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### The Administrative Conference of the United States

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## THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

By RALPH F. FUCHS \*

With the presentation to the President of its Final Report and a letter of transmittal dated December 17, 1962 containing suggestions for means of improving federal administrative procedures in the future, The Administrative Conference of the United States, established by Executive Order 10934 of April 13, 1961 and directed to make a final report by the end of 1962, discharged its assignment. The Conference proposed that a permanent body of a similar character be established by statute and that, pending congressional action on this proposal, the Conference be continued until December 31, 1964 or until the prior enactment of such a statute. The President did not act before the end of the calendar year on the continuance of the Conference.

### OVER-ALL ASPECTS OF THE CONFERENCE

The Conference carried forward under the present administration the kind of consideration of administrative law problems that had been undertaken originally by the President's Conference on Administrative Procedure during the Eisenhower administration.<sup>1</sup> The two bodies were similar in composition, and Judge E. Barrett Prettyman, Jr., presided over both in the calm, warm, effective manner which is natural to him. As Chairman of the recent Conference and of its directing Council, he guided all of its efforts during its continuance. The Conference paid tribute to him and accorded him a standing ovation at its final session in early December.

The Council, which was named by the President, consisted of three members from federal agencies, four practicing lawyers, two

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\* Professor of Law, Indiana University. As a member of the Conference, the author had an opportunity to become acquainted with its operations through experience. Although this account of the Conference reflects this experience and may be justified because of it, it expresses only such knowledge as the author has and such opinions as he has formed, for which he assumes full responsibility. He does not speak for anyone else, inside or outside of the Conference.

<sup>1</sup> See the printed Report of that Conference as submitted to the President (March, 1955). The Conference met during the 12 months following its first meeting in November, 1953.

law professors, and a professor of political science, in addition to the Chairman. The 77 other members of the Conference included 46 who were designated by federal agencies and 31 others appointed by the Council. Two of the latter were hearing examiners, two were from state agencies, 21 were lawyers in private practice, one was an accountant and five were university professors, of whom two were in political science and three in law. There were six congressional representatives who, in turn, were usually represented at sessions of the Conference by alternates from the staffs of Senate and House committees.

Unlike its predecessor, this Conference was provided with funds which made possible the payment of travel expenses for out-of-town members and of compensation to some of the specially qualified consultants who assisted the Conference and attended its sessions. Eight of these, four lawyers in private practice and four law professors, advised the Council or particular committees, while seven other law professors served as reporters to an equal number of the nine committees into which the Conference membership was divided. Additional teachers performed special work from time to time. The Director of the Office of Administrative Procedure in the Department of Justice was Executive Secretary to the Conference. The staff of the Office conducted research and served in many other ways. In addition, a total of 40 agency lawyers was assigned to the Conference to assist committee reporters for varying periods. All in all, an impressive array of talent was mobilized in the performance of the Conference's tasks.

Aside from the proposals in the Conference's letter transmitting its Final Report, the tangible products of the body's work fall into three categories: informational reports emanating from committees; documents prepared by committee reporters to serve as background for Conference recommendations; and carefully drafted recommendations adopted by the Conference. The latter resulted from proposals by the committees, often based on reporters' suggestions but sometimes departing from these.

All together, 93 committee meetings were held, at which work was planned or carried forward and proposals were formulated. An initial plenary session of the Conference took place in June, 1961. At five succeeding sessions, commencing in December, 1961 and recurring during the ensuing 12 months, recommendations were considered and acted upon in a total of nine days of meetings. Attendance at the meetings was excellent.

Committee work and study by the reporters were, of necessity, intensive over periods of time. Discussions on the floor of the Conference were often lively and sometimes resulted in close divisions when votes were taken. It is fair to say that, nevertheless, there was much more agreement than disagreement among the members, whether from private practice, the Government, or the universities; for basic conceptions as to administrative processes were shared. As a result, each recommendation of the Conference received, in the end, a heavy preponderance of support, even though on prior points of detail significant differences had arisen. Considerable dissent as to fundamentals exists, however, with respect to some portions of Parts II and III of Conference Recommendation No. 28, dealing with hearing officer personnel administration and a career service for government attorneys.

#### THE NUMBERED RECOMMENDATIONS OF THE CONFERENCE

The 30 recommendations of the Conference, numbered in the order of their adoption and contained in the Final Report, may be grouped according to subject matter. In addition to three which have reference to the gathering of statistics and strengthening the Office of Administrative Procedure in the Department of Justice, they deal with nine topics or varieties of topics: the Federal Register and Government Manual, agency attention to procedural rules, particular aspects of agency inquiries (subpoenas, discovery, and rights of witnesses), ex parte communications in on-the-record proceedings, delegation of decisional authority, agency handling of particular classes of complex proceedings (in the CAB, FCC, and ICC, and in rate proceedings generally), judicial review and enforcement, public contract proceedings, and aspects of personnel administration. Some of the recommendations are simple and brief; others, such as Recommendation No. 16 on ex parte communications and No. 28 on personnel, contain elaborate sets of proposals. Some proposals contained in the recommendations are addressed to the discretion of agency authorities; others definitely urge particular agency action, and still others advocate legislation.

A number of the recommendations and parts of recommendations are noncontroversial, proposing manifestly desirable developments which have so far not come about because of inattention to the problems involved or failure to direct resources to their accomplishment. Such are Recommendations No. 10 and 11 relating to greater clarity of documents sent to the Federal Register

and better distribution of the United States Government Organization Manual, Recommendation No. 8 concerning continuing attention to agency rules, and, probably, Recommendation No. 5 (1) advocating rules of court that would permit the agencies to create records of proceedings in a form which would eliminate the need for reproduction of these records for judicial review purposes. Neither these nor the remaining, more debatable recommendations can be reviewed with thoroughness here. It will be necessary to select for brief discussion a few aspects of the recommendations that involve the greatest innovations or deal with subjects of greatest controversy.

Recommendation No. 13 advocates wide agency powers to issue subpoenas, to be broadly delegable and exercised in adjudicatory hearings by presiding officers on the mere request of a party, with judicial enforcement such as many statutes now provide. A "statement or showing of general relevance and reasonable scope" of the evidence sought, which is now required by § 6 (c) of the Administrative Procedure Act, would not be necessary. During the discussion of the recommendation a question was raised concerning the adequacy of applications by subpoenaed persons to revoke or modify the subpoenas addressed to them, such as the recommendation would permit, as a safeguard against undue use of subpoenas pursuant to mere request. Possible efforts to secure the cumulative testimony of hundreds of union members in an NLRB proceeding were cited as an example. The point thus raised was not clearly met in the discussion and may call for further attention. The recommendation does not propose an enlargement of judicial authority to invalidate subpoenas upon application of persons subject to them, such as the American Bar Association's proposed Code of Federal Administrative Procedure contains.<sup>2</sup>

Endorsement by the Conference in Recommendation No. 30 of the principle of discovery in adjudicatory proceedings is not implemented by suggested procedures, but constitutes an important step beyond previous recommendations as to the matter.<sup>3</sup> Recommendations No. 15 and 25 regarding the right to counsel concern mainly the position of witnesses in inquiries and embrace

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<sup>2</sup> See § 1005(b) of the Code, 9 AD. L. BULL. at 189, and the corresponding provision of S. 1887, 87th Cong.

<sup>3</sup> The President's Conference of 1953-54 did not act on the subject of discovery when urged to do so. It did include in its Report an illustrative uniform rule on depositions and interrogatories, which the Conference neither approved nor disapproved and which, in any event, does not exhaust the subject.

both the right to accompaniment by counsel and the functions counsel should be permitted to perform. The recommendation is that as a minimum these functions, by interpretation of § 6(a) of the Administrative Procedure Act applicable to witnesses compelled to appear, should include the right to offer objections and argue in support of them. In addition, supplementary examination of a witness by his own counsel might well be allowed, and cross-examination and presentation of rebuttal evidence should be permitted "to the extent appropriate". Witnesses who appear voluntarily should have the same rights as those compelled to appear before the same agencies. The recommendations do not apply to agencies not having powers of compulsion, such as the FBI, whose possible inclusion was made the subject of considerable discussion in the Conference.

Recommendation No. 16, dealing elaborately with *ex parte* communications in on-the-record proceedings and urging the agencies to adapt its proposals to their needs in agency codes of behavior, results from detailed thought and attention to the "influence" problem and the numerous suggestions during the past few years for dealing with it. The text of the recommendation is closely knit and must be read in its entirety to be understood. The recommendation does not embrace off-the-record communication among agency personnel, which relates more properly to the decisional process and the separation of functions than it does to outside pressures on agencies. Agency personnel do, however, come under the recommendation in respect to notice of *ex parte* communications which they may receive from outsiders. Communications from persons in public positions outside of an agency, including members of Congress, would become subject, under the recommendation, to the same rules as communications from other persons. It is not proposed to forbid, however, mere requests for information about the status of proceedings. The recommendation eschews the approach of a statutory code to the subject, but envisages similar rules among agencies. The Committee on Interstate and Foreign Commerce of the House of Representatives has already welcomed the recommendation and called upon the agencies subject to the Committee's legislative jurisdiction to carry it out.<sup>4</sup>

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<sup>4</sup> H. REPT. No. 2553, 87th Cong., 2d sess., pp. 10-11. Recommendation No. 16 of the Conference suggests for agency-by-agency adoption many of the means of controlling *ex parte* communications that were previously proposed by the Committee for

With respect to delegation of decisional authority, Recommendation No. 9 proposes the amendment of § 8 of the Administrative Procedure Act to make it clear that as to all proceedings subject to that section an agency might, with finality as against subsequent judicial review, limit its review of initial decisions of presiding officers. Review might be confined to instances in which parties requested it on limited statutory grounds as elaborated by agency rule. The requesting parties would be required to make a reasonable showing of these grounds, which are specified in the recommendation as prejudicial procedural error, clearly erroneous fact finding, error of law, or involvement of an important exercise of discretion or decision of law or policy. The review, if granted, might be restricted to the grounds alleged. Initial decisions which an agency declined to review or which it summarily affirmed would be agency orders subject to judicial review of the same scope as other such orders. The Conference referred back for further study a provision originally contained in Recommendation No. 9 as it came from committee, whereby, after an agency had reviewed an initial decision, confining its review according to the request of a party, judicial review at the instance of that party would have been limited to the grounds and the portions of the record originally specified. The recommendation as it stands differs from Reorganization Plans No. 3, 4, and 7 of 1961 and the amendment of the same year to § 5 of the Communications Act,<sup>5</sup> which confer on the CAB, the FTC, the FMC, and the FCC, respectively, a discretionary or "certiorari type" reviewing authority. That authority operates with respect to decisions made by subordinates pursuant to enlarged agency powers to delegate deciding authority to them. The intent of the recommendation is that review of initial decisions shall not be refused when there is a reasonable showing of the stated grounds for review. The purpose is to reduce the decisional burden on agency heads while preserving the right of parties to secure the determination of essential points at the highest level.

The recommendations with regard to particular classes of complex proceedings in the CAB, the FCC, and the ICC are among

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legislative enactment, with application to the principal independent regulatory agencies. The Committee's report endorses the agency-by-agency approach. On January 4, 1963 the Securities and Exchange Commission announced a proposed regulation conforming to Recommendation No. 16., 28 Fed. Reg. 455.

<sup>5</sup> 47 U.S.C.A. § 155(d). See also P.L. 87-592, 76 Stat. 394, 15 U.S.C.A. § 78d-1 & 2, applicable to the SEC.

those which received the closest attention of the Conference and of the committees from which they came. Recommendation No. 14, dealing with licensing of truck operations, is submitted to the consideration of the Interstate Commerce Commission. No. 19, relating to rate-making procedures, contains proposals to facilitate rate proceedings in all agencies in which they take place. Nos. 20 and 21, applicable to domestic route proceedings in the CAB, propose, respectively, to enlarge the statutory discretion of the Board with respect to consolidation of these proceedings and to secure consideration by the Board of a series of internal procedural changes. Nos. 22 and 23 suggest specific improvements in broadcast licensing proceedings in the FCC, only one of which definitely requires a statutory change. In general these recommendations propose means of sharpening issues, simplifying and expediting proof, bringing the information possessed by agency staffs more readily to bear, and increasing the use of formulated guides to decision. The increased role of staff members in defining issues and supplying data would be on the record;<sup>6</sup> but in complex rate proceedings the hearing examiner would have access to specialized, disinterested advice in the preparation of his report or decision;<sup>7</sup> and in CAB route proceedings, subject to observance of the principle that decisions must be based on the record,<sup>8</sup> and with the accompaniment of a more largely neutral, advisory role for the Bureau of Economic Regulation,<sup>9</sup> "unrestricted consultation" would be permitted "between personnel of the Bureau . . . and Board decisional personnel," except Bureau counsel of record and his witnesses.<sup>10</sup> On the mooted question of identification of in-

<sup>6</sup> Recommendations No. 19, paragraph 2 (19-2), 19-5, 21-10.

<sup>7</sup> Recommendation No. 19-5.

<sup>8</sup> Recommendation No. 21-10.

<sup>9</sup> Recommendation No. 21-6.

<sup>10</sup> Recommendation No. 21-8. A motion which included broadening the exception to the permitted consultation, to exclude all personnel that had participated in the presentation of the particular case, was defeated by the Conference after discussion. In the opinion of the present writer the broadened exception is desirable for protecting the principle of decision on the record and avoiding prejudicial bias. The proposal that the Bureau assume a more neutral role, stating pros and cons in a proceeding in which it would still be expected to take a position, would not be likely to produce the desired objectivity of personnel who took part in inquiries or gave intra-Bureau advice to counsel or to witnesses in a proceeding. Inapplicability of § 5(c) of the Administrative Procedure Act to initial licensing proceedings does not eliminate the need for the safeguard proposed in the amendment where a unit in an agency plays the kind of role which the recommendation would allow to the Bureau.

dividual CAB members with the opinions that decide cases, Recommendation No. 21 takes the middle ground that there should be such identification when the role of a particular member warrants but not otherwise, and that individual-member responsibility for supervision of opinion writing and preparation by individual members of supplementary personal comments on anonymous Board opinions should be encouraged.<sup>11</sup>

By contrast to the more complex recommendations, Recommendation No. 26 calls for simple courtesy and efficient practice toward attorneys representing parties to proceedings, through communication by the agencies to them of notices and other communications in the course of the proceedings. The Conference had before it indications that most agencies follow the recommended behavior; but it took cognizance of indications that departures from good practice may be sufficiently numerous to justify asserting the principle involved. The recommendation calls also for implementation of the principle through agency rules.

Recommendations No. 3 and 4 call for legislation to render orders of the Interstate Commerce Commission subject to review by the Courts of Appeals on the basis of the administrative records, in place of the present three-judge court procedure, and to establish Supreme Court review of Court of Appeals decisions upon certiorari instead of by appeal. Time, venue, and other requirements of the proposed review proceedings are included in the recommendations. Also with reference to judicial action upon administrative orders, Recommendation No. 18 proposes that orders of the National Labor Relations Board be judicially reviewable in the Courts of Appeals upon petitions filed within 30 days by parties desiring review, and that when no petition for review of an order is entered the Board promptly file its order in the appropriate Court of Appeals, for entry of an enforcement decree forthwith if review of the order is not sought by a party upon 15 days' notice of the filing.

The public contracts recommendations, Nos. 6, 7, 12, and 29, propose (1) the creation of an Armed Services Board of Contract Appeals in the Department of Defense, such as has since been established,<sup>12</sup> (2) the publication or availability for publication of rules of procedure and final decisions of such boards in all agencies having them, (3) that in agency contract appeal proceedings the

<sup>11</sup> Recommendation No. 21-7.

<sup>12</sup> 27 Fed. Reg. 6139 (June 29, 1962), amending 32 C.F.R. § 30.1.

contractors be given opportunity to know and contest the evidence supporting the determinations of contracting officers, and (4) that debarment of firms from government contracts or subcontracts or from participation in Federally assisted construction work be for stated reasons and for limited terms only and be preceded by trial-type hearings paralleled in appropriate cases by suspensions for restricted periods. In these recommendations the Conference rejected completely the unrealistic theory that, since the enjoyment of particular government contracts is not a matter of right, contractors and would-be contractors have no interests deserving of substantial procedural protection.

The Conference gave unanimous support to Part I of Recommendation No. 28 dealing with personnel problems. That Part proposes that each regulatory agency seek funds for a program of advanced training for highly qualified personnel; that it conduct regular in-service training of personnel; that the Civil Service Commission instigate inter-agency training programs with regard to substantive policy problems; and that a government-wide effort be made under the leadership of the Commission to develop a program of advanced university study for promising professional staff members. The obvious purpose of these proposals is to increase the short-run effectiveness of regulatory proceedings and to enhance the quality of statesmanship entering into regulatory decisions. No more fundamental proposals have come from the Conference than these; yet the Conference was under no illusions as to the probability of steps to place them in effect. Such steps are easily postponed because of apparently more pressing demands, and the benefits of education and training are sufficiently intangible and distant in time to deprive them of "practical" appeal. A great deal of organized attention to these proposals will be required if they are to bear fruit.

The Conference's approval of continued Civil Service Commission administration of the hearing examiner personnel system and its proposal that an attorney career service in the government be under the jurisdiction of the Commission came after warm debate. The outcome is not a reflection of satisfaction with the Commission's past conduct of the hearing examiner program. The Commission itself confessed frankly that its administration had been inadequate and lacking in suitable response to the recommendations of the President's Conference of 1953-54. It proposed, however, to institute immediate improvements, some of which have

already taken place. An office immediately under the Commission to administer the program, advised by a committee of lawyers from within and without the Government, has been established. This arrangement would extend to the proposed attorney career service if it were to be created. If a permanent Conference or other successor agency to the Administrative Conference is established, it would be charged under the proposals contained in the recommendation with continued watchfulness over the hearing examiner and attorney programs. The viewpoint which prevailed in the Conference was that these steps give greater promise of successful administration than would the adoption of such an untried measure as placing these personnel programs under an independent Administrative Office. Some members of the Conference felt that the programs might be attached to a permanent Conference under the direction of the Conference Chairman; but the majority were of the view that the Conference staff would be inadequately equipped for such a task and that the supervision of personnel functions would require different qualifications in the Chairman from those upon which his selection would be based.

The recommendation envisages quite different examining methods in the selection of hearing examiners from those to be used for attorneys. The former would include a written test to screen a large number of applicants for a small number of positions, to be followed by oral examinations "conducted with the participation of lawyers of outstanding ability and experience." Examinations for attorney positions, on the other hand, would in all probability be conducted agency-by-agency by special examining boards wherever substantial numbers of appointments were to be made, and would in most instances be entirely oral. Such agency boards and single-agency registers of eligibles resulting from the examinations are now used frequently in filling other kinds of professional positions under Civil Service regulations.

The recommendation advocates unranked registers of eligibles for both hearing examiner and attorney positions; in other words, freedom would be given to appointing agencies to choose from among candidates who succeeded in passing the examinations, in the light of their grades on the examinations and other relevant data.<sup>13</sup> Veterans' preference would be given in the grading of those

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<sup>13</sup> This method was followed in administering the attorney career system which operated under the Board of Legal Examiners from 1941 to 1944. Attorney positions at that time included those of many of the hearing examiners. See Executive Order No. 8743 (1941).

who received passing marks without benefit of the preference,<sup>14</sup> but the requirement of the Veterans' Preference Act of 1944 that appointments be restricted to eligibles at the top of ranked registers<sup>15</sup> would not be applicable.

Recommendation No. 28 also proposes increased professional leadership by the chief hearing examiner within each agency, to develop interchange of ideas among examiners, increased acquaintance with "agency policy and expertise," and better working facilities for the examiners. For government attorneys it proposes career development and merit promotion programs, such as are appropriate to a career service, as well as facilitation of inter-agency transfers of attorneys, recruitment at medium and higher levels from outside the Government when necessary, and continued study of turnover in attorney positions. Continuance and extension of so-called honor programs, under which initial appointments of law graduates with high scholastic records may be made at the GS-9 instead of at the GS-7 level, are proposed. The recommendation also advocates amendment of standards relating to attorney positions, to make clear that the highest grades are attainable by outstanding attorneys who work independently, whether or not their work is subject to technical review or other attorneys serve under them.

For hearing examiners a single grade in each agency is proposed, with not more than two grade levels in the Government. "[S]ubstantial and prompt increases in compensation" above that now prevailing are advocated. Probationary appointments for hearing examiners are also suggested, with "determination as to successful completion of probation [to] be made by the Civil Service Commission." The hearing examiner salary recommendation gave trouble because, despite a general disposition to emphasize the importance of the hearing examiner function, the specification of higher salaries for examiners than attorneys could hope to attain, except rarely, might continuously drain attorneys at the top into the hearing examiner corps. This item in the recommendation was therefore couched, in the end, in the general terms in which

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<sup>14</sup> Ten points are added to the grades of veterans who are under service-connected disability, the wives and unmarried widows of those not able to qualify, and under some circumstances the mothers of those who lost their lives in the armed forces. Five points are added to the grades of other veterans. 58 Stat. 387 as amended, 5 U.S.C.A. § 851.

<sup>15</sup> The so-called "rule of three." See § 8 of the Act, 58 Stat. 389 as amended, 5 U.S.C.A. § 857.

it now stands, leaving the ultimate resolution of the problem to future determination. Much depends on the future willingness of Congress to deal realistically with attorney salaries at the highest levels.

#### OTHER PRODUCTS OF THE CONFERENCE

The Conference's Final Report and the other products of its work have so far appeared only in processed form. Whether or not they are published further, many of them make permanent contributions to the understanding and solution of problems of administrative organization and procedure. Their availability in research libraries is therefore a matter of importance. In addition to the Final Report and letter of transmittal, the products consist of the reports of meetings of the Conference, known as plenary sessions; minutes of the Council meetings; massive statistical compilations relating to agency proceedings in the fiscal years 1961 and 1962; an exhaustive compilation of statutory and C.F.R. provisions governing agency proceedings, pointed to the provisions governing judicial review;<sup>16</sup> and the reports of committees and of reporters to committees. Some significant reports were still in preparation when the Conference terminated, but are mentioned as "Unfinished Business" in the Final Report.

No uniform method prevailed in the formulation and transmission of committee documents. Committee deliberation and reports were coordinated by the Council, providing guidance as to subjects to be studied and to be considered in meeting. The Council gave attention to substantive issues and to the feasibility of Conference consideration in plenary sessions. All of the recommendations were formulated by committees or cleared through them, typically on the basis of study and report by a committee reporter or reporter and staff. Some reporters' reports were circulated among the members of the Conference for information and comment before final committee action upon them. A revised draft of a reporter's report occasionally became a committee's report without designation as such on its cover, and was supplemented by the recommendation or recommendations based upon it. Usually, how-

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<sup>16</sup> The compilation, issued by the Committee on Judicial Review, is in two parts covering, respectively, the executive departments and the independent agencies, and is entitled "Special Statutory Provisions Governing Judicial Review of Federal Administrative Proceedings." A supplement analyzes the statutory judicial review provisions in greater detail.

ever, a committee report, designated as such, accompanied each recommendation, whether stapled or bound with it or separately. Dissenting or supplementary individual views of committee members on particular points accompanied some of the reports.

Studies in depth not directed to recommendations envisaged in advance, a number of which were made, have great value, as do the over-all compilations of data, for the light they throw on administrative problems for purposes of future inquiry. Among the studies of this type that were circulated are *The Conduct of Rate Proceedings in the Interstate Commerce Commission*, by the Reporter to the Committee on Rulemaking; three studies by the Reporter to the Committee on Licenses and Authorizations: *Licensing of Truck Operations by the Interstate Commerce Commission*, *Licensing of Major Broadcast Facilities by the Federal Communications Commission*, and *Licensing of Domestic Air Transportation by the Civil Aeronautics Board*; portions of the report on *Section 11 Hearing Examiners* by the Reporter to the Committee on Personnel and of the *Staff Report on Government Attorneys*, made to the same committee; and two memoranda by the Reporter to the Committee on Internal Organization and Procedure, entitled *The Legislative History of Section 5(c) of the Administrative Procedure Act*, and *Analysis of S. 1734 as Originally Introduced and as Revised by the Bureau of the Budget*. Other reports to committees, which were not released to the Conference as a whole, are doubtless of equal value. A substantial number of committee reports adduce large bodies of information, as well as advocacy, in support of the recommendations contained in them.

#### RELATION OF CONFERENCE PROPOSALS TO FUTURE IMPROVEMENT OF ADMINISTRATIVE PROCEDURE

Like the Administrative Conference just ended, the permanent body proposed by the Conference would have a directing Council of ten members, plus a Chairman. The Chairman would be appointed by the President with the advice and consent of the Senate and would have a five-year term of office; the members of the Council would be appointed by the President for three-year terms. The Conference would have an Assembly of not more than 80 members, the preponderance of whom would be named by the heads of agencies designated by the Council and the remainder of

whom would be chosen by the Council from the bar, the universities, and other sources. "Each member should function as an individual charged with a personal, non-delegable responsibility, rather than as a representative of any governmental or non-governmental organization." The members would serve without compensation, except for reimbursement of actual expenses.

The Assembly would have ultimate authority over all activities of the Conference. The Council would be the managing group. The Chairman would be "the chief executive and administrative officer" of the Conference, making preliminary inquiries into matters he deemed important, proposing subjects for study and discussion, representing the Conference in external relations, endeavoring to effectuate the policies and recommendations of the Conference and its predecessors, and carrying forward statistical and other research studies and reports. He would be assisted by a staff of his selection. He would preside at all meetings, report regularly to the Council and the Assembly, and report annually to the President and the Congress.

The Conference also proposed a Committee on Agency Ethics of the permanent Conference. It would consist of five members elected by the Assembly upon nomination of the Council. The members, three of whom would be from within the Government service, might or might not be members of the Conference. The Committee would, upon request by the head of an agency, render advisory opinions on questions of ethics or conduct involved in the actions of agency members or employees or of lawyers or other persons professionally related to agency proceedings. The Committee's opinions would be published in the Federal Register, but would not identify "with particularity" the persons or agencies involved.

The proposal of a permanent Conference, coupled with the recommendations outlined above, inevitably invites comparisons with other proposals for the improvement of administrative organization and procedure. Especially involved are, of course, the Code of Administrative Procedure<sup>17</sup> and the Administrative Practice Act<sup>18</sup> which have been advocated by the American Bar Association.

There is obviously no basic inconsistency between the concep-

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<sup>17</sup> The Code was published in 9 AD. L. BULL. at 184-198 (1957) and has been introduced in successive Congresses since that time. See, e.g., S. 1887, 87th Cong.

<sup>18</sup> Bills embodying the act have similarly been introduced in succeeding Congresses. See S. 600, 86th Cong., and H.R. 349, 87th Cong.

tion of a Code, constituting simply an expanded Administrative Procedure Act to serve as a base for further improvement as well as for the regulation of procedures, and the kind of specific steps toward improvement which the Conference recommendations contain. Inconsistencies between particular provisions of the proposed Code and specific recommendations of the Conference are capable of adjustment in the enacting process.<sup>19</sup> Future Conference treatment of the problems with which other Code provisions deal might lead to other divergencies needing adjustment.

Under the proposed Practice Act, the Director of the Office of Federal Administrative Practice would be advised by a Committee which might be similar in composition to the permanent Conference now proposed.<sup>20</sup> His administration of the hearing examiner and attorney career services, for which the act provides,<sup>21</sup> is, of course, a complete alternative proposal to Civil Service Commission administration of the two services, which the Conference recommends. The most basic choice presented is, however, between the performance of research and recommending functions by a Director advised by a committee and performance of the same functions by a Conference headed by a Chairman, each provided with funds and the necessary staff.

According to the letter to the President transmitting the Administrative Conference's report, the Conference approach to administrative law problems is one whereby agencies may cooperatively, continuously, and critically examine their administrative processes and related organizational problems . . . , with a sufficient infusion of outside experts to assure objectivity and variety of views." The letter states that "in all fairness and decency" the agencies should be permitted to attack their own problems with the aid of the resources and the collective judgment that a pooling of their efforts can secure. It is for this reason that they would have a majority of members of the permanent Conference and that the Conference, rather than a Director, would have the final authority. The agencies are, however, as all would recognize, basically servants and not masters. Hence the problem is one of providing conditions productive of good results and not one of giving effect to agency rights.

<sup>19</sup> See *supra*, text at note 2.

<sup>20</sup> See § 108 of the proposed act. The size and composition of the proposed Advisory Committee are not specified in the act and would be left to the discretion of the Director.

<sup>21</sup> Proposed Act, § 110(a).

Prior to the President's Conference of 1953-54 there had been no experience with the conference type of body, and the recent one is the first such body to command funds for substantial research in support of group deliberation. The results are impressive. It can be said further in behalf of the conference device that it may provide backing for adequate budgetary provision for the research operation, such as some have feared might be difficult to obtain in an independent office which would inevitably be small in relation to the Government as a whole. The Chairman of the Conference should in general be in a position to provide leadership equal to that of the Director of an Office. When he spoke for the Conference he would, in addition, have the support of a body whose members, even including those who might have been in disagreement originally, might be expected to recognize the importance of the judgment of the whole. There was little evidence of intransigence or special pleading by individual agency personnel in the Conference just ended—although the ultimate test will be, of course, whether the recommendations which call for agency consideration are acted upon in good faith. Unlike a Director, on the other hand, a Chairman can proceed only so far and so fast as he can carry the Conference with him. All in all, it seems to this writer that the advantages of the conference device outweigh the disadvantages.<sup>22</sup>

A question naturally arises whether non-governmental participation and influence are adequate in a Conference of the kind that has existed and is now proposed. In the Conference just ended the members from the agencies were in a majority, and they would be so in the proposed permanent body. Nevertheless, there is no doubt about the participation and effectiveness of the non-Government members during the recent sessions. Their voices were heard frequently in the discussions, their influence was strong in committees, and specific effects of their urgings are clear from the record. They also were in a preponderance on the Council. There was widely expressed appreciation of the quality of their thought and of the willingness of members of the bar in private practice to attend meetings despite the absence of compensation for time irretrievably lost from normal professional work. Very occasion-

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<sup>22</sup> The House of Delegates of the American Bar Association at its February meeting voted to recommend the creation by law of a permanent Administrative Conference of the United States similar to the one proposed by the Conference just ended, but differing somewhat from it in composition. *American Bar News*, Feb. 15, 1963, p. 5.

ally, intra-government attitudes, once crystallized in the Conference, perhaps became unduly inflexible; but even then the division between government and non-government members was not clear-cut. Indeed, transitions into and out of the Government, exemplified in the careers of many members of the Conference, strikingly reduce the likelihood of inability on the part of either group to understand the concerns of the other.

The Conference's letter of transmittal to the President also expresses a preference for the conference device over the possible exercise of oversight functions in relation to federal agencies by an official in the Executive Office of the President, doubtless aided by a staff. "The scope of problems is so great," the letter says, "that no one official would be able to encompass them;" and the directives of such an official might not be accepted willingly. The "independence" of some of the major regulatory agencies would also create "added elements of difficulty" with relation to procedural instructions issuing from the executive offices. Emphasizing the professional and advisory character of the proposed permanent Conference and its leadership, the Conference just concluded rejected in its final session a motion to delete the proposal that the Chairman serve for a fixed five-year term.

It would be a mistake to assume that the Administrative Conference's recommendation that hearing examiner and attorney career-merit systems be administered by the Civil Service Commission is attributable to a bureaucratic preference, dominating the Conference, for traditional methods. On the contrary, the division of opinion on this point ran through all of the groups and subgroups in the Conference, and involved some striking departures from views previously held. The conclusion that was reached reflected a judgment which many came to share. Its acceptance would involve sacrificing the provisions of the American Bar Association Administrative Practice bill for the Office of Federal Administrative Practice to administer the career-merit programs. The bill is well-considered and well-drafted in this and other respects, and is not to be discarded lightly. The Director of an Office could probably administer personnel systems less inconsistently with his other duties than the Chairman of a Conference, who would be responsible in other matters, but not as to personnel functions, to the Conference. Yet when all is said and done the Practice Act would impose a large and difficult administrative task on a small research-oriented agency. That task would require

knowledge of personnel matters and of political forces bearing on personnel administration, in addition to professional legal qualifications. If Civil Service Commission administration can really be rendered adequate now, the legislative and other steps to make it so are far more likely to be successful and to win assent in Congress than a more drastic alternative. If a more drastic alternative turns out to be needed in the future, it can be adopted then.

An essential feature of the Conference personnel recommendation is the relation of the proposed permanent Conference and its Chairman to the Civil Service Commission's administration. The Director of an Office of Federal Administrative Practice could, obviously, stand in the same relation; but the recommendation would not have been approved without the presence in it of a "watchdog" duty to be performed by an agency independent of the Commission, which could bring to bear the judgment of lawyers and political scientists not themselves immersed in personnel functions. The hearing examiner and attorney personnel problems and the alternative proposals which now exist to carry forward the research and recommending functions performed in 1960-61 by the Administrative Conference of the United States must therefore be considered together.

## APPENDIX

### TEXT OF THE RECOMMENDATIONS OF THE CONFERENCE

#### CONTENTS

<i>Recommendation No.</i>	<i>Subject of Recommendation</i>
1	Statistics on administrative proceedings (1961)
2	Office of Administrative Procedure
3	Jurisdiction for review orders of the Interstate Commerce Commission
4	Procedures for review of orders of the Interstate Commerce Commission
5	Production of the record and briefs by means more economical than printing, and designation of record after the filing of briefs
6	Unification of the Armed Services Board of Contract Appeals, and elimination of subsidiary boards
7	Availability of rules and decisions of boards of contract appeals
8	Re-examination by the agencies of their procedural rules, and creation of machinery within the agencies of procedures