1992 ANNUAL REP

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Administrative Conference of the United States

LETTER OF TRANSMITTAL

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

February 1993

To the President and the Congress of the United States:

I have the honor to transmit herewith the 1992 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, 1992 through December 31, 1992.

Respectfully,

Brian C. Griffin
Chairman

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CHAIRMAN'S FOREWORD

During 1992, the Conference, under the able leadership of Acting Chairman Robert S. Ross, Jr. and the Council, pursued an active agenda. The Conference completed important studies and recommendations for improving the efficiency and fairness of administration of governmental programs and actively sought implementation of existing recommendations and specific statutory responsibilities. It was my great privilege to become the eighth Chairman of the Administrative Conference on December 23, 1992.

Conference recommendations influenced several pieces of new legislation during the year. The President signed Pub. L. No. 102-345, the Federal Aviation Administration's civil penalty legislation, on August 26th. The law makes permanent the FAA's Civil Penalty Demonstration Program, and transfers authority over adjudication of civil penalty matters affecting pilots and flight engineers from the FAA to the National Transportation Safety Board (NTSB). To this extent, it implements Conference Recommendation 91-8, "Adjudication of Civil Penalties Under the Federal Aviation Act." The bill also adds mechanics and repairmen to the categories of individuals whose cases would be adjudicated by the NTSB.

The Court of Federal Claims Technical and Procedural Improvements Act of 1992 (Title IX of Pub. L. No. 102-572) modified the certification provision of the Contract Disputes Act so that it is no longer a jurisdictional requirement to appealing a denial of a contract claim. In this respect, the statute incorporates a central element of Conference Recommendation 83-1, "The Certification Requirement in the Contract Disputes Act."

Title XIII of Pub. L. No. 102-550, the Housing and Community Development Act of 1992, created within the Department of Housing and Urban Development a new Office of Federal Housing Enterprise Oversight with responsibility for supervising the safety and soundness of the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation. Insofar as these two government-sponsored enterprises are concerned, the legislation implements Conference Recommendation 91-6, "Improving the Supervision of the Safety and Soundness of Government-Sponsored Enterprises."

During the year, the Conference also made significant strides in carrying out the responsibilities Congress gave it in the Administrative Dispute Resolution Act and the Negotiated Rulemaking Act. The Conference held several training sessions to introduce agency dispute resolution special-

ists to the requirements of and opportunities under the new statute. In addition, Conference staff provided specific assistance to agencies in the development of policy statements required by the legislation. Late in the year the Conference established a coordinating committee and four interagency working groups to help agencies implement the ADR Act. The groups will focus on training and education, clearinghouse and outreach, implementation efforts, and systems design in coming years.

Perhaps the most significant new recommendation in the Conference's recent history was adopted in December. The Conference examined the evolving administrative adjudication system and the role of agency presiding officers, including administrative law judges and non-ALJ adjudicators. The supporting study was prepared by a distinguished research team headed by member Paul Verkuil. The Committee on Adjudication, under the able leadership of Richard Leighton, met throughout the summer and fall to consider the issues. It was necessary to devote two plenary sessions of the full membership to consideration of the issues presented. Ultimately, the membership was able to arrive at consensus and adopt a formal recommendation—Recommendation 92-7, "The Federal Administrative Judiciary"—that is likely to shape the debate in the Congress and agencies over administrative adjudication reform initiatives.

In addition, the Conference completed several other major projects requested and funded by other federal agencies, including a study of the juvenile justice grant compliance and monitoring system used by the Department of Justice, Office of Juvenile Justice and Delinquency Programs, and a study of regulatory and coordination barriers to federal migrant programs requested by the National Commission on Migrant Education. Both studies resulted in Conference recommendations.

The Conference will continue to examine basic issues involving federal rulemaking and adjudication processes. In recent years, some agencies have become disaffected by the federal rulemaking process and have turned to other mechanisms perceived as more flexible. Use of certain types of informal issuances, such as interim rules, have not been fully examined. Congress also has become impatient with the pace of agency rulemaking and has employed mechanisms, such as regulatory "hammers", which deserve study. The Conference will attempt to illuminate these areas.

This year the Conference completed a major "self-study". A Special Committee on the Future of the Administrative Conference, appointed in 1991, evaluated the Conference's charter and operation and in May submitted its conclusions and recommendations concerning the Conference's future. The Conference is most appreciative for the time and efforts of public member and former Council member Lewis A. Engman, who skillfully chaired the committee, and Conference members Mary Azcuenaga, Professor Walter Gellhorn, Sally Katzen, Robert Kaufman, James C. Miller III, Alan Morrison, and Richard Wiley.

The Special Committee reaffirmed the continued vital importance of the Conference's role in the federal government. While concluding that major

changes in the Conference's charter or operation are not needed, it did identify and recommend changes in areas where Conference performance could be improved. Regarding the Conference's research program, the committee encouraged a flexible mix of agency-specific and government-wide studies. It also made several proposals for improving the process of consideration of research reports and recommendations. Many of these recommendations have been implemented.

The Committee's report also contained suggestions that would enhance implementation of the Conference's adopted recommendations. Specifically, it recommended involving Conference committees in the task of reviewing the status of past committee recommendations. Following receipt of the Committee's report in May, Conference committees began to review past recommendations to identify steps that should be taken to increase agency and Congressional awareness of the recommendations.

The Committee strongly supported continuation of the Conference's information exchange activities and recommended an enhanced program that uses the expertise of Conference members in various governmental programs. In response, the Conference revitalized a program of substantive meetings for agency general counsels.

A final noteworthy achievement was enactment of Pub. L. No. 102-403, which amends the Administrative Conference Act to clarify the Conference's authority to respond to requests from foreign governments for administrative law and process advice and assistance. The new law expressly authorizes Conference international advisory activity, and it provides that such 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.

Brian C. Griffin
Chairman

Chairman Brian C. Griffin.

INITIATIVES

In keeping with its mission to study issues in administrative law and regulatory procedures, during 1992 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

The Federal Administrative Judiciary

In one of its largest and most controversial projects, the Conference, at the behest of the Office of Personnel Management, undertook a broad and large-scale study of the federal administrative judiciary. Conducted by a team of consultants headed by Paul Verkuil, the study examined the current landscape of the federal administrative judiciary, including both administrative law judges (ALJs) and non-ALJ adjudicators (administrative judges or AJs). Issues considered included the evolution of the use of ALJs, differences among agencies in their use of adjudicators, the ALJ selection process, issues relating to the scope of ALJ independence, surveys of adjudicator attitudes, and the need for changes. The study concluded that agency reluctance to use ALJs stemmed from perceived problems arising from the current ALJ selection process, including agencies' inability to hire women and minorities, and from the agencies' difficulties in managing their ALJs.

Recommendations reflect the Conference's basic view that the uniformity that derives from using ALJs in adjudicatory hearings should be encouraged. To foster such uniformity, the Conference recommended some significant changes in the way ALJs are selected. Among the changes recommended are substantial expansion of the register of eligible candidates from which an agency can select an ALJ, and elimination of the veterans' preference in ALJ selection. The Conference also recommended that processes be developed to allow chief ALJs to review the performance of ALJs, to provide a mechanism for addressing complaints about ALJ performance, and to provide a forum for complaints by ALJs about improper interference with their decisionmaking. If

such recommended changes are made, the Conference recommends that Congress consider expanding the categories of cases where ALJs would be required.

This project was a controversial one. The Committee on Adjudication, as part of its consideration of the project and recommendations, held a public hearing in addition to a large number of public meetings. The recommendation was originally presented at a special plenary session in early September, and was finally adopted (Recommendation 92-7) in December.

De Minimis Settlements Under Superfund

Recommendation 92-9, "De Minimis Settlements Under Superfund," suggests to the Environmental Protection Agency (EPA) measures that may help avoid substantial transaction costs for parties who are potentially responsible for a relatively small share of the cleanup costs at hazardous waste sites covered by the Superfund program.

The aggregate cost of remedying the hazardous waste problem has been placed at several hundred billion dollars. Joint and several liability for these cleanup costs has been imposed on a broad set of parties.

Potentially responsible parties, known as PRPs, at typical Superfund sites include not only large industrial firms, but an array of small entities. However, responsibility does not depend on the size of the firm, but rather on the firm's hazardous waste contribution at the site. Some PRPs, therefore, bear a large share of the liability at a site because they generated a large proportion of the hazardous substances. Other PRPs, which generated a relatively small proportion, may be responsible for only a few thousand dollars in cleanup costs. The process for apportioning the cleanup costs at a site gives rise to substantial transaction costs, principally legal fees and technical consulting costs. Parties that are responsible for only a small share of the cleanup costs might have to disburse several times this amount in transaction costs.

In 1986, Congress translated these concerns into statutory provisions encouraging settlements in general and making it easier for so-called "de minimis parties" to enter into early settlements with EPA, thereby limiting their transaction costs. Nevertheless, it appears that the predominant approach to de minimis settlements taken by EPA has been for the regional offices to wait for groups of de minimis parties to form and take the first step in proposing settlements. As a result, the vast majority of de minimis settlements have been entered relatively late in the process. This approach entails expenditure of additional transaction costs by private parties and can take considerable time. The Conference recommended that EPA establish procedures and incentives to negotiate de minimis settlements as a standard practice at all multi-party Superfund sites involving de minimis parties, and that EPA's regional offices take a more active role in seeking such settlements.

The Conference's study, conducted by Professors Lewis A. Kornhauser and Richard L. Revesz, also found significant differences in the approaches of the regional offices, and even across sites in the same region, due to the lack of

concrete guidance on several important issues and the absence of an adequate database of cleanup costs at similar sites in other locations. The recommendation suggests a need for additional guidance from EPA headquarters to regional offices and the establishment of a central, publicly accessible repository of de minimis settlement documents.

Housing and Urban Development

As part of its ongoing interest in administrative civil money penalty programs, the Conference undertook a study of the enforcement program at the Department of Housing and Urban Development (HUD) under the 1988 amendments to the Fair Housing Act. In those amendments, Congress for the first time had authorized an administrative remedy for housing discrimination, although a judicial remedy had existed since the law's inception.

The study, conducted by Professor Leland Ware, noted that despite an attractive administrative remedy, the majority of housing discrimination cases continued to be litigated in the courts. The reasons for this trend remain unclear. The Conference, in Recommendation 92-3, "Enforcement Procedures Under the Fair Housing Act," recommended that HUD continue to study the reasons why parties continued to opt for a judicial remedy. The Conference also recommended some changes in who should be considered parties to housing discrimination cases, that HUD increase its efforts to meet statutory deadlines for investigating housing discrimination complaints, and that it carefully monitor the state program certification process and the conciliation programs.

Model Rules

A Working Group established by former Chairman Breger within the Office of the Chairman has completed work on a set of model procedure and practice rules suitable for use in formal agency adjudications. At year's end, public comment on the model rules and accompanying commentary was being solicited through a notice in the Federal Register.

Hearings are currently held before presiding officers at scores of federal departments and agencies. Each agency has its own set of procedure and practice rules that cover many of the same procedural areas. To the extent that the conduct of hearings at these agencies presents similar problems, it appeared useful to agency litigators and presiding officers, as well as private practitioners who litigate before several agencies, to formulate model procedure and practice rules that address common procedural problems. It would also be helpful if there were a set of model regulations and related commentary for use by those agencies that are either required to establish formal procedures for new adjudicatory programs or interested in amending their existing rules in selected areas. Because each agency has its own unique procedural needs, the model rules are not intended as a set of uniform procedures. Rather, they are designed to provide a menu of guidelines amenable to adaptation to each agency's special

requirements. They are intended for those proceedings that offer an opportunity for an oral, fact-finding hearing before an agency adjudicator, whether conducted pursuant to the Administrative Procedure Act, other statutes, or agency regulations or practice.

The Working Group is comprised of members and nonmembers of the Conference under the chairmanship of government member Alan W. Heifetz. The Working Group includes agency presiding officers, public and private sector litigators, and career civil servants who are expert in the adjudicatory process. Professor Michael P. Cox, who served as Reporter for the Working Group, surveyed more than 50 sets of agency procedure and practice regulations.

JUDICIAL REVIEW

Attorney's Fees

The Equal Access to Justice Act (5 U.S.C. 504, 28 U.S.C. 2412(d)) authorizes the award of reasonable attorney's fees and expenses to certain parties who prevail over the United States in civil litigation in the federal courts or in formal adversary administrative proceedings. To be eligible to receive a fee award, a party must be "small," with a net worth below certain limits and, in the case of businesses and organizations, fewer than 500 employees. Also, the government may avoid a fee award if it can show that its position was substantially justified. Fees are limited in most cases to $75 per hour, adjusted for inflation.

A study by Assistant Professor Harold Krent concluded that, while overall use of the Equal Access to Justice Act has been lower than predicted, the Act has nevertheless generated a significant amount of contentious litigation.

University of Virginia School of Law Assistant Professor Harold J. Krent addressing the June plenary on his study of attorney's fees.

Recommendation 92-5, "Streamlining Attorney's Fee Litigation Under the Equal Access to Justice Act," focuses primarily on ways to reduce litigation over the award of attorney's fees under the Act. The Conference recommends that Congress strike the provision allowing enhancement of fees when "a special factor . . . justifies a higher fee" and clarify the provision permitting adjustments to the fee cap to reflect changes in the cost of living. The recommendation also proposes enactment of an offer-of-judgment provision, which would encourage settlement of fee disputes by eliminating government liability for fees and expenses incurred after a party rejects a settlement offer if the award ultimately made does not exceed the amount of the offer. To balance the impact of these recommendations, the Conference further urges Congress to raise the hourly fee cap in the Act to approximate more closely the prevailing rate for attorneys' services.

The Conference recommends elimination of the substantial justification standard in litigation involving individual benefit claims under the Social Security Act and related statutes (including Social Security disability, SSI, Medicare and similar claims). In addition to reducing litigation over fees, this step should increase benefit claimants' access to representation. Another matter of particular concern in benefits litigation has been the applicability of the 30-day deadline for filing applications for fees. The deadline is triggered by final judgment in the underlying proceeding, but the term "final judgment" has been difficult to define in the context of Social Security disability litigation. Recommendation 92-5 calls for revision of the deadline provision to resolve these problems.

Finally, the Conference suggests that Congress consider whether the Equal Access to Justice Act should apply to formal proceedings in administrative agencies or Article I courts that are not covered by the Act because they are not "adjudications under section 554 of [title 5]" or "civil actions," though they are directly analogous to those covered proceedings.

REGULATORY PROCEDURES

Coordination of Migrant and Seasonal Farmworker Service Programs

In Recommendation 92-4, "Coordination of Migrant and Seasonal Farmworker Service Programs," the Conference suggests steps to improve interagency coordination among federal programs that serve the health, education, housing, job training, and other needs of migrant and seasonal farmworkers (MSFWs).

Since the 1960s, approximately 10 MSFW-specific service programs have been established, through a number of separate enactments. In addition, farmworkers draw on the assistance of numerous other general programs such as food stamps or Medicaid. The four largest federal programs are separately administered by the Department of Education, the Department of Health and Human Services, and the Department of Labor. This division of responsibility results in a lack of coordination and causes overlap as well as gaps in service.

The Conference undertook its study, conducted by Professors David A. Martin and Philip Martin, at the request of the National Commission on Migrant Education.

Recommendation 92-4 urges that the President establish by executive order a policy-level Interagency Coordinating Council on MSFW programs. This Council is not intended to replace, and indeed should promote, existing coordination at the program staff, state, and service delivery level. The Conference suggests that the Council be specifically charged to coordinate and review MSFW service programs, giving particular attention to gaps in services and unjustified overlap. It should encourage public participation through public meetings, creation of an advisory committee, or other means.

The Conference found that data currently being collected are not adequate for achieving effective coordination of MSFW programs. Although each agency has its own mechanism for generating program statistics and estimates of the target population, these vary widely in method and scope, and each suffers from specific inadequacies. They produce widely varying pictures of the nation's population of MSFWs, to the continuing frustration of legislators, service providers, researchers, and others. Moreover, agricultural labor data have always been left out of the Department of Labor's regular employment data system, and no other adequate permanent data source now fills the gap. For these reasons, whether or not the recommended Council is created, the Conference suggests that a reliable system for gathering data on the nation's population of MSFWs be established. Recommendation 92-4 provides some guidance on the goals of such an information-gathering effort.

Juvenile Justice

In December 1992 the Conference approved a recommendation addressing the formula grant program administered by the Department of Justice's Office of Juvenile Justice and Delinquency Prevention (OJJDP). The recommendation was based on a report by Professor William V. Luneburg and Drs. David M. Altschuler and Michael E. Bell. This report was undertaken in response to a request from OJJDP.

OJJDP, established by Congress in 1974, undertakes a variety of activities in administering a program of formula grants to state and local governments to help them improve their juvenile justice systems. In this connection, OJJDP monitors for levels of state compliance, determines grant eligibility status, reviews submitted plans and reports, and responds to technical assistance requests. The Conference study, and the resulting recommendation, focus on the regulatory and administrative process and procedures used to determine and monitor compliance with the deinstitutionalization, separation and jail removal requirements of the OJJDP's state formula grant program. The study examines such issues as application of the de minimis criteria; determining the nature and degree of compliance; the use of waivers of termination; negotiations with states regarding waiver, termination and settlement issues; rulemaking and dispute resolution; and related technical assis-

tance provision and compliance monitoring. In addition, the study examines other federal formula grant programs for comparative purposes.

The Conference recommendation stemming from this study contains proposals for improving administration of the grant program, including changes related to OJJDP's communication and consultation with states, consistency and clarity in policy elaboration, staffing, and training.

Implementation of the Noise Control Act

Recommendation 92-6, "Implementation of the Noise Control Act," addresses procedural implications arising from the elimination of funding of the Environmental Protection Agency's Office of Noise Abatement and Control (ONAC) since 1981.

Before then, under the authority of the Noise Control Act of 1972, EPA had engaged in a wide variety of activities to abate noise pollution that included identifying sources of noise for regulation, promulgating noise emission standards, coordinating federal noise research and noise abatement, working with industry and international, state, and local regulators to develop consensus standards, disseminating information and educational materials, and sponsoring research concerning the effects of noise and the methods by which it can be abated. In addition, the Quiet Communities Act of 1978 authorized EPA to provide grants to state and local governments for noise abatement.

EPA stopped most noise abatement activities after ONAC's funding was eliminated. Nevertheless, the agency retains regulatory responsibilities under the Noise Control Act. Moreover, the federal noise emission and labeling standards EPA had promulgated have remained in effect, thereby preempting state and local governments from adopting different standards. Thus, the standards remain frozen, as neither the EPA nor the state or local agencies have been in a position to amend or update possibly outmoded standards despite the technological developments of the last decade.

Although the decision to end funding was substantive rather than procedural, the Conference found that, in part, the impact has been procedural. No procedure has been available for a decade to reexamine the existing preemptive standards to take into account developments in science and technology that may bear on implementation of the legislative intent. Elimination of funding for the agency's noise control program has had the additional procedural effect of leaving several proposed but unissued standards pending for a decade without final agency action.

Under these circumstances, EPA asked the Conference to assist it in reevaluating the current status of the Noise Control Act by recommending options that relate to procedural considerations. In its recommendation, based on a study by Professor Sidney A. Shapiro and Dr. Alice H. Suter, the Conference took no position concerning what actions, if any, EPA should take regarding enforcement and implementation of the Noise Control Act. The Conference's recommendation identified several considerations that should be part of any EPA reassessment.

The recommendation urges EPA to analyze the preemptive effects of its existing and pending noise standards to eliminate, where possible, any unintended effects. It suggests Congress then review the issues raised by the analysis, including whether the continuation of substantive regulatory requirements without funding, or EPA's inability to reexamine, modify, or rescind those requirements, creates undue procedural burdens upon industry, the states, and the public. Finally, the Conference recommends that Congress then either repeal the Noise Control Act or fund whatever responsibilities under the Act are delegated to EPA.

RULEMAKING

Procedural and Practice Rule Exemption

Section 553(b)(A) of the Administrative Procedure Act provides that the requirements for notice-and-comment rulemaking do not apply to "rules of agency organization, procedure, or practice . . . ." Although courts have used a number of different tests to determine whether a rule was one of procedure or practice, none has been particularly satisfactory.

Recommendation 92-1 provides guidance to the agencies on applying the exemption. The recommendation recognizes that there may be costs to the agency associated with the use of notice-and-comment procedures that are difficult to calculate. Nonetheless, the study, conducted by Conference Research Director Jeffrey S. Lubbers and senior staff attorney Nancy G. Miller, suggests that for significant procedural rule changes the benefits of noti and comment are likely to outweigh the costs, although this may not be the case for minor procedural amendments. Thus, unless the agency decides that the likely costs will outweigh the benefits, the recommendation strongly encourages agencies voluntarily to use notice and comment even where an APA exemption applies.

The recommendation notes that the procedural and practice rule exemption can, in appropriate circumstances, serve a legitimate governmental purpose, and that Congress intended it to be available in such cases. Where such rules are truly procedural, rather than substantive in a procedural mask, the statutory exemption should be available. The recommendation, therefore, urges that a two-part test be applied by agencies as a guide in determining when a rule is procedural. First, agencies should determine that the rule relates to an agency's internal operations or methods of interacting with the public. Second, agencies should then determine that the rule has no substantive impact because it neither significantly affects conduct, activity, or a substantive interest that is the subject of agency regulation, nor affects the standards for eligibility for government programs. Only if the proposed rule meets both parts of this test, should it be considered as being within the exemption from notice-and-comment requirements as a rule of practice or procedure.

To encourage agencies voluntarily to use notice and comment, the recommendation also urges that the Office of Management and Budget refrain

from exercising its jurisdiction to review rules fitting within this definition when an agency voluntarily publishes them.

Agency Policy Statements

Recommendation 92-2, "Agency Policy Statements," concerns agency use of policy statements, which include all substantive nonlegislative rules that are not limited to interpreting existing law. They come with a variety of labels and include guidances, guidelines, manuals, staff instructions, opinion letters, press releases or other informally captioned documents.

The recommendation, based on a study by Professor Robert A. Anthony, recognizes that policy statements that inform agency staff and the public about agency policy are beneficial to both. While they do not have the force of law (as do legislative rules) and therefore may not be binding on the public, they nonetheless are important tools for guiding administration and enforcement of agency statutes and for advising the public of agency policy.

The recommendation addresses a concern, however, about situations where agencies issue policy statements that they treat or that are reasonably regarded by the public as binding and dispositive of the issues they address. The issuance of such binding pronouncements as policy statements does not offer

Council member Paul A. Vander Myde, Vice President for Corporate Affairs, VSE Corporation, greeting AAA President Paul R. Verkuil while Council members William R. Neale, member of the firm of Krieg DeVault Alexander & Capehart (left) and Walter Gellhorn, Professor emeritus, Columbia University (right) look on.

the opportunity for public comment that is normally afforded during the notice-and-comment legislative rulemaking process for rules that have the force of law.

The recommendation urges that this outcome be avoided, first by requiring that when an agency contemplates an announcement of substantive policy (other than through an adjudicative decision), it should decide whether to issue the policy as a legislative rule, in a form that binds affected persons, or as a nonbinding policy statement. Second, to prevent policy statements from being treated as binding as a practical matter, the recommendation suggests that agencies establish informal and flexible procedures that allow an opportunity to challenge policy statements.

This recommendation does not preclude an agency from making a policy statement that is authoritative for staff officials in the interest of administrative uniformity or policy coherence. In fact, agencies are encouraged to provide guidance to staff in the form of manuals and other management directives as a means to regularize employee action that directly affects the public. Agencies should advise staff, however, that policy guidance, while instructive to them, does not constitute standards whose violation may be an independent basis for action against any person.

OTHER RESEARCH ACTIVITIES

The Conference conducts most of its research by using the services of outside professional 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 1992 approximately 20 research projects were underway. These include the following:

Model Rules of Practice for Agency Adjudication: A complete set of the model rules was completed (see page 7) and comments are being solicited. Final rules will be published early in 1993.

Non-APA Procedures for Assessing Civil Money Penalties: The use of APA adjudication procedures for assessing civil money penalties in administrative proceedings is well accepted. However, in various environmental laws, Congress has created bifurcated statutes allowing EPA to use non-APA procedures (including non-ALJ hearing officers) to assess small-amount civil penalties. EPA is attempting to implement these laws, and the D.C. Circuit has ruled favorably (though not squarely) in an analogous enforcement case. The study, by Professor William Funk of Lewis and Clark Northwestern School of Law, examines and assesses this trend.

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. Professor Carl Tobias of the University of Montana is studying whether an analogue in federal agency proceedings would be desirable.

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, with others in the Coast Guard (each 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 will be examining these issues.

Agency Peer Review Procedures for Reviewing Discretionary Grant Applications: There is no government-wide statute covering the procedures agencies with grant authority must use in reviewing applications. Professor Thomas McGarity of the University of Texas is examining agency discretionary grant programs that use a peer review procedure, such as in the National Science Foundation, National Endowment for the Arts, and National Institutes of Health. Phase 2 of the study will look at purely discretionary grant programs such as that of the Department of Housing and Urban Development.

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 have focused attention on the need for better conflict management under the Endangered Species Act. This project examines this and other case studies and will consider ways to improve 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.

Right-to-Counsel Issues in Agency Proceedings: The Administrative Procedure Act provides little guidance on procedural limitations applicable to agency investigations. For example, how far does the right to counsel in Section 555 extend? Does it extend to persons questioned by agency inspectors? Can agencies regulate the presence of attorneys during testimony given by persons subpoenaed as part of an agency civil investigation? What about an agency's right to demand unescorted inspections? These issues are the subject of a study by Professor Ronald Wright of Wake Forest University.

Agency Procedures for Distribution and Sale of Government Assets: Professors Jonathan Macey of Cornell University and Geoffrey Miller of the University of Chicago are conducting a survey and evaluation of the

various agency techniques for auctioning, selling or distributing government assets, including oil leases, airport landing rights and "resolved" savings and loans.

Judicial Review of Early Intervention Decisions of Federal Banking Regulators: The new bank regulatory laws give the FDIC and other banking agencies strong authority to take prompt corrective action ("early intervention") against ailing institutions. Although the statutes specifically provide for judicial review of seizure (conservatorship or receivership) actions, the laws are silent on judicial review of early interventions. Some courts have found such actions (e.g., removal of officers or directors) to be unreviewable. Other courts have entertained suits for injunctive relief. This causes uncertainty for regulators and regulated alike. Professor Lawrence Baxter of Duke University will be analyzing these problems.

Choice of Forum in Government Contract Litigation: Under current law, challengers to government action in contract cases have a multiplicity of forums. In pre-award (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). In post-award disputes, the choice is between the U.S. Court of Federal Claims or the appropriate agency board of contract appeals. Professor Robert N. Davis of the University of Mississippi is evaluating the effect of the choice of forum.

Pesticide Registration and Cancellation: The process for cancelling or suspending approved pesticides has been strongly attacked as too cumbersome and Congress is considering proposed legislation to reform the process. Such proceedings are similar to those in other licensing programs in the health and safety area. Professor Donald Hornstein of the University of North Carolina will be providing a report and recommendations on this subject.

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 or proposed as an alternative to regulation in a variety of regulatory contexts, including meat and poultry inspection, EEO contract compliance, environmental controls, and—perhaps most often—in the securities and commodities arena. An evaluation of this technique to determine when it is effective would contribute greatly to what has been, up to now, mostly a rhetorical debate. The study by Professor Douglas Michael of the University of Kentucky will use both a survey and case study approach.

The Rulemaking Process—Has It Become Overburdened and Underused? Agencies have increasingly turned to less satisfactory alternatives to notice-and-comment rulemaking (e.g., adjudication, "non-rule" rulemaking) to make policy. Both external requirements and internal organizational constraints have changed the nature of rulemaking from the simple APA procedures to a long and uncertain process. This study by Professor Jerry Mashaw of Yale University examines legislative, judicial, and executive branch constraints on rulemaking and evaluates agency responses and proposed solutions.

Interim-Final Rulemaking: Professor Michael Asimow of the University of California at Los Angeles will supplement a report he has already written, concerning IRS use of the interim-final 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? How long after the interim rule?

The Interplay Between Civil and Criminal Enforcement of Regulatory Statutes: There are many variations among agencies' behavior in choosing between civil and criminal sanctions. 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* [109 S. Ct. 1892 (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, the Nuclear Regulatory Commission, Occupational Safety and Health Administration, and the Department of Justice. A team consisting of four professors from The George Washington University will be 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 SEC'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 as the use of similar letter rulings by the IRS, Customs Service, 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 will be conducting this review.

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 in 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

Two statutes enacted during the year altered the Administrative Conference Act. Pub. L. No. 102-403 amended the Act to clarify the Conference's authority to respond to requests from foreign governments for advice and assistance on administrative law and process. Under the new law, Conference international advisory activity 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.

Pub. L. No. 102-354, the Administrative Procedure Technical Amendments Act of 1992, renumbered the negotiated rulemaking and alternative means of dispute resolution (ADR) provisions added to Title 5 of the U.S. Code in 1990 to eliminate duplication. The negotiated rulemaking provisions became sections 561-570 and the ADR provisions became sections 571-583 of Title 5. To accommodate these changes, the statute transferred the Administrative Conference Act, previously found at sections 571-576 of Title 5, to new sections 591-596. Pub. L. No. 102-354 also clarified an issue that had been left open when the original ADR legislation was passed. It provides that ADR may

be used in cases in which the agency is simply the decisionmaker resolving disputes between private parties, as well as when the agency itself is a party to an administrative proceeding.

The Conference continued its active program of advice and assistance to Congress and the Office of Management and Budget on legislative matters, especially the application of Conference recommendations to proposed legislative changes. Several statutes enacted in 1992 reflected Conference recommendations. Pub. L. No. 102-345 made permanent the Federal Aviation Administration's demonstration civil penalty program and transferred authority over the adjudication of civil penalty matters affecting pilots and flight engineers from the FAA to the National Transportation Safety Board. The legislation, with minor modifications, was modeled on Recommendation 91-8, "Adjudication of Civil Penalties Under the Federal Aviation Act." The Conference's study of the FAA's civil penalty demonstration program was conducted pursuant to an earlier statutory directive.

Title XIII of Pub. L. No. 102-550, the Housing and Community Development Act of 1992, created within the Department of Housing and Urban Development a new Office of Federal Housing Enterprise Oversight with responsibility for supervising the safety and soundness of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac). Insofar as these two government-sponsored enterprises are concerned, the legislation implements Conference Recommendation 91-6, "Improving the Supervision of the Safety and Soundness of Government-Sponsored Enterprises."

The Court of Federal Claims Technical and Procedural Improvements Act of 1992, which is Title IX of Pub. L. No. 102-572, modified the certification provision of the Contract Disputes Act so that it is no longer a jurisdictional requirement to appealing a denial of a contract claim. In this respect, the statute incorporates a central element of Recommendation 83-1, "The Certification Requirement in the Contract Disputes Act."

The Conference presented testimony before four congressional subcommittees in 1992. In addition to the presentation of the Conference's annual appropriations testimony, Acting Chairman Ross presented the Conference's views in support of its recommendation regarding the FAA's civil penalty program to the House Subcommittee on Aviation. At the request of the Subcommittee on Oversight of Government Management of the Senate Governmental Affairs Committee, he presented testimony on ways to address allegations of possible bias by administrative law judges within the Social Security Administration. And, at the invitation of the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee, he offered comments on the application of alternative means of dispute resolution to medical malpractice litigation involving the federal government.

The Conference transmitted the tenth annual report on agency activities under the Equal Access to Justice Act, covering agency action during fiscal year 1991. The Office of the Chairman also presented its fifth annual seminar for congressional staff in January. The 1992 program focused on ADR. The

program is part of the Conference's ongoing effort to acquaint congressional staff with basic administrative law principles.

ADVICE AND ASSISTANCE TO AGENCIES AND FOREIGN GOVERNMENTS

The Conference devoted substantial effort to providing advice and assistance to federal agencies in 1992 and continued to give priority attention to working with federal agencies and other interested groups to carry out its responsibilities under the Administrative Dispute Resolution and Negotiated Rulemaking Acts. (See ADR and Reg Neg Implementation, page 25.)

Legislation pertaining to requests from foreign governments is described in Legislative Activities, page 19.

The Conference's role as a central source of expertise on administrative process issues resulted in visits during 1992 by numerous foreign government officials who discussed the American administrative system. In June Conference staff presented an overview of U.S. administrative law to a group of seven lawyers from North Cyprus, Gambia, Taiwan, and Tanzania. Conference staff also met and discussed administrative law issues with with Erik Harremoes, Director of Legal Affairs, Council of Europe; Professor Jacek Mazur, Legal Advisor to the President of the Supreme Chamber of Control of Poland (a Polish constitutional entity created to audit and investigate the performance of government agencies); and Judge Uzi Savan, Comptroller and Ombudsman for the City of Jerusalem.

AGENCY INTERCHANGE OF INFORMATION

By statute the Conference is directed to "arrange for interchange among administrative agencies of information potentially useful in improving administrative procedure" (5 U.S.C. 594(2)). 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.

During 1992 the Conference initiated a quarterly seminar series for agency chief legal officers. More than 40 department and agency chief counsels and general counsels, or their representatives, participated. Solicitor General Kenneth Starr was the guest speaker at the June 1 opening session. At a second seminar Research Director Jeffrey S. Lubbers and public member Paul R. Verkuil addressed issues pertaining to the federal administrative judiciary.

About 50 members from more than 20 independent boards and commissions attended the Conference's fifth annual seminar for members of independent regulatory agencies. C. Boyden Gray, Counsel to the President, was the keynote speaker for the May 11 program. The topic of international regulatory cooperation was addressed by Richard C. Wright, Commercial Counselor of the Delegation of the Commission of the European Communities to the United States; Janet Steiger, Chairman of the Federal Trade Commission;

and Claude E. Barfield, Director of Science and Technology Policy for the American Enterprise Institute. The program also included a presentation by Jane S. Ley, Deputy General Counsel, Office of Government Ethics, on new ethics laws, including post-government employment restrictions and rules on receipt of honoraria, gifts, or reimbursements.

The Chairman of the Conference chairs the Council of Independent Regulatory Agencies (CIRA). CIRA is an informal organization composed of the chairs of the 13 major independent regulatory boards and commissions. It enables agency chairs to exchange ideas concerning governmental and regulatory issues with select members of the executive branch, academics, and members of Congress. CIRA met several times in 1992 and addressed issues such as the regulatory moratorium, communication between independent agencies and the White House, regulatory relief for small businesses, the Conference's recommendation regarding the federal administrative judiciary, past recommendations as they apply to the independent regulatory agencies, and other regulatory issues. Speakers included Dr. Michael J. Boskin, Chairman, Council of Economic Advisers; Constance Horner, Assistant to the President and Director of Presidential Personnel; and John L. Howard, Counsel to the Vice President.

During the year the Conference also continued to foster the interchange of information on alternative dispute resolution in the federal government. (See ADR and Reg Neg Implementation, page 25.)

PUBLICATIONS

The Conference issues several types of publications including reports, sourcebooks, and a newsletter. The Conference's publications reflect the variety of its research interests.

During 1992 one new book, FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK: STATUTES AND RELATED MATERIALS, 2d edition was issued.

Other types of publications the Conference issues include how-to guides, such as the MANUAL FOR ADMINISTRATIVE LAW JUDGES (a third edition will be available in late 1993); the series of "Studies in Administrative Law and Practice"; the series of "Resource Papers in Administrative Law," of which MEDIATION: A PRIMER FOR FEDERAL AGENCIES will be available in early 1993; and special studies of administrative law issues, such as MULTI-MEMBER INDEPENDENT REGULATORY AGENCIES, A PRELIMINARY SURVEY OF THEIR ORGANIZATION (revised in 1992). The Administrative Conference of the United States RECOMMENDATIONS AND REPORTS, published annually, contains copies of the Conference's formal recommendations and their accompanying reports. Appendix F, page 111, contains a list of the Conference's 1992 publications, reports, and articles.

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

Regulatory Takings

At the Conference's April 21 colloquy about cases before the U.S. Supreme Court that involved the question of when a "regulatory taking" occurs, Barry Hartman, Acting Assistant Attorney General for Environment and Natural Resources, discussed the lack of predictable outcomes in regulatory takings cases due to the absence of neutral principles. He identified the three-tiered test in *Penn Central Transportation v. New York* (1978), which balances (1) the character of the governmental action involved, (2) the extent of the economic impact on the regulated entity, and (3) the interference with reasonable investment-backed expectations, as a major step in the development of an analytic framework.

John Echeverria, Counsel to the National Audubon Society, stated that being in favor of environmental regulation does not mean that one is opposed to private rights. While conceding that "private rights are entitled to protection," he observed that the community has rights too, and the value of those rights is what is at issue in regulatory takings cases. Mr. Echeverria presented the Audubon Society's position that "there should continue to be a broad deference to legislative judgments, and that so long as there is a significant public harm or harm to the property owners or other landowners, and so long as the regulation is substantially related to dealing with that harm, it should not be found to be a taking."

Paul Kamenar, Executive Legal Director of the Washington Legal Foundation, questioned the appropriateness of the Department of Justice's argument that the Court should return to the *Penn Central* three-part analysis because "the economic impact and the investment-backed expectation tests are fraught with mischief, for the government can easily manipulate them to partially take property without compensation." He argued instead that the Court should extend the holding in *Loretto v. Teleprompter Manhattan CATV Corp. (1982)* regarding the government's physical occupation of property, and concentrate on the nature of the governmental action.

Supreme Court

Judge Patricia M. Wald of the Court of Appeals for the D.C. Circuit, Solicitor of Labor (and former Conference Chairman) Marshall J. Breger, and Professor Thomas O. Sargentich of American University's Washington College of Law reviewed administrative cases decided by the Supreme Court last term and discussed their significance for the future at a Conference colloquy on September 24.

Judge Wald concentrated her remarks on cases in which environmental groups or states sought some greater protection of the environment. In her view, the most important of these cases is *Lujan v. National Wildlife Federation*, which she predicts will affect the standing of environmental groups to challenge statutory nonfeasance or malfeasance of the government in implementing national programs. Her view of the Court's evolving standing jurisprudence is that it incorporates a political philosophy about the function of courts, and it also limits Congress' ability to provide remedies for procedural injuries. The end result, from a separation-of-powers standpoint, is to increase greatly the power of the Executive.

Mr. Breger presented an executive branch perspective, focusing mainly on cases involving the Department of Labor. In *Lechmere v. NLRB*, characterized by Breger as the "most significant and controversial" labor case last term, the Court, in an opinion by Justice Thomas, held that employers do not have to allow nonemployee union organizers to distribute literature on their property.

Professor Sargentich found the decisions of the Court in the last term to fit several trends in recent Supreme Court cases. He sees the direction the Court is taking on standing, as well as its deference to agencies on procedure (*Vermont Yankee*) and substance (*Chevron*), to reflect a move away from the judicial activism of the 1970s. In addition, the Court's unwillingness to look to legislative history suggests a skepticism about the legislative process itself and the notion that laws reflect public, rather than special interest, purposes. Sargentich questioned whether Executive decisionmaking, to which the Court increasingly defers, is any less free of special interest influences than the legislative process.

Council on Competitiveness

At an October 30 colloquy on "EPA Rulemaking and the President's Council on Competitiveness," jointly sponsored by the Conference and The Administrative Law Journal of The American University, Cass R. Sunstein, Professor of Jurisprudence at the University of Chicago, and David B. Rivkin, Jr., Associate Executive Director of the President's Council on Competitiveness, presented opposing views of the constitutional basis for Presidential review of agency rulemaking.

While viewing Presidential oversight of agency rulemaking as an excellent policy innovation, Professor Sunstein stated that the popular notion of a "unitary Executive" is not supported by an originalist view of the Constitution. He believes the text of the Constitution, particularly the President's power to demand written opinions of department heads, does not support the unitary Executive theory.

Mr. Rivkin, speaking for the Council on Competitiveness, argued that analysis of the same historical documents provides persuasive evidence that the Framers and the First Congress had a clear understanding of Executive power and chose to invest the President with complete Executive power through Article II.

ADR AND REG NEG IMPLEMENTATION

The Administrative Conference's dispute resolution program continued in 1992 as the Conference's major implementation initiative. Most of the Conference's professional staff were involved in an intensified effort to help agencies carry out their responsibilities under the Administrative Dispute Resolution (Pub. L. No. 101-552) and Negotiated Rulemaking (Pub. L. No. 101-648) Acts, enacted in 1990. Passage of these laws represented the implementation of two significant Conference initiatives and reflects a congressional endorsement of the priority that the Conference accords its dispute resolution program. Both statutes incorporate several Conference recommendations: they strongly encourage use of ADR processes without requiring their use in any specific circumstances.

The ADR Act does require each agency to designate a senior official as its dispute resolution specialist, and assigns that person certain responsibilities with respect to ADR training and development of an agency dispute resolution policy. In formulating those policies, agencies are required to consult with the Conference. In February, the Conference published and distributed IMPLEMENTING THE ADR ACT: GUIDANCE FOR AGENCY DISPUTE RESOLUTION SPECIALISTS. This 75-page manual, intended to assist agency officials responsible for carrying out the Act, offers advice on ways to set up ADR programs successfully. The guidance document briefly explains the Act and its requirements, describes the operation of the consultation process under the ADR Act, and offers advice and further resources for agencies on finding and hiring neutrals, institutionalizing ADR methods, and evaluating ADR experiments. The Conference is also developing a manual that discusses legal questions under the ADR Act, which is expected to be ready in mid-1993. Another volume prepared in 1992, MEDIATION: A PRIMER FOR FEDERAL AGENCIES, is part of the Conference's "Resource Papers in Administrative Law" series. It will be available in early 1993.

During 1992 the Conference also consulted extensively with dozens of agencies in an effort to help them comply with the legislation. Throughout the year, this advice and assistance was provided to numerous agencies through a combination of meetings, informal discussions, and comments on policy drafts.

In several cases, the Conference's aid was extended beyond consultation. The Conference participated in an April seminar at the FDIC on running an FDIC roster of mediators and subsequently worked with FDIC to develop

procedures. Conference staff worked in 1992 with EPA and FMCS to develop the first training program (sessions will take place in early 1993) specifically aimed at equipping experienced mediators to facilitate negotiated rulemaking proceedings. Through an interagency agreement with the Air Force, the Conference received funding to develop ADR experiments, training, and written materials for Air Force ADR programs. These efforts will help the Air Force implement mediation and other ADR processes in contracting, environmental, and personnel matters. During 1992, the Conference assisted the Department of Labor's ADR work on two fronts. The Conference helped the Department to design a pilot project in its Philadelphia region, in which in-house mediators were trained to help settle enforcement cases that otherwise would have been litigated by the Office of the Solicitor. A 2-day seminar in March was developed and presented by the Conference for about 100 regional managers to kick off Labor's pilot program. Conference staff also advised the Department of Labor on the drafting of its NEGOTIATED RULEMAKING HANDBOOK and its reg neg policy.

Beyond policy development, the ADR Act requires appropriate training for effective implementation. Working with a variety of other agencies, professional organizations, and private ADR service providers, the Conference has carried out extensive activities to meet this need. For example, approximately 350 people attended a full-day seminar in May, organized by the Conference, the Society for Professionals in Dispute Resolution (SPIDR), and the Federal Mediation and Conciliation Service. The seminar covered basic issues in applying ADR to contracting, regulatory, enforcement, policy, and personnel disputes.

Panelists Philip A. Harter, mediator in private practice, Cathy A. Constantino, Director ADR Unit at the FDIC, and Charles Pou, Conference senior attorney (from left), talking about "Where do we go from here?" at the May seminar.

The Conference presented a roundtable for agency personnel in October on finding and hiring qualified neutrals such as mediators or arbitrators. As an outgrowth of the roundtable, the Conference is preparing a primer with advice to agencies on this subject as part of its "Resource Papers in Administrative Law" series. Also in October, the Conference offered a training program for administrative law judges at the Federal Energy Regulatory Commission, to enable them to function more effectively as "settlement judges"—an approach to case resolution in which one judge is assigned adjudicatory responsibility, while a second judge acts as a mediator. In addition, the Conference's annual administrative law seminar for congressional staff members this year focused on ADR.

Conference staff members have helped develop, and participated in, several training courses presented by other government agencies. These include classes conducted by the Department of Justice's Legal Education Institute, the Office of Personnel Management's Western Management Development Center, the Departments of the Army and Justice, the National Security Agency, the IRS, and the Small Agency Council.

In November, the Conference established four interagency working groups to assist agency personnel concerned with dispute resolution in sharing experiences and coordinating activities with their counterparts at other agencies. Under the auspices of a Conference-led Coordinating Committee, the working group members, meeting frequently in subject-related subgroups, are able to maximize their individual efforts through brainstorming and joint problem solving so as to create ADR models and systems that can be used by all interested agencies. The Training and Education working group will be developing packages for agencies to use and share in training neutrals as well as educating management in the nature and use of ADR. The Systems Design Working Group will be creating models for systems to be used in the various types of disputes commonly arising in federal agencies such as employment and contracting matters, enforcement disputes, and the creating of public policy. A Clearinghouse and Outreach working group is developing ways in which agencies can share information on ADR and methods for reaching the general public as well as regulated communities. Finally, an Implementation working group is developing ways to help agencies implement ongoing ADR systems, dealing with issues such as ways to find and acquire appropriate neutrals.

Although parts of the ADR Act do not apply directly to equal employment opportunity (EEO) disputes affecting federal employees, the Conference has found a growing interest among many agencies in ways to utilize ADR procedures in such cases. In June, the Conference co-sponsored four programs with the Federal Mediation and Conciliation Service, to explore agency experience in this area. Agency EEO directors have been invited to join with the four working groups in addressing the use of ADR in EEO matters.

The Conference has also found it useful for staff of the Office of the Chairman to participate actively in several programs presented by professional organizations. These include sessions on federal and state ADR legislation for SPIDR in Dallas and Pittsburgh, a program of the American Bar Association's

Section of Business Law on reg neg, one by the tax law section of the Federal Bar Association on the potential for ADR in tax disputes, and several informal sessions of the District of Columbia chapter of SPIDR.

The Conference's 1992 ADR activities were undertaken in part thanks to a unique set of private grants from the Hewlett and Culpeper Foundations. These grants represent an unusual private commitment of funds in recognition of the value of governmental promotion of consensual decisionmaking.

G. William Frick, Vice President and General Counsel, American Petroleum Institute; Francis X. Cameron, Special Counsel for Public Liaison and Waste Management, NRC; David Pritzker, Conference senior staff attorney; Owen Olpin, member of the firm of O'Melveny & Myers and Conference public member; and Marianne Smythe, Director, Division of Investment Management, SEC participating in a reg neg panel at the ABA meeting in August.

In addition, this year's visiting executives, Patricia Hahn, on loan from the Interstate Commerce Commission, and Sandra Shapiro, on loan from the Department of Health and Human Services, have provided support on ADR efforts—assisting on working group and roundtable activities, helping out with various training functions, drafting ADR materials to be published and working with agency personnel to assist their ADR efforts.

The Conference will continue to offer agency dispute resolution specialists (and selected others) introductory programs on the various forms and uses of ADR and practical issues in building ADR into agency decisionmaking. Among these are likely to be programs on developing useful evaluation tools to measure the relative costs and benefits of ADR processes and developing systems for regular application in some agency activities (e.g., contracting, rulemaking, personnel). In addition, the Conference is trying, through the working groups, to develop a series of more intensive training programs and help in the development of evaluation instruments. Other courses will equip agency personnel to train others in their agency in mediation techniques.

BUDGET AND AUTHORIZATION

During fiscal year 1992 the Conference's appropriation was $2,227,000. This was reduced $5,000 pursuant to Pub. L. No. 102-141 §523A.

Dollar Amounts

1992 appropriation	$2,227,000

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. §§571 et seq.), including not to exceed $1,500 for official reception and representation expenses; [$2,327,000] $2,400,000.

Programmatic Application of Funds (in thousands of dollars)

General Administration	479
Personnel Compensation and Benefits	1,501
Formal Recommendations (Research; reports)	158
Implementation and Advisory (Agency assistance)	40
Clearinghouse (Information interchange)	44
Budget Authority	2,222
Outlays	2,186

Reimbursable Programs

Obligation Authority	218
Outlays	218

Totals: Direct and Reimbursable Programs

Obligation Authority	2,440
Outlays	2,404

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

F. Conference Publications

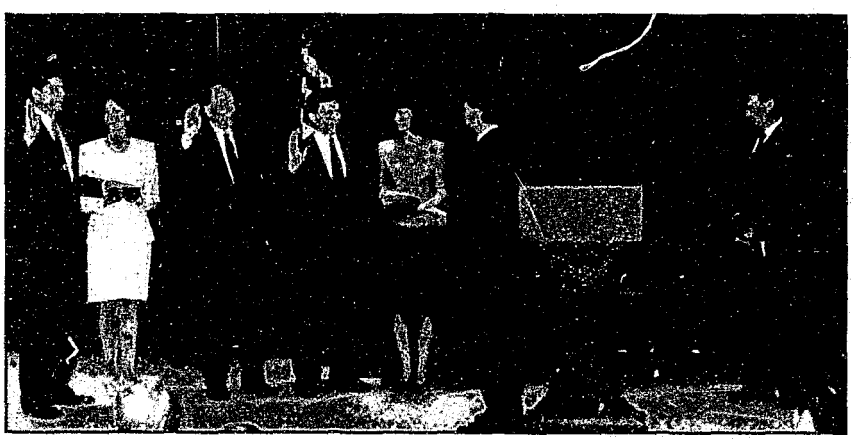
G. Bylaws of the Administrative Conference

H. The Administrative Conference Act

APPENDIX A - MEMBERS OF THE ADMINISTRATIVE CONFERENCE

THE COUNCIL

Chairman	BRIAN C. GRIFFIN[1]
	ROBERT S. ROSS, JR. (Acting)[2]
Vice Chairman	ROBERT S. ROSS, JR.[2]
Government Members	PHILLIP D. BRADY
	RICHARD C. BREEDEN
	CONSTANCE HORNER[3]
	CONSTANCE BERRY NEWMAN[4]
Public Members	SUSAN AU ALLEN
	HAROLD R. DEMOSS, JR.[4]
	WALTER GELLHORN[5]
	WILLIAM R. NEALE[6]
	R. CARTER SANDERS[7]
	PAUL A. VANDER MYDE[8]
	EDWARD L. WEIDENFELD[9]



Vice President J. Danforth Quayle swearing in Council members Paul A. Vander Myde, Walter Gellhorn, and William R. Neale (from left to right), with the assistance of Jeanne Vander Myde and Carolyn Neale, at the Old Executive Office Building as Acting Chairman Robert S. Ross, Jr. observes.

GOVERNMENT MEMBERS

Department of Agriculture	JOHN GOLDEN
Department of Commerce	WENDELL L. WILLKIE II
Commission on Civil Rights	EMMA MONROIG
Commodity Futures Trading Commission	WILLIAM P. ALBRECHT
Consumer Product Safety Commission	JERRY G. THORN
	MARY SHEILA GALL[7]
	ANNE GRAHAM[10]
Department of Defense	DAVID S. ADDINGTON
	TERRENCE O'DONNELL[11]
(Armed Services Board of Contract Appeals)	PAUL E. WILLIAMS[12]
Department of Education	THEODORE SKY
Department of Energy	ERIC J. FYGI
	JOHN J. EASTON, JR.[7]
Environmental Protection Agency	RAYMOND B. LUDWISZEWSKI
Equal Employment Opportunity Commission	R. GAULL SILBERMAN
Federal Communications Commission	[VACANT]
	ROBERT L. PETTIT[11]
Federal Deposit Insurance Corporation	ROGER A. HOOD
Federal Election Commission	LAWRENCE M. NOBLE
Federal Energy Regulatory Commission	DAVID N. COOK
Federal Maritime Commission	CHRISTOPHER L. KOCH
	FRANCIS J. IVANCIE[4]
Federal Reserve System	J. VIRGIL MATTINGLY, JR.
Federal Trade Commission	MARY L. AZCUENAGA
General Services Administration	DENNIS MULLINS
	ROBERT C. MACKICHAN[7]
Department of Health and Human Services	SUSAN K. ZAGAME
	MICHAEL J. ASTRUE[11]
(Food and Drug Administration)	MARGARET JANE PORTER
(Social Security Administration)	DANIEL L. SKOLER
Department of Housing and Urban Development	FRANK KEATING
(Administrative Law Judge)	ALAN W. HEIFETZ[13]
Department of the Interior	[VACANT]
	TIMOTHY GLIDDEN[4]
(Inspector General)	JAMES R. RICHARDS[14]
Interstate Commerce Commission	EDWARD J. PHILBIN
Department of Justice	KEVIN R. JONES
(Executive Office for Immigration Review)	[VACANT]
	WILLIAM R. ROBIE[15]
Department of Labor	SETH D. ZINMAN
(Occupational Safety and Health Administration)	ALAN C. MCMILLAN[11]

Merit Systems Protection Board	DANIEL R. LEVINSON
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. EARL R. OHMAN, JR.[7]
Office of Government Ethics	STEPHEN D. POTTS
Office of Management and Budget	[VACANT]
Office of Personnel Management	ARTHUR TROILO III PATRICIA W. LATTIMORE[7] VERNON PARKER[7] JAIME RAMON[7]
Securities and Exchange Commission	[VACANT] JAMES R. DOTY[11]
Small Business Administration	MICHAEL WYATT
Department of State	EDWIN D. WILLIAMSON
Department of Transportation (Federal Aviation Administration)	NEIL R. EISNER KENNETH P. QUINN
Department of the Treasury (Internal Revenue Service)	JEANNE S. ARCHIBALD JAMES J. KEIGHTLEY
U.S. International Trade Commission	ANNE E. BRUNSDALE
U.S. Postal Service	STEPHEN EBBERT ALPERN
Department of Veterans Affairs	JAMES A. ENDICOTT, JR. NORMAN G. COOPER[7] FREDERIC L. CONWAY III[7]

PUBLIC MEMBERS

CURTIS H. BARNETTE	SALLY KATZEN
DAVID Q. BATES, JR.[7]	ROBERT M. KAUFMAN
WARREN BELMAR	FREDERIC ROGERS KELLOGG
CARYL S. BERNSTEIN	DENNIS J. LEHR
KENNETH J. BIALKIN[7]	JAMES C. MILLER III
ARTHUR EARL BONFIELD	JOSEPH A. MORRIS
THOMAS M. BOYD	BETTY SOUTHARD MURPHY
ELLIOT BREDHOFF	THEODORE B. OLSON
JAMES H. BURNLEY IV	WILLIAM T. QUILLEN
RONALD A. CASS	BRUCE RABB[7]
JAMES W. CICCONI	JAMES F. RILL
CHARLES J. COOPER	JONATHAN ROSE
ELDON H. CROWELL	ABRAHAM D. SOFAER[4]
ARTHUR B. CULVAHOUSE, JR.	STUART J. STEIN
LEWIS A. ENGMAN	PHILLIP N. TRULUCK

FRED F. FIELDING	MICHAEL M. UHLMANN
MARVIN E. FRANKEL[7]	DAVID C. VLADECK
ERNEST GELLHORN	MICHAEL B. WALLACE
MARK H. GITENSTEIN	WILLIAM H. WEBSTER
STEPHEN L. HAMMERMAN	RICHARD A. WEGMAN[7]
MICHAEL D. HAWKINS	JONATHAN WEISS
FREDERICK WELLS HILL	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	DAVID E. NETHING
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
	WILLIAM E. PERSINA[7]
Federal Mediation & Conciliation Service	EILEEN B. HOFFMAN
Federal Mine Safety and Health Review Commission	ARLENE HOLEN
	FORD B. FORD[7]
General Accounting Office	JAMES F. HINCHMAN
Judicial Conference of the U.S.	STEPHEN G. BREYER
	STEPHEN F. WILLIAMS
Legal Services Corporation	[VACANT]
National Transportation Safety Board	DANIEL D. CAMPBELL
Office of the Federal Register	MARTHA L. GIRARD
Office of the Vice President	JOHN L. HOWARD
Pension Benefit Guaranty Corporation	[VACANT]
Postal Rate Commission	GEORGE W. HALEY
Railroad Retirement Board	GLEN L. BOWER
Selective Service System	HENRY N. WILLIAMS
U. S. Claims Court	MARIAN BLANK HORN
U. S. Court of Appeals, Federal Circuit	S. JAY PLAGER
U. S. Court of International Trade	[VACANT]
U. S. Court of Military Appeals	EUGENE R. SULLIVAN
U. S. Sentencing Commission[16]	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 WEIDENFELD[17]
JAMES E. WESNER
RICHARD E. WILEY
JERRE S. WILLIAMS
FRANK M. WOZENCRAFT

SPECIAL COUNSELS

JOEL M. FLAUM
PHILIP A. FLEMING
C. BOYDEN GRAY
DARREL J. GRINSTEAD
STANLEY SPORKIN
JOHN M. WALKER, JR.[4]

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1 Appointed by President Bush as Chairman on December 23, 1992.
2 Served as Acting Chairman from December 19, 1991-December 23, 1992.
3 Appointed to the Council July 31, 1992.
4 Resigned during 1992.
5 Reappointed to the Council February 26, 1992.
6 Appointed to the Council March 11, 1992.
7 Term of service ended during 1992.
8 Appointed to the Council May 4, 1992.
9 Term of service ended during 1992; appointed as senior fellow.
10 Term of service ended by 1992.
11 Resigned government service during 1992.
12 Designated Board of Contract Appeals member.
13 Designated administrative law judge member.
14 Designated Inspector General member.
15 Served as designated administrative judge member; died in office October 18, 1992.
16 Agency designated liaison status in 1992.
17 Also served as Council Member during 1992.

Senior fellow Sallyanne Payton awaiting an answer to her question from the consultant while members Judge Loren Smith, Richard Leighton, and Stephen Grossman (rear) and Judge Stephen Williams and Jonathan Rose (front) also wait for the response.

Members Paul R. Verkuil and C. Boyden Gray conversing with Stuart Gerson (left), while members Kenneth P. Quinn, James H. Burnley IV, and Judge Joel Flaum (right) are similarly engaged.

Members Reuben B. Robertson III, John Golden, and Neil R. Eisner listening to public member Jonathan Weiss raising an issue at the September plenary session.

APPENDIX B - BIOGRAPHICAL INFORMATION

MEMBERS*

David S. Addington, General Counsel, Department of Defense, Washington, DC. Appointed Government Member September 4, 1992. Committee on Administration.

William P. Albrecht, Commissioner, Commodity Futures Trading Commission, Washington, DC. Government Member since 1989. Committee on Adjudication.

Susan Au Allen, Esquire, Partner in the law firm Paul Shearman Allen & Associates, Washington, DC. Council Member since 1991. Committee on Governmental Processes; 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 since 1988. Special Committee on Financial Services Regulation; Committee on Judicial Review.

Michael J. Astrue, General Counsel, Department of Health and Human Services, Washington, DC. Government Member 1989-92. Committee on Regulation.

Mary L. Azcuenaga, Commissioner, Federal Trade Commission, Washington, DC. Government Member since 1990. Special Committee on the Future of the Administrative Conference, Committee on Administration.

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.

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* During calendar year 1992. Affiliations and positions are listed as of December 31 or the date of termination of Conference service, if earlier.

David Q. Bates, Jr. Esquire, Member of the legislative consulting firm of Bayless, Boland, Bates & Madigan, Inc., Washington, DC. Public Member 1990-92. Committee on International Assistance in Administrative Law.

Dinah Bear, General Counsel, Council on Environmental Quality, Washington, DC. Liaison Representative since 1986. Committee on Administration.

Warren Belmar, Esquire, Member of the law firm of Fulbright & Jaworski, Washington, DC. Public Member since 1986. Committee on Judicial Review; Special Committee on Financial Services Regulation.

Caryl S. Bernstein, Esquire, Executive Vice President, General Counsel and Secretary, Federal National Mortgage Association (FannieMae), Washington, DC. Appointed Public Member July 10, 1992. Committee on Regulation.

Kenneth J. Bialkin, Esquire, Member of the law firm of Skadden, Arps, Slate, Meagher & Flom, New York, NY. Public Member 1986-92. Special Committee on Financial Services Regulation (Chairman).

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 relating to public property, loans, grants, benefits, or contracts (Recommendation 69-8); rulemaking relating 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.

Thomas M. Boyd, Esquire, Deputy General Counsel, Kemper Corporation, Washington, DC. Appointed Public Member July 10, 1992. Committee on Governmental Processes.

Phillip D. Brady, Assistant to the President and Staff Secretary, Executive Office of the President, Washington, DC. Council Member since 1988. Special Committee on Government Ethics Regulation; 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 since 1989. Special Committee on Financial Services Regulation; Committee on Adjudication.

Marshall J. Breger, Solicitor, Department of Labor, 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 Shaw, Pittman, Potts & Trowbridge, Washington, DC. Council Member 1987-88. Public member since 1988. 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.

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 Akin, Gump, Hauer & Feld, Washington, DC. Council Member October-December 1990. Public Member since 1991. Committee on Adjudication.

Frederic L. Conway III, Deputy Assistant General Counsel, Department of Veterans Affairs, Washington, DC. Government Member (VA) 1983-89. Government Member 1991-92. Committee on Administration.

David N. Cook, Deputy General Counsel, Federal Energy Regulatory Commission, Department of Energy, Washington, DC. Appointed Government Member May 22, 1992. Committee on Regulation; Committee on Adjudication.

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

Norman G. Cooper, Esquire, Special Assistant to the General Counsel, Department of Veterans Affairs, Washington, DC. Government Member February 4 - April 14, 1992. Committee on Administration.

Eldon H. Crowell, Esquire, Senior Partner in 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); Special Committee on International Assistance in Administrative Law (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.

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.

Harold R. DeMoss, Jr., Circuit Judge, U.S. Court of Appeals for the Fifth Circuit, Houston, TX. Public Member 1989. Council Member 1989-92. Committee on Rulemaking.

James R. Doty, General Counsel, Securities and Exchange Commission, Washington, DC. Government Member 1990-1992. Special Committee on Financial Services Regulation; Committee on Governmental Processes.

John J. Easton, Jr., General Counsel, Department of Energy, Washington, DC. Government Member 1991-92. Committee on Judicial Review.

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. Appointed Government Member April 14, 1992. Committee on Judicial Review.

Lewis A. Engman, Esquire, Member of the law firm of Winston & Strawn, Washington, DC. Council Member 1974-75. Public Member since 1986. Committee on Governmental Processes; Special Committee on the Future of the Administrative Conference (Chairman).

Fred F. Fielding, Esquire, Senior Partner in the law firm of Wiley, Rein & Fielding, Washington, DC. Special Counsel 1981-86. Public Member since 1986. Special Committee on Government Ethics Regulation (Chairman); 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, Partner in 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.

Ford B. Ford, Chairman, Federal Mine Safety and Health Review Commission, Washington, DC. Liaison Representative 1986-92. Committee on Regulation.

Edwin G. Foulke, Jr., Chairman, Occupational Safety and Health Review Commission, Washington, DC. Appointed as Government Member November 11, 1992. Committee on Judicial Review.

Marvin E. Frankel, Esquire, Partner in the law firm of Kramer, Levin, Nessen, Kamin & Frankel, New York, NY. Public Member 1990-92. Committee on Regulation.

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. Appointed Government Member September 15, 1992. Committee on Judicial Review.

Gall, Mary Sheila, Vice Chairman, Consumer Product Safety Commission, Washington, DC. Government Member January 31-February 25, 1992. Committee on Governmental Processes.

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. Special Committee on the Future of the Administrative Conference, 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 Mayer, Brown & Platt, Washington, DC. Appointed Public Member July 10, 1992. Committee on Judicial Review.

Timothy Glidden, Esquire, Counselor to the Secretary, Department of the Interior, Washington, DC. Government Member 1989-92. Committee on Rulemaking.

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

C. Boyden Gray, Counsel to the President, Washington, DC. Special Counsel since 1981. Committee on Judicial Review; Special Committee on Financial Services Regulation.

Brian C. Griffin, Chairman, Administrative Conference of the United States, Washington, DC. Appointed by President Bush December 23, 1992. Previously served as Deputy Assistant Attorney General, Tax Division, U.S. Department of Justice.

Darrel J. Grinstead, Associate General Counsel, Department of Health and Human Services, Washington, DC. Government Member (HEW) 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 since 1990. Committee on Rulemaking.

Stephen L. Hammerman, Esquire, Vice Chairman of the Board and General Counsel, Merrill Lynch & Company, Inc., New York, NY. Appointed Public Member July 10, 1992. Committee on Rulemaking.

Michael D. Hawkins, Esquire, Daughton Hawkins Brockelman & Guinan (formerly with Bryan, Cave, McPheeters & McRoberts), 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).

Frederick Wells Hill, Esquire, Executive Director, Government Programs, Westinghouse Electric Corporation, Washington, DC. Appointed Public Member September 9, 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. Designated Liaison Representative October 20, 1992. Committee on Regulation.

Roger A. Hood, Assistant General Counsel, Federal Deposit Insurance Corporation, Washington, DC. Government Member since 1982. Committee on Governmental Processes; Special Committee on Financial Services Regulation.

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. Appointed Council Member July 31, 1992. Committee on Rulemaking.

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

Francis J. Ivancie, Commissioner, Federal Maritime Commission, Washington, DC. Government Member 1989-92. 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, Esquire, Member of the law firm of Wilmer, Cutler & Pickering, Washington, DC. Public Member since 1988. Special Committee on the Future of the Administrative Conference; Committee on Judicial Review (Chairman).

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

Frank Keating, General Counsel, Department of Housing and Urban Development, Washington, DC. Government Member since 1989. Special Committee on Financial Services Regulation; Committee on Governmental Processes.

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

Frederic Rogers Kellogg, Esquire, Attorney-at-Law, 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. Appointed Government Member December 7, 1992. Committee on Rulemaking.

Patricia W. Lattimore, Associate Director for Administration, Office of Personnel Management, Washington, DC. Government Member August 11-November 17, 1992. Committee on Governmental Processes.

Dennis J. Lehr, Esquire, Member of the law firm of Hogan & Hartson, Washington, DC. Special Counsel 1987-91. Public Member since 1991. Special Committee on Financial Services Regulation; 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.

Daniel R. Levinson, Chairman, Merit Systems Protection Board, Washington, DC. Government Member (OPM) 1984. Liaison Representative (MSPB) 1986. Government Member (MSPB) since 1987. 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. Liaison Representative (ABA NCALJ) since 1990. Committee on Judicial Review.

Raymond B. Ludwiszewski, Acting General Counsel, Environmental Protection Agency, Washington, DC. Government Member since 1991. Committee on Regulation.

Robert C. MacKichan, Jr., General Counsel, General Services Administration, Washington, DC. Liaison Representative (ACTION) 1985-87. Government Member 1988-1992. Special Committee on Government Ethics 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. Special Committee on Financial Services Regulation; Committee on Judicial Review.

Susan D. McCluskey, Chief Counsel, Federal Labor Relations Authority, Washington, DC. Designated Liaison Representative November 18, 1992. Committee on Adjudication.

Alan C. McMillan, Deputy Assistant Secretary, Occupational Safety & Health Administration, Department of Labor, Washington, DC. Government Member 1989-92. Committee on Regulation.

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

James C. Miller III, Ph.D. Distinguished Fellow, Citizens for a Sound Economy, Washington, DC. Council Member 1981-88 (Vice Chairman 1987-88). Public Member since 1988. Special Committee on the Future of the Administrative Conference, 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, Partner in 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. Special Committee on the Future of the Administrative Conference; Special Committee on Government Ethics Regulation; 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. Appointed as Government Member February 26, 1992. Committee on Administration, Special Committee on Government Ethics Regulation.

Betty Southard Murphy, Esquire, Partner in 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. Agency designated liaison status March 4, 1992; appointed Liaison Representative May 28, 1992. Committee on Judicial Review.

William R. Neale, Esquire, Partner in the law firm Krieg DeVault Alexander & Capehart, Indianapolis, IN. Appointed to the Council March 11, 1992. Committee on Regulation.

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

Constance Berry Newman, Director, Office of Personnel Management, Washington, DC. Government Member (CPSC) 1973-76. Public Member 1979-80. Council Member 1989-92. Committee on Administration.

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 Financial Services Regulation; Committee on Rulemaking.

Terrence O'Donnell, General Counsel, Department of Defense, Washington, DC. Government Member 1991-92. Committee on Adjudication.

Earl R. Ohman, Jr., General Counsel, Occupational Safety and Health Review Commission, Washington, DC. Government Member 1988-92. Committee on Judicial Review.

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. Committtee on Administration.

Max D. Paglin, Esquire, Washington, DC. Government Member (FCC) 1968-72, (AEC) 1972-74, (NRC) 1974-75. Consultant on: implementation of Conference 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.

Vernon Parker, General Counsel, Office of Personnel Management, Washington, DC. Government Member from January 28-June 15, 1992. 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.

William E. Persina, Solicitor, Federal Labor Relations Authority, Washington, DC. Liaison Representative 1988-92. Committee on Adjudication.

Robert L. Pettit, General Counsel, Federal Communications Commission, Washington, DC. Government Member 1989-92. Committee on Judicial Review (Vice Chairman).

Edward J. Philbin, Chairman, Interstate Commerce Commission, Washington, DC. Government Member 1990. 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.

Margaret Jane Porter, Chief Counsel, Food and Drug Administration, Department of Health and Human Services, Rockville, MD. Appointed Government Member April 28, 1992. Committee on Rulemaking.

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

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

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

Bruce Rabb, Esquire, Member of the law firm of Kramer, Levin, Nessen, Kamin & Frankel. Public Member 1982-86. Special Counsel 1986-88. Public Member 1988-92. Committee on Adjudication; Special Committee on Financial Services Regulation.

Jaime Ramon, General Counsel, Office of Personnel Managment, Washington, DC. Government Member 1990-92. Committee on Governmental Processes.

James R. Richards, Inspector General, Department of the Interior, Washington, DC. Government Member (DOE) 1984-86; (designated Inspector General since 1987). Committee on Governmental Processes; Special Committee on Government Ethics Regulation.

James F. Rill, Esquire, Partner in the law firm of Collier, Shannon, Rill & Scott, Washington, DC. Appointed Public Member July 6, 1992. Committee on Adjudication.

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

William R. Robie, Chief Immigration Judge, Executive Office for Immigration Review, Department of Justice, Falls Church, VA. Liaison Representative 1984-90. Government Member (designated AJ) 1990-92. Died October 18, 1992. Committee on Rulemaking (Vice Chairman); Model Rules Working Group.

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 to the Attorney General, Department of Justice, Washington, DC. Vice Chairman; served as Acting

Chairman from December 19, 1991-December 23, 1992. Council Member since 1989. 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.

Raymond Carter Sanders, Jr., Esquire, Senior Partner, Libby, Sanders, Nee & O'Reilly, Washington, DC. Council Member 1988-92. 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. Appointed Liaison Representative April 29, 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, Lewis, White & Clay, Detroit, MI. Public Member 1972-78. Council Member 1978-88. Senior Fellow since 1988. Committee on Judicial Review.

Abraham D. Sofaer, Esquire, Member of the law firm of Hughes Hubbard & Reed, Washington, DC. Consultant on: change-of-status applications to INS (Recommendation 71-5). Government Member (State) 1985-90. Public Member 1991-92. Committee on Governmental Processes.

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; Special Committee on Financial Services Regulation (Vice Chairman).

Stuart J. Stein, Esquire, Member of the law firm of Certilman Balin Adler & Hyman, East Meadow, 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. Appointed Government Member February 25, 1992. Committee on Governmental Processes.

Arthur Troilo III, General Counsel, Office of Personnel Management, Washington, DC. Appointed Government Member November 17, 1992. Committee on Administration.

Phillip N. Truluck, Executive Vice President, The Heritage Foundation, Washington, DC. Public Member since 1986. Special Committee on Government Ethics Regulation; Committee on Regulation.

Michael M. Uhlmann, Esquire, Member of the law firm 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. Appointed Council Member May 4, 1992. Committee on Governmental Processes.

Paul R. Verkuil, Esquire, President, American Automobile Association, Heathrow, FL. Formerly President, College of William and Mary, Williamsburg, VA. Consultant on: pre-enforcement 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.

John M. Walker, Jr., Judge, U.S. Court of Appeals for the Second Circuit, New York, NY. Special Counsel 1986-92. Special Committee on Financial Services Regulation; Committee on Adjudication.

Michael B. Wallace, Esquire, Member of the law firm of Phelps Dunbar, Jackson, MS. Public Member 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.

Richard A. Wegman, Esquire, Garvey, Schubert & Barer, Washington, DC. Public Member 1990-92. Committee on Regulation.

Edward L. Weidenfeld, Esquire, Member of the law firm of Weidenfeld & Rooney, Washington, DC. Council Member 1981-92. Committee on Regulation. Appointed as Senior Fellow June 18, 1992. Committee on Governmental Processes.

Jonathan A. Weiss, Esquire, Director, Legal Services for the Elderly Poor, 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. Special Committee on the Future of the Administrative Conference; Committee on Governmental Processes.

Henry N. Williams, General Counsel, Selective Service System, Washington, DC. Government Member (SSS) 1971-75. Liaison Representative since 1975. Committee on Adjudication.

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 since 1982. 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 since 1991. Committee on Judicial Review.

Richard S. Williamson, Esquire, Partner in 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 (DEd) 1986-88. Government Member since 1989. Special Committee on Financial Services Regulation; 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 since 1991. Committee on Regulation.

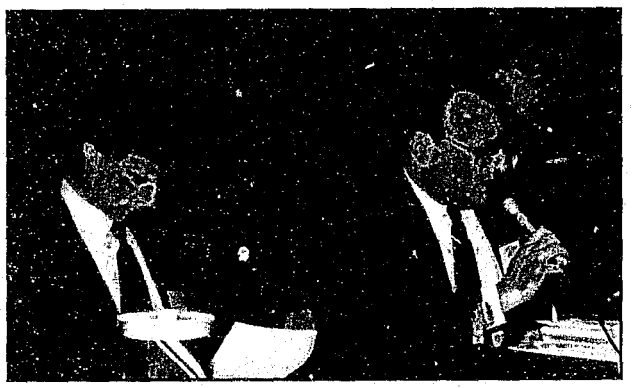
Susan K. Zagame, Acting General Counsel, Department of Health and Human Services, Washington, DC. Appointed Government Member December 3, 1992. Committee on Regulation.

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

RESEARCH CONSULTANTS

David Altschuler, Ph.D., Johns Hopkins University, Baltimore, MD. Consultant on: formula grant compliance procedures of the Office of Juvenile Justice and Delinquency Prevention (Recommendation 92-8) (with Dr. Bell and Professor Luneburg).

Robert A. Anthony, Professor of Law, George Mason University School of Law, Arlington, VA. (See biographical information under member listing.) Consultant on: agency policy statements (Recommendation 92-2).



Staff attorney Kevin L. Jessar (left) and Rule-making Committee chairman Ernest Gellhorn (right) ponder point on agency policy statements made by Professor Robert A. Anthony

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); enforcement procedures of banking agencies.

Michael Bell, Ph.D., Johns Hopkins University, Baltimore, MD. Consultant on: formula grant compliance procedures of the Office of Juvenile Justice and Delinquency Prevention (Recommendation 92-8) (with Dr. Altschuler and Professor Luneburg).

George A. Bermann, Professor of Law, Columbia University School of Law, New York, NY. Public member of the Administrative Conference (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.

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

Robert N. Davis, Professor of Law, University of Mississippi School of Law, University, MS. Consultant on: choice of forum in government contract 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.

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.

Daniel J. Gifford, Professor of Law, University of Minnesota Law School, Minneapolis, MN. Consultant on: remission and mitigation of forfeitures in the Justice Department (1969); federal administrative judiciary (Recommendation 92-7) (with Professors Koch, Pierce, and Verkuil).

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

Charles H. Koch, Jr., Professor of Law, Marshall-Wythe School of Law, College of William and Mary, Williamsburg, VA. Consultant on: Social Security Appeals Council (Recommendation 87-7), federal administrative judiciary (Recommendation 92-7) (with Professors Gifford, Pierce, and Verkuil).

Lewis Kornhauser, Professor of Law, New York University School of Law, New York, NY. Consultant on: de minimis settlements under Superfund (Recommendation 92-9) (with Professor Revesz).

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

Professor Lewis Kornhauser presenting results of the study on de minimis settlements under Superfund at the December plenary session.

Harold J. Krent, Assistant Professor of Law, University of Virginia Law School, Charlottesville, VA. Consultant on: Equal Access to Justice Act.

Paul Light, Associate Dean, Hubert H. Humphrey Institute, University of Minnesota, Minneapolis, MN. Consultant on: the role and operations of federal offices of inspector general.

William V. Luneburg, Professor of Law, University of Pittsburgh School of Law, Pittsburgh, PA. Consultant on: petitions for rulemaking (Recommendation 86-6); agency use of private attorneys (Recommendation 87-3); the federal employee grievance and personnel appeals process (Statement 15 - 1989); formula grant compliance procedures of the Office of Juvenile Justice and Delinquency Prevention (Recommendation 92-8) (with Dr. Altschuler and Dr. Bell).

Ira C. Lupu, Professor of Law, 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, 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).

Michael P. Malloy, Professor of Law, Fordham University, New York, NY. Consultant on: adjudication practices and procedures of the federal banking agencies (Recommendation 87-12); administration of the Securities Exchange Act of 1934 by the bank regulatory agencies (1991-92).

David A. Martin, Professor of Law, University of Virginia School of Law, Charlottesville, VA. Consultant on: asylum adjudication procedures (Recommendation 89-4); coordination of federal migrant programs (Recommendation 92-4) (with Professor Philip Martin).

Philip L. Martin, Professor of Agricultural Economics, University of California (Davis), Davis, CA. Consultant on: coordination of federal migrant programs (Recommendation 92-4) (with Professor David Martin).

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.

Thomas O. McGarity, Professor of Law, University of Texas School of Law, Austin, TX. Consultant on: multiparty 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); agency procedures for reviewing discretionary grant applications.

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, Assistant Professor of Law, University of Kentucky College of Law, Lexington, KY. Consultant on: industry self-regulation.

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.

Richard J. Pierce, Jr., Professor of Law, Columbia University School of Law, New York, NY. Consultant on: preemption of state regulation by federal agencies (Recommendation 84-5); use of Federal Rules of Evidence in agency adjudications (Recommendation 86-2); federal administrative judiciary (Recommendation 92-7) (with Professors Gifford, Koch, and Verkuil).

Richard L. Revesz, Professor of Law, New York University School of Law, New York, NY. Consultant on: nonacquiescence by federal agencies (1989); de minimis settlements under Superfund (Recommendation 92-9) (with Professor Kornhauser).

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

Roy A. Schotland, Professor of Law, Georgetown University Law Center, Washington, DC. Consultant on: the audit and inspection practices of banking agencies.

Peter H. Schuck, Professor of Law, Yale Law School, New Haven, CT. Consultant on: formulation of policy through exceptions process (Statement 10 - 1983); judicial remands of cases to administrative agencies (1990); judicial review of immigration cases (1991-92).

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

Sidney A. Shapiro, Professor of Law, University of Kansas School of Law, Lawrence, KS. Consultant on: hearing procedures for the resolution of scientific issues (Statement 11 - 1985); OSHA rulemaking (Recommendations 87-1 and 87-10); federal regulation of biotechnology (Recommendation 89-7); noise control regulation (Recommendation 92-6) (with Dr. Suter).

Alice H. Suter, Ph.D., Cincinnati, OH. Consultant on: noise control regulation (Recommendation 92-6) (with Professor Shapiro).

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

Paul R. Verkuil, President, American Automobile Association, Orlando, FL (formerly President, College of William and Mary). (See biographical information under member listing). Consultant on: federal administrative judiciary (Recommendation 92-7) (with Professors Gifford, Koch and Pierce).

Leland B. Ware, Assistant Professor of Law, School of Law, St. Louis University, St. Louis, MO. Consultant on: fair housing enforcement procedures (Recommendation 92-3).

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

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., Assistant Professor of Law, Wake Forest University School of Law, Winston-Salem, NC. Consultant on: right to counsel in agency investigations.

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*
Vice Chairman, Acting Chairman	Robert S. Ross, Jr.**
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	Patricia A. Hahn**
	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	Cari Votava**
	Katherine S. Zeigler
Systems Administrator	Gloria J. C. King
Secretarial Staff	Sharon D. Anderson
	Susan M. Mack
	Demetra K. Matsis**
	Lamenthia C. Silver
	Karyn A. Zaayenga
Paralegal Specialists	Eva Marie Loser**
	Kim Rubenstein**
Volunteer Legal Intern	Gerald S. Schatz
Receptionist	Theresa Charlene Young
Clerk Typist	B. Clarice Brown

* Service began December 23, 1992.
** Service ended in 1992.
*** Detailed to another federal agency.

Senior staff attorney Charles Pou reviewing points with Gary J. Edles, Conference General Counsel, at the June plenary session.

Staff members Dharmatma Kaur Keil, Renée Barnow, Nancy G. Miller, and Michael Bowers listening to discussion at the December plenary session.

Senior fellow Robert L. Strauss and public member Sally Katzen discussing an issue at the December plenary session as staff attorney Mary Candance Fowler listens.

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 has qualified. Vice Chairman Robert S. Ross, Jr. served as Acting Chairman until late December 1992 when President Bush named Brian C. Griffin as Chairman as a recess appointment. Mr. Griffin was sworn in on December 23, 1992.

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 brought to his attention 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.

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

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.

During 1992 President Bush appointed two new members to the Council, William R. Neale and Paul A. Vander Myde. At the end of 1992 there were seven 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 1992 the Conference had 94 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 include:

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 1992 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 law judge.

Cabinet departments include:

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 include:

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 1992 public members numbered 40. 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 35, 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. During 1992 one new liaison arrangement was established—U.S. Sentencing Commission. Although there are 27 organizations with liaison representation—the Judicial Conference of the U.S. has two—at the close of 1992 liaison representatives numbered 25. 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 International Trade
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
Legal Services Corporation
National Transportation Safety Board
Office of the Federal Register
Office of the Vice President
Pension Benefit Guaranty Corporation
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 1992, senior fellows numbered 27. (See Appendix A, page 37, 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 designates 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 1992 five special counsel appointments were in effect. (See page 37 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 it establishes special committees to concentrate on certain timely issues. Two such committees were created in 1991—the Special Committee on the Future of the Conference and the Special Committee on International Assistance in Administrative Law. The Special Committee on the Future of the Conference completed its work in 1992. Two special committees established in 1987—the Special Committee on Financial Services Regulation and the Special Committee on Government Ethics Regulation—were dissolved in 1992.

THE COMMITTEES

The 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 consideration by the Assembly. 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 177 recommendations. Nine recommendations were adopted during 1992; one proposal (by the Special Committee on Financial Services Regulation) was rejected. On occasion, the Assembly acts to state its views on a particular matter without making a formal recommendation on the subject. Fifteen of these "statements" have been adopted by the Conference since 1968. The recommendations the Conference adopted during 1992 are reprinted in full in Appendix E.

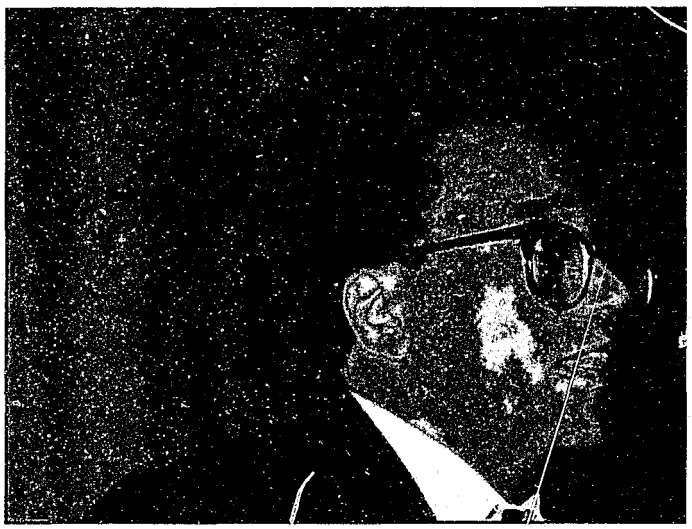
Official actions of the Conference, along with related research reports, are published in the annual series ADMINISTRATIVE CONFERENCE OF THE UNITED STATES: RECOMMENDATIONS AND REPORTS. Recommendations and statements (but not reports) are also published in the FEDERAL REGISTER, and those of continuing interest in the CODE OF FEDERAL REGULATIONS, Title 1, Parts 305 and 310.

Committee Activities

The COMMITTEE ON ADJUDICATION, chaired by Richard J. Leighton, completed two projects in 1992. The Conference's substantial study of the federal administrative judiciary, prepared by a team of consultants including AAA President Paul Verkuil; Professors Daniel Gifford, Charles Koch, and Richard Pierce; and Conference Research Director Jeffrey Lubbers, was considered by the committee during summer and fall 1992. This important project culminated in Recommendation 92-7, "The Federal Administrative Judiciary," which was adopted at the December plenary session, and proposes significant changes to the way administrative law judges are selected and

Consultants on the study of The Federal Administrative Judiciary Richard Pierce, Daniel Gifford, Paul Verkuil, Adjudication Committee chairman Richard Leighton, and Acting Chairman Robert S. Ross, Jr., reserach director Jeffrey S. Lubbers, and senior staff attorney Nancy G. Miller (from left) listening to consultant Charles Koch (far left) responding to a question.

evaluated. At the June plenary session the committee presented a recommendation relating to enforcement of the fair housing laws. This recommendation, 92-3, "Enforcement Procedures Under the Fair Housing Act," derived from a study done by Professor Leland Ware.



Professor Leland Ware addressing the June plenary on the results of his study of enforcement of fair housing laws.

The COMMITTEE ON ADMINISTRATION, chaired by Darrel J. Grinstead, completed one project leading to Conference action in 1992. In December, the committee presented a recommendation on the operation of the Office of Juvenile Justice and Delinquency Prevention's formula grant program. The recommendation adopted, 92-8, was based in large part on a report to the Conference by consultants Professor William Luneburg and Doctors David Altschuler and Michael Bell. The recommendation addressed issues of consultation and communication with states grant recipients, monitoring state compliance with statutory mandates, and staffing and training in the program.

In 1992, the COMMITTEE ON GOVERNMENTAL PROCESSES, chaired by Neil R. Eisner, examined a study on right-to-counsel issues in agency investigations written by Professor Ronald F. Wright of Wake Forest University School of Law. The recommendations on this subject developed by the committee are pending agency comments and are expected to be addressed by the Conference Assembly at its June 1993 Plenary session.

The COMMITTEE ON JUDICIAL REVIEW, chaired by Sally Katzen, completed work on one project resulting in Recommendation 92-5, "Streamlining Attorney's Fee Litigation Under the Equal Access to Justice Act." The recommendation proposes changes in the statute authorizing awards

of attorney's fees to certain parties who prevail over the federal government, with the goal of reducing wasteful litigation under the Act. The recommendation was based on a study by Assistant Professor Harold J. Krent.

The committee also began work on a study of the availability of judicial review of prompt corrective action decisions by federal banking agencies, which is being conducted by Professor Lawrence G. Baxter. The committee should complete its consideration of this project in 1993.

The COMMITTEE ON REGULATION, chaired by John Golden, submitted three proposals for consideration in 1992. Recommendation 92-4, "Coordination of Migrant and Seasonal Farmworker Service Programs," was the result of a study suggested by the National Commission on Migrant Education. The committee worked with consultants Professors David A. Martin and Philip Martin to formulate recommendations on improving interagency coordination and acquiring better data on the affected population.

In 1992, the committee completed its examination of EPA's implementation of the Noise Control Act of 1972. The Conference's study, undertaken at the request of EPA and conducted by consultants Professor Sidney A. Shapiro and Dr. Alice H. Suter, led to adoption of Recommendation 92-6, "Implementation of the Noise Control Act."

The committee's consideration of procedures for achieving settlements with de minimis parties in EPA's Superfund program resulted in Conference Recommendation 92-9, "De Minimis Settlements Under Superfund." This recommendation suggests steps that may help avoid substantial transaction costs for parties who are potentially responsible for a relatively small share of the cleanup costs at hazardous waste sites. The Conference's consultants on this topic were Professors Lewis A. Kornhauser and Richard L. Revesz.

Also on the committee's agenda is Professor Errol Meidinger's research on cooperation between federal and state governments in joint regulatory programs.

The COMMITTEE ON RULEMAKING, chaired by Ernest Gellhorn, worked on Recommendations 92-1 and 92-2, both of which were adopted at the June 1992 plenary session. Recommendation 92-1, "The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements," encourages agencies to use notice-and-comment procedures voluntarily in promulgating rules of procedure and practice except in situations in which the costs of such procedures will outweigh the benefits of having public input.

Recommendation 92-2, "Agency Policy Statements," seeks to ensure that policy statements are not treated as binding and that before an agency promulgates substantive policies that bind affected persons, it provide appropriate notice and opportunity for comment on such policies. In particular, this recommendation urges agencies not to issue statements of general applicability that are intended to impose binding substantive standards or obligations upon affected persons without using legislative rulemaking procedures (normally including notice and comment).

Currently the committee is working with Professor Jerry Mashaw of Yale University on the "ossification" of the rulemaking process. In 1992 he submitted the final version of the report, which addresses various factors affecting agency rulemaking, including internal agency management of the rulemaking process, executive and congressional oversight of agency rulemaking, and preenforcement judicial review of agency rules. A recommendation is expected for the June 1993 plenary.

In 1991 Chairman Marshall Breger established two special committees. During 1992 both completed their research. The Special Committee on International Assistance in Administrative Law will issue its report in 1993.

The SPECIAL COMMITTEE ON THE FUTURE OF THE ADMINISTRATIVE CONFERENCE, chaired by Lewis A. Engman, was created in 1991 to review Conference operations and make recommendations for improvements. The committee completed its evaluation in May 1992 and recommended changes in the conduct of the Conference's research program, the process of consideration of research reports and recommendations, implementation of the Conference's adopted recommendations, and the Conference's information exchange program.

The SPECIAL COMMITTEE ON INTERNATIONAL ASSISTANCE IN ADMINISTRATIVE LAW, chaired by Eldon H. Crowell, was established in 1991 to consider and propose Conference activities in expectation of enactment of then-pending legislation. On October 9, 1992, the President signed Pub. L. No. 102-403, which amends the Administrative Conference Act to clarify the Conference's authority to respond to requests from foreign governments for advice and assistance in administrative law and process. The new law expressly authorizes Conference international advisory activity. It provides that such 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. The committee expects to complete its report in 1993.

APPENDIX E - RECOMMENDATIONS

Conference recommendations appear in 1 CFR §305.

Recommendation 92-1
The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements
(Adopted June 18, 1992)

The Administrative Procedure Act, 5 U.S.C. §553, establishes the procedural requirements for notice-and-comment rulemaking. It requires that an agency generally publish notice and provide opportunity for public comment before adopting a rule. The section also provides for a number of specific exceptions. One of these exemptions, in subsection (b)(A), provides that the requirements for notice and comment do not apply to "rules of agency organization, procedure, or practice . . . ."[1]

The scope of APA exceptions has been described as "enshrouded in considerable smog,"[2] and the question of what is a procedural or practice rule has no clear answer.[3] The issue is in a state of flux.[4] Although courts have used a number of different tests to determine whether a rule was one of procedure or practice, none has been particularly satisfactory. Over the years the Conference has addressed the scope of most of the other exceptions to the APA rulemaking requirements.[5] Because the procedural rule exception is a subject of increasing controversy, it is appropriate for the Conference to fill this gap.

The Conference has long advocated the value of notice and comment in rulemaking,[6] and this recommendation encourages agencies to use such processes voluntarily in promulgating rules of procedure or practice. Notice and comment can provide the agency with valuable input from the public as well as furnish enhanced public acceptance of the rules. On the other hand, there can be costs to the agency in using notice-and-comment procedures, including the time and effort of agency personnel, the cost of Federal Register publication, and the additional delay in implementation that results from seeking public comments and responding to them. For significant procedural rule changes, the benefits seem likely to outweigh the costs; but this may not be the case for minor procedural amendments. Thus, unless the costs outweigh the benefits, we strongly encourage agencies voluntarily to use notice and comment even where an APA exemption applies.

The Conference believes, however, that the procedural and practice rule exemption can in appropriate circumstances serve a legitimate governmental purpose, and that Congress intended it to be available in such cases. Where such rules are truly procedural, rather than substantive in a procedural mask, the statutory exemption should be available. The Conference therefore recommends, as a guide to agencies in determining when a rule is procedural, that agencies should establish first that the rule relates to an agency's internal operations[7] or methods of interacting with the public and second that the rule has no substantive impact because it neither significantly affects conduct, activity or a substantive interest that is the subject of agency regulation, nor affects the standards for eligibility for government programs.[8] Only if the proposed rule meets both parts of this test, should it be considered as being within the exemption from notice-and-comment requirements as a rule of practice or procedure. Examples of rules that would be procedural under this standard include rules governing conduct of formal hearings or appeals, ex parte rules, and rules concerning the business hours of the agency. Examples of nonexempt rules include rules relating to the criteria for determining the severity of enforcement sanctions, levels of civil money penalties, or application requirements that serve to limit eligibility for a government benefit program.

In order to encourage agencies voluntarily to use notice and comment, the Conference also recommends that the Office of Management and Budget refrain from exercising its jurisdiction to review rules fitting within the definition of rules relating to an agency's procedure or practice when an agency voluntarily publishes them.

RECOMMENDATION

1. Federal agencies should exercise restraint in invoking the Administrative Procedure Act's statutory exceptions to the notice-and-comment rulemaking procedures. Thus, the Administrative Conference has consistently urged agencies voluntarily to use notice-and-comment procedures when issuing rules that fall within the terms of most of the exemptions under 5 U.S.C. §553.[9]

2. For rules falling within the "procedure or practice" exception in 5 U.S.C. §553(b)(A), agencies should use notice-and-comment procedures voluntarily except in situations in which the costs of such procedures will outweigh the benefits of having public input and information on the scope and impact of the rules, and of the enhanced public acceptance of the rules that would derive from public comment.

3. In determining whether a proposed rule falls within the statutory exception for rules of agency "procedure or practice," agencies should apply the following standard: A rule is within the terms of the exception when it both (a) relates solely to agency methods of internal operations or of interacting with regulated parties or the public, **and** (b) does not (i) significantly affect conduct, activity, or a substantive interest that is the subject of agency jurisdiction, or (ii) affect the standards for eligibility for a government program.[10]

4. To assist agencies in implementing this recommendation, the Office of Management and Budget should refrain from exercising jurisdiction under Executive Order 12,291 with respect to rules relating to an agency's procedure or practice that an agency voluntarily publishes for notice and comment.

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[1]The term procedural rule will be used herein to refer to rules of agency practice and procedure. Other exemptions from notice-and-comment rulemaking requirements cover interpretive rules, policy statements, and situations where good cause exists. See section 553(b). Section 553(a) completely exempts from notice-and-comment rulemaking rules involving militaryor foreign affairs, agency management or personnel, grants, loans, benefits, or contracts.

[2]*Noel v. Chapman*, 508 F.2d 1023, 1030 (2d Cir. 1975); *see also Community Nutrition Institute v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987).

[3]There has been less debate about what are rules of agency organization.

[4]*Air Transport Association v. Department of Transportation*, 900 F.2d 369 (D.C. Cir. 1990), *cert. granted*, 111 S.Ct. 669 (1991), *judgment vacated and remanded*, 111 S. Ct. 944 (1991), *opinion vacated and petition dismissed on mootness grounds*, 933 F.2d 1043 (D.C. Cir. 1991), has recently focused attention on the scope of the exemption.

[5]Recommendation 69-8, "Elimination of Certain Exemptions from the APA Rulemaking Requirements, 1 CFR §305.69-8; Recommendation 73-5, "Elimination of the 'Military or Foreign Affairs Function' Exemption From APA Rulemaking Requirements," 1 CFR §305.73-5; Recommendation 76-5, "Intrepretive Rules of General Applicability and Statements of General Policy," 1 CFR §305.76-5; Recommendation 83-2, "The 'Good Cause' Exemption from APA Rulemaking Requirements," 1 CFR §305.83-2.

[6]See, e.g., Recommendation 69-8, supra n.5.

[7]It is likely that some rules relating to agency internal operations will also fall within a category of rules exempt from all of section 553's requirements (including publication of a statement of basis and purpose and delayed effective date) as a "matter relating to agency management or personnel." 5 U.S.C. §553(a)(2).

[8]The term "program" is meant to be interpreted broadldy to include, among others, those involving benefits, contracts, licenses, permits, and loan guarantees. In this connection, it should be noted that many agencies, following Recommendation 69-8, have voluntarily waived the exemption from notice-and-comment rulemaking for matters relating loans, grants, benefits, or contracts.

[9]In some cases, the Conference has recommended that agencies generally use notice and comment, Recommendation 76-5, "Interpretive Rules of General Applicabilityn and Statements of General Policy," 1 CFR §305.76-5; Recommendation 83-2, "The 'Good Cause' Exemption from APA Rulemaking Requirements," 1 CFR §305.83-2. In the case of some other exemptions, the Conference has also recommended eliminating them altogether. Recommendation 69-8, "Elimination of Certain Exemption from the APA Rulemaking Requirements, 1 CFR §305.69-8; Recommendation 73-5, "Elimination of the 'Military or Foreign Affairs Function' Exemption From APA Rulemaking Requirements," 1 CFR §305.73-5.

[10]The term "program" is meant to be interpreted broadly to include, among others, those involving benefits, contracts, licenses, permits, and loan guarantees. See footnote 7, *supra*.

Recommendation 92-2
Agency Policy Statements
(Adopted June 18, 1992)

This recommendation addresses use of agency policy statements. Policy statements fall within the category of agency actions that are "rules" within the Administrative Procedure Act's definition because they constitute "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or describe law or policy," 5 U.S.C. §551(4). "Rules" include (a) legislative rules, which have been promulgated through use of legislative rulemaking procedures, usually including the notice-and-comment procedures of the Administrative Procedure Act, 5 U.S.C. §553, and (b) nonlegislative rules—that is, interpretive rules and policy statements—which fall within the above definition of "rules" but which are not required to be promulgated through use of legislative rulemaking procedures. Thus, policy statements include all substantive nonlegislative rules to the extent that they are not limited to interpreting existing law. They come with a variety of labels and include guidances, guidelines, manuals, staff instructions, opinion letters, press releases or other informal captions.

Policy statements that inform agency staff and the public regarding agency policy are beneficial to both. While they do not have the force of law (as do legislative rules) and therefore can be challenged within the agency, they nonetheless are important tools for guiding administration and enforcement of agency statutes and for advising the public of agency policy.

The Conference is concerned, however, about situations where agencies issue policy statements which they treat or which are reasonably regarded by the public as binding and dispositive of the issues they address.[1] The issuance of such binding pronouncements as policy statements does not offer the opportunity for public comment which is normally afforded during the notice-and-comment legislative rulemaking process for rules which have the force of law. Courts have frequently overruled agency reliance on policy statements as binding on affected persons.

Where the policy statement is treated by the agency as binding, it operates effectively as a legislative rule but without the notice-and-comment protection of §553. It may be difficult or impossible for affected persons to challenge the policy statement within the agency's own decisional process; they may be foreclosed from an opportunity to contend that the policy statement is unlawful or unwise, or that an alternative policy should be adopted. Of course, affected persons could undergo the application of the policy to them, exhaust administrative remedies and then seek judicial review of agency denials or enforcement actions, at which time they may find that the policy is given deference by the courts. The practical consequence is that this process may be costly and protracted, and that affected parties have neither the opportunity to participate in the process of policy development nor a realistic opportunity to challenge the policy when applied within the agency or on judicial review. The

public is therefore denied the opportunity to comment and the agency is denied the educative value of any facts and arguments the party may have tendered.

The Conference believes this outcome should be avoided, first by requiring that when an agency contemplates an announcement of substantive policy (other than through an adjudicative decision), it should decide whether to issue the policy as a legislative rule, in a form that binds affected persons, or as a nonbinding policy statement.[2] Second, to prevent policy statements from being treated as binding as a practical matter, the recommendation suggests that agencies establish informal and flexible procedures that allow an opportunity to challenge policy statements. Recognizing that each agency's process differs, the choice of which procedures to change in implementing this recommendation remains in the discretion of each agency. Likewise, actions taken during review of the policy statement would not necessarily be affected by such reconsideration.

RECOMMENDATION

The following recommendations applicable to policy statements are intended to ensure that, before an agency promulgates substantive policies which bind[3] affected persons, it provides appropriate notice and opportunity for comment on such policies, and makes sure that policy statements are not treated as binding.

I. Legislative Rulemaking for Binding Policies

A. Agencies should not issue statements of general applicability that are intended to impose binding substantive standards or obligations upon affected persons without using legislative rulemaking procedures (normally including notice-and-comment). Specifically, agencies should not attempt to bind affected persons through policy statements.

B. When an agency publishes a legislative rule (e.g., in the Federal Register and in official agency publications), the preamble to the rule should state that it is a legislative rule intended to bind affected persons. The preamble should also cite the specific statutory authority for issuing the rule in binding form as well as the steps that it has taken to comply with procedural requirements.

II. Policy Statements

A. *Notice of Nonbinding Nature.* Policy statements of general applicability should make clear that they are not binding. Persons affected by policy statements should be advised that such policy statements may be challenged in the manner described in part B below. Agencies should also ensure, to the extent practicable, that the nonbinding nature of policy statements is communicated to all persons who apply them or advise on the basis of them, including agency staff, counsel, administrative law judges, and relevant state officials.

B. *Procedures for Challenges to Policy Statements.* Agencies that issue policy statements should examine and, where necessary, change their formal and informal procedures, where they already exist, to allow as an

additional subject requests for modification or reconsideration of such statements. Agencies should also consider new procedures separate from the context in which the policy statement is actually applied. The procedures should not merely consist of an opportunity to challenge the applicability of the document or to request waivers or exemption from it; rather, affected persons should be afforded a fair opportunity to challenge the legality or wisdom of the document and to suggest alternative choices in an agency forum that assures adequate consideration by responsible agency officials. The opportunity should take place at or before the time the policy statement is applied to affected persons unless it is inappropriate or impracticable to do so. Agencies should not allow prior publication of the statement to foreclose full consideration of the positions being advanced. When a policy statement is subject to repeated challenges, agencies should consider instituting legislative rulemaking proceedings on the policy.

III. Instructions to Agency Staff

This recommendation does not preclude an agency from making a policy statement which is authoritative for staff officials in the interest of administrative uniformity or policy coherence. Indeed, agencies are encouraged to provide guidance to staff in the form of manuals and other management directives as a means to regularize employee action that directly affects the public. However, they should advise staff that while instructive to them, such policy guidance does not constitute a standard where noncompliance may form an independent basis for action in matters that determine the rights and obligations of any person outside the agency. Further, agencies are encouraged to obtain public comment on such guidance. Finally, in any case in which staff officials' adherence to such directives may affect a member of the public, care should be taken to observe the requirements of 5 U.S.C. §552(a) which imposes a publication requirement independent of any obligation to employ notice-and-comment procedures.

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[1]There are many facets that must be assessed in determining whether a policy statement is operationally a rule that binds affected persons. In general, we apply the concept here to agency statements that are usually issued in permanent form and that are relied upon by an agency and its staff to decide policy whose basis, legality, and soundness cannot be challenged within the agency. Whether a statement is a matter of policy or interpretation, is issued in a permanent form, and is in fact binding (or to what extent it is binding) are often difficult questions that can only be decided in context.

[2]The Conference has already urged agencies to use notice-and-comment procedures, where possible, before promulgating an interpretive rule of general applicability or statement of general policy that is ligely to have substantial impact on the public. Agencies were urged to use post-promulgation notice-and-comment procedure if it is not practicable to accept and consider comments before the rule is promulgated. See Recommendation 76-5, "Interpretive Rules of General Applicability andf Statements of General Policy."

[3]As the term is used here, an agency rule is "binding" when the agency treats it as a standard where noncompliance may form an independent basis for action in matters that determine the rights and obligations of any person outside the agency. This is true whether or not the rule was promulgated in accordance with §533. A document that was not issued pursuant to §533, and therefore cannot be binding *legally*, may nevertheless be binding *as a practical matter* if the agency treats it as dispositive of the issue it addresses. This recommendation is concerned only with substantive, as opposed to procedural, rules. See Recommendation 92-1, "The Procedural and Practice Rule Exemption From the APA Notice-and-Comment Rulemaking requirements."

Recommendation 92-3
Enforcement Procedures Under the Fair Housing Act
(Adopted June 18, 1992)

Background

The 1968 Fair Housing Act outlaws various types of discrimination in the sale or rental of residential housing. It prohibits discrimination on the basis of race, color, religion, sex, and national origin, and covers sale and rental of residential housing, refusal to deal, and a number of related actions. In 1988, Congress amended the Fair Housing Act, by altering the enforcement provisions for violations of the antidiscrimination provisions, while at the same time extending the Act's coverage to discrimination against the handicapped and families with children.

The 1968 Act contained limited enforcement provisions, under which the Department of Housing and Urban Development (HUD) had a circumscribed role. The Act provided that persons aggrieved by discrimination could file (within 180 days) a complaint with the Secretary of HUD, who was obligated to conduct an investigation and use informal methods (conferences, conciliation and persuasion) to eliminate any discriminatory practices. If a state or local agency provided rights and remedies that were substantially equivalent to those under the federal statute,[1] the Secretary was required to refer the case to that state or local agency.

If neither agency was able to secure voluntary compliance, the aggrieved party was permitted to file a civil action in a United States District Court, unless state or local forums provided substantially equivalent rights and remedies. In such cases, the state or local court had to be used. The Act also provided for a private right of action in U.S. District Court. Remedies were limited to injunctive relief, actual damages, and punitive damages not in excess of $1,000. The 1968 Act also authorized the Department of Justice to file suit in cases involving "pattern or practice" or issues of "general public importance." Injunctive relief was available in such cases.

These remedies were considered by many to be inadequate, both because of the limited judicial remedies and the lack of an effective administrative enforcement process. In 1988, Congress amended the Act's enforcement provisions, while at the same time expanding the Act's coverage.

The 1988 amendments created two additional categories of people protected from discrimination under the Act. Discrimination with respect to handicapped persons is now prohibited, and is defined to include refusal to permit certain "reasonable modifications" of existing premises at the handicapped person's expense, and refusal to make certain "reasonable accommodations" for access. Discrimination against families with children is also prohibited, although there is an exception for certain "housing for older persons."

The amended enforcement provisions furnished significant new remedies. The Act now provides an administrative enforcement procedure, which requires HUD to investigate filed complaints within 100 days. The statute of

limitations has been doubled to a year. During the investigation period, HUD is to undertake conciliation efforts. If those are not successful, and HUD finds "reasonable cause" to believe a violation has occurred, it must issue a formal charge of discrimination. Upon issuance of a formal charge, the complainant and respondent each have 20 days to elect to have the claim adjudicated in court. If neither party so elects, the case is heard in an APA hearing before a HUD administrative law judge, with evidence presented under the Federal Rules of Evidence. The parties to the hearing are HUD (reprensented by its Office of General Counsel) and the defendant, with the aggrieved party permitted to intervene. The ALJ has the authority to award compensatory damages and injunctive relief, and to impose civil penalties against a defendant of up to $10,000 for the first offense, $25,000 if there has been a prior violation within the previous 5 years, and $50,000 if there have been two or more violations within the previous 7 years. ALJ decisions are reviewable by the Secretary,[2] and appealable to the U.S. Courts of Appeals.

If either party elects to "remove" the case to court, the case is litigated by the Department of Justice, and the complainant may intervene. As in the administrative forum, injunctive relief and compensatory damages are available, but instead of civil money penalties, punitive damages may be awarded. A jury trial is also available.

The private right of action remains, with an extended statute of limitations, and removal of the $1000 cap on punitive damages. (Injunctive relief and compensatory damages are also available, but civil penalties are not.) There is no requirement that a party exhaust its administrative remedies before filing suit in court, but if administrative proceedings are pending, a private suit may not be filed. The Department of Justice's authority to file suit in "pattern and practice" cases remains the same, except that available relief has been expanded to include civil penalties.

As under the old statute, state and local remedies are to be used to the extent that they are "substantially equivalent" to those provided for in the Act. State and local agencies must be certified by HUD as having equivalent procedures before cases must be referred to them. Agencies that had been certified prior to 1988 were grandfathered in for 40 months with respect to handling discrimination complaints covered by the prior Act. The 40-month period expired in January 1992, but was extended until September 1992. During this "grandfathering" period, state agencies could process housing discrimination complaints involving race, color, sex, religion, and national origin, even though their procedures were not substantially equivalent to the Act's amended provisions. However, until they have been specifically certified to do so, they may not handle complaints involving familial status or the handicapped.

Discussion

Implementation of the new enforcement provisions of the Act is in an early stage. HUD appears to be taking its responsibilities seriously. Some portions of the program seem to be working well, while in some others, emerging trends may be cause for concern.

The administrative hearing portion of the enforcement program appears to be functioning smoothly. To the extent that parties have elected to stay in the administrative adjudication process, their cases have been processed expeditiously. However, in more than half the cases, one of the parties has chosen to "remove" the case to court, and most of these court cases are still pending.

HUD has indicated that it is conducting a study on why so many cases are "removed" to court. The Conference applauds that endeavor, and suggests that such a study be an ongoing effort. HUD should also undertake an education program to advise potential complainants and respondents of the practical considerations that relate to the decision on which process to use. Such explanations should address the potential remedies available in each option, as well as the likely time periods that each will require for resolving the dispute.

In virtually all other civil rights enforcement processes, an existing administrative remedy must be used. In fact, in most administrative processes, parties do not have the choice between using an existing administrative process or going to court. Thus, the Fair Housing Act's provision permitting either party the choice of going through the administrative process or to court is an unusual one, offering the potential for quicker hearings in the administrative forum and larger (punitive) damages in judicial forums.

The Fair Housing Act amendments' system arose out of a political compromise resulting from, among other things, concern about the constitutionality of eliminating a party's opportunity for a jury trial in the context of fair housing rights enforcement. The existence of a right to a jury trial in this situation is a subject of some debate, but in light of this debate, as well as the recent nature of the political compromise that permitted enactment of the Fair Housing Act amendments, the Conference does not at this time recommend eliminating the option of a district court remedy. The Conference is reluctant to strongly encourage parties to use the administrative process rather than the judicial route until it has more information as to why parties select one over the other, and more data on alleged significant differences in the relief granted in each.

Under current law, complainants are not automatically parties to proceedings brought by HUD (at the administrative level) or the Department of Justice (in court) as a result of their complaints. Although procedures for intervention exist, concerns have been raised that, in some cases, the interests of complainants and the government may diverge at points in the litigation where intervention as of right is no longer available. For example, the Department of Justice may not wish to appeal a determination with which the complainant is unsatisfied. If the complainant is not already a party to the litigation, his or her appeal rights may be lost. Providing that a complainant is automatically a party to any case based on his or her complaint would alleviate this problem. Moreover, HUD should notify complainants of their right to be represented by their own counsel (separate from counsel from the government), not only at the beginning of the litigation process, but at subsequent stages where the interests of the government and of the individual complainant may diverge on a significant or dispositive issue (e.g., on the question whether to appeal an adverse decision).

The Act requires that HUD undertake conciliation efforts in cases in which complaints are filed. Conciliation efforts are made by the HUD investigator assigned to the complaint. It appears that close to 25 percent of the cases are conciliated successfully. Conciliation (and other opportunities to use alternative means of dispute resolution) should continue to be encouraged. HUD should study whether using the investigator as conciliator has been advantageous due to the investigator being knowledgeable about the case and the program, or whether parties may tend to perceive some bias because of the investigator's initial involvement in determining the objective merits of the parties' positions. Proper training in conciliation and mediation would be essential for the investigative staff if they are to continue to have a role in this part of the dispute resolution process.

A major area where HUD has not been successful in meeting its responsibility under the Act is its inability to complete investigations and determine whether or not to file charges within the 100 days allowed by statute. In fact, almost 75 percent of the Fair Housing Act complaints filed in 1990 were not processed within the 100-day statutory deadline. There are several possible reasons for this. There has been a significant increase in the number of complaints filed since the Act's amendment. Much of the burden of this increase falls on HUD, because state and local agencies have not been certified for the cases under the expanded coverage.[3] Moreover, HUD has used a fairly complicated internal review system with respect to making "cause" determinations, which might be simplified, now that its personnel have had some experience. HUD has been taking steps to ensure that complaints are processed in a timely fashion, including delegating some decisional authority to regional personnel. Such efforts are to be encouraged, so long as care is taken to ensure adequate training.

As described above, state and local agencies that provide rights and procedures substantially equivalent to those available under federal law may be certified, in which case complaints must be processed by such agencies rather than by HUD. The automatic grandfathering provisions in the 1988 Act have expired (although they have been extended to the extent permitted by the Act), and many state agencies have not been certified. There are concerns from both ends of the spectrum: concern that HUD will be overlenient in determining that the processes of state and local agencies are substantially equivalent, and concern that HUD will not act expeditiously enough in certifying those that do have equivalent processes.

As a result of the enlarged coverage of the Fair Housing Act, about one-half of the complaints over the last 2 years have involved allegations of discrimination on the basis of familial status. There also have been a substantial number of complaints involving alleged discrimination against the handicapped. Thus, the earlier concentration on discrimination cases arising under the old Act has necessarily been diluted to some degree. HUD should take care to ensure that the importance of attacking all types of discrimination within its purview continues to be recognized, notwithstanding resource limitations.

RECOMMENDATION

1. Congress should amend the Fair Housing Act to provide that each aggrieved person on whose behalf a complaint has been filed shall automatically be deemed a party to a lawsuit or administrative proceeding that results from such complaint.

2. The Department of Housing and Urban Development (HUD) should notify each complainant of his or her option to select private counsel (separate from counsel from the government), at the time a reasonable cause finding is made, and at future points where action by government counsel is potentially adversely dispositive of that complainant's remedies. This notice should explain the potential implications to the complainant of exercising that option.

3. HUD should continue to study why parties in cases under the Fair Housing Act are opting in a large portion of cases to use the judicial process, rather than the administrative adjudication process. The results of such studies should be shared with the Administrative Conference, the Congress and the public.

4. HUD should undertake an educational program to advise potential complainants and respondents of the practical considerations that bear upon a decision to choose the administrative process or the judicial process in Fair Housing Act cases, including an explanation of the potential remedies and time periods for resolution of the dispute.

5. HUD should increase its efforts to process complaints within the 100-day statutory period. Among the alternatives it should consider are delegating increased authority to regional offices, with concomitant additional training and appropriate headquarters oversight.

6. In deciding whether to certify or maintain certifications of state and local agencies, HUD should examine closely whether such agencies offer substantially equivalent rights and procedures, and move as rapidly as possible to certify those that do.

7. HUD should encourage the use of alternative dispute resolution in all stages of Fair Housing Act cases. It should particularly monitor the conciliation process, to ensure that it is perceived as working fairly. It should continue to offer training in conciliation and mediation skills.

8. HUD should not allow efforts directed towards the newly covered categories of discrimination to diminish the recognized importance of complaints falling under the original categories.

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[1]Among the provisions in the Act were subpoena authority and authority to submit interrogatories to respondents.

[2]HUD regulations provide that the Secretary will review only in extraordinary cases.

[3]It may also be that, given the financial pressures facing states, they will not take the necessary actions that would allow HUD to certify them.

Recommendation 92-4
Coordination of Migrant and Seasonal Farmworker Service Programs
(Adopted June 19, 1992)

Since the 1960s, the federal government has established numerous service programs to help meet the needs of migrant farmworkers. From the early days, migrants have been considered a uniquely federal responsibility, primarily because of their interstate movement, which makes it hard for the workers and their families to qualify for local assistance and disrupts other services like schooling for the children. As these programs have evolved, many have come to serve nonmigrant seasonal farmworkers as well.

The programs to meet health, education, housing, job training, and other needs of migrant and seasonal farmworkers (MSFWs) have developed separately. There are approximately 10 MSFW-specific service programs, and farm workers also draw upon the asistance of numerous other general programs such as food stamps or Medicaid. The four largest federal programs are Migrant Education, administered by the Department of Education; Migrant Health and Migrant Head Start, both administered by the Department of Health and Human Services; and the Department of Labor's special job training programs for MSFWs under Section 402 of the Job Training Partnership Act.

Each program has its own definition of migrant and/or seasonal farmworker, as well as other eligibility standards. The result is a potential for overlap of some services and gaps in others, and there is no overarching provision for effective coordination among the programs. Various efforts have been undertaken at the national level to improve coordination, but with mixed success to date. These include an Interagency Committee on Migrants, a staff-level group that meets quarterly, largely for information-sharing purposes; an Interagency Coordinating Council, established informally as a forum for policy-level decisionmakers involved in the various programs, but now inactive; and a Migrant Inter-Association Coordinating Committee, involving nonprofit grantees and other organizations representing direct service providers.

In addition, MSFWs often qualify for other services provided by state and local governments or funded through private initiative, each governed by its own particular definitions or eligibility standards. These services are especially important in areas where some or all of the major federal programs are not present. Effective local service providers therefore have to be adroit in locating those available services, from whatever source, that can best meet the needs of their clientele. Because of the great variety in locally available services of this kind, much of the task of coordination among MSFW service programs necessarily takes place at the local and state level. Many states are finding ways to encourage this process by the creation of a governor's committee or task force, involving service providers, growers, representative government officials, farmworkers, and others.

The federal government should also take steps to improve coordination of services. For example, the intake procedures for each service program (now typically undertaken separately by each of the agencies, despite considerable duplication) should be streamlined. To effectuate such efforts, and to provide better interagency consultations before program changes are introduced, the President should establish by executive order a policy-level Interagency Coordinating Council on MSFW programs. This Council is not intended to replace, and indeed should promote, existing coordination at the program staff, state, and service delivery level.

To facilitate interagency coordination, whether or not such a Council is created, a reliable system for gathering data on the nation's population of MSFWs is needed. Although each agency has its own mechanism for generating program statistics and estimates of the target population, these vary widely in method and scope, and each suffers from specific inadequacies. They produce widely varying pictures of the nation's population of MSFWs, to the continuing frustration of legislators, service providers, researchers, and others. Agricultural labor data have always been left out of the Department of Labor's regular employment data system, and no other adequate permanent data source now fills the gap. The recommendation provides some guidance on the goals of such an information-gathering effort.

RECOMMENDATION

I. Coordination at the National Level

An Interagency Coordinating Council on migrant and seasonal farmworker (MSFW) programs should be established to strengthen national coordination of MSFW service programs. The Council would be charged, inter alia, with identifying specific coordination tasks to be accomplished, in most cases under the primary responsibility of a designated lead agency.

A. To ensure an enduring structure and a clear mandate, the President should issue an executive order creating the Council, specifying the policy-level officials from appropriate agencies who would be permanent members and designating a chair. The order should also designate an agency that would initially have primary responsibility for staffing the Council's meetings and other functions. The Council should be specifically charged to coordinate and review MSFW service programs, giving particular attention to gaps in services and unjustified overlap. It should encourage public participation through public meetings, creation of an advisory committee, or other means.

B. The executive order should provide that the Council, in cooperation with the Office of Management and Budget, review proposals for significant changes in any agency's MSFW service program (including proposed legislation, regulations, and grantee performance standards). OMB should consolidate or coordinate its own oversight of all federal MSFW service programs.

C. The executive order should assign to the Council the initial responsibility to develop, through delegations to the appropriate agencies, a reliable and comprehensive MSFW population census system, independent of any of the specific programs, along the lines described in part II. Other specific

coordination tasks that the Council might wish to take up include development of consolidated or streamlined intake processing for MSFW programs, provision of better linkages among existing MSFW information clearinghouses, and encouragement of cooperation among direct service providers.

D. The Council should identify and assign priorities to the coordination tasks to be accomplished, with a strategy and timetable for their achievement. In most instances, it should assign lead responsibility for each specific coordination task to a designated agency. That agency's coordination efforts with other agencies may include suggesting regulations or other implementation measures.

E. The Council should study the differing eligibility standards of MSFW programs and identify, if appropriate, where consistency could be achieved without substantial impact on the beneficiaries of those programs.

F. The Council should also study and make recommendations on the strengthening of state and local coordination of MSFW programs.

II. Information Gathering on Migrant and Seasonal Farmworkers

A. To improve coordination of and service delivery in MSFW programs, the executive order should:

(1) Authorize the Council to develop an integrated, cost-effective system for gathering data on the number, characteristics, and distribution of MSFWs and their dependents;

(2) Authorize the Council to designate an appropriate agency to have responsibility for collecting the data, with the cooperation of federal agencies with MSFW service programs;

(3) Direct appropriate federal agencies with expertise in gathering these kinds of data, such as the Bureau of the Census, the Bureau of Labor Statistics, the National Center for Education Statistics, or the National Agricultural Statistics Service, to cooperate with the Council's effort; and

(4) Provide opportunities for submission of data and information from the public.

B. This data system should ensure that the information gathered on MSFWs and their dependents sufficiently describes workers employed in a broad spectrum of U.S. agriculture and related industry. This means that the data should include and distinguish among workers employed, for example, in crop and livestock production, the packing and processing of farm products, and fisheries. Data should be collected on workers and their dependents, including such factors as recency and frequency of migration, farm and nonfarm earnings and periods of employment, and health, education, and housing characteristics. These comprehensive data should be collected in a form designed to be useful to service programs with differing definitions of eligible workers and their dependents.

C. This data system should be designed to help the Council identify general trends—including changes in the total number of MSFWs and their dependents and employment patterns—and opportunities for coordination among MSFW programs. To help achieve this goal, the Council should consider whether there are areas in which a consensus on a set of common characteristics of MSFWs should be developed for statistical purposes.

Recommendation 92-5
Streamlining Attorney's Fee Litigation Under the Equal Access to Justice Act
(Adopted June 19, 1992)

Congress first waived the government's immunity from attorney's fee awards in the Equal Access to Justice Act (EAJA), 5 U.S.C. §504, 28 U.S.C. §2412(d), in 1980 and reenacted the Act in 1985. The EAJA authorizes certain private parties that prevail in nontort civil litigation against the United States in both courts and agencies to recover their fees and expenses. No recovery is allowed, however, if the government demonstrates that its position was substantially justified, which has been construed to require the government to show that its position had a reasonable basis in both law and fact. The Act precludes fee awards to parties that exceed a specified net worth or, in the case of businesses and organizations, number of employees. It also sets a maximum hourly rate for attorney's fees of $75 per hour. The rate can be raised if the court "determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee"; in agency proceedings, the agency must make such a determination through rulemaking. With cost-of-living increases, attorneys can, at present, hope to recover a little over $100 per hour under the EAJA for most court litigation, though they remain limited to $75 per hour for most litigation before agencies.

Congress sought to accomplish two interconnected goals in the Act: to provide an incentive for private parties to contest government overreaching and to deter government wrongdoing. Congress feared that parties with limited resources would not be able to defend vigorously against government enforcement actions or challenge opprobrious regulation. One-way fee shifting under the Act was intended to help rectify the imbalance in resources. Because fee awards must be paid out of the offending agency's budget, Congress hoped that EAJA litigation would also spur agencies to act more prudently, particularly when determining the rights of parties of modest means.

Congress originally estimated that the EAJA would cost the government $100 million a year. In recent years, approximately 2,000 EAJA applications have been resolved each year, of which the vast majority involve social security disability or similar individual benefits disputes. The total payout of fees in these cases has been only $5 to $7 million per year.

Reducing Litigation and Encouraging Settlement

Although the EAJA may not have been used as often as predicted, it has nevertheless generated a significant amount of contentious litigation. Relatively few EAJA applications appear to be settled, and the empirical evidence available indicates that fee litigation often results in more complicated proceedings than are merited. Ambiguous provisions in the Act—such as the substantial justification standard and the provision permitting enhance-

ments to the fee cap—foster additional litigation and minimize the potential for settlement of fee disputes. The Administrative Conference believes that amendments to the EAJA would produce significant savings in litigation costs.

To reduce litigation over the proper amount of fees awardable under the EAJA, the Conference recommends several technical modifications to the Act. First, Congress should strike the provision allowing enhancement of fees when "a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." The enhancement provision breeds uncertainty, costs money to litigate, and makes settlement more difficult to obtain. Second, Congress should amend 28 U.S.C. §2412(d)(2) to specify how courts should calculate cost-of-living increases. Little is gained by litigating over issues such as which price index or subcategory of an index to use in these calculations. Third, Congress should make clear that fees are to be calculated at the adjusted rate applicable on the date the judge or adjudicator issues an order granting the EAJA application. Currently, courts are split as to when the cost-of-living increase is applicable—for instance, whether it should be calculated as of the date the work is performed, or as of some later date. Choosing the date when the application is granted creates a bright-line rule that should simplify the calculation and compensate a private party to a limited extent for the delay in payment, *e.g.*, payment in 1992 for work performed in 1986. Fourth, because the Conference recommends eliminating the enhancement provision and including an offer-of-judgment provision (described below), both of which should tend to reduce the fees payable by the government, it also recommends raising the fee cap to approximate more closely the prevailing market rate for attorneys, to ensure that the level of compensation under the Act remains adequate to serve its purposes.

In addition to these relatively technical modifications to the Act, the Administrative Conference recommends that Congress enact an offer-of-judgment provision to help encourage settlements of fee disputes arising under the EAJA. Upon receiving a private party's fee application, the government could make an offer of judgment as to the fee award. If the private party rejects that offer and ultimately recovers no more than the offer, it could not recover any fees or expenses incurred for services rendered after the offer was rejected. The offer-of-judgment device should encourage settlement, thereby saving both parties the expense of litigating fee disputes; while the government party gains leverage by extending an offer of judgment, the private party benefits from the opportunity to obtain prompt payment of fees.

This offer of judgment recommendation and the four technical recommendations that precede it involve careful balancing of factors that may either increase or reduce the incentives for attorneys to accept EAJA cases. The Conference presents them as a single package, rather than separate proposals, and emphasizes the interrelationship among the recommendations.

The Conference also recommends that Congress act to resolve problems involving implementation of the EAJA's requirement that parties seeking fees file applications within 30 days after final judgment (or final disposition in agency proceedings). Thirty days does not always provide adequate time for

prevailing parties to prepare the necessary materials, and the jurisdictional nature of the requirement forecloses the option of a time extension. Extending the filing deadline to 60 days would reduce the pressure on fee applicants without undue prejudice to the government. More importantly, the Supreme Court's recent decisions in *Melkonyan v. Sullivan*, 111 S. Ct. 2157 (1991), and *Sullivan v. Finkelstein*, 110 S. Ct. 2658 (1990), have spawned significant litigation about the timeliness of EAJA applications when the federal courts remand cases to agencies. Currently, some district court remands to agencies are considered final judgments, thus triggering the 30-day filing limit in the EAJA, even though claimants do not yet know whether they have "prevailed" in the underlying action. The uncertainty created by these cases could be avoided by making clear in the statute that the filing deadline is not triggered in a proceeding on remand until the party has prevailed in the remanded proceeding. Alternatively, Congress could resolve these problems by deleting the 30-day requirement. Most other attorney's fee statutes do not include any such deadline, and attorneys waiting to be paid for their services will have no incentive to delay filing.

Congress should also encourage private parties litigating against the United States to inform the court or administrative adjudicator before judgment if they intend to apply for EAJA fees should they prevail. This would permit such decisionmakers, in appropriate cases, to make a determination as to the substantial justification of the government's position at the same time they resolve the merits. That simultaneous finding may obviate the need for more extensive briefs at a later time.

Streamlining Fee Disputes in Individual Benefit Cases

Individual benefit claims brought directly under 42 U.S.C. §405(g) or under a provision cross-referencing 42 U.S.C. §405(g), which include social security disability, SSI, Medicare and similar claims, raise some unique issues deserving special consideration. Currently, the substantial justification issue is litigated in a high percentage of all EAJA disputes arising out of such benefit cases; from July 1989 to June 1990, the government prevailed in less than 15% of these disputes. The average EAJA award in such cases is less than $3,500. In light of these facts, the Conference concludes that the substantial justification standard should be eliminated for benefit cases involving individual claimants (but not for class actions). Although automatic fee shifting in these cases would increase the government's exposure to EAJA awards, that increase would be counterbalanced to some extent by the elimination of considerable governmental expense in litigating the substantial justification issue.

More importantly, elimination of the substantial justification standard should enable benefit claimants to find representation. Currently, parties seeking to press small disability claims and most SSI claims may have difficulty retaining counsel either through hourly rates or through a contingency fee arrangement; eliminating the substantial justification standard should help ensure the availability of counsel in these cases by making certain that a

reasonable fee will be available for any successful claim. In addition, in cases—primarily disability cases—in which claimants can obtain counsel through contingency fee arrangements (restricted, in social security cases, to a reasonable fee not to exceed 25% of back benefits, 42 U.S.C. §406(b)), their counsel currently have little incentive to apply for fees under the EAJA. If counsel have a contingency fee arrangement and obtain an EAJA fee award, they must return the lesser award to the claimant. Pub. L. No. 96-481, §206, as amended by Pub. L. No. 99-80, §3, 99 Stat. 186 (August 5, 1985). Not surprisingly, many successful benefits claimants do not apply for EAJA fees (fewer than 40 percent did so from July 1989 to June 1990), even though private parties' success rate in EAJA litigation exceeds 80 percent.

Extending the EAJA's Coverage

Finally, the Conference recommends that Congress consider extending the Act's coverage, on a category-by-category basis, to particular agency and court proceedings that have the same characteristics as those adversary proceedings now covered by the Act. The Act covers only "adversarial adjudications" in agencies, which are defined as "adjudications under section 554 of [title 5]." The Supreme Court in *Ardestani v. INS*, 112 S. Ct. 515 (1991), construed that provision to exclude agency proceedings—such as deportation cases—which have virtually the identical attributes as proceedings under §554 but are not technically covered by that provision. Similarly, it is unclear whether the EAJA covers all litigation against the United States in Article I courts, even though such proceedings are often directly analogous to those covered by the Act in Article III courts. Congress has dealt explicitly with some of these courts; for example, the EAJA was amended in 1985 to include the United States Claims Court, and a separate statute, with somewhat different standards than the EAJA, provides for fee awards in Tax Court proceedings. 26 U.S.C. §7431. But other Article I bodies remain to be considered. The Court of Veterans Appeals, for example, recently decided that it does not have authority to award attorney's fees under the Act. *Jones v. Derwinski*, No. 90-58 (March 13, 1992).

RECOMMENDATION

1. Congress should amend the Equal Access to Justice Act, 5 U.S.C. §504, 28 U.S.C. §2412(d), as follows:

a. To reduce litigation over the dollar value of fee awards, (1) the provision in the Act allowing enhancement of fees when "a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee" should be stricken, (2) the Act should specify the precise method to be used in calculating future cost-of-living adjustments to the fee cap, (3) the Act should state that the rate to be used is the one that is applicable when the judge's (or administrative adjudicator's) order awarding EAJA fees is issued, and (4) the $75 per hour fee cap should be raised to approximate more closely the prevailing market rate for attorneys.

b. To encourage settlements, the Act should include an offer-of-judgment procedure: after an EAJA application is filed, the government may make an offer of judgment on the EAJA claim; if the private party rejects the government's offer and is ultimately awarded no more than that offer, that party forfeits the right to seek fees or expenses for the EAJA litigation from the time the offer of judgment is rejected.

c. To eliminate litigation on the question of when prevailing parties must file for fees, either the 30-day filing deadline in 5 U.S.C. §504 and 28 U.S.C. §2412(d) should be extended to 60 days, to run from the date of final disposition of the case,[1] or the filing deadline should be eliminated.

d. To promote judicial economy, the Act should encourage private parties litigating against the United States to notify the court or administrative adjudicator prior to judgment if they intend to file an EAJA application should they prevail, so as to enable the decisionmaker, in appropriate cases, to determine whether the government's position was substantially justified within the meaning of the Act at the same time that judgment is entered against the United States.

2. Congress should modify the provisions of 28 U.S.C. §2412(d) as they apply to individual benefit claims either brought directly under 42 U.S.C. §405(g) or under a provision cross-referencing 42 U.S.C. §405(g) in the federal courts. For those cases, the Act should provide for fee awards to prevailing claimants in individual actions without reference to whether the position of the United States was substantially justified.

3. Congress should consider whether to extend the Act's coverage, on a category-by-category basis, to:

a. Agency proceedings that, although not technically adjudications "under section 554 [of Title 5]," are required by statute to employ procedures equivalent to those of such formal adversary proceedings.

b. Proceedings before Article I courts that have the same attributes as covered proceedings in Article III courts and in agencies.

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[1] "Final disposition" occurs when a party has prevailed in a proceeding and the disposition of the proceeding is final and unappealable; in proceedings involving a remand from a court to an agency, final disposition does not occur until the remanded proceeding is concluded and the resulting administrative order is final and unappealable.

Recommendation 92-6
Implementation of the Noise Control Act
(Adopted June 19, 1992)

In 1981, Congress agreed to the Administration's proposal to cease funding for the Office of Noise Abatement and Control (ONAC) in the Environmental Protection Agency (EPA). Congress, however, did not repeal the Noise Control Act[1] when it eliminated ONAC's funding.

Before the elimination of ONAC, EPA engaged in a wide variety of activities to abate noise pollution under authority of the Noise Control Act and, after 1978, the Quiet Communities Act.[2] These included identifying sources of noise for regulation, promulgating noise emission standards, coordinating federal noise research and noise abatement, working with industry and international, state and local regulators to develop consensus standards, disseminating information and educational materials, and sponsoring research concerning the effects of noise and the methods by which it can be abated. The Quiet Communities Act authorized EPA to provide grants to state and local governments for noise abatement.

EPA ceased virtually all noise abatement activities after ONAC's funding was eliminated. However, the federal noise emission and labeling standards it had promulgated have remained in effect, thereby preempting state and local governments from adopting different standards. Thus, the standards remain frozen, as neither the EPA nor the state or local agencies have been in a position to amend or update possibly outmoded standards despite the technological developments of the last decade. Moreover, some private rights to bring tort or other actions may be affected by these EPA emission and labeling standards.

The Conference recognizes that the decision to end funding was substantive rather than procedural, but, in part, the impact has been procedural.[3] No procedure has been available for a decade to reexamine the existing preemptive standards to take into account developments in science and technology that may bear on implementation of the legislative intent. Elimination of funding for the agency's noise control program has had the additional procedural effect of leaving several proposed but unissued standards pending for a decade without final action by EPA.

EPA retains the statutory responsibility for enforcing the Noise Control Act, and has used minimal resources for engaging in limited enforcement and other related activities.[4] Pursuant to this authority, EPA has asked the Conference to assist it in reevaluating the current status of the Noise Control Act by recommending options that relate to procedural considerations. The Conference takes no position concerning what actions, if any, EPA should take regarding enforcement and implementation of the Noise Control Act. If EPA wishes to assess the current situation, however, the Conference has identified considerations that should be part of such reassessment.

The Conference is unaware of any other instance where Congress has eliminated the funding for an ongoing program that preempts state and local

actions without also ending the statutory authorization for that program or addressing the preemptive effect of existing regulations. If this situation does exist in other contexts, there may be procedural problems similar to those associated with the Noise Control Act.

RECOMMENDATION

1. In considering its authority and responsibility under the Noise Control Act, the Environmental Protection Agency (EPA) should analyze the preemptive impact of its existing and pending noise standards for the purpose of eliminating, where possible, any unintended impacts. EPA should then advise the appropriate congressional committees respecting the preemptive effects of EPA's possibly outmoded regulations under the Noise Control Act, or any other implications of the cessation of funding respecting the agency's responsibilities under the Act.

Executive Director William J. Olmstead and Professor Sidney A. Shapiro, University of Kansas School of Law, reviewing the results of Recommendation 92-6, adopted at the June plenary session.

2. In making the determinations called for under this recommendation, EPA should take into account, among other considerations:

(a) The scientific and technological developments that have occurred since 1981;

(b) Whether there is a need to update EPA's past methodology for measuring and assessing the effects of noise;

(c) The appropriate allocation of responsibility among federal agencies, and between the federal government and the states and localities, in accomplishing any goals determined by Congress respecting regulation of noise, educating the public on the dangers posed by noise, and sponsoring research into noise effects and abatement techniques;

(d) Whether there is a need for additional coordination of the noise abatement activities of federal agencies and the states and localities;

(e) The adequacy of current coordination between the United States and foreign government agencies concerning noise abatement standards and regulations impacting U.S. international trade;[6]

(f) Any appropriate federal government participation in the activities of private-sector standard-setting organizations concerning noise;[7] and

(g) The relative advantages and disadvantages of utilizing public education, market incentives, emission standards, or other approaches for any abatement of noise that Congress may wish to pursue.

3. After reviewing whatever advice may be received from EPA under this recommendation, the appropriate congressional committees should review the issues raised by the foregoing recommendations, including whether the continuation of substantive regulatory requirements without funding, or EPA's inability to reexamine, modify, or rescind those requirements, creates undue procedural burdens upon industry, the states, and the public. Congress should then either repeal the Noise Control Act or fund whatever responsibilities under the Act Congress delegates to EPA.

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[1]42 U.S.C. §§4901-4918 (1988).

[2]42 U.S.C. §4913 (1988).

[3]Although Congress eliminated funding for the Noise Control Act after ONAC had adopted some preemptive regulations and proposed others, it did not repeal the Noise Control Act. This situation is different from the more common circumstance where Congress passes legislation but does not fund its implementation.

[4]Since 1981, EPA has engaged only in very limited enforcement of existing noise regulations, disseminating information created during ONAC's existence, and commenting on environmental impact statements issued by the Federal Aviation Administration concerning airport noise. The FAA has independent authority to abate airport noise under the Noise Control Act and the Aviation Noise and Capacity Act, Pub. L. No. 101-508, §§9301-09 (1990). Responsibility for the enforcement of EPA's railroad and motor carrier emission standards is located in the Department of Transportation, which has funding for this purpose. The Department, however, does not have authority to promulgate new or amended emission standards different from those adopted by EPA.

[5]See Conference Recommendation 84-5, "Preemption of State Regulation by Federal Agencies," 1 CFR §305.84-5.

[6]See Conference Recommendation 91-1, "Federal Agency Cooperation with Foreign Government Regulators," 1 CFR §305.91-1.

[7]See Conference Recommendation 78-4, "Federal Agency Interaction with Private Standard-Setting Organizations in Health and Safety Regulation," 1 CFR §305.78-4.

Recommendation 92-7
The Federal Administrative Judiciary
(Adopted December 10, 1992)

Preamble

At the request of the Office of Personnel Management, the Administrative Conference undertook a study of a series of issues relating to the roles of federal administrative law judges (ALJs) and non-ALJ adjudicators, or administrative judges (AJs),[1] as they have evolved over the last several decades. The study addressed a number of different issues, including those relating to selection and evaluation of ALJs and AJs, the relationship of ALJs and AJs to their employing agencies, including the appropriate level of "independence" of such decisionmakers, and under what circumstances each type of decisionmaker should be used. Many of these issues are controversial, and the Conference has heard strong arguments from those with differing views.

The Administrative Conference takes as its starting point in considering the role of the federal administrative judiciary the role created for "hearing examiners," now redesignated as "administrative law judges," in the Administrative Procedure Act in 1946.[2] That Act contemplated the existence of impartial factfinders, with substantive expertise in the subjects relevant to the adjudications over which they preside, who would be insulated from the investigatory and prosecutorial efforts of employing agencies through protections concerning hiring, salary, and tenure, as well as separation-of-functions requirements. The decisions of such impartial factfinders were made subject to broad review by agency heads to ensure that the accountable appointee at the top of each agency has control over the policymaking for which the agency has responsibility.

The need for impartial factfinders in administrative adjudications is evident. To ensure the acceptability of the process, some degree of adjudicator independence is necessary in those adjudications involving some kind of hearing.[3] The legitimacy of an adjudicatory process also depends on the consistency of its results and its efficiency.

ALJs possess a degree of independence that dates back to the enactment of the APA and is governed by the APA and related statutes. The APA provides that certain separations of functions must be observed to protect the ALJ from improper pressures from agency investigators and prosecutors. ALJs are selected through a special process overseen by OPM. Their pay is set by statute and OPM regulations. Any attempt by an agency to discipline or remove an ALJ requires a formal hearing at the Merit Systems Protection Board. ALJs are also exempt from the performance appraisal requirements applicable to almost all other federal employees under the Civil Service Reform Act.

While the number of ALJs in the federal government has leveled off in the last decade, and has actually decreased outside of the Social Security Administration, some agencies have been making increased use of AJs. The amount of functional independence accorded to AJs varies with the particular agency and type of adjudication; however, AJs generally lack the statutory

protections guaranteed to ALJs. AJs are not statutorily exempt from performance appraisals, and several major groups of AJs regularly undergo such appraisals by the agencies for which they work. In general, however, AJs presiding in agency adjudications in which a hearing is provided are accorded de facto protection from pressure from agency investigators and prosecutors, and, according to the Conference's survey, do not perceive themselves as significantly more subject to agency pressure than do ALJs.

The Conference's general view is that the movement away from the uniformity of qualifications, procedures, and protections of independence that derives from using ALJs in appropriate adjudications is unfortunate. The Conference believes that, to some extent, this movement away from ALJs toward AJs has been fueled by perceptions among agency management of difficulties in selecting and managing ALJs. These recommendations attempt to address these perceived problems. It should be noted that these recommendations are interdependent. For example, recommendations concerning the conversion of AJ positions to ALJ positions, and creation of new ALJ positions in new programs, are premised on the implementation of improvements in the selection and evaluation processes.

Use of ALJs and AJs

There is no apparent rationale undergirding current congressional or agency decisions on the use of ALJs or non-ALJs in particular types of cases. Congress seems to make such choices on an ad hoc basis. Moreover, it is quite clear that similar types of determinations made in different agencies are being made by different types of decisionmakers. For example, disability benefits adjudications at the Social Security Administration are handled by ALJs; at the Department of Veterans Affairs, AJs adjudicate similar types of cases. Moreover, in some contexts, non-ALJ adjudicators preside over cases in which extremely important issues of personal liberty are potentially at stake, such as deportation proceedings and security clearance cases.

The uniform structure established by the APA for on-the-record hearings and for qualifications of presiding officers serves to provide a consistency that helps furnish legitimacy and acceptance of agency adjudication. A rationalized system of determining when ALJs should be used would encourage uniformity not only in procedure, and in the qualifications of the initial decider, but in adjudication of similar interests. The Conference, therefore, recommends that Congress consider the conversion of AJ positions to ALJ positions in certain contexts. While the Conference does not identify specific types of cases for which such conversion should be made, it proposes a series of factors for Congress to consider in making such determinations; these same factors should also apply when Congress creates new programs involving evidentiary hearings.

One critical factor is the nature of the interest being adjudicated. The separation of functions mandated by the APA, as well as the selection criteria designed to ensure the highest quality adjudicators, are of particular value in

situations where the most important interests are at stake. Generally speaking, a hearing that is likely to involve a substantial impact on personal liberties or freedom, for example, is one where use of an ALJ likely would be appropriate. Similarly, cases that could result in an order carrying with it a criminal-like finding of culpability, imposition of sanctions with a substantial economic effect (such as large monetary penalties or some license revocations),[4] or a determination of discrimination under civil rights laws (unless there is an opportunity for a de novo hearing in court) represent categories of proceedings that may call for ALJ use. This characterization should be done for types of cases rather than for particular cases.

Another factor to consider is whether the procedures established by statute or by rule for cases heard and decided are, or would be, substantially equivalent to APA formal hearings. In such cases, the additional uniformity that would derive from making the cases formally subject to 5 U.S.C. §§554, 556, and 557 would argue in favor of ALJs.

ALJs are required to be lawyers. Some AJs who decide cases are not lawyers, but have other needed specialized expertise. For example, certain adjudicators at the Nuclear Regulatory Commission are physicists or engineers who participate on multi-member boards. In determining whether it is appropriate to use ALJs in particular types of cases, Congress should consider whether the benefits of using ALJs are outweighed by the benefits of having other expertise brought to bear. It should also consider whether lawyers serving with nonlawyers on decision panels should be ALJs.

A final consideration, particularly in the context of considering conversion of existing AJ positions to ALJ positions, is the extent to which the current adjudicators closely approximate ALJs in their decisional independence, the criteria for their selection, or their compensation and experience levels. If existing AJs are functioning well and do not approach parity with ALJs on these criteria, there may be no need to make the conversion. On the other hand, if they closely match ALJs on these factors, uniformity interests may weigh in favor of conversion.

Although none of these factors is necessarily intended to be determinative, the more that these factors weigh in favor of ALJ status for the decisionmaker, the more appropriate it is for Congress to mandate such status. It should be noted, however, that these recommendations are not intended to be seen as encouraging increased formalization of administrative adjudicatory processes.

In situations where Congress does convert AJ positions to ALJ positions, those AJs who can satisfy OPM eligibility qualifications should be eligible for immediate appointment as ALJs. Thus, only those existing AJs meeting the standards for ALJ appointment would become ALJs, but they would not be required to go through the competitive selection process.

Historically, OPM has had responsibility to review and rule on agency requests for additional ALJ positions. In the past, when there were government-wide limits on "supergrade" positions, which included ALJs, this oversight role served a purpose. Those limits no longer exist, and it is no longer necessary for

OPM to participate in this process. Agencies should be free, within their normal resource allocation constraints, to determine for themselves whether they need more or fewer ALJs.

ALJ Selection

The selection process for ALJs has been administered by OPM (and its predecessor agency) since 1946. OPM develops the criteria for selection, accepts applications for the register of eligibles, and rates the applicants on the basis of their experience as described in a lengthy statement prepared by the applicant, a personal reference inquiry, a written demonstration of decision-writing ability, and a panel interview. The scores from this process determine an applicant's rank on the register of eligibles. Because OPM has historically considered ALJs as being in the competitive service, OPM follows the statutory requirements for filling vacancies. Thus, OPM rates and ranks eligibles on a scale from 70 to 100, and when an agency seeks to fill a vacancy, OPM certifies the top three names on the register to that agency. In practice, only applicants with scores from 85 to 100 have been certified.

The Veterans' Preference Act, which has historically applied to most civil service hiring, is applicable to selection of administrative law judges. As applied, veterans deemed qualified for the preference are awarded an extra 5 points, and disabled veterans are awarded an extra 10 points in their scores. These extra points have had an extremely large impact, given the small range in unadjusted scores. In addition, under current law, agencies may not pass over a veteran to hire a nonveteran with the same or lower score on the certificate. As a consequence, application of the veterans' preference has almost always been determinative in the ALJ selection system.

There has been concern about the ALJ selection process, arising from the determinative impact of veterans' preference and the very limited selection options available to agencies. In fact, most agencies in recent years have found ways to circumvent this process somewhat, primarily by hiring laterally from other agency ALJ offices, or (in those few agencies that hire substantial numbers of ALJs) by waiting until there are numerous slots to fill at one time, thus entitling them to a larger certificate of eligibles from OPM.

Despite this circumvention, the application of veterans' preference to the ALJ selection process has had a materially negative effect on the potential quality of the federal administrative judiciary primarily because it has effectively prevented agencies from being able to hire representative numbers of qualified women candidates as ALJs. There is also some evidence that application of the veterans' preference may have adversely affected the hiring of racial minorities. Thus, agencies are prevented from being able to select the best qualified ALJs for specific positions from a pool of representative applicants. The Conference recognizes that the general policy of veterans' preference in federal hiring reflects a valid social concern, particularly as it helps those who leave military service enter the federal civilian workforce. But, in view of the conflict between this policy and the valid need of federal agencies

to have an opportunity to select the best qualified ALJs from among representative applicants, the Conference recommends that Congress abolish veterans' preference in the particular and limited context of ALJ selection.[5] In that connection, it should be noted that in 1978, Congress created a similar narrow exemption for members of the Senior Executive Service. Moreover, there is no veterans' preference in the selection for any other federal judicial position.

The Conference's recommendation on the selection of ALJs would leave with OPM the responsibility for preparing the register of eligibles (i.e., for determining the basic qualifications for the position and rating the applicants). OPM is urged to ensure that all applicants placed on the register are in fact qualified to fulfill the responsibilities of being an ALJ.

In conjunction with this, however, the recommendation would also expand the choices that agencies would have in selecting from among those qualified applicants. Under this recommendation, after OPM rated the applicants, it would compile a register of all applicants deemed qualified following the final rating process. An agency could request a certificate with the names of all applicants whose numerical ratings placed them in the highest-ranked 50 percent of the register. Agencies could also request a certificate containing a smaller number of names or applicants in a higher percentile. The agency would have the authority to hire anyone on the certificate.[6]

In addition, if, following review of the highest-ranked 50 percent, an agency needed to review additional names to find a suitable candidate, it could request an additional certificate from OPM. Such an exception should be invoked rarely, and only upon a showing of exceptional circumstances.

The Conference recognizes that any limitation on the number of qualified candidates on the certificate, including the "top three" limitation now in place, might be criticized as arbitrary. By recommending the highest-ranked 50 percent of the applicants OPM has determined to be qualified, the Conference is attempting to balance two factors. The Conference recognizes the agencies' strong interest in having a substantially larger pool of qualified candidates from which to select ALJs who meet their varying criteria and needs. It also recognizes the importance of ensuring that such a pool is highly qualified, as measured by a uniform objective rating system. The Conference believes that its recommendation provides a reasonable balance of these factors. It provides a pool large enough that agencies should be able to find candidates for ALJ positions who satisfy their varying and specific needs. At the same time, OPM estimates that the top 50 percent of the register corresponds to those applicants with scores of 85 or better out of 100.

Agencies would also have access to a computerized database that would contain the complete application files of individual applicants on their certificate, including numerical ratings, geographical or agency preferences, particular kinds of experience, and veterans status. This database would allow agencies the option to narrow the list of qualified applicants and focus on those whom they would like to consider further. For example, an agency could search for all candidates willing to relocate to New York City, who spoke Spanish, and had ratings in the top 20 percent.

To ensure that the register contains a broad range of qualified applicants, the Conference also recommends that OPM and hiring agencies expand recruitment of women and minority applicants for ALJ positions. In addition, because questions have been raised about OPM's current method of assessing litigation experience for the purposes of scoring applicants for ALJ positions, the Conference recommends that OPM review its rating criteria to determine whether they are appropriate.

For much of the last decade, the register has been closed, thus precluding newly interested applicants from being considered for ALJ positions. Although OPM deferred reopening the register pending the outcome of the Conference's consideration and recommendations, it has announced that the register will be reopened in the spring of 1993. While the Conference's recommendations would significantly affect the ALJ selection process, the impact would come mostly at the end of the process, after OPM has evaluated and rated the new applicants. This procedure is likely to be a time-consuming one, given the expected large influx of applicants. Therefore, the Conference supports reopening the application process, so that OPM can begin rating the candidates now, even though the recommended changes in the later stages have not yet been implemented. This way, when and if those changes are in place, the updated register will be readily available. It should be noted, however, that the Conference is also recommending that OPM review some of its rating criteria, which would need to be done before it begins rating new applicants.

OPM has indicated that it has a planned program to expand recruitment of women and minority applicants for the register. The Conference both encourages OPM to give such a program a high priority, and recommends that OPM and the hiring agencies take steps in particular to recruit among minority bar associations and other institutions with large numbers of minorities or women.

The Conference's view is that implementing these recommendations will provide agencies the opportunity to select ALJs from a broad range of highly qualified candidates and to hire the best applicants from a representative register.

ALJ Evaluation and Discipline

At present, ALJs, virtually alone among federal employees, are statutorily exempt from any performance appraisal. Although agencies may seek removal or discipline of ALJs "for good cause" by initiating a formal proceeding at the MSPB, the Board has applied standards that have strictly limited the contexts in which such actions may successfully be taken against an ALJ. For example, agency actions premised on low productivity have never been successful before the Board.

The Conference recognizes the importance of independence for ALJs. Their role under the APA as independent factfinders requires that they be protected from pressure in making their decisions. There can be a tension, however, between this independence and the agency's role as final policymaker,

including the need for consistency of result and political accountability. Moreover, agencies have a legitimate interest in being able to manage their employees, including ALJs, in order to ensure that the adjudicatory system is an efficient and fair one.

The Conference, therefore, recommends that a system of review of ALJ performance be developed. Chief ALJs would be given the responsibility to coordinate development of case processing guidelines, with the participation of other agency ALJs, agency managers and others. These guidelines, which would address issues such as ALJ productivity and step-by-step time goals,[7] would be one of the bases upon which Chief ALJs would conduct regular (e.g., annual) performance reviews. Judicial comportment and demeanor would be another basis for review. Another factor on the list of bases for performance review, which list is not intended to be exclusive, would be the existence of a clear disregard of, or pattern of nonadherence to, properly articulated and disseminated rules, procedures, precedents and other agency policy. Such performance review systems need not involve quantitative measures or specific performance levels, but they should provide meaningful and useful feedback on performance.[8]

Conversely, ALJs should also have a mechanism for dealing with legitimate concerns about improper agency infringement of, or interference with, their decisional independence. Under the Conference's recommendation, each agency employing ALJs should set up a system for receiving and investigating allegations of such activity by agency management officials, and, where warranted, referring them to the appropriate authorities for action.[9] OPM would have oversight responsibility, and could, upon request by an ALJ or at its own discretion, review an agency's response to such allegations, and recommend appropriate further action.

Under the Conference recommendation, the Chief ALJs' responsibilities would also include developing ALJ training and counseling programs designed to enhance professional capabilities and to remedy individual performance deficiencies, and, in appropriate cases, issuing reprimands or recommending disciplinary action.[10]

Recently, attention has been focused on allegations of prejudice against certain classes of litigants by some ALJs.[11] While there is no known evidence that such a problem is widespread, the Conference's view is that it is important to have a mechanism for handling complaints or allegations relating to ALJ misconduct, including allegations of bias or prejudice. The Conference, therefore, recommends that Chief ALJs, either individually or through an ALJ peer review group, receive and investigate such complaints or allegations, and recommend appropriate corrective or disciplinary actions. To the extent practicable, such investigation and the processing of any corrective or disciplinary recommendation should be expedited to protect affected interests and create public confidence in the process. Where appropriate, consensual resolutions are encouraged. The Conference also recommends that agencies publicize the existence of their complaint procedures, in published rules and procedures or in some other appropriate fashion, and inform complainants in a timely manner of the disposition of their complaints.

The Conference is also recommending that OPM assign the various responsibilities relating to ALJs to a specific unit within that agency. Such a unit would, among other things, have responsibility for overseeing personnel, hiring and performance matters involving Chief ALJs, thus providing them additional insulation from agency pressures. Because of the increased importance of the position of Chief ALJ under this proposal, Congress also should consider making the position subject to a term appointment, as it has done for Chief Judges of United States District Courts.

The Conference also recommends that proceedings before the Merit Systems Protection Board involving charges against ALJs be heard by a three-judge panel. Judging administrative law judges is a sensitive process, and the benefit of collegial decisionmaking in this context seems worth the added cost. The panel should be selected from a pool of ALJs. Currently, MSPB has only one ALJ. So long as this is the case, the pool should consist of ALJs from other agencies, but the panel in a particular case should not involve ALJs from the same agency as the respondent ALJ.

Policy Articulation

As discussed, the APA model of agency decisionmaking is based on the use of independent ALJs to find facts and to apply agency policy to those facts. This system requires that ALJs be granted independence as factfinders, but it also must ensure that agency policymakers are able to establish policies in an efficient manner for application by ALJs in individual cases. The methods available to agencies include promulgation of rules of general applicability, the use of a system of precedential decisions,[12] or other appropriate practices, such as proper use of policy statements.[13] Such policy statements must be properly disseminated.

Where the agency has made its policies known in an appropriate fashion, ALJs and AJs are bound to apply them in individual cases. Policymaking is the realm of the agency, and the ALJ's (or AJ's) role is to apply such policies to the facts that the judge finds in an individual case.

The Concept of an ALJ Corps

There has been over the last decade considerable discussion of the concept of an ALJ corps. Although there have been differences among the specific proposals, the concept in general includes separating ALJs from individual agencies, and placing them in a new, separate agency. Recent legislative proposals provided, among other things, that new ALJs would be selected by a chief judge of the corps, and that ALJs would be divided into several general subject matter divisions (such as health and benefits; safety and environment; and communications, public utility and transportation regulation).[14]

The Conference discussed these recent legislative proposals to establish a centralized ALJ corps as a means of handling some of the issues addressed in this recommendation. Some of these recommendations are independent of

such proposals; others are inconsistent with them. The Conference concluded that there is no basis at this time for structural changes more extensive than those proposed here.

RECOMMENDATION

I. Congressionally Mandated Use of ALJs and AJs[15]

A. When Congress considers new or existing programs that involve agency on-the-record adjudications, it should seek to preserve the uniformity of process and of qualifications of presiding officers contemplated by the APA, by providing for the use of administrative law judges (ALJs) in all appropriate circumstances.[16] In order to further this goal, Congress should consider converting certain existing administrative judge (AJ) positions to ALJ positions.[17] In determining the appropriateness of converting existing AJ positions to ALJ status and of requiring the use of ALJs in particular types of new adjudications, Congress should consider the following factors, if present, as indicia to weigh in favor of requiring ALJ status:

1. The cases to be heard and decided are likely to involve:
   a. substantial impact on personal liberties or freedom;
   b. orders that carry with them a finding of criminal-like culpability;
   c. imposition of sanctions with substantial economic effect; or
   d. determination of discrimination under civil rights or other analogous laws.
2. The procedures established by statute or regulation for the cases heard and decided are, or would be, the functional equivalent of APA formal hearings.
3. The deciders in such cases are, or ought to be, lawyers—taking into consideration the possibility that some programs might require other types of specialized expertise on the part of adjudicators or on panels of adjudicators.
4. Those incumbent AJs in such cases who are required to be lawyers already meet standards for independence, selection, experience, and compensation that approximate those accorded to ALJs.

B. When Congress determines that it should require ALJs to preside over hearings in specific classes of existing federal agency adjudications at which ALJs do not now preside, it should specify that those AJs presiding over such proceedings at that time who can satisfy the Office of Personnel Management's eligibility qualifications for ALJs be eligible for immediate appointments as ALJs.

C. Congress should provide that OPM should no longer be responsible for reviewing and ruling on agency requests for additional ALJ positions. Decisions relating to an agency's need for more or fewer ALJ positions should be made by the individual agencies through the normal resource allocation process.

II. ALJ Selection

A. Congress should authorize where required, and OPM should establish, a process for the selection of qualified ALJs by federal agencies that contains the following elements:

1. OPM should continue to administer the process for determining whether applicants are qualified to be on the register of eligibles for ALJ positions and for rating such applicants. OPM should ensure that all applicants appearing on the register are in fact qualified to fulfill the duties of an ALJ under applicable law, including that they have the capability and willingness to provide impartial, independent factfinding and decisionmaking. To the extent that this may require revising the examination process, OPM should make the appropriate changes.

2. Those applicants determined by OPM to be qualified should be listed on the register with their numerical scores noted. Agencies seeking to fill ALJ positions should be allowed to request a certificate containing the names of those applicants whose numerical ratings place them in the highest-ranked 50 percent of the register of eligible applicants. Agencies should have the discretion to request a certificate with a smaller number or percentage of the register. Agencies should also be given access to a computerized database containing the complete application files of those applicants on the certificate.

3. A hiring agency should be permitted to select any applicant from the certificate who, in the agency's opinion, possesses the qualifications for the particular position to be filled. An agency may request that OPM provide an additional number of names upon a showing of exceptional circumstances.

B. OPM and the hiring agencies should give a high priority to expanding recruitment of women and minority applicants for ALJ positions. OPM also should review its ALJ application criteria to determine whether its current method of assessing litigation experience is appropriate.

C. OPM immediately should implement Parts II(A)(1) and (B), which may involve revisions to the examination or scoring process. Pending implementation of the other recommendations in this Part, OPM should open the register application process as soon as possible, and keep it open continuously.

D. In order to implement the proposals in paragraphs II(A) and (B) above, Congress should abolish the veterans' preference in ALJ selection.

III. ALJ Evaluation and Discipline

Congress should authorize, where necessary, and OPM and the agencies that employ ALJs should establish, the following processes for assisting ALJs and the agencies that employ them to carry out their responsibilities to the public and to individual parties:

A. Organization

1. OPM should assign a specific unit the responsibility for (a) overseeing those matters concerning the selection of ALJs, (b) overseeing all personnel, hiring and performance matters that involve Chief ALJs, (c) acting on allegations of improper interference with decisional independence of ALJs, (d) conducting regular performance reviews of Chief ALJs, and (e) periodically publishing reports on the effectiveness with which OPM's responsibilities are performed and seeking recommendations as to how the program may be improved.

2. Each agency that employs more than one ALJ should designate a Chief ALJ, who is given the responsibility within the agency to do the tasks assigned to the Chief ALJ under this Part III.[18]

3. OPM should provide guidance and assistance to aid Chief ALJs fulfilling the responsibilities given to them under this Part III.

4. OPM and the agencies should ensure that Chief ALJs are insulated from improper agency influence when carrying out the responsibilities described in this Part III.[19]

B. Evaluation and Training

Chief ALJs should be given the authority to:

1. Develop and oversee a training and counseling program for ALJs designed to enhance professional capabilities and to remedy individual performance deficiencies.

2. Coordinate the development of case processing guidelines, with the participation of other agency ALJs, agency managers and, where available, competent advisory groups.

3. Conduct regular ALJ performance reviews based on relevant factors, including case processing guidelines, judicial comportment and demeanor, and the existence, if any, of a clear disregard of or pattern of nonadherence to properly articulated and disseminated rules, procedures, precedents, and other agency policy.

4. Individually, or through involvement of an ALJ peer review group established for this purpose, provide appropriate professional guidance, including oral or written reprimands, and, where good cause appears to exist, recommend that disciplinary action against ALJs be brought by the employing agency at the Merit Systems Protection Board (MSPB), based on such performance reviews.

C. Complaints About ALJs

Each agency that employs ALJs should set up a system for receiving and evaluating complaints or allegations of misconduct by an ALJ, including bias or prejudice.

1. The Chief ALJ in each agency, individually or through involvement of an ALJ peer review group established for this purpose, should be given responsibility for receiving and investigating such complaints.

2. If a Chief ALJ determines that ALJ misconduct occurred, the Chief ALJ should recommend that the agency take appropriate corrective action, or, in appropriate cases, recommend that disciplinary action against the ALJ be brought by the agency at the MSPB.

3. If a Chief ALJ determines that further investigation by another authority is warranted, he or she should refer the case to that authority.

4. Each agency should make known to interested persons in an appropriate fashion the existence of such complaint procedure.

5. Where allegations of misconduct implicate a Chief ALJ, they should be referred to OPM for such investigation and recommended action.

6. Complainants should be given notice of the disposition of their complaints.

D. Complaints by ALJs

Each agency that employs ALJs should set up a system for receiving and investigating allegations of unlawful agency infringement on ALJ decisional independence or other improper interference in the fulfillment of ALJ responsibilities. Such a system should be be subject to OPM oversight. Where investigation reveals the probable occurrence of such an impropriety, the matter should be referred to the appropriate authority for review and recommended action designed to remedy the situation and prevent recurrence, including the issuance of oral or written reprimands and other appropriate sanctions.

E. MSPB Panels

MSPB should assign cases involving charges against ALJs to a three-judge panel of ALJs drawn from a pool. No judge on the panel should be from the same agency as the respondent ALJ.

IV. Policy Articulation

To ensure that ALJs and affected persons are aware of their responsibilities, agencies should articulate their policies through rules of general applicability, a system of precedential decisions, or other appropriate practices.[20] Congress, the President, and the courts should encourage such policy articulation.

V. The Concept of an ALJ Corps

Congress should not at this time make structural changes more extensive than those proposed here, such as those in recent legislative proposals to establish a centralized corps of ALJs.

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[1]The term "administrative judge," as used here, includes non-ALJ hearing officers, whatever their title, who preside at adjudicatory hearings.

[2]In 1969, the Conference addressed some of these issues in the context of hearing examiners. See Conference Recommendation 69-9, 1 CFR §305.69-9 (Part A) (1988). Many of the recommendations set forth here pertaining to selection and training of ALJs are broadly consistent with the earlier recommendation, but to the extent that they differ, this recommendation is intended to supersede Part A of Recommendation 69-9.

[3]The study underlying this recommendation limited its consideration to adjudicators who preside over some kind of hearing. More informal adjudication processes are outside the scope of the study.

[4]Grant or contract disputes would not fall within this category, unless a monetary penalty was involved.

[5]The Conference has recommended a similar modification to the veterans' preference in this context before. See Conference Recommendation 69-9, 1 CFR §305.69-9 ¶A(4) (1988).

[6]In order to implement this recommendation, Congress would need at a minimum to modify the veterans' preference to eliminate the provision restricting the passing over of veterans, so that agencies would have the ability to hire any qualified applicant on the certificate.

[7]See Conference Recommendation 86-7, "Case Management as a Tool for Improving Agency Adjudication," 1 CFR §305.86-7 (1992), at ¶2.

[8]Many states now use performance reviews for their state court judges and ALJs. The performance of federal magistrate-judges is evaluated as a condition of reappointment. Even some federal courts are beginning to experiment with evaluation of judges' performance.

[9]Such authorities might include OPM for certain lesser sanctions, and the Office of Special Counsel or MSPB in more serious cases.

[10]See 43 Op. Att'y Gen. 1 (1977) (discussing certain limitations on agency's authority to reprimand ALJs).

[11]See, e.g., U.S. GAO, SOCIAL SECURITY, RACIAL DIFFERENCE IN DISABILITY DECISIONS WARRANTS FURTHER INVESTIGATION, GAO/HRD-92-56 (April 1992). Cf. Ninth Circuit Gender Bias Task Force, Preliminary Report (Discussion Draft) (July 1992) at 93-103 (discussing gender bias issues relating to disability determinations).

[12] See Conference Recommendation 89-8, "Agency Practices and Procederes for the Indexing and Public Availability of Adjudicatory Decisions," 1 CFR §305.89-8 (1992) ¶1 at n.2.

[13]See Conference Recommendation 92-2, "Agency Policy Statements," 57 Fed. Reg. 30101, 30103 (1992), to be codified at 1 CFR §305.92-2.

[14]See S. 8226 and H.R. 3910, 102d Cong.

[15]The recommendations in this Part I are interdependent with those of Parts II and III urging improvements in the selection and evaluation processes for ALJs.

[16]This recommendation is not intended to be seen as encouraging increased formalization of administrative adjudicatory processes.

[17]The term "administrative judge," as used here, includes non-ALJ hearing officers, whatever their title, who preside at adjudicatory hearings.

[18]In agencies with large numbers of ALJs, the Chief ALJ might appropriately delegate some or all such responsibility to deputy or regional chief ALJs.

[19]Congress also should consider making the position of Chief ALJ subject to a term appointment. This suggestion does not result from a finding by the Conference that any number of current Chief ALJs are not functioning effectively. The Conference notes, however, that Chief Judges of United States District Courts are subject to term appointments and believes it is appropriate to conisder whether a similar limitation should apply to Chief ALJs.

[20]See generally Conference Recommendation 71-2, "Articulation of Agency Policies," 1 CFR §305.71-2 (1992); Conference Recommendation 87-7, "A New Role for the Social Security Appeals Council," 1 CFR §305.87-7 (1992); Conference Recommendation 89-8, "Agency Practices and Procedures for the Indexing and Public Availability of Adjudicatory Decisions," 1 CFR §305.89-8 (1992); Conference Recommendation 92-2, "Agency Policy Statements," 57 Fed. Reg. 30101, 30103 (1992), to be codified at 1 CFR §305.92-2.

Recommendation 92-8
Administration of the Office of Juvenile Justice and Delinquency Prevention's Formula Grant Program
(Adopted December 11, 1992)

In 1974 Congress enacted the Juvenile Justice and Delinquency Prevention ("JJDP") Act, which created the Office of Juvenile Justice and Delinquency Prevention ("OJJDP" or "the Office") within the U.S. Department of Justice. Among OJJDP's responsibilities, then and now, is that of administering a program of formula grants to states and local governments. While the overall purposes of the formula grant program were broadly framed,[1] the statute also required states to achieve several very specific substantive outcomes. Compliance with those mandates,[2] as well as with a variety of other administrative and procedural requirements, continues to determine eligibility for formula grant funds from OJJDP.

Monitoring for levels of state compliance, determining grant eligibility status, reviewing submitted plans and reports, and responding to technical assistance requests all fall to OJJDP's State Relations and Assistance Division (SRAD). Its administration of the formula grant program is guided by a substantial body of regulations, rules, policies and interpretations that OJJDP has developed over the years. Mechanisms such as waivers, exceptions, and de minimis criteria—characteristic features of many regulatory and grant programs—have been adopted by either Congress or the agency over the years.

The Conference, in response to a request from OJJDP, studied OJJDP's administration of the formula grant program, including its efforts to monitor and assist state compliance with the statutory mandates and requirements. As part of this study, the Conference examined issues of communication and consultation with states, coordination and collaboration at various levels of government, consistency and clarity of policy elaboration, staffing, and training.

RECOMMENDATION

1. Policymaking

(a) The Department of Justice should ensure that overall policy, priorities, and objectives for all federal juvenile delinquency programs and activities are coordinated so that related activities and programs advance efforts by OJJDP and the states to achieve and maintain compliance with the substantive mandates of the JJDP Act.

(b) OJJDP should (1) create, and ensure adherence to, internal operating guidelines and (2) assign formula grant staff responsibilities, so that important issues of policy or interpretation are identified and dealt with promptly. Once such an issue has been finally resolved, the Office's policy or interpretation should be made available promptly by appropriate means—whether the Federal Register or otherwise—to all state juvenile justice specialists,[3] the National Coalition of State Juvenile Justice Advisory Groups,[4] and

other groups and entities, that may have a substantial interest in the policy or interpretation.

(c) In all instances where issues of policy or interpretation may substantially affect interested persons or organizations or the interests of one or more states, the Office should engage in pre-decisional consultation with the affected persons or entities. OJJDP, in selecting a mode of consultation, should take into account the scope and impact of the policy or interpretation and other matters relevant to effective communication of views and efficient decisionmaking.

(d) The Office should ensure that the reasons underlying its policies and interpretations, including changes and clarifications, are clearly explained in documents announcing them.

(e) The Office should develop adequate internal procedures to ensure that consistent advice regarding the requirements applicable to the formula grant program is afforded to affected states by the OJJDP state representatives.

2. **OJJDP Staffing**

(a) The Office should have a general attorney assigned primarily to advising OJJDP state representatives,[5] the SRAD Director, and OJJDP's Administrator concerning general legal issues arising in OJJDP's grant administration.

(b) The Office should take steps to ensure that the evaluation of monitoring data and other information relevant to determining compliance and waiver of grant termination is even-handed and takes into full account Office policies and interpretations. In so doing, the Office should consider reestablishing the position of "monitoring coordinator."

(c) The Office should refrain from so frequently shifting the state assignments of the OJJDP state representatives that the value of familiarity with state programs is lost.

3. **Background and Training of OJJDP and State Formula Grant Personnel**

(a) The Office should accord due weight to prior general training or experience in the area of juvenile justice and grants management in hiring applicants for the position of state representative.

(b) The Office should train both new and experienced state representatives to ensure that they:

(i) are fully informed with regard to their roles and responsibilities;

(ii) have adequate knowledge regarding the Office's procedures and practices for the conduct of their work;

(iii) have a firm working knowledge of the relevant state and federal statutes, regulations, and guidelines applicable to the formula grant program; and

(iv) are kept apprised of recent developments in relevant Office policy and in the area of juvenile justice generally that may affect their work as state representatives.

(c) The Office should ensure that adequate training is provided to states' juvenile justice specialists for their role in the implementation of the formula grant program. This should include regularly scheduled training programs for new and experienced state juvenile justice specialists. The

programs should (i) be timed so that necessary training is provided soon after new specialists take their positions, and (ii) make sure that training materials are updated expeditiously to reflect new developments in Office policy and interpretation, juvenile justice generally, and state compliance efforts.

4. **Information Dissemination to States**

(a) As part of its research and program development functions, the Office should collect information that may be helpful to the states in complying with the statutory mandates; the Office should disseminate this information to state juvenile justice specialists in a timely fashion and accessible format.

(b) The Office should create procedures to ensure that states will be (i) fully consulted in a timely manner regarding applications for special emphasis grants awarded to projects in their respective jurisdictions and (ii) regularly informed about the progress, results, and lessons of those projects.

(c) The Office should advise all states in a timely fashion concerning promising approaches to achieving and maintaining compliance with the substantive mandates of the JJDP Act.

(d) The Office should ensure that state-submitted monitoring data and other information by which it determines compliance and waiver are widely available both to the states and the public generally.

(e) A study should be undertaken to determine whether restructuring of, or improving communications between, the four divisions that have responsibilities for establishing juvenile delinquency and prevention programs, evaluating effective strategies, fostering promising approaches, and disseminating information would help the Office achieve its goals.

5. **Enforcement and Administration**

To enhance administration of the program, Congress should repeal the existing provision of the JJDP Act that authorizes waiver of the requirement that states submit annual monitoring reports to OJJDP. It should also retain the current requirement that the Office periodically audit state monitoring systems to ensure their reliability.

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[1]Funds may be used for a broad variety of programs and services related to juvenile justice and the treatment and prevention of juvenile delinquncy. State participation in the formula grant program is strictly voluntary, with state funding levels determined on the basis of relative population under age 18.

[2]The three substantive mandates are as follows:

1. Juveniles who are accused or convicted of status offenses (conduct not considered criminal if committed by an adult, such as running away or truancy) and nonoffenders (such as abused, dependent, or neglected children) must not be placed in secure detention or secure correctional facilities.
2. Juveniles who are accused or adjudicated of delinquency or status offenses must not have regular contact with incarcerated adults where both juveniles and adults are confined in the same institution.
3. No juveniles may be detained or confined in any adult jail or lockup.

[3]State juvenile justice specialists serve as the states' primary staff liaison with OJJDP.

[4]The Coalition consists of the members of the state advisory groups that are appointed by the governors of all states participating in the formula grant program. The JJDP Act provides for the Coalition to play an advisory role to Congress and the Administrator of OJJDP on program operations and related matters.

[5]OJJDP state representatives serve in a liaison role between OJJDP and the states, communicating and interpreting federal policy, reviewing state plans and performance, and providing technical assistance to state agencies.

Recommendation 92-9
De Minimis Settlements Under Superfund
(Adopted December 11, 1992)

In the last decade, following the passage in 1980 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[1] commonly referred to as Superfund, the nation has begun focusing its attention on the cleanup of hazardous waste sites. The task is a daunting one. There currently are approximately 1200 sites on the National Priorities List (NPL), the list of most hazardous sites, and it is likely that many more will be added to this list in the coming decades. The average cleanup cost at each of these sites is about $25 million. The aggregate cost of remedying the hazardous waste problem has been placed at several hundred billion dollars.

Joint and several liability for these cleanup costs has been imposed on a very broad set of parties—practically any party that had any connection with hazardous substances placed at a site in need of a cleanup, as well as owners and operators of contaminated facilities. Potentially responsible parties, known as PRPs, at typical Superfund sites include not only large industrial firms, but an array of small entities. Under the governing contribution rule, responsibility does not depend on the size of the firm, but rather depends generally on the firm's hazardous waste contribution at the site. Some PRPs therefore bear a large share of the liability at a site because they generated a large proportion of the hazardous substances. Other PRPs, which generated a relatively small proportion, may be responsible for only a few thousand dollars in cleanup costs. The process for apportioning the cleanup costs at a site gives rise to substantial transaction costs, principally legal fees and technical consulting costs. Parties that are responsible for only a small share of the cleanup costs might have to disburse several times this amount in transaction costs.

Congress expressed concern about this situation in 1986 when it reauthorized the program and substantially amended the statute. The Superfund Amendments and Reauthorization Act of 1986 (SARA),[2] included provisions designed to make it easier for such "de minimis parties" to enter into early settlements with EPA, thereby limiting their transaction costs.

SARA set forth a far-reaching scheme for imposing liability for the cleanup of hazardous waste sites. The liability provisions are triggered by the release or threat of release of hazardous substances into the environment. For each site, the statute establishes four categories of liable parties: the generators of the hazardous substances present at the site, the transporters of these substances to the site, the current owner of the site, and prior owners during whose period of ownership there was disposal of hazardous substances at the site.[3] These parties are liable for the costs of cleanup of the site, as well as for damage to natural resources under the control of the federal or state governments, or Indian tribes.[4]

The language of the statute has the effect of imposing a strict liability rather than a negligence standard. Moreover, current law holds parties jointly and severally liable if the harm at the site is indivisible. Under the statute, PRPs

held jointly and severally liable can seek contribution from other PRPs. The existence of joint and several liability is significant in the Superfund context because, given the significant periods of time—often several decades—between the disposal of hazardous substances and the cleanup, it is particularly likely that some liable parties will not be found, or will be insolvent. The remaining PRPs will then have to bear a disproportionate share of the costs.

The statute provides a limited set of defenses. Generally, a party can escape liability only if it can show by a preponderance of the evidence that the release or threat of release was caused solely by an act of God, an act of war, an act or omission of a third party, or a combination of these causes. Only the third-party defense has been of practical significance. In addition to showing causation by a third party, a PRP seeking to escape liability must show that (i) it took due care with respect to the hazardous substances, (ii) it took precautions against foreseeable acts or omissions of the third party, and (iii) such acts or omissions did not occur in connection with a contractual relationship with the PRP. So, for example, a generator cannot escape liability simply by showing that the problem was caused by the transporter with which it contracted for the disposal of the wastes.

To understand the context for de minimis settlements, it is important to review both the process of cleanup of hazardous waste sites and the allocation of responsibility for this cleanup among EPA and the PRPs. One of the most compelling reasons for offering early settlements to parties who bear only a small share of the liability is the very long time (averaging 12 years) that elapses between the discovery of a site and its ultimate cleanup. Settling with de minimis parties relatively early in this process can save them substantial legal and consulting costs.

The allocation of responsibility between EPA and the major PRPs at a particular site is also of critical importance. Many of the issues raised by a de minimis settlement concern its effect on subsequent settlements pursuant to which the major parties agree to undertake the cleanup of the site.

The early stages in the Superfund process involve the screening of sites to determine which pose the most serious health problems, and should therefore become the focus of EPA's attention. The later stages involve the cleanup of these sites. Obviously, the call for de minimis settlements during the early stages of the process is more compelling because the process is a slow one.

Congress translated these concerns into statutory provisions encouraging settlements in general[5] and de minimis settlements in particular.[6] With regard to de minimis settlements, the statute provides that "whenever practicable and in the public interest," the Administrator "shall as promptly as possible reach a final settlement with a potentially responsible party . . . if such settlement involves only a minor portion of the response costs at the facility." In addition, to qualify for de minimis status, generators and transporters must show that the amount and the effect of their hazardous waste contribution are both minimal in comparison to other hazardous substances at the facility.

Landowners constitute a unique class of PRPs. They may invoke an "innocent landowner" third-party defense to escape liability if they can establish that they (i) "did not conduct or permit the generation, transportation,

storage, treatment, or disposal of any hazardous substance at the facility," (ii) "did not contribute to the release or threat of release of a hazardous substance at the facility through any act or omission," and (iii) purchased the property without "actual or constructive knowledge that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substances." If they elect, instead of pursuing this defense, to limit their liability by a settlement, they may do so. Since such settlements are entered into under the statutory provisions applicable to de minimis settlements, these landowners are customarily referred to as "de minimis landowner" PRPs.

This recommendation identifies several procedural steps that can be taken by the Environmental Protection Agency to improve the functioning of the de minimis settlement program.

As a general principle, EPA should establish procedures and incentives to negotiate de minimis settlements as a standard practice at all multi-party Superfund sites involving de minimis parties. The Conference's study indicates that the vast majority of de minimis settlements have been entered relatively late in the process, and that the majority of the regional offices have shown little interest in undertaking earlier settlements. They frequently have favored resolving the liability of de minimis parties as part of global settlements pursuant to which the major parties undertake cleanups by requiring de minimis parties to negotiate directly with the major parties to determine their contribution to the cleanup cost. Paragraph 1 expresses the Conference's belief that transaction costs can be reduced significantly by settling with de minimis parties rather than seeking de minimis settlements as part of a global settlement.

The predominant approach to de minimis settlements taken by EPA regional offices has been to wait for groups of de minimis parties to form and take the first step in proposing settlements. However, the formation of such groups requires the expenditure of transaction costs by private parties and can take considerable time, and such groups might not represent the smaller de minimis parties that have the greatest interest in settlement. Paragraph 2 recommends that EPA's regional offices take a more active role in seeking such settlements. The Conference also recognizes, however, that reasonable limitations on the negotiation process may be appropriate to avoid unduly protracted negotiations.

The study found significant differences in the approaches of the regional offices, and even across sites in the same region, due to the lack of concrete guidance on several important issues. Perhaps the most significant example is the variation in the volumetric determinant used to determine de minimis status. This lack of uniformity increases the incentives for parties to protest the terms of individual settlements, and increases the probability that such settlements could be successfully challenged in court. Paragraph 3(a) addresses this concern.

Paragraph 3(b) recognizes that, while current policy guidelines on de minimis landowner settlements contemplate some payment, they do not specify either how to compute this payment or its relationship to estimated costs of cleanup. Such guidelines are necessary because the current "innocent land-

owner" guidance does not provide any assistance to the regional offices in determining an appropriate settlement figure for such landowners.

Currently, settlement documents are dispersed throughout the regions, making it difficult to determine both the extent to which de minimis settlements are used and the content of the settlements reached. Assurance that similarly situated parties are treated similarly requires knowledge of what actual practice has been, and any efforts to standardize the practice would benefit from knowledge of the variants already employed. Paragraph 3(c) urges creation of a central repository of such documents to address this need.

The explanation given most frequently by the regional offices as to the impracticality of early de minimis settlements is the lack of sufficiently reliable information on cleanup costs. EPA's recent guidance document has attempted to deal with this question on a regional level. Paragraph 4(a) suggests that this task is better accomplished on the national level. In general, there is no reason for a regional office to confine itself to its own sites in determining the costs of similar cleanups, as the inventory of comparable sites that have progressed sufficiently in the cleanup process may be small or nonexistent. Furthermore, there is no central repository for de minimis settlement documents, which might contain relevant data, and no EPA database contains their full terms. While this information can generally be obtained from the individual regional offices, this process is cumbersome and time-consuming.

An element over which there is substantial conflict among EPA and the de minimis and major parties is the premium to be charged in exchange for a waiver of any cost overrun and the risk that future events may trigger the possibility of further action by EPA against a party that has already settled ("reopeners"). The study found wide variation, ranging from approximately 50% to 250%, not readily explained merely by the different stages at which the settlements were entered. Moreover, there does not appear to be a standardized method for calculating premiums. Paragraph 4(b), like paragraph 3(a), is intended to reduce the potential for conflict by standardizing the approach.

In general, earlier settlements will be based on less accurate estimates of ultimate cleanup costs than settlements reached at later stages of the process. Paragraph 4(c) suggests that settlements, at the time they are reached, should represent a fair allocation of expected burdens.

The study found some evidence of confusion as to whether EPA can set up an account to finance a cleanup in cases in which it will not perform the cleanup itself and negotiations with the major parties are not sufficiently advanced. In these cases, the funds are generally placed in the Superfund and are not made available to finance a later cleanup by the major parties. These parties, understandably, object to this outcome, and the resulting friction is one of the reasons why several of the regional offices favor global settlements. Paragraph 5 suggests that EPA headquarters seek mechanisms to provide that an appropriate portion of the proceeds from de minimis settlements benefit the parties that take responsibility for the cleanup. Appropriate benefits might include amounts paid for future cleanup costs and premium payments.

RECOMMENDATION

1. EPA should make further efforts to establish procedures and incentives to negotiate de minimis settlements as a standard practice at all multi-party Superfund sites involving de minimis parties. EPA should not rely on global settlements as the preferred mechanism for resolving the liability of de minimis parties.

2. EPA's regional offices should actively seek de minimis settlements by informing potentially responsible parties (PRPs) of their potential eligibility and circulating a draft settlement agreement as soon as the required statutory findings can be made.[7] These steps should be taken as soon as is practicable, but in any event no later than the time EPA completes the "waste-in list," which identifies the type and quantity of waste contributed to a site by each PRP. In undertaking settlement negotiations with de minimis parties, EPA regional offices should be permitted to impose reasonable limitations on the negotiation process.

3. EPA headquarters should:

(a) make further efforts to standardize the general terms of de minimis settlements and should establish a procedure to determine site-specific terms,

(b) provide guidelines for the determination of appropriate payments and terms in de minimis landowner settlements, and

(c) create and maintain a central repository of de minimis settlement documents, readily accessible to the public.

4. To facilitate de minimis settlements, EPA headquarters should:

(a) establish a database and methodology to assist and guide the regional offices in estimating site cleanup costs,

(b) establish principles for determining premiums (additional fees charged to settling parties in exchange for immunity against reopening of their cases) applicable at different stages in the process, and

(c) make clear that regional offices should seek settlements that, at the time of settlement, represent a fair allocation of expected burdens.

5. To enhance the acceptability of de minimis settlements, EPA headquarters should, to the extent permitted by law, establish mechanisms to ensure that the parties that take responsibility for the cleanup receive appropriate benefits from the proceeds of de minimis settlements.

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[1] Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§9601-9675).

[2] Pub. L. No. 99-499, 100 Stat. 1613 (1986). This law generally reflects the pro-negotiation approach urged by the Conference in Recommendation 84-4, "Negotiated Cleanup of Hazardous Waste Sites under CERCLA" (1984).

[3] 42 U.S.C. §9607(a). Under a limited set of circumstances a prior owner can be liable even if there was no disposal during its period of ownership. Liability will attach if the prior owner had actual knowledge of the release or threatened release when it owned the property, and transferred it without disclosing such knowledge. 42 U.S.C. §9607(35)(C).

[4] 42 U.S.C. §9607(a), (f)(1).

[5] 42 U.S.C. §9622.

[6] 42 U.S.C. §9622(g).

[7] See 42 U.S.C. §9622(g).

Council members Susan Au Allen, Constance B. Newman, and Walter Gellhorn reviewing issues at the June plenary session while members Mary L. Azcuenaga and Ronald A. Cass attend to the same.

Conference senior fellow Alan B. Morrison making a point at the September plenary session while Jonathan Weiss listens.

APPENDIX F - CONFERENCE PUBLICATIONS

During 1992 one new book, FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK: STATUTES AND RELATED MATERIALS, 2d edition was published. The SOURCEBOOK is a basic introduction and reference book on the major federal procedural statutes. The following list includes agency-sponsored reports and articles printed during 1992.

Administrative Conference of the United States, *Proceedings of the Administrative Conference of the United States, October 31,1991, Colloquy: An Administrative Alternative to Tort Litigation to Resolve Asbestos Claims*, 13 CARDOZO L. REV. 1817 (1992).

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Administrative Conference of the United States, *The Supreme Court's Administrative Law Docket: Proceedings from the Administrative Conference of the United States* (a colloquy held September 19, 1991), 6 ADMIN. L. J. AM. U. 261 (1992).

Administrative Conference of the United States, *Transcript: Forty-Second Session of the Administrative Conference of the United States* (discussion regarding the future of ACUS, December 17-18, 1990), 53 U. PITT. L. REV. 857 (1992).

Administrative Conference of the United States (Office of the Chairman), FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK: STATUTES AND RELATED MATERIALS, 2d ed., U.S. Government Printing Office, 1992.*

Administrative Conference of the United States (Office of the Chairman), MULTI-MEMBER INDEPENDENT AGENCIES: A PRELIMINARY SURVEY OF THEIR ORGANIZATION, Rev. ed., May 1992.

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

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Anthony, Robert A., *Interpretive Rules, Policy Statements, Guidances, Manuals and the Like: Should Agencies Use Them to Bind the Public?*, 1992 ACUS ____. 41 DUKE L. J. 1311 (1992). Recommendation 92-2: "Agency Policy Statements."

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Fenton, Howard N., III, *Reforming the Procedures of the Export Administration Act: A Call for Openness and Administrative Due Process*, 27 TEX. INT'L. L. J. (1992). See 1991 ACUS 173; Recommendation 91-2.

Frye, John H., III, *Survey of Non-ALJ Hearing Programs in the Federal Government*, 44 ADMIN. L. REV. 261 (1992).

Grassley, Sen. Charles E., and Charles Pou, Jr., *Congress, the Executive Branch, and the Dispute Resolution Process*, 1 J. DISP. RESOL. 1 (1992).

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Krent, Harold J., *Monitoring the Federal Government's Conduct Through Fee Shifting Under the Equal Access to Justice Act: An Inconclusive Experiment* (May 1992), 1992 ACUS ____. Recommendation 92-5: "Streamlining Attorney's Fee Litigation Under the Equal Access to Justice Act."

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Lowenfeld, Andreas F., *Binational Dispute Settlement Under Chapter 19 of the Canada-United States Free Trade Agreement: An Interim Appraisal*, 24 N.Y.U. J. INT'L. L. & POL. 269 (1991).

Lubbers, Jeffrey S., and Nancy G. Miller, *The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements* (November 1991), 1992 ACUS ____. Recommendation 92-1: "The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements."

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Perritt, Henry H., Jr., *Electronic Records Management and Archives*, 53 U. PITT. L. REV. 963 (1992). See 1990 ACUS 389; Recommendation 90-5.

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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 become 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.

Council member Richard C. Breeden, Chairman, Securities and Exchange Commission, discussing recommendations adopted at the December plenary session with public member Michael M. Uhlmann, member of the firm of Pepper, Hamilton & Scheetz.

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); 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.

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 595(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.

Government member David Cook, Deputy General Counsel at the Federal Energy Review Commission, in a discussion with government member Alan W. Heifetz, Chief Administrative Law Judge, Department of Housing and Urban Development, about the Federal Administrative Judiciary study.

Senior fellows Clark Byse and Victor G. Rosenblum engaged in conversation at the December plenary session.