[18] and codified in numerous rulemaking programs, has the virtue of settling legal issues early and definitively. When overused, however, preenforcement review can have the negative effect of inducing precautionary challenges to most rules and the raising of as many objections to a rule as possible, including somewhat speculative challenges pertaining to the rule's potential application.

Under the *Abbott Laboratories* standard, challenges to a rule are permitted where issues are appropriate for judicial review and where the impact on a challenger is direct and immediate. The Conference believes that the *Abbott Laboratories* standard strikes a sensible balance, and that preenforcement challenges generally are appropriate where the administrative record provides a sufficient basis for the court to resolve the issues before it. Thus, a preenforcement challenge to a rule based on the procedures used in the rulemaking should normally be permitted. Preenforcement review that involves a facial challenge to a rule's substantive validity (whether because of a conflict with a statute or the Constitution, or because of the inadequacy of the facts or reasoning on which it is based) should also generally be heard.[19] In contrast, challenges to a rule because it might be applied in a particular way should normally be deferred until the rule has actually been applied.

Although prompt resolution of legal issues is to be encouraged, Congress should be cautious in coupling mandated time-limited preenforcement review with preclusion of review at the enforcement stage. Such time-limited

review should be provided for only in the situations and conditions specified in Recommendation 82-7.[20] Where Congress does set time limits for preenforcement review, it should, in the interests of consistency, generally specify that preenforcement review should occur within 90 days of a rule's issuance. Current statutory specifications vary. There does not seem to be any reason for variation that outweighs the benefits of uniformity in this context.

Congress should also amend any existing statutes that mandate use of the "substantial evidence" test for reviewing legislative rules, by replacing it with the arbitrary and capricious test. The occasional introduction of the substantial evidence test in the rulemaking context has created unnecessary confusion; some courts apply it in a manner identical to that of the arbitrary and capricious test; others believe that it sets a higher standard. The Conference believes that the arbitrary and capricious test provides sufficient review in the informal rulemaking context.

The intensity of judicial review directly affects the rulemaking process. For example, the scope of review of agency statutory interpretations is governed by the deferential *Chevron* test, which requires affirmance if the agency's interpretation of an ambiguous statute is permissible.[21] On the other hand, when reviewing the reasonableness of an agency's policy and factual justifications for its rules, courts apply the stricter "hard look" doctrine.[22] Deferential review of the legal issue of statutory interpretation, coupled with the rigorous review of a rule's factual and policy underpinnings that the "hard look" doctrine specifies, has been criticized as anomalous. The Conference believes, however, that the review standards can be harmonized by looking beyond the labels. That is, under both of these doctrines, courts are required to determine independently the limits of the agency's statutory authority and whether the factors the agency took into account in formulating the rule were permissible. Following that determination, courts properly defer to an agency's permissible reading of its statute and to its choice of inferences from the facts in making policy decisions. Courts would help make their review more consistent and predictable if they articulated more clearly this two-step approach. Both the *Chevron* and "hard look" doctrines would then be understood as including a searching review of the range of an agency's legally permissible choices (statutory, policy, and factual), combined with, in each instance, deference to the agency's reasonable selection among such choices, once the alternatives are determined to be within the permissible range.

Finally, in order to prevent additional litigation, courts should be encouraged to address certain issues that arise in many if not most reviews of rules. Reviewing courts should, for example, specify, to the extent feasible, which portions of the rule, if any, are to be set aside, vacated, stayed or otherwise affected by the decision in the case. They should seek to ensure that portions of a rule unaffected by a finding of illegality remain in effect, unless the rule expressly or impliedly indicates that the rule is inseverable. A reviewing court should also consider the extent to which its mandate will apply retroactively. In considering the effect to be given to its decision, the court should weigh the impact of the decision on parties not before the court, and recognize their

interest in being heard or adequately represented prior to any ruling that adversely affects them.

Amendment of the APA

As we approach the fiftieth anniversary of the APA, some of its rulemaking provisions need to be updated. Section 553(c), which does not now state a length of time for the comment period, should be amended to specify that a comment period of "no fewer than at least 30 days" be provided (although a good cause exception for shorter periods should be incorporated). This would relieve agencies of the need to justify comment periods that were 30 days or longer. The thirty-day period is intended as a minimum, not a maximum; agencies would still be encouraged to allow longer comment periods and to leave the record open for the receipt of late comments.[23] Section 553 should also specify that a second round of notice and comment is not required where the final rule is the "logical outgrowth" of the proposed rule, thus codifying generally accepted doctrine.[24] A provision requiring maintenance of a public rulemaking file should be incorporated into section 553, so that those who seek access to the file are not forced to rely on the Freedom of Information Act to obtain it.[25] (The content of such a file is discussed further below in connection with internal agency management initiatives.)

In addition, the requirement in section 553(c) of a statement of basis and purpose for the rule should be revised to require a "reasoned statement"[26] (deleting the "conciseness" provision), which includes a response to significant issues raised in the public comments.[27] These changes are designed to codify the salutary aspects of the caselaw on rulemaking, discourage insubstantial arguments and objections on review, and stem the tendency to require additional, more burdensome justifications.

Another long-overdue change in the Act is elimination of section 553(a)(2)'s exemption from notice-and-comment procedures for matters relating to "public property, loans, grants, benefits, or contracts." As the Conference recognized as early as 1969, this "proprietary exemption" is an anachronism.[28] The exemption for "military or foreign affairs function[s]" in section 553(a)(1) should be narrowed so that all but secret aspects of those functions are open to public comment.[29]

Internal Agency Management Initiatives

Rulemaking is not just a product of external constraints. The agency's own processes for developing rules and reviewing them internally affect the rulemaking environment. Thus, agency management initiatives can have a significant impact on the effectiveness and efficiency of rulemaking. The Conference recommends a number of steps agency managers can take to improve their internal processes.

Senior agency staff should develop management strategies to set priorities and track agency rulemaking initiatives.[30] Agencies should seek to involve the presidential oversight entity in the rulemaking process as early as feasible, in order to reach agreement on the significance of rules in the developmental stage, to provide greater coordination, and to speed final oversight review. Agencies should also review their existing systems for developing and reviewing regulations, to determine where problems and

bottlenecks are occurring. They should seek to achieve more rapid internal clearances of proposed and final rules, and to develop reasoned analyses[31] and responses to significant issues raised in public comments. They should also take steps to manage the rulemaking file (and associated requests for access to it).[32] The file should, to the extent feasible, contain notices of the rulemaking, all written[33] comments submitted to the agency, and copies or an index of all written factual material, studies, or reports substantially relied on or seriously considered by the agency in formulating its proposed and final rule (except insofar as disclosure is prohibited by law). Materials substantially relied on or seriously considered need not encompass every study, report, or other document that the agency may have in its files or has otherwise used, but they should include those that exerted a significant impact on the agency's thinking, even if they represent an approach that the agency ultimately did not accept.

Agencies should also consider innovative methods for developing and getting public input on rules. Agencies should use advisory or negotiated rulemaking committees where appropriate to improve the quality and acceptability of rules.[34] They should also consider the use of "direct final" rulemaking where appropriate to eliminate double review of noncontroversial rules. Direct final rulemaking involves issuing a rule for notice and comment, with an accompanying explanation that if the agency receives no notice during the comment period that any person intends to file an adverse comment, the rule will become effective 30 days (or some longer period) after the comment period closes.

RECOMMENDATION

To improve the environment for agency legislative rulemaking, the President, Congress, and the courts should take steps to eliminate undue burdens on agency legislative rulemaking; Congress should update the Administrative Procedure Act's rulemaking provisions; and agencies should review their internal rulemaking environment and, where appropriate, implement internal management initiatives aimed at improving the effectiveness and efficiency of their efforts.

I. Presidential Oversight[35] of Rulemaking

A. The President's program for coordination and review of agency rules should be set forth in a directive that is reviewed periodically. The program should be sensitive to the burdens being imposed on the rulemaking process, and implementation of the program should ensure that it does not unduly delay or constrain rulemaking. The President should consider the cumulative impact of existing analytical requirements on the rulemaking process before continuing these requirements or imposing new ones.[36]

B. The President's directive, as well as the explanations provided and the procedures followed by the presidential oversight entity, should, insofar as practicable:

1. Promote dialogue and coordination between the oversight entity and rulemaking agencies in the early identification and selection of rules

warranting application of the review process;

2. Set forth the relevant analytical requirements that the oversight entity should apply to agency rulemaking, and provide interpretive guidance to assist agencies in complying with these requirements;

3. Ensure appropriate expedition and openness in the process, in accordance with Conference Recommendation 88-9;

4. Support a process for planning regulatory initiatives and tracking rule development; and

5. Encourage and support agency efforts to use consensual processes such as negotiated rulemaking.

II. Congressional Structuring of Rulemaking

A. Section 553 of Title 5, United States Code, which established the framework for legislative rulemaking, has operated most efficiently when not encumbered by additional procedural requirements. Congress generally should refrain from creating program-specific rulemaking procedures or analytical requirements beyond those required by the APA. When Congress determines that additional procedures beyond those required by section 553 are justified by the nature of a particular program, such procedures should be focused on identified problems and, where possible, adopted incrementally or after experimentation.[37] In addition, Congress should repeal formal ("on-the-record") or other adjudicative fact-finding procedures in rulemaking in any existing statutes mandating such procedures.[38]

B. In general, Congress should not legislate time limits on rulemaking, but should instead rely on judicial enforcement of prompt agency action under §706(1) of the APA.[39] However, if Congress determines that a deadline is appropriate, it also should ensure that the agency has sufficient resources to support the required rulemaking effort without distorting the agency's other regulatory functions. If Congress further determines that a default rule is necessary where an agency does not meet a deadline, it should specify the terms of that rule and, in particular, should not impose "regulatory hammers" that would cause the agency's proposed rules to take effect automatically.

C. Congress should reconsider the need for continuing statutory analytical requirements that necessitate broadly applicable analyses or action to address narrowly-focused issues.[40] If Congress nonetheless determines that such analytical requirements are necessary, Congress should structure its requirements more narrowly (e.g., by confining their application to the most significant rules or to rules likely to be affected by the stated concern).

III. Timing and Scope of Judicial Review

Congress and the courts generally should be sensitive to the impact of judicial review on agency rulemaking and should seek to simplify, clarify, and harmonize provisions for judicial review of rules.

A. Congress and the Courts

In determining whether preenforcement challenges to rules are appropriate, courts have traditionally evaluated "both the fitness of the issues for judicial decision and the hardship to the parties of withholding its consider-

ation."[41] Adherence to this standard benefits both agencies and those affected by agency rules. Congress generally should authorize and courts should allow preenforcement challenges where the administrative record is a sufficient basis for resolving the issues. Thus, preenforcement challenges to a rule based on the procedures used in the rulemaking or on the asserted substantive invalidity of the rule, however it would be applied, should normally be permitted. Claims of substantive invalidity would include facial challenges based on statutory or constitutional grounds, or asserting the inadequacy of the facts or reasoning underlying the rule. Challenges to a rule on the basis that the rule might be applied in a particular way should normally be deferred until the application seems likely or has occurred.

B. Congress

1. Congress should be cautious in mandating time-limited preenforcement review coupled with preclusion of review at the enforcement stage, and should rely on time limits only in the situations and conditions specified in Recommendation 82-7.[42] Congressional time limits on preenforcement review should be understood to bar later challenges in the enforcement context only to the extent specified by Congress. Where Congress mandates a time limit on preenforcement review, it generally should specify that such review be requested within 90 days of the issuance of the rule.[43] It should also provide that preenforcement review cases be directly reviewable in the courts of appeals, and that a stay or partial stay of the rule's effectiveness ordinarily be issued only on the demonstration of likelihood of success on the merits and the prospect of significant private harm if the rule is permitted to take effect.

2. The standards set out in §706(2)(A) of the APA's judicial review provisions should apply in all cases involving review of rules. Specifically, Congress should not provide for the use of the "substantial evidence" test for agency rules. It should conform existing statutes to this standard by deleting the use of the "substantial evidence" test for review of agency rules.

C. Courts

1. In articulating the doctrines used in the judicial review of rulemaking, reviewing courts should more clearly harmonize the deferential *Chevron* doctrine, applied in reviewing agency interpretation of its statutory authority, with the "hard look" doctrine, used in examining an agency's justification for its rule. Courts, in applying these doctrines, should recognize that both the *Chevron* and "hard look" tests call for a searching review of the range of factors or permissible choices that may be considered by the agency, and require deference to agency application of those factors once they are shown to be legally appropriate.

2. When reviewing an agency's explanation for its rule, courts should consider the context of the entire proceeding and concern themselves principally with whether the agency's overall explanation and analysis is reasonable, including its response to the significant issues raised in public comments.

3. In reviewing challenges to agency rules, courts should, to the extent feasible and after taking into account the effect of the decision on affected

persons not before the court, consider: (a) whether any portion of a rule unaffected by a finding of illegality should remain in full force and effect; (b) which portions of the challenged rule, if any, are to be set aside, vacated, stayed, or otherwise affected by the court's decision in a case; and (c) the extent to which the court's mandate should apply retroactively.

4. Courts should continue, where appropriate, to consider whether agency action in a rulemaking is "unreasonably delayed."[44]

IV. Amendments to the APA's Legislative Rulemaking Provisions

Congress should update the APA and eliminate outmoded provisions. It should codify court decisions that have increased the effectiveness of public participation in the rulemaking process. In particular, Congress should consider amending section 553 of the APA to:

A. Eliminate the exemption (§553(a)(2)) for rules relating to public property, loans, grants, benefits or contracts, and delete the exemption (§553(a)(1)) of military and foreign affairs matters, except for secret matters;[45]

B. Specify a comment period of "no fewer than 30 days" (§553(c)),[46] provided that a good cause provision allowing shorter comment periods or no comment period is incorporated, and codify the doctrine holding that a second round of notice and comment is not required if the final rule is a "logical outgrowth" of the noticed proposed rule;

C. Require establishment of a public rulemaking file beginning no later than the date on which an agency publishes an advance notice of proposed rulemaking or notice of proposed rulemaking, whichever is earlier.

D. Restate the "concise" statement of basis and purpose requirement (§553(c)) by codifying existing doctrine that a rule must be supported by a "reasoned statement," and that such statement respond to the significant issues raised in public comments.

To the extent permitted by law, agencies should adopt these proposed policies pending Congressional action.

V. Agency Management Initiatives

In order to improve their internal rulemaking environments, agencies should develop management techniques to ensure efficient and effective administration of rulemaking. Such techniques should include:

A. Systematically setting priorities at the highest agency levels and tracking rulemaking initiatives, including identifying clearly who has the authority to ensure that agency schedules and policies are followed;

B. Coordinating with the presidential oversight entity on the identification of rules warranting review as early in the process as is feasible, and establishing internal review procedures at the highest levels to ensure compliance with presidential analytical requirements;

C. Reviewing the agency's existing system for developing and reviewing regulations, to determine where problems and bottlenecks are occurring, and to improve and streamline the process;

D. Achieving timely internal clearances of proposed and final rules,

using, where feasible, publicly announced schedules for particular rulemaking proceedings;

E. Managing rulemaking files, so that maximum disclosure to the public is achieved during the comment period and so that a usable and reliable file is available for purposes of judicial review. The rulemaking file should, insofar as feasible, include (1) all notices pertaining to the rulemaking, (2) copies or an index of all written factual material, studies, and reports substantially relied on or seriously considered by agency personnel in formulating the proposed or final rule (except insofar as disclosure is prohibited by law), (3) all written[47] comments submitted to the agency, and (4) any other material required by statute, executive order, or agency rule to be made public in connection with the rulemaking.[48]

F. Making use, where appropriate, of negotiated rulemaking and advisory committees;

G. Considering innovative methods for reducing the time required to develop final rules without eliminating the opportunity for consideration and comment;

H. Taking steps to ensure that proposed rules are acted on in a reasonably timely manner or withdrawn; and

I. Evaluating and reconsidering existing rules and initiating amendments and repeals where appropriate.

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[1]*See generally* McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L. J. 1385 (1991).

[2]*See* Conference Recommendation 92-2, "Agency Policy Statements," 1 CFR §305.92-2 (1993), which distinguished "legislative" rules, normally promulgated through notice-and-comment procedures, from interpretive rules and policy statements, which are exempt from such procedures. The present recommendation addresses legislative rulemaking.

[3]*See* Conference Recommendation 88-9, "Presidential Review of Agency Rulemaking" 1 CFR §305.88-9 (1993) (applying Presidential oversight to both executive branch and independent agencies).

[4]Among the mandates reflected in these executive orders are requirements that agency rulemakers include cost-benefit estimates and analyses of the proposed and final rule's impact on federalism, family values, and future litigation, of whether it effects a "regulatory taking," and of other matters. The Conference of course takes no position on the merits of the values underlying these executive orders.

[5]*See* Conference Recommendations 82-4 and 85-5, "Procedures for Negotiating Proposed Regulations," 1 CFR §305.82-4, 305.85-5 (1993);" Negotiated Rulemaking Act of 1990, 5 U.S.C. §§561-69.

[6]*See* Conference Recommendation 88-9, "Presidential Review of Agency Rulemaking," 1 CFR §305.88-9 (1993) at 4.

[7]While the most recent executive order of presidential review of rules generally reflects the views set forth in this recommendation, see Executive Order 12866, 58 Fed. Reg. 51735 (1993), the Conference takes no position on the specifics of that order.

[8]*See* Conference Recommendation 76-3, "Procedures in Addition to Notice and the Opportunity to Comment in Informal Rulemaking," 1 CFR §305.76-3 (1993).

[9]*See* Conference Recommendation 80-1, "Trade Regulation Rulemaking Under the Magnuson-Moss Warranty - Federal Trade Commission Improvement Act," 1 CFR 305.80-1 (1988).

[10]42 U.S.C. 7607.

[11]*See* Conference Recommendation 76-3, "Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking," 1 CFR §305.76-3 (1993).

[12]*See* Conference Recommendation 78-3, "Time Limits on Agency Action," 1 CFR 305.78-3 (1993).

[13]*See*, e.g., Conference Recommendation 90-8, "Rulemaking and Policymaking in the Medicaid Program," 1 CFR §305.90-8 (1993).

[14]Where the "hammer" applied because of a failure to meet a deadline is that a proposed rule becomes effective, the anomalous result is that a policy that has withstood no public airing will be implemented.

[15]Courts should continue, where appropriate, to consider whether agency action in a rulemaking is "unreasonably delayed." See 5 U.S.C. §706(1); Telecommunications Research and Action Center v. FCC, 750 F.2d 70, 80 (D.C. Cir. 1984).

[16]Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978).

[17]Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); Toilet Goods Ass'n v. Gardner, 387 U.S. 158 (1967).

[18]*See* Conference Recommendation 74-4, "Preenforcement Judicial Review of Rules of General Applicability," 1 CFR §305.74-4 (1993); Conference Recommendation 91-5, "Facilitating the Use of Rulemaking by the National Labor Relations Board," 1 CFR §305.91-5 (1993).

[19]A challenge based on the facial invalidity of the rule, in this context, would normally be directed at a requirement or course of action to which the agency has clearly committed itself.

[20]Recommendation 82-7, "Judicial Review of Rules in Enforcement Proceedings," 1 CFR §305.82-7 (1993), sets out criteria for when judicial review should be limited at the enforcement stage, and what kinds of issues should remain reviewable at that stage.

[21]Chevron USA Inc. v. NRDC, 467 U.S. 837 (1984).

[22]Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983) (State Farm).

[23]*See* Conference Statement #7, "Views of the Administrative Conference on Proposals Pending in Congress to Amend the Informal Rulemaking Provisions of the Administrative Procedure Act," 1 CFR §310.7 (¶2).

[24]*See* South Terminal Corp. v. EPA, 504 F.2d 646, 659 (1st Cir. 1974), in which the 1st Circuit originated the "logical outgrowth" test. It was subsequently embraced by other circuits, particularly the D.C. Circuit. *See* Shell Oil Co. v. EPA, 950 F.2d 741 (D.C. Cir. 1991); International Union, United Auto, Aerospace and Agr. Implement Workers of America v. OSHA, 938 F.2d 1310 (D.C.Cir. 1991); American Medical Association, 887 F.2d 760 (7th Cir. 1989); NRDC v. USEPA, 824 F.2d 1258 (1st Cir. 1987); United Steelworkers v. Schuykill Metal Corp., 828 F.2d 314 (5th Cir. 1987); National Black Media Coalition v. FCC, 791 F.2d 1016 (2nd Cir. 1986); Chocolate Mfrs. Ass'n v. Block, 755 F.2d 1098 (4th Cir. 1985).

[25]Conference Statement # 7, supra n. 23, at ¶4.

[26]State Farm, supra n. 22, 463 U.S. at 57 (quoting Greater Boston Television Corp. v, FCC, 444 F.2d 841, 852 (D.C. Cir. 1970)).

[27]Conference Statement #7, supra n. 23, at ¶5.

[28]*See* Conference Recommendation 69-8, "Elimination of Certain Exemptions From the APA Rulemaking Requirements," 1 CFR §305.69-8 (1993).

[29]*See* Conference Recommendation 73-5, "Elimination of the 'Military or Foreign Affairs Function' Exemption from APA Rulemaking Requirements," 1 CFR §305.73-5 (1993).

[30]*See* Conference Recommendation 87-1, "Priority Setting and Management of Rulemaking by the Occupational Safety and Health Administration," 1 CFR §305.87-1 (1993).

[31]*See* Conference Recommendation 85-2, "Agency Procedures for Performing Regulatory Analysis of Rules, 1 CFR §305.85-2 (1993); Conference Recommendation 88-7, "Valuation of Human Life in Regulatory Decisionmaking," 1 CFR §305.88-7 (1993).

[32]Computerized access should be made available, preferably in a uniform system government-wide. *See* Conference Recommendation 88-10, "Federal Agency Use of Computers in Acquiring and Releasing Information," 1 CFR §305.88-10 (1993).

[33]"Written" includes documents in electronic form.

[34]Any government-wide policy concerning the use of advisory committees should be consistent with their use as part of the process of negotiated rulemaking.

[35]The recommendations contained in this section apply to oversight of both executive and independent agencies. The Conference has previously recommended that presidential review of rulemaking apply to the independent agencies to the same extent it applies to the rulemaking of the Executive Branch departments and agencies. *See* Conference Recommendation 88-9, "Presidential Review of Agency Rulemaking," 1 CFR §305.88-9 (1993).

The term "presidential oversight entity," as used herein, is that part of the Executive Office of the President delegated responsibility for review and oversight of agency rulemaking.

[36]In recommending review of analytical requirements beyond those contained in the APA, we express no position on the substantive policies being mandated.

[37]See, for example, the development of more specific, but not necessarily more burdensome, procedures for EPA rulemaking that has significant economic and competitive effects. *See* 42 U.S.C. §7607 (§307 of the Clean Air Act). See also Conference Recommendation 76-3, "Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking," 1 CFR §305.76-3 (1993), which encourages agency experimentation with use of oral procedures beyond simple notice and comment in some circumstances.

[38]The Conference has recommended against the mandated use of cross-examination and other "adjudicative" procedures for agency fact-finding in rulemaking. *See, e.g.*, Conference Recommendation 79-1, "Hybrid Rulemaking Procedures of the Federal Trade Commission," 1 CFR §305.79-1 (1993). The Conference recognizes, however, that more formal procedures may be appropriate for ratemaking based on party-related facts. See United States v. Florida East Coast RR, 410 U.S. 224 (1973). Congress may also wish to consider whether less formal hybrid processes may be useful in contexts currently requiring formal rulemaking.

[39]This is not a comment on the legitimacy of congressional directives in this regard, but on their impracticality. On the other hand, agency self-imposed deadlines are encouraged, see V(D), below. For more detailed advice on time limits, see paragraph 5 of Conference Recommendation 78-3, "Time Limits on Agency Action," 1 CFR §305.78-3 (1993).

[40]*See, e.g.*, the Regulatory Flexibility Act of 1980. The Conference takes no position on the substantive issues the Act seeks to address. Insofar as possible, however, such concerns are more appropriately included in the President's oversight guidelines. See I(B)(2) above.

[41]Abbott Laboratories v. Gardner, supra n. 17, 387 U.S. at 149.

[42]*See* Conference Recommendation 82-7, "Judicial Review of Rules in Enforcement Proceedings," 1 CFR §305.82-7 (1993).

[43]Congress should likewise reevaluate existing statutes for conformity with this approach.

[44]*See* n. 15, 39, supra.

[45]*See* Conference Recommendation 69-8, "Elimination of Certain Exemptions From the APA Rulemaking Requirements," 1 CFR §305.69-8 (1993), and Conference Recommendation 73-5, "Elimination of the 'Military or Foreign Affairs Function' Exemption from APA Rulemaking Requirements," 1 CFR §305.73-5 (1993). The latter recommendation urged eliminating the APA's categorical exemption for matters pertaining to the military or foreign affairs function. It does recognize, however, that a modified exemption may be appropriate for matters "specifically required by executive order to be kept secret in the interest of national defense or foreign policy."

[46]The 30-day period is intended as a minimum, not a maximum. Agencies are encouraged to use longer periods for public comment.

[47]"Written" includes documents in electronic form.

[48]*See* Conference Statement #7, 1 CFR 310.7 (1993), "Views of the Administrative Conference on Proposals Pending in Congress to Amend the Informal Rulemaking Provisions of the Administrative Procedure Act."

Recommendation 93-5
Procedures for Regulation of Pesticides
(Adopted December 10, 1993)

The Environmental Protection Agency cannot accomplish its substantive mission in regulating pesticides without change and improvement in the Agency's regulatory procedures. The Conference recommends the adoption of a more coordinated and strategic procedural framework for the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). EPA needs procedures that create multiple and reinforcing incentives for regulatory compliance by registrants, for timely and accurate decisionmaking by EPA, and for effective public participation.

The Reregistration Process

The reregistration of existing pesticides under contemporary risk assessment standards, and the removal of unacceptable pesticides from the marketplace, are examples where procedures can hinder the agency's prospects for success in its substantive mission. Reregistration of existing pesticides, which Congress originally directed to be completed by 1976, became sufficiently delayed so that Congress in 1988 amended FIFRA specifically to force the completion of reregistration by 1998. Yet subsequent delays in the reregistration process may cause EPA to miss this congressional deadline. To some extent, the delay may reflect the underlying difficulty and resource-intensiveness of the risk assessment enterprise with which EPA has been charged. There are some 50,000 pesticide products that are separately formulated from 642 identified active ingredients. Although EPA has tried to expedite its task by focusing reregistration on some 402 "cases" (composed of single or related active ingredients), each case can require evaluation of 100-150 separate studies, every one of which may pose further questions of scientific protocol and interpretation. It may be that EPA's Office of Pesticide Programs needs more personnel to match its regulatory task.

Whatever the case for additional resources (a question not addressed by the Conference), there is a more basic need for timely and adequate data from registrants—all else in the reregistration process depends on this. Yet the reregistration process does not now provide sufficient procedural incentives to encourage submission of timely and adequate data. In general, because registrants continue to market their products during reregistration, they have little to lose by regulatory decisions that are reached later rather than sooner. Although the 1988 FIFRA Amendments require registrants to identify data gaps, and commit to fill them, the 1988 Amendments do not provide the agency with sufficient tools to police tardy or inadequate data submissions.

As to tardiness, the 1988 Amendments authorized the agency to suspend registrations of those registrants that fail to submit data. But EPA must first provide nonsubmitters with 30-days' notice in response to which registrants can demand a limited hearing (which must be held within 75 days); the 1988 Amendments further provide that registrants suspended for not submitting data can have their registrations "reinstated" upon submission of the data. Some

registrants, ironically, have used these suspension procedures as a means of obtaining penalty-free and self-awarded extensions of time. In the 7 months between August 1991 and February 1992, for example, EPA found it necessary to issue 70 Notices of Intent to Suspend for nonsubmittal of data, yet in the majority of these instances (53) the registrants merely submitted their data prior to exhausting their procedural rights and were no worse off for having missed their deadlines. To create an additional disincentive for untimely data submissions it is necessary to make lateness costly to the registrant. To this end, the Conference recommends that Congress authorize EPA to impose civil money penalties for untimely data.

As to the adequacy of data, EPA may now have the theoretical (but untested in court) capacity to suspend or cancel the registration of those pesticides for which inadequate data have been submitted. However, the more common response to inadequate data is a "data call-in," through which the agency demands that studies be redone—a source of additional delay that the agency has identified as significant. Even with respect to its highest priority pesticides, EPA has in the recent past found 50 percent of studies to be either inadequate, "upgradable" or otherwise requiring supplementation. Although the cost of redoing studies should provide some incentive for registrants to ensure that their studies meet EPA's quality criteria, it does not seem to provide a sufficient incentive. In fairness to some registrants, there is evidence that EPA itself may be partially to blame for the high rates of data rejection. In 1992, an internal agency review found that misinterpretation of data requirements and poor guidance from EPA case managers were in part responsible for the inadequacy of data submissions. The Conference therefore recommends that EPA promulgate and communicate clear data standards and guidance on the data expected from registrants. To help prevent the submission of inadequate data even after sufficiently clear agency guidance has been given, the Conference recommends that Congress authorize EPA to levy administrative civil money penalties upon registrants submitting data that fail to meet previously announced standards. This will not only create incentives for registrants to take the extra steps necessary to ensure the adequacy of their submittals, but it will also create incentives for the agency to make clear its expectations.

Whatever the additional tactical advantages that the agency may gain by improving its own ability to enforce data timeliness and adequacy, the sheer number of studies and the innumerable decisions requiring agency discretion suggest that more global incentives are needed to ensure that registrants themselves have a stake in timely and adequate data. The danger is that the reregistration process now has become, even with the best of intentions, an analytical treadmill powered by the rhythms of data call-ins, subsequent requests for data waivers and time extensions, submission of data that do not always meet EPA's standards for adequacy, and further data call-ins that restart the sequence. The Conference believes that the unique demands of the reregistration process justify congressional consideration of a "hammer" provision that would legislatively impose an automatic suspension of all "List A" pesticides (those high-priority pesticides to which there is greatest human

exposure) for which there are still significant data gaps within the registrant's control, and of which the registrant is aware—subject to a provision for a registrant to petition for reinstatement. Such a provision would not only provide an overarching incentive for registrants to favor the completion rather than postponement of their data obligations, but it would also better align the reregistration process with FIFRA's central procedural presumption—that, in the face of uncertainty, applicants (especially those seeking to reregister pesticides with extensive human exposure) should bear the burden of proof in establishing that their pesticides do not pose unreasonable risks.

Suspension and Cancellation Hearings

Apart from improvements in the reregistration process, the Conference urges Congress to substitute a relatively informal decisionmaking process for the formal adjudicatory hearings that registrants can now demand in cancellation and suspension matters. In the past, formal hearings under FIFRA have averaged 1,000 days to complete. These hearings can directly impose on EPA significant resource costs and can also indirectly discourage the agency from aggressive prehearing negotiations with registrants (lest the registrant "take EPA to hearing"). It is not surprising that EPA has long sought alternatives to cancellation hearings. For years, it sought to identify problem pesticides for heightened regulatory attention in a "Special Review" process. There is little need for procedural formality in these types of decisions. At issue in most cancellation and suspension proceedings are scientific data concerning risks and benefits, disputes over which can generally be well ventilated when EPA gives registrants detailed reasons for the agency's actions and then provides registrants with sufficient time to file responsive written comments and supporting documentation. For those cases where oral testimony or cross-examination is justified, the benefits of more formal procedures can be preserved by providing registrants an opportunity to show cause why such procedures are warranted. Accordingly, the Conference recommends that Congress pattern cancellation and suspension proceedings on a basic notice-and-comment model, with more formal procedures available only if a party will be demonstrably prejudiced by the informal procedure.

Labeling and Phase-down Procedures

Although the reregistration process and adjudicatory hearings are the most visible aspects of pesticide regulation in need of procedural improvement, they are not the only places where procedural reform is important. Since the late 1980's, EPA has in fact sought to reduce the risks of pesticides through private negotiations with registrants over label changes that impose restrictions on use. Such regulatory action has the potential to attain interim risk reduction quickly when warranted by available data, without going through the cumbersome Special Review and cancellation procedures, even when complete reregistration may still be years away. But there are also disadvantages to relying so heavily on private negotiations with registrants—chief among them the lack of participation among the various interested publics in crafting label changes. In the early 1980's, similar concern about privately negotiated Special Review and pre-Special-Review decisions seriously undermined the agency's

credibility and slowed regulatory progress. In 1985, EPA adopted procedures to open the door for information from, and participation by, the public in those processes.[1] The Conference recommends that EPA adopt analogous procedures to regularize and open the agency's negotiated label program. In addition, because label changes are effective in reducing risk only if they are actually implemented in the field, the Conference recommends procedures to facilitate feedback from registrants, pesticide users, and all other interested persons on the effectiveness or ineffectiveness of the interim risk-reduction measures EPA has adopted. Moreover, the Conference recommends that EPA's Office Of Pesticide Programs (OPP) establish regular channels of communication with EPA's Office of Enforcement and Compliance Assurance to inform that office of all label changes and of any material information received by OPP on noncompliance with such changes.

The Conference also urges Congress to consider providing EPA with a new procedural device designed to accommodate a safer pesticides policy: the ability by informal procedures to order the phase-down of existing pesticides when there are available for use safer, effective pest management products or practices.[2] Empowering the agency to develop an informal phase-down mechanism would have several procedural advantages. First, ordering the phase-down of an existing pesticide on relative risk grounds will cause less stigmatization of an existing product than would a cancellation proceeding based on the traditional, more absolutist "unreasonable risk" judgment. Second, phase down procedures provide for an incremental style of decisionmaking in which EPA's reasoned judgments about comparative risk can be tested and reevaluated without making irreversible decisions about existing pesticides in cancellation proceedings. Finally, phase-down procedures based on relative risk can reinforce and integrate EPA's pesticide programs under FIFRA with other federal environmental programs.

RECOMMENDATION

I. Adequacy and Timeliness of Data

A. EPA should adopt, whenever possible, rules setting clear standards for pesticide reregistration data and should communicate those standards to registrants.

B. Congress should authorize EPA to impose administrative civil money penalties on registrants for the failure to submit data by any applicable deadline, or for submitting data (even if timely) that do not comply with the data standards adopted by EPA.[3]

C. Congress should consider imposing an automatic suspension of "List A" (high priority) pesticides for which there still remain, by a date to be set by Congress, previously identified and significant gaps in data within the registrant's control, and of which the registrant is on notice. Once suspended, pesticides could be reinstated through a petition process.

II. Informal Procedures

A. Congress should eliminate the provisions in FIFRA allowing for formal adjudicatory hearings in proposed suspension or cancellation actions and should provide instead an informal procedure, including notice in the Federal Register, that informs registrants and others of the specific grounds on which EPA bases its proposed action and that provides a reasonable opportunity to file written comments and data. Only if a party will be demonstrably prejudiced by the written notice-and-comment process should the agency be required to grant the right to introduce oral testimony or to subpoena and cross-examine witnesses.

B. Congress should consider providing EPA the authority to order a phase-down in the use of any registered pesticide through an informal notice-and-comment procedure in which EPA considers such factors as the relative risks and benefits of the pesticide at issue when compared with alternative pest management products and practices.

III. Public Participation

A. EPA should regularize and open for broader public participation its informal procedures for achieving interim risk reduction through pesticide label changes. EPA should inform the public, through a Federal Register notice, when it commences private label negotiations with registrants. EPA should simultaneously open a public "negotiation docket" into which interested persons may submit comments they believe might be relevant, for consideration by EPA and the registrants during their negotiations. If, after negotiations with registrants, EPA proposes a label change, it should publish a notice of the proposed change in the Federal Register and provide the public an opportunity to file written comments. The notice should include a concise, general statement of the proposed label's basis and purpose, including a summary of the material aspects of the agency's negotiations with registrants.

B. After requiring a label change, EPA should establish and publicize the availability of a "compliance docket" for any input about the effectiveness or ineffectiveness of interim risk-reduction measures. In addition, EPA's Office of Pesticide Programs (OPP) should communicate to EPA's Office of Enforcement and Compliance Assurance the adoption by OPP of label changes and any material information received by OPP in its compliance docket.

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[1]40 CFR Part 154, Subpart B.

[2]Without taking any position on the substantive questions involved in determining the relative safety and effectiveness of pest control measures, the Conference notes EPA's interest in both the present and prior presidential administrations in developing such a substantive capability.

[3]Imposition of penalties should be through formal adjudication. See Conference Recommendation 93-1, "Use of APA Formal Procedures in Civil Money Penalty Proceedings," 58 Fed. Reg. 45409 (Aug. 30, 1993).

Statement 16
Right to Consult with Counsel in Agency Investigations
(Adopted December 10, 1993)

In recent years, Congress has attached sanctions to an increasingly wide range of regulatory violations, causing federal administrative agencies to become involved more routinely in investigations that lead to civil or criminal prosecution. The Administrative Conference has completed a study that explores the procedures that govern the relationship between the agency and a person compelled to appear before the agency in such investigations.

The Administrative Procedure Act at section 555(b) provides that "[a] person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding." This brief reference to counsel in the APA leaves a number of questions open. The Act, for example, does not specify the types of actions attorneys may take in representing their clients during agency investigative proceedings. It also does not indicate precisely which persons coming in contact with an agency may invoke the right to counsel.[1]

Because the roles of investigators in federal agencies, and the methods by which witnesses or parties appear before agencies, vary considerably, the Administrative Conference does not believe it can develop a uniform set of recommendations concerning these procedures. However, the Conference believes it would be valuable to provide a statement on some of the issues raised in such investigations concerning the role of counsel so that those government officials involved can be made aware of the issues and seek additional guidance where warranted.

I. Agency Exclusion of Counsel

Although courts construing the APA's right-to-counsel provision have held that the right includes the power to retain counsel of one's own choosing, some federal agencies have, by rule or order, reserved the power to exclude counsel who represents a person compelled to appear before an agency representative during an investigation. They have done so out of a concern that the particular attorney may impair the effectiveness of the investigation, especially where the attorney represents either multiple witnesses, or a witness and his or her employer.

Agencies should consider whether, in most situations, a person compelled to appear in agency investigative proceedings ought to have the discretion to choose his or her own counsel, even where counsel represents multiple witnesses or parties in the matter. As courts have held, an agency must have "concrete evidence" that an investigation will be impaired before it may exclude counsel.[2] Thus, the mere fact of multiple representation, an employment relationship between the witness and some other party involved in the

investigation, or past dealings between the agency and a particular attorney should not be considered, in and of themselves, a sufficient basis for excluding the counsel of a witness.

Regardless of an agency's decision on the above matter, it has the power to exclude counsel for disruptive or obstructionist behavior during the proceedings, and to take action in situations where the attorney is suspected of personal involvement in the potential violations or matters under investigation.

II. Consultation with Auxiliary Experts

Because of the highly technical nature of many regulatory fields, attorneys who advise witnesses or parties in some agency investigations must consult with accountants, engineers, economists, or other experts in order to provide effective legal assistance. The prevailing practice among federal agencies is to allow such consultation with auxiliary personnel, either by allowing the expert to attend the proceedings or by allowing the attorney a reasonable opportunity during the proceeding to consult with the expert about the substance of the investigation. Agencies that do not currently provide this opportunity should consider whether to allow counsel representing a person compelled to appear before the agency reasonable access to auxiliary experts, regardless of whether the investigation involves civil or criminal sanctions.

III. Informing Persons of their Right to Counsel

Agencies should be sensitive to the right to counsel that persons compelled to appear before them are granted under the APA and other statutes, and should consider when it is appropriate to advise such an individual of this right. Where necessary, agencies should consider providing training on this subject to field investigators. In the interest of maintaining an effective working relationship between federal regulatory agencies and regulated parties, agencies should consider whether it is appropriate to conduct a compelled investigative proceeding in the absence of legal counsel when it is apparent that a person is unaware of his or her right to counsel.

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[1]The 1941 Attorney General's Report on Administrative Procedure in Government Agencies is strangely taciturn on the subject of legal representation. Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941). The report throughout refers to the presentations and contentions of "parties," without any indication whether parties would or would not have the benefit of legal counsel. Statements in both House and Senate committee reports regarding this provision of the APA state simply that it is "designed to confirm and make effective" the "statutory and mandatory right" of interested persons to appear personally or with counsel before the agency. Sen. Doc. No. 248, 79th Cong., 2d Sess. 205, 263 (1946).

[2]*See* SEC v. Csapo, 533 F.2d 7 (D.C. Cir. 1976); Professional Reactor Operator Society v. NRC, 939 F.2d 1047 (D.C. Cir. 1991).

APPENDIX F - CONFERENCE PUBLICATIONS

During 1993 the Conference published English and Spanish language versions of a brochure on mediation and the transcript of a colloquy on inspectors general. The Model Adjudication Rules Working Group, established in 1988, completed its report during the year. Also in 1993, a videotape introduction to ADR in the federal government was produced with Federal Mediation and Conciliation Service. Finally, the ADR Clearinghouse and Outreach Working Group began publishing a newsletter, *ADR Network.* The following list includes agency-sponsored reports and articles printed during 1993.

Administrative Conference of the U.S., "*From Conflict to Cooperation: Alternative Dispute Resolution,*" a presentation of ACUS in partnership with the Federal Mediation and Conciliation Service, December 1993 (videotape).

Administrative Conference of the U.S., MEDIATION: A PRIMER FOR FEDERAL AGENCIES, U.S. Government Printing Office, 1993. (Spanish translation) LA MEDIACIÓN CARTILLA PARA AGENCIAS GUBERNAMENTALES, U.S. Government Printing Office, 1993.

Administrative Conference of the U.S., INSPECTORS GENERAL: AN INSTITUTION IN NEED OF REFORM?, Colloquy transcript, March 3, 1993 (1993).

Administrative Conference of the U.S., RECOMMENDATIONS AND REPORTS 1992, U.S. Government Printing Office, 1993.* 2 vols.

Administrative Conference of the U.S. MODEL ADJUDICATION RULES, December 1993.

Altschuler, David M., Michael E. Bell, and William V. Luneburg, *The Office of Juvenile Justice and Delinquency Prevention's Formula Grant Program,* 45 ADMIN. L. REV. 225 (1993).

*May be ordered from the U.S. Government Printing Office (202/783-3238).

Recommendation 92-8, "Administration of the Office of Juvenile Justice and Delinquency Prevention's Formula Grant Program," 1 CFR §305.92-8 (1993).

Baxter, Lawrence G., *Review of Prompt Corrective Action Decisions*, 1993 ACUS ___.
Recommendation 93-2, "Administrative and Judicial Review of Prompt Corrective Action Decisions by the Federal Banking Regulators," 58 FED. REG. 45410 (Aug. 30, 1993).

Bermann, George A., *Regulatory Cooperation with Counterpart Agencies Abroad: The FAA's Aircraft Certification Experience*, 24 L. & POL'Y INT'L BUS. 669 (1993).
Recommendation 91-1, "Federal Agency Cooperation with Foreign Government Regulators," 1 CFR §305.91-1 (1993).

Davey, William J. and John H. Jackson, *Reform of the Administrative Procedures Used in U.S. Antidumping and Countervailing Duty Cases*, 6 ADMIN. L.J. AM. U. 399 (1992).
Recommendation 91-10, "Administrative Procedures Used in Antidumping and Countervailing Duty Cases," 1 CFR §305.91-10 (1993).

Funk, William, *Close Enough for Government Work? Using Informal Procedures for Imposing Administrative Penalties*, 1993 ACUS ___, and 24 SETON HALL L. REV. 1 (1993).
Recommendation 93-1, "Use of APA Formal Procedures in Civil Money Penalty Proceedings," 58 FED. REG. 45409 (Aug. 30, 1993).

Hornstein, Donald T., *Regulating Pesticides: FIFRA Registration, Reregistration, Suspension, and Cancellation Procedures*, 1993 ACUS ___.
Recommendation 93-5, "Procedures for Regulation of Pesticides," 59 FED. REG. 4675 (Feb. 1, 1994).

Lubbers, Jeffrey S., *Passive Restraints and Activist Courts: The Story of Federal Regulation of Auto Safety*, 6 ADMIN. L.J. AM. U. 721 (1993) (reviewing Jerry L. Mashaw and David L. Harfst, THE STRUGGLE FOR AUTO SAFETY (1993)).

Lubbers, Jeffrey S. and Nancy G. Miller, *The APA Procedural Rule Exemption: Looking for a Way to Clear the Air*, 6 ADMIN. L.J. AM. U. 481 (1992).
Recommendation 92-1, "The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements," 1 CFR §305.92-1 (1993).

Mashaw, Jerry L., *Improving the Environment of Agency Rulemaking*, 1993 ACUS ___.
Recommendation 93-4, "Improving the Environment for Agency Rulemaking," 59 FED. REG. 4670 (Feb. 1, 1994) and 59 FED. REG. 8507 (Feb. 22, 1994).

McGarity, Thomas O., *Peer Review in Awarding Discretionary Grants in the Arts and Sciences*, 1993 ACUS ___.
Recommendation 93-3, "Peer Review in the Award of Discretionary Grants," 58 FED. REG. 45412 (Aug. 30, 1993).

Riskin, Leonard L., *Two Concepts of Mediation in the FmHA's Farmer-Lender Mediation Program*, 45 ADMIN. L. REV. 21 (1993).
Recommendation 91-7, "Implementation of Farmer-Lender Mediation by the Farmers Home Administration," 1 CFR §305.91-7 (1993).

Ware, Leland B., *New Weapons for an Old Battle: The Enforcement Provisions of the 1988 Amendments to the Fair Housing Act*, 7 ADMIN. L.J. AM. U. 59 (1993).
Recommendation 92-3, "Enforcement Procedures Under the Fair Housing Act," 1 CFR §305.92-3 (1993).

Wright, Ronald F., *The Right to Counsel During Agency Investigations*, 1993 ACUS ___.
Statement 16: "Right to Consult with Agency Counsel in Agency Investigations," 59 FED. REG. 4677 (Feb. 1, 1994).

APPENDIX G - BYLAWS OF THE ADMINISTRATIVE CONFERENCE

TITLE 1, CODE OF FEDERAL REGULATIONS, PART 302*

§302.1 Establishment and Objective

The Administrative Conference Act, 5 U.S.C. §§591 *et seq.*, 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.

§302.2 Membership

(a) General

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

(2) Each member is expected to devote personal and conscientious attention to the work of the Conference and to attend plenary sessions and committee meetings regularly. When a member has failed to attend two consecutive Conference functions, either plenary sessions, committee meetings, or both, the Chairman shall inquire into the reasons for the non-attendance. If not satisfied by such reasons, the Chairman shall: (i) in the case of a Government member, with the approval of the Council, request the head of the appointing agency to designate a member who is able to devote the necessary attention, or (ii) in the case of a non-Government member, with the approval of the Council, terminate the member's appointment, provided that

* As revised June 13, 1991.

** Formerly 5 U.S.C. §§571-576. Renumbered in Pub. L. No. 102-354 (August 26, 1992).

where the Chairman proposes to remove a non-Government member, the member first shall be entitled to submit a written statement to the Council. The foregoing does not imply that satisfying minimum attendance standards constitutes full discharge of a member's responsibilities, nor does it foreclose action by the Chairman to stimulate the fulfillment of a member's obligations.

(b) Terms of Non-Government Members

Non-Government members are appointed by the Chairman with the approval of the Council. One-half of the non-Government memberships shall be filled by appointments made on or after July 1 of each year, and each term will expire on June 30 of the second year thereafter. To avoid shortening the term of any non-Government member in service as of the effective date of this paragraph, the Chairman shall, by random selection, designate one-half of the non-Government members to serve terms terminating on June 30, 1988, and the other half to serve terms terminating on June 30, 1989. No non-Government members, other than senior fellows, shall at any time be in continuous service beyond four full terms.

(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 re-designations 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, a suitably informed 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. Use of an alternate does not lessen the obligation of regular personal attendance set forth in paragraph (a)(2) of this section.

e) Senior Fellows

The Chairman may, with the approval of the Council, appoint persons who have served as members of the Conference for eight or more years, or former Chairmen of the Conference, to the position of senior fellow. The terms of senior fellows shall terminate at 2-year intervals in even-

numbered years. Senior fellows shall have all the privileges of members, but may not vote, except in committee deliberations, where the conferral of voting rights shall be at the discretion of the committee chairman.

(f) Special Counsels

The Chairman may, with the approval of the Council, appoint persons who do not serve under any of the other offical membership designations to the position of special counsel. Special counsels shall advise and assist the membership in areas of their special expertise. Their terms shall terminate at 2-year intervals in odd-numbered years. Special counsels shall have all the privileges of members, but may not vote, except in committee deliberations, where the conferral of voting rights shall be at the discretion of the committee chairman.

§302.3 Committees

The Conference shall have the following standing committees:

1. Committee on Adjudication;
2. Committee on Administration;
3. Committee on Governmental Processes;
4. Committee on Judicial Review;
5. Committee on Regulation; and
6. Committee on Rulemaking.

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.

§302.4 Liaison Arrangements

The Chairman may, with the approval of the Council, make liaison arrangements with representatives of the Congress, the judiciary, federal agencies that are not represented on the Conference, and professional associations. Persons appointed under these arrangements shall have all the privileges of members, but may not vote, except in committee deliberations, where the conferral of voting rights shall be at the discretion of the committee chairman.

§302.5 Avoidance of Conflicts of Interest

(a) Disclosure of Interests

(1) Non-Government members (including senior fellows) may be deemed to be special government employees within the meaning of 18 U.S.C.

§202 and subject to the provisions of sections 201-224 of Title 18, United States Code, in accordance with their terms. The Chairman of the Conference is authorized to prescribe requirements for the filing of statements of employment and financial interests necessary to comply with Part III of Executive Order 11,222, as amended, or any successor Presidential or statutory requirement. Without conceding the correctness of the view that non-Government members are special Government employees, the Conference has chosen to adopt the bylaw provisions that follow in order to eliminate whatever uncertainties might otherwise exist concerning the propriety of participation in Conference proceedings.

(2) In addition to complying with any requirement prescribed by statute or Executive order, each member, public or governmental, shall, upon appointment to the Conference and annually thereafter, file a brief general statement describing the nature of his or her practice or affiliations, including, in the case of a member of a partnership, a general statement about the nature of the business or practice of the partnership, to the extent that such business, practice, or affiliations might reasonably be thought to affect the member's judgment on matters with which the Conference is concerned. (For example, a member might state that he or she represents employers or unions before the National Labor Relations Board, broadcasters before the Federal Communications Commission, or consumer groups before agencies and courts.) The Chairman will include with the agenda for each plenary session a statement calling to the attention of the members the requirements of this section. Each member who believes the content of the agenda calls for disclosure additional to that already on file will file an amended statement concerning his or her interests. Current statements of all members will be open to public inspection at the Office of the Chairman and will be readily available at any plenary session. Except as provided in paragraph (b), members may vote or participate in matters before the Conference without additional disclosure of interest.

(b) Disqualifications

(1) In accordance with 18 U.S.C. §208 a member shall not, except as provided in paragraphs (b)(2) or (3) of this section, vote or otherwise participate as a member in the disposition of any particular matter of Conference business, including the adoption of recommendations and other statements, in which, to his or her knowledge, the member has a financial interest. For purposes of this paragraph (b) a member is deemed to have a financial interest in any particular matter in which the member, the member's spouse, minor child, partner, organization in which the member is serving as officer, director, trustee, partner, or employee, or any person or organization with whom he or she is negotiating or has any arrangement concerning prospective employment, has a financial interest.

(2) Notwithstanding paragraph (b)(1) of this section, a member may, at any stage of Conference consideration and without further disclosure, participate and vote on a proposed recommendation or other Conference

statement or action relating to the procedure of any Federal agency or agencies, where the Conference action is not directed to and is unlikely to affect the substantive outcome of any pending judicial matter or administrative proceeding involving a specific party or parties (other than the United States) in which to his knowledge he has a financial interest. The Conference determines pursuant to 18 U.S.C. §208(b) that in such a case any financial interest which the member may have in the matter before the Conference is too remote to affect the integrity of the member's service to the Conference.

(3) Where a member believes that he or she is or may be disqualified from participating in the disposition of a matter before the Conference under the provisions of this subsection, the member may advise the Chairman of the reason for his or her possible disqualification, including a full disclosure of the financial interest involved. If the Chairman determines in writing pursuant to 18 U.S.C. §208(b) that the interest is not so substantial as to be likely to affect the integrity of the member's service to the Conference, the member may, upon receipt of such determination, vote and otherwise participate in the disposition of the matter.

§302.6 General

(a) Meetings

All sessions of the Assembly shall be open to the public. Privileges of the floor, however, extend only to members of the Conference, to senior fellows, to liaison representatives, to consultants and staff members insofar as matters on which they have been engaged are under consideration, and to 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.

APPENDIX H - THE ADMINISTRATIVE CONFERENCE ACT

TITLE 5, UNITED STATES CODE, CHAPTER 5
Subchapter III--Administrative Conference of the United States*

§591. 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.

§592. 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

* Pub. L. No. 88-499, August 30, 1964, 78 Stat. 615; as codified by Pub. L. No. 89-554, September 6, 1966, 80 Stat. 388-390; as amended by Pub. L. No. 92-526, §1, October 21, 1972, 86 Stat. 1048; as amended by Pub. L. No. 95-293, §1 (a), June 13, 1978, 92 Stat. 317; as amended by Pub. L. No. 97-258 §3(a)(1), September 13, 1982, 96 Stat. 1062; as amended by Pub. L. No. 97-330, October 15, 1982, 96 Stat. 1618; September 13, 1982, 96 Stat. 1062; as amended by Pub. L. No. 99-170, October 14, 1986, 100 Stat. 1198; as amended by Pub. L. No. 101-422, October 12, 1990, 104 Stat. 910; as amended by Pub. L. No. 102-354, August 26, 1992; as amended by Pub. L. No. 102-403, October 9, 1992, 106 Stat. 1968.

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.

§593. Administrative Conference of the United States

(a) The Administrative Conference of the United States consists of not more than 101 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 40 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.

§594. Powers and Duties of the Conference

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

(1) study the efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies in carrying out administrative

programs, and make recommendations to administrative agencies, collectively or individually, and to the President, Congress, or the Judicial Conference of the United States, in connection therewith, as it considers appropriate;

(2) arrange for interchange among administrative agencies of information potentially useful in improving administrative procedure;

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

(4) enter into arrangements with any administrative agency or major organizational unit within an administrative agency pursuant to which the Conference performs any of the functions described in this section; and

(5) provide assistance in response to requests relating to the improvement of administrative procedure in foreign countries, subject to the concurrence of the Secretary of State, the Administrator of the Agency for International Development, or the Director of the United States Information Agency, as appropriate, except that--

(A) such assistance shall be limited to the analysis of issues relating to administrative procedure, the provision of training of foreign officials in administrative procedure, and the design or improvement of administrative procedure, where the expertise of members of the Conference is indicated; and

(B) such assistance may only be undertaken on a fully reimbursable basis, including all direct and indirect administrative costs.

Payment for services provided by the Conference pursuant to paragraph (4) shall be credited to the operating account for the Conference and shall remain available until expended.

§595. Organization of the Conference

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

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

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

(b) The Conference includes a Council composed of the Chairman of the Conference, who is Chairman of the Council, and 10 other members appointed by the President, of whom not more than one-half shall be employees of federal regulatory agencies or executive departments. The

President may designate a member of the Council as Vice Chairman. During the absence or incapacity of the Chairman, or when that office is vacant, the Vice Chairman shall serve as Chairman. The term of each member, except the Chairman, is 3 years. When the term of a member ends, he may continue to serve until a successor is appointed. However, the service of any member ends when a change in his employment status would make him ineligible for Council membership under the conditions of his original appointment. The Council has the power to-

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

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

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

(4) receive and consider reports and recommendations of 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 1342 of Title 31;

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

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

(16) request any administrative agency to notify the Chairman of its intent to enter into any contract with any person outside the agency to study the efficiency, adequacy, or fairness of an agency proceeding (as defined in section 551(12) of this title).

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.

§596. Authorization of Appropriations

There are authorized to be appropriated to carry out the purposes of this subchapter not more than $2,000,000 for fiscal year 1990, $2,100,000 for fiscal year 1991, $2,200,000 for fiscal year 1992, $2,300,000 for fiscal year 1993, and $2,400,000 for fiscal year 1994. Of any amounts appropriated

under this section, not more than $1,500 may be made available in each fiscal year for official representation and entertainment expenses for foreign dignitaries.

Attorney General Janet Reno, host of the 48th plenary reception, greeting public member Robert M. Kaufman, member of the law firm of Proskauer, Rose, Goetz, and Mendelsohn.

Solicitor General Drew Days III discussing issues with Jamie Gorelick, then-general counsel at the Department of Defense, at the September 21 seminar for general counsels.

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