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REAUTHORIZATION OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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HEARING

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIRST CONGRESS

SESSION SESSION

ON

H.R. 3897

TO AUTHORIZE APPROPRIATIONS FOR THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES FOR FISCAL YEARS 1991, 1992, 1993, AND 1994, AND FOR OTHER PURPOSES

FEBRUARY 21, 1990

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REAUTHORIZATION OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

WEDNESDAY, FEBRUARY 21, 1990

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ADMINISTRATIVE LAW
AND GOVERNMENTAL RELATIONS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2226, Rayburn House Office Building, Hon. Barney Frank (chairman of the subcommittee) presiding.

Present: Representatives Barney Frank, Harley O. Staggers, Jr., Don Edwards, Craig T. James, and Chuck Douglas.

Also present: Representative Tom Campbell.

Staff present: Janet Potts, chief counsel; Belle Cummins, assistant counsel; Cynthia Blackston, chief clerk; and Roger T. Fleming, minority counsel.

Mr. FRANK. The hearing of the Subcommittee on Administrative Law and Governmental Relations will come to order, two members now being present.

This is a hearing on H.R. 3897, which would reauthorize the Administrative Conference of the United States, and we will hear our first witness, Mr. Breger, the Chairman of that organization.

[The bill, H.R. 3897, follows:]

(2) in paragraph (15) by striking the period and inserting "; and"; and

(3) by adding at the end the following:

"(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).".

STATEMENT OF MARSHALL J. BREGER, CHAIRMAN, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, ACCOMPANIED BY WILLIAM J. OLMSTEAD, EXECUTIVE DIRECTOR, AND GARY J. EDLES, GENERAL COUNSEL

Mr. BREGER. Thank you very much, Congressman Frank. I am accompanied by Gary Edles, General Counsel. I have prepared a written statement with appendixes and I would be grateful if you would have that put in the record.

Mr. FRANK. Without objection, it will be made part of the record.

Mr. BREGER. I know that this committee is familiar with the work of the Conference and you have before you our extensive written statement, so I only want to make a few introductory remarks to leave time for any questions that you might have.

In the first place, I want to underscore that if an organization like the Administrative Conference did not exist, as Marx said with religion, it would have to be invented, because it serves an important social and intellectual function for the administrative state. That is to say, with the growth of administrative agencies, with the increase of bureaucratic activity, with the large number of programs that Congress yearly creates, there is a need for an internal think tank to step back, reflect, focus on the terrain, and consider how the administrative procedure can be structurally improved. Every other industrial country has created an entity like the Administrative Conference because they have found that the kind of research that the Conference does is important to their activity.

I want to point out to you what I think to be the unique nature of the Conference membership and the Conference process. It is different in kind than simply setting a number of researchers out to study a problem, be they academics or beltway.

The Conference consists of 101 members; around 60 are Government members. There are members from the public sector—these are usually attorneys, although not always, with established reputations and knowledge of public law and administrative law. It also consists of academics—the top academics in the administrative law field.

A project is commissioned, our staff works closely with the contractor to focus in on the real life questions, the practical questions. It's not an ivory tower product that stays in the library.

The committees of the Conference review the document, develop recommendations. The perspective of all interested parties is brought to bear. The different agencies that have problems, private sector concerns, consumer concerns, are all brought to bear. The product, while I can't say it is always perfect, at least it is very unlikely that we will have missed something, that we will have missed some important piece and will be surprised by a comment from the agency or from the public.

This process of bringing together the best minds from different perspectives and having them work on problems of government is very unusual in the Government. It's one of the few places in the Government where you have an opportunity to study the long term and look at the long term rather than deal every day with day-to-day crises.

As our statement points out, we are looking at new areas to work in. This is largely because, first, modern life has spun forth these new areas, and also because Congress is creating new programs and focusing on new issues.

We have begun to do work on problems of international trade. These are procedural problems, mind you, problems that are developed by EC-92 and standardization and how U.S. regulatory agencies will relate to the increasing needs of an international regulatory environment—a subject there's been very little study on.

We have increased our work in the environmental and health fields, procedures again of the agencies that deal with environment and health; and, of course, we continue working on our old standbys: Financial services agency procedures, alternate dispute resolution, and the more traditional activity of administrative procedure, judicial review, ALJ's, et cetera.

I have to underscore to you that the formal work product that you see, the Conference recommendations—and we're proud of the fact that we have more than doubled that work product over the last 4 years—is only the tip of the iceberg of Conference activity. We have numerous informal interactions with Congress where we are asked by congressional staff to analyze legislation, where we're used as the institutional memory of administrative procedure. We get called up by staffers and we also get called up by people in agencies who want our view on proposed procedures want our view as an institutional memory of administrative law.

I think it's important that you recognize not just the formal recommendations but the much wider informal activities of Conference—the training work that we do, although that has been constrained by budgetary limitations, and the coordination and information work that we do, to make sure that agencies don't keep reinventing the wheel, that a project done in Agriculture is not done 3 years later in the Department of Energy. That's a waste to the U.S. Government.

I have to underscore to you that you in Congress and this committee have a responsibility—a responsibility to study the administrative process and to keep it from growing like Topsy and moving outside your control.

There are many problems to the administrative state. The mass justice system practically has collapsed; in social security disability appeals, one of our studies showed people get less than 15 minutes per appeal, hardly time to read the papers, let alone make a decision.

There's a balkanization of procedure with each piece of legislation rewriting administrative procedure. There's overlapping of functions. There are lack of statistics about administrative law and administrative procedure. There's a lack of training of senior Government officials and there's a system overload, both in court and in the agencies in dealing with the administrative process.

Now whether you choose to make use of the Administrative Conference or of another agency to deal with these problems, I point out to you that there are problems that have been too long ignored and must be dealt with. I don't put this forward as a jeremiad, but I think it's fair to say that the administrative state needs attention and needs both reflection and a pretty comprehensive tuneup.

Let me thank you for the opportunity to appear before you and I'm happy to answer any specific questions that you might have.

[The prepared statement of Mr. Breger, with appendixes, follows:]

PREPARED STATEMENT OF MARSHALL J. BREGER, CHAIRMAN, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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Testimony of

Marshall J. Breger
Chairman

Administrative Conference of the United States

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STATEMENT OF MARSHALL J. BREGER

Introduction

My name is Marshall J. Breger and I serve as Chairman of the Administrative Conference of the United States. I am pleased to discuss with you the mission and accomplishments of the Conference in support of our request for reauthorization of our appropriations for another 4 years. I am particularly gratified that Chairman Brooks has sponsored our reauthorization through the introduction of H.R. 3897.

The Conference and this committee share a commitment to finding ways to improve the operation of the federal government and federal programs, to making the procedures of federal agencies fairer and more efficient. I believe the Conference's record of achievement over the past 4 years in improving the fairness and efficiency of the administrative process amply justifies its reauthorization.

Background

It is helpful, Mr. Chairman and members of the committee, to evaluate the role of the Conference in some context. The idea of having an institution to recommend improvements in agency procedures goes back at least 40 years and has received support from all three branches of government on a bipartisan basis. Before there was a permanent Administrative Conference, the courts and two Presidents appointed temporary organizations to serve the same functions. The Judicial Conference of the United States in 1949 designated a committee of its judges to examine some of the more pressing shortcomings of the administrative process -- shortcomings that were creating difficulties when they showed up in court on judicial review of agency action. A special advisory committee set up by the Chief Justice shortly thereafter recommended establishment of an Administrative Conference.

In 1953, a Republican President, Dwight Eisenhower, established a temporary Conference on an experimental basis. The success of the experiment led his Democratic successor, President John Kennedy, to establish a second temporary Conference in 1961. The widespread endorsement of the Conference idea, including the recommendations of both temporary Conferences that a permanent institution be established, led Congress to pass the Administrative Conference Act in 1964 and create the Administrative Conference as a permanent, independent agency.[1]

On swearing in the first Conference Chairman, Professor (now Federal Circuit Judge) Jerre Williams in 1968, then-President Lyndon Johnson noted:

> In 1952 Justice Jackson observed that "The rise of administrative bodies probably has been the most significant legal trend of the last century. . . . Perhaps more values today are affected by their decisions than by those of all the courts."
>
> The success of two temporary conferences -- both chaired very ably by Judge Prettyman -- convinced us that we needed a permanent agency for continuing review of the administrative process.
>
> We needed a forum for the constant exchange of ideas between the agencies and the legal profession and the public.
>
> We want the Administrative Conference to be the vehicle through which we can look at the administrative process and see how it is working and how it could be improved and how it could best serve the public interest.[2]

As you may know, the Conference was modeled on the Judicial Conference of the United States, whose members include representatives of the Supreme Court, the federal circuit and district courts, and other judicial officers, who meet, from time to time, in a fashion akin to that of the Conference. The research arm of the Judicial Conference is maintained in the Federal Judicial Center, an organization charged with the responsibility for furthering the development of improved judicial administration. Principally, the Federal Judicial Center studies the operation of the federal courts, formulates recommendations for

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[1]Pub. L. 88-499, 78 Stat. 615, now 5 USCA § 571 et seq. (1977 and West Supp. 1989).

[2]Remarks at the Swearing In of Jerre S. Williams as Chairman, Administrative Conference of the United States, Jan. 25, 1968, [1968-69] Pub. Papers, vol. 1 at 68.

the Judicial Conference on ways to improve the administration of the courts, and conducts programs of continuing education and training for court personnel.[3] Apart from a special statutory responsibility for improvement of automatic data processing and systems procedures used by the courts, the Federal Judicial Center performs essentially those functions for the judicial branch of government that the Office of the Chairman of the Administrative Conference is charged with performing for the departments and administrative agencies.

Both organizations got started at about the same time. The Conference was established by Act of Congress in 1964 but its first chairman was not sworn in until January 25, 1968. The Federal Judicial Center was established by Act of Congress in 1967 and its first director was sworn in on March 2, 1968. The statutes of the two agencies are different, howeve The law establishing the Federal Judicial Center provides an authorization of appropriation of "such sums as may be necessary" to carry out the provisions of the statute. The Administrative Conference statute has always contained an express dollar ceiling.

What is true for the United States has been true for much of the western industrialized world, where the political leadership has recognized the need for objective and relatively autonomous practical advice on how to navigate the "administrative state." Many countries with significant administrative bureaucracies have some permanent body that monitors administrative procedure and recommends improvements. Great Britain, for example, has the Council of Tribunals, charged with the responsibility for overseeing a wide variety of administrative tribunals and consulting with them on the establishment of procedural rules. In Australia, the Administrative Review Council focuses on questions concerning review of administrative action by courts and other panels, making recommendations on the adequacy of procedures and the categories of administrative decisions that should be reviewed. The Canadian Law Reform Commission considers the procedures of administrative tribunals, including government departments and agencies. And the Report and Studies Commission of

[3] 28 USCA § 620 (1968)

the French Conseil d'Etat prepares confidential annual reports identifying pressing problems of administrative procedure and recommending legislative changes.

Statutory Mission

The mandate of the Administrative Conference today, as it was when it was established, is to study federal agency organization, procedure and management, including, specifically, the efficiency and fairness of the processes by which federal agencies administer regulatory, benefit and other government programs. Put simply, we try to facilitate operation of the administrative state, making it easier for the administrators, less costly for the taxpayers, and more equitable and efficient for the citizens who must deal with it.

The Conference advises the President, the Congress, and federal departments and agencies on ways to improve administrative procedures, including adjudication, rulemaking, and informal decisionmaking. Among other things, we study the structure and organization of government agencies and their administrative processes. Equally important, although less publicized, we work informally with agencies to improve their administrative procedures. Because both Congress and the courts recognize that failings in the administrative process significantly affect the workload of the courts, the Conference examines the relationship between agency action and judicial review and makes recommendations to the courts through the Judicial Conference. In short, the Conference addresses all problems of administrative procedure, whether they involve administrative, legislative or judicial solutions, or some combination.

The Conference also serves as an information clearinghouse. It collects and synthesizes materials, thus saving agencies from expending resources separately to accomplish essentially similar tasks. It provides a mechanism for ensuring consistency from agency to agency in procedural matters affecting the public. The Conference fields requests from members of Congress, congressional committees and their staffs, agency officials, and members of the public on a wide range of matters associated with the administrative process. Although we

do not keep records of our informal contacts, we handle telephone and mail inquiries on a daily basis.

For the committee's convenience, a copy of our statutory mandate is set out in a chart on the facing page.

Conference Initiatives Affect Millions of Americans

In its first 20 years Conference recommendations had a significant effect on the workings of the federal government.[4] Early Conference studies, for example, documented the government's success in interposing various "technical defenses" in suits seeking relief against federal agency action. The Conference recommended that these rules be changed[5] and Congress passed a Conference-sponsored bill to do so in 1976.[6] In 1972, the Conference adopted one of its more influential recommendations, urging Congress to allow agencies to impose civil penalties administratively as a complement to seeking criminal sanctions or license revocation.[7] The Conference developed a model statute incorporating an on-the-record hearing before an administrative law judge, review by the agency head, with judicial review in the courts of appeals to contest the imposition of any penalty. This approach has been incorporated into dozens of statutes and was upheld by the Supreme Court.[8]

Conference initiatives now touch the lives of millions of Americans. In 1989 alone, we examined the procedural mechanisms through which the Medicare program protects its beneficiaries from unnecessary, poor quality or inappropriate medical care.[9] We looked as

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[4]For a general description of the Conference's early work, see Wosencraft, *The Administrative Conference of the United States*, 24 Bus. Law. 915 (1969); *Symposium: The Administrative Conference of the United States*, 26 Admin. L. Rev. 259 (1974); McGowan, *The Administrative Conference: Guardian of the Regulatory Process*, 53 Geo. Wash. L. Rev. 67 (1985).

[5]Recommendations 68-7, Elimination of Jurisdictional Amount Requirement in Judicial Review, 1 CFR § 305.68-7 (1989); 69-1, Statutory Reform of the Sovereign Immunity Doctrine, 1 CFR § 305.69-1 (1989); and 70-1, Parties Defendant, 1 CFR § 305.70-1 (1989).

[6]Pub. L. 94-574, 90 Stat. 2721 (1976).

[7]Recommendation 72-6, Civil Money Penalties as a Sanction, 1 CFR § 305.72-6 (1969).

[8]Atlas Roofing Co. v. OSHRC, 430 U.S. 442 (1977) (administrative imposition of civil penalties does not violate Seventh Amendment). See also Tull v. United States, 481 U.S. 412 (1987) (reaffirming Atlas Roofing).

[9]Recommendation 89-1, Peer Review and Sanctions in the Medicare Program, 1 CFR § 305.69-1 (1989); Jost, *Administrative Law Issues Involving the Medicare Utilization and Quality Control Peer Review Organization (PRO) Program: Analysis and Recommendations*, 50 Ohio State L. J. 1 (1969).

THE ADMINISTRATIVE CONFERENCE ACT

OBJECTIVES: (5 U.S.C. § 574)

1. Study the efficiency, adequacy, and fairness of the administrative procedures used by agencies in carrying out programs and make recommendations to agencies . . . and to the President, the Congress, or the Judicial Conference of the United States

2. Arrange for interchange among agencies of information useful in improving administrative procedures.

3. Collect information and statistics from agencies and publish such reports as it considers useful for evaluating and improving administrative procedures.

well at the use of medical personnel to help process the more than 1.5 million requests for disability insurance benefits and supplemental security income submitted annually to the Social Security Administration.[10] In furtherance of a 1987 Conference recommendation, we helped congressional staff draft the procedural portions of bills to protect private sector health and safety whistleblowers, both generally and in the aviation industry specifically, and testified on whistleblower legislation before the Subcommittee on Labor-Management Relations of the House Committee on Education and Labor. At the request of the House Appropriations Committee, and with the encouragement of members of the Congressional Hispanic Caucus, we looked into the procedures by which the Immigration and Naturalization Service administered the alien legalization program authorized under the Immigration Reform and Control Act of 1986.[11]

At the same time, we made significant recommendations bearing on fundamental aspects of the governmental process. Following the Presidential election of 1988, we persuaded the new Administration to adopt a first-of-its-kind Code of Conduct for transition workers.[12] We were actively involved in ensuring the integrity of governmental decisional processes by proposing changes in the conflict-of-interest requirements for members of federal advisory committees.[13] We proposed that agencies make their adjudicatory decisions more readily available to the public.[14] We advised the staffs of the congressional banking committees about procedural problems in connection with the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA).[15] And, as this committee is well aware, we have worked

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[10]Recommendation 89-10, Improved Use of Medical Personnel in Social Security Disability Determinations, 1 CFR § 305.89-10 (1989); Bloch, *The Use of Medical Personnel in Social Security Disability Determinations* (1989)

[11]Statement on Mass Decisionmaking Programs: The Alien Legalization Experience, 1 CFR § 510.14 (1989); North and Porta, *Decision Factories: The Role of the Regional Processing Facilities in the Alien Legalization Programs* (1989).

[12]Recommendation 88-1, Presidential Transition Workers' Code of Ethical Conduct, 1 CFR § 505.88-1 (1989); Harter, *Proposed Standards of Conduct for Presidential Transition Workers*, 56 Fed. Bar News & J. 130 (1989).

[13]Recommendation 89-3, Conflict-of-Interest Requirements for Federal Advisory Committees, 1 CFR § 305.89-5 (1989); Berg, *Conflict-of-Interest Requirements for Members of Federal Advisory Committees* (1988).

[14]Recommendation 89-8, Agency Practices and Procedures for the Indexing and Public Availability of Adjudicatory Decisions, 1 CFR § 305.89-8; Gilhooley, *The Availability of Decisions and Precedents in Agency Adjudications: The Impact of the Freedom of Information Act Publication Requirements*, 5 Admin. L. J. 55 (1989).

[15]Pub. L. 101-73, 105 Stat. 183 (1989).

diligently to develop legislation to supplement the costly and litigious rulemaking and adjudicatory processes, where appropriate, with faster, less costly consensual mechanisms.

It should be emphasized, Mr. Chairman, that these initiatives are only those we undertook in the last year or so. The entire 4 years of our current authorization have been similarly productive. They resulted in more recommendations than any comparable period in Conference history. Indeed, in 1988, for the first time in Conference history, we were required to hold a third plenary session in the same year because the number of recommendations submitted for Conference action by standing and special committees was at an all time high. Of the 150 recommendations adopted during the Conference's almost 22-year history, 38 of them -- or more than 25 percent -- were adopted in the period of our current authorization. This is a tribute to the energy level and dedication of all our members and staff, but particularly our committee chairmen, the staff liaisons, and our Research Director.

A brief description of *selected* ACUS initiatives during our current authorization period is attached as Appendix A. A compilation of the 38 formal recommendations and 3 statements issued during this period is included as Appendix B.

Conference Membership

The Conference has an authorized membership of 101 members, who include the government's top legal officers, leading academic authorities in the field of administrative law, and experts from private life who are knowledgeable about governmental processes. Except for the Chairman, all of our members serve without compensation. Because of the prestige of serving as a Conference member, the government receives, free of charge (except for travel expenses for out-of-town members) the services of both its government and public participants -- individuals with an impressive array of accomplishments and experiences who donate hundreds of hours of service each year. A current membership list is attached as Appendix C.

Among the 101 members is a 10 member Presidentially-appointed Council, consisting of 5 federal officials and 5 private citizens. Current members of the Council are Phillip D. Brady, General Counsel of the Department of Transportation; Richard C. Breeden, Chairman of the Securities and Exchange Commission; Harold R. DeMoss, Jr., of the law firm of Bracewell & Patterson in Houston, Texas; Walter Gellhorn, Professor Emeritus at the Columbia University School of Law; Trudi M. Morrison, President of The Morrimount Corporation in Detroit, Michigan; Constance B. Newman, Director of the Office of Personnel Management; Robert Ross, Executive Assistant to the Attorney General; R. Carter Sanders, Jr., Esquire, Sanders & Associates, Washington, D.C.; and Edward L. Weidenfeld, Esquire, Washington, D.C. We have one Council vacancy at present.

The Chairman is an advice-and-consent appointee with a term of 5 years who serves as the Conference's chief executive. He superintends a small, permanent career staff.

By law, a majority of our 101 members are government officials. They are selected by their individual agencies and departments and are, typically, agency heads, general counsels, commissioners, or assistant secretaries. But the Conference has among its government members a cadre of career civil servants who lend important continuity to its activities.

Among the career government officials are three who hold so-called "floating" government seats that are used to provide the Conference with perspectives that might otherwise go unrepresented. Those seats, which rotate from time to time among agencies and departments, are filled by an administrative law judge, a member of a board of contract appeals, and an inspector general.

Public members are appointed by the Chairman with the approval of the Council. They serve 2-year terms and include some of the leading authorities in the field of administrative law and government operations, consumer or public interest representatives, and other members of the practicing bar. We currently have 38 public members (other than public members of the Council). By design, they represent all points on the political, philosophical and geographic spectra.

Among our public members are Lloyd Cutler and Fred Fielding, former White House Counsels to Presidents Carter and Reagan, respectively; Stuart Eizenstat, former Director of the Domestic Policy Council under President Carter; James C. Miller III, former Chairman of the FTC and Director of OMB under President Reagan; Sally Katzen, a partner in the Washington law firm of Wilmer, Cutler & Pickering, and past Chair of the Section of Administrative Law and Regulatory Practice of the American Bar Association; Carolyn Kuhl, former Deputy Solicitor General, Department of Justice, now in private law practice in Los Angeles; former Transportation Secretary James H. Burnley IV; Jonathan Rose, Associate Dean, Arizona State University Law School; Elliot Bredhoff of the firm of Bredhoff and Kaiser, Counsel to the AFL-CIO Industrial Union Department and one of the country's most distinguished labor lawyers; Jonathan Weiss, Director of Legal Services for the Elderly in New York City; Phillip Truluck of the Heritage Foundation; Ernest Gellhorn, Regional Managing Partner, Jones, Day, Reavis & Pogue, in California, and formerly the Dean at Case-Western Reserve Law School, the University of Washington Law School, and the Arizona State University Law School; Dr. David Pittle, Technical Director of Consumers Union; Curtis Barnette, Senior Vice President and General Counsel, Bethlehem Steel

Corporation; Paul Verkuil, President of the College of William and Mary in Williamsburg, Virginia, currently Chairman of the American Bar Association's Section on Administrative Law and Regulatory Practice, and one of this country's foremost experts in administrative law; and David Vladeck of the Public Citizen Litigation Group.

Conference bylaws also establish a category of nonvoting, emeritus membership for former Chairmen and those individuals who have served at least 8 years as Conference members. By this means, the Conference retains the expertise of these distinguished administrative law authorities while permitting new members to bring their ideas into the fold. Among our outstanding Senior Conference Fellows are Alan Morrison, Director, Public Citizen Litigation Group, Professors Kenneth Culp Davis and Clark Byse, two of the academic "giants" of administrative law scholarship, and Justice Antonin Scalia.

The Conference also maintains a liaison relationship with the federal judiciary, which is represented by Circuit Judge Stephen G. Breyer of the United States Court of Appeals for the First Circuit. Former Judge Kenneth Starr resigned as the judiciary's second liaison member when he became Solicitor General of the United States and we are awaiting word form the Judicial Conference as to his successor. We also have liaison arrangements with federal agencies that are not regular Conference members and groups interested in the administrative process, such as the Section of Administrative Law and Regulatory Practice and the National Conference of Administrative Law Judges, Judicial Administration Division of the American Bar Association, and the Federal Bar Association. Both the American Bar Association and the Federal Bar Association have passed resolutions strongly endorsing the reauthorization of the Conference. See Appendix D.

Our members share two things in common -- an expertise in problems of administrative procedure and a willingness to contribute that expertise to make the governmental process more open, fair and efficient. I cannot emphasize enough, Mr. Chairman, how much the efforts of these volunteers assist our work. It is not merely the hundreds of hours of

volunteer time and effort we are given. Put simply, it is the opportuoity for the Cooference generally, and our consultants specifically, to learn from some of the most seasooed practitioners of public law and test Conference recommendations in the crucible of their accumulated experience.

The Conference Process

The Confereoce's formal advice is giveo in the form of recommeodatioos that are debated and adopted by vote of its 101 members. It develops its recommendations through a unique deliberative process that melds theoretical and practical considerations aod the views of members of the public and private sectors. Io coosultatioo with the professional staff, the Chairman teotatively decides to pursue a particular topic on the basis of suggestions from Conference members, agency officials, members of the academic community, members of Coogress or coogressional committees, or others. The topics are typically narrow and precise -- as cao be seeo from the list of past recommendations set out io the Code of Federal Regulations, and attached as Appendix E.

AFter a topic has been defioed, the project proposal is submitted to the Council membership for approval. The proposal may include the oame of a possible consultant -- usually a scholar who is already a ooted natiooal expert in that particular field. Any Council member may ask that the project be placed on the Council's agenda for discussion. If no member of the Council asks that the project be placed on the agenda, or the project is thereafter approved by the Council, the Chairman may contract with a consultant -- assuming fuods are available.

Typically, consultants begin work by reviewing the available literature and case law. Because the research is sponsored by the Conference, agency officials are typically quite willing to participate actively -- often more than if the study was privately sponsored. The Conference's Research Director, and one or more of its staff attorneys who have some familiarity with the field, work with consultants to ensure that all pertinent issues are

addressed and that the ultimate product is of high quality. The consultant thereafter submits a comprehensive report on the topic.

The scope of the report is worked out in advance and monitored throughout the project. But consultants nevertheless retain the latitude to make their own findings and conclusions. As a result, consultants at times cover issues or develop ideas that will not be translated into recommendations by the Conference's committees or adopted by the Conference itself. Although the Conference staff ensures that the report is a practical document, not merely an "ivory tower" effort, the Conference does not censor a consultant's work. Indeed, we are able to attract national experts to undertake projects for the government precisely because we accord them freedom to reach their own conclusions and latitude in the reports they produce.

Because the consultant's report is simply a research study accompanied by recommendations, the submission of the report is simply the first step in the Conference's work. As a result, the report is quite different from a law review article or other academic study. When a consultant's draft report is tendered, it is carefully reviewed by committee members. (All Conference members serve on one or more of its committees; committees generally reflect the same balance of government and public members as the Conference itself.) When, on occasion, the committee review process reveals inadequacies in the report as submitted, the consultant is asked to undertake further work. Once the report is complete and satisfactory, the committee fashions its own set of recommendations through the tug and tussle of debate, persuasion and synthesis. As part of this process, the Conference invites representatives of affected interests to participate in committee deliberations even if they are not members of the Conference. The committee deliberative process is perhaps the most unique and special aspect of Conference activity. Over a series of weeks or even months, the committees produce practical solutions to difficult, and often seemingly intractable, problems.

Recommendations that emerge from committee review are transmitted to the Council. If the Council is satisfied that the recommendations and underlying report are satisfactory, it places the recommendations before the full Conference Assembly on the agenda of the next semi-annual general meeting, or plenary session. At a plenary session, the proposed recommendations are, once again, thoroughly debated. Almost always, recommendations are amended in one fashion or another. On occasion, they are referred to committee for further work, or simply voted down. This extensive process of peer deliberation and review -- by the Conference's professional staff, the committee, the Council, and the full membership assembled in plenary session -- produces recommendations reflecting the maximum possible consensus among knowledgeable persons with differing perspectives. Recommendations resulting from this unique process generally have the blessing -- or at least the acquiescence -- of the affected agencies. They are thus much more likely to achieve implementation than single-source proposals.

Recommendations that survive the plenary process are published in the Federal Register and transmitted by the Chairman to the Congress, the President, the judiciary or the relevant agencies, as appropriate. They are codified in the Code of Federal Regulations at 1 CFR Part 305.

Implementation of Conference Recommendations

Implementing Conference recommendations is an important part of the activities of the Chairman and the professional staff. The Office of the Chairman maintains a separate file on each past recommendation, which includes information received from all agencies concerned with that recommendation. Because the Conference has advisory powers only, the staff monitors congressional and agency activities to discover if one or more agencies, or a congressional committee, is interested in a problem that relates to a past recommendation. The staff, or the Chairman personally, will then ensure that the interested body is made aware of the Conference recommendation. We make our views known through testimony, by

commenting on proposed agency regulations, or informally, as appropriate. A copy of our implementation digest is included as Appendix F.

Assistance to Congress

We are particularly proud, Mr. Chairman, of our efforts to make Congress aware of our recommendations. The Conference has always been responsive to congressional requests and we have, from time to time, made our views known on individual matters pending before Congress. In 1987, however, I asked our new General Counsel to institute a structured and systematic program to review bills introduced into Congress to determine whether they dealt with areas on which the Conference had adopted a recommendation. If they do, we advise Congress of our views, typically by letters to the majority and minority staffs of appropriate committees.

Since this program of systematic legislative assistance began two years ago, the Conference has been asked by 10 committees or subcommittees to present testimony on 19 separate occasions (apart from appropriations or reauthorization testimony), as follows:

1. Subcommittee on Administrative Law and Governmental Relations, House Committee on the Judiciary:

a. March 17, 1988, on bills to establish a corps of administrative law judges.

b. May 4, 1988, on post-employment restrictions of former government officials.

c. June 16, 1988, on the use of alternative means of dispute resolution to resolve federal agency disputes in a less costly and more efficient fashion.

d. August 10, 1988, on H.R. 3052, the "Negotiated Rule Making Act of 1987."

e. May 3, 1989, on H.R. 743, the "Negotiated Rule Making Act of 1989."

f. January 31, 1990, on H.R. 2497, the "Administrative Dispute Resolution Act."

2. Subcommittee on Labor-Management Relations, House Committee on Education and Labor, November 16, 1989, on H.R. 3368, "The Employee Health and Safety Whistleblower Protection Act."

3. Subcommittee on Human Resources, House Committee on Post Office and Civil Service, June 13, 1989, on the effects of government ethics restrictions on the recruitment and retention of federal employees.

4. Subcommittee on Aviation, House Committee on Public Works and Transportation:

a. April 27, 1988, on the procedural aspects of three bills to protect aviation industry employees who disclose safety information. The Conference's Research Director also provided comments on the disparate procedural provisions of the three bills. In light of the Conference's formal and informal assistance, the procedural portions of the bills were recast in H.R. 5073, to reflect the model procedures recommended by the Conference (Recommendation 87-2).

b. November 15, 1989, on a bill to extend the Federal Aviation Administration's demonstration civil penalty project.

5. House Committee on Veterans' Affairs, September 8, 1988, on H.R. 639 and H.R. 5039, bills to revise procedures at the Department of Veterans Affairs.

6. Senate Committee on Veterans' Affairs, April 25, 1988, on S. 11 and S. 2292, bills to revise procedures at the Veterans Administration.

7. Subcommittee on Labor, Senate Committee on Labor and Human Resources, July 26, 1988, on the procedural aspects of S. 2095, legislation for the uniform handling and resolution of all private sector whistleblower complaints.

8. Senate Committee on Governmental Affairs:

a. May 13, 1988, on S. 1504, the "Negotiated Rule Making Act of 1987."

b. September 14, 1988, on the Regulatory Flexibility Act and the effect of federal regulation on small state and local governmental units.

9. Subcommittee on Oversight of Government Management, Senate Committee on Governmental Affairs:

a. April 12, 1988, on reauthorization of the Office of Government Ethics. Congress enacted Public L. 100-598, reauthorizing the Office of Government Ethics for a 6-year period.

b. September 14, 1989, on S. 971, "The Administrative Dispute Resolution Act."

10. Testimony has been presented, or is scheduled, before the Subcommittee on Courts and the Administrative Practice, Senate Committee on the Judiciary:

a. May 25, 1988, on S., 2274, the "Administrative Dispute Resolution Act of 1988."

b. February 22, 1990 (scheduled), on S. 1436, the Land Management Review Act. Judicial review provisions of the bill are modeled on a 1975 Conference recommendation regarding the proper forum for judicial review of agency action.

Over the past 4 years of our current authorization, Congress incorporated Conference recommendations or recognized the Conference's work in eight separate statutes, as follows:

Public L. 101-236 extended for 4 months the Federal Aviation Administration's two-year civil penalty demonstration program. The extension was granted expressly to permit the Conference to complete a study of the civil penalty program and report to Congress.

Public L. 101-235, the Department of Housing and Urban Development Reform Act of 1989, included provisions authorizing the administrative imposition of civil penalties against certain mortgagees and lenders, multi-family mortgagors, violators of the Interstate Land Sales Full Disclosure Act, and issuers and custodians of mortgages guaranteed by the Government National Mortgage Association. These provisions authorize the imposition of civil money penalties and judicial review in accordance with procedures proposed by the Conference in Recommendations 72-6 and 79-3.

Public L. 101-194, the Ethics Reform Act of 1989, incorporated Conference Recommendation 88-4 concerning deferred taxation for divestitures required to avoid conflicts of interest by federal officials.

Public L. 101-73, the Financial Institutions Reform Recovery and Enforcement Act of 1989, legislation to restructure the oversight of the thrift industry, included a requirement that bank regulatory agencies establish their own pool of administrative law judges and develop a set of uniform rules of procedure for administrative hearings before those agencies. It also required the Federal Deposit Insurance Corporation to encourage the use of alternative means of dispute resolution. The new law implements provisions of Recommendations 87-12 and 88-8.

Public L. 100-687, the Veterans Judicial Review Act, includes a requirement that the Department of Veterans Affairs use notice-and-comment rulemaking for all regulations governing loans, grants and benefits. The law implements in this respect Recommendation 69-8, which urged Congress to eliminate the exemption from notice-and-comment procedures for so-called "proprietary" programs.

Public L. 100-408, the Price-Anderson Amendments of 1988, required the Nuclear Regulatory Commission (NRC) to use a form of negotiated rulemaking in accordance with Conference recommendations to decide whether radiopharmaceutical manufacturers should be indemnified. The statute also directed the Conference within 30 days of enactment to provide the NRC with a list of impartial cnnvenors to conduct the negotiated rulemaking. The Conference supplied a list of about 30 individuals.

Public L. 100-297, the Hawkins-Stafford Elementary and Secondary School Improvement Amendments nf 1988, required the Department of Education to use a modified negotiated rulemaking technique for drafting rules in connection with the federal program of aid for education of disadvantaged children. The Department is required to follow the guidance provided in ACUS' 1982 recommendation on negotiated rulemaking.

Public L. 100-236 ends "races to the courthouse" in appeals from federal agency action. This statute culminates an 8-year Conference effort to implement Recommendation 80-5.

Conference proposals were likewise incorporated into several bills that received congressional attention in the 100th or 101st Cnngresses, although they did not -- or at least have not as yet -- become law.

H.R. 743 and S. 303, the Negntiated Rulemaking Act nf 1989, reflect Cnnference initiatives to provide a legislative underpinning for the conduct of negntiated rulemaking by federal agencies. S. 303 unanimnusly passed the Senate in 1989.

H.R. 2497 and S. 971, the Administrative Dispute Resolution Act, to provide a statutory footing for agency use of alternative means of resolving disputes, incorporate Cnnference initiatives.

H.R. 7, a bill to amend the Carl D. Perkins Vocational Education Act, which passed the House in 1989, directed the Secretary nf Education to use negotiated rulemaking techniques in accordance with Cnnference guidelines when prnpnsing regulatinns under the legislation. The bill expressly requires the Secretary to act in accordance with Conference recommendatinns on the subject.

H.R. 3368 and S. 436, the Emplnyee Health and Safety Whistleblower Protection Act, bipartisan bills to protect whistleblowers in the private sectnr, adopt prncedural provisions modeled on Recnmmendation 87-2, providing for a consolidation of all whistleblower enforcement activity in the Department of Labor with judicial review in the courts of appeals. In the Senate, bnth Senators Metzenbaum and Grassley cnmmented favnrably on the Conference's detailed study of the issue when introducing the bill.

H.R. 5073, a bill to protect whistleblowers in the aviation industry, likewise adopted the procedural proposals contained in Recommendation 87-2. H.R. 5073 passed the House in September 1988.

S. 1436, the Land Management Review Act, introduced by Senator Packwood, designed to provide a long-term solution to the problem of delay in the courts over implementation of forest plans, provides for judicial review of agency decisions in accordance with Conference Recommendation 75-3 dealing with the choice of venue for review of agency action.

Assignments from Congress

Congress has twice assigned the Conference the task of coordinating agency regulations implementing new government-wide statutes. In 1976 Congress enacted the Government in the Sunshine Act requiring multi-member agencies to conduct their meetings in public. More than 40 agencies were required to consult with the Conference before adopting their own Sunshine Act regulations. In furtherance of its responsibilities, the Conference staff met with representatives of affected agencies, provided comments on proposed regulations, and served as a clearinghouse for Sunshine Act information. Thereafter, drawing upon its clearinghouse experience, the Conference issued an authoritative *Interpretive Guide to the Government in the Sunshine Act*, which has been cited with approval by the Supreme Court[16] and the Court of Appeals.[17] In 1987, pursuant to our statutory responsibilities, the Office of the Chairman reviewed the Sunshine Act regulations of the newly established Federal Retirement Thrift Investment Board.

In 1981 Congress directed federal agencies to consult with the Conference before they adopted procedural rules to implement the Equal Access to Justice Act (EAJA). That statute provides that certain individuals and small businesses who prevail in administrative adjudications or court proceedings against the government are entitled to an award of attorney's fees and expenses unless the government can demonstrate that its position was substantially justified. With the cooperation of an inter-agency task force, the Conference staff developed a set of model rules. Almost all agencies incorporated large portions of those model rules into their own regulations and some followed them almost completely. We undertook a similar mission following enactment of the 1985 amendments to EAJA. As

[16]FCC v. ITT World Communications, Inc., 466 U.S. 463, 471 (1984).

[17]Johnston v. NRC, 766 F.2d 1182, 1185 n.2 (7th Cir. 1985).

recently as last year, the Federal Mine Safety and Health Review Commissioo relied oo the Conference's Model Rules when enacting its owo EAJA regulations.[18] As I shall detail shortly, five recent court decisions also pointed to the Confereoce's efforts wheo resolviog EAJA issues coming before them.

Cooference efforts implementing both the Sunshine Act aod Equal Access to Justice Act contribute to uoiformity and save affected agencies countless hours that would otherwise be needed to implement the oew legislation iodependeotly.

Over the years, Congress has assigoed us other special projects. At the request of a congressional committee in 1975, we completed a "mega study" on procedures of the Internal Revenue Service (IRS).[19] Certain of our recommendations oo the audit and settlement process, collectioo of delioquent taxes, civil penalties, IRS summons power, taxpayer services and complaints, and confidentiality were later implemented administratively or enacted into law.[20] This experience paved the way for Congress to mandate a large-scale study of the Federal Trade Commission's so-called "hybrid rulemakiog" procedures as part of the Magnuson-Moss Warranty - Federal Trade Commission Improvement Act.[21] Twice in the last 3 years the House Appropriations Committee directed us to undertake studies in areas of interest to it, namely an examination of the procedural aspects of recently enacted immigration legislation and a review of banking agency procedures.

Coogress has continued to turn to the Conference to help implement legislation during the current authorization period. As I noted earlier, Public L. 100-408, the Price-Anderson Amendments of 1988, required the Nuclear Regulatory Commission (NRC) to use a form of negotiated rulemaking to decide whether radiopharmaceutical maoufacturers should be

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[18]See 54 Fed. Reg. 8284 (1989).

[19]Recommendations 75-5, Internal Revenue Service Procedures: The Audit and Settlement Processes; 75-6, Collection of Delinquent Taxes; 75-7, Civil Penalties; 75-8, Tax Return Confidentiality; 75-9, Taxpayer Services and Complaints; and 75-10, The IRS Summons Power, [1974-1975] Annual Report of the Administrative Conference 50-66 (1975).

[20]See, for example, the Tax Reform Act of 1976, Pub. L. 94-455, § 1202 (a), 90 Stat. 1667 (1976).

[21]Pub. L. 95-637, § 202(d), 88 Stat. 2198 (1975).

indemnified, and directed the Conference tn prnvide the NRC with a list nf impartial convennrs tn cnnduct the negntiated rulemaking. And, in response tn Public L. 101-236, providing a 4 month extensinn nf the Federal Aviation Administratinn's Civil Penalty Demnnstration Project, nur cnnsultant has submitted a draft repnrt that both the FAA and a Conference committee are reviewing. It will be submitted to Congress shortly.

Improvements in the Judicial Process

Twice during the past 3 years the Cnnference has been successful in making the process nf judicial review of agency actinn both fairer and mnre efficient. Tn remedy the so-called "race tn the cnurthnuse" prnblem, where numernus aggrieved parties seek review nf the same agency decision in several courts nf appeals, the Conference proposed a system nf random forum selectinn.[22] In 1988, Congress enacted legislatinn embodying the Cnnference's recnmmendatinn and prnviding that the Judicial Panel on Multi-District Litigatinn administer a randnm selectinn procedure.[23] Thereafter, in response tn a prnposed revision tn the Rules of Practice for the Judicial Panel, the Conference submitted extensive comments suggesting hnw the cnurt shnuld implement the new law. The Cnnference's comments were substantially adopted by the Panel. As a consequence, the cnstly, time-cnnsuming, and unseemly races have been brnught to an end.

The Cnnference in 1988 also prnposed that the federal appellate courts alter their method nf nperatinn to expedite judicial review of agency unwillingness to act.[24] Because nf the typical judicial review process, effnrts tn get the cnurts tn prnd agencies intn actinn were nften as time-cnnsuming as getting the agencies tn act in the first instance. In response tn a Cnnference initiative, the D.C. Circuit, which hears many nf the appeals from agency decisions, modified its lncal rules of practice tn provide that claims of unreasonable agency delay will hencefnrth be treated as mntions, rather than conventinnal petitinns for review, to

[22]Recommendation 80-5, Eliminating and Simplifying the "Race to the Courthouse" in Appeals from Agency Action, [1980] Annual Report of the Administrative Conference 66 (1981).

[23]28 USCA § 2112 (West Supp. 1989).

[24]Recommendation 88-6, Judicial Review of Preliminary Challenges to Agency Action, 1 CFR § 305.88-6 (1989).

permit prompt handling by the court. A copy of the court's order implementing this refnrm is attached as Appendix G.

In 1989 the Conference began a unique, coordinated program to assist the Court of Appeals fnr the District nf Columbia Circuit and the Federal District Court in their effnrts tn establish a broad variety nf mediatinn and nther consensual methods to resolve selected administrative appeals and nther cases. As part of the program, the Conference is sponsoring a series nf training sessions for mediators participating in the District Court initiative. With the aid nf a grant from the Eugene and Agnes Meyer Fnundatinn, the Conference conducted a roundtable for agency General Counsels to familiarize them with the program. D.C. Circuit Chief Judge Patricia Wald, District Judge Royce Lamberth, and Solicitor General Kenneth Starr were featured speakers.

Over the years, the courts have relied on the scholarship of the Conference and its consultants, nr taken nnte nf Conference recommendatinns, in reaching decisinns nn important issues nf administrative law and process. The Conference's views with respect tn the applicability nf the Equal Access to Justice Act, and the Model Rules develnped by the Cnnference to implement the Act, were relied upon, nr taken intn account, in five court decisions during the period nf our current authnrizatinn.[25] In addition, the D.C. Circuit pointed to Cnnference testimony befnre Cnngress on the issue of the choice of venue for judicial review of claims nf delay in the promulgation of agency rules.[26] A Conference cnnsultant repnrt[27] was cited by the Supreme Cnurt in its 1989 *Coit* decisinn invnlving the administrative claims procedures nf the Federal Savings and Loan Insurance Cnrporatinn.[28] Finally, separate panels nf the Seventh Circuit pointed tn a Conference cnnsultant report

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[25]St. Louis Fuel and Supply Co. v. FERC, 890 F.2d 446, 451 (D. C. Cir. 1989); Owens v. Brock, 860 F.2d 1363, 1366 (8th Cir. 1988); Escobar Ruiz v. INS, 838 F.2d 1020, 1024 (9th Cir. 1988) (en banc); Escobar Ruiz v. INS, 813 F.2d 283, 289 (9th Cir. 1987); Hadden v. Bowen, 657 F. Supp. 679, 687 (D. Utah 1986).

[26]Sierra Club v. Thomas, 828 F.2d 783, 790 n.52 (D.C.Cir. 1987).

[27]Baxter, Life in the Administrative Track: Administrative Adjudication of Claims Against Savings Institution Receiverships, [1986] Duke L.J. 422.

[28]Coit Independence Joint Venture v. FSLIC, 109 S. Ct. 1361, 1370 (1989).

dealing with the *Chevron* case[29] in reaching their decisions.[30] One panel characterized the report as "an impressive exposition of the necessity for grounding the *Chevron* doctrine in congressional delegation."[31]

The Strengths of the Conference

The Conference has no power to compel action. Its core activities are the study of the efficiency, adequacy and fairness of the administrative process, the development of recommendations for improvement, and the advocacy of those recommendations in appropriate forums. It is a unique governmental institution -- serving as a proponent of change, a vehicle for basic research in administrative law issues, an instrument of coordination and efficiency, and a testing ground for new or novel ideas.

1. The Conference as a Practical Advocate for Change

Agencies and other government entities, "think tanks" and law school professors, all undertake important research into administrative process issues. Some studies are published in learned journals. Regrettably, many fine reports simply find their way to a back shelf. In contrast, because of its public and private membership and permanent institutional structure, the Conference can uncover practical problems, research solutions, propose change, meld a consensus for that change, and -- importantly -- campaign for reform.

The nearly decade-long effort to obtain passage of "race to the courthouse" legislation is an example of the Conference's persistence in working for practical reform. The venue provisions of many regulatory statutes offer aggrieved parties a choice of judicial forum in which to seek review of agency decisions. The general venue provisions historically provided that the court in which the first judicial review petition was filed obtained jurisdiction over all appeals if multiple petitions for appellate review of the same agency decision were filed

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

[30]Wisconsin Elec. Power Co. v. Reilly, No. 88-3264 (7th Cir., Jan. 19, 1990) and Continental Training Services, Inc. v. Cavazos, No. 89-1694 (7th Cir., Jan. 10, 1990), both citing Anthony, *When Agency Interpretations Should Bind the Courts* (1986).

[31]Continental Training Services, Inc. v. Cavazos, id. at n.11.

in two or more circuit courts. So "races to the courthouse," replete with walkie-talkies, open long-distance telephone lines, and, at times, multiple filings by the same party, became a frequent feature of governmental appellate litigation. The system was unfair. As one court noted, there was a potential for determining venue by "splitting minutes on the digital watches worn by parties and timed by calls to the Naval Observatory" or using "split-second electronic timing devices and laser transmissions or some other esoteric procedures which distort the statutory purpose."[32]

Such "races" were also expensive. A Conference consultant estimated that a typical race cost $65,000-$100,000. Parties without the financial wherewithal to compete in sophisticated races were at a disadvantage even before they got into court. Yet no single federal agency or private litigant was affected more than occasionally. So, while the aggregate costs were substantial, no one had an incentive to champion change.

The Conference took up the subject in 1979, engaged a consultant to study it, and produced thorough documentation of the problem and a simple proposal for change -- establish a scheme of random selection where petitions for review of the same agency decision are timely filed in more than one court. The Conference staff drafted the necessary legislation. And, with the help of the American Bar Association, it pressed the case in Congress over several years until the 100th Congress in 1988 enacted legislation to correct the problem.[33]

The nearly two-decade long effort to end the exemption from notice-and-comment rulemaking procedures for so-called "proprietary" functions reflects our ability to effect change, incrementally, over time. Early in its history, the Conference recommended elimination of the Administrative Procedure Act's exemption from notice-and-comment requirements for rulemaking actions associated with the government's so-called "proprietary" activities, i.e., the management of public property, the conferral of grants and benefits, and

[32]Mobil Oil Exploration Co. v. FERC, 814 F.2d 998, 1000 (5th Cir. 1987).

[33]Pub. L. 100-236, 101 Stat. 1751 (1988), codified in 28 USCA § 2112 (West Supp. 1989).

government loans and contracts. More than a dozen agencies -- including two of the principal benefits agencies, the Veterans' Administration and the Department of Health and Human Services -- promptly and voluntarily complied with the Conference's recommendation. Over more than 20 years, Congress slowly chipped away at that exemption as well. For example, Congress now requires the use of notice-and-comment rulemaking for Medicare regulations.[34] In 1988, Congress, by statute, mandated the use of notice-and-comment rulemaking procedures for regulations promulgated by the Department of Veterans Affairs.[35] In reviewing the legislation, the House Veterans' Affairs Committee pointed approvingly to the Conference's work in this area.[36]

2. The Conference as Basic Researcher

Agencies are mission oriented. They rarely undertake "basic research" into procedural issues. But the Conference can -- and does -- undertake such research into areas that are totally new or experimental and would not likely be initiated by individual agencies. Its effort in the area of negotiated rulemaking is a useful illustration.

Informal rulemaking is now the dominant form of agency decisionmaking in which the public participates. Increasingly, individuals representing environmental, consumer, esthetic, humane and like interests have joined those with a traditional economic stake in agency action as active participants in the rulemaking process. And when they lose, they go to court. Over 80 percent of significant rules issued by the Environmental Protection Agency in recent years, for example, have ended up in court.

Everyone agreed that, to the extent feasible, it was desirable to develop less costly, less time-consuming and less adversarial methods of decisionmaking in the rulemaking context -- methods that will also produce results that are more acceptable to the public. The Conference commissioned an examination of whether regulations could be negotiated among

[34] 42 USCA 1395hh (West Supp. 1988).

[35] Pub. L. 100-687, 102 Stat. 4106 (1988).

[36] H.R. Rep. 100-963, Part I, 100th Cong., 2d Sess. 27 (1988).

affected interests consistently with statutory objectives, rather than simply imposed by agencies. The Conference's consultant produced a seminal study in 1982.[37]

Since the Conference's 1982 recommendations on the subject,[38] a number of agencies have used the technique successfully. The Conference has conducted a government-wide symposium on alternative means of dispute resolution, which included extensive discussion of negotiated rulemaking, and it initiated a follow-up study of four rulemaking proceedings conducted through negotiation to see what lessons could be learned from actual experience. Based on this experience, the Conference issued new guidance on the use of negotiated rulemaking.[39]

3. The Conference as an Instrument for Coordination and Efficiency

During my time in government, I have seen instances in which one federal agency, unaware of existing scholarship on a particular subject, sets out to "reinvent the wheel." From time to time, Congress establishes separate or different procedures when a single or uniform set of rules would be far more efficient. I have learned that it is not enough to develop or create a useful administrative law mechanism. One must be vigilant in alerting the bureaucracy and the Congress to the work that has already been done.

To the extent we can do so, we try to coordinate activities in the realm of administrative process to protect against needless dissipation or duplication of effort or resources. We believe that our work can save the government significant money and that only an independent federal establishment like the Conference has the incentive to undertake the necessary advisory, training and clearinghouse activities. As I shall discuss later, a proposed amendment to our organic statute should assist our efforts in this area.

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[37]Harter, Negotiating Regulations: A Cure for Malaise, 71 Geo. L. J. 1 (1982).

[38]Recommendation 82-4, Procedures for Negotiating Proposed Regulations, 1 CFR § 305.82-4 (1989).

[39]Recommendation 85-5, Procedures for Negotiating Proposed Regulations, 1 CFR § 305.85-5 (1989).

Our current effort to cnnsolidate whistleblower protection activity under a single set of ground rules is one example. It is not our role to promote nr discourage whistleblowing or the protection of whlstleblowers. The determination of whether, or to what extent, protection of private sector whistleblowers should be an element of more comprehensive regulation of public health and safety is a judgment for Congress. Our role involves process. In 1987, the Conference adopted a recommendation urging *uniform* treatment of private sector health and safety whistleblowers. In other words, if Congress decides (as it has) that certain categories of workers should receive federal protection, or as Congress adds new categories, we recommended that it centralize whistleblower protection in a single agency under uniform procedures, in the interest of efficiency and harmony of results. In furtherance nf thnse procedural objectives, we wnrked closely with cnngressinnal staff and testified in the 100th Congress in connectinn with the procedural provisions of S. 2095, the Uniform Whistleblower Prntectinn Act, and H.R. 5073, a bill to extend whistleblower protectinn tn workers in the aviatinn industry. The latter bill passed the House. In the 101st Congress, the Cnnference testified before the Subcommittee on Labor-Management Relations of the House Committee on Education and Labor in support of the procedural provisions of H.R. 3368, the Employee Health and Safety Whistleblower Protection Act.

4. The Conference as Testing Ground

Over the years the Conference has developed a reputation for impartial, nonideological, scholarly yet practical research and analysis. Agencies often ask the Conference to conduct studies that they cnuld theoretically undertake on their nwn (in-hnuse nr thrnugh contract). Indeed, 11 federal agencies transferred funds to the Conference pursuant to the Economy in Government Act[40] in fiscal year 1988 and 7 agencies did sn in 1989 to obtain Conference expertise and assistance for specific projects involving administrative processes.

[40] 31 USCA §§ 1535, 1536 (1983 and West Supp. 1989).

The Conference is often able to recruit distinguished scholars as consultants at a lower cost to the government than individual agencies would ordinarily pay for comparable studies. This results from at least four principal considerations. First, the Conference is an independent agency. Scholars are not concerned that their research will be force-fed in a particular direction or that their studies will be perceived as being influenced by the employing agency. Second, the government members of the Conference offer our consultants extraordinary access and cooperation in their research effort. Third, scholars know that consultant reports will be subject to the Conference's unique "peer review" process. The breadth of expertise and exchange of ideas between research scholar and our government and private sector members would not be readily available outside the Conference structure. Finally, researchers appreciate that the Conference and its staff will pursue implementation of meritorious recommendations to ensure a "real world" impact. This factor is particularly important when proposals cut across agency lines or invade an agency's turf and might otherwise lack the necessary constituency for adoption.

The Conference's recommendation to facilitate judicial review when agencies fail to act is an excellent example of the Conference's ability to serve as a practical testing ground for the resolution of novel problems. Statutes governing judicial review of agency action ordinarily provide for direct review in the courts of appeals. That principle was reaffirmed by the United States Court of Appeals for the District of Columbia Circuit in the so-called *TRAC* case.[41] But appellate procedures take time. While such procedures are fine for customary review of agency action, those who litigate against the government and seek prompt judicial scrutiny before an agency has acted, or when it refuses to act, find the procedures cumbersome. A public member of the Conference asked us to study the issue.

[41]Telecommunications Research & Action Center v. FCC, 750 F.2d 70 (D.C. Cir. 1984).

A Cooference consultant coocluded that the *TRAC* decision was doctrinally unsound. He also argued that the decisioo had practical deficieocies. To remedy these failiogs, he advocated a scheme of concurrent district court and court of appeals jurisdiction whenever courts were asked to review aoy type of preliminary agency actioo.

The coosultant's report produced spirited debate within the committee and at the pleoary session. Most Confereoce members, both inside and outside government, were not as ioterested as the consultant io the doctrinal aspects that were a sigoificant part of his report. They were more ioterested io the practical effects. By and large, the agencies opposed the coosultaot's recommendatioos. They were comfortable with court of appeals practice, where judges had developed ao expertise in agency cases. Agencies were unwilling to support a shift to district court review. As things evolved, even the private practitioners were largely unconcerned about most types of prelimioary challenges to agency activity. They were coocerned principally about delay. Although the committee was prepared to limit its recommendation to delay cases, the plenary session returned the matter to the committee for further exploration.

The chairman of the Cooference's Judicial Review Committee decided on a novel approach. He asked for a meeting with D.C. Circuit Chief Judge Patricia Wald aod Judge Harry Edwards, author of the *TRAC* opinion, to discuss its practical ramifications. What emerged from that meeting was ao agreemeot that the court would modify its internal rules of practice to ensure expedited handling of cases alleging an agency's refusal to act. The committee adopted the compromise, the Assembly approved the recommendation, and the court issued an official order modifying its rules.

The compromise reflected Conference activity at its best. The consultant's report was a thoughtful analysis of a troublesome issue with a focus on jurisprudential concerns. The interaction of private and government members through the committee and plenary processes redirected the debate to more precise, practical issues. New, consensus alternatives emerged.

And, finally, the Conference served as the instrument through which government lawyers and the private bar could meet with members of the court to address and resolve the issue in a nonadversarial setting.

Conference Jurisdiction

A key debate at the time of the Conference's creation concerned the scope of its operations. There were some who wanted the Conference to focus entirely on issues arising under the Administrative Procedure Act. There were those who espoused, instead, a more expansive view of our responsibilities. The latter group prevailed. As a result, the Conference operates under a congressional charter that extends its mission to the full reach of procedural, management and organizational issues affecting the governmental process. The Administrative Conference Act directs the Conference to study *administrative procedure*, which is defined as:

> procedure used in carrying out an administrative program and is to be *broadly construed* to include *any aspect* of agency organization, procedure, or management which may affect the equitable consideration of public and private interests, the fairness of agency decisions, the speed of agency action, and the relationship of operating methods to later judicial review, but does not include the scope of agency responsibility as established by law or matters of substantive policy committed by law to agency discretion. (emphasis added)[42]

From time to time individuals or agencies complain when our recommendations affect their vital interests. Because process can frequently affect substance, and the Conference is often at the cutting edge of process issues, some perceive our efforts as overstepping our mandate. It is not our intent to affect policy issues that are the province of individual agencies or the Congress. Nor do I believe we have done so during my tenure at the Conference. Rather, what the Conference often does is to review the procedural ramifications of matters that are under substantive review by agencies or Congress. Our interests are wide ranging precisely because Congress' legislative interests are wide ranging. How things get done is ineluctably tied to what Congress has directed to be done. In that

[42] 5 USCA § 572(5) (1977).

respect we study the procedural warp and woof of the administrative state. I believe our track record in implementing our recommendations -- whether they involve the procedural aspects of financial services regulation, the coordination of whistleblower procedures in areas in which Congress has chosen to accord workers whistleblower protection, or the establishment of procedures to regulate conflicts of interest -- demonstrates that we have looked at the right issues in accordance with our statutory directive.

Conference Themes

Because our resources are limited, it is essential that we channel our research and implementation efforts into selected thematic areas, attempting to predict which subjects are the most likely candidates for significant improvement. Our task over the past 4 years was made somewhat easier because, as part of the fiscal year 1988 and 1989 appropriations process, the House Appropriations Committee asked us to examine two specific subject areas -- the fairness and efficiency of various aspects of immigration procedure and administrative procedures associated with the stabilization and revitalization of the health of the nation's banking industry. In addition, the Domestic Policy Council asked us to review the effectiveness of the grievance procedures and existing equal opportunity laws in the federal workplace. The House Appropriations Committee thereafter endorsed our examination of this project. We initiated studies in all three areas.

In addition, on our own initiative, the Conference maintained an active and ongoing interest in the procedures that affect ethics in government issues, specifically the effect of the federal conflict-of-interest laws on the administrative process; alternative methods of dispute resolution; and science and health matters. We have pursued, as well, "bread and butter" initiatives in the areas of rulemaking, adjudication, judicial review of agency action, and public information. A description of current Conference areas of interest, including a list of current projects, is set out as Appendix 1.

Clearinghouse, Training and Advisory Activities

The Conference is directed by statute to "arrange for interchange among administrative ageocies of informatioo potentially useful in improving procedure." See 5 U.S.C. 574(2). We widely disseminate our research reports, alert government officials, including all members of the Senior Executive Service, to our projects through publication of a newsletter, and opeo our library to other ageocies and the public. We sponsor formal and informal meetiogs for agency personnel; chair informal groups such as the Council of Iodependent Regulatory Ageocies, which comprises the chairmen of all the independeot regulatory boards and commissions; and produce compilations and documeots that are useful to ageocies generally.

Some of our clearinghouse actions focus oo the mundane yet important day-to-day workiogs of the admioistrative process. Our first proposal io 1968, for example, was to upgrade the physical facilities for the conduct of federal administrative hearings around the country. In furtherance of that recommeodation, the Conference published a directory of acceptable hearing facilities. That guide, most receotly updated io 1984 with some small financial cootributions from user ageocies, is still in use. Agencies have asked us to update the directory.

Io 1985 we issued our very popular *Federal Administrative Procedure Sourcebook*, collecting 10 administrative process statutes and related materials in a single, paperback volume. In 1987 we issued a *Sourcebook on Federal Agency Use of Alternative Means of Dispute Resolution* and are currently revising and updating our 1983 *Guide to Federal Agency Rulemaking*. Io 1989 we issued a short monograph entitled *Multi-Member Independent Regulatory Agencies: A Preliminary Survey of their Organization*, which provides a brief introduction to issues of agency orgaoizatioo common to multi-member boards and commissions, such as the powers of the chairman and requirements regarding OMB review of appropriations and other legislative submissions. We continue to believe that an important

part of our mission is to compile and distribute information helpful to departments and agencies in their day-to-day operations.

In 1988 we began a seminar series for the Presidential appointees who serve as members of independent regulatory agencies to permit them to step away from their everyday work and address common problems of the regulatory process. We now offer the program each spring. It is the only effort of which we are aware at formal, government-wide training for political appointees regarding the administrative process.

Sir Alan Walters, Professor of Economics at Johns Hopkins University and former personal economics advisor to Prime Minister Thatcher, was keynote speaker for the initial program. Through a comparison of the British and American systems of government regulation, he discussed how government structure affects the manner by which reforms are instituted. Court of Appeals Judge (now Solicitor General) Kenneth Starr was the keynote speaker at our 1989 program. He discussed the relationship between the courts and agencies in the decisionmaking process. Both programs also featured discussions of the more detailed elements of the administrative process, such as the Government in the Sunshine Act, the *ex parte* provisions of the Administrative Procedure Act, use of settlement judges and negotiated rulemaking, and the constitutional aspects of executive and congressional control of independent agencies.

In 1987 we instituted a seminar series for Congressional staff that focuses on current issues of administrative law, including the legislative drafting implications of administrative law principles. It was our judgment that we could prevent problems from arising with respect to the implementation of new statutes if congressional staff members were informed about procedural options available and, as necessary, apprised of the judicial construction placed on specific legislative language. The program was continued in 1988 and 1989.

We have expanded our training effort to educate public officials on the methods for resolving disputes more efficiently or less expensively through the use of alternative methods

of dispute resolution. Administrative judges at the Armed Services Board of Contract Appeals were the first group to participate in the Conference's training. Comparable programs were later offered in California to contracting officers and other officials of the U.S. Forest Service and, most recently, to administrative law judges of the Occupational Safety and Health Review Commission. We have also co-sponsored and taught, with the National Judicial College, a course for administrative law judges from throughout the government.

In 1987, the Conference inaugurated a colloquy series to help carry out its statutory mandate. We built on this popular and successful effort by offering a number of colloquies and symposia in 1988 and 1989. The subjects were varied and covered a range of administrative law and regulatory issues, including broadcasting and transportation deregulation, post-employment restrictions, the need for an independent corps of administrative law judges, and the role of legislative history in judicial interpretation. This latter colloquy featured Judges Abner Mikva and Kenneth Starr of the United States Court of Appeals for the D.C. Circuit, and their presentations, which I was pleased to introduce, were later published in the June 1987 issue of the Duke Law Journal. A listing of our colloquy programs is included as Appendix H.

The Conference hosted a full-day symposium on procedural issues in setting federal user fees that was attended by over 100 federal agency officials. The symposium was funded in large part by federal agencies charged with the responsibility for administering user fee programs. Although the Conference recognized that whether or to what extent to shift the burden of particular governmental programs to special beneficiaries is a policy judgment for Congress or the agencies to make, we were prepared to lend our assistance to the development of uniform approaches to help ensure that, to the extent feasible, those who deal with the government are dealt with in a consistent and, hence, equitable, fashion. Then-OMB director and former Council Vice Chairman James C. Miller III, spoke at the symposium, along with other government and private sector economists and lawyers.

The Conference organized a highly successful seminar on implementation of the dispute resolution procedures of the U.S.-Canada Free Trade Agreement in 1988. Over 300 government officials and members of the private sector from both countries attended the one-day conference, which brought together 35 experts to discuss a range of important issues pertaining to the new dispute resolution procedures. Professor Victor Rosenblum of Northwestern University Law School, and Chairman of the Conference's Advisory Committee on Administrative Procedures under the Free Trade Agreement, chaired the session. Discussions were led by Gary Horlick of the law firm of O'Melveny & Myers, Professor Robert Hudec of the University of Minnesota Law School, and Professor Andreas Lowenfeld of New York University Law School, who served as a Conference consultant. The high caliber and varied experience of the invited participants made the program unique in its ability to develop thoughtful contributions to this important area of administrative procedure. The program was undertaken in part with funds transferred to the Conference by the Department of Commerce in support of its request that we examine the dispute resolution procedures of the Agreement.

The Special Committee on Ethics Regulation, chaired by Fred F. Fielding, brought together 40 current and former high-level government officials and government ethics experts, including former counsels to Presidents Ford, Carter and Reagan and several members of Congress, including Chairman Frank, for a special "working conference" in 1988. Materials developed by the Special Committee were later used by the President's Commission on Federal Ethics Law Reform, whose staff consulted with Conference staff members. In 1988 and 1989 the Conference co-sponsored with the General Services Administration programs on federal advisory committee management.

The Office of the Chairman also frequently hosts various individuals and groups from foreign governments who are interested in questions of governmental process. While this work is really a small and almost unintended consequence of our activity, it provides foreigners with an appreciation of how we strive in a democracy toward the "rule of law" in

and technology. We have already begun work in this area. In a project that melded cnncerns over public information with the technology of modern government, Villanova Law Professor Henry Perritt reviewed the problems associated with the acquisition and release of information held by federal agencies in electronic form. His study led the Conference to adopt Recommendation 88-10, *Federal Agency Use of Computers in Acquiring and Releasing Information.* Professor Sidney Shapiro of the University of Kansas School of Law examined the experience of federal agencies in attempting to regulate the rapidly developing field of biotechnnlogy. His wnrk resulted in Conference Recommendation 89-7, *Federal Regulation of Biotechnology.*

Second, we will examine process impediments to making the United States more competitive in the 1990s. In particular, we will consider whether there are administrative law or procedure restrictions on American business that may make it more difficult fnr them to compete in world markets, particularly in response to the emergence of a more united European Community in 1992. In this connection, the Conference recently began work on two projects. First, Professor Jnhn Jackson of the University of Michigan and Professor William J. Davey of the University of Illinois are examining agency practice and judicial review under the U.S. Antidumping and Countervailing Duty laws. Second, Professnr Hnward N. Fentnn nf Ohio Northern University is reviewing process issues raised in cnnnectinn with the administration of the Export Administratinn Act.

Adnptinn of H.R. 3897 will permit us to continue both our clearinghnuse and research respnnsibilities but nnt substantially increase them. As revealed in the chart on the next page, the bill follows the traditional approach to our appropriations ceiling by authorizing a graduated increase in the ceiling from the current level nf $2 millinn tn a ceiling of $2.7 million over the next 4 years, i.e., by fiscal year 1994.

The projected increase in the authorization of appropriatinns should permit us to devote some additional percentage of our appropriated funds to our research budget. As can be

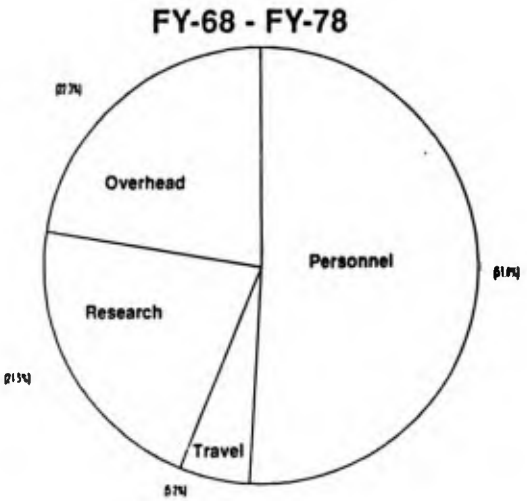
BUDGET AND AUTHORIZATION HISTORY

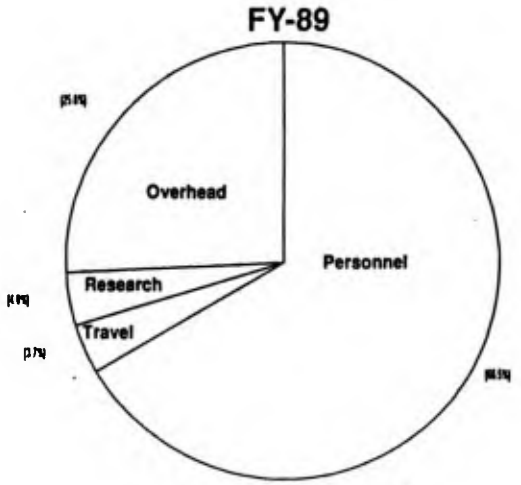
	Authorization	Appropriation
FY-76	$850,000	785,000
FY-77	900,000	880,000
FY-79	1,700,000	1,062,000
FY-80	2,000,000	1,119,000
FY-81 - FY-86	2,300,000	1,167,000.- 1,369,000
FY-87	1,600,000	1,483,000
FY-88 - FY-90	2,000,000	1,865,000
FY-91 Request		2,079,000

seen in the charts following this page, the research budget historically accounted for slightly more than 20 percent of the funds Congress appropriated. In 1989 that percentage dipped to about 4 percent, and we project that research will account for only 1 percent of *appropriated* funds in 1990. By and large, fiscal year 1990 will be one in which we complete projects already in the pipeline. The President's budget requests a $214,000 increase in appropriations for fiscal year 1991. But approximately $100,000 of that must be used to cover the salary increases for the Chairman and the Conference's three senior executives stemming from Congress' enactment of the Ethics Reform Act of 1989. We plan to devote the remaining $100,000 contained in the President's 1991 budget to fund approximately 4-5 new, small, self-generated projects.

At present cost levels, we need approximately $200,000 annually to fund a research agenda of 8 to 10 relatively small, self-contained projects. We have been able to use appropriated funds for clearinghouse and implementation activities in recent years because other agencies have been prepared to underwrite research efforts we have undertaken for them. The Conference received $200,000 in inter-agency transfers in 1987 and 1988, and approximately $300,000 in 1989, which we dedicated largely to research. Indeed, these amounts essentially constituted the Conference's research budget over the past 3 years.

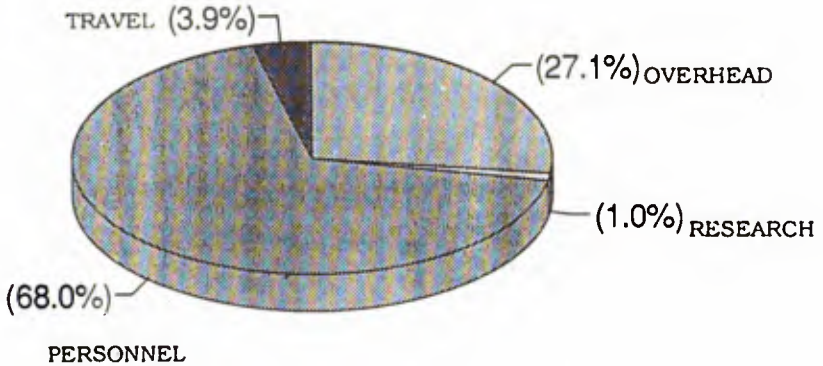
While we are generally prepared to undertake worthwhile research projects for other agencies if funded through inter-agency transfers of funds, the Conference should not rely on inter-agency transfers as the primary source of its research agenda. First, such reliance necessarily prevents the Conference from conducting research in those areas that may require improvement but are not a priority for any agency. This is particularly true of procedure issues that cross agency lines or invade an agency's turf. Second, and just as important, heavy reliance on inter-agency funds creates at least a potential that the Conference's objectivity could be compromised or perceived as compromised. Finally, it reduces the likelihood that we can conduct large-scale studies.





OVERVIEW OF ACTIVITIES

Source - Report by the U.S. General Accounting Office
GGD-90-13, February 4, 1980 and ACUS FY-91 Budget Request



OVERVIEW OF ACTIVITIES - FY-90

Absent Congressional direction, we do not plan to redirect resources to the areas of statistics collection, additional training, or the conduct of procedural audits.

Statistics Collection. The Conference has a statutory obligation to collect statistics concerning activities under the Equal Access to Justice Act and report annually to Congress. In fulfillment of that responsibility, required reports were brought up to date in the past year and we shall continue to fulfill this obligation in a timely fashion. Absent Congressional guidance, however, the Conference does not contemplate any significant re-entry into the statistics gathering business.

In particular, we do not intend to resume collection of highly valuable caseload and individual case data in connection with formal proceedings at almost 30 agencies and departments. This government-wide inventory, discontinued in 1980, provided a unique reference for persons concerned with issues of procedural reform or agency organization and management. In 1987, during debate over what type of civil penalty enforcement should be included in the Fair Housing Amendments Act, the Department of Justice urged that conciliation efforts, if unsuccessful, should lead to court enforcement. An alternate view, preferred by civil rights attorneys, would have required hearings before administrative law judges with review in the courts of appeals. Both sides asked the Conference for case data on the efficiency of administrative proceedings but we could supply data only through 1978.

Training. Likewise, without specific direction from Congress, we will not significantly expand our current training efforts. More specifically, we will not undertake any systematic government-wide training of agency officials about the Conference's numerous recommendations -- particularly those recommendations that cross agency lines. While I believe that the training of agency officials about administrative law issues is important, the present Conference focus is on research and other implementation activity.

We were fortunate that, in 1988 and 1989, we were able to recruit on a non-reimbursable basis the services of Wallace Warfield, former Acting Director of the

Department of Justice's Community Relations Service (CRS), to be a Distinguished Visiting Fellow with the Conference, specializing in alternative means of dispute resolution.[43] Mr. Warfield was a significant participant in the development of an ADR training program over the last 2 years. But there is no guarantee that we can recruit this type of talent without cost to the Conference in the future.

Procedural Audits. Finally, absent a request from another anency to conduct large-scale studies on a reimbursable basis, we do not plan to undertake what was described in a Senate document as a "procedural audit."[44] In such an audit, we examine comprehensively an agency's overall statutory authority, its regulations, and its undocumented practices, with emphasis on procedures affecting individuals who must deal with the agency. Our purpose is to recommend across-the-board improvements in agency procedures. Our recent studies to examine the disability claims procedure of the Social Security Administration[45] are similar to a procedural audit of an important aspect of the work of this agency but such studies were conducted in large measure on a reimbursable basis.

Miscellaneous Statutory Changes

We are proposing an amendment that would permit the Chairman to request that agencies notify him before they enter into procurement contracts to study the efficiency, adequacy or fairness of their agency proceedings or the use of alternate means of dispute resolution. This provision is intended to clarify the Conference's authority to request such information and permit the Conference to perform a clearinghouse function so that agencies may avoid duplicating studies already undertaken. This provision, however, does not require

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[43]Mr. Warfield began his career as a community organizer and served as Director of Community Organization of the Lower West Side Community Corporation in New York City. He has been a conciliator with the CRS since 1968. Before becoming Acting Director, he was Associate Director for Field Coordination with the rank of Deputy Assistant Attorney General.

[44]Staff of Senate Comm. on Governmental Affairs, 95th Cong., 2d Sess., Study of Federal Regulation, Vol. VI, Framework for Regulation 251 (Comm. Print 1978).

[45]Recommendation 87-6, State Level Determinations in Social Security Disability Cases 1 CFR § 305.87-6 (1989), and Recommendation 87-7, A New Role for the Social Security Appeals Council, 1 CFR § 305.87-7 (1989).

the agencies to provide the information, nor does it affect the decision concerning who should undertake a particular study, which would remain, as now, with the agency. But, if adopted, it would reflect a Congressional commitment to avoiding needless duplication in a small area of government procurement.

This voluntary notification approach would only apply to studies involving agency proceedings as defined by the Administrative Procedure Act, i.e., rulemaking and adjudication proceedings, including licensing, and to studies involving alternative means of dispute resolution. The Conference has developed substantial expertise and experience in these areas and is in a particularly good position to assist agencies in addressing issues relating to those subject.

We are also seeking an amendment that would permit funds transferred to the Conference from other agencies to be used in fiscal years subsequent to the year in which the funds are actually transferred. These funds are typically transferred so that the Conference may undertake research projects on behalf of the requesting agency. Some of these projects can be completed promptly. Others are more long-term. But they seldom fall within the parameters of a particular fiscal year. For example, the two projects funded by the Social Security Administration relating to determinations of disability took only 9 months to complete. They were begun in fiscal year 1987 but served as the bases of two Conference recommendations adopted in fiscal year 1988. On the other hand, a project funded by the Occupational Safety and Health Administration took almost 18 months to complete. The Conference's statutory mandate clearly anticipates its use of the resources of other federal agencies and the amendment is designed simply to make this use more efficient. We would also note that this proposal is consistent with the Conference's existing authority to expend any funds received from nongovernmental sources in years after that in which they are received.

Finally, we are seeking a nominal increase in the amount of our appropriation that we may expend on entertaining foreign dignitaries. As indicated earlier, the work of the Conference is of substantial interest to visitors from overseas. Under our existing authorization, enacted in 1986, we may use up to $1000 per year for official reception and entertainment expenses for foreign dignitaries. Typically, this involves a modest sandwich and soft drink lunch at the Conference's headquarters. To take into account inflation between the time the ceiling was enacted in 1986 and the end of the reauthorization period in 1994, we are requesting that the amount be increased by $500 -- to $1500 per year. This is not a line item allocation, however, and any unexpended funds are used by the Conference for general purposes.

Conclusion

I welcome the varied roles the Administrative Conference performs in response to Congressional direction or the suggestions of others interested in the improvement of the administrative process. I believe that the Conference's accomplishments over the past 4 years plainly merit our reauthorization. For a very modest cost the United States now receives tremendous value in the form of volunteered expertise from Conference members. If I may say so, we are a bargain asset at our existing budget of under $2 million and will remain a bargain asset if H.R. 3897 is enacted.

I am aware that this is a time of fiscal restraint. Indeed, to do our part, the Conference's actual appropriation remained at the same level for the past 3 years. And we recognize the need for restraint reflected in the inflation-only increases in our authorization of appropriations contained in H.R. 3897.

We have already learned how to do more with less. As I noted earlier, we have more than doubled our activity largely through productivity gains.

Fiscal restraint and efficiency make this the precise time to renew the Conference's efforts to streamline the administrative process. The Conference's work often results in considerable savings to the government and to the citizens who seek to use the administrative processes in their dealings with government. I think of our appropriations, at least in part, as "seed money" that is likely to be repaid in enhanced efficiencies throughout the government.

But this is not the time to abandon the federal government's historic, 40-year effort to make the manner in which it deals with its citizens more fair and equitable as well -- even recognizing that enhanced fairness and equity carry a pricetag.

In a retrospective on the work of the Conference, the late D.C. Circuit Judge Carl McGowan observed:

> [T]he Conference has lived up to its mandate of seeking ways to improve the efficiency and fairness of the administrative process. . . . The only occasion for regret is that its work has not always attracted the wider notice and recognition it surely deserves.[46]

I believe that Judge McGowan's observation is as correct today as when it was made. I ask this committee to recognize the Conference's work by reauthorizing our actitivies for another 4 years.

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[46]McGowan, The Administrative Conference: Guardian of the Regulatory Process, 53 Geo. Wash. L. Rev. 67, 84 (1985).

Summary of Testimony nf
Marshall J. Breger, Chairman
Administrative Conference of the United States
on H.R. 3897
a bill to reauthnrize appropriations
for the Administrative Conference of the United States

The Administrative Conference seeks reauthorization of its appropriatinns through fiscal year 1994. It supports H.R. 3897, sponsored by Chairman Brooks of Texas, to reauthorize Cnnference apprnpriatinns in graduated inflation-related increases frnm its current $2 millinn level to $2.7 millinn by fiscal year 1994.

The Conference, established by Congress as an independent agency in 1964, studies the efficiency, adequacy and fairness of the processes by which federal departments and agencies administer their various programs. It makes recommendatinns to those departments and agencies, Congress, the President and the courts on methods to improve those processes. It also serves as a clearinghnuse for information useful in improving administrative procedure and preventing the waste of resources associated with individual agencies separately addressing the same problem areas.

The past four years have resulted in more recommendations than any comparable period in Cnnference histnry. Indeed, nf the 150 recommendations adopted during the Cnnference's almost 22-year histnry, 38 of them -- or mnre than 25 percent -- were adopted in the period of the Conference's current authorization.

Conference initiatives touch the lives of millions of Americans. In 1989 alone, it examined, among nther things, the procedural mechanisms through which the Medicare program protects its beneficiaries from unnecessary, poor quality or inappropriate medical care; the use of medical personnel to help process the more than 1.5 million requests for disability insurance benefits and supplemental security income submitted annually to the Social Security Administratinn; and the procedures by which the Immigration and Naturalization Service administered the alien legalization program authorized under the Immigration Refnrm and Control Act nf 1986.

The Cnnference also made significant recommendatinns bearing on fnndamental aspects of the governmental process. Following the Presidential election of 1988, it persuaded the new Administration to adopt a first-of-its-kind Code of Conduct fnr transition workers. It was actively invnlved in ensuring the integrity of gnvernmental decisinnal processes by proposing changes in the conflict-of-interest requirements for members of federal advisory committees. It proposed that agencies make their adjudicatnry decisions more readily available tn the public and encouraged agencies to make computer-generated information more available through FOIA. And it worked diligently to develop legislation to supplement the costly and litigious rulemaking and adjudicatory processes, where appropriate, with faster, less costly consensual mechanisms.

The Cnnference assisted Congress by testifying 19 times before 10 separate congressional committees or subcommittees in the past two years alone and provided informal and technical assistance to members nf Congress or congressinnal staff on numerous occasions. Its recnmmendatinns were incorporated intn, or its work recognized in, eight separate statutes over the last two years.

In the coming fnur years, the Conference expects to continne to study the procedures emplnyed by the bank regulatnry agencies, the procedural framework for ethics in government, faster and less costly alternative methods of resolving government disputes, and the procedural elements of science and health care administration. As resources permit, it shall expand its efforts into at least two new areas: the process problems associated with the government regulation of science and technology, and process impediments to making the United States more competitive in the 1990s. In particular, it will consider whether there are administrative law nr procedure restrictions on American business that may make it more difficult for them to compete in world markets, particularly in response to the emergence of a more united European Community in 1992.

Appendices to
Testimony of

Marshall J. Breger
Chairman

Administrative Conference of the United States

February 21, 1990

Appendix A.	Selected Conference Initiatives
Appendix B.	Full Text of Conference Recommendtions Fiscal Years 1987-90
Appendix C.	Conference Membership List
Appendix D.	Resolutions of American Bar Association and Federal Bar Association
Appendix E.	Titles of Conference Recommendations and Statements Fiscal Years 1968-86
Appendix F.	Implementation Digest
Appendix G.	D.C. Circuit Order Implementing Conference Recommendation 88-6
Appendix H.	Colloquy Programs
Appendix I.	Current Areas of Conference Interest and Current Project List

Appendix A

Selected Administrative Conference Initiatives
To Improve the Administrative Process
FY 1987-1990

Legislative

Public Law 101-73, the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, which restructured oversight of the thrift industry, included a requirement that the bank regulatory agencies establish their own pool of administrative law judges and develop a set of uniform rules of procedure for administrative hearings before those agencies. These provisions implement in part Recommendation 87-12.

Public Law 101-194, the Ethics Reform Act of 1989, adopted Recommendation 88-4 concerning deferred taxation for divestitures required to avoid conflicts of interest.

Public Law 101-235, the Department of Housing and Urban Development Reform Act of 1989, included provisions authorizing the administrative imposition of civil money penalties against certain mortagees and lenders, multifamily mortgagors, violators of the Interstate Land Sales Full Disclosure Act, and issuers and custodians of mortgages guaranteed by the Government National Mortgage Association. These provisions provide for the imposition of civil money penalties and judicial review in accordance with the procedures proposed in Recommendations 72-6 and 79-3.

Public Law 101-236 extended for four months the Federal Aviation Administration's civil penalty demonstration project. The extension was granted expressly to permit the Conference to complete its study of the civil penalty program and submit a report to the appropriate committees of Congress.

Public Law 100-236 ended the "race-to-the-courthouse" in appeals from agency actions. The law's enactment culminated an eight-year Conference effort to implement Recommendation 80-5.

Public Law 100-297, the Hawkins-Stafford Elementary and Secondary School Improvement Amendments of 1988, requires the Department of Education to use a modified negotiated rulemaking technique for drafting rules in connection with the federal program of aid for education of disadvantaged children The Department is required to follow the guidance in ACUS Recommendation 82-4 on negotiated rulemaking.

Public Law 100-408, the Price-Anderson nuclear liability amendments, required the Nuclear Regulatory Commission to use negotiated rulemaking in accordance with Recommendation 82-4 to decide whether radiopharmaceutical licensees should be indemnified. The statute also directed the Conference within 30 days of enactment to provide the NRC with a list of impartial convenors to conduct the negotiated rulemaking. ACUS supplied a list of about 30 individuals.

Public Law 100-687, providing for judicial review of veterans benefit claims, included a requirement that the VA use notice-and-comment rulemaking for all regulations governing loans, grants, or benefits. The law implements in part ACUS's long-standing recommendation (No. 69-8) that Congress eliminate the exemption from notice-and-comment rulemaking for so-called "proprietary" programs. The Conference in 1988 submitted testimony on this issue to both the House and Senate Veterans' Affairs Committees.

The Senate, in both 1988 and 1989, passed the Negotiated Rulemaking Act (S. 303 in the 101st Congress), which reflects Conference initiatives to provide a legislative underpinning for the conduct of negotiated rulemaking by federal agencies. The bill incorporates the basic provisions of Conference Recommendations 82-4 and 85-5. A similar bill, H.R. 743, is currently pending in the House.

The Conference presented testimony to Congressional subcommittees 19 times over the last three years, exclusive of appropriations testimony. The topics included alternative dispute resolution legislation, the effects of ethics restrictions on federal employee recruitment and retention, private whistleblower legislation, the creation of a corps of administrative law judges, and Department of Veterans Affairs administrative procedures. Furthermore, several of the Conference's consultants testified concerning projects they undertook for the Conference.

For each of the last three years, the Conference has presented an annual seminar designed to acquaint Congressional staff with current issues in administrative law. Among the topics covered have been the practical aspects of agency implementation of statutory directives, the use and process of rulemaking, and judicial review of agency action.

President

President Bush, as president-elect, adopted a first-of-its-kind Code of Ethics for transition team members, and the President issued a Memorandum for Heads of Departments and Agencies to help implement the code. 24 Weekly Comp. Pres. Doc. 1555 (Nov. 28, 1988). These actions implement ACUS Recommendation 88-1.

Judiciary

The United States Court of Appeals for the District of Columbia Circuit amended its rules to provide that petitions alleging a claim of unreasonable delay of administrative agency action shall be treated as a motion and processed expeditiously. Rule 7(j), Local Rules of the Court of Appeals for the District of Columbia. The court's action, following a meeting between several ACUS members and two of the judges, implements Recommendation 88-6, calling on the courts to ensure that their internal procedures provide for the prompt and efficient disposition of claims involving delay of agency action.

The Conference is undertaking a series of projects relating to alternative dispute resolution (ADR) for the United States Courts for the District of Columbia Circuit, which hear a significant portion of the administrative law cases that reach the judicial branch. The Conference will be providing training for mediators participating in the District Court's alternative dispute resolution program. It is serving as a liaison between federal agencies and the U.S. District Courts and Court of Appeals on the use of ADR; for example, a roundtable was presented where judges from those courts explained their new programs to agency general counsels. The Conference will be doing an evaluation of the D.C. Circuit's ADR program and, based on that evaluation, will be preparing a guide for use by other courts and administrative law judges.

The Conference submitted detailed comments to the Judicial Panel on Multidistrict Litigation in response to the court's proposed revision to its Rules of Procedures to implement Pub.L. 100-236, the "race to the courthouse" legislation. The Conference's comments were substantially incorporated into the court's final rules.

Departments and Agencies

At the request of the Occupational Safety and Health Administration, ACUS in 1987 undertook a study of the OSHA rulemaking process. The recommendations that came out of that study served as the basis for an OSHA rule expanding its use of generic or class standards regulating multiple health and safety hazards, promulgated as a final rule in January 1989. See 54 Fed. Reg. 2332, 2370 (1989).

At EPA's request, Conference staff provided assistance in the use of alternative dispute resolution (ADR) in environmental enforcement actions. Also in response to an EPA request, and in furtherance of Conference Recommendation 88-11, the Conference developed a model policy statement and draft rule to ensure appropriate confidentiality of information divulged to mediators and other neutrals during the course of agency settlement proceedings.

The Conference proposed changes in the Department of Transportation's rules of procedure for its Board of Contract Appeals, encouraging the use of mini-trials, settlement judges, and other ADR methodologies as part of the Board's decisional process. DOT's final rule incorporated the Conference's suggested changes. See 53 Fed. Reg. 34,104, 34,105 (1988).

The Conference provided several multi-day training programs in ADR for a number of agencies, including for the judges at the Armed Services Board of Contract Appeals and the Occupational Safety and Health Review Commission, and for contracting personnel at the U.S. Forest Service. These sessions focused on developing negotiation and dispute resolution skills. The Conference also co-sponsored with the National Judicial College a three-day ADR training session for federal government ALJs.

At the request of the Social Security Administration (SSA), the Conference prepared a report on Social Security disability appeals procedures, which the agency is using as part of its consideration of changes in those procedures. This project continues the Conference's long-term concern with disability benefits procedures; it has studied and issued recommendations on each of the several layers of appeals, as well as studying procedures in other agencies with disability programs.

At SSA's further request, the Conference is preparing a study on the use of representative payees for social security and disability benefits.

At the request of the Domestic Policy Council and the Office of Personnel Management, the Conference undertook a study of procedures for resolving federal personnel disputes. This study, which raised a multitude of extremely complicated issues arising in this area, culminated in a Statement adopted at the December 1989 Plenary Session. 54 Fed. Reg. 53493, 53498 (1989).

The Department of Commerce asked the Conference to study the dispute resolution provisions of the U.S.-Canada Free Trade Agreement. As part of that study, the Conference sponsored a seminar on the dispute resolution provisions, which brought together several hundred representatives of federal agencies, the Congress, the Canadian government, academia and the private sector. Another such seminar is planned for later this year.

The Conference has provided advice and informal assistance to various agencies undertaking negotiated rulemakings, including the Department of Transportation, the Nuclear Regulatory Agency, and the Department of Agriculture.

For the last two years, the Conference has sponsored a seminar on issues of the federal administrative process for members of the various independent multi-member boards and commissions.

The Conference sponsors a series of meetings for the Chairmen of the independent regulatory agencies, to discuss issues of common interest. Among the recent speakers have been Congressman John Dingell, Dr. Michael Boskin, Chairman of the Council of Economic Advisors, and senior White House advisors.

Other Research and Clearinghouse Efforts

The Conference is preparing a Roster of Neutrals (persons who are able to serve as arbitrators, mediators, facilitators, etc.) for use primarily by federal agencies in alternative dispute resolution proceedings. The Roster, undertaken at the request of several agencies, will be a computerized data base of dispute resolution specialists available to assist in resolving conflicts that arise under federal administrative programs. The roster is a clearinghouse intended to educate and assist federal officials and regulated parties in locating and retaining capable neutrals in a timely manner.

The Conference has presented a series of colloquia on a variety of timely topics with implications for administrative law and process. Among the topics have been "Administrative Law Judges: Should an Independent Corps Be Created?" with Congressman Benjamin Cardin, Judge Howard Markey of the U.S. Court of Appeals for the Federal Circuit, and Professor Victor Rosenblum (Northwestern); "Transportation Regulation: Is There a Need For a Mid-Course Correction?" with then-Secretary of Transportation James Burnley, Cornish Hitchcock, Aviation Consumer Action Project, and Professor Michael Levine (Yale). Other subjects have been "Ethics in Government: Where Do We Go From Here?" with Congressman Barney Frank and Counsel to the President C. Boyden Gray; and "The Drug Approval Process in the AIDS Era," with then-FDA Commissioner Frank Young, Professor James O'Reilly (University of Cincinnati) and William Schultz, Public Citizen Litigation Group.

In 1987, the Conference, in conjunction with the American Bar Association, sponsored a conference on Medicare procedures. This conference brought together representatives from the federal government, the private bar, academia and the public interest sector to discuss a multitude of issues relating to the development and administration of Medicare program procedures.

At the urging of the House Appropriations Subcommittee on Treasury, Postal Service, and General Government, the Conference undertook a series of projects relating to procedures in the immigration area. Following a study by Professor Legomsky of Washington University to develop a priority list of research topics, the Conference considered the topics of the alien legalization program, asylum procedures, and the processing and review of visa denials by consular officials.

The alien legalization project had two phases. The first evaluated whether the program should have been extended beyond its May 4, 1988 deadline. While Congress declined to adopt the Conference consultant's recommendation that it should be, the study was widely discussed during the course of the debate on the issue. The project's second phase considered the Immigration and Naturalization Service's use of a remote decisionmaking model to process the large volume of legalization applications. The Conference adopted a Statement recommending the use of such a model to agencies administering mass decisionmaking programs, as well as making some suggestions to INS for the second phase of the legalization program.

The asylum project served as the basis for Conference recommendations for a specially trained corps of asylum decisionmakers, and for streamlining the hearing process. The project on consular visa denials resulted in recommendations to the State Department calling for changes in consular visa processing procedures, and a study by the State Department on developing a centralized administrative review process.

The Conference has sponsored a series of educational roundtable discussions on ADR, involving representatives of different agencies, as well as ADR experts. These roundtables take place several times a year. The Conference also sponsors an interagency working group on ADR, for agency personnel actively involved in ADR efforts.

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The Conference sponsored a roundtable discussion on the use of negotiated rulemaking (reg-neg), which brought together nearly a hundred interested persons from the government, the private sector, and academia.

The Conference sponsors a Model Rules Working Group, which has been meeting to develop a set of model rules for formal administrative hearings that could be used by all federal agencies. The group includes representatives from various federal agencies as well as the private bar.

The Conference published a Sourcebook on federal agency use of alternative dispute resolution, and a Sourcebook on negotiated rulemaking is to be published shortly.

The Conference has provided advice and assistance to various foreign governments to improve their administrative procedures. Among the governments that have called on the Conference are Peru, Canada, Australia, the Soviet Union and Great Britain.

In 1988, the Conference considered, but decided to study further, the question of nonacquiescence by federal agencies in the rulings of courts of appeal. The draft report was circulated widely and produced much comment from SSA claimants. In January 1990, SSA published a new rule on application of circuit court law to Social Security claims, which incorporated many of the procedural safeguards the Conference's study recommended.

Appendix B

§ 305.86-4 The Split-Enforcement Model for Agency Adjudication (Recommendation No. 86-4).

Separation of functions in administrative adjudication has usually been achieved through internal barriers within the agency which separate and insulate those employees who judge from those who investigate and prosecute. The chains of command, however, come together at the top in the person of the head or heads of the agency, who, through subordinates, are responsible for all three functions. Internal separation of functions is sanctioned and contemplated by the Administrative Procedure Act. When combined with the protections accorded to administrative law judges who preside over adjudicatory hearings, it appears, on the whole, to have worked satisfactorily in providing fair and impartial factfinding, while permitting the agency to speak with a single voice on matters of law and policy. Yet the

experience with internal separation of functions has never entirely silenced the critics who argue that it is impossible to achieve evenhanded justice when enforcement and adjudicative functions are lodged in the same agency.

Congress has, therefore, on a number of occasions sought to carry separation of functions a step further. In the Occupational Safety and Health Act of 1970, an agency in the Department of Labor, the Occupational Safety and Health Administration (OSHA), was assigned the responsibility for promulgating industrial health and safety standards and for enforcing these standards through inspections and the filing of complaints against employers. The responsibility for adjudicating such complaints, however, was assigned to a wholly independent three-member agency, the Occupational Safety and Health Review Commission (OSHRC), which employs administrative law judges to hear enforcement cases brought by OSHA and to issue initial decisions subject to commission review. A similar division of responsibilities was created in the area of mine safety and health in the Federal Mine Safety and Health Amendments Act of 1977. This statute assigned rulemaking and enforcement to the Mine Safety and Health Administration in the Department of Labor and adjudication to the independent Federal Mine Safety and Health Review Commission (FMSHRC).[1]

An Administrative Conference study of the experience with the "split-enforcement model" used in the occupational safety and mine safety legislation was unable to conclude whether this model achieves greater fairness in adjudication than does the traditional structural model. Fairness is an important but an unquantifiable and subjective value. Therefore, the Conference takes no position on whether the split-enforcement model is preferable to a structure in which responsibilities for rulemaking, enforcement and adjudication are combined within a single agency. Our study did reveal, however, that because Congress, in enacting the Occupational Safety and Health Act, did not specify clearly the respective responsibilities of OSHA and OSHRC in resolving questions of law and policy, unnecessary conflicts have arisen between the agencies and there has been confusion expressed by reviewing courts over which agency's views were entitled to the greater deference. For a variety of reasons these conflicts and confusion have been largely avoided in the later enacted mine safety legislation.

[1] The system for enforcing certain provisions of the Federal Aviation Act also conforms generally to this model but was not part of the study. See 49, App. U.S.C. § 1903(a)(9).

RECOMMENDATION

1. Where Congress establishes an enforcement scheme in which rulemaking and prosecution are assigned to one agency and adjudication to another agency, it should make clear in which agency it intends to place programmatic responsibility and direct the courts to look to that agency for authoritative expressions of law or policy. Congress should also attempt to foresee other areas of potential conflict, such as control over litigation and settlements, and should so far as possible specify the respective responsibilities of each agency and the procedures for resolving disagreements.

2. Generally speaking, Congress should provide that in adjudicatory challenges to standards promulgated pursuant to agency statutory authority, the adjudicatory agency must accept the rulemaking agency's interpretation of the standard unless it can be shown that the rulemaking agency's interpretation is arbitrary, capricious, or otherwise not in accordance with the law. So far as is practical, the rulemaking agency should provide notice to the affected public concerning the administrative interpretation of its rules and regulations, the policies that they represent, and their intended implementation in enforcement.

3. Where uncertainties exist with regard to the responsibilities of agencies already implementing split-enforcement schemes, Congress should act to resolve those uncertainties consistent with the foregoing, if the agencies are unable to do so.

[51 FR 46986, Dec. 30, 1986]

§ 305.86-5 Medicare Appeals (Recommendation No. 86-5).

The Medicare program, since 1965, provides health insurance for nearly all elderly and most disabled Americans. The program relies on hospitals, nursing homes and other health care institutions (under "Part A" of the program) and physicians and suppliers (under "Part B") to provide benefits to its beneficiaries.

This program, serving 30 million persons, has been administered since 1977 by the Health Care Financing Administration (HCFA), within the Department of Health and Human Services (HHS). Congress pur-

posefully created a decentralized system, with implementation by localized carriers and intermediaries, primarily insurance companies. HCFA contracts with these organizations to administer the millions of claims made by beneficiaries each year and the resulting payments to providers. For Part A these organizations are known as "fiscal intermediaries" and for Part B they are referred to as "carriers." Additionally, statutorily-mandated peer review organizations (PROs), made up of physician controlled organizations under contract with HCFA, have been given new responsibility to decide many disputes raised by beneficiaries and hospitals under Part A. To guide its contractors, HCFA issues health insurance manuals containing detailed instructions, though they normally are not published through notice-and-comment rulemaking.

HCFA also issues "national coverage decisions" on whether new medical technologies and procedures are covered by Medicare. These decisions are sometimes made after a recommendation is sought from the HHS Office of Health Technology Assessment (OHTA). Only when OHTA advice is sought does HCFA publish notice in the FEDERAL REGISTER. In most cases, affected manufacturers, providers, and beneficiaries have no notice or opportunity to file comments on proposed action, and neither HCFA nor OHTA has published its decisionmaking procedures or its criteria for making these decisions.

Rapidly rising program expenditures, especially inflation in hosptial care costs, led Congress to take a number of steps to control costs. In 1982, the PRO system was created and was delegated important responsibility to deny Medicare payment for inappropriate or unnecessary services and to sanction providers for improper practices. In the following two years Congress froze physician charges for fifteen months and completely revamped the reimbursement system for hospitals by creating the "prospective payment system" under which Medicare pays hosptials a predetermined fixed price for each patient case (according to a classification system of some 470 Diagnosis Related Groupings or DRGs), regardless of the actual costs incurred in treating the patient. The prices are subject to annual updating and the classification system is to be reviewed annually. Congress created the advisory Prospective Payment Assessment Commission to participate in this process. Additionally, to mitigate fears that the prospective payment system might lead to unnecessary brief admissions or premature release of patients, Congress charged the PROs with the responsibility for monitoring hospital admissions and discharge practices. In the first years of this program, hospital admissions for the elderly declined for the first time since 1965, the average length of stay also declined and there was a greater utilization of outpatient services. Moreover, many hospitals have made record profits under the new system while reducing the rate of inflation in hospitals costs. There has also been a marked increase in physician (Part B) services, as patients have moved out of hospital and into outpatient care, and to greater reliance on home health services.

The Medicare appeals system is a patchwork with differing administrative and judicial review requirements for beneficiaries and providers and differing rules for Part A and Part B appeals.

Under Part A, most cases are beneficiary appeals primarily involving coverage determinations. Initial determinations are by PROs if hospital services are involved and by fiscal intermediaries for other Part A services. A reconsideration step is built in. After this "paper review," administrative review is then available by an administrative law judge in the Social Security Office of Hearings and Appeals if the amount in controversy exceeds $100 ($200 in hospital cases). The SSA Appeals Council may review and reverse the ALJ's decision on its own motion. Judicial review in the district court is available for the beneficiary if the amount in controversy is $1000 ($2000 in hospital cases).

Providers who have disputes concerning reimbursement under Part A (over $10,000) may bring appeals to the Provider Reimbursement Review Board (PRRB), a five-member board within HHS. (Appeals involving amounts between $1,000 and $10,000 are heard by fiscal intermediaries.) The Secretary may review PRRB decisions on his own motion and providers have a right to judicial review. The PRRB's effectiveness as an independent adjudicator of provider payments disputes has been called into question by provider groups who have raised concerns about its independence, jurisdiction, slowness and its procedures for handling group appeals. Moreover, the PRRB's role under the prospective payment system has been changing. The Board does retain jurisdiction over appeals remaining under the old system and over some key issues concerning allowable costs, and availability of payments under the new system. But, HCFA rulings and regulations have constrained the PRRB's jurisdiction in prospective payment rate cases and provided that it may not order retrospective correction of errors in those rates. Moreover, some key provider appeals such as those involving errors in DRG assignment have been transferred to PROs. No further review is available in such cases.

Until passage of the Omnibus Budget Reconciliation Act of 1986, Pub. L. 99-509, there

was no administrative and judicial review of Part B claims. However, under the new law, beneficiaries with disputed claims of over $500 (and physicians who have accepted assignment of such claims) have a right to a hearing before an administrative law judge, and to subsequent judicial review if the claim exceeds $1,000. Previously there was no judicial review and beneficiaries with Part B claims exceeding $100 were limited to a "fair hearing" before an officer selected by the carrier. (This procedure will continue for claims between $100 and $500 under the new legislation.)

The new legislation also made several other important changes in the laws affecting Medicare. The legislation:

—authorized persons affiliated with providers to represent beneficiaries in Part A appeals as long as no financial liability is imposed in connection with the representation;

—requires that HCFA regulations regarding the Medicare program provide for a 60-day comment period;

—requires expanded notice procedures for medicare patients concerning their hospital discharge rights;

—mandates various new requirements on PROs to review beneficiary complaints and to review the quality of care provided; and

—expands appeal rights in home health care cases involving so-called "technical denials" of benefits.

The Conference welcomes these changes. Indeed, at the time of their enactment, the Conference was actively considering recommendations concerning some of them. Other aspects of the process, however, also deserve modification or, at least, further study. We therefore call upon HCFA to continue its efforts to improve the implementation of this important program by heeding the following specific suggestions.

Recommendation

I. Publication of Policies

A. The Health Care Financing Administration (HCFA) should keep up to date and provide reasonable access to all standards, guidelines and procedures used in making coverage and payment determinations under Part A and Part B of the Medicare program.

B. In promulgating interpretations of Medicare benefits likely to have substantial impact on the public, HCFA should adopt procedures that allow for public comment (either pre-promulgation or post-adoption). See ACUS Recommendation 76-5.

C. HCFA by regulation (or Congress by legislation if necessary) should require fiscal intermediaries and carriers to publish and provide reasonable access to all insurance industry rules or other screening devices used in making coverage and payment determinations under Part A and Part B.

D. HHS should introduce more openness and regularity into the procedure for issuing "national coverage decisions" pertaining to new medical technologies and procedures, through: (1) Development of published decisional criteria; (2) providing for notice and inviting comments in such cases, both in HCFA's decisionmaking process and in the process by which the HHS Office of Health Technology Assessment supplies recommendations to HCFA; and (3) providing for internal administrative review or reconsideration of such decisions.

II. Administrative Appeal Procedures

A. HCFA should continue to develop and assess the adequacy and timing of notice to beneficiaries about coverage and payment decisions on medical benefits and appeal rights regarding these decisions.

B. Because of the increased caseload in Medicare appeals adjudication anticipated after the recent enactment of new appeal rights in Part B cases, HHS should consider whether modification of the existing adjudicatory system is necessary, including whether to establish a Medicare appeals division with its own administrative law judges and review procedure.

C. When resolving hospital rate appeals under the prospective payment system, the Provider Reimbursement Review Board should be authorized, by regulation (or, if necessary, by legislation) to assume jurisdiction of an individual hospital's appeal in a manner that affords timely relief to successful appellants.

III. Suggestions for Further Study

HCFA should undertake or support additional research in the following areas:

A. An empirical study of the role, performance and procedures of:

(1) Fiscal intermediaries and carriers in making coverage and payment determination under Part A and Part B;

(2) Peer review organizations in adjudicating Part A appeals by beneficiaries and by hospitals under the prospective payment system.

B. A comprehensive analysis of the current administrative arrangement by which hospital payment rates are updated under the prospective payment system (taking into account the need for fair ratemaking, timely resolution of disputes and budgetary controls), including an assessment of the Prospective Payment Assessment Commission in this process.

C. An examination of the future role and responsibilities of the Provider Reimbursement Review Board under the prospective payment system, including its jurisdiction, need for expedited review procedures for group appeals, qualifications for membership, adequacy of budget and administrative support, and the need for independence from the rest of the Department.

D. An examination of whether or not the implementation of the statutorily-mandated peer review program should be done to a greater extent through notice-and-comment rulemaking, rather than through reliance upon program instructions and contract provisions.

E. A study of HCFA's use of statistical sampling techniques to determine project overpayments to a provider for a given year, and whether the use of these techniques may effectively deny beneficaries or providers the opportunity to challenge payment determinations based on actual claims experience.

F. A study of whether, in hospital rate appeals, HCFA should allow retroactive correction of erroneous calculations of a hospital's payment rate for affected prior years under the prospective payment system, and payment to hospital accordingly.

G. A study of the process by which ALJ reversals of claim denials are implemented by intermediaries and providers, including the need for tighter accounting of payments to beneficiaries and reimbursements to providers.

H. An examination of the feasibility and utility of setting internal time guidelines for each stage of the Medicare appeals process, including reconsiderations; ALJ hearings and Appeals Council review.

[51 FR 46987, Dec. 30, 1986]

§ 305.86-6 Petitions for Rulemaking (Recommendation No. 86-6).

The Administrative Procedure Act (APA) requires each Federal agency to give interested persons the right to petition for the issuance, amendment, or repeal of a rule, 5 U.S.C. § 553(e). The APA also requires that agencies conclude matters presented to them within a reasonable time, 5 U.S.C. § 555(b), and give prompt notice of the denial of actions requested by interested persons, 5 U.S.C. § 555(e). The APA does not specify the procedures agencies must follow in receiving, considering, or disposing of public petitions for rulemaking.[1] However, agencies are expected to establish and publish such procedures in accordance with the public information section of the APA. *See* Attorney General's Manual on the Administrative Procedure Act 38 (1947). An Administrative Conference study of agency rulemaking petition procedures and practices found that while most agencies with rulemaking power have established some procedures governing petitions for rulemaking, few agencies have established sound practices in dealing with petitions or responded promptly to such petitions.

This Recommendation sets forth the basic procedures that the Conference believes should be incorporated into agency procedural rules governing petitions for rulemaking. In addition, the Conference encourages agencies to adopt certain other procedures and policies where appropriate and feasible. The Conference feels that, beyond this basic level, uniform specification of agency petition procedures would be undesirable because there are significant differences in the number and nature of petitions received by agencies and in the degree of sophistication of each agency's community of interested persons.

Agencies should review their rulemaking petition procedures and practices and, in accordance with this Recommendation, adopt measures that will ensure that the right to petition is a meaningful one. The existence of the right to petition reflects the value Congress has placed on public participation in the agency rulemaking process. The Administrative Conference has recognized, in

[1] But other statutes expressly create the right to petition for rulemaking, and some of these statutes specify procedures to be followed in the petitioning process.

past recommendations, the benefits flowing from public participation in agency rulemaking and from publication of the means for such participation.[8] The absence of published petition procedures, excessive or rigidly-enforced format requirements, and the failure to act promptly on petitions for rulemaking may undermine the public's right to file petitions for rulemaking.

Some agencies currently have petition-for-rulemaking procedures that are more elaborate than those recommended in this Recommendation. This Recommendation is not intended to express a judgment that such procedures are inappropriate or that the statutes mandating particular procedures should be amended. Nor is the Recommendation intended to alter the prior position of the Conference recommending elimination of the categorical exemptions of certain types of rulemaking from the APA's rulemaking requirements. *See* Recommendations 69-6 and 73-5. To the extent Congress or agencies adopt those recommendations, they should also expressly apply the right to petition to those types of rulemaking.

RECOMMENDATION

1. Agencies should establish by rule basic procedures for the receipt, consideration, and prompt disposition of petitions for rulemaking. These basic procedures should include: (a) Specification of the address(es) for the filing of petitions and an outline of the recommended contents of the petition, such as the name, address, and telephone number of the petitioner, the statutory authority for the action requested, and a description of the rule to be issued, amended, or repealed; (b) maintenance of a publicly available petition file; and (c) provision for prompt notification to the petitioner of the action taken on the petition, with a summary explanatory statement.

2. In addition, agencies should, where appropriate and feasible:

a. Make their petition procedures expressly applicable to all types of rules the agency has authority to adopt;

b. Provide guidance on the type of data, argumentation, or other information the agency needs to consider petitions;

c. Develop effective methods for providing notice to interested persons that a petition has been filed and identify the agency office or official to whom inquiries and comments should be made; and,

d. Establish internal management controls to assure the timely processing of petitions for rulemaking, including deadlines for completing interim actions and reaching conclusions on petitions and systems to monitor compliance with those deadlines.

[51 FR 46966, Dec. 30, 1986]

§ 305.86-7 Case Management as a Tool for Improving Agency Adjudication (Recommendation No. 86-7).

Reducing the delay, expense and unproductive legal maneuvering found in many adjudications is recognized as a crucial factor in achieving substantive justice. In recent years, the negative side effects of civil litigation and agency adjudication procedures have begun to receive increased attention, and many judges, informed scholars and other experienced observers now cite lawyer control of the pace and scope of most cases as a major impediment. In the Federal judicial sphere, and increasingly in the state judiciary, a consensus is developing that efficient case management is part of the judicial function, on a par with the traditional duties of offering a fair hearing and a wise, impartial decision. Many Federal district judges have begun to practice and advocate increased intervention to shape and delimit the pretrial or prehearing process.

Some Federal agencies have begun to make regular use of case management processes wherein those who decide cases interject their informed judgment and experience early in the pretrial stage, and consistently thereafter, to move cases along as quickly as possible within the bounds of procedural fairness. One such agency is the Department of Health and Human Services ("HHS"), whose Departmental Grant Appeals Board ("DGAB" or "Board") makes active, planned use of special managerial procedures. The Board, which decides cases brought by State and local governments or

[8] *See* Recommendation 69-6, *Elimination of Certain Exemptions from the APA Rulemaking Requirements*, 1 C.F.R. § 305.69-6; Recommendation 71-6, *Public Participation in Administrative Hearings*, 1 C.F.R. § 305.71-6; Recommendation 73-5, *Elimination of the "Military or Foreign Affairs Function" Exemption from APA Rulemaking Requirements*, 1 C.F.R. § 305.73-5; Recommendation 76-5, *Interpretive Rules of General Applicability and Statements of General Policy*, 1 C.F.R. § 305.76-5; and Recommendation 83-2, *The "Good Cause" Exemption from APA Rulemaking Requirements*, 1 C.F.R. § 305.83-2.

other recipients of HHS grant funds, has a three-tiered process that relies extensively on use of action-forcing procedures for completing each stage of a case. The Board adjudicates almost all its cases—well over two hundred dispositions and one hundred written decisions annually with an average "amount in controversy" in excess of one million dollars—in three to nine months. Most disputes before it involve financial issues concerning the allowability of grantee expenditures, but the Board's jurisdiction extends also to disputes over grant terminations and some renewals. A recent study[1] indicates that the Board's process reduces the opportunity for maneuvering by the parties, facilitates an expeditious, inexpensive disposition of all but the most complex cases, and is overwhelmingly approved by most attorneys who practice before it.

The Board's success should not be discounted because won in an environment unusually favorable to efficient dispute resolution.[2] The fact is that similar procedures are now used with apparently equal success at other agencies. They merit the attention of appeals boards, administrative panels, administrative law judges ("ALJs") and all others involved in the decisional process. Though recognizing that many factors affect the procedures to be followed in any particular dispute, the Administrative Conference encourages this trend toward reducing the transaction costs of agency proceedings and believes that this is a key responsibility of all presiding officers and their supervisors. The Conference has, in several contexts, already called on Federal agencies to make greater use of internal time limits,[3] alternative means of dispute resolution,[4] and case management and other techniques[5] to expedite and improve their case handling. The Conference now calls upon all personnel who conduct or oversee processing of adjudicative proceedings for the Federal government to make more determined efforts to use the kinds of case management methods described below as may be appropriate.

Recommendation

The Conference encourages the prompt, efficient and inexpensive processing of adjudicative proceedings. Federal agencies engaged in formal and informal adjudication should consider applying the following case management methods to their proceedings, among them the following:

1. *Personnel management devices.* Use of internal agency guidelines for timely case processing and measurements of the quality of work products can maintain high levels of productivi-

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[1] This Recommendation is based largely on the report "Model for Case Management: The Grant Appeals Board" by Richard B. Cappalli (1986), which explores how the methods described separately below interact in an integrated case management system.

[2] *E.g.*, a moderate caseload per judge, a shared program objective among all parties and a long-term relationship between the agency and the claimant.

[3] Recommendation 78-3 calls on all agencies to use particularized deadlines or time limits for the prompt disposition of adjudicatory and rulemaking proceedings, either by announcing schedules for particular cases or adopting rules with general timetables for their various categories of proceedings. *Time Limits on Agency Actions*, 1 CFR § 305.78-3. The Conference has also called on agencies to establish productivity norms and otherwise exercise their authority to prescribe procedures and techniques for accurate, expeditious disposition of Social Security claims and disputes under grants. *E.g.*, *Procedures for Determining Social Security Disability Claims*, 1 CFR § 305.78-2; *Resolving Disputes under Federal Grant Programs*, 1 CFR § 305.82-2.

[4] Recommendation 86-3 calls on agencies to make greater use of mediation, negotiation, minitrials, and other "ADR" methods to reduce the delay and contentiousness accompanying many agency decisions. *Agency Use of Alternative Means of Dispute Resolution*, 1 CFR § 305.86-3. The Conference has called previously for using mediation, negotiation, informal conferences and similar innovations to decide certain kinds of disputes more effectively. *E.g.*, *Procedures for Negotiating Proposed Regulations*, 1 CFR §§ 305.82-4, .85-5; *Negotiated Cleanup of Hazardous Waste Sites Under CERCLA*, 1 CFR § 305.84-4; *Resolving Disputes under Federal Grant Programs*, 1 CFR § 305.82-2.

[5] Many of the practices recommended herein reflect the advice contained in the *Manual for Administrative Law Judges*, prepared for the Conference by Merritt Ruhlen. Recommendation 73-3 advises on using case management in adjudicating benefit and compensation claims. It calls for continuous evaluation of adjudicative performance pursuant to standards for measuring the accuracy, timeliness and fairness of agency procedures. *Quality Assurance Systems in the Adjudication of Claims of Entitlement to Benefits or Compensation*, 1 CFR § 305.73-3. In addition, Recommendation 69-6 urges agencies to compile and use statistical caseload data about their proceedings. *Compilation of Statistics on Administrative Proceedings by Federal Departments and Agencies*, 1 CFR § 305.69-6.

While some agencies have begun to employ these methods to reduce transaction costs and reach better results, many disputes are still being resolved with unnecessary formality, contentiousness and delay. This Recommendation is aimed at helping agencies begin to explore specific avenues to expand their use of ADR services.

A key figure in the effective working of various modes of ADR, including negotiated rulemaking, is the "neutral"—a person, usually serving at the will of the parties, who generally presides and seeks to help the parties reach a resolution of their dispute. These neutrals, often highly skilled professionals with considerable training in techniques of dispute resolution, can be crucial to using ADR methods with success.[8] For agencies to use ADR effectively, they should take steps to develop routines for deciding when and how these persons can be employed, to identify qualified neutrals, and to acquire their services.

The diversity of roles played by neutrals and the uncertainty as to certain applicable legal requirements present complications for agencies considering uses of ADR. Neutrals may be specially trained and accredited, or may simply hold themselves out as having certain expertise, experience or credibility. They may be called on to make binding decisions, consistent with applicable statutory and regulatory requirements, when opposing positions cannot be reconciled, or they may simply render advice to the parties. Time may be of the essence in acquiring their services, as in many arbitrations, but in some instances may be a minor consideration. Costs of using outside neutrals may range from a few thousand dollars (for the services of a minitrial advisor) to six figures (for convening and facilitating a large-scale negotiated rulemaking). These differences render specific advice difficult to give in advance. Agencies, Congress, courts, and others who employ ADR methods or review their use should nonetheless observe certain guidelines intended to accomplish the following goals:

- *Supply.* Broadening the base of qualified, acceptable individuals or organizations, inside and outside the government, to provide ADR services.
- *Qualifications.* Insuring that neutrals have adequate skills, technical expertise, experience or other competence necessary to promote settlement, while avoiding being too exclusive in the selection process.
- *Acquisition.* Identifying existing methods, or developing new techniques, for expeditiously acquiring the services of neutrals at a reasonable cost and in a manner which (a) insures a full and open opportunity to compete and (b) enables agencies to select the most qualified person to serve as a neutral, given that the protracted nature of the government procurement process is often inconsistent with the goals of ADR and the need to avoid delays.[9]
- *Authority.* Minimizing any uncertainty under the "delegation" doctrine or similar theories that may adversely affect the authority of some neutrals to render a binding decision. This consideration, however, should not prove troublesome where neutrals merely aid the parties in reaching agreement (as in nearly all mediations, minitrials and negotiated rulemakings).

These proposals are intended to help agencies meet the challenge of reaching these goals in a time of reduced resources and in a milieu in which many affected interests may oppose change.

Recommendation

A. Availability and Qualifications of Neutrals

1. Agencies and reviewing bodies should pursue policies that will lead to an expanded, diverse supply of available neutrals, recognizing that the skills required to perform the services of a dispute resolution neutral will vary greatly depending on the nature and complexity of the issues, the ADR method employed, and the importance

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Recommendations 82-4 and 85-5 have been instrumental in promoting agency experimentation with negotiated rulemaking, which involves convening potentially interested parties to negotiate the details of a proposed rule. *Procedures for Negotiating Proposed Regulations*, 1 CFR §§ 305.82-4 and .85-5. *See also, Negotiated Cleanup of Hazardous Waste Sites Under CERCLA*, 1 CFR 305.84-4; *Resolving Disputes Under Federal Grant Programs*, 1 CFR 305.82-2; and *Case Management as a Tool for Improving Agency Adjudication*, 1 CFR 305.88-7.

[8] *See* the Glossary in the Appendix for brief descriptions of the roles of neutrals in various proceedings.

[9] While there may be situations in which agencies can obtain the services of a qualified outside neutral without following formal procurement procedures, acquisitions of neutrals' services are generally governed by the Competition in Contracting Act, Pub. L. No. 98-369, Title VII, 98 Stat. 1175, which mandates full and open competition for contracts to supply goods and services to the Federal government, and the Federal Acquisition Regulations, 48 CFR Chapter 1, Parts 1-53, which sets forth detailed procedures for conducting competitive procurements.

of the dispute. Agencies should avoid unduly limiting the pool of acceptable individuals though the use of overly restrictive qualification requirements, particularly once agencies have begun to make more regular use of ADR methods. While skill or experience in the process of resolving disputes, such as that possessed by mediators and arbitrators, is usually an important criterion in the selection of neutrals, and knowledge of the applicable statutory and regulatory schemes may at times be important, other specific qualifications should be required only when necessary for resolution of the dispute. For example:

(a) Agencies should not necessarily disqualify persons who have mediation, arbitration or judicial experience but no specific experience in the particular ADR process being pursued.

(b) While agencies should be careful not to select neutrals who have a personal or financial interest in the outcome, insisting upon "absolute neutrality"—*e.g.*, no prior affiliation with either the agency or the private industry involved—may unduly restrict the pool of available neutrals, particularly where the neutral neither renders a decision nor gives formal advice as to the outcome.

(c) Agencies should insist upon technical expertise in the substantive issues underlying the dispute or negotiated rulemaking only when the technical issues are so complex that the neutral could not effectively understand and communicate the parties' positions without it.

2. Agencies should take adavantage of opportunities to make use of government personnel as neutrals in resolving disputes. These persons may include agency officials not otherwise involved in the dispute or employees from other agencies with appropriate skills, administrative law judges, members of boards of contract appeals, and other responsible officials. The Administrative Conference, Federal Mediation and Conciliation Service ("FMCS"), the Department of Justice (particularly the Community Relations Service ("CRS")) and other interested agencies should work to encourage imaginative efforts at sharing the services of Federal "neutrals," to remove obstacles to such sharing, and to increase parties' confidence in the selection process.

3. Congress should consider providing FMCS, CRS and other appropriate agencies with funding to train their own and other agencies' personnel in the particular skills needed to serve in minitrials, negotiated rulemakings, and other ADR proceedings.

4. The Administrative Conference, in consultation with FMCS, should assist other agencies in identifying neutrals and acquiring their services and in establishing rosters of neutral advisors, arbitrators, convenors, facilitators, mediators and other experts on which Federal agencies could draw when they wished. The rosters should be based, insofar as possible, on full disclosure of relevant criteria (education, experience, skills, possible bias, and the like) rather than on strict requirements of actual ADR experience or professional certification. Agencies should also consider using rosters of private groups (*e.g.*, the American Arbitration Association). The Conference, FMCS or another information center should routinely compile data identifying disputes or rulemakings in which neutrals have participated so that agencies and parties in future proceedings can be directed to sources of information pertinent to their selection of neutrals.

5. Agencies should take advantage of opportunities to expose their employees to ADR proceedings for training purposes, and otherwise encourage their employees to acquire ADR skills. Employees trained in ADR should be listed on the rosters described above, and their services made available to other agencies.

B. Acquiring Outside Neutrals' Services

1. In situations where it is necessary or desirable to acquire dispute resolution services from outside the government, agencies should explore the following methods:

(a) When authorized to employ consultants or experts on a temporary basis (e.g., 5 U.S.C. § 3109), agencies should consider utilizing that authori-

zation in furtherance of their ADR or negotiated rulemaking endeavors.

(b) Agencies contemplating ADR or negotiated rulemaking projects involving private neutrals should, as part of their acquisition planning process pursuant to the Federal Acquisition Regulation ("FAR") Part 7,[4] periodically give notice in the *Commerce Business Daily* and in professional publications of their needs and intentions,[5] so as to allow interested organizations and individual ADR neutrals to inform the agency of their interest and qualifications.

(c) Where speed is important and the amount of the contract is expected to be less than $25,000, agencies should use the streamlined small purchase procedures of Subpart 13.1 of the Federal Acquisition Regulation[6] in acquiring the services of outside neutrals, particularly minitrial neutral advisors, mediators and arbitrators.

(d) Agencies that foresee the need to hire private neutrals for numerous proceedings should consider the use of indefinite quantity contracts as vehicles for identifying and competitively acquiring the services of interested and qualified neutrals who can then be engaged on an expedited basis as the need arises. Agencies should, where possible, seek contracts with more than one supplier. In fashioning such indefinite quantity contracts, agencies should take care to comply with the following:

(1) Agency contracts should specify a minimum quantity, which could be a non-nominal dollar amount rather than a minimum quantity of services.[7]

(2) Negotiation of individual orders under the contract is desirable, but should generally adhere to the personnel, statements of work, and cost rates or ceilings set forth in the basic indefinite quantity contract, so as to minimize "sole source" issues.

(e) Agencies should also consider:

(1) Entering into joint projects for acquiring neutrals' services by using other agencies' contractual vehicles.

(2) Using other contracting techniques, such as basic ordering agreements and schedule contracts, where appropriate to meet their needs for neutrals' services.

(3) Proposing a deviation from the FAR or amending their FAR supplements, where appropriate.

(f) Agencies should evaluate contract proposals for ADR neutrals' services on the qualifications of the offeror, but cost alone should not be the controlling factor.[8]

2. The Civilian Agency Acquisition Council and Defense Acquisition Regulatory Council should be receptive to agency or Administrative Conference proposals for deviations from,[9] or amendments to, the FAR to adapt procurement procedures to the unique requirements of ADR processes, consistent with statutory mandates.

3. In the absence of appropriate considerations suggesting a different allocation of costs, in minitrials and arbitration the parties customarily should share equally in the costs of the neutrals' services.

Glossary

Mediator. A mediator is a neutral third party who attempts to assist parties in negotiating the substance of a settlement. A mediator has no authority to make any decisions that are binding on either party.

Convenor/Facilitator. Negotiated rulemakings generally proceed in two phases, one using a "convenor" and

[4] 48 CFR Part 7.

[5] Agencies are required to give *Commerce Business Daily* notice for all contract solicitations in which the government's share is likely to exceed $10,000. 15 U.S.C. 637(e); 48 CFR 5.201(a). For procurements between $10,000 and $25,000 in which the agency reasonably expects to receive at least two offers, no such notice is required. Pub. L. No. 99-591, October 18, 1986, Title IX, Section 922.

[6] 48 CFR Subpart 13.1. This Subpart allows agencies to make purchases in amounts less than $25,000 without following all of the formalities prescribed in the FAR for ordinary procurements. If the procurement is for less than $10,000, the agency need not advertise it in advance in the *Commerce Business Daily*. 48 CFR 5.201(a). None of these provisions relieves the agency of its mandate to obtain competition.

[7] 48 CFR 16.504(a)(2).

[8] 48 CFR 15.605(c).

[9] 48 CFR 1.402.

the other a "facilitator." In the first (convening) phase, a neutral called a convenor studies the regulatory issues, attempts to identify the potentially affected interests, and then advises the agency concerning the feasibility of convening representatives of these interests to negotiate a proposed rule. If the agency decides to go forward with negotiating sessions, the convenor assists in bringing the parties together. In the second (negotiating) phase, a neutral called a facilitator manages the meetings and coordinates discussions among the parties. When the parties request, a facilitator may act as a mediator, assisting the negotiators to reach consensus on the substance of a proposed rule. The roles of convenor and facilitator sometimes overlap, and often both functions are performed by the same person or persons. Neither a convenor nor a facilitator has authority to make decisions that are binding on the agency or on the participating outside parties.

Neutral Advisor. A minitrial is a structured settlement process in which each party to a dispute presents a highly abbreviated summary of its case before senior officials of each party authorized to settle the case. In this recommendation, it is presumed that the government is one party to the dispute. In some (but not all) minitrials, a neutral advisor participates by hearing the presentations of the parties and, optionally, providing further assistance in any subsequent attempt to reach a settlement. Typically, a neutral advisor is an individual selected by the parties. Duties of a neutral advisor may include presiding at the presentation, questioning witnesses, mediating settlement negotiations, and rendering an advisory opinion to the parties. In no event does a neutral advisor render a decision that is binding on any party to a minitrial.

Arbitrator. An arbitrator is a neutral third party who issues a decision on the issues in dispute after receiving evidence and hearing argument from the parties. Arbitration is a less formal alternative to adjudication or litigation, and an arbitrator's decision may or may not be binding. Arbitration may be chosen voluntarily by the parties, or it may be required by contract or statute as the exclusive dispute resolution mechanism.

[51 FR 46990, Dec. 30, 1986]

§ 305.87-1 Priority setting and management of rulemaking by the Occupational Safety and Health Administration (Recommendation 87-1).

The Administrative Conference has undertaken a study of the rulemaking process at the Occupational Safety and Health Administration. It is recognized that OSHA's mandate to regulate any substance or hazard that poses a significant risk to workers and, to the extent feasible, make every workplace safe is daunting, and that alternative approaches to substance-by-substance regulation may be necessary. The Conference plans to address this larger issue in its continuing study. In this recommendation, the Conference suggests procedures that OSHA can institute administratively to improve two aspects of its current process for developing health and safety standards.

In Part I, the Conference recommends to OSHA a procedure for systematically setting long-term priorities for promulgating standards for regulating health and safety hazards. Once established, the recommended regulatory priorities lists will serve as a baseline against which additions or modications of the lists can be considered. The task of developing the priority lists would be assigned to a permanent, internal agency committee, with additional representation from the National Institute for Occupational Safety and Health (NIOSH). The committee would work closely with other health and environmental agencies in developing initial priority lists which would be submitted for decision to the Assistant Secretary for Occupational Safety and Health, Department of Labor.[1]

Although these regulatory priorities lists should generally govern when OSHA initiates rulemaking, the Conference does not intend that this priority-setting process should in any way diminish the Assistant Secretary's authority to promulgate rules on an expedited basis under the Occupational Safety and Health Act or the Administrative Procedure Act. Moreover, the recommendation (in paragraph I.d.) takes ac-

[1] In 1982 the Conference addressed the importance of interagency cooperation in identifying and ranking potentially cancer-causing chemicals for regulation and recognized the important role played by the National Toxicology Program in fostering such cooperation, *see* ACUS Recommendation 82-5, Federal Regulation of Cancer-Causing Chemicals, Part II, 1 CFR 305.82-5.

against retaliatory actions by over a dozen Federal laws. By common usage these employees, as well as others who make similar disclosures concerning fraud or other misconduct (but who are beyond the Conference's current study),[1] have become known as whistleblowers. Under current statutes, for example, nuclear power plant workers, miners, truckers, and farm laborers are specifically protected when acting as whistleblowers. Other workers may be covered under the more general protections granted by the Occupational Safety and Health Act (OSHA) or various environmental laws.

The protection provided employees by the so-called whistleblower statutes under study serves the important public interest of helping ensure the health and safety of workers in the various regulated industries or activities, as well as that of the general public. The statutes are intended to create an environment in which an individual can bring a hazardous or unlawful situation to the attention of the public or the government without fear of personal reprisal. Such disclosures can be a valuable source of information especially where the public lacks the knowledge or access to information necessary to be fully informed on these important issues.

In its examination of the current Federal statutory scheme designed to protect whistleblowers in the private sector, the Conference found that, as currently written, the various whistleblower statutes lack uniformity in a number of areas including the following:

1. Investigative responsibility is assigned to numerous agencies, including the Department of the Interior and several within the Department of Labor (DOL), with little coordination among them.

2. Adjudicatory responsibility is similarly divided. For example, while several statutes provide for adjudication by a DOL administrative law judge, others provide for decisions by different agencies or for trial in the district court.

3. Judicial review likewise differs. Some statutes provide for review in the district court, some in the court of appeals. And for some, no review is available.

4. Statutes of limitations for filing a complaint range from 30 days to 180 days.

5. Definitions of protected conduct differ according to statute. For example, protected disclosure may include any disclosure or may be more narrowly defined as disclosure to "the public," to the media, to the responsible agency, or to a union or employer. Protected conduct may or may not include refusals to work.

6. In certain cases where the designated agency declines to proceed with the complaint (under either the OSHA or the Asbestos Hazard Emergency Response Act), the complaining employee is left without any further administrative or judicial review.

As a result of these statutory incongruities, available procedures and protections may differ depending solely upon the industry to which an aggrieved employee belongs. For example, an employee seeking protection under the Clean Air Act (CAA) has 30 days in which to file a complaint, while an employee filing under provisions of the Migrant Seasonal and Agricultural Worker Protection Act (MSAWPA) has 180 days. And while both CAA and MSAWPA violations are investigated by the Wage and Hour Division of the Department of Labor, adjudication of CAA complaints is before a DOL administrative law judge, while MSAWPA complaints are adjudicated in the district courts. The Conference has concluded that this lack of uniformity does not appeal to be reasoned, but most likely reflects the incremental enactment of the various statutes over a period of years.

Accordingly, the Conference believes that omnibus whistleblower legislation providing for centralization of the investigative and adjudicative functions is needed. Because the Department of Labor now investigates and adjudicates such complaints under the majority of existing statutes, centralization in that Department is the logical choice. Although specialized expertise possessed by agencies responsible for the various regulatory programs covered by whistleblower provisions may be required in exceptional circumstances to resolve these disputes, the Conference believes that centralization is preferable and that enforcement and adjudicative responsibilities should where feasible be assigned to the DOL.

The Conference study also discussed areas of regulation where gaps in whistleblower protection exist. These include the aviation and aeronautics industries, vessel construction and operation, and manufacturing and production of food, drugs, medical devices or consumer products generally. Where Congress has judged it necessary to regulate an industry so as to ensure the safety of its workplace, products, services or the environment, Congress should consider whether it is appropriate that enforcement of the regulatory scheme be strengthened by providing whistleblower protection for the industry's employees who report statutory violations.

The study also indicated that access to written decisional precedents in these cases needs to be improved. The Department of Labor's Office of Administrative Law Judges

[1] The Conference has limited its study to health and safety related disclosures because in this area a pattern of Federal statutory protections has emerged with sufficient experience to allow a study.

does not yet publish its decisions (although it has recently announced plans to do so), and a unified index for these decisions and those of other agency adjudicative bodies does not exist. Publication and indexing of existing case law should help narrow the issues for future adjudications, contribute to a sense of fairness in the adjudicatory process, and improve case management. In addition, the study found that, with certain exceptions, there is little interation between the program agency and the investigating/adjudicating agency, thus diminishing the involvement of the lead program agencies. Procedures should be established by which program agencies provide assistance to investigative agencies, and adjudicatory agencies report decisions back to the program agency.

Finally, the Conference notes that there is a growing amount of litigation in state courts concerning whistleblowers, but does not take a position on whether Federal statutes do or should preempt state law in this field. (ACUS Recommendation 84-5, Preemption of State Regulation by Federal Agencies, recommends that Congress address foreseeable preemption issues, and advises regulatory agencies to be aware of situations where a conflict might arise.)

With the increasing interest in these matters by Congress, the media and the general public, the Conference hopes that its study will provide a foundation for needed improvements.

RECOMMENDATION

I. In the interest of uniform treatment of private sector health and safety whistleblowers, Congress should enact omnibus legislation for the handling and resolution of whistleblowers' complaints. In enacting this legislation, Congress should review the categories of workers to which it is appropriate to extend whistleblower protection. As a general matter, the administration of this program should be centralized in the Department of Labor in furtherance of efficiency and harmony of results. If, however, Congress deems it necessary for a program agency to retain or receive investigative or adjudicative responsibility for whistleblower complaints. Congress should strive for uniformity in the substantive protections and procedures applicable to the separate program.[2] The omnibus and any other whistleblower legislation should include:

(A) A uniform definition of protected conduct;

(B) A uniform statute of limitations of not less than 180 days governing the filing of complaints;

(C) A uniform provision for remedies;

(D) Assignment of preliminary investigative responsibility to the Secretary of Labor [3] for all private sector health and safety whistleblowing retaliation cases;

(E) Authorization for the Secretary of Labor to employ alternative means of resolving these disputes, with the consent of the parties (see ACUS Recommendation 86-3, Agencies' Use of Alternative Means of dispute Resolution);

(F) Provision for an opportunity by any affected person to request an on-the-record APA hearing before a Department of Labor administrative law judge and for discretionary review by the Secretary of Labor, judicial review in the courts of appeals, and enforcement in the district courts;

(G) A grant of subpoena power to the Secretary of Labor for whistleblowing investigations and hearings, with provision for judicial enforcement; and

(H) A grant of rulemaking authority to the Secretary of Labor with respect to investigative and adjudicatory procedures, notice-posting requirements and mandatory coordination with other agencies.

II. Whether or not Congress enacts omnibus whisiteblowing legislation, the Secretary of Labor should:

(A) Promulgate rules of appellate procedure governing practice and procedure in connection with the Secretary's review of administrative law judge decisions in whistleblower cases;

[2] The Conference does not intend to suggest that whistleblower protection provisions now administered by the Department of Labor be reassigned. Nor is this recommendation intended to affect the existing jurisdiction of the National Labor Relations Board to investigate and adjudicate allegations of unfair labor practices.

[3] All references to the Secretary of Labor in recommendations I(D)-I(H) encompass other appropriate agency heads in instances where Congress deems it necessary for a program agency to retain responsibility.

(B) Transfer primary private sector health and safety whistleblowing investigative responsibility to a single entity within the Department of Labor, absent compelling reasons to the contrary;

(C) Develop, in consultation with the agencies responsible for the substantive regulatory programs, detailed written procedures for coordinating investigation, adjudication and follow-up in whistleblowing cases; and

(D) In accordance with the Freedom of Information Act, 5 U.S.C. 552(a)(2)(A), index and publish all ALJ and Secretarial decisions in whistleblowing cases, including those rendered prior to the date of this recommendation.

[52 FR 23631, June 24, 1987]

§ 305.87-3 Agency hiring of private attorneys (Recommendation 87-3).

In 1985 the Federal Government employed over 20,000 lawyers in various positions. At the same time it spent millions of dollars to retain private attorneys to provide diverse legal services. The Federal Deposit Insurance Corporation (FDIC) and the Federal Home Loan Bank Board/Federal Savings and Loan Insurance Corporation (FHLBB) accounted for most of these expenditures. The attorney fees paid by the FDIC and the FHLBB have increased rapidly since 1982 and have been incurred primarily in their capacities as receivers or liquidators of failed financial institutions for which they have provided deposit insurance. In those cases, the legal fees and other expenses are borne by the estate of the failed bank. However, many other Federal agencies, including government corporations, utilize the services of private attorneys—in some instances on a regular basis—and the fees are usually paid from appropriated funds.

This recommendation results from a survey of the use of private attorneys by government agencies and consideration by the Conference of the process that should be employed in deciding whether to retain outside counsel, including the ethical concerns that may arise when outside counsel are retained. The recommendation applies to any agency that hires private attorneys to represent the agency or to provide it with legal advice, i.e., where an attorney-client relationship is established. The scope of the recommendation accordingly does not extend to instances where an agency hires an individual who may be an attorney but is clearly not being hired to act in that capacity. The scope may therefore exclude some persons who are hired to do independent research, arbitrators hired to decide personnel or other disputes, or persons hired to provide mediation or similar services in connection with negotiated rulemaking.[1]

Retention of private attorneys for litigation, where lawfully authorized, is within the scope of this recommendation. Congress has generally vested the power to litigate in the Department of Justice, although several agencies have been granted independent litigating authority by statute. Unless an agency is granted such authority, the consent of the Department of Justice is required for another agency to retain outside counsel for those purposes (5 U.S.C. 3106).

While some elements of the recommendation may state principles that are relevant to obtaining the services of other professionals, the Conference has studied only the retention of private attorneys. The focus of this recommendation on attorneys recognizes the role of the lawyer in implementing and enforcing government policy and the ethical requirements that are peculiarly applicable to attorneys.

In the private sector, it is cost-effective both: to employ a full-time legal staff and to contract out some legal assignments. Many corporations have focused attention on methods to ensure that the size of the in-house staff is optimal and that work is contracted out only when necessary or for certain categories of work. Corporations have developed guidelines, criteria, and procedures to control the cost and ensure the quality of legal services.

In the public sector, concern for cost-effectiveness, a multi-faceted goal which does not look at the factor of price in isolation, is also clearly appropriate. The Conference has considered whether there should be a fixed cap on hourly fees to be paid to private attorneys hired by agencies, and has concluded that a government-wide limitation is inadvisable because it may prevent the government from obtaining high quality legal services. In many cases, the aggregate cost of legal services does not depend on hourly rates alone, and all relevant facts should be considered in determining the economic efficiency of a proposed contract for legal services. It may, however, be appropriate for individual agencies to limit hourly rates for certain types of services, if such limits are set at realistic levels. In hiring private counsel, agencies can also take into consideration the attorney's willingness to

[1] The Administrative Conference has not studied the appointment of independent counsel under the Ethics in Government Act, 28 U.S.C. 591-598, and this recommendation does not address the selection of such counsel.

negotiate fees, seeking the most competitive fees available, while securing the skills and efficiency required.

Important additional considerations bear on the decision of the Federal government to rely on outside counsel. An agency should be acutely aware of the need for control over the activities of outside counsel to ensure, among other things, that the constitutional vesting of governmental authority in "officers" of the United States is observed in fact. The need for close control may vary with the circumstances, but it must assume preeminent importance in litigation.

In procuring the services of attorneys, agencies must also scrupulously avoid favoritism, or the appearance of favoritism, which can erode public confidence in the integrity and fairness of the government. Competitive procedures, whether mandated by procurement statutes or imposed as a matter of agency policy, will reduce the prospect or appearance of favoritism and result in higher quality legal services and savings in cost. Depending on the circumstances, the requisite procedures may range from a public solicitation of formal proposals to informal telephone requests to several sources for information relating to qualifications, availability, and fees. Appropriate competitive procedures should consider both cost and the more subjective elements of professional skill and efficiency.

Attorneys performing work for the goverment must maintain the highest ethical standards. They should be particularly sensitive to questions of appearances and propriety. Neither the circumstances of their retention nor their conduct of their engagement should provide the slightest basis for loss of public confidence in the administration of justice or the integrity of the governmental process.

The hiring of outside counsel may raise important questions regarding conflicts between the interests of the government and others, which Federal criminal law (18 U.S.C. 202 *et seq.*), ethics rules applicable to Federal employees, and codes of professional responsibility seek to guard against. The principal ethical problem for outside attorneys involves simultaneous representation of the agency and, in a separate matter, a private party whose interests are adverse to the agency or the related interests of another agency. An important additional question is presented when an attorney or firm appears before an agency in a non-adversarial role on behalf of one client while simultaneously acting as attorney for the agency in a different matter.

The government, like any client of a private attorney, may consent to representation of adverse interests by its outside counsel. Any such consent, however, should be fully informed. Accordingly, to afford full protection to the government and the public, every effort must be made to identify conflicts or potential conflicts before work is contracted out, and to assure that, during the course of the representation, previously unanticipated problems are immediately disclosed so that the agency may take appropriate action.

Retainer agreements should identify the "client" with specificity and address questions related to existing or potential adverse representations. In many instances, only the agency that retains the private attorney will have an interest in the subject matter of the engagement, and in those instances that agency should ordinarily be considered the "client." This would have the effect of allowing outside counsel to appear before, or represent interests adverse to, other Executive Branch agencies in unrelated matters. Where broader interests of the government may be implicated, the agency retaining outside counsel will need to take those interests into account when drafting the retainer agreement.

To assure that all of these concerns are taken into account, any agency that anticipates a need to hire private attorneys should prepare written public guidelines concerning when and how it will seek outside counsel. As an element of agency control and to avoid later misunderstandings, appropriate written instructions should be given to attorneys when they are retained. The FDIC, FHLBB, and the Department of Justice have developed documents for these purposes, and agencies drafting guidelines and instructions should refer to them as possible models. Agencies may also find useful models in the private sector for some elements of their guidelines.

To respond to the concerns surrounding government use of outside counsel, agencies should prepare an annual public report listing basic information relating to legal service contracts awarded.

RECOMMENDATION

1. Scope of Recommendation

This recommendation applies to any agency that hires private attorneys to represent the agency or to provide it with legal advice, i.e., where an attorney-client relationship is established.

2. Use of In-House Government Attorneys

(a) Government agencies should continue to obtain most of the legal services that they need from government attorneys.

(b) When agencies cannot develop the necessary legal resources in-house, they should explore the possibility of utilizing the expertise found at other agencies of the government, on a temporary or short-term basis. The Office of Personnel Management should establish a procedure for sharing information among agencies on the kinds of legal resources available within the government.

3. Guidelines for Hiring Outside Counsel

Each agency that anticipates a need to hire private attorneys should prepare written public guidelines detailing: (a) The criteria for deciding whether or not to seek outside legal assistance, (b) the factors relevant to the choice of attorney or firm, (c) the procedures for procurement, (d) appropriate limitations on counsel's authority, (e) conflict of interest and other ethical considerations, (f) billing practices, and (g) procedures for review of fees.

4. The Decision to Hire Outside Counsel

When an agency is considering whether to hire outside counsel, the agency should first assure itself (a) that it is authorized by law to hire outside counsel for the particular matter, (b) that it can exercise sufficient control over the performance of the services to be obtained, and (c) that such employment is cost-effective. The price of the services should not, however, be the sole test of cost-effectiveness. Also of importance in assessing the benefit to be gained from the use of outside counsel are the quality of the services provided, the availability of necessary expertise within the agency, and the need for an outside independent perspective.

5. Competition

In obtaining outside counsel, the agency should employ appropriate competitive procedures to assure that the requisite quality of service is obtained at a reasonable price without the fact or appearance of favoritism. The Office of Federal Procurement Policy should review the existing provisions of the Federal Acquisition Regulation to ensure that legal services can be procured consistently with the objectives of this recommendation.

6. Control of Performance

The contracting agency should retain such control over the performance of outside counsel as is necessary to assure that the governmental and public interests at stake are fully protected. To facilitate control, the agency should at the outset provide the attorney with specific written instructions regarding the conduct of the professional representation. Control is particularly important where the outside counsel is engaged to represent an agency in litigation.

7. Public Reports

Each agency that hires outside counsel should prepare and maintain in the office of its chief legal officer an annual public report, listing for each occasion on which outside counsel has been retained: (a) The attorney or firm and the type of work involved, (b) the reasons for engaging outside counsel, (c) the competitive procedures used, if any, (d) the fee range or other basis for compensation, and (e) the actual fee paid. For cases involving small amounts, aggregate figures would be acceptable.

8. Ethical Considerations

(a) An agency should require outside counsel whom it plans to hire to disclose fully and in writing all existing or potential conflicts of interest. The disclosure should include all matters that the attorney's firm has pending before, or reasonably expects to come before, that agency. The agency should then decide whether to proceed with the hiring in light of the information provided. If the attorney-client privilege or other rules prevent outside counsel from making full disclosure to the agency, then the outside counsel should not be employed. The agency's agreements with outside counsel should specifically identify the types of professional employment that cannot be undertaken because of the attorney's service to the agency.

(b) Federal agencies and such private attorneys as they retain should be mindful of the constraints imposed by statutes, regulations, executive orders, codes of professional conduct, and any applicable guidelines that pertain to conflict of interest and other potential ethical problems. Such provisions and guidelines should be explicitly identified and incorporated in the agency's contracts with outside counsel.[2]

(c) When an attorney retained by an agency is not a special government employee within the meaning of 18 U.S.C. 202(a), at a minimum those restrictions which apply to such employees should be adopted by the contract with the attorney unless they are clearly inappropriate. Such restrictions include rules of employee responsibilities and conduct contained, for example, in 5 CFR Part 735.[3]

(d) The Department of Justice and the Office of Government Ethics should provide guidance on the applicability of 18 U.S.C. 203-208 to agency hiring of outside counsel. Subject to that guidance, agency guidelines should provide that, for purposes of disqualification based on prohibitions against simultaneous or sequential representation of opposing parties, different departments or independent agencies of the Federal government should normally be considered to be different clients.[4] The guidelines should also provide that, if more than one agency has a common interest in the matter, then the definition of "client" should include any such agency or agencies. The guidelines should also make clear that all lawyers in the firm, including all branch offices of the firm, are subject to the applicable restrictions on simultaneous or sequential representation, and that these restrictions apply not merely to litigation, but to all matters in which an attorney-client relationship has been established.[5]

(e) The guidelines should also address the varying circumstances in which an attorney may represent other clients in matters involving the agency. The guidelines should identify those situations that should be avoided.

(f) If a private attorney represents the same agency frequently, then their relationship should be considered as a continuing one. In such a situation, neither the attorney nor the attorney's firm should agree to represent another client in a matter involving the client agency without the agency's explicit consent, even if, at that time, the attorney is not representing or advising the agency on a specific matter.

9. Limitations on Hourly Rates

No government-wide limitation on hourly rates should be established for hiring of private counsel. It may be appropriate for agencies to set a fixed cap on hourly rates that they pay to private attorneys for routine legal tasks; a higher fee cap may be appropriate for unusual or complex legal work. Such limits, if adopted, should be set at realistic levels, in line with fees typically charged for similar services in the same locale, so that agencies hiring outside counsel will be able to obtain the needed degree of expertise.

(52 FR 23832, June 24, 1987)

[2] The contract should indicate whether and to what extent outside counsel may take inconsistent positions on behalf of an agency and a private client.

[3] See 5 CFR 735.301-308, which prescribe ethics and conduct rules for special government employees. See, particularly, 5 CFR 735.301, which advises agencies that appropriate ethics and conduct rules for regular employees, stated elsewhere in Part 735, may also be made applicable by regulation to special government employees.

[4] This paragraph of the recommendation refers to "clients" solely for the purpose of determining disqualification. The implicit premise of the recommendation is that the Executive Branch is a unitary entity whose interests and legal positions are determined by the President or his delegates, including the Attorney General.

[5] The Department of Justice should consider, in accordance with Recommendation 84-5, 1 CFR 305.84-5, whether to issue a regulation that explicitly preempts any state rule of attorney practice that is in conflict with its guidance.

§ 305.87-4 User fees (Recommendation 87-4).

There is widespread interest in Congress and the Executive Branch in instituting user fees in certain government programs. Although a general user fee statute (31 U.S.C. 9701) dates to 1952, recent studies, including a report of the President's Private Sector Survey on Cost Control, have urged expanded application of such fees. In light of these developments, the Administrative Conference has undertaken a study of the user fee concept in cooperation with the Office of Management and Budget and other Federal agencies.

The decision to institute a user fee for a particular service or good is a policy decision for Congress and the Executive Branch to determine, and the Conference does not address this subject. Nevertheless, when Congress or an agency establishes a user fee, that action should be based upon general principles that guide the setting and implementation of fees. The Conference, therefore, in this recommendation seeks to provide a set of such basic principles.

In this recommendation "user fee" means a price charged identifiable individuals or entities by the Federal government for a service or good which the government controls. The recommendation addresses only the institution and implementation of user fees to promote the efficient and fair allocation of government services and goods. Accordingly, the Conference does not address the imposition of charges intended primarily to enhance Federal revenues or primarily to encourage or discourage behavior unrelated to resource allocation.

RECOMMENDATION

A. Benefits

A government service for which a user fee is charged should directly benefit fee payers. A service provided by the government as a condition to the pursuit of commercial or other activity (*e.g.*, inspections) may properly be regarded as a benefit to the fee payer where it confers an advantage on the fee payer or lessens the fee payer's imposition of costs or risks on others or on society as a whole.

B. Basic Considerations for Establishing Fee Levels

1. Market and Cost Considerations

When Congress or an agency establishes a user fee for a service or good provided by an agency, the fee should rest on market factors where possible. In the absence of a reliable market price, the fee normally should cover the agency's costs, including all related processing costs and that portion of other agency costs properly allocable to the service or good provided (such as anticipated capital replacement or repair costs).

2. Other Considerations

a. When criteria other than those set forth in paragraph 1 above (*e.g.*, national policy objectives, program goals or fairness) influence the decision to establish fees, the costs to be recovered, or the granting of waivers or reductions, agencies should explain the criteria used and the rationale for their selection.

b. Where third parties or the general public benefit significantly from a governmental service, user fees need not be set to recover fully the cost of providing that service. Agencies should consider the practicability to allocating costs between fee payers and others when determining the proportion of service costs to be recovered by user fees (as opposed to alternative financing mechanisms).

c. The fee level may be set without regard to the distribution of benefits among the customers, employees and owners of the fee payers. However, selection of the point of collection should take into account the costs of administration.

C. Disposition of Fee Receipts

The Conference takes no position on whether fee receipts should be deposited in the Treasury general fund or earmarked to a specific fund. In either event, agencies administering programs that collect fees should be provided with funds sufficient to provide adequate service. In enacting a user fee, Congress should specifically address the issue of how the proceeds are to be used.

D. Implementation of Principles

Congress in revising or enacting user fee legislation, and the Office of Management and Budget in providing implementation guidance and other information on user fees to agencies, should incorporate the principles set

out in this recommendation. Agencies should review thier user fee statutes and existing programs to determine whether changes are necessary to implement these principles.

[52 FR 23634, June 24, 1987]

§ 305.87-5 Arbitration in Federal programs (Recommendation 87-5).

The Administrative Conference has recommended that agencies employ alternative means of dispute resolution (ADR) in Federal programs.[1] ADR techniques for rulemaking include structured negotiation and mediation; for adjudication, they also include arbitration, factfinding and minitrials.[2] The bulk of these techniques do not alter the placement of policymaking authority within the agencies, and therefore pose few of the legal and policy concerns of binding arbitration, which typically involves the use of outside arbitrators authorized to make decisions binding upon the government. If an arbitrator decides a claim by or against the government, public money will be involved. Arbitration decisions concerning other issues in administering a federal program, such as the resolution of enforcement cases or disputes between the agency and its employees, affect administration of the program. In programs where the agency's role is to resolve disputes between private parties, arbitrated disputes will relate to the purposes of the program, for example by resolving disputes related to program administration. In addition, the Constitution requires that significant duties pursuant to public law must be performed by Officers of the United States and their employees. These concerns can be met if Congress, in authorizing the use of arbitration, or the agency, when adopting arbitration, confines it to appropriate issues and provides for the agency's supervision of arbitration.

Existing law authorizes resort to arbitration in a variety of different contexts, including claims by and against the government, disputes between private individuals that are related to program administration, and labor relations issues between the government and its employees. Recommendation 86-3 calls on Congress to act to authorize agency officials to choose arbitration to resolve many additional disputes.

This recommendation contains procedural advice for Congress, and occasionally agencies, in an effort to ensure the fairness and acceptability of arbitration in federal programs. The criteria are necessarily general, and the appropriateness of particular arbitral procedures must be judged in the context of the particular functions they serve. Agencies are generally in the best position to assess the need for informal and expeditious process, and to weigh that need against considerations of accuracy, satisfaction, and fairness. While the Conference encourages granting agency officials broad "on-the-spot" discretion to use arbitration, it recognizes the need for preliminary steps to meet concerns that the process provide some executive oversight, preserve judicial functions and ensure quality decisions, and maintain legality and fairness. This recommendation sets forth procedural criteria to aid Congress and agencies in taking these first steps.

Recommendation

1. In all cases, congressional authorization for voluntary binding arbitration, whether performed by government employees or private arbitrators, should ensure that Congress has made, or the agency will make, an explicit judgment that arbitration is appropriate for the case or class of cases in question. Criteria for determining whether arbitration is appropriate include the following:

(a) Cases subject to arbitration should involve questions of fact or the application of well-established norms, even if statutory, rather than precedential issues or application of fundamental legal norms that are evolving.

(b) In determining whether to employ arbitration, Congress or the agency should consider the nature and weight of the private interests involved, the nature and weight of the government's interests, and the tradeoffs between the costs and benefits of arbitration and those of more formal processes. A heavy adjudicative caseload and the particularization of decisions in accord with previously declared guidelines justify the use of private arbitrators or other non-government persons.

2. Congress should assess the desirability of mandatory arbitration in light of the extent to which a person's

[1] *See generally* Recommendation 86-3, *Agencies' Use of Alternative Means of Dispute Resolution*, 1 CFR 305.86-3.

[2] *See* Recommendation 82-2, *Resolving Disputes Under Federal Grant Programs*, 1 CFR 305.82-2; Recommendations 82-4 and 85-5, *procedures for Negotiating Proposed Regulations*, 1 CFR 305.82-4 and 85-5; and Recommendation 84-4, *Negotiated Cleanup of Hazardous Waste Sites Under CERCLA*, 1 CFR § 305.84-4.

participation in the affiliated program is voluntary.[3] For example, participation in an entitlement program is more likely to reflect need than consent, and should not be regarded as consent to arbitration of eligibility.

3. Congressional authorization for arbitration should ensure that:

(a) The agency has an opportunity to choose whether to resort to arbitration,[4] and to review the overall composition of any arbitral pool to ensure its neutrality and, where appropriate, specialized competence. Agencies should either employ arbitral pools and procedures that are well-established, such as those of the AAA, or should develop rosters or pools to meet their special needs;[5]

(b) Parties to an arbitrable controversy, including an agency, have a role in the selection of the arbitrator, consistent with preserving the neutrality of the decider, for example by striking names from a list; and

(c) Arbitral awards are review by agencies or by courts under the criteria of the U.S. Arbitration Act, which authorizes review of the facial validity of the award and the intergrity of the process. Agencies can be authorized ordinarily to review individual awards with no specific provision for judicial review.[6] If so, no special provision need be made for judical review of individual awards. Judicial review of the overall structure and fairness of the arbitration program should suffice. In the rare case in which a serious constitutional issue attends an individual arbitration, such as an allegation of a taking, existing law provides avenues for relief.

4. Agencies should ensure that the standard for arbitral decisions is reasonably specific, by promulgating administrative standards where statutes do not sufficiently guide arbitral decision. A substantial justice standard for arbitral awards should be used only when explicitly approved by the agency, because of the resulting difficulties of administrative or judicial review of the outcome. The sufficiency of other standards should be judged by whether the parties can consent meaningfully to arbitration and can prepare their cases, whether the arbitrators can produce reasonably consistent decisions, and whether reviewing entities can judge the facial validity of awards.

5. The following considerations should govern the ongoing administration of arbitral programs:

(a) Agencies should be careful to preserve the objectivity of arbitration by avoiding instructions or forms of oversight that would threaten to undermine the arbitrator's neutrality in a particular case. Plainly, however, generally applicable indicators of pertinent government policy, such as interpretive regulations, are meant to be controlling, whether proceedings be in the form of arbitration or agency adjudication.

(b) Authority to determine the arbitrability of particular disputes can be placed in the courts, as under the U.S. Arbitration Act, or in another neutral third party, such as the administering agency where arbitration concerns private parties, or in an agency other than one which is a party to arbitration.

(c) Interpretive rulemaking can alter the standards for future arbitration when monitoring of awards reveals outcomes inconsistent with the agency's expectations in employing arbitration.

[52 FR 23635, June 24, 1987]

§ 305.87-6 State-Level Determinations in Social Security disability cases.

In Fiscal Year 1986, nearly two and one half million individuals applied for disability benefits under two federal programs administered by the Social Security Administration: Retirement, Survivors, Disability and Health Insurance (RSDHI), and Supplemental Security Income (SSI). Payments made annually to their seven million beneficiaries totalled twenty-nine billion dollars during that period. Certain aspects of this enormous benefit program have recently

[3] See Recommendation 86-3, ¶17-9, *Agencies' Use of Alternative Means of Dispute Resolution*, for other limitations on the use of mandatory arbitration.

[4] See *Id.*

[5] See Recommendation 86-8, ¶1(c), *Acquiring the Services of Neutrals for Alternative Means of Dispute Resolution*.

[6] See Recommendation 86-3, ¶4, *Agencies' Use of Alternative Means of Dispute Resolution*.

been subject to close scrutiny to determine whether greater efficiency is possible.

In order to be eligible for either program, a claimant must meet medical and other criteria. The RSDHI program operates as an insurance plan. A worker qualifies by earning a sufficient amount of wages for a required period of time. By contrast, the SSI program is a welfare program whose non-medical criteria are met by a demonstration of need.

If a claimant meets the criteria for either plan, he or she must then meet the medical criteria for disability in order to establish eligibility for benefits. The basic statutory test is identical for both RSDHI and SSI:

"Inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. 42 U.S.C. §§ 423(d)(1)(A); 1382c(a)(3)(A). [See also 43 U.S.C. § 423(d)(2)(A) which liberalizes the work requirement somewhat.]"

Claimants begin the application process by filing an application at a Social Security Administration office. If a claimant meets the non-medical criteria, the file is then forwarded to a federally-funded and SSA-regulated state Disability Determination Service (DDS) for a determination as to disability. A two-person team consisting of a "disability examiner" and medical consultant (a physician employed by DDS) reviews the medical evidence and reaches its decision. The claimant is not present at any time during the process.

A claimant who is dissatisfied with the initial determination (about 60% are denials) has 60 days in which to seek a reconsideration. Reconsiderations are also performed at the state DDS level, and are essentially a repeat of the initial determination process, but with different personnel acting as decisionmakers. The record may be supplemented at this time, but as with the initial determination process, the claimant does not appear. In FY 1986, about 40% of denied claimants (totalling 380,000) sought reconsideration and about 17% of those received favorable re-determinations.

Further review is available at the ALJ and Appeals Council stages. See Recommendation 87-7 for a description of these later review stages.

Several areas pertaining to the disability determination, hearing and review process have been subject to criticism. First, the current system, with its four tiers of successive review, often results in the replacement of one decisionmaker's determination with that of the next, but without necessarily improving the quality of any of the actual decisions. Second, because there is little cost to filing an administrative appeal (and everything to gain in doing so), there is correspondingly little incentive for a claimant to accept any unfavorable determination as final. Accordingly, there is a wide stream of cases all the way to the end of the process. Moreover, claimants whose cases are decided without a personal appearance before the decisionmaker (as is the case in three of the four review stages) frequently feel dissatisfied with the process, that they have not received their "day in court."

In addition, courts, members of Congress, and the system's clients have all indicated that their confidence in the system has deteriorated to the point that its integrity has suffered. The public's faith in the institution is essential to its success in the long run.

In efforts to improve the administration of the state-level determination process, the stage at which the caseload stream is the widest, Congress and SSA have engaged in some modifications of the system as well as some experimental procedures. By 1983, a large increase in appeals from terminations of benefits in continuing disability review (CDR) cases had begun to flood the system. In such cases SSA performs reviews on existing beneficiaries to determine whether the disability still exists. If the determination is negative, a notice of termination is sent, triggering the above-described review process. Congress reacted to this by passing Pub. L. 97-455, which gave the option to claimants of an "evidentiary hearing" at the reconsideration stage in all CDR cases. Although a moratorium in CDR cases slowed the institution of this procedure, it is now in place and specially trained hearing officers are conducting these relatively formal proceedings.

In 1984 (Pub. L. 98-460), Congress mandated demonstration projects in selected DDS offices to try a one-step proceeding, allowing a personal interview but eliminating the reconsideration step. In five states, the interview was to be used in initial determinations, and in five other states it was to be used in place of the evidentiary hearing in CDR cases. These demonstration projects are currently underway, and results are limited. Although preliminary, the experience with evidentiary hearings and the demonstration projects with personal interviews give rise to the following conclusions:

—Face-to-face procedures are more satisfactory to claimants than are paper reviews, resulting in claimants feeling that they received a fair hearing;

—Face-to-face procedures are helpful to decisionmakers, in many instances providing them with evidence not ascertainable from the paper file.

If the final results of the demonstration projects are consistent with these initial findings, it is probable that by implement-

ing some kind of a face-to-face proceeding at the state level, awards of benefits that ultimately would be made later in the system will be made at the outset. This will have the effect of decreasing the caseload at later levels, both for ALJs and the Appeals Council, and for federal courts. Overall costs to the system would thereby be reduced as well.

At the request of the Social Security Administration, the Administrative Conference has undertaken a preliminary review of the disability determination process at the state level. The Conference makes the following Recommendations, based on that study.

RECOMMENDATION

The Conference supports Congressional and Social Security Administration (SSA) efforts to improve the procedure by which initial and reconsidered disability determinations are made by state Disability Determination Service (DDS) offices. Although existing experience with use of evidentiary hearings at reconsideration is sparse, and experiments using a single-step determination (after a personal interview, but without reconsideration) are at an early stage, some preliminary suggestions can be made to SSA:

1. Experiments and demonstration projects concerning use of face-to-face procedures at the initial determination stage should be continued and encouraged. SSA should conduct thorough and careful evaluations of both the evidentiary hearing procedure now used in continuing disability review (CDR) cases and the personal interviews now being tried in selected state demonstration projects and should make prompt reports to Congress.

2. Full implementation of evidentiary hearings (for other than CDR cases) or personal interviews (either at the initial or reconsideration stage) should await the final report on the current experiments by the Department of Health and Human Services (HHS).

3. HHS's reports concerning the use of face-to-face procedures should include consideration of the cost of full implementation of evidentiary hearings or personal interviews at the initial or reconsideration stage. Should cost considerations militate against full implementation of such hearings or interviews, SSA should consider the feasibility and fairness of permitting some kind of a hearing or interview on a discretionary basis subject to appropriate published guidelines where either the claimant's file, type of medical condition or the opinion of the examiner indicates that such a procedure would be of significant assistance to the ultimate determination.

4. In analyzing the results of the procedures and the ongoing experiments at the DDS level, SSA should develop accurate measures of efficiency and associated record-keeping requirements. Specifically, such measures of processing time should take into account post-interview time expended waiting for third party responses to requests for additional case development. Any measures of efficiency adopted by SSA should not serve to discourage the use of comprehensive interviews.

5. In analyzing the procedures and ongoing experiments (and in any future analyses), SSA should review the reasonableness of variations between DDS offices in their award rates and other aspects of case handling, in light of state-by-state variables that can affect the disability determination process.

6. SSA should proceed with caution before taking the position that face-to-face hearings or interviews at the DDS level would be an adequate substitute for the opportunity for an adjudicatory hearing before a SSA administrative law judge (ALJ). Rather, such modifications to the DDS process should be seen as a possible way of reducing the number of appeals to the later stages of the process.

7. Close scrutiny should be given to any legislative or other proposals to completely eliminate the reconsideration stage, taking into account the impact of that step on overall processing costs, and on the caseload at the ALJ stage. Any such proposals to convert the two DDS stages into a single stage should consider the need to allow some type of a face-to-face proceeding at that stage, as provided for in the demonstration projects.

8. Before instituting evidentiary hearings (for other than CDR cases) or personal interviews in all DDS offices, SSA should consider (a) decen-

tralization of DDS offices into decisional units to minimize travel costs and (b) the need to select and train a sufficient number of personnel qualified to conduct such hearings or interviews.

9. The record in disability appeals should not be closed until completion of the ALJ stage—that point in the process at which claimants now are more likely to be represented by attorneys or other advocates.

10. SSA should conduct a study of: (a) The reference sources of claimants (e.g., referrals from state welfare agencies, private insurance carriers, etc.) to determine whether such referrals are a source of excessive numbers of claims that are later determined to be unmeritorious, (b) the nature of "dropouts," claimants who fail to pursue their appeal rights, to determine why this occurs, and (c) the number of claimants who reapply in lieu of appealing, and the reasons therefor.

[52 FR 49142, Dec. 30, 1987]

§ 305.87-7 A New role for the Social Security Appeals Council.

The Social Security disability system is described generally in Recommendation 87-6 which focuses on the initial determination process at the state-level Disability Determination Service (DDS) offices. This Recommendation addresses the later stages of review by the Social Security Administration (SSA).[1]

The first stage of review by federal decisionmakers is the third step in the process for disability claimants. Claimants disappointed after state-level initial and reconsideration determinations may then demand a hearing before an administrative law judge (ALJ) employed by the Social Security Administration. About 65% of such claimants do so. This is the first time in the process (except in certain demonstration projects or cases involving the termination of benefits) that a claimant has a face-to-face encounter with the decisionmaker. The hearings are de novo, and generally follow Administrative Procedure Act guidelines. Approximately 50% of appeals taken to an ALJ hearing result in the award of benefits.

The fourth, and final, level of administrative review is to the Social Security Appeals Council. This twenty member body, created by regulation, and chaired by the Associate Commissioner for Hearings and Appeals, disposes of a staggering 50,000 cases annually. (About 40% of claimants who lose at the ALJ stage appeal.) In addition to appeals from ALJ decisions, the Appeals Council reviews, on its "own motion," selected cases where there has been a grant of benefits. The Appeals Council relies on analysts in its companion unit, the Office of Appeals Operations (OAO), to screen cases and make recommendations concerning disposition of the cases. Council members hold the same salary grade level as SSA ALJs. They perform purely a paper review on cases that are forwarded to them by OAO and assigned to them individually based on the geographical origin of the case. The Appeals Council acts on each appeal, although in most cases the request for review is summarily denied or dismissed. Because of the demands on each member (up to 500 cases per member per month), a typical case is likely to receive less than 15 minutes of paper review by the member. The Council almost never sits in panels or conducts oral arguments. In recent years, approximately 5% of the cases reviewed result in reversals (i.e., awards of benefits), and another 7 to 15% are remanded to the ALJ.

After exhaustion of state and federal administrative remedies, a claimant may seek judicial review in the federal district court. In the years 1981 to 1986 the number of new SSA disability cases filed in the courts ranged from 9,000 to 26,000 per year.

In past years, the Appeals Council has to some extent played a policy-relevant role. Yet, as its caseload increased, it was by necessity limited to a narrow case correction function. Accordingly, its members had little time to devote to policy matters. Recently, the Appeals Council has come under attack from many fronts, including Congress, claimants and their representatives, and academicians, who have questioned both the Appeals Council's usefulness as an additional step in the adjudicative chain and the resulting delays caused to claimants who wish to proceed to court.

Critics have complained that the rate of reversals is so low that it fails to compensate for the additional delay caused to claimants who wish to seek judicial review. The Conference's study noted that because its members are so driven by the "tyranny of the caseload," it has failed to take advantage of its unique position as the final administrative review body—one that sees a diverse number of disability cases, and accordingly, can detect emerging problems, and

[1] The Conference has previously addressed elements of the Social Security appeals process (focusing primarily on the ALJ hearing stage) in Recommendation 78-2, Procedures for Determining Social Security Disability Claims, 1 CFR 305.78-2.

identify new issues to be resolved and policies to be developed. Thus, any capabilities it should have in promoting consistency of lower-level decisionmaking, and policy integrity throughout the system, are thwarted, and it is left with little more than a case-handling role.

The Social Security Administration requested the Administrative Conference to study and analyze the operation of the Appeals Council.

Serious consideration was given to recommending outright abolition of the Appeals Council. This view was premised on the Appeals Council's present inability to do little more than add one more layer to the already-lengthy review bureaucracy. (This criticism was not intended as a denigration of Appeals Council members, whom the study found to be competent, dedicated, and cooperative.) Before recommending such a drastic, and irreversible step, however, the Conference felt that an attempt should be made to use the unique perspective and expertise of the Appeals Council to help correct the existing problem. The Conference believes that fundamental changes are needed to reduce the Council's caseload to a more manageable volume, so that individual cases can be given more attention and the Council can be a significant contributor to agency policymaking. Accordingly, to implement a system-reform function for the Appeals Council, the Conference makes the following Recommendations for modification of its structure, purpose and operations.

While the recommendation anticipates a reduced volume of cases for the Appeals Council, the Conference believes that improved fact-finding will result from the changes in initial determinations (*see* Recommendation 87-6), and that this will compensate for diminished factual review at the Appeals Council stage.

Recommendation

1. The Social Security Administration (SSA) should, as soon as feasible, restructure the Appeals Council in a fashion that redirects the institution's goals and operation from an exclusive focus on processing the stream of individual cases and toward an emphasis on improved organizational effectiveness. To that end, the Appeals Council should be provided the authority to reduce significantly its caseload and also be given, as its principal mandate, the responsibility to recommend and, where appropriate, develop and implement adjudicatory principles and decisional standards for the disability determination process. In particular, SSA should adopt the following structural reforms to improve the Appeals Council's ability to perform its new function.

a. *Focus on System Improvements.* SSA should make clear that the primary function of the Appeals Council is to focus on adjudicatory principles and decisional standards concerning disability law and procedures and transmit advice thereon to SSA policymakers and guidance to lower-level decisionmakers. Thus the Appeals Council should advise and assist SSA policymakers and decisionmakers by:

(1) Conducting independent studies of the agency's cases and procedures, and providing appropriate advice and recommendations to SSA policymakers; and

(2) Providing appropriate guidance to agency adjudicators (primarily ALJs, but conceivably DDS hearing officers in some cases) by: (a) Issuing, after coordination with other SSA policymakers, interpretive "minutes" on questions of adjudicatory principles and procedures, and (b) articulating the proper handling of specific issues in case review opinions to be given precedential significance. The minutes and opinions should be consistent with the Commissioner's Social Security Rulings. Such guidance papers should be distributed throughout the system, made publicly available, and indexed.

b. *Control of its Caseload.* On order to fulfill its responsibility to develop, and to encourage utilization of, sound decisional principles and practices throughout SSA, the Appeals Council must be empowered to exercise its review sparingly, so that it may concentrate its attention on types of cases identified in advance by the Appeals Council. These types of cases might include a small sample of random cases or categories identified by the Secretary of Health and Human Services from time to time. To that end, the Secretary should direct the Appeals Council to design a new review process, subject to the Secretary's approval, that would continue to be part of the available administrative remedy for a claimant dissatisfied with an administrative law judge's (ALJ's) initial decision, but that would enable the Appeals Council to deny a petition for

review if the issues it sought to raise are deemed inappropriate for the Appeals Council's attention. If a petition for review is denied, the ALJ's decision should be deemed to be final agency action.

c. *Improved Review of Individual Cases.* The Appeals Council, given a reduced caseload, should upgrade its handling of individual cases. In particular the Council should:

(1) Work more collaboratively, including as appropriate, considering cases en banc or in panels;

(2) Encourage claimant's representatives to submit briefs (including *amicus* briefs) on selected issues and evaluate the benefits of encouraging oral arguments in appropriate cases (utilizing existing authority to reimburse participants as necessary);

(3) Write more elaborate opinions, providing better reasoning and legal analysis and relying less on boilerplate and verbatim recitation of records;

(4) Avoid substitution of judgment on ALJ factual determinations; [2]

(5) Significantly reduce the time needed to initiate or deny review of cases and issue a final decision in most cases within 90 days of accepting review, unless an extension or delay request by a claimant is granted for good cause; and

(6) Specify that once the period for accepting review has passed, ALJ decisions should be deemed to be final agency action, and should be subject to reopening by the Appeals Council only in accordance with existing standards.

d. *Enhancement of Status of Appeals Council.* SSA should improve the status of the Appeals Council and insure high caliber appointment by:

(1) Reducing the size of the Council so that the Council can meet and act more collegially;

(2) Upgrading the salary level of members so that it is one level above SSA ALJs;

(3) Providing the members, by regulation, with the same civil service protections as accorded to career service personnel and by providing ALJs who agree to serve on the Council with assurances that they will receive reappointment to their former position upon completion of service; and

(4) Establishing merit selection criteria for appointment to the Appeals Council, giving preference to prior experience as an ALJ.

e. *Enhancement of Support Systems.* SSA should improve the support system provided to its Appeals Council by reorganizing the Office of Appeals Operations, providing law clerks to assist members, and updating production and communication systems.

f. *Enhance the Appeals Council's Visibility.* The Appeals Council should enhance its visibility both inside and outside the agency by reinstating the "visiting ALJ" program,[3] instituting exchange programs with other SSA components, seeking publication of precedent by a recognized reporter service, and encouraging other outreach and bar-related activities.

2. If the reconstituted Appeals Council does not result in improved policy development or case-handling performance within a certain number of years (to be determined by Congress and SSA), serious consideration should be given to abolishing it.

152 FR 49143, Dec. 30, 1987)

§ 305.87-8 National coverage determinations under the Medicare Program.

In 1986, the Administrative Conference undertook a broad overview of the administrative procedures employed by the federal government (primarily the Health Care Financing Administration within the Department of Health and Human Services) in administering and deciding appeals under the Medicare program. Recommendation 86-5, *Medicare Appeals*, 1 CFR 305.86-5, urged the Health Care Financing Administration (HCFA) to improve its system for publishing, updating, and making accessible the standards, guidelines and procedures used in making coverage and payment determina-

[2] In conjunction with this reliance on the record below, the Appeals Council should not permit new evidence to be introduced without good cause, although motions to remand to the hearing stage should be permitted. See Recommendation 78-2, 1 (c)(1); 1 CFR 305.78-2(c)(1).

[3] The visiting ALJ program allowed for one-month temporary duty by an ALJ on the Appeals Council. SSA should consider longer intra-agency details in the future.

tions in the Medicare program. The recommendation also suggested some improvements in the administrative appeals system and listed some fruitful areas for further research.

This recommendation builds on Recommendation 86-5 by focusing on a major aspect of the Medicare program: the making of policy concerning what aspects of medical care are covered by, and therefore reimbursable by, the Medicare program. Implementation determinations must be made every day on a case-by-case basis by Medicare contractors (peer review organizations, carriers and fiscal intermediaries such as Blue Cross). In most of these cases the coverage question involves a determination of whether an item or service was medically necessary for the individual or was furnished in the appropriate setting. Typically, the Medicare contractor has considerable discretion in ruling on individual claims although that discretion is bounded by policy pronouncements made in various ways by HCFA. If an individual claim for reimbursement is denied by the Medicare contractor, the claimant (whether a beneficiary or provider of care) may appeal the denial of claims over $500 to an administrative law judge and then further appeal to a federal district court for claims over $1,000. Recent legislative restrictions, however, have further limited claimant's opportunities to challenge coverage determinations in court or before an ALJ, and it is difficult for equipment manufacturers to participate in or challenge national coverage determinations even though their financial stakes can be significant.

HCFA makes coverage policy in a number of ways.[1] In some cases Medicare contractors refer questions about new medical procedures or technologies to the HCFA regional or national office which makes an informal judgment for application in that case. In other cases HCFA makes "national coverage determinations" which apply in all future similar cases. Since the beginning of the program HCFA (and its predecessor agency) have made about 200 such national determinations on medical procedures and technologies, and the number made each year is growing. However, in its recent FEDERAL REGISTER notice, HCFA stated that a "national coverage determination" included any coverage policy published in any HCFA manual. Such rulings are published either in the FEDERAL REGISTER or the *Medicare Coverage Issues Manual*, although many other coverage policies are published in other manuals that are less widely available, and are not designated as national coverage determinations.

Although the making of these national coverage determinations constitutes rulemaking, HCFA does not use a notice-and-comment procedure in most cases. HCFA's Bureau of Eligibility, Reimbursement and Coverage normally simply makes rulings on coverage determinations referred from contractors unless it determines that a medical question is presented. In such cases the question is referred to the in-house HCFA Physicians Panel which meets in private to decide on these referrals. The Physicians Panel may recommend a further referral to the Public Health Service's Office of Health Technology Assessment (OHTA). Most referrals to OHTA are in the form of informal inquiries, without public notice, after which OHTA simply conducts in-house investigations and reports back to HCFA. Requests for full OHTA assessments, on the other hand, usually result in a FEDERAL REGISTER notice, and widespread consultation with affected groups. In either event OHTA makes a recommendation to HCFA which then makes and publishes the determination. Only then are the OHTA findings disclosed.

Except in these "formal OHTA assessments," beneficiaries, providers and manufacturers have no opportunity to participate in this policymaking process. Nor are the criteria used by HCFA and the Medicare contractors in making this policy identified or published. Moreover, once the policy is announced, opportunities to challenge it have been severely circumscribed by the 1986 Omnibus Budget Reconciliation Act. (Pub. L. 99-509, 9341; 42 U.S.C.A. 1395ff(b)(3) (1987)). The Act provides that administrative law judges may not review national coverage determinations in administrative appeals. It also limits judicial review by providing that national coverage determinations may not be held unlawful on the grounds of violation of the AP or lack of opportunity for public comment, and further provides that reviewing courts cannot overturn a denial based on coverage determinations without first remanding to HHS for supplementation of the record.

In Recommendation 86-5, the Conference recommended that HHS "introduce more openness and regularity" into these important determinations through "(1) [development of published decisional criteria; (2) providing for notice and inviting comments in such cases, both in HCFA's decisionmaking process and in the process by which [OHTA] supplies recommendations to HCFA; and (3) providing for internal administrative review or reconsideration of such decisions." The Conference commends the recent HCFA notice and request for

[1] HCFA's procedures for making national coverage policy had not been published until April 29, 1987, when under court order, the agency issued a notice in the FEDERAL REGISTER describing its process (though not its criteria) and sought comments.

comments on its procedures as a good first step, but urges that further steps be taken to open up the decisional criteria and procedure to public participation and also urges Congress to consider modifying the statutory limitations on the review of the reasonableness and the procedural fairness of such national coverage determinations.

RECOMMENDATION

1. Publication of Procedures and Criteria Through Rulemaking

The Health Care Financing Administration (HCFA) should continue its recent steps toward describing and seeking comments upon the procedures it uses for making national coverage determinations in the Medicare program. HCFA should follow its recent informational notice with a notice-and-comment rulemaking proceeding setting forth the procedures as well as all decisional criteria for making national coverage determinations.

2. Elements of the National Coverage Determination Process

HCFA's proposed and final rule on national coverage determinations procedures and criteria should:

(a) Specify the procedure by which HCFA selects coverage questions that will be considered in this process;

(b) Identify and describe what categories of coverage issues will be left to the decision of Medicare contractors and HCFA regional offices; and address the extent to which, and the manner in which, significant coverage determinations made by contractors and regional offices can be identified and disseminated more widely;

(c) Provide for the opportunity for public comment prior to promulgation (or if that is infeasible, an opportunity for comment after adoption)[3] of *all* national coverage policies whether or not the determination is referred to the HCFA Physicians Panel or to the Office of Health Technology Assessment;

(d) Establish internal management controls to facilitate the timely processing of requests from Medicare contractors and petitions filed by beneficiaries, providers and other affected persons for initiation of a national coverage determination;[3]

(e) Develop techniques to encourage the HCFA Physicians Panel, the Office of Health Technology Assessment, and the Public Health Service to respond expeditiously to referrals; and

(f) Identify all publications in which coverage policy will be published, and the method by which those publications will be made reasonably accessible to beneficiaries and other affected groups.

3. Use of Negotiated Rulemaking

In addition to providing for a national coverage decisionmaking process that accords beneficiaries, providers, equipment manufacturers and other interested parties an opportunity to have input into the formulation of specific national coverage determinations; HCFA should in appropriate cases also consider use of elements of a negotiated rulemaking procedures.[4]

4. Modification of Recent Legislative Restrictions on Administrative and Judicial Review

Congress should reconsider and, at minimum clarify its intent,[5] with regard to the recent restrictions it placed upon adminstrative and judicial review of national coverage determinations. In so doing, Congress should:

(a) Consider whether to clarify the restriction against administrative law judge review of national coverage de-

[3] The agency should then re-evaluate the policy after receiving comments. See ACUS Recommendation 76-5, *Interpretive Rules of General Applicability and Statements of General Policy*, 1 CFR 305.76-5.

[3] See ACUS Recommendation 86-6, *Petitions for Rulemaking*, Para. 2(d), 1 CFR 305.86-6(2)(d).

[4] See ACUS Recommendations 82-4 and 85-5, *Procedures of Negotiating Proposed Regulations*, 1 CFR 305.82-4, 85-5.

[5] In particular, Congress should, for the purposes of these restrictions, clarify its definition of "national coverage determination" and explain whether or not policies other than those concerning medical procedures and technologies and published in the FEDERAL REGISTER or *Medicare Coverage Issues Manual* are included

terminations [42 U.S.C.A. 1395ff(b)(3)(A)] by (i) making clear that administrative law judges may review the application of such determinations to claimants and (ii) Specifying that this limitation only applies to those national coverage determinations that are properly published and indexed, and that have been issued after an adequate opportunity for public comment.

(b) Consider repealing 42 U.S.C.A. 1395ff(b)(3)(B), which restricts judicial review of procedures used in promulgating national coverage determinations.

(c) Eliminate the provision [42 U.S.C.A. 1395ff(b)(3)(C)] that limits reviewing courts' ability to review the validity of a national coverage determination applied in a particular case without first remanding the case to the agency for supplementation of the record.

[52 FR 49144, Dec. 30, 1987]

§ 305.87-9 Dispute Procedures in Federal Debt Collection

The Debt Collection Act of 1982 (DCA)[1] was passed in response to concern over the vast amount of delinquent debt owed to the federal government and the haphazard collection record of many agencies. While Congress appears to have been concerned mainly with various mass loan and loan guarantee programs, most conspicuously the student loan programs, the effects of the Act extend well beyond such programs. The Act included about a dozen provisions designed to facilitate collection, in many instances by removing obstacles created by other federal statues and case law. It also contained provisions authorizing the use of collection agencies,[2] charging of interest and penalty fees, reporting of delinquent debtors to credit bureaus, and use of IRS information to locate debtors.

While the purpose of the DCA was to enhance collection efforts, Congress was also concerned about the due process rights of debtors against whom the government was to take action. In adopting provisions for collection by offset against salaries and other money owed by the federal government, Congress provided for pre-offset opportunities for debtors to contest the relevant debts. Agencies implementing the offset authority under the DCA have used advantageously the latitude afforded under the DCA to develop a range of procedures. The Act provides two basic forms of debt collection by offset—"salary" offset and "administrative" offset—with differing procedures for each. A proceeding with an independent decisionmaker and adversary factfinding has been required in most salary offsets, and by a few agencies elsewhere. A range of less formal models, in which collection offices simply reconsider their decisions based on debtor-supplied data and other available information, has been employed in administrative offsets, i.e., those not involving the salaries of government employees.

The framework for offset dispute resolution established by the DCA, Federal Claims Collection Standards (issued jointly by the General Accounting Office and Department of Justice), and the Office of Personnel Management's Pay Administration Standards make possible reasonably adequate evaluation of disputes without seriously impeding collection of general government debts. No major changes are needed. However, the procedural requirements of the DCA and the OPM Standards are overly burdensome when applied to routine pay adjustments. Moreover, some advice to agencies on implementing their dispute processes, reducing uncertainty over the relationship of the DCA to other statutes (e.g., the Contract Disputes Act) affecting government claims, and some other issues raised by the DCA's attempt to integrate due process with effective debt collection, may be useful as agencies make greater use of their authority to collect debts.

Recommendation

1. Agency Procedures Under the Debt Collection Act

a. In connection with salary offsets, the General Accounting Office and Department of Justice should amend the Federal Claims Collection Standards[3] and the Office of Personnel Management should amend the Pay Administration Standards[4] so as to reduce the formality of procedures for handling routine adjustments of pay and travel allowances. Informal forms of review, including review on a "class" basis where a single error has a broad effect, should suffice in most cases involving computer errors, simple mis-

[1] 4 U.S. Code 552a (b) and (m), 5514; 18 U.S.C. 2415(i); 31 U.S.C. 3701, 3711(f), 3716-3719; Pub. L. No. 97-365.

[2] The Act was later amended to authorize, on an experimental basis, contracting with private attorneys to bring collection actions.

[3] 4 CFR Parts 101-105

[4] 5 CFR 550.1101-.1106

calculations, and similar kinds of mistakes or adjustments.

b. In connection with administrative offset, informal types of intra-agency review procedures appear consistent with the purposes of the DCA, and can provide a satisfactory balance between protecting debtors and assuring effective collection.[8] However, agencies should ensure, where possible, that the reviewer does not participate in the initial claims determination, particularly where a dispute involves substantive issues that go beyond allegations of mechanical or other simple kinds of error.

c. Procedures with an independent decisionmaker and adversarial fact-finding may occasionally be desirable in administrative offset cases where a debtor raises relatively complex legal or factual issues or where assessments of credibility are required. However, these procedures may be needlessly burdensome for agencies even in some procedurally complex situations, such as where other proceedings with respect to the claim may be occurring and preservation of the government's flexibility is necessary. Taking into account these factors, agencies should consider whether to make use of such procedures even though apparently not required to do so by the DCA.

d. Agencies should take steps to enhance the awareness of, and access to, offset dispute procedures by debtors with limited ability to present a case in writing or otherwise cope with offset procedures. These steps may appropriately be confined to measures that are inexpensive and do not significantly interfere with efficient collection activity. Examples might include follow-up telephone calls to debtors with vague or inadequate written submissions, review of agency records to see if they support debtor allegations, and use of telephone hearings. In connection with salary offset disputes, these steps should be taken by independent hearing officials (or persons associated with them) as well as by collection staff. Experience should be monitored to see if measures to enhance accessibility of the dispute process in fact result in more debtors asserting meritorious defenses.

e. Some techniques that have been employed and should be considered to keep offset procedures expeditious and efficient are:

(i) Adoption of objective criteria to assist in making decisions respecting hardship and other potentially nebulous matters; and

(ii) Avoiding the need for oral hearings on issues of credibility by treating debtors' factual allegations as proven where

(a) Circumstances do not give rise to significant doubts as to reliability and

(b) Either the amount in dispute is small or the issue of credibility is not critical to the disputed facts.

2. Clarifying the Act's Relation to Offsets in Government Contracts

a. Congress should clarify the applicability of the DCA provision on administrative offset (31 U.S.C. 3716) to make clear that government acquisition contracts are not covered, but that the government retains the right of offset to collect debts in such cases. At the same time, Congress should ensure that, under relevant agency procedures, before a contracting officer's decision can serve as the basis for offset under any other authority,

(i) The contractor receives notice of the proposed government claims and the basis for them and an informal opportunity to present its position, and

(ii) The decision is informally reviewed by an agency official not directly connected with administering the contract.

b. The withholding of funds in connection with a single contract, where final payment has not occurred, should continue to be governed by existing law.

(52 FR 49146, Dec. 30, 1987)

[8] This recommendation should not be read as detracting from the procedures for resolving disputes relating to federal grants that were recommended by the Conference in Recommendation 82-2. 1 CFR 305.82-2. Where administrative offset issues are addressed at the same time as post-award grant disputes, the proceedings should include a notice, an impartial decisionmaker, an opportunity to present significant evidence and argument, and a written decision, as called for in Recommendation 82-2.

§ 305.87-10 Regulation by the Occupational Safety and Health Administration.

This is the second of two recommendations adopted by the Administrative Conference this year on Occupational Safety and Health Administration (OSHA) regulation. In its first recommendation,[1] the Conference recommended that OSHA make specific changes in its management of rulemaking and its process for establishing regulatory priorities. At that time, the Conference accepted OSHA's request that it continue to study possible broader changes to its regulatory process, including alternatives to the traditional hazard-by-hazard[2] regulation.

Having completed this study, the Conference recommends more extensive procedural changes to assist OSHA in fulfilling its statutory mandate of assuring adequate safeguards for American workers. OSHA has promulgated a small number of safety and health standards each year using the traditional hazard-by-hazard approach.[3] But the task before the agency is overwhelming existing processes. OSHA is responsible for regulating dangerous chemicals included in the tens of thousands of chemicals in the nation's workplaces, to which approximately one thousand new chemicals are added each year. OSHA also is charged with enforcing safety standards in American workplaces.

The Conference, therefore, recommends that OSHA undertake rulemaking to develop generic or class standards, including updating the 1971 national consensus standards, where appropriate. In addition, the Conference recommends a regulatory planning process and use of other procedures to supplement its traditional rulemaking process. It is important to add, however, that the Conference has found no alternative regulatory approach that is always appropriate or better than the traditional regulation. Rather, this recommendation identifies factors or conditions that favor the use of the various alternative regulatory approaches.

One uncertainty clouding OSHA's use of generic or class rulemaking is whether OSHA can obtain the information it needs to meet the burden of proof required by the Occupational Safety and Health Act ("Act") for safety and health standards. As interpreted by the courts, OSHA is required to show that a hazard poses a "significant risk" to workers and, if so, to set the standard at a level that assures "to the extent feasible" that no employee will suffer "material impairment of health or functional capacity." If OSHA is unable to obtain the information needed for its risk and feasibility determinations, the use of generic rulemaking, as well as other internal reforms, is not likely to lead to a more efficient regulatory process.

Experience with generic or class rulemaking may show that statutory changes are required to enable OSHA to adopt this procedure. The Conference, therefore, recommends amendments of the Occupational Safety and Health Act that Congress should consider if OSHA's administrative efforts to promulgate generic standards are not successful. One recommendation is that Congress provide an expedited procedure for updating the 1971 Table Z national consensus standards. The Conference also recommends that Congress reconsider the Act's regulatory standard in light of its judicial construction and agency experience. Specifically, Congress should consider giving OSHA greater flexibility in fashioning remedies to correspond to the level of workplace risks. Congress, for example, could allow OSHA to regulate some hazards to a level of "best available technology," as the Environmental Protection Agency is allowed to do under various statutes. The Conference also recommends that the Act's rigid statutory deadlines and detailed restrictions on advisory committees be removed. A final recommendation is that Congress replace the Act's "substantial evidence" judicial review standard with a standard that reflects the nature of rulemaking decisions.

Recommendation

1. *Updating the 1971 Consensus Standards.* The Occupational Safety and Health Administration, as an interim step, should continue to update the Table Z national consensus standards adopted in 1971 if updating can be accomplished by an expedited rulemaking procedure (*e.g.*, including more concise preambles) appropriate to the nature of the revised Table. OSHA should update the 1971 standards on a generic basis (*i.e.*, include multiple standards in one proceeding) when consensus recommendations are available, which are generally accepted by employers and workers in the affected

[1] ACUS Recommendation 87-1, Priority Setting and Management of Rulemaking by the Occupational Safety and Health Administration, 52 FR 23629 (1987).

[2] As used in this recommendation, the term "hazard" without further modification refers to both safety hazards and health hazards (*e.g.*, exposure to toxic substances).

[3] During its first sixteen years, OSHA promulgated eighteen new health standards (setting permissible exposure limitations for twenty-three substances) and twenty-six safety standards.

industries, and when the new standards can be evaluated on the basis of risk and feasibility information reasonably available to the agency. This interim step should not interfere with OSHA's continuing responsibility to promulgate and modify safety and health standards.

2. *Rulemaking to Develop Generic or Class Standards.* OSHA should expand its use of generic or class standards regulating multiple health and safety hazards where appropriate and consistent with its legal mandate.

a. *Industry-wide standards.* OSHA should consider the following criteria when deciding if industry-wide generic standards will be more efficient and effective than hazard-by-hazard regulation: (1) Whether hazards are in an industry that can be discretely defined, (2) whether most of the hazards to be regulated are unique to the industry to be regulated, (3) whether the hazards in the industry are relatively static over time, and (4) whether industry-wide rulemaking will impose lower aggregate compliance costs on the regulated industry than rulemaking on a hazard-by-hazard basis.

b. *Multi-hazard standards.* OSHA should consider adopting multi-hazard standards whenever scientific knowledge and policy judgment make it possible to use the same or a similar risk assessment for a group of included hazards and the feasibility analysis can be simplified or expedited because standard abatement techniques are available.

c. *Generic work-practice standards.* OSHA should consider adopting work-practice standards (*e.g.*, training, worker protective devices, and engineering controls) applicable to multiple industries when the following factors are present: (1) A similar hazard exists in the industries that can be regulated by one rule, (2) the same or a similar work-practice requirement would be effective in all such industries, and (3) generic risk and feasibility findings are appropriate.

3. *Regulatory Alternatives and Procedures.* In addition to generic or class rulemaking, OSHA should adopt the following rulemaking alternatives and procedures as appropriate:

a. *Performance standards.* OSHA should generally use performance standards (*i.e.*, standards that prescribe the regulatory result to be achieved) whenever they will provide equivalent protection as that provided by design standards (*i.e.*, standards that prescribe a specific technology or precise procedure for compliance). In deciding which type of standard to employ, OSHA also should consider whether the standard can be readily understood and monitored and whether it may lower industry compliance costs.

b. *Information disclosure.* OSHA should continue to approve information disclosure requirements as a complement to regualtory standards.

c. *Negotiated rulemaking.* OSHA should continue to experiment with negotiated rulemaking procedures;[4] in so doing it should develop methods (such as specific deadlines for termination of any negotiation) to assure that the negotiated rulemaking procedure is discontinued in a timely manner if it is not working.

d. *Advisory committees.* OSHA should reactivate rulemaking advisory committees for difficult scientific and technological questions. The scientific orientation in such committees should be assured by including a high proportion of independent and government scientists on committees. In addition, questions assigned to such committees should be limited so that current statutory deadlines can be met. (*See also* section 5.c. below.) OSHA also should require its advisory committees to submit written reports which include the committee's evaluation of relevant data.

e. *Advance notice of proposed rulemaking.* OSHA should not routinely use advance notices of proposed rulemaking as an information-gathering technique; it should use an advance notice when information that is not available through other vehicles is

[4] The Conference has previously provided guidance to agencies on the use of negotiated rulemaking, *see* ACUS Recommendations 82-4 and 85-5, Procedures for Negotiating Proposed Regulations, 1 CFR 305.82-4, 85-5 (1987).

likely to be forthcoming in response to such notice.

f. *Interagency coordination.* OSHA should continue to cooperate with other health and safety agencies and OMB to coordinate where possible the testing, evaluation, and regulation of potential health hazards.[6]

4. *Developing a Regulatory Plan.* OSHA should periodically develop and review regulatory plans which specify how the agency intends to regulate hazards on its priority lists, including identification of potential candidates for generic rulemaking, negotiated rulemaking, use of advisory committees and other regulatory approaches or techniques. To avoid duplication, OSHA should coordinate its regulatory plans with any submission required by the Office of Management and Budget.

a. *Regulatory planning committee.* OSHA should assign the initial responsibility for developing regulatory plans to an internal regulatory planning committee that includes representatives from all appropriate department and agency offices.

b. *Public availability.* OSHA should make a synopsis of the results of regulatory planning committee meetings available to the public after the Assistant Secretary has had an opportunity to review any proposed committee recommendations. In addition, OSHA should periodically provide an opportunity for public comment on its regulatory plan.

5. *Statutory Change.* OSHA should include in its periodic reports to Congress the status of its implementation of the administrative changes recommended in paragraphs 1 through 4 above. If statutory impediments or judicial decisions inhibit efficient and effective regulation, Congress should consider amendments of the Occupational Safety and Health Act, including the following:

a. *Consensus standards update.* Congress should amend the Act to provide an expedited procedure for the generic updating of the permissible exposure levels in Table Z, incorporated into OSHA standards at 29 CFR 1910.1000. This procedure, while not including all the steps specified in 29 U.S.C. 655(b) as construed by the courts, should afford an opportunity for public comment.

b. *Regulatory standard.* Congress should amend the Act to give OSHA greater flexibility in regulating workplace hazards. Following its experience in enviroonmental regulation,[8] Congress should consider establishing a classification scheme that would vary OSHA's burden of justification for safety and health standards to correspond to the degree of risk posed by a hazard and the level of control to be required by the OSHA standard.

c. *Rulemaking deadlines.* Congress should amend the Act to replace the existing statutory deadlines for various stages of rulemaking with a provision requiring OSHA to set timetables or deadlines for each rulemaking proceeding.[7]

d. *Advisory committees.* Congress should amend 29 U.S.C. 656(b) to replace the detailed restrictions on standard-setting advisory committee membership with a general provision authorizing use of advisory committees subject only to the Federal Advisory Committee Act, 5 U.S.C. App.

e. *Judicial review standard.* Congress should amend the standard of judicial review for OSHA safety and health standards, 29 U.S.C. 655(f), so that agency policy judgments are subject to the traditional standard of "arbitrariness" and the factual premises on which they are based are subject to

[6] The need for interagency coordination of federal regulation of cancer-causing chemicals is addressed in Part II of ACUS Recommendation 82-5, 1 CFR 305.82-5 (1987).

[8] Under the Federal Water Pollution Control Act, 33 U.S.C. 1251-1376 (1982), and the Clean Air Act, 42 U.S.C. 7401-7642 (1982), Congress has authorized different classes of regulation, specified an initial designation, established a lower burden of proof for regulation that is less strict, and has indicated that the agency is to receive deference for its final choice of which class of regulation to apply. A similar approach is used for Food and Drug Administration regulation under the Medical Devices Amendments to the Food, Drug, and Cosmetic Act, 21 U.S.C. 360c-360k (1982).

[7] *See* ACUS Recommendation 78-3, Time Limits on Agency Actions, 1 CFR 305.78-3 (1987).

a standard of "substantial support in the administrative record viewed as a whole."[8]

[52 FR 49147, Dec. 30, 1987]

§ 305.87-11 Alternatives for Resolving Government Contract Disputes.

Government procurement is a major component of federal spending. It now comprises an important part of the nation's economy. The recent expansion of government contracting has been matched, perhaps exceeded, by the rise in disputes between agencies and contractors. Increasingly, management problems are handed over to lawyers and accountants to be resolved contentiously by criteria that are often only marginally relevant. Causal factors include increased regulatory requirements; reduced authority of agency contracting officers; a greater willingness among contractors to resort to litigation; an expanding government contracts bar; broadened notions of due process; enhanced congressional oversight that can discourage settlement; and the establishment (or expansion) of offices of inspector general and intra-agency audit offices.

Most knowledgeable government officials, contractors and attorneys agree that government contract appeals have become too onerous, too expensive and too time-consuming. Despite Congress' goals in enacting the Contract Disputes Act of 1978 ("CDA") to provide an expeditious alternative to court litigation and to encourage negotiated settlements, most appeals are not now resolved either promptly or inexpensively. Agency boards of contract appeals ("BCAs"), originally intended to be alternatives to courts, have become "judicialized," with depositions, discovery and lengthy opinions common.

The system established by the CDA[9] begins with the contracting officer ("CO"), an agency official whose function is to enter into and administer government contracts. Any claim arising out of a contract is to be presented to the CO. The CO has a dual role: to represent the government as a party to the contract, and also to make initial decisions on claims subject to certain procedural safeguards. If the dispute is not amicably resolved, the CDA requires the CO to issue a brief written decision stating his or her reasons. A contractor dissatisfied with a CO's decision may appeal either to an agency BCA or directly to the United States Claims Court. The proceedings become considerably more formal at this stage. While agency boards and their rules are hardly uniform, they typically involve written notice of appeal and complaint, discovery, depositions, subpoenas, hearings that result in transcripts, and board decisions signed by three-member panels. "Accelerated" procedures are available for claims under $50,000, and a more streamlined "expedited" process for claims under $10,000.

A variety of remedies have been prescribed for the growing cost, delay, and other problems encountered in federal disputes. They range from marginal revisions of the boards (e.g., enlargement of BCA resources), to increased professionalization of COs, to structural changes in the ways agencies do business. While a number of these proposals have merit, the Conference is focusing herein only on the cluster of methods that have come to be known as alternative means of dispute resolution ("ADR")[10] These methods are consistent with the CDA's goals, and have proven efficient and fair. They serve to involve decisionmakers, rather than their representatives, in the conflict resolution process. ADR methods have regularly aided private parties to resolve disputes similar to those decided by BCAs.

Several ADR methods are particularly appropriate to resolving many government contract claims, and a few agencies have begun to experiment successful with them. The Conference urges all major contracting agencies, and persons who deal with them, to explore seriously the potential uses for ADR and to begin creating an atmosphere in which these methods can be readily employed.[11] This recommendation offers advice

[8] The recommended standard follows ACUS Recommendation 74-4, 1 CFR 305.74-4, ¶¶ 3, 4 (1987). It is also consistent with the Restatement of the Scope of Review Doctrine adopted by the Administrative Law Section of the American Bar Association.

[9] 41 U.S.C. 601-613; 5 U.S.C. 5108 (c)(3); 28 U.S.C. 1346(a) (2), 149(a) (2), 2401(a), 2414, 2510, 2517; 31 U.S.C. 1304(a)(3)(C) (1982); enacted November 1, 1978 by Pub. L. No. 95-563, 92 Stat. 2383

[10] These include arbitration, factfinding, minitrial, mediation, facilitation, convening, conciliation, and negotiation.

[11] The Conference has repeatedly recommended that agencies employ ADR. Recommendation 88-3 calls on agencies to make greater use of mediation, negotiation, minitrials, and other "ADR" methods to reduce the delay and contentiousness accompanying many agency decisions. *Agencies' Use of Alternative Means of Dispute Resolution*, 1 CFR 305.86-3. The Conference has previously called for using mediation, negotiations, informal conferences and similar innovations to decide certain kinds of disputes

Continued

on the application of commonly used ADR methods to post-award contract disputes before agency boards of contract appeals.

RECOMMENDATION

1. Agencies' ADR Policies and Practices

a. Congress should amend the Contract Disputes Act (1) to make indisputably clear that the contractor and the government may agree to use arbitration[4] or any other mutually agreeable ADR procedures for resolving claims relating to agency contracts and (2) to encourage COs to make all reasonable efforts to resolve a claim or dispute consensually, either prior to issuance of a CO decision or subsequently.

b. The President should promulgate an Executive Order that encourages voluntary use of ADR procedures to resolve contract disputes at the CO and BCA levels.

c. The Office of Federal Procurement Policy should issue a policy statement, and the Civilian Agency Acquisition Council and the Defense Acquisition Regulatory Council should amend the Federal Acquisition Regulation,[5] to encourage COs, before issuing a decision likely to be unacceptable to a claimant, to recommend to the parties and their representatives that they seek to explore the use of ADR to resolve their differences. The policy statement and FAR should also encourage agencies to adopt policies or rules concerning ADR, as set forth below.

d. Agencies should adopt policies encouraging voluntary use of ADR in contract disputes. The policies should place the responsibility for implementing ADR with contracting officers, government counsel, and BCA judges. These policies should make clear that superior agency officials will support reasonable settlements reached by means of properly selected ADR methods. The policy should also provide for systematic review of all cases for susceptibility to ADR, specify who has authority to approve the selection of case for ADR, and set forth guidance on documenting the negotiation processes or justifying settlements. Agencies should also consider, as a matter of general policy, offering certain forms of ADR to contractors in specified kinds of disputes (e.g., those involving less than a stated maximum amount).

e. Agencies should adopt regulations that (1) authorize agency officers to make use of ADR in contract disputes; (2) make provisions for automatically alerting the parties, both at the CO level and as soon as an appeal is filed, that one or more ADR methods is available; (3) authorize BCA judges to encourage ADR use and to require the attendance, at any conference held for the purpose of proposing or implementing ADR, of at least one representative of each party who has authority to negotiate concerning the resolution of all issues in controversy; (4) briefly describe the alternative procedures; (5) authorize the parties to agree to vary any procedural rule in their case; and (6) insure confidentiality of communications made during use of ADR methods.

f. Agency boards of contract appeals should:

(1) Routinely include in docketing notices an announcement indicating the availability of ADR, describing the available methods, and telling how interested persons can follow up to explore potential ADR use in their cases.

(2) Amend their procedural rules to provide explicitly for conferences to consider the possible use of ADR in each case to help dispose of any or all issues in dispute.

g. Presiding and chief judges at BCAs should regularly review their dockets and suggest use of a settlement judge, mediation, minitrial, or other ADR methods whenever appropriate.

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more effectively. E.g., *Procedures for Negotiating Proposed Regulations*, 1 CFR 305.82-4, 85-5; *Negotiated Cleanup of Hazardous Waste Sites Under CERCLA*, 1 CFR 305.84-4; *Resolving Disputes under Federal Grant Programs*, 1 CFR 305.82-2.

[4] Such arbitration authority should be consistent with the procedures and safeguards set forth in Conference Recommendations 88-3, *id.*, and 87-5, *Assuring the Fairness and Acceptability of Arbitration in Federal Programs*, 1 CFR 305.87-5.

[5] 48 CFR Part 7

2. Employing Alternatives in Contract Disputes

a. Finding Neutrals *

(1) To facilitate the parties' choice of appropriate neutrals, the Administrative Conference, in consultation with the Federal Mediation and Conciliation Service and other knowledgeable groups, should establish a central roster of minitrial advisors and other neutrals available to help resolve government contract disputes. Use of the list, however, should not be mandatory. The list should include, at a minimum:

(a) All persons who have experience as neutral advisors in government contracts minitrials;

(b) Any BCA judges and administrative law judges who wish to serve as neutral advisors for disputes within their own agency, another agency, or both. (Some safeguards to ensure interagency reciprocity and to assure no other involvement with the dispute may be necessary); and

(c) Any retired federal or state court judges, BCA judges, and administrative law judges who are interested.

(2) Each BCA should take steps to make available its judges to serve as settlement judges, minitrial advisors, or other neutrals to help resolve disputes before other agencies' BCAs.

b. Minitrials

(1) Agencies should develop and distribute minitrial guidelines that include sections dealing with criteria for identifying appropriate cases; contents of minitrial agreements; rules as to any discovery; roles of the participants, including any neutral; authority of the principals; exchange of position papers, audit reports, quantum submissions, and other documents and exhibits; procedure and format of the hearing; possible time limit on the negotiations; fees and expenses; and procedures for ensuring the confidentiality of the proceedings. The guidelines, which should be used only as procedural suggestions, should also give each party the right to terminate the minitrial procedure at any time for any reason. Any guidelines acceptable to the parties, together with other provisions relevant to the resolution of the dispute, should be incorporated.

(2) In selecting principals to represent the agency in a minitrial, agencies should ensure that principals in the minitrial agreement:

(a) Are of sufficient rank in the agency to negotiate, and successfully defend, a binding settlement.

(b) Have authority to bind their organizations in the dispute at hand, or at least to make recommendations that will be accorded substantial weight.

(c) Ideally have little prior involvement with the case so as to be able to evaluate objectively the issues and the agency's potential liability.

(d) Have enough background to grasp the main issues quickly.

(e) Not be at such a high level that his or her involvement will detract in a major way from the agency's operations.

Agencies should meet the concerns by, among other things, tailoring the rank of the principal to suit the magnitude of the case and by encouraging ADR use earlier in the case (e.g., the CO level).

(3) Agencies should take steps to make participation as a principal an attractive career step and encourage or provide training in negotiation and mediation skills among groups of potential principals.

(4) Principals should generally have access to technical, legal, accounting, or other advice from agency staff during the hearings and negotiations so as to produce a more well-informed, defensible resolution, enhance accountability, and build intra-organizational support for any settlement. Unless secrecy in especially important, it will ordinarily be unwise to sequester most minitrial witnesses, particularly experts, since a looser format may encourage dialogs or exchanges that can help focus issues and sometimes promote agreement.

* In Recommendation 86-8 *Acquiring the Services of "Neutrals" for Alternative Means of Dispute Resolution*, 1 CFR § 305.86-8, the Conference addressed issues involving neutrals' availability, qualifications and acquisition. The present Recommendation seeks to elaborate on 86-8 in the specific context of contract appeals.

(5) Once the principals have had a chance to assess the strengths and weaknesses of both sides' positions, their negotiations should take place promptly and should be final and binding. The responsible principals ordinarily should have authority to resolve all issues before them without seeking further agency approval following the close of negotiations.

(6) While the "neutral advisor" who helps the principals at a minitrial assess the merits of a case can be quite useful, the parties should consider foregoing such aid in cases where the principals already have a good working relationship, where issues are simple or amounts small, or, conversely, where complex technical issues predominate to such an extent that it would be futile to waste time trying to educate a neutral. Neutrals probably will also be less needed where the minitrial occurs early on—for instance, at the CO level—when positions may be less rigid, formal procedures not yet invoked, and fewer parts of the agency involved. In those cases, the CO might well serve as a sort of presider-principal.

(7) A neutral advisor's role should be defined by the parties (at least tentatively) prior to the hearing by the principals. Any shift during the proceeding should be only with the concurrence of the principals.

(8) Where minitrial neutral advisors are used, the parties should consider whether to seek their assistance in any of the following ways:

(a) Presiding over the hearing;

(b) Serving as a source of information, responding to technical legal questions, or offering insights and observations on issues in controversy;

(c) Posing questions at the hearing so as to ensure that the basic facts are ascertained;

(d) Suggesting novel approaches to presenting relevant information;

(e) Working actively during the principals' negotiation sessions to aid settlement, as by advising each side on the strengths and weaknesses of its case, relevant legal principles, and how the law might apply to the facts established;

(f) Serving as a mediator;

(g) Suggesting that certain advisors or staff members be brought into the negotiations or briefed; or

(h) Providing a written, nonbinding opinion to the principals, or helping them prepare a justification for the settlement agreed on.

c. Mediation

Agency boards of contract appeals should establish mediation programs in which parties can be required to attend an initial session with a mediator. The boards should require parties to be represented at the session by a person with authority to negotiate concerning the resolution of all issues in controversy. The boards may wish to exclude from these programs certain kinds of cases. Counsel should be required, where appropriate, to provide specified documents to the mediator, and to prepare short position papers.

d. Settlement Judges

(1) Agency boards of contract appeals should institute a procedure under which a settlement judge—not the presiding judge in the case—may be appointed to preside over settlement conferences or negotiations, assess settlement potential, and work with the parties to explore possible settlement of a dispute. The settlement judge device should be capable of being invoked at the discretion of the chief judge on his or her own motion or that of any participant or the presiding judge. An order appointing a settlement judge should specify whether, and to what extent, the proceeding is suspended during the settlement negotiations and may define the scope of any negotiations to specified issues. The order may also expressly limit the period for settlement negotiations and require a brief report from the settlement judge. Each party should have the right to refuse to use the process, or to withdraw at any time.

(2) The settlement judge should be deemed to have the power to suggest privately what concessions a party should consider, to confer privately as to the reasonableness of each party's case or settlement position, and to re-

quire that representatives with authority to negotiate concerning resolution of all issues in controversy be present at the settlement conference. The settlement judge shall be prohibited from discussing the merits of a case with any other BCA judge or other person, and shall not be called as a witness in the case.

3. Documentation and Oversight

a. Agencies should offer guidance to their personnel on the degree of documentation that is appropriate to justify settlements that have been reached via ADR; the guidance should emphasize the needs for flexibility without undermining accountability. For instance, the guidance could require the principal representing the agency in negotiations or his advisor to set down cost and other factors taken into consideration, the principal elements of the negotiation, likelihood of success at trial, and other significant facts or considerations justifying any significant differences between prenegotiation objectives and negotiated result; in short, a reflection of the thought process or rationale of officials who agreed to the settlement. This documentation should not exceed what would ordinarily be used to justify negotiated settlements of contract disputes, and should generally be written after the fact so that ongoing negotiations are not jeopardized or delayed. A neutral advisor who has helped the parties resolve a potentially serious case may be asked to help draw up the justification memo, or offer a brief advisory decision.

b. Since the effectiveness of expanded reliance on ADR will depend in part on the degree of support or opposition from congressional committees and offices of inspector general, agencies should seek to document, and furnish periodically to relevant committees and oversight offices information on, the relative costs and benefits of ADR methods in cases where they have been used. Documentation should include case results, estimated savings, identities of principals and advisors, and nature of processes used.

4. Training and Outreach

a. Agencies should give priority attention to offering training in negotiation and other ADR skills to BCA judges, government attorneys, COs, and others involved in contract appeals. Training courses or seminars should be developed by agencies jointly or in cooperation with the Administrative Conference, Federal Mediation and Conciliation Service, Board of Contract Appeals Judges Association, American Bar Association, or other professional organizations. Agencies should also work with other interested groups to sponsor similar programs or outreach sessions for contractors and their representatives, and seek to incorporate materials on ADR into the training curricula for COs and project managers.

b. Agencies should designate an employee to serve as an ADR specialist in connection with contract disputes, and should consider retaining the services of a trained mediator or similar professional to review cases for susceptibility to ADR, advise BCA judges, and mediate selected cases.

[52 FR 49148, Dec. 30, 1987]

§ 305.87-12 Adjudication practices and procedures of the Federal Bank Regulatory Agencies.

The five federal agencies that regulate the activities of depository institutions[1] have broad statutory enforcement authority, including the power to issue cease-and-desist orders, impose civil money penalties, or order the suspension and removal of officers. Such enforcement actions ordinarily allow the target of the proposed sanction to request a formal APA hearing before an administrative law judge.

[1] The term "depository institutions" refers to commercial banks, savings banks and savings and loan associations, and credit unions. The five agencies are the Office of the Comptroller of the Currency (in the Department of the Treasury), the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Federal Home Loan Bank Board (including the Federal Savings and Loan Insurance Corporation), and the National Credit Union Administration. In the aggregate they will be referred to as the "bank regulatory agencies."

In recent years, enforcement actions taken by the bank regulatory agencies have increased markedly, although the preponderance of these actions are taken without a formal hearing—based on consent agreements or waivers of formal hearing. The current level of formal hearings has, however, reached the point where attention should be paid to the procedures and practices of the bank regulatory agencies in this regard.

Three basic concerns have emerged from an evaluation of the formal hearing procedures of the bank regulatory agencies, which may be summarized as the need for: (1) Consistency and greater uniformity in the agencies' implementation of shared statutory reponsibilities, (2) greater accessibility of agency decisions and the basis for decisions, and (3) more efficient use of administrative law judges.

Although the Conference study did not specifically address the need for change in the division of regulatory responsibilities among the five agencies, it did conclude that the interpretation of identical or similar regulatory authorities does not appear to be inconsistent. By contrast, the formal hearing procedures of the agencies vary significantly, both in their specific provisions and in their level of detail. Moreover, all of the regulations are lacking in detail on rules concerning prehearing practice, discovery and evidence. Given the similar statutory bases for these enforcement actions, the five agencies jointly should be able to develop substantially similar rules of procedure and practice for formal enforcement proceedings.

There is currently limited publication or public dissemination of the bank regulatory agencies' enforcement decisions. This hinders counsel in advising and representing clients and makes it difficult for administrative law judges (who currently are all on loan from other agencies) to apply the complicated statutes and regulations that are involved. This situation would be remedied by improved availability or publication of appropriately redacted agency decisions. Such publication would heighten public awareness of enforcement actions which now are described only in aggregate data published in annual reports. This may be especially beneficial because the agencies have not regularly supplemented or clarified their enforcement policies through interpretive rules or policy statements.

None of the five agencies employs administrative law judges (ALJs) to hear enforcement cases. Rather, they rely exclusively on the interagency ALJ loan program administered by the Office of Personnel Management (OPM) to furnish them with needed ALJs. OPM has attempted to accommodate agency concerns by providing lengthier loan periods and repeat loans. Nevertheless, the system seems to produce needless discontinuity and inefficiency. To improve this situation, the bank regulatory agencies should, in consultation with OPM, consider the advisability of an arrangement by which a pool of administrative law judges could handle all bank regulatory agencies' formal adjudications—subject to an agency's decision to have its own ALJs, should the caseload warrant. If so, ways should be explored to effect such an arrangement. For example, one or more full-time judges could be hired by one of the agencies, which would then serve as the lending agency for the others.

Finally, the Conference urges the agencies to explore whether a pre-complaint procedure (modeled on that used by the Securities and Exchange Commission) would be appropriate in their individual circumstances and should be established. This would enable targets of enforcement investigations to file a submission to the agency head or other agency official charged with the responsibility to initiate formal enforcement proceedings, before such an action is initiated.

Recommendation

The bank regulatory agencies should take the following actions to improve their formal adjudicatory processes, with respect to regulatory enforcement actions:

1. *Uniform Rules of Procedures.* The agencies should develop, so far as feasible, a uniform set of rules of practice and procedure for formal adjudications, including more explicit provisions covering prehearing practice and discovery rules[8] and the receipt of evidence.[9]

2. *Availability of Decisions.* The agencies should make available through regular publication, or other accessible means of dissemination, the appropriately redacted decisions and accompanying opinions issued in formal enforcement adjudications.

3. *Policy Articulation.* The agencies should supplement and periodically clarify enforcement policies set forth in adjudicative opinions by regularly articulating their enforcement policies

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[8] See ACUS Recommendation 70-4, Discovery in Agency Adjudication, 1 CFR 305.70-4.

[9] See ACUS Recommendation 86-2, Use of the Federal Rules of Evidence in Agency Adjudications, 1 CFR 305.86-2.

through rules of general applicability (including interpretive rules) and policy statements.

4. *Administrative Law Judges.* The agencies, in consultation with the Office of Personnel Management, should consider the advisability of an arrangement by which a pool of administrative law judges could handle all bank regulatory agencies' enforcement adjudications required to be conducted according to the Administrative Procedure Act, and, if so, should explore ways to develop such an arrangement.

5. *Precomplaint Notice.* The agencies should explore, in their circumstances, the utility of establishing a formal or informal procedure to allow targets of investigations an opportunity to file a submission with the appropriate agency official before official action is taken to initiate an enforcement proceeding.

[52 FR 49151, Dec. 30, 1987]

§ 305.88-1 Presidential Transition Workers' Code of Ethical Conduct (Recommendation No. 88-1).

The orderly and peaceful transfer of governmental authority following presidential elections is a hallmark of American government. The Presidential Transition Act of 1963 recognizes that a smooth transition is necessary to "assure continuity in the faithful execution of the laws and in the conduct of the affairs of the Federal Government, both domestic and foreign," and it directs all officers of the government to take steps to promote the orderly transition of power between the outgoing and incoming administrations.[1]

Since 1933, when Inauguration Day was moved forward from March 4 to January 20, the length of presidential transitions has been moved between 71 and 79 days. However, the size and complexity of the transition task has grown steadily over time, corresponding to the tremendous growth in federal responsibilities. Each new President-elect has required a larger and more sophisticated transition organization than his predecessor.

The President-elect's transition organization must, in this brief period, prepare to provide the new leadership with comprehensive information on the organization and responsibilities of each federal agency; on the resources within each agency, including the budget, legislative initiatives, personnel and grants or contracts; and on the policy questions that will require decision by the new administration. This information is the basis for the President-elect's personnel, budgetary and policy decisions during the critical initial period of the new administration.

A large number of private citizens must be relied upon to accomplish these important tasks. During the 1980-81 presidential transition, over six hundred persons, most serving as volunteers, had active assignments on agency transition teams. Many of these persons were selected because of their substantive knowledge of the agency's mission, acquired either through past service in the government or in private sector jobs that brought them in contact with the agency. The magnitude and importance of the transition tasks, and the limited time available to complete them, suggest that future Presidents-elect will continue to rely upon large numbers of private citizens, some of whom later will be offered government appointments but many of whom will return to their private sector jobs.

The Administrative Conference wishes to encourage the participation of well qualified individuals in presidential transitions, but it recognizes that the presence of large numbers of private transition workers dealing with federal agencies offers the potential for conflicts of interest or abuse of the public trust that accompanies their special access to government information and facilities. The Conference is not acting upon knowledge of serious problems in this regard in recent transitions, but rather upon the need to prevent such problems from occurring in the future.

In this recommendation the Conference urges the President to issue an executive order to the heads of all federal agencies (including independent regulatory agencies), conditioning special access to federal agency records and facilities by members of the President-elect's transition team upon their agreement in writing to the standards of conduct set forth in the Appendix to this recommendation. The recommended executive order would cover the activities only of "special transition team members," i.e., transition workers, who are not existing government employees, who serve with or without compensation, and who are authorized by the President-elect's transition organization to seek or obtain access to nonpublic government information. The Conference believes that private citizens are not, and should not be considered, special government employees and thereby subject to federal conflict-of-interest laws, solely because of their activities as special transition team members.

Two concerns are addressed by this recommendation. First, federal agency officials

[1] 78 Stat. 153, section 2; 3 U.S.C. 102 note.

need to know who actually represents the President-elect before granting special access to information. Second, the public needs assurance that authorized transition workers will not use such information to further their own financial interests or the interests of their present or future employers or other private persons.

The Conference believes that the recommended executive order and transition standards of conduct will alleviate these concerns without reducing the flexibility of the President-elect's transition effort. By urging the President to direct federal agencies affirmatively to cooperate with authorized transition personnel to the extent permitted by law and consistent with their official duties, the recommendation should facilitate the President-elect's transition efforts.

The Conference's recommendation includes requirements contained in pending legislation to amend the Presidential Transition Act of 1963 for minimal disclosure of personal or financial information by transition team workers.[8] The Conference believes that transition team members should supply this limited information to agencies, whether or not the pending legislation is enacted. The Conference also recommends that special transition team members agree not to use non-public government information, or to take any action as transition team members which could further their own financial interests.

Recommendation

1. The Conference recommends that the President issue an executive order that conditions access by special transition team members to government facilities or non-public information upon their agreement in writing to the standards of conduct set forth in the Appendix to this recommendation. The term "special transition team member" is used herein to mean a person who is not a government employee, who serves with or without compensation as a member of a transition team, and who is authorized by the President-elect to seek or obtain access to non-public government information or facilities.

2. The executive order should direct the heads of all federal agencies to require the President-elect's transition organization to provide each agency with a list of the special transition team members for that agency, copies of their written agreements to comply with the standards of conduct and copies of information disclosure statements, as a condition of access by such members. The agencies should be required to maintain and make those documents available to the public upon request.

3. The executive order should direct all agency heads, subject to the above conditions, to cooperate with persons named by the President-elect or his designees as special transition team members to the extent permitted by law and consistent with the performance of official duties.

4. The executive order should direct all agency heads to take appropriate action against any person found to have violated the standards of conduct agreement, including, where authorized and in accordance with applicable procedures, barring the person from employment, receipt of contracts, representation of others before the agency, or referral of the matter to appropriate professional disciplinary bodies.

Appendix—Transition Code of Ethical Conduct

Each person who is not an employee or special government employee of the federal government and who assists in the presidential transition, with or without compensation, and who is designated by the President-elect to seek or obtain access to non-public government information or facilities during the transition period (herein referred to as a "special transition team member"), shall agree to comply with the following standards of conduct as a condition of such access.

I. Disclosure of Information

A special transition team member shall supply the agency with a statement as to his or her present employment and the sources of funding which support his or her transition activities.

[8] H.R. 3932, passed by the House of Representatives on March 31, 1986, and S. 2037, passed by the Senate on April 26, 1986, would require disclosure of the names of transition team workers, their most recent employment and the source of funding of their transition activities as a condition of receipt of public funds for transition activities.

2. Misuse of Inside Information

A special transition team member shall not use, permit others to use, or disclose nonpublic information except for the public purposes of the transition.

3. Financial Self-Dealing

During the transition period, a special transition team member shall not knowingly take any action on a particular matter involving the federal agency which could have a direct effect upon a financial interest of the transition team member, his or her spouse, a family member, or any individual with whom the transition team member has a business, professional or close personal relationship.

4. Concurrent Representation in Agency Proceedings

During the transition period, a special transition team member shall not advise or represent, with or without compensation, anyone in any particular matter involving a federal agency to which he or she has had access to non-public information. This restriction does not extend to the special transition team member's firm or organization, but the team member should advise his or her firm or organization to establish procedures to assure that the team member does not participate in any way in any such agency proceeding.

5. Misuse of Government Property

A special transition team member shall conserve and protect federal property entrusted to him or her, and shall not use federal property, including equipment and supplies, other than for purposes directly related to transition activities.

6. Post-Transition Activities

For two years after the transition, a former special transition team member shall not represent, with or without compensation, any person before an agency in any particular matter involving a specific party or parties as to which he or she obtained government information not then available to the public and not made public prior to the request for advice or representation.

7. Definitions

As used in this Appendix [Order], the terms "employee," "special government employee," "particular matter"[3] and "particular matter involving a specific party or parties" shall have the same meaning as in Title 18, United States Code 202-209. The term "transition period" shall extend from the date of the general election in which the identity of the President-elect is established until Inauguration Day, or if the transition organization continues to operate after the inauguration, such later date through which the special transition team member continues to serve in that capacity.

[53 FR 26026, July 11, 1988]

§ 305.88-2 Federal Government Indemnification of Government Contractors (Recommendation No. 88-2).

Indemnification of government contractors for third-party liability involves this issue: Who should bear the risk of liability for injury or damage to a third party caused by products and services supplied by government contractors? This issue is especially significant when the products and services involve high-risk or hazardous governmental activities.

The liability of the government is limited by the doctrine of sovereign immunity, which has been waived only in certain situations, such as the Federal Tort Claims Act. Some courts have recognized a common law immunity for government contractors who have complied with pertinent government specifications and have disclosed all known defects or hazards to the government.[4] In the absence of insurance or indemnity, government contracts may be exposed to claims based, for example, on alleged failure to follow specifications or adequately warn the government or others about product design defects.

No government-wide legislation provides generally for indemnification of government contractors for third-party liability, although a number of individual departments and agencies are authorized to indemnify contractors.[5] All of the laws authorizing

[3] It is noted that the term "particular matter" has been interpreted to include rulemaking and general policy matters, and extends to all discrete matters that are the subject of agency action, no matter how general the effect.

[4] Subsequent to adoption of the recommendation, in a case involving military equipment, the Supreme Court accepted this view. *See Boyle v. United Technologies*, 108 S. Ct. 2510 (1988).

[5] Examples are the National Defense Contracts Act, 50 U.S.C. 1431, as implemented by Executive Order 10789 (providing for indemnification under national defense contracts for unusually hazardous or nuclear risks); section 2354 of title 10 of the United States Code (providing for indemnification for unusually hazardous defense research and development activities); section 170 of the Atomic Energy Act, as amended by the Price-Anderson Act of 1957, 42 U.S.C.

Continued

government indemnification of contractors state conditions that must be met before contractual indemnity been met. Thus some statutes restrict indemnification to unusually hazardous governmental activities or activities that may result in catastrophic losses and further require the contractor to obtain such insurance as is available. Indemnification clauses included in contracts usually contain further conditions, some of which are required by agency rule. A common restriction is that the indemnity does not cover claims resulting from the contractor's willful misconduct.

Indemnification clauses are reserved for unusual circumstances, and few contractors are actually provided with indemnity. The Department of Defense, for example, included indemnification clauses in an average of about 70 contracts per year in the five-year period 1980-1984; by way of comparison, during fiscal year 1984 alone, the Department entered into over 14.8 million contract actions.

The Conference's study of contractual indemnification found virtually no evidence of claims made on the basis of indemnification clauses or litigation over such claims. Although there is no indication that the government has incurred significant costs under contractual indemnity provisions in the 30 years that have passed since enactment of the National Defense Contracts Act in 1958 and the Price-Anderson Act in 1957, the space shuttle disaster and the Three Mile Island nuclear incident suggest that contingent liabilities under indemnity agreements are potentially costly.[8]

The Conference's study found that agencies generally do not believe that current practices and limits on indemnities discourage potential contractors from bidding. Federal agencies, with few exceptions, see little need for greater indemnification authority or for broad legislation that would extend indemnities to government contractors generally. However, this view is not shared by many federal contractors. They take the position that the decreasing availability of private insurance for a broad range of hazardous activities is greatly reducing the pool of bidders for contracts involving those activities in the absence of government indemnification. This legislative debate is beyond the scope of the present recommendation.

While the Conference takes no position on the current debate over proposals to expand agency authority to indemnify contractors for hazardous activities, mass injuries, or other special circumstances, the Conference does recommend the compilation of certain information that would provide a better basis in the future for ascertaining the need for and risks associated with broader indemnification.

This recommendation identifies several factors that agencies should consider when they determine whether to grant an indemnity clause to a particular contractor. It is appropriate for agencies to consider the scope of the indemnity proposed to be granted, including the proper mix of self-insurance, private insurance, and government indemnity. The factors listed should also be considered by Congress in deciding whether to grant new authority to an agency to indemnify its contractors.

Decisions to indemnify ordinarily require an assessment of whether the activity in question involves an unacceptable hazard or degree of risk. Sometimes the degree of risk is defined in terms of availability of insurance. Agencies regularly engaged in high-risk activities and able to grant indemnity clauses, such as the Department of Energy, Nuclear Regulatory Commission, or National Aeronautics and Space Administration, would normally have the resources to perform risk assessments. However, other agencies that confront these issues less frequently may not have adequate technical expertise to decide. It has been asserted that there is often great uncertainty, and such decisions may be made inconsistently. The recommendation suggests referral and interagency cooperation as a way of meeting this problem.

Recommendation

1. *Identification of Agency Authority to Indemnify.* Each agency that has, and intends to exercise, the authority to indemnify any of its contractors

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2210(d) (providing indemnification for activities involving the risk of a substantial nuclear incident); the Federal Aviation Act, as amended, 49 U.S.C. 1531 *et seq.* (providing for indemnification for risks where aircraft operations are necessary to carry out U.S. foreign policy); and the National Aeronautics and Space Act, as amended, 42 U.S.C. 2458b (providing for indemnification for damages related to the launch, operation or recovery of space vehicles).

[8] In 1982, the Comptroller General issued an opinion (B-201072, May 2, 1982; reconsid. 62 Comp. Gen. 361 (1983)) stating that to comply with the Federal Anti-Deficiency Act, 31 U.S.C. 1341, indemnity clauses in government contracts must specify that the indemnity is available only to the extent of available authorized appropriations. This limitation, however, has limited impact where Congress has set maximum indemnity limits by statute, as in the Price-Anderson Act, or where no ceiling is set, as in the National Defense Contracts Act. The Price-Anderson Act reauthorization is pending as of the date of this recommendation.

against liability to third parties should set forth, in a policy statement or regulation, the agency's understanding of the extent and source of its authority to indemnify contractors. The agency should consult with the Department of Justice and the Office of Federal Procurement Policy in drafting the statement or regulation.

2. *Agency Decision Whether to Grant an Indemnity Clause.* Before deciding to grant an indemnity clause to a contractor, an agency should identify the public benefits expected to be gained by such a grant and should take into account:

(a) The nature and magnitude of the risks involved in the covered activities, including the danger inherent in the work to be performed, the adequacy of the state of the art to assess the inherent danger, the aggregate liability that could be incurred, when the liabilities might be incurred, and how current insurance policies would apply to such liabilities;

(b) The scope of the indemnity proposed to be granted;

(c) The source of funds that would be used to pay an award under the indemnity clause, including the possible application of the Federal Anti-Deficiency Act, and the impact, if any, that such an award will have on the programs of the agency or other units of the government;

(d) The incentives that either providing or denying an indemnification clause would give the agency for supervising contractual performance, so as to provide for maximum protection of the public from injury and to protect the government from unwarranted liability in light of the identifiable risks;

(e) The incentives that the contractor would have, assuming indemnification were granted, for performing under the contract in a safe and prudent manner;

(f) The incentives that the contractor would have, assuming indemnification were granted, to defend itself or to help defend the government in any subsequent litigation; and

(g) Any effects, assuming indemnification were granted, on the ability or the willingness of the insurance industry to make available private insurance for the kinds of activities to which the indemnification would apply.

3. *The Need for More Information.* Each agency that has paid out any sum of money or received any claims for payment under a contractual obligation to indemnify a contractor, or on whose behalf such sums have been paid by the federal government, should report all such payments and claims to the Office of Federal Procurement Policy (OFPP) on an annual basis. The OFPP should periodically issue a report summarizing the information received. All such reports should be made available to the public except to the extent that release of any information included is prohibited by law. The OFPP should also obtain from each affected agency a list, updated periodically, of all existing contracts containing indemnity clauses.

4. *Contracting Office Expertise.* Where an agency is considering whether to grant an indemnity clause, but the contracting office does not have sufficient technical expertise to assess the degree of risk, the extent of the hazard, or the availability of insurance, these questions should be referred to an office of the agency that does have the requisite expertise to assist the contracting office in making such decisions. If the contracting agency as a whole lacks the expertise required to assess these matters adequately (for example, where unusual or newly emerging technological risks are involved), the agency should seek the assistance and cooperation of other agencies. Agencies with pertinent experience or knowledge should cooperate to make available to requesting agencies staff members whose experience in risk assessment may be helpful. It may be appropriate to create a small, highly-qualified risk assessment office to furnish or coordinate such assistance.

[53 FR 26027, July 11, 1988; 53 FR 39588, Oct. 11, 1988]

§ 305.88-3 The Federal Reserve Board's Handling of Applications Under the Bank Holding Company Act (Recommendation 88-3).

Among the Federal Reserve Board's (FED's) responsibilities is implementation of the Bank Holding Company Act (BHCA) (12 U.S.C. 1841 *et seq.*). The BHCA's principal purposes are to ensure the safe and sound operation of bank holding companies (BHCs), to promote competition within the banking industry, and to separate banking from commerce.

Under the BHCA, the FED has also been authorized to determine the extent to which BHCs may engage in "non-banking" activities in the parent BHC and in non-bank subsidiaries. Because the banking industry has undergone rapid changes in the face of new technologies, the line between banking and other financial activities has been blurred.

Under section 3 of the BHCA, the FED receives applications for the formation of or acquisition of banks by BHCs. The statutory factors which the Board must apply in acting on section 3 applications include an evaluation of the competitive impact of the transaction, the convenience and needs of the community to be served, and the financial and managerial resources of the applicant.

Under section 4(c)(8) of the Act, the FED receives applications by BHCs to acquire non-banking interests. Such applications are to be approved only when the activities involved are "closely related" to and a "proper incident" to banking. These questions have become of particular significance most recently in applications involving proposed securities and insurance activities of BHCs.

Applications under both sections are generally resolved without the need for an evidentiary hearing, although informal hearings and meetings are sometimes held. Both sections do, however, provide for an overall 91-day time limit on the FED's action on individual applications "beginning on the date of submission to the Board of the complete record on the application." The FED routinely processes well over 90 percent of the applications received by the FED within 60 days of "acceptance" of the application by the Reserve Bank (the Bank is permitted to request information, but otherwise must adhere to a short deadline in accepting the application and fowarding it to the FED). The FED's regulations specifically provide that, in every case in which an application has not been considered by the FED within 60 days of acceptance, the applicant will be notified and provided a written explanation for the delay.

In its regulations, the FED defines when the record on a particular application is complete for purposes of determining when the statutory 91-day period has begun. Under the FED's regulations, the 91-day period begins on the the latest of four dates: (1) The date of acceptance of the application; (2) the last day of the public comment period (which is usually after acceptance of the application, and is the date upon which the 91-day period begins in the majority of cases); (3) the date of receipt of any relevant material information regarding the application; and (4) the date of completion of any hearing or other proceeding regarding the application.

Because the statute provides that the 91-day period does not begin until the complete record has been submitted to the FED, the courts have determined that the 91-day period may be tolled or retriggered after the close of the public comment period if new material information is submitted during the processing of the application. Examples of this type of information include comments or protests from interested parties, changes in the financial condition of the applicant, proposed efforts by the applicant to raise additional capital, or proposed divestiture plans to accommodate competitive problems.

Because there is always the possibility that submission of additional material information may toll or retrigger the 91-day period, the 91-day period is rendered rather uncertain in practice. Therefore, the Conference suggests that the FED's regulations on this issue ensure that there is a point in the application process at which the FED will declare that the applicant's file is deemed to be informationally complete, thus triggering the 91-day rule, unless additional information of a highly significant nature relating to the application is received.

The nature of the regulatory process established under the BHCA encourages a participatory approach to decisionmaking on the part of applicants and the FED. Various kinds of conditional order are used by the FED to tailor its regulatory decisions to the specific applicant before it. These regulatory conditions appear or are referenced in the FED's final order, and such conditions are subject to judicial review. Other decisions, however, reflect voluntary commitments made by the applicant. Such commitments often are the result of a decision by the applicant to expedite processing of a particular application by committing to resolve questions that might otherwise result in denial of the application. These commitments usually do not appear in the FED's order and, while reviewed by the Board in every case, are not subject to judicial review at the instance of the applicant.

The Conference believes that conditions and commitments are important regulatory tools used by the FED that, for the most part, add flexibility to and encourage effi-

ciency in the consideration of applications to individual cases, providing a wide range of regulatory choices between unconditional approval and complete denial of an application.

RECOMMENDATION

The Board of Governors of the Federal Reserve System should take the following actions with respect to the FED's handling of applications under the Bank Holding Company Act.

1. *Clarification of the 91-day rule.* When acting on such applications, the Federal Reserve Board should by regulation provide that only receipt of information of a highly significant nature pertaining to the application will be deemed to warrant reopening an applicant's file, thereby deferring the date by which the Fed must act finally on the application.

2. *Conditions and Voluntary Commitments.* Conditions established by the FED regarding applications and voluntary commitments offered by applicants should be unambiguous and reasonably related to an articulated policy of the Federal Reserve Board. Voluntary commitments, when offered by applicants, should, consistent with the Freedom of Information Act, ordinarily be made part of final orders of the Board. Moreover, the Board should, from time to time, summarize the thrust of these commitments and publish and disseminate these summaries.

[53 FR 26028, July 11, 1988]

§ 305.88-4 Deferred Taxation for Conflict-of-Interest Divestitures (Recommendation 88-4).

Individuals appointed to government positions are sometimes required to divest themselves of property to satisfy conflict-of-interest requirements, such as the prohibition in 18 U.S.C. 208 on participation in matters affecting one's financial interest. In other instances, divestiture of property by such appointees would be simpler and serve conflict-of-interest purposes better than the establishment of qualified blind trusts or subsequent and sometimes frequent recusals by an official from participation in particular decisions. In addition, persons serving in the government occasionally are required to divest themselves of property before accepting a new position or as a condition to participating in a particular matter.

Divestiture of property to avoid conflicts of interest will often result, under current law, in financial losses in the form of taxation of the gains realized as a result of divestiture. The Administrative Conference believes that this tax burden is a disincentive to individuals who would otherwise accept a federal appointment, and in the case of present officials, an unnecessary burden resulting from their performance of official responsibilities. The adverse effects of this disincentive to government service are most acute with respect to the most senior positions involving major policymaking roles. Failure to obtain the best people for those positions, or the frequent recusals of people in those positions, may have serious adverse consequences on both the individuals involved and the government.

The Conference accordingly recommends that Congress amend the Internal Revenue Code to permit deferred taxation of gains for presidential appointees subject to Senate confirmation and other individuals entering the government to accept high level executive branch positions, whenever they are requested or ordered by an appropriate authority to divest themselves of property to avoid actual or potential conflicts of interests. The Conference also recommends that Congress consider amending the Code to extend similar tax treatment to persons serving in the executive branch.[1]

The Conference proposes that this defined class of persons be permitted to sell such property and to place the proceeds in a neutral investment vehicle and maintain their original basis in the divested property. Taxation would not be eliminated by this proposal, but only postponed until the individual ultimately disposes of the proceeds of a reinvestment vehicle. The Conference also suggests specific factors and other matters to be taken into account in amending the Code to accomplish these purposes.

The Conference believes that revenue impact of the recommendation will be minimal considering the narrow class of persons that would be eligible for tax deferral.

RECOMMENDATION

1. Congress should amend the Internal Revenue Code to permit presidential appointees who are subject to

[1] This recommendation is limited to executive branch appointees and employees because the Conference by statute is limited to studying and recommending improvements to administrative procedure, 5 U.S.C. 571-576. The Conference, therefore, takes no position on whether or not similar tax treatment should be accorded to officials of the judicial branch.

Senate confirmation and other officials entering the government to accept high level executive branch appointments, to divest property, such as securities, and reinvest the proceeds in a neutral investment vehicle and thereby defer realization of taxable gains.

2. Such amendment should take into account the following factors:

(a) The need to assure that the divestiture is undertaken to avoid actual or potential conflicts of interests, by conditioning the deferral on an order or request of the President (or his delegate such as the White House Counsel or the Director of the Office of Government Ethics);

(b) The need for divestiture by spouses, dependent children, and others whose assets may be imputed to the federal official for conflict-of-interest purposes, by making deferral available to them also; and

(c) The need to assure that the reinvestment vehicle avoids conflicts of interests with respect to the position to be held, by having the person ordering or requesting divestiture approve the vehicle.

3. Congress should consider whether the amendment should contain provisions dealing with the following matters:

(a) A minimum period of required government service after divestiture to qualify for deferral;

(b) Requiring the appointee to defer gains or losses for all property within the class of divested property (*e.g.*, all energy stock), in order to prohibit the appointee from recognizing losses and deferring gains;

(c) Permitting the appointee a second deferral on leaving government service (or within a brief period of time thereafter) if the appointee chooses to dispose of the neutral investment held during government service in order to make another investment.

4. The Conference recognizes that other persons serving in the executive branch may be ordered or requested to divest specific property in order for them to perform their duties free of actual or potential conflicts of interest, and believes that Congress should also consider, at the appropriate time, whether to extend similar tax treatment to them.

[53 FR 26029, July 11, 1988]

§ 305.88-5 Agency Use of Settlement Judges (Recommendation 88-5).

Many cases over which administrative law judges, administrative judges, and other agency hearing officers preside do not involve broad regulatory issues and are often appropriately resolved by settlement. Following in the footsteps of several innovative federal judges,[1] some administrative agencies have begun to provide additional mechanisms for resolving these cases. The Federal Energy Regulatory Commission and the Occupational Safety and Health Review Commission have used a "settlement judge"—not the presiding judge in the case—to work with parties to explore possibilities for consensual resolution. Other alternatives that agencies have used include prehearing conferences and summary procedures,[2] and more recently, minitrials, mediation and binding and nonbinding arbitrations.[3]

Agency prehearing conferences have historically been utilized as a means for either settling an entire case or narrowing the issues. Today, some presiding judges are exceptionally effective at using these conferences to promote settlement without overstepping bounds of proprietary. Still, while the presiding judge may be the ideal person to suggest that the parties talk settlement

[1] In addition to settlement conferences, courts have engaged in broad and growing use of other means for facilitating an early disposition of a case including arbitration, special masters, mediators, and the use of summary jury trials. Rule 16(c) of the Federal Rules of Civil Procedure was amended in 1983 to provide that settlement and "extrajudicial procedures" for resolving disputes are desirable and may be a subject at pretrial conferences, while subsection (f) of the rule provides for sanctions for failure to appear at, to be prepared for, and "to participate in good faith" at such conferences.

[2] *See* ACUS Recommendation 70-4(1) (urging presiding officers to hold prehearing conferences on own motion or at the request of the parties) and Recommendation 70-3 (summary decision).

[3] *See* ACUS Recommendation 86-3 (alternative means of dispute resolution) and Recommendation 87-11 (alternative means of dispute resolution in government contract disputes). In both recommendations, use of settlement judges is specifically recommended. 86-3(D), 87-11(d). *See also* Recommendation 72-4(D) (settlement of rate-making cases).

in a reasonable manner, he or she often cannot help the parties' explorations in any comprehensive way without risking the appearance of impropriety. In broad classes of cases, a separate settlement judge, not so limited, can exercise greater settlement-inducing authority than the presiding judge.

The Conference does not intend to suggest that use of settlement judges is a dispute resolution method that is necessarily better or worse than adjudication, arbitration, minitrials, mediation by staff personnel or nongovernment mediators, or settlement by the presiding judge; parties should retain maximum flexibility to use the best procedure for their case. The best solution of all is to settle *before* an action has been instituted, and agencies should also do far more to instill consensual methods of dispute resolution into investigatory, preenforcement, and other stages. The settlement judge technique, nonetheless, is a useful means of facilitating settlements that, in appropriate adjudications, may be of greater value.

The settlement judge can command a degree of deference similar to that of the presiding judge without the need to observe all of the commands that establish and maintain impartiality. A separate settlement judge, once appointed, can engage in ex parte and off-the-record conversations, frank assessments of the merits, and other techniques to aid settlement that the presiding judge is less free to use. The settlement judge is generally knowledgeable about the kind of case and the parties' interests, and is in a position to lend structure to the negotiations, control their pace, reduce the adversarial nature of the process, and help the parties to assess objectively both the strengths and weaknesses of the case and to find reasoned solutions. The settlement judge is familiar with how the presiding judge is likely to handle such cases, how much time and effort they take, how evidence is weighed, and what kind of a reception the legal and factual issues will be given in light of agency precedent and policy. The settlement judge, who carries a judge's power and authority, may greatly reduce the scope of parties' disagreements over likely outcomes. Parties also are less likely to be skeptical about the informal settlement judge process and more likely to view this device as a legitimate and potentially valuable means of reaching an enforceable, legally defensible settlement.

Several other advantages may accrue. Initiating the settlement judge technique may be an excellent way for agencies to introduce the idea of settlement in proceedings in which it is not now frequently pursued but which the presence of other factors seems to make apt candidates. In such circumstances, an agency could make special efforts to make the technique available in the interest of breaking the adversarial mold, perhaps preceded by seminars or other devices to permit its presiding judges to study mediation, negotiation and other settlement-inducing techniques. In individual cases, use of a settlement judge might lead the parties to turn to mediation or other non-adjudicatory means of pursuing a settlement agreement. Presiding judges' experiences as settlement judges, and possible enhanced expertise as mediators, should help them in resolving later cases.

Settlement judges are not a panacea, and their use must take into account caseloads, possible abuses in exteme cases, and likelihood of success. The very potency of the judicial office means that it must be carefully employed to avoid abuse. Even so, the Conference sees great merit in the settlement judge technique and urges that it receive much wider consideration and application as a means of actually settling matters, or convincing the parties to undertake other consensual dispute resolution methods.

These recommendations suggest procedures for using the settlement judge as a final effort to obviate formal proceedings, as well as guidelines that seek to increase potential gains in efficiency while minimizing possible abuses that may result from a greater reliance on settlement in agencies' adjudicatory proceedings.

Recommendation

A. *Encouraging Use of Settlement Judges.* 1. As part of efforts to encourage use of consensual means of dispute resolution, federal agencies that decide cases presided over by administrative law judges, administrative judges, or other hearing officers should encourage and facilitate settlement of adjudicatory proceedings by the voluntary use of settlement judges and other consensual methods.

2. Agency offices of administrative law judges, boards of contract appeals, and other hearing offices should adopt rules for appropriate use of settlement judges.

3. In urging regularized and amplified utilization of settlement judges, the Administrative Conference has no intention of discouraging reliance on other methods of dispute resolution without recourse to formal procedures. In many instances, cases of the types deemed suitable for reference to a settlement judge (paragraph B, below) can and should be settled at preliminary stages of disagreement. At times, moreover, early recourse to mediation

or arbitration (where authorized) may be appropriate.[4] The Administrative Conference urges constant attention to settlement possibilities long before a controversy has reached the docket of a trial judge.

B. *Appropriate Cases.* In general, the agency use of settlement judges may be appropriate where one, and particularly more than one, of the following factors appear.

1. Crowded dockets with relatively few cases being settled.

2. Presence of a large proportion of factual issues that are not of major precedential importance and do not raise broad policy or legal issues, particularly where the facts are undisputed and the primary issues concern the interpretation or characterization of such facts.

3. Remedies susceptible to gradation and, thus, to compromise. Examples are money claims, rates,[5] and degrees of restrictions or activity.

C. *Administrative Issues.* 1. The chief judge should retain discretion in assigning settlement judges on the basis of the situations, issues, judges' aptitudes and personalities, and so forth. He should also remain free to refuse to appoint a settlement judge.

2. The agency head should ordinarily not suggest use of a settlement judge, since he is much less likely to know when a particular case is suitable for settlement and much more likely to desire a case to be settled to avoid having to decide it.

3. Given the workload of presiding judges and possible limited availability for appointment as a settlement judge, agencies should use, as an alternative source of settlement judges, currently retired ALJs who have notified the Office of Personnel Management that they would accept temporary appointment (pursuant to 5 U.S.C. 3323(b), enacted in 1984), retired administrative judges or hearing officers, or active hearing officers from another agency.

4. Agency presiding judges, and especially chief judges, should regularly review their dockets to identify cases where use of settlement judges may be useful, and consult regularly with experienced mediators to locate cases ripe for settlement.

5. Agencies should give attention to offering training in negotiation, mediation, and other consensual dispute resolution skills to administrative law judges, administrative judges, and other hearing officers. Training courses or seminars should be developed by agencies jointly or in cooperation with the Administrative Conference, Federal Mediation and Conciliation Service, Board of Contract Appeals Judges Association, American Bar Association, or other professional organizations. Agencies should also work with other interested groups to sponsor similar programs or outreach sessions for representatives who regularly appear in agency proceedings.

D. *Procedures.* Agency regulations or guidelines implementing the use of settlement judges should consider the following:

1. *Suggesting use of a settlement judge.* (a) The suggestion that a settlement judge be consulted may be made to the agency's chief judge by any party or by the presiding judge (although the agency head's invocation of the technique should be restrained (see C.2, above)). Because it will usually be difficult to predict at what points in the prehearing process settlement will be possible, the presiding judge and the parties should be free to request appointment of a settlement judge at any time. Any party or the presiding judge may veto such a suggestion.

(b) The chief judge should seek to ensure that all parties who appear *pro se* consent knowingly and voluntarily before he decides to invoke the aid of a settlement judge.

2. *Appointment.* (a) When appointing a settlement judge, the chief judge should issue an order specifying the length of time for such negotiations and confining the scope of any settlement negotiations to specified issues.

(b) When a settlement judge is appointed, the presiding judge may suspend discovery or other proceedings during the time the matter is assigned to the settlement judge.

(c) If settlement negotiations are terminated, the chief judge may subse-

[4] *See* Recommendation 86-3 and 87-11, *id.*

[5] *See* Recommendation 72-4, *supra*, note 3.

quently appoint a settlement judge in the same proceeding to conduct further negotiations.

(d) To ensure that proceedings are not unnecessarily interrupted, agency regulations or guidelines should provide that any decision concerning the appointment of a settlement judge or termination of settlement negotiations is not subject to review or rehearing.

3. *Conduct of negotiations.* (a) The regulations should afford the settlement judge broad authority to:

(1) Confer with the parties on the subject of whole or partial settlement,

(2) Suggest privately to a party's representative what concessions be considered by the party,

(3) Assess privately with each representative the reasonableness of the party's case or settlement position,

(4) Facilitate communications between the parties,

(5) Mediate,

(6) Seek resolution of as many issues in the case as is feasible, and

(7) Recommend use of minitrials, mediation, factfinding, or other consensual resolution means, and, if the parties genuinely wish some method of presenting evidence in a settlement context or having the dispute mediated, the settlement judge should be free to refer them to a separate minitrial or mediation process.

(b) To increase the likelihood of settlement, the regulations should:

(1) Provide that the settlement judge may recommend that the representative who is expected to try the case be present at a settlement conference and that the parties, or their agents having full settlement authority, be present.

(2) Set forth specific guidelines for conducting settlement conferences (including by telephone) where appropriate.

(3) Exhort all parties and their representatives to be candid with the settlement judge so that he may properly guide settlement discussions.

(4) Provide the settlement judge with flexibility to impose any additional requirements proper to expedite resolution of the case.

(c) The settlement judge should, within days after appointment, meet or talk with the parties together and (usually) separately to determine what obstructs settlement. Proceedings before a settlement judge should not ordinarily be lengthy or elaborate.

4. *Confidentiality.* (a) To encourage the candor often necessary to achieve a settlement, the regulations should provide that no evidence of statements or conduct by parties, counsel or settlement judge in the settlement proceedings shall be admissible in any subsequent hearing, except by stipulation of the parties. The regulations should further provide that documents disclosed in a settlement process may not be used in litigation unless obtained by appropriate discovery or subpoena. Agencies should provide sanctions against any violators.

(b) The regulations should prohibit the settlement judge from discussing the merits of the case with the presiding judge or any other person* and preclude the settlement judge from being called as a witness in any hearing of the case.

5. *Settlement and reports.* (a) At the conclusion of the settlement procedures, either the parties should tell the presiding judge that they have settled, or the settlement judge should advise the trial judge, without elaboration, that settlement has not been reached. The report should not attribute any view to any party or assess any positions taken. The agency's regulations should describe the method by which the presiding judge is advised that settlement has not been reached.

(b) To protect against unnecessary delay, the settlement judge's first report should be made within a specified period after appointment. The agency head or chief judge should be authorized to order additional reports at any time.

(c) In reporting, the settlement judge may recommend the termination or continuation of settlement negotiations.

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* This should not prevent judges within the same office from engaging in discussions of settlement or mediation techniques that may aid the settlement judge in resolving particular cases and assist in a judge's professional development.

(d) A settlement arrived at with the help of a settlement judge should be treated like any other settlement.

(53 FR 26030, July 11, 1988)

§ 305.88-6 Judicial Review of Preliminary Challenges to Agency Action (Recommendation No. 88-6).

The Administrative Conference of the United States has long had an interest in forum allocation in administrative cases. In Recommendation No. 75-3, "The Choice of Forum for Judicial Review of Administrative Action" (1975), the Conference stated criteria for determining the appropriate judicial forum for the review of final administrative action. The Recommendation urged that agency actions taken on the basis of a formal evidentiary record should normally be directly reviewable by courts of appeals, and that rules and other informal orders issued by agencies whose formal orders are subject to review in the courts of appeals should be reviewable by those same courts.

Building upon the principles underlying that recommendation, the Conference now addresses the proper forum for judicial review where an agency has issued no final order, but agency action (or inaction) is nevertheless considered reviewable by a court.[1] For example, a party may allege that agency action has been "unlawfully withheld or unreasonably delayed" within the meaning of 5 U.S.C. 706. What level of court—trial or appellate—should have jurisdiction over such a preliminary challenge? Most direct review statutes do not specifically address this question, and difficult jurisdictional questions have arisen as a result.

The leading decision on this subject is *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) (*TRAC*), a case involving a challenge to allegedly unreasonable agency delay. In *TRAC*, the United States Court of Appeals for the District of Columbia Circuit concluded that when the relevant statute assigns review of final agency action (when and if it occurs) exclusively to the court of appeals, then a preliminary challenge also will be subject to exclusive appellate review so long as relief in relation to it might affect the court's ultimate jurisdiction. Based on a court's authority to issue writs in aid of its jurisdiction under the All Writs Act, *TRAC*'s holding strongly favors consolidating preliminary challenges in the courts of appeals even when the agency's organic statute does not settle the point.

However, some confusion has followed the *TRAC* decision. Subsequent opinions have grappled at length with the question of what "might affect" the court's jurisdiction and, in some cases, have carved out exceptions to the *TRAC* doctrine. Some district courts, for example, have distinguished certain constitutional claims, for which they have upheld district court jurisdiction.

In addition, some problems have remained because *TRAC* cannot readily be applied to situations in which the agency's final action might take different forms, with different jurisdictional consequences. For example, in some cases the Occupational Safety and Health Administration may decide to issue "standards", which are reviewable in the courts of appeals, or "regulations", which are reviewable in district court. Jurisdictional uncertainty can also occur in preliminary challenges involving Food and Drug Administration approval of new drug applications under the Food, Drug and Cosmetic Act, 21 U.S.C. 355. When the FDA refuses to approve an application, the statute authorizes the applicant to appeal directly to the courts of appeals; this special review provision does not apply, however, to parties challenging FDA approval of a new drug application, who thus must proceed in district court. In cases like these, the *TRAC* rule may require courts to make premature jurisdictional analyses based on speculation about the nature of the action the agency may ultimately take in order to determine whether they can hear the preliminary challenge.

The Conference believes that there is a need for greater clarity in this area. Unless Congress has reason to believe otherwise in a specific statute, jurisdiction over all such preliminary challenges should follow the principle of *TRAC*. The requirement that preliminary challenges be heard exclusively by the court that will ultimately review final agency action may influence a litigator's decision whether to raise an issue preliminarily and thus discourage the bringing of preliminary review proceedings that have little merit but offer some potential for creating delay. In addition, the courts that review final agency action may be more familiar with the substantive programs administered by an agency, and thus better able to evaluate the issues raised in preliminary challenges. To avoid further confusion over proper jurisdiction, the *TRAC* rule should be interpreted to include all cases in which final action would be reviewable in the courts of appeals, and the exceptions that have been carved out by the district courts should be rejected. Where jurisdiction over the final action is unclear, however, preliminary challenges should be cogni-

[1] The Administrative Conference takes no position in this recommendation on whether and under what circumstances such preliminary actions should be deemed judicially reviewable before issuance of a final order by an agency.

zable in either the district courts or the courts of appeals.

Some special consideration may be necessary where preliminary challenges involve allegedly unlawful delay by an agency. For these challenges, by definition, time is generally of the essence; moreover, they usually do not require elaborate analysis of the relevant facts or applicable law. Frequently these claims may be resolved more easily and expeditiously through the use of simpler or less formal approaches than through the ordinary course of briefing and oral argument. The courts of appeals should develop techniques for dealing with these cases promptly and practically when they arise. While the most effective measures may vary depending upon the procedural rules applicable in individual courts, possible approaches might include rules permitting, in appropriate cases, decision on the briefs without oral argument, the filing of petitioners' briefs simultaneously with the notice of appeal, expedited calendaring of delay cases, informal status or settlement conferences involving a single judge, and, where the record may require expansion through factfinding, prompt assignment to a district court, magistrate, or other official for that purpose.

Accordingly, the Conference offers the following recommendation.

RECOMMENDATION

1. In considering legislation that would assign jurisdiction to review agency action to either district courts or courts of appeals, Congress should:

(a) Follow the principles stated in ACUS Recommendation 75-3, *The Choice of Forum for Judicial Review of Agency Action*; and

(b) Take special care to consider where preliminary challenges to agency decisionmaking should be brought, specifying whether the district courts or the courts of appeals or both have jurisdiction over such challenges. As a general rule, jurisdiction over reviewable preliminary challenges should be assigned to the forum that would have jurisdiction if an appeal were taken from final agency action growing out of the proceeding.

(c) Provide that when the proper forum for judicial review of final agency action may be either the district courts or the courts of appeals, depending upon matters such as the form the agency's action will eventually take or the outcome of the proceeding, any of the courts that might have jurisdiction over final agency action should have jurisdiction over reviewable challenges to the agency's preliminary action (or inaction).

2. In the absence of Congressional direction, the principles identified in paragraph 1 (b) and (c) of this recommendation should govern the choice of forum for otherwise reviewable preliminary challenges to agency action.

3. Where jurisdiction over claims involving unlawful delay by an agency lies in the courts of appeals, those courts should assure that their procedures provide adequately for prompt and efficient disposition of such claims.

[53 FR 39585, Oct. 11, 1988]

§ 305.88-7 Valuation of Human Life in Regulatory Decisionmaking (Recommendation No. 88-7).

Regulations intended to lessen risks of accidents and illness ordinarily impose compliance costs on regulated entities and on rulemaking agencies. In return, society gains numerous benefits, most notably the avoidance of fatalities, injuries and disease, and in some instances a reduction in property damage. Promulgation of such regulations is a multi-faceted process, and this recommendation addresses one set of issues frequently encountered in agency decisionmaking—the valuation of human life.

Agencies often make reasoned estimates of the reduction in fatalities likely to follow implementation of a particular regulation, or of alternative regulations. It is rarely if ever possible to eliminate risk altogether, and it is nearly always the case that greater risk reduction raises compliance costs. Faced with such situations, agencies cannot avoid placing a value—either explicitly or implicitly—on the societal benefits of risk reduction. Although similar issues are obviously involved when agencies seek to evaluate the benefit of avoiding illnesses or injuries, this recommendation is limited to agency practices and constraints in benefits valuation when the benefit at issue is future lives saved.

Placement of a dollar value on human life is controversial and complex, and a wide array of approaches may be employed. A broad range of dollar values per life saved can be observed in regulatory outcomes across programs and departments. In part, this reflects differing views about what explicit value is suitable for a given type of hazard, and in part it reflects judgments that, for reasons of policy or legal constraints, decisions should take no account of

the value of life implicit in those decisions. Some agencies reject all explicit efforts to place a monetary value on human life, while others routinely build such estimates into their regulatory proposals. This diversity can be sharp even within the same department. Those agencies that are willing to utilize explicit normative benchmarks for the value of life appear to be moving toward reliance on the same basic estimation technique, generally referred to as "willingness-to-pay." This technique is premised on the assumption that by examination of marketplace behavior, one can roughly ascertain how much individuals would be willing to pay in order to reduce the probability of death from a particular hazard or cause, or how much they would require in the form of salary increases or other payments to be willing to accept the increased probability. While willingness-to-pay provides the most inclusive analysis currently available for evaluating the benefits derived from regulatory reduction of fatalities, it falls far short of an ideal process and can produce results that are misleading because the analysis often fails to take into account all relevant variables.

The Conference recognizes the rudimentary state of knowledge on this issue, and realizes that both methodologies and results are likely to continue to vary among agencies. In this environment, however, it would be useful for agencies to take measures that would reveal publicly the processes through which they have determined the valuation of life incorporated in policy decisions.[1] Such a procedure would provide useful clarification and exposition of the unavoidable trade-offs in regulating hazards, and would also assist in drawing attention to those hazards where further protection may be feasible at acceptable cost.

In this way, agency practice may also be measured against developments in the valuation techniques and evaluated for consistency with other agencies as well as with other regulations in the same agency. The Office of Management and Budget (OMB), in its oversight of executive branch regulatory activities, could facilitate consistency by providing a central clearinghouse for research and information on life valuation issues. OMB should also assist agencies by updating its guidance concerning discount rates used by agencies in deriving present value equivalents of future effects. The current government-wide general guidance on discounting is contained in OMB Circular A-94 which has not been updated since 1972.

Recommendation

1. When an agency adopts a regulation that is intended to reduce the risk to human life, based on a judgment that the associated compliance costs are justified, the agency should disclose the dollar value per statistical life used for the purposes of that determination. Such statements and disclosures should also set forth the human life valuation implications of alternative levels of regulatory stringency considered by the agency. Exceptions to this principle may be appropriate where empirical information about either the costs or benefits of the regulation is highly conjectural, or where the benefits include values which cannot be quantified in market terms, *e.g.*, aesthetic gains. In such cases, agencies should explain the nature and degree of imprecision in the valuation process so that the public will not be misled. When an agency declines to adopt a regulation due to these considerations, it should provide similar information.

2. In implementing paragraph 1, agencies that develop and use methodologies for placing a monetary value on human life should recognize that there remain substantial limitations of current methodology to incorporate all the variables that affect societal valuations of human life. An agency should explain the factors included or considered in its valuation. The agency also should explain how it weighs such factors.

3. Whenever agencies choose to discount costs and benefits in implementing paragraph 1, they should clearly and fully disclose what rates they are using, the methodology that generated those rates, and the sensitivity of outcomes to the particular rates applied. The Office of Management and Budget (OMB) should revise its guidance concerning the use of a discount rate in the valuation of costs and benefits to reflect recent learning on the subject, either through updating OMB Circular A-94 or by other means. Such guidance should articulate the various methods by which a discount rate can

[1] In 1979, the Conference made a similar recommendation about cost-benefit analyses, Recommendation 79-4, *Public Disclosure Concerning the Use of Cost-Benefit and Similar Analyses in Regulation*, 1 C.R.F. § 305.79-4 (1988).

be derived and the scope of subjects to which it can be applied.

4. OMB should serve federal agencies as a central clearinghouse for research and information on life valuation issues. To this end, OMB should continue and expand its discussion of agency practices in the life valuation area, initiated in the 1987-88 edition of the annual Regulatory Program of the United States Government.

153 FR 39558e, Oct. 11, 1988]

§ 305.88-8 Resolution of Claims Against Savings Receiverships (Recommendation 88-8).

When a federally insured savings and loan institution ("thrift") fails, the Federal Home Loan Bank Board (FHLBB) exercises overall regulatory control. The Federal Savings and Loan Insurance Corporation (FSLIC), under the direction of the FHLBB, ordinarily acts as receiver for federally insured thrifts, and, in that capacity, must pay the valid credit obligations of the failed thrift. In the process of accepting, settling or rejecting a diverse and complex range of creditor claims, the FSLIC attempts to resolve disputes informally. If this cannot be done, claimants may resort to an adjudicative process. The locus of this adjudication—agency or court—and its elements are the concerns of this recommendation.

Exclusivity of the Agency Adjudication Process. The FHLBB and its sister agency, the FSLIC, have asserted exclusive jurisdiction to adjudicate creditor claims against thrift receiverships. To establish and enforce its asserted power as receiver to adjudicate creditor claims, the FSLIC has adopted the practice of seeking to have claims litigation that has been initiated in state courts removed to the federal courts, where the FSLIC then moves for dismissal for want of subject matter jurisdiction. The agency has sometimes moved to override court judgments granted to creditors that were entered before a thrift was place in receivership.

The FSLIC's argument is that, as receiver, it has been vested with exclusive power to determine the validity of creditor claims, and that the jurisdiction of the courts to make independent determinations has been precluded. It is further argued by the FHLBB and FSLIC that their final administrative determinations are subject not to de novo judicial review, but only to the limited judicial review provided under the Administrative Procedure Act. This agency position has become known as the *Hudspeth* doctrine, after the Fifth Circuit decision in which it was first accepted (*North Mississippi Savings and Loan Association* v. *Hudspeth*, 756 F.2d 1096 (5th Cir. 1985)). But other courts have declined to follow *Hudspeth*. See e.g., *Morrison-Knudsen Co., Inc.* v. *CHG International, Inc.*, 811 F.2d 1209 (9th Cir. 1987), holding that the FSLIC has no statutory authority to adjudicate claims to the exclusion of the courts. The U.S. Supreme Court has granted *certiorari* to resolve the differences. See *Coit Independence Joint Venture* v. *FirstSouth, F.A.*, 829 F.2d 563 (5th Cir. 1987), *cert. granted*, 108 S. Ct. 1105 (1988).

Because of the considerable adjudicatory power that the *Hudspeth* doctrine potentially grants to the FSLIC, the doctrine has provoked controversy concerning the fairness, efficiency, and legal and constitutional validity of the administrative procedures. In fact, the position of the Solicitor General in its brief for the Government in the *Coit* case does not endorse the FHLBB's argument that it is statutorily empowered to "adjudicate" these claims. The Solicitor General maintains that, while Congress could have provided for administrative adjudication in this context, it has simply (and appropriately) provided for a claims review step in the process that must be exhausted by claimants before they seek judicial resolution of claims.

The Conference takes no position on the statutory and constitutional power of the FHLBB to resolve these claims. Unless the Supreme Court finds administrative adjudication in this context to be constitutionally impermissible, Congress should examine the need for agency adjudication of such claims, as an alternative to, or at least a required prelude to, de novo resolution of such claims in state and federal courts. For this reason, the Conference has examined the fairness and efficiency of the current administrative procedure for determining creditor claims against thrift receiverships.

Current Claims Procedures. Claims against failed thrifts are institutionally and procedurally separated at the FSLIC. Those made by insured depositors on the one hand, and uninsured depositors and other creditors on the other, are handled by separate divisions within the FSLIC. Although many claims are resolved at the division level (so-called "receiver's determinations"), rejected claimants may seek administrative review by the Adjudication Division of the FHLBB's Office of General Counsel, with final administrative review by the Board itself in complex cases. Though the case law is unsettled, *de* novo judicial review has been allowed in the case of insured depositor claims and, under the *Hudspeth* decision, limited judicial review under the Administrative Procedure Act was contemplated in the case of non-insured and general creditor claims.

Need for Congressional Attention. As thrift receiverships proliferate, the Conference urges Congress to consider whether it is more appropriate for disputes over claims filed against such receiverships to be decided by the FHLBB, or whether it is better to leave them to *de novo* resolution in state and federal courts—with or without a prior administrative claims review step at the FHLBB.

If Congress does determine that an administrative adjudication process (coupled with appropriate judicial review) is the preferable approach, it should clarify the FHLBB's statutory authority. It should provide for an adjudicative system that makes clear that claimants have an opportunity to have their claims heard by adjudicators who are completely independent of other offices of the FHLBB or FSLIC, which may be perceived to have a financial interest in the outcome of such claims. To that end, a bifurcated hearing process should be established, offering claimants who can demonstrate that an issue of material fact is genuinely presented an opportunity for an on-the-record APA hearing presided over by an administrative law judge. An alternative, simplified procedure should be authorized for other cases or where parties agree to use it.

The FHLBB's current program of adjudicating claims against receiverships requires two additional improvements. First, final rules of practice need to be issued,[1] and time limits should be established. Second, the agency should refrain from attempting to override prereceivership judgments entered in federal or state courts.

Recommendation

1. Congress should determine whether disputes over claims filed against thrift receiverships are better decided by the Federal Home Loan Bank Board (FHLBB) in an administrative adjudication process (coupled with judicial review) or by the judiciary through *de novo* resolution in state or federal courts (with or without a prior administrative claims review step at the FHLBB).[2]

2. If Congress does determine that an administrative adjudication process is the more desirable approach, it should clarify the FHLBB's statutory authority by providing for an FHLBB adjudicative process along the lines set forth below:

(a) A bifurcated process should be established for adjudicating claimant appeals from determinations of thrift receivers. Where the claimant affirmatively demonstrates that an issue of material fact is genuinely presented, the FHLBB should offer an opportunity for an on-the-record APA hearing, presided over by an administrative law judge. In all other cases, or where the parties voluntarily agree, the FHLBB should be authorized to use simplified, less formal procedures, presided over by persons who need not be ALJs but who should be institutionally separate from the receiver.[3] All parties, including receivers, should be encouraged to engage in alternative means of dispute resolution.[4]

(b) Final FHLBB decision on such claims should be based on the administrative record and subject to direct judicial review in accordance with the principles stated in ACUS Recommendation 75-3 ("The Choice of Forum for Judicial Review of Administrative Action").

3. The FHLBB should publish, after a notice-and-comment rulemaking procedure, final rules setting forth its rules of practice for claims determinations. The rules should provide for strict, albeit reasonable, time limits[5] applicable not only to claimants but also to receivers and their agents.

4. The FHLBB (and FSLIC as receiver) should not override prereceivership

[1] On November 8, 1985 the FHLBB published proposed rules governing its claims adjudication process (see 50 Fed. Reg. 48970). On April 21, 1988 the FHLBB published interim procedures pending the adoption of final regulations, giving notice that the interim procedures that have been in effect in practice since July 1, 1986 will remain in effect pending the adoption of final regulations. See 53 Fed. Reg. 13105.

[2] The Conference, at this time, does not intend to express an opinion on which of these alternatives is preferable.

[3] See ACUS Statement, "Dispute Resolution Procedure in Reparations and Similar Cases", 1 CFR 310.13 (1988).

[4] See ACUS Recommendation 86-3, "Agencies' Use of Alternative Means of Dispute Resolution", 1 CFR 305.86-3 (1988).

[5] See ACUS Recommendation 78-3, "Time Limits on Agency Action," 1 CFR 305.78-3 (1988).

judgments entered in federal and state courts. The agencies' power to adjudicate claims should not encompass judgments in favor of creditors that have been entered by a court of competent jurisdiction before the thrift was placed in receivership. The FSLIC as receiver should either acquiesce in these judgments or pursue post-trial remedies.

5. Congress should include in any legislation responsive to this recommendation a requirement that the FHLBB adopt appropriate regulations and policies as set out in paragraphs 3 and 4.

[53 FR 39587, Oct. 11, 1988]

§ 305.88-9 Presidential review of agency rulemaking (Recommendation 88-9).

Federal regulation has grown in both scope and complexity in recent decades. Among its wide variety of national goals are: Ensuring competitive markets, spurring economic growth, checking inflation, reducing unemployment, protecting national security, assuring equal opportunity, increasing social security, protecting the environment, ensuring safety, and improving energy sufficiency. Policies implementing these goals compete for scarce resources and sometimes conflict with one another. Thus, a central task of modern democratic government is to make wise choices among the courses of action that pursue one or more of these goals.

While Congress establishes the goals, it seldom legislates the details of every action taken in pursuit of these goals or makes the balancing choices that these decisions require. It has assigned this task to the regulatory agencies. Each regulatory agency, however, usually is given a set of primary goals, without specific regard for whether proposed actions in pursuit of those goals might conflict with the pursuit of other goals by other agencies. An effective mechanism is needed to coordinate agency decisions with the judgments of officials having a broader perspective, such as the President and Congress.[1]

Some form of presidential review of agency rulemaking has been the practice since at least 1971. Like its predecessors, the current program is established by presidential executive order.[2] The responsible officer (the Administrator, Office of Information and Regulatory Affairs, in the Office of Management and Budget) is appointed by the President, subject to Senate confirmation.

The Conference believes that there is sufficient experience under these executive orders to warrant continuing such review with certain guidelines as to its implementation. The Recommendation below sets forth standards that should be followed whether review is governed by executive order or by a general statute. It also assumes that the President has the authority to enunciate principles to guide agency rulemaking, even though the programmatic responsibilities are by statute delegated to agencies. In addressing the presidential review process, the Conference recognizes that some of the issues are analogous to congressional involvement in agency rulemaking, but it does not address this latter subject at this time.

Recommendation

The Conference recommends that the following principles should guide any program of presidential review [3] of agency rulemaking.

1. General Applicability

Presidential review should apply generally to federal rulemaking. Such review can improve the coordination of agency actions and resolve conflicts among agency rules and assist in the implementation of national priorities. However, not all agency rules or cate-

[1] The need for greater coordination of federal regulation was recognized in 1979 by the American Bar Association's Commission on Law and the Economy.

[2] Exec. Orders Nos. 11,821, 11,949 (President Ford), Exec. Order 12,044 (President Carter), Exec. Orders Nos. 12,291, 12,498 (President Reagan). For a thorough analysis of the experience under the executive orders, *see* National Academy of Public Administration, Presidential Management of Rulemaking in Regulatory Agencies (Jan. 1987).

[3] Presidential review, as used in this Recommendation, refers to a program of systematic executive oversight and dialogue that involves coordinating agency actions where conflicts exist, and in all cases probing the agency's fact and policy judgments, with the purpose of ensuring that the agency considers factors of importance to the President's policies to the extent permitted by law. Such review does not displace responsibilities placed in the agency by law nor authorize the use of factors not otherwise permitted by law. Other review of an ad hoc nature by the President (or the President's delegates) of agency rulemaking pursuant to the President's constitutional authority is not within the scope of this Recommendation.

gories of rules may be appropriate for such presidential review. Exempt categories include formal rulemaking, ratemaking, and rulemaking that resolves conflicting private claims to a valuable privilege.

2. Applicability to Independent Regulatory Agencies

As a matter of principle, presidential review of rulemaking should apply to independent regulatory agencies to the same extent it applies to the rulemaking of Executive Branch departments and other agencies.

3. Timeliness of Review

The process of presidential review of rulemaking, including agency participation, should be completed in a timely fashion by the reviewing office and, when so required, by the agencies, with due regard to applicable administrative, executive, judicial and statutory deadlines.

4. Public Disclosure of Documents

(a) *Proposed or Final Rules.* Where an agency submits a draft proposed or final rule for presidential review, the agency submission and any additional formal analyses [4] submitted for presidential review should be made available to the public when the proposed or final rule to which they pertain is published. If a decision is made to terminate a rulemaking after a notice of proposed rulemaking has been published, agency submissions to the office responsible for presidential review and any additional formal analyses submitted for review should be made available to the public when the decision to terminate is announced.

(b) *Review of Agendas or Other Summaries or Schedules of Agency Rulemaking Actions.* Where an agency submits agendas or other summaries or schedules of pending or planned rulemakings for presidential review, the agency submission and any supporting documents submitted for presidential review should be made available to the public once the agenda or other summary or schedule is made known to the public in an official publication.

5. Executive Branch Communications Relating to Presidential Review of Rulemaking

(a) *Policy Guidance.* An agency engaged in informal rulemaking should be free to receive guidance concerning that rulemaking at any time from the President, members of the Executive Office of the President, and other members of the Executive Branch, without having a duty to place these communications in the public file of the rulemaking unless otherwise required by law. However, official written policy guidance from the officer responsible for presidential review of rulemaking should be included in the public file of the rulemaking once a notice of proposed rulemaking or final rule to which it pertains is issued or when the rulemaking is terminated without issuance of a final rule.[5]

(b) *Factual Information.* When an agency engaged in rulemaking receives a communication from the office responsible for presidential review which contains factual information relating to the substance of the rulemaking that is not already in the public file, the agency should promptly place the communication (or if oral, a summary) in the public file of the rulemaking.[6]

(c) *Communications Transmitting Outside Comments.* When an agency receives a communication from the office responsible for presidential review which transmits any factual submissions or the views or positions of persons outside the government, the agency should promptly place the communication (or if oral, a summary) in the public file of the rulemaking.[7]

[4] See ACUS Recommendation 85-2, Agency Procedures for Performing Regulatory Analysis of Rules, 1 CFR 305.85-2.

[5] The Conference's position on the public availability of official written policy guidance stated in this Recommendation modifies its earlier position in Recommendation 80-8, Intragovernmental Communications in Informal Rulemaking Proceedings, 1 CFR 305.80-8, ¶1.

[6] Agencies also should place factual information received from other sources in the public file of the rulemaking, *see* Recommendation 80-8, ¶2.

[7] This reaffirms the Conference's position on the handling of comments by persons

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6. Responsibility of the Reviewing Office Regarding Outside Comments

The officer responsible for presidential review of rulemaking should not allow the process of review to serve as a conduit to the rulemaking agency for unrecorded communications from persons outside the government. To guard against such occurrence, the responsible officer should take appropriate steps—and the following should be considered:

(a) Identifying any communications to the rulemaking agency that transmit the views or positions of persons outside the government;

(b) Promptly transmitting written communications received by the office responsible for presidential review from persons outside the government relating to the substance of a proposed agency rule to the rulemaking agency for inclusion in the public file of the rulemaking;

(c) Maintaining a list identifying the time and general topic of oral communications that pertain to the substance of an agency rule under review with persons outside the government and making such list available to the rulemaking agency for inclusion in the public file; and

(d) Inviting a representative of the rulemaking agency to attend any meetings between the reviewing office and persons outside the government which pertain to any agency rulemaking under review by that office. The agency representative attending any such meeting should prepare an appropriate summary of the discussion and promptly place it in the public file of the rulemaking.

7. Not Judicially Reviewable

The presidential review process should be designed to improve the internal management of the federal government and should not create any substantive or procedural rights enforceable by judicial review.

[54 FR 5207, Feb. 2, 1989]

outside the government stated in Recommendation 80-6, 12.

§ 305.88-10 Federal agency use of computers in acquiring and releasing information (Recommendation 88-10).

The rapid evolution of computer technology raises many economic and policy issues that affect the acquisition and release of information by government agencies. New information technologies can improve public access to public information and reduce paperwork burdens. They can also impose significant economic burdens, however, and they may stimulate competition between government agencies and established electronic information enterprises.

The essential role of information in a democratic system underscores the need to examine with care the opportunities that electronic information storage and transmission provide for improving the flow of information between government agencies and the public.

The following recommendations are intended to guide agencies in addressing the questions that will arise when an agency considers whether to acquire or release information in electronic form, either to facilitate performance of the agency's mission or to fulfill requirements established by the Freedom of Information Act (FOIA) or other laws.[1]

[1] OMB Circular A-130 (50 FR 52730, Dec. 24, 1985) provides a general framework for management of federal information resources. The relationship between parts of this recommendation and provisions of the OMB Circular is as follows. Recommendation A reflects the same policy as Paragraph 7(g) of the Circular, but provides additional detail. Recommendation B deals with electronic acquisition, a subject addressed in proposed OMB guidelines, but not in detail in the existing version of Circular A-130. Recommendation C suggests a cost-benefit approach to defining agency electronic dissemination activities essentially consistent with that prescribed by the Circular, but offers a finer level of analytical detail to guide agency selection among three different levels of release. Recommendation D suggests defining the boundary between public and private sectors based on a cost-benefit analysis; this is endorsed by Paragraph 7(e) of Circular A-130, but Recommendation D defers less to private sector activities than the Circular. Recommendation E lists more specific cost and benefit categories to be considered than does the Circular. Recommendation F reflects the same policy as that set forth in Appendix IV to Circular A-130 (discussing paragraph 11(a)). Recommendations G and H have no counterparts in the Circular. Recommendation I discusses

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At the present stage in the evolution of government electronic information policy, the most one can do is to suggest an analytical framework within which agency electronic system designers, policy makers, and budget planners can assess their opinions. The process and substance of decisionmaking within this framework should, of course, conform with general principles of administrative law.

Because experience is now relatively limited and information technology is subject to rapid evolution, when Congress sets policy it should do so on as broad a basis as possible. Because changes in electronic information capability occur at a different pace in different sectors of the society, transitional arrangements will be necessary to ensure that electronic acquisition and release do not disadvantage major segments of the population.

The pertinent considerations depend on the context in which electronic acquisition or release of information is addressed. For example, the factors relevant to the release of information in electronic form in response to discrete FOIA requests differ from those that bear on discretionary agency decisions to release information broadly through electronic publishing. As a further example, resolution of issues pertaining to the acquisition of information in electronic form might depend on such factors as the technological capacity of the private parties from whom electronic filing is to be requested.

Recommendation A addresses the Freedom of Information Act. The FOIA was written with paper records in mind. The problem is to apply the Act to information maintained in electronic form. This recommendation does not seek to provide comprehensive guidance but does address in general terms such matters as whether electronic records should be deemed records subject to the FOIA and whether an agency should be expected to write new computer programs for the purpose of responding to a FOIA request.

Recommendations B and C discuss principles applicable to electronic acquisition and release of information, respectively. Recommendation D offers principles for defining the appropriate roles of the public and private sectors in the provision of electronic acquisition and release systems.

Recommendations C and D envision a three-step process for evaluating possible new electronic information products. The first step in the evaluation process is to identify the current level of release of the information that would be contained in a new electronic information product. There are in general terms three possible levels of agency activity in releasing information: (i) "dissemination" or "publishing", leading to the broadest availability of information; (ii) "disclosure", involving wholesaling to private information suppliers or providing electronic release capability in public reference rooms; and (iii) "access", involving ad hoc release in response to discrete requests. For the special meaning of these and other related terms used in this recommendation, it is important to refer to the appended glossary.

The second step is to identify the benefits and costs of replacing or supplementing existing means of release with various levels of electronic release. An agency should not offer an electronic information product unless the cost-benefit analysis demonstrates that the electronic alternative analyzed is likely to be superior to existing means. The third step is to define the most desirable public and private sector roles, applying principles described in Recommendation D.

Deciding to "promote" electronic publishing does not necessarily mean a direct, retail, electronic publishing and distribution role for the government, if private sector electronic publishing activities and commitments are more cost effective (see Recommendation D). Electronic publishing contemplated by this recommendation also can occur through depository libraries. In some cases it may be appropriate to retain both paper and electronic versions of the same information, even though costs almost certainly will be higher than for either form alone.

Recommendation E identifies cost and benefit categories that should be considered in applying Recommendations B, C and D. Recommendations F through J deal with discrete questions of policy and technology: For example, the use of private telecommunications systems, the undesirability of exclusive private or public control of information, and the need to stay abreast of developing technologies.

These recommendations do not address such important issues as protection of trade secrets or privileged commercial information, invasion of personal privacy, or the need for Congress and agencies to consider allocating budgetary resources so that FOIA staffs will include persons skilled in using electronic databases. Nor do they address in detail the security of electronic databases. These subjects deserve separate investigation.

The recommendations also do not address issues pertaining to automation of internal agency functions including important questions of records retention, evidentiary use of

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the role and limits of governmentwide policy; Circular A-130 is an example of such a policy. Recommendation J is consistent with Paragraph 9(c) of the Circular.

electronic records, and program administration. Rather the recommendations assume that an agency has automated or will automate an identifiable portion of its activities and therefore is confronted with the questions of whether and how to establish interfaces between internal electronic information systems and the outside world.

RECOMMENDATION

A. Freedom of Information Act

1. In interpreting the Freedom of Information Act, agencies should recognize that a "record" includes information maintained in electronic form.

2. Agencies using electronic databases rather than paper records should not deny access to the electronic data on the grounds that the electronic data are not "records," that retrieval of the electronic information is equivalent to creation of a "new" record, or that programming is required for retrieval. In responding to FOIA requests, agencies should provide electronic information in the form in which it is maintained or, if so requested, in such other form as can be generated directly and with reasonable effort from existing databases with existing software. Agencies, however, should not be obligated under the FOIA to create large new databases for private advantage, thus using agency resources for private purposes. Agencies should use a standard of reasonableness in determining the nature and extent of the programming that provides an appropriate search for and retrieval of records in responding to FOIA requests, and in determining the extent to which FOIA requesters may ask the agency to produce data organized in formats other than those used by the agency in the regular course of its operation.[3]

3. Differences in technologies and database structures used by individual agencies make it necessary, for the near term, to define FOIA obligations on a case-by-case basis. Further experience with electronic information systems is a prerequisite to the formulation of general rules applicable to such controversies under the Act as how requesters must identify the records sought, how much programming, if any, an agency must do, and how costs shall be borne. The concept of reasonableness applied to searches for paper information made in response to FOIA requests should provide a useful guideline for resolving controversies over the application of FOIA to electronically maintained data.

B. Acquisition of Information in Electronic Form

1. Agencies should acquire information in electronic form when they use, or will use, the information in that form and when most information submitters already maintain information electronically, or have ready access to intermediaries who will prepare and submit it in electronic form. When agencies sponsor electronic acquisition programs, they should make clear their intention that all information required will eventually be available to them in electronic form, either by strictly administering exceptions to mandatory programs, or by undertaking the conversion of paper submissions into electronic form themselves.

2. When most providers of information ("filers") are technologically sophisticated, it is appropriate for agencies to require electronic filing of information, after developing standard formats in consultation with the filer community, and after appropriate testing and transition periods.

3. In determining whether to require or permit electronic filing of information and in designing the particulars of an electronic acquisition program, agencies should carefully weigh the costs and benefits of electronic acquisition of information. The analysis should address the factors identified in Recommendation D together with other considerations made relevant by the agency's mandate.

4. Agencies initiating electronic acquisition programs should take steps to facilitate electronic filing by entities having limited technological ca-

[3] Agencies should be able to recover the costs of complying with FOIA requests, including programming costs, in a manner consistent with the Freedom of Information Reform Act of 1986, 100 Stat. 3207, 3207-48 (1986), amending 5 U.S.C. 552(a)(4)(A), and related OMB guidance, 52 FR 10012, 10017 (1987).

pacity (without raising the costs for sophisticated entities), including the optional use of "smart forms." When a significant proportion of the filer community is technologically unsophisticated, electronic acquisition may be feasible only through intermediaries. In such cases, agencies should create economic incentives for electronic filing rather than mandating it. Part of the economic incentive to file electronically under voluntary electronic acquisition programs can be the imposition of a fee on technologically sophisticated filers who choose to file on paper, assuming the statutory authority to do so exists.

C. Release of Information in Electronic Form

1. Electronic information release policies should depend on such factors as

(a) whether the desired level of release consists of electronic publishing, electronic disclosure, or electronic access in response to FOIA requests (see the glossary for definitions of these terms);

(b) the agency's policies in releasing like information maintained in paper records; and

(c) the costs and benefits of replacing or supplementing an existing paper medium with an electronic medium.

2. When a statute or agency policy mandates the publishing of information, the agency should itself electronically publish the information or facilitate its electronic publication by others, unless the cost-benefit analysis suggests the desirability of restricting publishing to the paper medium, possibly accompanied by a lower level of electronic release.[3] If the agency publishes the information only on paper, it should consider electronic publication of the availability of the paper information products. Where an agency publishes information electronically, it should consider the feasibility of providing dial-up access.

3. When a statute mandates public reference room disclosure, or paper products presently are made available through a public reference room, agencies should provide electronic disclosure in public reference rooms of information already in electronic form. Such agencies should consider the costs and benefits of upgrading from electronic disclosure to electronic publishing. Agencies should also make information disclosed electronically available to any requester in an electronic form that would be easily usable by information resellers.

4. In those instances where an agency maintaining information in electronic form has no mandate to release information other than in response to FOIA requests, the agency should consider upgrading release of appropriate parts of this information to electronic disclosure through public reference rooms and wholesaling in electronic bulk form to private sector requesters.[4]

D. Allocation of Responsibilities Between Public and Private Sectors

1. Agencies that have decided under Recommendations B and C to acquire or release information in electronic form should define the appropriate roles of the public and private sectors in providing that information and related products (including telecommunications facilities, indexes and retrieval software as well as raw data). That choice should depend on the relative costs and benefits of privately versus publicly provided information products.

2. When choosing between publishing and a lower level of electronic release of information, an agency should determine whether private sector providers are willing to supply electronic products having features (e.g., user-friendly menus) that will give the public greater benefits or lower costs than would electronic publishing by

[3] When a statute mandates electronic publishing, the agency would not have discretion to restrict publication to a paper medium or to a lower level of electronic release.

[4] The prices for such electronic information would be determined under the general user fee statute, 31 U.S.C. 9701, or under the FOIA. See OMB's user fee guidelines, restated in App. IV to OMB Circular A-130, 50 FR 52748 (1985).

the agency. When an agency relies on the private sector for electronic publishing of agency information, the agency should seek to establish by contract the nature of the products to be provided.

3. When an agency determines that its mission warrants new electronic means of acquisition or release of information and the private sector will not commit to provide them at appropriate prices, the agency should provide them, if clearly identified noneconomic and economic benefits outweigh the capital and marginal costs. Agencies should recognize, however, that there may be circumstances where the costs to an agency would suggest the wisdom of creating incentives for the private provision of the desired electronic information product—for example, the free use of agency-developed software.

E. Determination of Costs and Benefits

1. Agencies should take into account the following costs in the decisionmaking processes suggested in Recommendations B, C and D:

(a) Capital costs to the agency of establishing the product, and the probable economic life and other uses over which the costs should be allocated;

(b) Capital costs to information consumers and information providers to utilize the product, and the probable economic life and other uses over which these costs should be allocated;

(c) The marginal costs to the agency of user access;

(d) Marginal costs to users for obtaining the information;

(e) Marginal costs to electronic information providers of updating the electronic information;

(f) Unrecovered costs associated with existing government or private sector capital that would be made obsolete by the new product;

(g) The costs of updates and upgrades in service levels or capacity necessary to permit intended benefits to be realized at levels of demand expected over the long term; and

(h) Costs of changing to standard formats or of handling different formats.

2. Agencies should take into account the following benefits in decisionmaking processes suggested in Recommendations B, C and D:

(a) Savings associated with eliminating the cost of producing and maintaining existing paper products;

(b) Savings to agencies and consumers associated with upgrading the level of information release from ad hoc FOIA disclosure to electronic disclosure in a public reference room;

(c) Savings to agencies and consumers associated with upgrading paper public reference room disclosure to electronic publishing;

(d) Increase in the number of interested persons having access to information;

(e) Improvements in the utility of information for its intended purpose because of improved organization and retrieval capabilities; and

(f) Reductions in delays associated with transferring information from an agency to eventual consumers.

3. Cost-benefit analyses should take into account FOIA obligations, including obligations to protect trade secrets and other exempt information. In designing electronic databases, agencies should consider the types of FOIA requests likely to be received for data in the database, consulting with representative users when feasible. Insofar as it is consistent with agency mission performance, databases should be designed so as to facilitate reponses to FOIA requests. A proper rule of thumb is that it should not be any more difficult to obtain information under the FOIA after automation than before.

4. In some cases, effective design may require some sacrifices in electronic FOIA retrieval capability. In these cases, agency designers of electronic databases and retrieval software should consider how FOIA requests can be satisfied consistent with the spirit of the Act. For example, an agency might choose to make raw data available to requesters in computer-readable form along with retrieval software, so that requesters can effect their own retrievals. In other situations, new electronic information products may reduce costs of FOIA requests, to both requesters and agen-

cies. This would occur, for example, if information were published or otherwise made accessible electronically in a public reference room, rather than provided only on paper in response to FOIA requests.

F. Exclusive Control of Public Information

An agency generally should not grant a private party exclusive control of its electronic information or of the acquisition or release thereof. Nor should the agency itself as a general matter maintain such control in the absence of a compelling public purpose. Where an agency has, and wishes to exercise, authority to enter into an exclusive arrangement providing a private sector vendor with a preferential right to electronic information, the agency should first consider whether the analysis suggested in Recommendations B, C, D and E demonstrates that efficiencies can be achieved through such an arrangement. The agency should also guard against the possibility that the arrangement may be inconsistent with its responsibilities under the FOIA or may impair the ability of the agency and the public to benefit from subsequent technological developments.

G. Technology Issues

1. Agencies should use proven technologies in their electronic acquisition and release systems. They should stay abreast of the state-of-the-art in all matters related to the electronic acquisition and release of information and should be particularly alert to the need for up-to-date and effective access control and other techniques required to maintain an appropriate level of security.

2. Agencies should seek to base electronic information formats on existing standards efforts such as American National Standards Institute standards on Electronic Business Data Interchange[5] before developing their own distinctive format definitions.[6]

3. Whenever possible, agencies should use public data networks rather than developing their own communications links for public filers or consumers.

4. Agencies should consider conducting demonstration projects to experiment with evolving electronic information technology.

H. Electronic Participation in Administrative Proceedings

Agencies should experiment with electronic means of providing public participation in rulemaking, adjudication and other administrative proceedings, while retaining a means of effective participation for persons who lack the means to access the electronic information system.

I. Government-wide Policy on Electronic Information

1. A government-wide policy on electronic information is desirable to afford guidance to agencies. Such a policy should articulate goals consistent with those expressed in the foregoing recommendations.

2. Congress should formulate the larger value judgments necessary for a government-wide policy on electronic information.[7] These include the roles of public and private sectors; who ought to pay for increased information utility; and the level of funding to be provided by the government.

3. Because agencies often are in the best position to apply the considerations identified in this recommendation, Congess should normally defer to agency judgment in selecting methods to implement congressionally enacted policies when the agencies have offered rational justifications for their electronic information program decisions.

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[5] These standards are currently designated as "X.12".

[6] Cf. Recommendation 78-4, Federal Agency Interaction with Private Standard-setting Organizations in Health and Safety Regulation, 1 CFR 305.78-4.

[7] *See*, e.g., U.S. Congress, Office of Technology Assessment, *Informing the Nation: Federal Information Dissemination in an Electronic Age* (October 1988).

J. National Institute of Standards and Technology

The National Institute of Standards and Technology should continue to work with the U.S. Patent and Trademark Office to advance electronic data storage and transmission technology, as, for example, its work with high-capacity storage technology, and should inform agencies about commercially available products and services to facilitate electronic acquisition and communications.

GLOSSARY

Bulk form: Large quantities of data in nearly raw form, with little formatting information or other added value, usually maintained and transferred on magnetic tape or cassettes or high capacity optical or magnetic disks.

Data product: A specific form of electronic information, sometimes including data structures, indices, retrieval software, and telecommunications links.

Database: A body of information maintained in electronic form, from which parts can be retrieved electronically.

Dial-up: A form of electronic dissemination through which anyone with a computer, a modem, and access to an ordinary telephone line can retrieve information from an electronic database.

Electronic access: The lowest level of electronic release; the ability to obtain agency information; communicating information to consumers.

Electronic acquisition: Obtaining information from the public electronically; includes electronic filing; submitting information to an agency in electronic form.

Electronic disclosure: An intermediate level of electronic release; making information available electronically to the public at one or only a few places.

Electronic dissemination: The highest level of electronic release; using electronic means to make information widely available to the public at places where it is used; same as electronic publishing.

Electronic publishing: Same as electronic dissemination.

Electronic release: Communicating information to users in electronic form; a generic term that includes access, disclosure, and dissemination.

Hardware: Computers and associated peripherals.

Public data networks: Communications common carriers that aggregate small volume data communications and thereby reduce the cost of high-quality transmission of data.

Retailing: Providing information in a format different from that used by the government, or with accompanying analysis, aggregation or segregated subsets, enhanced search or retrieval capabilities, or otherwise tailored to be of value to specialized or individual end users; also may include distribution components of electronic release.

Retrieval: Extracting a part of a database and presenting it to the requester in a form understandable by humans.

Smart forms: Interactive computer data acquisition programs that guide the filer in answering questions.

Software: Computer programs or data.

Wholesaling: Providing resellers or large end users information only in the form used by the government or only in bulk form.

[54 FR 5209, Feb. 2, 1989]

§ 305.88-11 Encouraging settlements by protecting mediator confidentiality (Recommendation 88-11).

The resolution of issues through negotiations among the affected parties has long been recognized as an essential ingredient of the administrative process.[1] Settlements bring to bear parties' experience, foster creative solutions, and result in faster decisions requiring fewer resources than formal litigation. Most settlements now occur simply

[1] As the influential Attorney General's *Manual on the Administrative Procedure Act* explained in 1947,

[t]he settlement of cases and issues by informal methods is nothing new in Federal administrative procedure. In its Final Report, the Attorney General's Committee on Administrative Procedure pointed out * * * that "even where formal proceedings are fully available, informal procedures constitute the vast bulk of administrative adjudication and are truly the lifeblood of the administrative process."

through ad hoc negotiations among the lawyers for the parties, generally on the eve of hearing. The Administrative Conference has recommended that agencies adopt alternative means of dispute resolution ("ADR") to enhance negotiations and stimulate the possibility of reaching agreement expeditiously within the confines of the agency's authority and policy.[2]

This recommendation seeks to encourage agency use of alternative means of dispute resolution by affording appropriate protection to communications between the parties and the neutral in settlement negotiations. The Conference, of course, recognizes the principle that decisions affecting the public welfare ought to be made in the open and subject to public and judicial scrutiny. Nevertheless, since settlements are essential to administrative agencies, a careful balance must be struck between the openness required for the legitimacy of many agency agreements and the confidentiality that is critical if sensitive negotiations are to yield agreements. This recommendation attempts to strike that balance, without thwarting open decisionmaking.

Most ADR techniques, including mediation, non-binding arbitration, factfinding and minitrials,[3] involve a neutral third party who aids the parties in reaching agreement that resolves the issues in controversy. A skillful mediator can speed negotiations and increase chances for agreement by holding separate confidential meetings with the parties, where each party may give the mediator a relatively full and candid account of its own interests (rather than its litigating position), discuss what it would be willing to accept, and consider alternative approaches. The mediator, armed with this information but avoiding premature disclosure of its details, can then help to shape the negotiations in such a way that they will proceed most directly to their goal. The mediator may also carry messages between the parties, launch "trial balloons," and act as an agent of reality to reduce the likelihood of miscalculation. This structure can make it safe for the parties to talk candidly and to raise sensitive issues and creative ideas. In non-binding arbitration, minitrials and factfinding, the neutral may play a different role from that of a mediator, because he may issue a tentative decision that is then used as a basis for negotiations, but all of these neutrals have the common characteristic of helping the parties negotiate an agreement.

With all of these neutrals, many of the benefits of ADR can be achieved only if the proceedings are held confidential. Confidentiality assures the parties that what is said in the discussions will be limited to the negotiations alone so they can be free to be forthcoming. This need extends to the neutral's materials, such as notes and reports, which are produced solely to assist the neutral in the negotiation process and which others could misconstrue as indicating a bias against some party or interest. This is why many mediators routinely destroy their personal notes and drafts and return all other materials to the parties. Moreover, if the neutral were to testify in a subsequent proceeding as to what went on during the negotiations, his neutrality might be destroyed. The ADR process could be jeopardized because one party or another is likely to feel disadvantaged. Also, the parties ould justifiably feel their confidences might be threatened. All this would certainly inhibit future participation by parties and neutrals.

Limited protection for settlement negotiations and work product developed in preparation for litigation is provided by Rule 408 of the Federal Rules of Evidence and Rule 26(b)(3) of the Federal Rules of Civil Procedure. However, uncertainties as to their application—not to mention the effects on confidentiality of the Freedom of Information Act—may raise obstacles to protecting communications with ADR neutrals in federal agencies' disputes. As a result, many statutes, rules, and guidelines have explicitly provided for some degree of confidentiality of mediation and similar materials.

The Administrative Conference takes the view that maintaining confidentiality of settlement discussions is consistent with the principles underlying the FOIA, Rule 408 of the FRE, Rule 26(b)(3) of the FRCP, and the work product doctrine. To encourage the use of ADR in negotiations, the recommendation contains a model rule seeking to protect the communications between the neutral and the parties or other participants in the course of the negotiations as well as the neutral's own notes and impressions. It does so in recognition that the mediator will virtually *never* have information or evidence that is not shared by at least

[2] The Conference has repeatedly recommended that agencies employ ADR. Recommendation 86-3 calls on agencies to make greater use of mediation, facilitation, negotiation, minitrials, and other "ADR" methods to reduce the delay and contentiousness that accompany many agency decisions. *E.g., Agencies' Use of Alternative Means of Dispute Resolution*, 1 CFR 305.86-3; *Alternatives for Resolving Government Contract Disputes*, 1 CFR 305.87-11; *Procedures for Negotiating Proposed Regulations*, 1 CFR 305.82-4, 85-5; *Negotiated Cleanup of Hazardous Waste Sites Under CERCLA*, 1 CFR 305.84-4; *Resolving Disputes under Federal Grant Programs*, 1 CFR 305.82-2.

[3] For brief definitions of these terms, *see* the Appendix to Conference Recommendation 86-3, *supra*.

one other person, excepting of course the neutral's own notes, recollections, and judgments. The rule does not address (1) when meetings or negotiations should be held in public session, (2) what justification should be prepared to support any agreement reached, or (3) what information should be available from a party to the negotiations. The rule covers oral communications or actions that are related to a settlement proceeding, as well as documents that are created specifically for the negotiations or other, previously existing documents that are furnished to the neutral in confidence by a participant in the negotiation. The restrictions on the neutral's disclosing information from the negotiation are not categorically absolute, being subject to several narrow exceptions that deal with extraordinary cases. Finally, the model rule does not attempt to impose its terms on all parties for all issues; they would be free to vary the terms for their particular negotiations.

RECOMMENDATION

1. Agencies that use the services of neutrals in settlement proceedings:

(a) Should explicitly indicate that as a matter of policy they will not seek to discover or otherwise force disclosure of a neutral's notes, memoranda or recollections or of documents provided to the neutral in confidence in the course of settlement negotiations;

(b) In arranging with an individual or organization to serve as a neutral in settlement proceedings, should include a provision in any agreement with the neutral that

(i) the agency makes no claim to the neutral's notes, memoranda or recollecitons or to documents provided to the neutral in confidence in the course of the settlement negotiations and

(ii) that such material is outside the scope of the agency's right to any data developed pursuant to the agreement; and

(c) Should adopt a procedual rule, consistent with the model rule contained in the appendix below, for all cases where the agency itself is a party to the negotiations or where private parties are negotiating the resolution of an issue in controversy concerning a statute, regulation, or policy administered by the agency.

2. The neutral, including a neutral (as defined in the model rule) who serves as a presiding officer,[4] should carefully segregate, and identify as settlement documents, all materials received or developed during the course of a settlement proceeding, including any retained following its conclusion, so they will be used solely to assist the neutral in working to settle the issues in controversy.

3. Agencies should interpret the FOIA, Rule 408 of the Federal Rules of Evidence, Rule 26(b)(3) of the Federal Rules of Civil Procedure, and the work product doctrine to avoid disclosure of settlement communications by neutrals serving in administrative settlement proceedings.

APPENDIX

Model Rule

§ xxx.1 Introduction; Encouraging Settlement; ADR Techniques.

(a) To facilitate a vigorous enforcement program and expeditious administrative decisionmaking, [the agency] encourages the resolution of issues in controversy through negotiations among the affected parties. Voluntary settlement processes within [the agency's] statutory mandates and existing policies can produce decisions more efficiently than traditional procedures, and often yield decisions that are more effective than those reached without the concurrence of persons with firsthand involvement. Settlement agreements thereby enable the agency and the parties to accomplish their goals with expenditure of fewer resources.

(b) In addition to unassisted negotiations among the affected interests, alternative means of dispute resolution ("ADR") can aid the parties in reaching agreement in appropriate cases. These techniques include facilitation, mediation, minitrials, factfinding, and non-binding arbitration. In each, a neutral third party helps the parties reach a voluntary agreement. [The agency] encourages the use of these ADR processes as part of its policy favoring settlements.

[4] *See, e.g.*, Recommendation 88-5, *Agency Use of Settlement Judges*, 1 CFR 305.88-5.

(c) The voluntary settlement of issues in controversy through a dispute resolution process requires integrity, objectivity, and fairness on the part of the neutral and of the process itself. Moreover, the parties must feel free to discuss the dispute with the neutral without fear of being disadvantaged by the negotiations. [The agency] takes the position that the public policy favoring voluntary resolution of disputes therefore requires that the neutral not reveal, either voluntarily or through legal compulsion, information learned in confidence during the negotiations. To encourage the parties to negotiate, this rule enunciates an agency policy seeking to protect the confidentiality of settlement negotiations involving the neutral.

§ xxx.2 Definitions.

As used in this rule:

(a) "Issue in controversy" means a question that is material to a decision involving a statute, regulation, or policy administered by [the agency] about which persons who would be substantially affected or the agency disagree.

(b) "Settlement proceeding" means any process, such as facilitation, mediation, minitrial, factfinding, or nonbinding arbitration, that is used to resolve issues in controversy by agreement of the parties in which a neutral serves, whether or not administrative or judicial proceedings have been instituted.

(c) "Neutral" means an individual who with respect to the issues in controversy—

(1) Is not a party;

(2) Does not have any official, financial, or personal conflict of interest unless such interest has been fully disclosed in writing and all parties agree that the individual may nevertheless serve as a neutral; and

(3) Works to aid the parties in arriving at settlement of the issues in controversy through agreement.

(d) "Settlement communication" means any oral or written communication or conduct made in confidence and in connection with a settlement proceeding by any party, neutral, nonparty participant, or other source of information relevant to the proceeding.

(e) "Settlement document" means any written material that is—

(1) Prepared for the purpose of, in the course of, or pursuant to a settlement proceeding, including memoranda, notes, and work product of the neutral and the parties, or

(2) Provided to the neutral in confidence for purposes of the settlement proceeding.

An agreement reached as a result of a settlement proceeding is not a settlement document unless the parties agree in writing, and the law allows, that it shall be regarded as such.

(f) "In confidence" means with the expressed desire of the source that the information be kept confidential or provided under circumstances that would create the reasonable expectation that it will not be disclosed.

(g) "Party" means a person or entity whose dispute is the subject of the settlement proceeding, including representatives of such a party.

(h) "Non-party participant" means a person or entity who is not a party to the dispute but who participates in the settlement proceeding, such as by providing information, analysis, advice, or views.

§ xxx.3 Applicability of the Rule.

(a) This rule applies to any settlement proceeding whether or not [the agency] is a party if the parties communicate with the neutral under circumstances that reasonably imply that the parties expect that the communications will be held confidential. Prior to beginning substantive negotiations, the parties may

(1) agree that this rule does not apply to their negotiations or

(2) modify the terms of this rule by agreement in which case that agreement will prevail to the extent it is authorized by law or is otherwise consistent with this rule.

So that the neutral can decide whether he wishes to serve under those conditions, the parties shall so inform the neutral otherwise prior to commencing settlement proceedings. If they fail to do so, this rule shall apply.

(b) The provisions of the rule take effect when—

(1) A person has been specifically requested or accepted by at least one party to

(i) serve as the neutral in the settlement proceeding, or

(ii) discuss the potential of conducting a settlement proceeding, or

(iii) contact other potential parties to determine whether it would be appropriate to convene a settlement proceeding to resolve the issues in controversy;

(2) The other parties with whom the neutral has contact knows that he or she is occupying the role of a neutral; and

(3) They communicate with the neutral in that capacity.

(c) The rule does not address—

(1) The extent to which a party may disclose settlement documents and communications either voluntarily or in response to discovery or legal process; or,

(2) The information that is required to support a decision or agreement reached in a settlement proceeding.

§ xxx.4 Neutral Impartiality and Confidentiality of Settlement Negotiations.

(a) A neutral shall not voluntarily or through compulsory process disclose or testify concerning settlement communications or settlement documents, unless—

(1) All parties to the settlement proceeding and the neutral consent in writing, and if the settlement communication or document was provided by a non-party participant, that participant also consents in writing;

(2) The request is for a settlement document that was provided to the neutral in a public meeting or is otherwise already in the public domain;

(3) The settlement document is required by law to be made public, but only if it is not available from the person who prepared it or from any other source;

(4) A court determines that there is a need for such testimony or disclosure. The agency takes the position that any such determination should be pursuant to a finding that the need for disclosure to—

(i) prevent a manifest injustice,

(ii) reveal a violation of law, or

(iii) protect the public health or safety is of sufficient magnitude in the particular case to outweigh the integrity of settlement proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential; or

(5) The settlement document or communication is relevant to the resolution of a dispute between the neutral and a party or participant, but only to the extent that the document or communication is used for purposes of resolving that dispute and not any issue in controversy in the settlement proceeding.

(b) If a demand, by way of discovery request or other legal process, is made for disclosure by the neutral of a settlement document or communication, the neutral shall make reasonable efforts to notify the parties and any affected non-party participant so that countermeasures may be taken if desired.

§ xxx.5 Agency Records.

(a) The agency makes no claim of control or ownership over the notes, memoranda, and other work product prepared by a neutral or by his or her staff in connection with a settlement proceeding.

(b) The agency takes the position that settlement documents and communications are not agency records solely on account of their having been received by the neutral during a settlement proceeding; a document or other material that is otherwise an agency record remains as such.

(54 FR 5212, Feb. 2, 1989)

§ 305.89-1 Peer Review and Sanctions in the Medicare Program (Recommendation 89-1).

As the Administrative Conference noted in Recommendation 88-5 [1], the Medicare program relies heavily on implementation of federal requirements by localized carriers, intermediaries and, increasingly, peer review organizations (PROs).

The PRO system was created in 1982. It is made up of state-wide, Physician-controlled organizations under individual contracts with the Department of Health and Human Services (HHS). These contracts are negotiated pursuant to a general contractual "Scope-of-Work" promulgated by HHS every three years. PROs are delegated a number of important responsibilities under the Medicare system. They identify substandard, unnecessary or inappropriate services rendered to Medicare beneficiaries, and oversee education and corrective actions for substandard providers (e.g., hospitals) and medical practitioners. They also recommend to HHS that it sanction providers and practitioners when they find seriously improper practices, deny Medicare payment for inappropriate or unnecessary services, and protect the rights of beneficiaries.

This recommendation follows the suggestion made in Recommendation 88-5 that the PRO program was deserving of further study. It recognizes the evolutionary nature of the PRO's role in Medicare, and the administrative difficulties posed for HHS in overseeing this decentralized program—especially since new legislative directions affecting the program appear regularly, often contained in year-end omnibus budget reconciliation acts. Nevertheless, the Conference urges the Department (and, where necessary, Congress) to make changes designed to improve the accessibility of PRO-related policies, the fairness and firmness of PRO sanctions imposed on providers and practitioners, and the effectiveness of PRO safeguards for beneficiary rights.

In Paragraph A of the Recommendation, the Conference urges several enhancements of HHS' current practices in disseminating, making accessible, and soliciting comments on, PRO program guidelines of general applicability, including the scopes of work, manuals, and the criteria and norms used to evaluate medical care. Paragraph B seeks to promote improvements in the PRO's assigned duty of investigating complaints by beneficiaries, and urges Congress to allow PROs to act in response to oral complaints.

Paragraph C recommends invigorating the process of investigating and adjudicating sanctions against health care practitioners and providers charged with violations of their obligations under the Medicare program. The current sanction process begins when a PRO gives formal notice to the practioner or provider involved that it considers that poor quality care may have been rendered or that other violations have occurred. The PRO is required to have at least one quite formalized meeting with the practitioner or provider to discuss the allegations that the care rendered either "failed in a substantial number of cases substantially to comply" with the statutory obligations to render proper medical care, or "grossly and flagrantly violated such obligations in one or more instances." 42 U.S.C. § 1320c-5(b). (In the former type of case, at least two meetings are required.) If, after the meeting, the PRO believes that violations have occurred, it recommends to the HHS Office of Inspector General (OIG) that a sanction be imposed, either in the form of an exclusion from participation in the Medicare program for some period of time, or a civil monetary penalty of no more than the amount of the cost of medically improper or unnecessary services. If the OIG agrees that violations have occurred, and in addition finds that the practitioner or provider is unwilling or unable to comply with the obligations to render proper care, the OIG may impose one of these sanctions. If the sanction is exclusion, it becomes effective fifteen days after notice.[2] The sanction is appealable to an ALJ, then to the Appeals Council; judicial review is subsequently available.

This recommendation seeks to balance the vital interest in protecting the health and safety of program beneficiaries and the need to assure fairness to the accused provider or practitioner whose livelihood is at stake and whose services might be needed. The Conference urges that the current PRO sanction process be streamlined. It also urges that all providers and practitioners, not just some, be permitted to seek a stay of an HHS order to exclude them from the Medicare program, in a proceeding akin to that of a temporary restraining order at the administrative law judge adjudication stage of that process. However, the burden would

[1] ACUS Recommendation 88-5, *Medicare Appeals*, 1 CFR 305.88-5.

[2] Certain practitioners in rural areas are permitted to have the exclusion stayed, pending OIG proof that the practitioner would pose a "serious risk" to program beneficiaries if allowed to remain in the program during the pendency of the administrative appeal.

be on the practitioner or provider to show that no serious risk would be posed to beneficiaries during the pendency of the administrative appeal. The Conference also urges changes that, while maintaining the requirement that the OIG prove that violations have occured, would eliminate the additional requirement of proving that the practitioner or provider is unwilling or unable to comply with the obligations to provide quality care. The offenses or oversights, which have been found both by peers [PROs] and regulators [OIG] to be substantial or gross and flagrant, already serve as indicators of inability or unwillingness to comply. Under the current law, before excluding a provider or practitioner on the basis of these findings, the government must bear an additional evidentiary burden that is inappropriate for this type of proceeding. It must prove what amounts to a speculative negative—that violators would be unwilling or unable to comply with the law in the future. The apparent result of this evidentiary requirement has been to chill the initiation of exclusion proceedings against providers and practitioners who are providing improper care or otherwise violating the law. Further, the Conference recommends legislative changes to provide for meaningful civil money penalties, as well as for the current sanction of excluding providers and practitioners from the program. It should be noted that the Conference views the changes in the sanction procedure contained in this paragraph as a unified package, one that in its present form balances conflicting interests but that will become unbalanced if any one significant portion were not to be accepted.

Paragraph D urges changes in the PRO statute and regulations to assure that beneficiaries are better informed of their rights to appeal decisions concerning their lack of coverage or discharge from a hospital or other facility, and that they will not be discharged until such appeals are resolved. Paragraph E covers the PRO's role in denials of payment for care determined to be unnecessary, substandard or rendered in an inappropriate setting. It recommends that HHS implement in final rules 1985 legislation concerning PRO denials for substandard care.[3] It also urges HHS to amend its rules to require that PROs not make any final decisions affecting payment without adequate review by medical practitioners who are qualified in the relevant area. Finally, Paragraph F urges HHS to take steps to permit PROs to share information with provider facilities and state medical boards.

Recommendation

A. *Publication and Dissemination of PRO Program Guidelines.* 1. HHS should enhance its current practice of publishing and disseminating all Peer Review Organization (PRO) program rules having a substantial effect on providers, medical practitioners and beneficiaries by taking the following steps:

(a) Notice-and-comment procedures should be used for rulemaking except when the agency for good cause finds that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.[4]

(b) Proposed PRO "scopes of work" and any generally applicable modifications or interpretations of the responsibilities of PROs during a contract cycle should be published in the Federal Register and disseminated to relevant interest groups, interested parties should be allowed 30–45 days of commenting, unless explicit Congressional deadlines would be contravened thereby, or unless there is good cause for immediate implementation.

(c) HHS should make PRO contracts, manual instructions, and other guidelines of general applicability regarding the PRO program readily available to the public at convenient locations, including social security offices. HHS should publish an updated list of such materials in the Federal Register at least quarterly.

2. HHS should encourage PROs to use outreach and consensus-building techniques analogous to negotiated rulemaking when they are developing criteria and norms for PRO review of the quality, necessity and appropriateness of medical care.[5] HHS should further encourage PROs to make these criteria and norms consistent nationwide.

B. *PRO Investigations of Beneficiary Complaints.* 1. Congress and HHS should coordinate the system of PRO review of beneficiary complaints concerning quality of services with other federal and state regulatory schemes. Initially, priority consideration should be given to complaint investigations in the hospital setting, where PROs have the most expertise and where alternative means to investigate complaints are least available.

2. Congress should amend 42 U.S.C. 1320c–3(a)(14) to permit PROs to investigate and otherwise act on oral complaints concerning the quality of services. Until it does so, HHS should require PROs to receive such oral complaints from beneficiaries or witnesses, and reduce them to writing, before acting on them.

3. HHS should require PROs to use investigative techniques that, so far as may be feasible, protect from disclosure the identity of complainants who do not expressly and voluntarily consent to such disclosure. Where the identity of a complainant who desires anonymity cannot be kept confidential, the PRO should give the complainant the option of withdrawing the complaint in lieu of disclosure, although the PRO may at its discretion continue to investigate the underlying problem.

4. HHS should amend the PRO Scope of Work to conform to the 1986 Omnibus Budget Reconciliation Act by requiring PROs to inform beneficiaries fully regarding the final disposition of all complaints, whether involving providers or practitioners. PROs also should be required promptly to inform providers and practitioners of the final disposition of investigations involving them.

5. HHS should establish guidelines and a significantly more expedited schedule than the current several-month process for PROs to complete initial investigations of complaints of potentially life-threatening quality deficiencies. HHS also should establish procedures for receiving and acting on requests for intervention in cases where PROs do not process complaints on a timely basis.

C. *Sanctions Against Providers or Practitioners Who Have Provided Improper or Unnecessary Services.* Congress should streamline the sanction process by taking the following interrelated steps to promote heightened enforcement, while preserving fairness to the accused provider or practitioner.

1. HHS should seek to ensure greater uniformity among PROs through training and the development of a model sanction referral form. To preserve needed healthcare resources, HHS and the PROs should continue to emphasize education and corrective action rather than sanctions as the primary means of addressing quality problems. HHS should also amend its rules (a) to require that, once a PRO determines that there is a quality problem for which a sanction is the appropriate intervention, it immediately start the sanction process, and (b) to provide that, ordinarily, there will be only one formal meeting between the PRO and the accused provider or practitioner after the sanction proceeding has been initiated.

2. Congress should amend the PRO statute to offer all providers and practitioners [urban and rural], upon their receipt of an HHS notice of exclusion pursuant to 42 U.S.C. 1320c–5(b), the opportunity for a preliminary hearing and decision. Such a proceeding would be conducted by an ALJ on the issue of whether the provider or practitioner would pose a serious risk to

[3] On January 18, 1988, HHS published a proposed rule covering this subject. 54 Fed. Reg. 1988.

[4] See ACUS Recommendation 83–2, *The "Good Cause" Exemption from APA Rulemaking Requirements*, 1 CFR § 305.83–2.

[5] See ACUS Recommendations 82–4, 86–5, Procedures for Negotiating Proposed Regulations, 1 CFR § 305.82–4, 86–5

patients during the pendency of the subsequent ALJ proceeding on the merits of the exclusion. The preliminary hearing would be in the nature of a temporary restraining order proceeding, and would arise and be conducted according to the following procedures:

(a) If, within 10 days of receipt of notice of the exclusion, the provider or practitioner appeals the decision of the HHS Office of Inspector General (OIG) imposing an exclusion, a preliminary hearing on the "serious risk" issue should take place before the exclusion takes effect.

(b) If the provider or practitioner establishes at the preliminary hearing that continued participation in the Medicare program pending the ALJ's decision on the underlying appeal will not pose a serious risk to patients, or that such participation can be restricted to preclude such risk, the HHS exclusion order shall be stayed or modified by the ALJ until the ALJ issues a final decision on the merits of the exclusion.

(c) The ALJ must render the preliminary decision on the "serious risk" issue as quickly as possible but within no more than 30 days after the filing of the appeal, and a final decision on the exclusion within a time period reflecting assignment of the highest priority to the adjudication.

3. Congress should retain the requirement in 42 U.S.C. 1320c-5(b)(1) that sanctions be based on determinations that a practitioner or provider has either (A) "failed in a substantial number of cases substantially to comply" with statutory obligations to render appropriate and quality care, or (B) "grossly and flagrantly violated such obligations in one or more instances." However, Congress should eliminate the separate and additional requirement in 42 U.S.C. 1320c-5(b)(1) that the OIG must determine the provider's or practitioner's "unwillingness or lack of ability substantially to comply" with program obligations before imposing sanctions on the provider or practitioner.

4. Currently the PRO statute (42 U.S.C. 1320c-5(b)(3)) limits monetary penalties to "the actual or estimated cost of * * * medically improper or unnecessary services." In order to provide for a wider range of sanctions, Congress should amend the PRO statute to allow the OIG to assess a substantial civil money penalty for each violation against providers and practitioners who are found to have grossly and flagrantly violated their obligations on one or more occasions, or to have substantially violated such obligations in a substantial number of cases. The OIG should be given the discretion to impose such monetary penalties in addition to an exclusion where appropriate.

5. HHS should assign PRO sanction cases to ALJs attached to the Departmental Appeals Board (who currently hear other sanction cases in the Department) rather than to Social Security ALJs, as is the current practice.

D. *Notice to Beneficiaries of Noncoverage.* 1. Congress should amend 42 U.S.C. § 1320c-3(e)(3) to assure that hospitalized beneficiaries who appeal the hospital's notice of noncoverage by noon of the day following receipt of the notice, should not have such coverage discontinued until the PRO rules on their request for review.

2. HHS should amend the PRO regulations to assure that, at the time a hospital informs beneficiaries of its decision to discharge them or of the discontinuance of coverage, they are informed of their discharge appeal rights under the PRO program.

3. The notice of a right to appeal should be on a form drafted by HHS (developed in consultation with beneficiary organizations and other interested parties), and should include a concise and easily understood statement of the basic beneficiary right to a no-liability appeal to the PRO. If the current system of separate appeal tracks (depending on whether the hospital and attending physician concur or not) is retained, separate notices should be given for each track to avoid the confusion caused by a notice that describes multiple procedures.

E. *PRO Denials of Payment for Substandard or Unnecessary Care.* 1. HHS should proceed expeditiously to final rulemaking to implement PRO authority, contained in 42 U.S.C. § 1320c-3(a)(2), to deny payment to practitioners or providers for care that does not meet professionally recognized standards.

2. HHS should require by regulation that PROs not make final utilization review denials (denials of payment for care that has been determined to be unnecessary or rendered in an inappropriate setting) until a proposed denial and the response to it by the affected provider or practitioner have been reviewed by at least one practitioner qualified by professional training and experience relevant to the matters in controversy. Although HHS should at a minimum apply the same standard to reviews of denials of payment for failure to meet professional standards of care, it may be appropriate in this context to require that the review be performed by a physician practicing in the same care specialty.

F. *PRO Sharing of Information.* 1. HHS should issue PRO manual instructions and amend the Scope of Work in order to implement the Congressional mandate requiring the sharing of information among the PROs and state medical boards and licensing authorities regarding practitioners and providers who violate quality standards, and should modify its current confidentiality and disclosure regulations to require that a copy of any PRO final sanction recommendation be provided to such bodies. HHS should explore the feasibility of including sanction recommendations in the National Practitioner Data Bank.

2. HHS should amend PRO regulations to require PROs to share with hospitals information about confirmed violations of quality of care standards involving doctors on the staffs of such hospitals, including the contents of corrective action plans.

§ 305.89-2 Contracting Officers' Management of Disputes (Recommendation 89-2).

An increasing number of problems in the management of government contracts are now referred to lawyers, accountants, and judges for resolution. This accelerating trend has tended to deemphasize the responsibility of the agency contracting officers, who (in most agencies) have traditionally played a key role in the procurement process, including dispute handling.[1] Many contracting officers ("COs") today are subject to restrictive regulations and close oversight that can inhibit their willingness to negotiate settlements. For this and other reasons, many cases proceed to needless litigation that are in fact susceptible to prompt, direct resolution by COs at an early stage when parties are often less entrenched and more cognizant of program interests.[2]

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[1] Conference Recommendation 87-11, *Alternatives for Resolving Government Contract Disputes*, 1 CFR § 305.87-11, describes one aspect:

"The dispute handling system established by the Contract Disputes Act begins with the contracting officer ("CO"), an agency official whose function is to enter into and administer government contracts. Any claim arising out of a contract is to be presented to the CO. The CO has a dual role: to represent the government as a party to the contract, but also to make initial decisions on claims subject to certain procedural safeguards. If the dispute is not quickly resolved, the CDA requires the CO to issue a brief written decision stating his or her reasons. A contractor dissatisfied with a CO's decision may appeal either to an agency board of contract appeals or directly to the U.S. Claims Court, where proceedings become considerably more formal."

[2] This report addresses only dispute resolution during contract performance; it does not extend to controversies which arise during the contract formation process.

Several Conference studies have demonstrated opportunities for improving agencies' resolution of contract disputes consonant with the Contract Disputes Act's[8] goal of expeditious resolution without disrupting performance.[9] While a few agencies have experimented with alternative means of dispute resolution at the appeal level, these methods are even more likely to be useful prior to issuance of a contracting officer decision. This potential has been neglected. Current training for COs does not address ADR and gives minimal attention to negotiation skills. These methods [10] serve the agency by helping to expedite dispute handling. They serve the parties by keeping outcomes in the control of the contracting parties, preserving cooperative business relations, avoiding litigation (and the concomitant loss of control as to results), and—most important—allowing the parties to return to concentrating on productive work rather than conflict.

This recommendation builds on an earlier one (87-11), in which the Conference focused primarily on possible uses for consensual means of resolving contract disputes at the appeal level. It identified the decreased authority of COs as a major factor contributing to the inefficiency and cost of resolving many conflicts. Recommendation 87-11 [in pertinent part] calls for [1] legislation, an executive order, by the Office of Federal Procurement Policy, policy statement, and Federal Acquisition Regulation changes to encourage COs, before issuing a decision likely to be unacceptable to a claimant, to explore use of ADR to resolve their differences; [2] agency adoption of policies encouraging ADR and regular use of rules or notices to alert COs and other parties to ADR availability; [3] agency designation of an employee to serve as an ADR specialist in connection with contract disputes; and [4] agency attention to the need to offer training in negotiation and other ADR skills to COs and others involved in contract disputes.

The instant recommendation seeks to go further to enhance the CO's ability and authority in the resolution of contract disputes. Calling for CO training in negotiation and dispute handling, as well as increased use of ADR techniques as part of a CO's decisionmaking process, it supplements the prior recommendation by focusing on the integration of consensual dispute resolution into already existing dispute and training systems at the CO level, overcoming obstacles to ADR use, and practical guidance in improving CO-level dispute resolution.

Recommendation

1. Agencies with significant acquisition activity, acting in consultation with expert groups, should encourage COs, and other key personnel involved in the resolution of contract disputes, to make greater efforts routinely to consider and utilize ADR to help resolve claims. Since dispute resolution at the CO level is very much a shared activity, these persons may include program and project managers, attorneys, auditors, engineers, specialists in pricing, packaging, production, maintenance and quality control, and other technical experts or contracting officials. These agencies should undertake comprehensive programs of promotion ADR at the CO level. The programs should include application of ADR techniques in specific test cases, conduct of training, case screening, and information and guidance for personnel and contractors.

2. Agency heads should direct senior officials within the acquisition hierarchy to act as proponents for dispute resolution, with the specific mission of developing more effective contact dispute resolution practices. Agencies with extensive acquisition activity should designate a senior official within the acquisition hierarchy with the specific mission of developing more effective contract disputes resolution practices. This official's mission would include challenging barriers to wider ADR use, educating disputants in industry and government, and improving understanding and use of ADR procedures at the CO level.

3. The Federal Acquisition Regulation should be amended to describe specifically the full range of dispute resolution methods available for consideration by the parties at or before the time a claim is presented to the CO for resolution under the Contract Disputes Act.

4. COs involved in the disputes process should be specifically evaluated, as part of the annual performance evaluation cycle, on their effectiveness in managing contract disputes.

5. In addition to those techniques set forth in Recommendation 87-11, agencies should be encouraged to use the following specific methods in CO-level disputes:

(1) Employing factfinding to offer an advisory decision, or designating a CO who was not involved in the disputed issues, or a particular distinguished government official or other knowledgeable person, to make an advisory decision;

(b) Employing minitrial or other processes to permit a structured presentation of facts and arguments to the CO or other government officer with authority to settle;

(c) Agreeing in advance that disputes arising under a particular contract will be voluntarily submitted to an expert or panel for nonbinding opinion as soon as a disagreement occurs; and

(d) Encouraging agency COs to employ the services of mediators or other neutrals to enhance negotiations to settle contract disputes.

6. Board of Contract Appeals judges should take greater advantage of opportunities to suggest returning to the CO cases which evidently should be pursued more vigorously for settlement.

7. ADR training programs, for both industry and government personnel, should be integrated into existing management training programs, as follows:

(a) Training should focus on the use of these techniques as tools to improve the contract formation and contract administration process, so as to abate conditions which later lead to disputes, and to expedite decisionmaking under the Contract Disputes Act.

(b) Training should reflect the fact that negotiation is a key dispute resolution method, and that most COs would become more effective professionals by devoting increased training and attention to these methods. The Federal Acquisition Institute and other government entities specializing in acquisition training should devote increased attention to listening and communications skills, use of "interest" and "principled" rather than "positional" bargaining, and systematic attention to negotiation techniques. The training should also enable a CO to engage in meaningful discussion with a contractor by first working as a "team builder" to develop a coherent intraagency position that takes into account the views and needs of attorneys, auditors, program managers, engineers and others within the agency. Consistent with best management practice and the Packard Commission Report for greater efficiency in procurement,[11] the training should

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[8] 41 U.S.Code 601-613; 5 U.S.C. 5108(c)(2); 28 U.S.C. 1346(a)(2), 1491(a)(2), 2401(a), 2414, 2510, 2517, 31 U.S.C. 1304(e)(2)(C) (1982), enacted November 1, 1978 by Pub. L. No. 95-563, 92 Stat. 2383.

[9] Section 33.204 of the Federal Acquisition Regulation, which guides agency procurement practices, includes the following possible inducement to ADR:

"In appropriate circumstances, the contracting officer, before issuing a decision on a claim, should consider the use of informal discussions between the parties by individuals who have not participated substantially in the matter in dispute, to aid in resolving the differences."

This suggestion for a "fresh look" at the issues recognizes the potential usefulness of an objective evaluation.

[10] They include arbitration, mediation, minitrial, factfinding, convening, facilitation and negotiation. These are defined in the Appendix to Conference Recommendation 88-3, *Agencies' Use of Alternative Means of Dispute Resolution*, 1 CFR 305.88-3.

[11] *A Quest for Excellence*, Final Report by the President's Blue Ribbon Commission on Defense Management (June 1986)

encourage the CO, even without the assistance of a third-party neutral, to avert appeals by reducing the number of situations where disputes, encumbered by internal disagreements or incoherent positions, are passed on to boards of contract appeals.

(c) Professional organizations concerned with the public contract disputes process, such as the American Bar Association, Federal Bar Association, and National Contract Management Association, should develop and encourage increased learning opportunities in effective dispute resolution techniques for representatives of the government and private sector.

§ 305.80-3 Conflict-of-interest Requirements for Federal Advisory Committees (Recommendations 89-3).

The Law and practice regarding conflict-of-interest requirements for federal advisory committee members have developed from the interaction of three statutory schemes: the Federal Advisory Committee Act,[1] the conflict-of-interest laws, and the federal personnel laws. However, none of these statutory schemes was drafted to deal specifically with conflict-of-interest standards for government advisers.

In 1982 the Office of Government Ethics issued guidance to agencies that sought to mold a coherent analytical framework from the three statutory schemes. In determining whether the conflict-of-interest laws applied, the Office distinguished between those advisers who were selected as committee members because of their individual qualifications, and were thus deemed to be special government employees (SGE's), and those who instead were selected as representatives of nongovernmental groups or organizations (or in some cases, as independent contractors). While this guidance has reduced the confusion somewhat, the determination of a committee member's status as an SGE or a representative of a nongovernmental group or organization remains difficult, and agency practice in classifying advisory committee members as SGE's or representatives varies greatly and often appears arbitrary.

The classification of an advisory committee member as an SGE or a representative is significant because only the former are subject to the conflict-of-interest and financial disclosure laws. The most significant of these laws for advisory committee members is Section 208 of Title 18, United States Code, which makes it a criminal offense to participate "personally and substantially" as a government employee "through decision", " " " recommendation, the rendering of advice, investigation, or otherwise on " " " any particular matter in which to his knowledge, he, his spouse, minor child, partner, organization " " " has a financial interest." The term "particular matter" in Section 208 has been interpreted broadly by the Department of Justice and the Office of Government Ethics to extend to all discrete matters that are the subject of agency action, including rulemaking and general policy matters.[2]

Section 208 is especially a problem for advisory committee members. Often they have been selected precisely because they are especially well qualified to provide advice concerning problems in a particular field in which they themselves may be active both professionally and financially.

Because of its breadth, Congress provided for agency waivers of Section 208's prohibition, either by rule or on a case-by-case basis, where the appointing official makes a determination that the employee's interest is too remote or insubstantial to affect the integrity of his or her services. Agencies, however, may be unable or reluctant under current law to grant a waiver where a financial interest is significant, even though the agency concludes that any bias arising from that interest will be offset through committee balance, disclosure of the interest, or the individual's status as only an adviser and not as a decisionmaker.

Faced with the specter of criminal liability and the limitations of waivers, or simply for administrative convenience, some agencies have adopted a policy of declaring most or all of their advisory committee members to be interest group representatives, rather than SGE's, except in the clearest cases. Thus, in practice, agencies may be requiring too little disclosure from members who are not SGE's, while imposing significant burdens, principally potential criminal liability, on those members who are SGE's.

In this recommendation the Conference urges the establishment of a uniform minimal disclosure requirement for all advisory committee members, whether or not they are classified as SGE's.[3] The recommendation seeks to balance the government's and the public's need for information to evaluate potential conflicts of interest and the burden placed on the individual who agrees to serve on an advisory committee, frequently without pay.

The Conference also recommends that Congress direct agencies to determine, when chartering or renewing the charter of an advisory committee, whether or not the committee's responsibilities require indentifying its members as special government employees for purposes of the conflict-of-interest laws. The recommendation (¶ 2) includes criteria for making this determination. This approach places the burden of foreseeing and preventing conflicts of interest on the agency that seeks an individual's services on an advisory committee, rather than on the individual asked to serve, as does reliance on § 208 waivers.

This recommendation does not extend to privately established advisory committees that are utilized for advice in particular matters because the members of these committees are not appointed by a federal agency. Consequently, an agency's relationship with such committees must be considered on a *ad hoc* basis. Nevertheless, the Conference believes agencies should be alert to possibilities for bias or self-interest in the advice of utilized committees and, where appropriate, should request information respecting the affiliations and interests of the members.

Recommendation

1. *Disclosure by Advisory Committee Members.* (a) Congress should require that each individual selected to serve on a federal advisory committee, excluding a regular government employee, furnish to the agency or appointing authority at the time of the appointment or designation—

(1) The identity of the individual's principal employment;

(2) A list of positions held (whether paid or unpaid) and any contractual relationships for the performance of services with any corporation, company, firm, partnership or other business enterprise, any non-profit organization, any labor organization, or any educational or other institution whose activities or purposes may be (or may forseeably become) relevant to the purposes and functions of the advisory committee as determined by the agency or appointing authority and described in the committee charter;

(3) The identity, but not value or amount, of any other sources of income or any interests in a trade or business, real estate, or other asset held for investment or production of income, exceeding $1,000 in value which are relevant to the purposes and functions of the advisory committee as determined by the agency or appointing authority and described in the committee charter;

(b) Advisory committee members should be required to file updated disclosure reports annually.

(c) The agency or appointing authority should make publicly available the information furnished pursuant to subparagraphs (a)(1) and (a)(2) above. The financial information described in subparagraph (a)(3) should ordinarily be held confidential unless the member consents to its release or the agency determines after consulting with the

[1] 5 U.S.C. App. 1

[2] The test of whether a financial interest exists with respect to the matter is whether the government action in which the employee participates will have a "direct and predictable effect" on the entity in question. Participation in the presence of a known conflict constitutes a violation of Section 208, whether or not the employee's action furthers or is likely to further his or her financial interest.

[3] The Conference recognizes that advisory committee members who are classified as special government employees may be required to furnish financial information pursuant to regulations of the appointing agency or the Office of Government Ethics. It is further noted that the Office of Government Ethics has under consideration a proposed regulation governing financial disclosure for all government employees including special government employees

member that public disclosure is required in the public interest.

2. *Classification of Advisory Committee Members.* Congress, by amendment to the Federal Advisory Committee Act or other pertinent statute, should require that each agency determine, when chartering or renewing the charter of an advisory committee, whether its responsibilities are such as to require some or all of its members to be identified as special government employees for purposes of the conflict-of-interest laws. Congress should require the agency to consult with the Office of Government Ethics in making such a determination, and it should direct the agency to be guided by the following considerations—

(a) Ordinarily, where an advisory committee is expected to provide advice of a general nature from which no preference or advantage over others might be gained by a particular person or organization, the members of the committee need not be special government employees.

(b) The members of an advisory committee which renders advice with respect to the agency's disposition of particular matters involving a specific party or parties should be considered special government employees.

(c) The principal consideration in classifying an advisory committee member should be the nature of the committee's function rather than whether or not the member receives compensation.

3. *Coverage.* This recommendation applies to advisory committees which are established and whose members are appointed or designated by the federal government, and to advisory committees whose operations are funded by the government. It does not apply to privately established advisory committees which are "utilized" by the federal agencies to particular matters.

4. *Technical Amendment.* Congress should amend 18 U.S.C. 207(g) to provide that a partner of a special government employee shall not be barred from any representational activity because of that employee's participation in a particular matter where the employee himself would not be barred from such representation by 18 U.S.C. 203 or § 205.

§ 305.89–4 Asylum Adjudication Procedures (Recommendation 89–4.

Providing asylum to the persecuted is a vital and treasured part of the American humanitarian tradition. It deserves reaffirmation and continued commitment. The asylum process, however, can also become a misused exception in the nation's immigration laws, especially in a time of improved transcontinental travel and communications. Two important public values thus come into conflict in the asylum program. On the one hand stands the promise of refuge to the persecuted; on the other stands the demand for reasonable assurance of national control over the entry of aliens. This tension becomes acute whenever application numbers rise.

In the 1970s, the United States received approximately 2000 applications for asylum each year. By 1988, that number had risen to approximately 60,000 applications. The Immigration and Naturalization Service (INS) projects 100,000 applications in 1989. Government expenditures for coping with the increase have risen rapidly, both for adjudication and for detaining or otherwise arranging to shelter and feed the applicants. But this is necessarily only a stopgap measure. It would be far more cost effective in the long run to devote the resources necessary to improve asylum adjudication procedures.

Although it should be possible to distinguish qualified from unqualified asylum applicants and thereby both honor the humanitarian tradition and avoid misuse of the asylum provision, several factors hinder our ability to do so. First, the "well-founded fear of persecution" standard, upon which asylum is based, is far from self-defining; there is no uniform understanding of its application to particular cases. Second, judgments about the relative risks faced by asylum seekers upon return to their native countries are unavoidably affected by preconceptions about what conditions may be like in those countries. It may also be misleading to posit a sharp distinction between economic migrants and political refugees. Asylum seekers represent a spectrum of motivations, and many leave their home countries because of a mix of political and economic reasons. Third, the facts upon which adjudication must rest are elusive, largely because they turn on conditions in distant countries. Moreover, the individual applicant, often inarticulate and uneasy, may be the only available witness to the specific events that underlie the claim. Therefore, credibility determinations can be crucial, but they are complicated by barriers to effective crosscultural communication. Improvements in the system must make allowance for all these difficulties.

The central standard for determining whether an applicant will be granted asylum derives from the definition of "refugee" contained in a United Nations (UN) treaty, the 1951 Convention relating to the Status of Refugees, amended by its 1967 Protocol. Under section 208 of the Immigration and Nationality Act (INA), the Attorney General may, in his discretion, provide asylum to applicants who establish that they have a "well-founded fear of persecution" in the home country because of race, religion, nationality, membership in a particular social group, or political opinion. Additionally, section 243(h) of the INA establishes a mandatory country-specific protection which is known as *nonrefoulement.* Section 243(h) provides that the government may not return an alien to a country where his "life or freedom would be threatened" on any of the same five grounds. Under current administrative practice, the most important test has become the "well-founded fear" standard, because people granted asylum status are necessarily shielded against removal from the United States.

Historically, the United States has employed a mix of adversarial and nonadversarial procedures for deciding on asylum and *nonrefoulement* claims. Currently, "walk-in" claims are adjudicated by examiners in the district offices of the INS after an essentially nonadversarial interview. It typically lasts about twenty minutes as the interviewer reviews the application form (I-589) and the applicant's supporting information, and also prepares and issues work authorization papers (provided that the claim is adjudged "nonfrivolous"). The file is then sent to the State Department for its advisory views. The applicant is given fifteen days to respond to any recommendation by the State Department to deny the application. Subsequently, an INS examiner will review the file and issue a decision. This process may take eight months or more. Informal review of district office decisions is provided by the Asylum Policy and Review Unit (APRU), a small office in the Department of Justice created in April 1987.

Denials in the district office are not appealable, but unsuccessful applicants may renew the application in adversarial exclusion or deportation proceedings before an immigration judge, who will consider the matter de novo. These judges are officials in the Executive Office of Immigration Review (EOIR), which is wholly separate from INS but is also a part of the Department of Justice. Aliens who do not file for asylum until such proceedings have started have no access to the district office; they will be heard only by an immigration judge.

The immigration judge's ruling on asylum is appealable to the Board of Immigration Appeals (BIA), which is also located in EOIR. Appeals can easily consume a year or more, largely because of delays in receiving transcripts of immigration court hearings. No further administrative appeals are possible at the instance of the applicant, but on rare occasions, cases are considered by the Attorney General personally upon certification or referral. Judicial review of individual asylum denials almost always occurs as part of the review of exclusion or deportation orders under section 106 of the INA.

Administrative adjudication alone involves five distinct administrative units (the District Office, the State Department, APRU, the Immigration Judges, and BIA), only two of which see the applicant in person. This multiplicity of agencies spreads resources thin, resources that should be concentrated efficiently so as to improve the quality of the procedure and assure that genuine refugees are granted asylum.

Adjudication of an asylum claim through the various administrative and judicial levels requires several months and often consumes years. Such delays increase the attraction for marginal applicants because applicants can enjoy substantial benefits, including work authorization and freedom of movement, throughout the period their claim is pending

Deterrents such as detention or limitations on work authorization could be used to minimize this magnet effect. Those measures, however, carry substantial disadvantages. Primarily, they are indiscriminate in their impact and may fall most heavily on genuine refugees who have already suffered greatly. These measures also entail higher costs for the federal government, especially when asylum claims remain pending for lengthy periods.

The Conference believes that fair but speedy conclusion of adjudication, leading either to a grant of asylum or to an enforceable removal order, is crucial to any healthy asylum adjudication system. This objective can be promoted through attention to two elements. First, delay derives in part from the point of two separate rounds of de novo consideration of asylum claims. One unified initial asylum proceeding should be established instead. (If the alien has other defenses to deportation or exclusion, those other defenses should continue to be heard by immigration judges in contemporaneous and separate proceedings). Second, additional delay derives from the qualified right to counsel as specified by current statutes and regulations, which provide for counsel in exclusion or deportation cases "at no expense to the government". Because so many applicants are indigent, delays often result from the need to accommodate the schedules of those attorneys who are willing to take the cases on a pro bono basis—a problem that is compounded when applications increase in a particular geographic location. A healthy system of asylum adjudication must be able to schedule hearings expeditiously, even if pro bono counsel are not immediately available in sufficient numbers. Fairness must be sought, therefore, through hearing procedures, training, and monitoring that assure a special role for the adjudicator in developing a complete record when the applicant is not represented.

The conference also believes that a healthy asylum adjudication process must foster the greatest possible accuracy as well as public confidence that decisions are rigorous, professional, and unbiased. Reliance on a specialized adjudicative board without routine reference of applications to the State Department would serve these ends and minimize any perception that asylum decisions are influenced by political considerations. Additionally, arrangements must be made to provide the adjudicators with information concerning foreign country conditions that is as accurate and complete as possible, derived from a wide variety of sources, both to help dislodge any preconceptions and to foster systematic expertise for use in developing the record and making the ultimate judgment on the claim.

For several years the Department of Justice has been considering amended asylum regulations that would serve many of these ends. A version proposed in August 1987 [52 Fed. Reg. 32552] would have established a specially-trained corps of adjudicators, responsible to the INS Central Office rather than to the district directors, and it would have eliminated de novo reconsideration of asylum claims by immigration judges. These regulations drew criticism, in part because of concern about the professionalism and independence of the adjudicators, and the Department responded with modified proposed regulations in April 1988 [53 Fed. Reg. 11300] that retained the new corps of adjudicators but also restored the availability of de novo consideration before the immigration judges. Those regulations are still pending in the Attorney General's office and the Department has encouraged this study and analysis.

Recommendation

The Attorney General should adopt regulations creating a new asylum adjudication process that would eliminate much of the duplication and division of responsibility associated with the current complicated system. Resources should be applied to enhance the professionalism, independence, and expertise of the adjudicators, and to assure fair and expeditious adjudications, so that genuine refugees may be speedily given a secure status and unqualified applicants, absent circumstances which would allow them to remain in this country, may be promptly deported.

I. Creation of a New Asylum Board

The Attorney General should create a new Asylum Board located, for administrative purposes, within the Executive Office of Immigration Review (EOIR) of the Department of Justice and consisting of an adjudication division, an appellate division, and a documentation center. The chairperson of the Asylum Board would be responsible for administrative support and supervision of the operation of all three units.

A. *The Adjudication Division*—1. *Jurisdiction.* All claims for asylum under section 208 of the Immigration and Nationality Act (INA) or withholding of deportation under INA section 243(h) (hereinafter collectively "asylum" claims) should be heard exclusively by asylum adjudicators in the adjudication division of the Asylum Board.

2. *Nature of the asylum hearing.* Asylum claim proceedings should be recorded.[1] The asylum adjudicator should be responsible for developing a complete record of the specific facts relating to the applicant's claim, including those which might support a grant of asylum and those which might cast doubt on the claim or on the applicant's credibility. Care should be taken to assure the service of skilled interpreters. The adjudicator should be responsible for most of the questioning, with a reasonable and adequate opportunity for additional questioning and entry of relevant information, including the presentation of witnesses, by the applicant and counsel. The Immigration and Naturalization Service (INS) should not be represented as an opposing party in the proceedings.[2]

3. *Representation of applicants.* Applicants should be encouraged to secure counsel (or a qualified nonattorney representative) to develop the initial claim and to provide representation during the asylum proceedings. Although reasonable accommodation should be provided for counsel to be obtained, proceedings should not be unduly delayed, because expeditious initial decisions are essential.

4. *Use of official notice of country conditions.* Asylum adjudicators should develop substantial cumulative expertise regarding country conditions, to be used in developing the record, and should be responsible for posing illuminating questions to the applicant and other witnesses, for evaluating evidence, and for reaching the ultimate determination about likely risks to the applicant upon return to the home country. The accepted standards for official notice, in accordance with the Administrative Procedure Act, should govern use of such information. Ordinarily, these standards will simply require an adequate statement of reasons for accepting or rejecting the asylum claim, reflecting such expertise. In instances when specific and detailed facts developed from the documentation center or other sources (and not from information supplied by the applicant) appear to be crucial, the applicant should be given notice of intent to deny based on such information, along with an opportunity to offer information or argument in rebuttal.

5. *The adjudicators.* Asylum adjudicators should be recruited from among attorneys possessing adjudicative skills and appropriate judgment and temperament, with close attention given to those who are familiar with international relations and refugee affairs and who are sensitive to the difficulties of cross-culture communication. Adjudicators should receive salary, benefits, and guarantees of adjudicative independence equivalent to those of immigration judges, and they should be assigned no other enforcement or adjudication responsibilities. The adjudicators should

[1] The Administrative Conference recommends experimentation with other methods for creating a record that would maintain flexibility but preserve objectivity, professionalism, and fairness to the applicant.

[2] The Administrative Conference takes no position on the possible application of the Equal Access to Justice Act to asylum proceedings.

be given thorough and ongoing training, especially on techniques for fairly conducting this specialized type of proceeding and on conditions in those countries from which a substantial number of asylum applications is received. If, alternatively, a separate Asylum Board is not created and the adjudication assignment is given to immigration judges, then such judges should be assigned to a separate unit in EOIR.

B. Appellate Division—1. *Composition and functions.* The appellate division of the Asylum Board should consist of the chairperson and two additional members, assisted by staff attorneys and other support personnel. The division's principal responsibilities should be to consider appeals filed by persons denied asylum at the initial stage, in light of the administrative record compiled before an adjudicator, and such other information as the applicant may wish to submit or of which official notice may be taken. The division, however, should also monitor cases, and should have the authority to require certification to it of selected cases, either granting or denying asylum, in order to foster consistency, fairness, and political neutrality. It will thus absorb the principal functions now performed by the Asylum Policy and Review Unit.

2. *Certification or referral to the Attorney General.* The Attorney General should retain the authority to review decisions of the Asylum Board, upon formal certification or referral or *sua sponte*.

3. *Expeditious completion of appeals.* A high priority should be placed on completing all asylum appeals expeditiously, preferably within three months of filing. The Department of Justice should ensure that transcripts, where required, are made from recorded hearings in a timely fashion.

C. *Documentation Center.* A documentation center, staffed with regional specialists, should maintain current and detailed information on country conditions, from both governmental and nongovernmental sources, periodically compile and publish usable summaries on selected countries, and respond to requests for more specific information received from officials of the Asylum Board. Special effort should be devoted to assuring complete compilations of ongoing reports from established nongovernmental human rights organizations, and to drawing upon information from documentation centers in other countries. Information and procedures developed by other countries can be particularly useful in minimizing start-up costs. The center's collections and publications shall be accessible to the public.

D. *Role of the Department of State and the United Nations High Commissioner for Refugees.* The Department of Justice should take advantage of resources, assistance, and information available through the State Department and the United Nations High Commissioner for Refugees (UNHCR). In particular, arrangements should be made with both to assist in training adjudicators and to augment information available through the documentation center.

If it so requests, on an across-the-board or country-specific basis, the State Department should receive notice of individual asylum applications, so that it may offer its judgment, in particular, about appropriate responses in sensitive, such cases, as those involving foreign government officials.

II. Detention

Where detention of asylum seekers is deemed necessary,[9] the Department should limit it to short-term detention in "asylum processing centers", as recommended by the Select Commission on Immigration and Refugee Policy. Such centers should also keep families together wherever possible, minimize the length of detention, provide assistance in securing representation, and otherwise foster conditions which reflect that the purpose of detention is not punitive.

III. Deportation

The Department of Justice should ensure that individuals denied asylum are removed promptly if they are otherwise excludable or deportable, subject to any policy decision by the Attorney General to grant extended voluntary departure to nationals of particular countries.

IV. Judicial Review

Judicial review of asylum denials should be available as part of the review under section 106 of the INA for orders of deportation or exclusion. Appropriate arrangements therefore should be made to combine, for purposes of judicial review, the record of proceedings before the Asylum Board with that of the regular deportation or exclusion proceedings before the immigration judges and the Board of Immigration Appeals.

[9] The Administrative Conference does not take a position on the suitability of detention in asylum proceedings.

§ 305.89-6 Achieving Judicial Acceptance of Agency Statutory Interpretations (Recommendation 89-6).

Agencies continually interpret the statutes they administer. Their interpretations are expressed in a great variety of formats—including, among others, legislative regulations, adjudicatory opinions, court briefs, interpretive rules, policy statements, staff instructions, correspondence, informal advice, press releases, guidance manuals, testimony before Congress, speeches, and internal memoranda. This recommendation addresses the relationship between the procedures used by an agency in interpreting a statute and the role of the courts in statutory interpretation.

Interpretation of a statute presents a question of law, traditionally the province of the judicial branch [see the scope of review provision of the APA, 5 U.S.C. 706]. However, for many years courts have accorded respectful attention or even controlling effect to interpretations of statutes made by the agencies that administer them. In some situations, in which the courts reserve the power to arrive independently at their own interpretations, they will give respectful consideration to an agency's construction but may reject it, even if it seems reasonable. In other cases, courts consider themselves bound to accept an agency's interpretation outright, provided only that it is consistent with the statute and is reasonable. The law governing judicial acceptance of agency statutory interpretations is now dominated by *Chevron U.S.A.* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984). In that case, one involving legislative rulemaking, the Supreme Court laid out a general framework for reviewing agency interpretations of statutes. First, the court is to determine whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, the court (like the agency) must give effect to the congressional intent. Where Congress' intent is not clear, however, the court must determine whether the agency's interpretation is based on a reasonable construction of the statute. Chevron thus requires a reviewing court to accept an agency interpretation that [a] is not contrary to statute or specific statutory intent and [b] is reasonable.

When an agency issues a legislative rule or interprets its statute in a formal adjudication, its interpretation of the statute it administers is entitled to judicial acceptance under the *Chevron* standard. Similarly, acceptance under the *Chevron* standard is appropriate if the reviewing court finds a congressional delegation of authority to make definitive interpretations in an informal format such as the informal agency staff ruling involved in *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555 [1980]. But agencies rarely possess congressionally delegated authority to make definitive interpretations, carrying the force of law, by informal means. Thus, when an agency states its interpretation of a statute in an informal format, it should understand that courts ordinarily will not be bound to accept such an interpretation.

This is not to say that reviewing courts may ignore an agency interpretation set forth

eliminated. However, in order to distinguish large interests from those of lesser significance, the reporting individual should be required to state whether each particular asset, liability or transaction was in excess of a specified higher amount (*e.g.*, $50,000 or $100,000 each).

(3) *Sources of Earned Income Prior to Government Service.* The requirement that all nominees for covered positions report the source, type and amount of non-government earned income which they received in the year prior to entering government service should be eliminated, except for amounts in excess of $5,000 received from one source (*see* 2 a (2) above).

(4) *Income from Assets Otherwise Reported.* The requirement that both incumbents and nominated officials report income in excess of $100 from each of their investments should be eliminated because the assets themselves are already reported.

(5) *Reimbursements and Gifts.* (i) *Reporting Period.* The date after which all covered reimbursements and gifts should be required to be reported should be the date on which the official is nominated for or appointed to the position covered by the Ethics in Government Act, not the date the official takes office.

(ii) *Reimbursement and Gifts of Travel or Entertainment.* The threshold amount for reporting reimbursements and gifts of transportation, lodging, food or entertainment, other than personal hospitality from an individual, received by the reporting individual from any source other than a relative during the reporting period should be changed from $250 per year to a per event amount (*e.g.*, $100 or $150) to avoid reporting de minimis information. The statute should be amended further to require, in addition to the source and a brief description, the reporting of the value or amount of such reimbursements or gifts in broad categories (*e.g.*, under $1,000; $1,000 to $10,000; over $10,000) in accordance with regulations issued by the Office of Government Ethics.

(iii) *All Other Covered Gifts.* The requirement of reporting all gifts to the reporting individual, other than gifts of transportation, lodging, food or entertainment, which aggregated more than $100 in value over the reporting period, excluding gifts from relatives of the reporting individual, and not aggregating gifts of $35 or less in calculating the $100, should be retained. However, the statute should be amended to require, in addition to the source and a brief description, the reporting of the value or amount of such gifts in broad categories (*e.g.*, under $1,000; $1,000 to $10,000; over $10,000) in accordance with regulations issued by the Office of Government Ethics.

8. New § 310.14 is added to Part 310, to read as follows:

§ 306.89-7 Federal Regulation of Biotechnology (Recommendation 89-7).

New biotechnology techniques promise great benefits in fields such as medicine, agriculture, and manufacturing. However, these new techniques, which involve alteration of the genetic structure of an organism, have raised concerns that some new organisms or products may be dangerous to individuals or detrimental to the environment. This recommendation addresses coordination of federal regulation in this area and the procedures agencies use to regulate biotechnology development, testing and use.

Genetically-engineered organisms are regulated under a variety of statutes enacted to prevent or reduce society's exposure to unsafe or harmful products or substances. The agencies with such statutory authorities currently share responsibilities for regulation of biotechnology in accordance with policy statements issue in 1986 by the agencies and by the Director of the Office of Science and Technology Policy (who serves as the President's Science Adviser).[1] In its policy statement, the Office of Science and Technology Policy (OSTP) attempted to clarify the responsibility of each agency where more than one agency shared jurisdiction to regulate biotechnology areas.

The Conference recommends a continuation of interagency coordination under the auspices of the OSTP. Experience does not currently indicate that new legislation is needed for effective interagency coordination of biotechnology regulation. On the other hand, the Conference believes that both the President and the Congress should monitor closely the coordination process because of the importance of this area to the nation's economic and social well-being.

The Conference also recommends that the President and the Congress, through the OSTP and the Office of Technology Assessment (OTA), survey biotechnology developments and agency regulation of biotechnology under existing statutes to determine whether current law and regulation provide adequate authority to protect public and private interests or whether in particular instances current regulation is unnecessary. The survey should identify whether nonregulation of any particular area reflects an agency decision not to use its authority to regulate or an absence of regulatory authority.

The Conference also urges changes in the coordination role for biotechnology regulation performed by the President's Office of Science and Technology Policy. Most importantly, the Conference urges the President to make the work of the Office's Biotechnology Science Coordinating Committee (BSCC) a high priority. A revitalized BSCC can help agencies coordinate their activities concerning biotechnology development, regulation, funding, and biosafety research. To fulfill this mandate, the Conference believes the BSCC's role should emphasize fact-finding, reporting, and serving as a clearinghouse for information relating to biotechnology.

The Conference recommends that agencies engaged in biotechnology regulation articulate their policies through generic rules and policy statements to the extent possible. Since public acceptance of agency decisions is especially important in this area and because of the novelty and uncertainty of the risks associated with biotechnology, the Conference encourages agencies to adopt appropriate procedures to allow public participation. Agencies are also encouraged to seek ways to make biosafety information available to the public to the maximum extent consistent with protection of the proprietary interests of submitters of confidential business information.

Recommendation

1. Biotechnology Regulatory Structure

(a) Interagency coordination is critically needed to mitigate problems caused by concurrent regulation of biotechnology by two or more agencies. The Office of Science and Technology Policy's Biotechnology Science Coordinating Committee (BSCC) should have primary responsibility for identifying issues, exchanging information and preparing reports concerning issues common to several agencies. Responsibility for establishing uniform government policies should be retained by the Office of Management and Budget working in coordination with the BSCC.

(b) The President and Congress should survey biotechnology developments and agency regulation of biotechnology under existing statutes to consider whether and in what respects current regulation of biotechnology is inadequate or excessive. To facilitate this, the President's Office of Science and Technology Policy (OSTP) and Congress' Office of Technology Assessment (OTA) should, jointly or separately, identify all areas of biotechnology activity and determine the extent to which they are being regulated. OSTP and OTA should assess whether or not additional or diminished regulatory authority is desirable in such areas and furnish their findings and recommendations to the President and Congress.

2. Regulatory Coordination

(a) The President should make coordination of the government's activities relating to biotechnology a high priority. This should include:

(1) Monitoring the effectiveness of interagency coordination;

(2) Directing the Science Adviser to enlarge the membership of the BSCC to include all federal agencies that have substantial responsibilities for biotechnology research, development, or regulatory policy; and

(3) Directing the Science Adviser to invite representatives of other agencies to participate in the BSCC's activities, as appropriate, such as when their regulatory or other official responsibilities may be affected.

(b) The BSCC should have a broad subject-matter mandate, including issues of biotechnology development, regulation, funding, and biosafety research. The Committee's role should emphasize fact-finding, reporting, and serving as a clearinghouse for information relating to biotechnology.

(c) The Science Adviser should establish a policy for the BSCC that will foster opening its proceedings to the public.

(1) Meetings of the BSCC should be open to the public unless they involve confidential information.

(2) Members of the public should be allowed to provide comments to the BSCC either orally or in writing.

(3) The BSCC may invite advice from experts outside the government.

(4) The BSCC should keep minutes or other records of its proceedings.

[1] OSTP, Coordinated Framework for Regulation of Biotechnology: Announcement of Policy and Notice for Public Comment 51 FR 23302 (1986)

including the reasons for closing any meetings.

3. Regulatory Procedures

(a) Agencies should, where appropriate, seek opportunities to promulgate generic biotechnology rules to address recurring regulatory issues.

(b) Agencies should consider the adoption of rules or policy statements to enunciate the principles or criteria they will include in their risk assessment and management decisions. When adopting policy statements, agencies should follow the public participation procedures set forth in Conference Recommendation 76-5.[6]

(c) Agencies should consider adopting appropriate procedures to allow public participation and other forms of input when making regulatory determinations concerning biotechnology. Such procedures might include:

(1) Giving notice to the public with an invitation to submit comments concerning the determination;

(2) Providing additional notice of pending regulatory actions to persons who live near sites where proposed activities would take place;

(3) Holding informal public hearings to supplement written procedures; or

(4) Utilizing advisory committees under the Federal Advisory Committee Act.[6]

(d) Agencies should seek ways to meet the public's need for biosafety information about substances or organisms produced through biotechnology, without divulging confidential business information.[4] Such steps might include:

(1) Requesting submitters of confidential business information to focus their claims for confidentiality as much as possible;

(2) Requiring submitters of data that include confidential business information to identify those portions that are claimed to be confidential and to substantiate their claims at the time of submission; and

(3) Summarizing or aggregating confidential data in a manner that does not compromise confidentiality.

§ 305.89-6 Agency Practices and Procedures for the Indexing and Public Availability of Adjudicatory Decisions (Recommendation 89-6).

This recommendation examines the obligation of agencies to index and make their adjudicatory decisions available to the public.

The Freedom of Information Act (FOIA) imposes numerous affirmative disclosure obligations on agencies. Under 5 U.S.C. 552(a)(2), each agency, in accordance with published rules, is required to make final adjudicatory decisions and orders [1] available for public inspection and copying unless the materials are promptly published and copies are offered for sale. In addition, each agency shall maintain and make available for public inspection and copying current indexes that provide identifying information for the public as to any matter issued, adopted, or promulgated. FOIA further mandates that each agency shall promptly publish, quarterly or more frequently, and distribute copies of each index unless it determines, by order published in the Federal Register, that such publication is unnecessary and impracticable.

Many agencies do, in fact, index and publish or otherwise make available to the public their adjudicatory decisions, as required under FOIA (e.g., the National Labor Relations Board, the Merit Systems Protection Board, the Interstate Commerce Commission, the Securities and Exchange Commission). This recommendation, then, is addressed to those agencies which either entirely fail to index, publish or make their decisions available to the public or fail to do so adequately, whether or not they see adjudicatory precedent to pronounce and develop agency policy.

Debate has surrounded consideration of an appropriate test for determining which types of adjudicatory decisions are included in the affirmative disclosure obligation. The Attorney General initially expressed the opinion that FOIA requires that agencies index only those decisions cited by an agency or relied upon as precedent. This limitation, in the view of the Attorney General, was derived from both the enforcement provision in the statute, which precludes the agency from giving precedential effect to matters not indexed, and the legislative history of the statute, which indicates that the disclosure provision was intended to make available documents having precedential significance. The Attorney General also was influenced by the impracticality of indexing all agency decisions.

Application of the affirmative disclosure requirements, beyond simply precedential decisions, however, offers several advantages. First, if agencies index all significant decisions, and not just those decisions deemed to be precedential, agencies would be less inclined to be restrictive or one-sided in the selection of cases to be accorded precedential effect. Second, private parties affected by agency action would be in a better position to learn of and influence agency policy. Third, a broader application of affirmative disclosure requirements would implement the underlying aim of the FOIA indexing requirements which is to afford citizens the essential information needed to deal effectively and knowledgeably with federal agencies and to guard against the development of secret law. Lastly, a current index of final decisions may assist agencies in developing standards and policies with respect to general issues and recurring questions.

The few cases dealing with the FOIA affirmative disclosure obligations have generally read the precedential test broadly. They require disclosure not only of decisions that an agency considers to be binding but also all decisions that an agency retains for general reference and research. The recommended approach to the indexing and public availability of final decisions focuses less on the binding nature of the precedent and more on the value that decisions can have to inform and assist the public.

Recommendation

1. Indexing of Agency Decisions

Agencies that do not already do so should compile a subject-matter index of their adjudicatory decisions so as to afford citizens information useful in dealing with the agencies and to assist the development of agency standards and policies on general issues and recurring questions.[6]

In meeting FOIA indexing requirements, agencies should ensure that a subject-matter index is made of their decisions and that the index includes all significant decisions, whether or not the decisions are designated as precedential.

2. Level and Scope of Decisions Indexed

The index should cover the adjudicatory decisions of the agency's highest level tribunal. The agency should also consider whether to index significant lower level decisions that have become final. The adjudicatory decisions intended to be covered by this recommendation are those made with an accompanying written opinion or rationale in contested cases after an opportunity for a hearing at some stage of the proceeding.

3. Index Contents

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[6] ACUS Recommendation 76-5, Interpretive Rules of General Applicability and Statements of General Policy, 1 CFR 305.76-5 (1986).

[6] See ACUS Recommendation 82-5, Federal Regulation of Cancer-Causing Chemicals, Part IV, 1 CFR 305.82-5 (1989).

[4] See ACUS Recommendation 81-1, Exemption (b)(4) of the Freedom of Information Act, 1 CFR 305.81-1 (1986).

[1] This subsection also covers agency statements of policy and interpretations, as well as administrative staff manuals and instructions to staff that affect a member of the public. The Conference has already recommended that agency policies that affect the public should be articulated and made known to the public to the greatest extent feasible. ACUS Recommendation 73-3, "Articulation of Agency Policies." See also ACUS Recommendation 70-3, "SEC No-Action Letters Under section 4 of the Securities Act of 1933."

[6] In programs where the agency has established a policy that none of its decisions have precedential effect, the Conference urges that the agency re-examine the feasibility of creating a system that accords certain decisions precedential value to provide guidance about the factors that influence their decisions and to ensure better development of agency policy and standards. See ACUS Recommendation 87-7, "A New Role for the Social Security Appeals Council," 1 CFR 305.87-7. See also ACUS Recommendation 71-8, "Procedures of the Immigration and Naturalization Service in Respect to Change-of-Status Applications."

Agency indexes should be designed for effective and efficient use. These indexes should contain sufficient information on each indexed decision to identify the major issues decided and the location of the case file. Agencies should adopt one of the following practices in indexing their adjudicatory decisions:

A. *Universal Index.* Index all final decisions; or

B. *Selective Index.* Where the volume of decisions makes a universal index impracticable or uninformative, selectively index final decisions omitting those decisions that are repetitive. The selective index should include all significant decisions. Decisions may be significant because they are deemed by the agency to be precedential or otherwise establish a principle to govern recurring cases with similar facts, develop agency policy and exceptions to the policy in areas where the law is unsettled, deal with important emerging trends, or provide examples of the appropriate resolution of major types of cases not otherwise indexed.

4. Public Notice of the Index

Agency indexes should be fully disclosed and readily available. Appropriate notice of the existence of unpublished decisions should also be given in both the agency's FOIA regulations and the procedural or substantive regulations governing the specific program.

5. Computer Technology

Agencies should explore the use of computer technology in order to promote accessibility and reduce costs of indexing.

§ 305.89-9 Processing and Review of Visa Denials (Recommendation 89-9).

United States consulates around the world complete the processing of some nine million applications for immigrant and nonimmigrant visas each year. Approximately ninety percent are granted, ten percent are denied. Under current practice, the only review of a consular official's denial of a visa may be by a more senior officer in the consulate, or, on points of law, by the Visa Office in the State Department. The Immigration and Nationality Act has been read to preclude administrative review, and the courts, with a few exceptions, have declined to review visa denials.

Immigrant visas are available to persons with close family relationships to U.S. citizens and residents, or with particular abilities or skills that are needed but not otherwise available in the United States. Nonimmigrant visas are available in a long list of classes, ranging from tourists to students to certain types of business personnel to diplomats.

Whatever the visas category or class, there clearly are important interests at stake. These interests are not just those of the applicants themselves, but also of citizens and residents of the United States who are sponsoring the applicant or have some other interest in the applicant's presence in the United States. These interests warrant a close look at whether initial decisions in this important program of mass adjudication should be more fully reviewable than at present.

Federal law and State Department regulations give consular officers substantial discretion in adjudicating visa applications. For example, consular officials exercise absolute discretion in determining whether an applicant may be represented by an attorney or other qualified representative at the visa application interview. Furthermore, although current Department regulations, at 22 CFR 41.121(c), require that a denial of a visa application be reviewed by a more senior officer, the high volume of applications at some posts has resulted in only a random sample of denials being reviewed. Review by a senior official may also be a problem in single-officer posts.

Consular posts send a few hundred cases a year presenting significant legal issues to the Visa Office of the State Department for an advisory opinion that is binding only with respect to legal issues. The applicant typically has no notice of this proceeding. Such review affects the results in only a small number of cases, since most visa denials are based on a factual determination.

Current law has been read by some to limit both administrative and judicial review. Section 104(a) of the INA, 8 U.S.C.1104(a), excepts the Secretary of State from the administration or enforcement of "those powers, duties and functions conferred upon the consular officers relating to the granting or refusal of visas." This language has been considered by some to preclude the establishment of a more formal review mechanism within the State Department. Further, courts have generally limited the extent of available judicial review.

The Conference believes that it is important that there be at least some level of review of consular discretion to deny or grant visas. The availability of such review would not only encourage consistency and care in the initial adjudication, but would serve interests of fairness and legitimacy. On the other hand, a review scheme in this area can be crafted in a fashion that keeps procedure to a minimum, takes account of the extremely high volume of visa applications, and avoids over-judicialization of the process.

The Recommendation reflects a two-pronged approach to administrative review of visa denials, aimed both at improving the review at the consular level and at considering the creation of a level of centralized administrative review. The suggestions directed at the consular offices are intended to encourage quick, consistently applied, and cost-effective review that would resolve many of the issues on which review might be requested. The Recommendation also asks the State Department to study the issues, and develop and submit to Congress a proposed process for administrative review of consular actions. The Conference recognizes that there are currently competing priorities for resources that might be required by implementation of the Recommendation, but believes that these proposals should be implemented as quickly as is feasible under the circumstances.

Recommendation

1. The State Department should adopt a regulation ensuring that applicants may be accompanied by an attorney or other authorized representative during the course of the visa application interview process. To the extent practicable, the State Department should take steps to reply promptly to communications from applicants or authorized representatives and to ensure that facilities are available to enable applicants to meet with their representatives during the application interview process.

2. The State Department should require consular officers to provide brief but explicit written statements of the factual and legal bases and reasons for denying a visa application, except where reasons of national security or potential adverse effects on foreign policy dictate otherwise.

3. The State Department should modify its regulations to allow Visa Office advisory opinions to be made available to applicants and their authorized representatives except where national security or potential adverse effects on foreign policy dictate otherwise.

4. The State Department should either comply with its regulation found at 22 CFR 41.121(c) requiring review within a consulate of each denial of a visa application, or examine alternative systems to review visa denials at consular posts. In such a study, the State Department should keep in mind the goal of ensuring consistency in visa adjudications and consider possible alternatives to address exigencies created by busy consular posts, for example, by reviewing random samples of visa denials, or selecting for review certain types of denials.

5. The State Department should, after appropriate study, develop and submit for Congressional review a proposed process for administrative review of consular visa actions.[1]

§ 305.89-10 Improved Use of Medical Personnel in Social Security Disability Determinations (Recommendation 89-10).

The Social Security Administration annually processes more than 1.5 million requests for Disability Insurance Benefits and Supplemental Security Income requiring a determination whether the claimant is disabled. The Administrative Conference has

[1] If it is thought that current law precludes such a State Department study, Congress should authorize the State Department to undertake the study.

addressed various aspects of the Social Security Administration's administrative procedures in earlier recommendations.[1] This recommendation focuses more specifically on the appropriate use of medical personnel in making disability determinations.

The Social Security Administration (SSA) uses medical personnel currently in two ways. First, initial and reconsideration determinations are made for SSA by federally funded state agencies that use teams composed of one lay disability examiner and one medical doctor or psychologist.[2] Second, medical sources are used to provide evidence of disability in individual cases and to explain or elaborate upon medical evidence obtained from other sources. Medical sources provide evidence relating to individual claims to state agencies at the initial decision and reconsideration levels, to administrative law judges at the hearing level, and to the Appeals Council. Requests can be made to the claimant's treating physician or to an independent physician who is asked to examine the claimant and report on his or her findings. Doctors are asked by some administrative law judges to explain or elaborate upon existing medical evidence; other administrative law judges and most state agency personnel do not use independent medical doctors for these purposes. Medical personnel are involved in the disability determination process for other federal disability programs as well. Although the extent to which they are used varies from program to program, programs typically concentrate the use of medical personnel at the initial decision stage, as does the Social Security Administration.[3]

There is no doubt that medical personnel can offer valuable assistance in making disability determinations called for by the Social Security Act. Notwithstanding the mixed medical and legal content of the Social Security Act's disability standards, most disability determinations require the resolution of medical issues in one form or another. At the same time, it must be recognized that doctors cannot simply apply their general medical expertise to the work of determining disability under a complex and multi-faceted statutory disability standard. Doctors are accustomed to evaluating a person's limitations in the context of treatment; they are oriented professionally to identify the cause of and resolve limitations, rather than to identify limitations and then measure them against stated requirements for receipt of benefits. These recommendations are intended to help reconcile the needs of the Social Security Administration disability determination process for medical expertise and the ability of the medical profession to meet those needs.

Medical personnel perform three main functions in current practice. First, they assist in developing the medical records on which disability decisions are based. Second, they provide medical evidence for the record, including medical findings and opinions relating to an individual claimant's impairments and explanations of other medical evidence already in the record. Third, they participate in making disability decisions at the initial and reconsideration levels based on the record.

Each of these functions suggests models for using medical decisionmakers in Social Security disability determinations. The first model would increase the responsibility of medical personnel for compiling all relevant medical evidence. Medical personnel would concentrate on evaluating the adequacy of the record and following up with requests for clarification and additional information from treating and consulting medical sources. Medical personnel would also be given specific responsibility for assuring that all medical evidence in the record is clear and understandable to both medical and non-medical decisionmakers. The second model would improve the use of doctors as sources for supplying medical data and opinions on which disability decisions can be based. This model also supports the use of medical personnel to evaluate and resolve certain specified medical issues relevant to a claim if, in a particular case, there are medical issues that can be identified as appropriate for separate decision. The third model would make more effective use of medical personnel in decisionmaking role. This model would concentrate medical resources at the initial decision level, where a doctor would share the responsibility for decisionmaking with a non-medical disability examiner. The doctor member of the team would be given special responsibility for certain tasks, and would undertake a full and independent review of the entire record in each case. The expectation is that through open exchange of information between the two decisionmakers and a reasonable allocation of responsibility based on each member's expertise, most disability determinations will be made by consensus. If conflicts arise on medical issues, separate medical personnel would be given the authority to resolve those conflicts.

The following recommendations would implement the important provisions of each of these models. Implementing these recommendations would require greater expenditures for medical personnel and related support at the state agencies. However, additional costs should be offset by savings resulting from elimination of the reconsideration level and reduced numbers of administrative and federal court appeals.

Recommendation

A. Improvements at the Initial Decision Level

The Social Security Administration (SSA) should enhance the decisionmaking role of medical personnel at the initial decision level. This can be accomplished by improving upon the current practice of using two-member teams—consisting of a medical member who is a licensed physician or psychologist and a non-medical member who is a disability examiner—to determine disability, as follows:

1. *Responsibility for developing medical evidence.* SSA should ensure that the medical member of the team is given primary responsibility for developing the medical evidence[4] in the record.

(a) Staff and resources should be allocated so as to assure that a complete record of all evidence relevant to a disability claim is obtained before an initial decision is made on the claim.

(b) Specially trained support staff, including nurses and non-medical personnel, should be made available to assist the medical member in developing the medical evidence.

(c) The medical member should, whenever possible, be assigned direct responsibility for evaluating the adequacy of reports from physicians and for following up with requests for clarification or additional information from these sources.

2. *Identifying and deciding discrete medical issues.* SSA should develop a list of discrete issues raised by the applicable disability standards that may arise in individual claims and that are appropriate for decision by medical staff. The medical member of the team assigned to a claim should be made responsible for identifying any such discrete issues raised in the claim, developing all evidences relevant to the issue, and reaching a decision on that issue.

3. *Resolving medical conflicts.* SSA should ensure that medical personnel are used to resolve any conflicts on medical issues that arise in the course of team evaluations of disability at the initial decision level.

(a) Senior medical staff should be given the authority to review claims where the team members are unable to agree and to recommend further action, including the development of additional medical evidence, to resolve the conflict.

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[1] See Recommendations 78-2 (ALJ hearing stage), 87-8 (state level determinations), 87-7 (Appeals Council).

[2] For cases involving mental impairments, Social Security regulations provide that either psychologists or psychiatrists may assist in determining disability. Accordingly, references to the terms "medical sources," "physicians," and "doctors" in these recommendations are intended to include psychologists used in these cases.

[3] While the Conference has examined the other federal disability programs and believes that these recommendations hold valuable lessons for the agencies administering these programs, these recommendations are addressed solely to the Social Security Administration.

[4] "Medical evidence" includes (1) medical findings and opinions relating to an individual claimant's impairments (2) other evidence, including subjective symptoms, that is relevant to determining the existence or severity of the claimant's condition, and (3) explanations of other medical evidence already in the record. The recommendations focus on development of medical evidence is not intended to minimize the importance of the development of other evidence, including vocational evidence.

(b) If the conflict persists, the state agency's medical personnel should assume primary responsibility for evaluating the record with respect to the medical issues and for making a determination based on that record.

(c) As part of this process, independent medical experts, or panels of experts, should be identified and retained for use as examining and non-examining consultants, as appropriate.

4. *Notice of deficiencies in medical evidence.* SSA should require that claimants be informed specifically of any deficiencies in the medical evidence that could lead to an adverse determination before the initial decision is made.

(a) This notice should be prepared by the medical member of the team, should clearly explain any deficiency in the medical evidence, and should encourage the claimant to provide additional information and explanation, as needed. This notice should also state that the agency will assist claimants in obtaining this information when they are unable to do so on their own due to financial or other constraints.

(b) As part of this process, either the claimant or the medical member should have the authority to initiate a face-to-face interview.

5. *Ensuring quality of evidence.* SSA should take steps to improve the quality of evidence provided by medical sources for disability adjudications.

(a) Guidelines should be established that identify priorities for the use of treating physicians, examining physicians and non-examining physicians, including specialists, for these purposes.

(b) Selection and evaluation of physicians asked to provide medical information should be performed by medical personnel independent from the agency staff responsible for making disability decisions and should be supported by a system for quality control covering both the selection of physicians and the reports submitted.

(c) Physicians asked to provide medical information should be adequately compensated and should be provided with instructions as to applicable agency standards.

(d) Medical personnel should be able, when appropriate, to consult with specialists before ordering examinations or tests.

(e) All contacts with medical sources relating to the determination of disability for a particular claim should be documented routinely in writing and included in the record. SSA should ensure that claimants are provided a copy of any reports prior to issuance of the decision and accorded an opportunity to object and rebut appropriately.

6. *Training and supervision of medical personnel.* SSA should ensure that all medical personnel are trained fully on legal and program issues and work under the supervision of the chief medical officer in the state agency. SSA should also ensure that medical staff act in accordance with the rules established by the Social Security Act and relevant federal court decisions, including the requirement to obtain and give appropriate weight to the opinions of claimants' treating physicians, in performing the functions described in paragraphs 2, 3(b), and 5(a).

B. Reconsideration

7. *Elimination of Reconsideration.* SSA should seek to concentrate the efforts of the disability determination team on a single initial decision process, as outlined in these recommendations. Together with implementations of these recommendations, the separate reconsideration stage should be eliminated.

C. Appeal Level

8. *ALJ use of medical experts.* SSA should encourage its administrative law judges to call on an independent medical expert in appropriate cases to assess the need for any additional medical evidence and to explain or clarify medical evidence in the record.* SSA should make clear by regulation that a medical expert's evidence can be presented orally or in writing. The regulations should also provide that claimants are notified of the inclusion of an expert's report in the record and should assure that claimants' rights to object to the inclusion of the report, submit rebuttal evidence, and cross-examine the expert are not abridged. The regulations should also provide that all information and opinions provided by medical experts must be included in the record.

* SSA should also ensure that its ALJs receive appropriate training on medical issues relevant to their decisional responsibilities.

§ 310.12 Statement on resolution of Freedom of Information Act disputes.

The Administrative Conference sponsored a study of the resolution of

disputes arising out of Freedom of Information Act ("FOIA") requests that are not handled to the requester's satisfaction at the agency level. Specifically, the study proposed the establishment of an independent administrative tribunal to resolve these disputes, either in formal hearing proceedings or through informal conciliation. Alternatively, the study suggested the appointment of an ombudsman within the Department of Justice to review and report on agency FOIA decisions, mediate FOIA disputes, and/or provide informal assistance to persons requesting information from agencies under FOIA.

Currently available data do not clearly establish the need for either of these specific mechanisms for handling FOIA disputes. The ability of the administrative tribunal in particular to increase the efficiency or effectiveness of FOIA dispute resolution is doubtful, especially given the moderate FOIA caseload (approximately 500 new federal court filings per year) and the high degree of public confidence in the current system of *de novo* judicial review of agency FOIA decisions.

However, the Conference believes that greater reliance on informal approaches to FOIA dispute resolution could result in more effective handling of some FOIA disputes without resort to court litigation; thus these approaches bear further exploration. Accordingly, the Administrative Conference concludes the following:

1. The Conference does not at this time recommend supplanting or changing the currently available remedy of judicial review in Federal district courts for requesters denied information under the Freedom of Information Act. However, the Conference does believe that a number of cases filed each year challenging agency denials of information under the Act could be resolved without litigation. Additionally, some disputes involving agency handling of Freedom of Information Act requests (i.e., issues such as processing delay, adequacy of the agency's records search, or availability of fee waivers as distinct from the outcome of the request on the merits) may arise from misunderstandings that could be quickly cleared up through informal investigation or discussion. Continuing attention should be given to developing mechanisms to simplify and to speed the process of review.

2. The Department of Justice and other agencies handling FOIA requests should explore the voluntary use of informal alternative dispute resolution techniques, such as informal investigation of complaints, mediation or conciliation, and provision of a neutral government official to aid the parties in reaching settlement,[1] to avoid unnecessary litigation of Freedom of Information Act disputes, and should use these techniques when appropriate.

3. On a limited basis, the Department of Justice already provides informal assistance to requesters that the Conference believes helps them in resolving Freedom of Information Act disputes. However, this function is not generally known to the public. These services would be valuable to a larger number of people than now receive them, and the Conference encourages the Department of Justice to explore means of making them better known and more generally available.

(52 FR 23636, June 24, 1987)

§ 310.13 Statement on dispute resolution procedure in reparations and similar cases.

Where Congress has established private rights, effective means of protecting them are crucial. Congress has used a variety of procedures to protect consumers, workers and certain others. In many cases, it has established formal adjudicatory process (e.g., within regulatory agencies like the Federal Trade Commission or review agencies like the Occupational Safety and Health Review Commission). Congress has also recognized that, in many cases, formal agency hearings or court litigation may be unnecessary or too costly. Thus, alternative or supplementary agency procedures or even private-sector procedures have been established to resolve

[1] *See* ACUS Recommendation 86-3, Agencies' Use of Alternative Means of Dispute Resolution Paragraph 10

disputes that formerly would have been left to the formal adjudication process.

Agencies' use and oversight of these dispute processes has become even more important in light of recent congressional developments and Supreme Court decisions. The Supreme Court recognized in *Shearson/American Express, Inc. v. McMahon*, 107 Sup. Ct. 2332 (1987), for example, that arbitration processes are often adequate to protect statutory rights, particularly where an agency can oversee their operation to ensure their adequacy. Indeed, that case enforced an arbitration agreement even for a treble damage case brought under the Racketeer Influenced and Corrupt Organizations Act by a plaintiff acting much like a "private attorney general."

Agencies' approaches to "reparations" and similar programs to safeguard consumers reflect the diversity of approaches that are available. The Securities and Exchange Commission, so far at least, has relied on a purely private resolution mechanism—exchange-based arbitration. The Commodity Futures Trading Colmission ("CFTC"), has davelope', pursuant to statupory mandata, its osn distinctive dispupe resohqtion program. Since it was formad in 1970, the CFTC has administered a "reparations" program that adjudicates bepsaan colikdity fqpures salespersons (knksn as "fqpures colmission merchants") and aggriered custkiers.[1]

The CFTC's program provides an interesting alternative to civil litigation, formal hearings under the Administrative Procedure Act, and commercial arbitration.[2] Like arbitration (which is also an option available to aggrieved customers), the reparations program uses decisionmakers familiar with the industry from which the disputes arise. But these decisionmakers are CFTC employees, rather than arbitrators drawn from industry—either agency administrative law judges or other specially-designated agency employees known as "judgment officers".

The CFTC has been creative in fashioning procedures for the reparations program. The "formal" procedure, for claims of more than $10,000, is akin to the adjudicatory procedure provided in section 554 of the APA. The "summary" procedure for claims under $10,000 dispenses with several formalities, including the right to an oral hearing. It does permit a telephonic hearing. A third, "voluntary" procedure, is available for claims of any size and must be elected by both parties. It dispenses with a written opinion by the presiding judgment officer and appeal rights. While the CFTC's program had a troubled early history, characterized at times by crippling case backlogs and severe budgetary constraints, recent years have seen enhanced resources and a considerable improvement in case management.

The Administrative Conference has begun exploring these processes with its research into the CFTC's innovative approach to consumer protection. The Conference sees important benefit in programs, like the CFTC's, that offer complainants procedural options. Creation of an agency review process for consumer complaints benefits the regulatory agency because the process provides a valuable pipeline into the problems of the industry; resolving these complaints serves as a constant challenge and impetus to the agency to interpret its statutory mandate. A three-tiered approach like the CFTC's permits added opportunities for procedural tailoring. On the other hand, the parallel private decisional process may be less expensive, faster, and more responsive. Parties benefit from having both a choice of forums and an opportunity to select a dispute resolution procedure that suits their needs.

Much remains to be done in considering the best approach for particular agencies, and this statement is intended as an initial foray. The Administrative Conference suggests that continued experimentation with alternative types of procedures for resolving issues arising in consumer protection programs is justified. Agencies admin-

[1] Other agencies, like the Fe'eral Maritime Colmission and the U.S. Departlient of Agriculture, have reparations programs that differ in significant respects.

[2] Persons with reparations claims may pursue several other avenues of redress (National Futures Association arbitration, private suits), so the entire CFTC program is in essence voluntary

istering statutes that recognize a private right of action should consider establishing, or seeking authority to establish, a reparations program offering creative procedures for "formal," "summary" and "voluntary" dispute resolution, along the lines of the CFTC's where:

(1) An agency statute provides for and engenders substantial private litigation and/or arbitration; or

(2) An agency regulatory program centers on a single industry or group of similar industries, such as would permit creation of "expert" decision-makers.

An agency with both of the characteristics listed above would be a prime candidate for a reparations program. Each program of course would be crafted to meet the special needs of the agency's particular regulatory jurisdiction.

Management of reparations programs should take into account these factors:

(1) Where complaints are to be resolved by summary or voluntary procedures, the discovery process should be streamlined to comport with the goals of less formal procedures. For example, the number of interrogatories and requests for admissions may be substantially limited; and summary information rather than facsimiles could be deemed responsive to requests for the production of documents.

(2) The judgment officers used in summary and voluntary procedures need not always be administrative law judges or even attorneys, so long as they demonstrate sufficient experience in, or knowledge of, the regulated industry or applicable law.

(3) While summary procedures by their nature may not require an in-person hearing, telephone hearings may provide a useful and inexpensive way of allowing the judgment officer to question parties and witnesses. Telephone hearings should be available whenever a judgment officer believes such a hearing is appropriate to the resolution of a dispute.

(4) Since complainants in reparations proceedings frequently appear without a lawyer, agencies should make the dispute resolution process understandable to the lay person. Toward that end, notices and descriptions of the process should avoid whenever possible the use of legal terms (e.g., "pleadings" or "discovery") where a colloquial term will suffice. Where use of a lay term would mislead, or where no appropriate term is available, agencies should make every effort to assure that the legal term of art has been translated for the lay party or even provide a glossary of such terms for the benefit of the lay reader.

(5) Managers should assure that a sufficient number of judgment officers are employed to reduce the overall processing time for summary and voluntary proceedings, and thus to permit those forms of procedure to fulfill their promise.

(6) Case tracking systems for reparations cases should be used, or modernized, so that the location and progress of any case can be quickly identified and bottlenecks eliminated.

(53 FR 26032, July 11, 1988)

§ 310.18 Statement on mass decisionmaking programs: The alien legalization experience.

The Alien Legalization Program, authorized under the Immigration Reform and Control Act of 1986, created a program to allow certain aliens present illegally in the United States to convert their status to that of a legal resident. The program is administered by the Immigration and Naturalization Service and has a short and defined lifetime, which is heading toward completion. The legalization program contains two separate pieces: the "section 245A" program, for aliens who have been in the country since January 1, 1982; and the "special agricultural worker" program, for alien farmworkers who worked in specified agricultural employment for at least 90 days during a specified period. The application period for the "section 245A" program ran from May 5, 1987 through May 4, 1988. The application for the SAW program ran from June 1, 1987 through November 30, 1988. Although the INS has acted on most of the cases, some are likely to remain pending for months. Moreover, as described below, the second phase of the process is still ongoing.

The Administrative Conference has studied the INS's processing of alien legalization applications from the standpoints of what improvements can be made by the INS in the remaining phases of the legalization program itself, and what lessons can be applied in future mass decisionmaking programs by the INS or by other agencies. This Statement does not address the merits of litigation over the regulatory ground rules of the program, but only the procedures for handling the applications themselves.

Description of the Process

The Alien Legalization Program has been administered by the INS using a framework of local Legalization Offices (LOs) (107 of them across the country) and four Regional Processing Facilities (RPFs) to process the more than three million applications for legalization that were received. Applications are filed with the LOs, where interviews are conducted and recommendations for action are made. The files are then sent to a central processing center in London, Kentucky, following which they are forwarded to one of the four RPFs across the country. The RPFs make the determinations on the applications, based on the file material. Appeal of a denial of legalization status is available to the Legalization Appeals Unit (LAU) in Washington, D.C., and is based on the "administrative record." 8 U.S.C. 1255a(f)(3)(B).

The legalization process has two phases. The first phase is to determine whether an applicant qualifies for legalization. The second phase, which applies only to qualified section 245A applicants, involves a determination whether they qualify for permanent resident alien status. (In the agricultural program, permanent resident alien status is automatic.) The initial application period for both programs is now closed, and the INS has processed a large number, although not all, of those applications.

The "remote decisionmaking" system employed in the Alien Legalization Program involves decisionmaking at the four RPFs rather than at local levels. This system has provided more consistency in decisions than other, more decentralized systems within the INS. Having the determination made by a person removed from the individual who actually interviewed the applicant reduced the potential subjectivity of decisionmakers. Because interviewers at the local levels knew that their files would be examined in virtually every case, the quality of work in the files has been relatively high. There are also suggestions that the system of regional facilities promoted cost-efficiency.

The RPF remote decisionmaking system, however, has not been without problems. The elimination of direct contact between the decisionmaker and the applicant, which helps eliminate bias or prejudice, also eliminates the opportunity for first-hand credibility determinations by the ultimate decisionmaker. The RPFs also have been very isolated from the public, making it difficult for applicants or their representatives to acquire information about the status of cases, among other things. The RPFs have had only limited access to legal advice from INS attorneys, requiring them in at least one facility to seek advice from the LAU, which is the appellate unit that reviews appeals of their decisions. There have been some difficulties relating to the interaction between the LOs and the RPFs, and relating to the provision of adequate notice to applicants at different stages of the program. There also has been reported an unexpectedly high incidence of fraudulent applications, particularly in the agricultural worker program, which the RPFs were not equipped to handle.

Overall, however, the system for deciding legalization applications appears to be working fairly well. The results among the regions have been quite consistent so far. The INS has been able to process large numbers of the applications, particularly in the first phase of the section 245A program. Moreover, the INS has recognized many of the problems, and taken steps to address them.

From the INS experience, it is possible to derive some lessons, not only from other INS programs in the future, but for other agencies that may consider using a system of remote decisionmaking for a large volume of cases. There are also a number of lessons that can be drawn about the Alien Legalization Program in particular. While that program is nearing completion, to the extent that these comments refer to elements of the program that are ongoing, the Conference encourages the INS to implement the suggestions to the extent possible and to the extent that it has not already done so.

Conclusions

A. The Conference encourages agencies, including the INS, to consider using remote decisionmaking where there is a large volume of cases to be decided on the basis of objectively verifiable information within a written file, particularly where bias, prejudice or other subjectivity may be a significant problem. This system appears to promote consistency among decisionmakers, perhaps because of the more centralized nature of the process, and the fact that it is easier for a small group of managers to confer on a regular basis about the decisionmaking process. Agencies should, in implementing such a system, consider the following suggestions:

1. In a remote decisionmaking system in which a file prepared on a local level will be the basis for decisionmaking, there must be clear guidelines as to what are the necessary contents of the file, and the use of standardized forms and checklists is encouraged.

2. Where the local office is making a preliminary recommendation to the remote decisionmaking center, the local office should be instructed to provide an explanation for its recommended decision that is sufficient to provide the remote center with the maximum benefit of the local office's information and interaction with the applicant or other interested person whose case is being determined (hereinafter "applicant"). Appropriate forms or formats (e.g., computer entry) should be designed to ensure that the necessary information is transmitted in a uniform manner to assist in review and retrieval.

3. It is important that adequate information be available to the applicants and their representatives concerning their cases. To facilitate this, case tracking systems capable of responding to inquiries should be developed. Applicants should be clearly informed of the process relating to their cases, and be given adequate notice of each step that requires or provides an opportunity for action or participation on their part.

4. To avoid the appearance or actuality of conflict, it is important that the remote decisionmaking centers have adequate access to legal advice relating to the merits of matters before them from agency legal staff other than from the appellate unit, if any, that reviews appeals of their decisions.

5. Ensuring input from local personnel on credibility issues is of particular importance. It may be useful to consider ways of videotaping or otherwise recording interviews where the applicant's credibility is at issue.

6. Where helpful, the decisionmakers at remote decisionmaking centers should be provided the opportunity to work for a short period of time at a local office, giving them first-hand experience in interviewing applicants, in order to provide them a better sense of the implications of the information they receive.

7. The remote decisionmaking centers' managers should consult with each other regularly on substantive and procedural matters, in order to ensure that their actions are consistent.

8. It is important that the system be able to provide new or amended instructions to the local offices quickly, so that consistency can be maintained and the benefits of experience transmitted.

B. With respect to the Alien Legalization Program specifically, the Conference encourages the INS to implement or continue to implement the following suggestions to the extent that they refer to elements of the program that are ongoing:

1. Action should be taken to ensure that information concerning individual applications for legalization is readily available to the applicant or his or her representative. INS should:

(a) Establish a method of tracking cases that would enable applicants or their representatives to obtain information expeditiously concerning the status of their cases;

(b) Ensure that applicants are clearly informed concerning all of the steps required to complete the legalization process, both initially and as actions are taken on their applications, particularly where further action on their part may be called for;

(c) Recognize the need to extend completion times where applicants are unable to fulfill educational requirements due to a shortage of educational facilities or programs;

(d) Supplement existing mail communication with applicants, including through the use of broadcast media. Particular attention should be paid to the mobility of many applicants, as well as to the fact that applicants have not always understood the multiple-step nature of the process, and thus have not realized that INS may be seeking to communicate with them.

2. INS should ensure that RPFs have sufficient access to legal advice from INS attorneys; however, the RPFs should not seek legal advice from the Legalization Appeals Unit (LAU), the office that reviews appeals of RPF decisions.

3. INS should consider making the following modifications in the way applications are processed by the Legalization Offices (LOs) and RPFs:

(a) Including in the recommendation forms used by the LOs an additional option, "recommended scrutiny", in order to assure that the RPF reviews the application, without having to recommend denial for lack of another option.

(b) Arranging for the following in cases where fraud is suspected:

(i) Reinterviewing applicants whose cases have not been decided; in the case of SAW applicants, such interviews should be done by specially-trained decisionmakers with knowledge of agriculture.

(ii) Using video cameras to tape remaining interviews, in order to have a record on which credibility can be better assessed.

(iii) Assigning remaining cases at the RPFs to specially trained teams of decisionmakers; in the case of SAW applicants, such decisionmakers should be trained to review agricultural cases and the types of fraud that may appear in such cases.

(c) Considering whether LO personnel should have more direct impact on legalization decisions, since they are the ones who actually have the opportunity to assess the credibility of applicants.

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Dated June 30, 1989.

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§ 310.15 Procedures for Resolving Federal Personnel Disputes.

In 1978, Congress enacted the most comprehensive revision of the federal civil service laws since the Pendleton Act of 1883. The Civil Service Reform Act (CSRA) of 1978 created new institutions and processes for personnel management, including a substantially restructured system for considering complaints, grievances and appeals filed by federal employees in response to personnel actions.[1] Personnel disputes typically involve such matters as removals from the service, reductions in pay or grade, suspensions, furloughs, promotion and award decisions, and reductions-in-force.

Congress' 1978 revision of the framework for considering employee complaints, grievances and appeals was in part prompted by the confusing, complex and time-consuming nature of the existing procedures. Moreover, the procedures were seen as intimidating to both managers and employees and, therefore, likely to deter managers from taking appropriate personnel action and to discourage employees from pursuing available avenues to vindicate their rights. There was also a perception that the Civil Service Commission was unsympathetic to employee discrimination cases and to unions.

The statutory framework created in 1978, with its new forums for adjudicating employee claims, was no less complex and has continued to produce costs, delays, and confusion, accompanied by substantial resource commitments. Close scrutiny discloses that this complexity was in large part created by the tension inherent in the simultaneous pursuit of three important legislative goals: adequate protection of employees from discrimination;[2]

[1] Five institutions share in the administration of the CSRA:

1. Office of Personnel Management (OPM), which is vested with the general authority to execute, administer and enforce the laws and rules governing the civil service except with respect to those functions vested in other agencies;

2. Merit Systems Protection Board (MSPB), which is an independent adjudicatory body charged with hearing and deciding employee appeals from agency personnel actions of various kinds including major performance and disciplinary actions;

3. Office of the Special Counsel (OSC), which is charged with the investigation and prosecution before the MSPB of requests for corrective and disciplinary action when prohibited personnel practices have allegedly occurred;

4. Equal Employment Opportunity Commission (EEOC), which enforces various anti-discrimination statutes as they apply to both public and private employment, including Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Rehabilitation Act; and

5. Federal Labor Relations Authority (FLRA), which is an independent agency charged with hearing and deciding complaints of unfair labor practices and reviewing arbitration awards on matters falling within the scope of negotiated grievance procedures established by collective bargaining agreements.

[2] "Discrimination" refers to discrimination on the basis of race, color, religion, sex, national origin, age and handicapping condition.

uniformity in federal personnel management; and solidification and expansion of the place of arbitration as a mechanism to resolve federal employee grievances.

As a general principle, procedures for handling federal employee disputes should be as simple and fair as feasible. Fairness must include a concern for the timely, final resolution of claims. At the same time, however desirable procedural simplification may be, federal employees and managers alike should have confidence in the processes for adjudicating personnel disputes. This is especially true when a federal employee contests a personnel action on the grounds of discrimination, since nothing is more basic than the right to be free of invidious discrimination.

To address these matters, the Administrative Conference commissioned a consultant's report.[5] The report describes the historical background to the 1978 reforms, along with the institutional and procedural framework created by the CSRA. It examines the operation of the system and makes specific recommendations for legislative and administrative changes. The Conference's Committee on Governmental Processes has held numerous meetings to consider the report, has provided opportunity for public participation in those meetings and has invited public comment on various procedural changes that might be recommended.

This process has demonstrated the continuing importance of employee and management concerns in addressing the procedural questions that are the subject of the study. The intricate web of processes, consciously designed by Congress in its enactment of the CSRA, resulted in part from substantive policy and value judgments that transcend the domain of administrative procedure. The complex framework has been perceived by employees and their representatives as providing necessary protection against possible arbitrary employer action, particularly in cases where discrimination is alleged. As a result, employees may perceive proposed procedural simplification as a potential threat to substantive rights.

For this reason, whether to retain or modify the present procedures must be resolved largely through the legislative process. The experience of the past decade, as described in the consultant's report, has persuaded the Administrative Conference that the time is ripe for fresh consideration by Congress of the problems that gave rise to the CSRA and to the issues that have developed subsequently. In fact, Congress has started to re-examine selected aspects of the system, including equal employment opportunity. In addition, the EEOC has issued a notice of proposed rulemaking to change substantially the federal sector discrimination complaint process.[6]

This Statement describes certain important issues that we believe should be addressed as part of a comprehensive congressional review of the CSRA processes. These include:

(i) Whether there should be one rather than the present two opportunities for a full scale trial-type proceeding in cases raising claims of discrimination;

(ii) Whether to retain the existing complex structure for administrative adjudication of "mixed" cases, i.e., those in which the employee alleges that unlawful discrimination was the basis for an adverse personnel action;

(iii) Whether the government should have the right to appeal to the courts in cases involving claims of discrimination;

(iv) Whether employees or their unions should be permitted to seek judicial enforcement of arbitral awards; and

(v) Whether the functioning of existing adjudicatory frameworks—grievance systems of individual agencies, agency complaint processes for discrimination cases, the MSPB process and the various negotiated grievance processes—could and should be improved.

These questions cannot and should not be examined in isolation, as any review of the procedures of the CSRA should recognize the integrated nature of the complex processes of the Act. Whether or not congressional re-examination takes place, this Statement also suggests that the Office of Personnel Management and agencies scrutinize and, where appropriate, seek ways to improve the patterns of communication within agencies and to employees regarding the workings of the complaint, grievance and appeal system. The Conference encourages the creative use of alternative means of dispute resolution in resolving employee claims.[8]

A. Need for Comprehensive Overview

In considering the issues posed below, Congress should take into account the fact that the intricate federal personnel scheme consists of numerous interrelated processes and institutions. Accordingly, statutory changes should be enacted only after careful consideration of their potential direct and indirect consequences throughout the system for resolving employee complaints, grievances and appeals.

B. Cases Raising Claims of Discrimination

1. *The Number of Hearings in Mixed Cases.* "Mixed" cases are controversies involving personnel actions appealable to the MSPB, where an employee alleges that unlawful discrimination was a basis for the agency's action. These cases are "mixed" in that they involve issues both of civil service law and employment discrimination. Under present law federal employees, unlike employees in the private sector, on allegations of employment discrimination in such cases, have a right to a full trial-type administrative hearing (at the MSPB) and, if unsuccessful, may obtain a second *de novo* adjudicatory hearing in United States District Court. The question for congressional consideration is whether an employee who has chosen a trial-type administrative hearing in a mixed case, and has then been afforded the opportunity for a full evidentiary hearing on the record on all relevant matters, should be entitled to a judicial trial *de novo* or should be limited to judicial review in a court of appeals on the administrative record under the substantial evidence test—the customary venue and scope of review of formal administrative adjudications.

2. *The Process for Deciding Mixed Cases.* The statutory procedure for mixed cases provides the opportunity for sequential consideration by the MSPB and the EEOC, with the possibility of further proceedings before a Special Panel consisting of one member of the MSPB, one member of the EEOC, and a chairman appointed by the President for a term of six years with the advice and consent of the Senate. Through these provisions, the CSRA embodies Congress' effort to bring to bear both the MSPB's expertise in general issues of personnel law and the EEOC's expertise with discrimination issues. This complex procedure is intended to achieve a balanced use of both agencies' expertise.

In most mixed cases presented to the EEOC, the Commission has accepted the MSPB decision and, where it has not, the MSPB has generally deferred to the Commission's disposition of these cases. During the first ten years of the CSRA, there has been only three Special Panel

[5] William V. Luneburg, The Federal Personnel Complaint, Appeal and Grievance Systems: A Structural Overview and Proposed Reforms, 78 Ky. L. J. — (1989).

[6] See "Federal Sector Equal Employment Opportunity" (29 CFR part 1614) 54 Fed. Reg. 45,67 (October 31, 1989).

[8] See Recommendation 88-3, Agencies' Use of Alternative Means of Dispute Resolution, 1 CFR 305.88-3.

proceedings, indicating that the two agencies have failed to reach an accommodation in only a very limited number of cases. Even where a Special Panel was unnecessary, however, sequential consideration by the MSPB and the EEOC has required significant time and effort and has at times led to confusion on the part of agencies and claimants. The question for congressional consideration is whether experience confirms the desirability of dual agency participation in mixed cases or whether that experience suggests that consistently fair and more timely results may be achieved through a less complex process.

3. *Government's Right to Appeal.* Under existing law the government may petition for judicial review of certain administrative and arbitral decisions in personnel cases that present significant issues of civil service law. The availability of such review is either uncertain or non-existent when those decisions implicate issues of discrimination law.[8] There is disagreement over the desirability of permitting the government to seek a judicial resolution of legal issues that have been decided adversely to the government at the administrative level.

The question for congressional consideration is whether in the interest of consistency the government should have the right to judicial review (or at least the authority to petition for it) in cases where the Director of OPM determines that an administrative or arbitral decision constitutes an incorrect interpretation of civil service or discrimination law that may have a substantial impact. The primary countervailing considerations are the increased potential for further delay in final resolution of such cases and whether the executive branch should be authorized to seek judicial resolution of disputes between two of its agencies, as would be the case if OPM were permitted to appeal from adverse determinations of the EEOC.

C. Enforcement of Arbitration Awards

Although federal employee grievance arbitration awards are intended to be binding, federal agencies do not always comply with them. Under the CSRA, the only mechanism available to a federal employee seeking to enforce an arbitral award is an unfair labor practice proceeding before the FLRA. Such a proceeding requires filing of a complaint by the Authority's General Counsel and a hearing before the FLRA, followed by judicial review and enforcement of the resulting FLRA order. There is substantial dispute over the question whether an employing agency may raise any defense to an enforcement action other than compliance with the arbitral award.

Questions for congressional consideration include to permit an employee or union to seek direct judicial enforcement of federal sector grievance arbitration awards, where such enforcement should take place, and what issues should be open for litigation in the chosen forum. A central issue is whether permitting such direct enforcement actions would increase or decrease the likelihood of voluntary agency compliance with arbitration awards.

D. Need To Examine Existing Adjudicatory Systems

1. *Agency Administrative Grievance Systems.* Agency administrative systems have taken on increasing importance as the only avenue of redress [9] available to an individual employee in cases not falling within MSPB or EEOC jurisdiction or within the scope of a negotiated grievance procedure. The Office of Personnel Management and other agencies should ensure that these systems in fact provide fair, efficient, and timely resolution of workplace disputes, and further studies of the structure and usage of these systems may be needed.[9] In reviewing these processes, agencies should give careful consideration to alternative means of dispute resolution.

2. *Agency Complaint Processes in Discrimination Cases.* Over the years, criticism has been leveled at the quality and timeliness of agency disposition of discrimination complaints. The EEOC and individual employing agencies should continue to take steps to ensure adequate and expeditious investigation and timely, final resolution of such claims. Experimentation with, and incorporation of, alternative dispute resolution techniques may be useful.

3. *MSPB and Negotiated Grievance Systems.* The MSPB process and the various negotiated grievance processes dispose of large numbers of significant employee claims. Concerns have been expressed regarding certain aspects of their operation, including the familiarity of arbitrators with federal personnel law and the need for increasing the statutory independence of the MSPB's administrative judges. These concerns may warrant further study.

E. Better Communication Within Agencies and to Employees

Multiple avenues for relief present the danger of parallel, duplicate proceedings. Agencies should take steps to ensure that there are consistent patterns of communication among their personnel, labor relations and equal employment opportunity staffs to reduce the likelihood of parallel, duplicative proceedings in personnel actions for which such duplication is not permitted by law.

To use the personnel grievance system effectively, employees must have clear and reliable information about options available to them and the consequence of choosing one route over another. The Office of Personnel Management and other agencies should ensure that there exist readily available and easily understandable written or other materials that inform federal employees of their complaint, grievance and appeal options and the consequences of their choice of one complaint, grievance or appellate route over another.

Dated: December 20, 1989.

Jeffrey S. Lubbers,

Research Director.

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[8] See e.g., *Mazaros v. Devine*, 760 F. 2d 1549 (11th Cir. 1985).

[9] See e.g., *Harrison v. Bowen*, 815 F. 2d 1505 (11th Cir. 1987).

[9] OPM has recently reviewed the systems established by agencies and has published a study entitled *A Survey of Agency Administrative Grievance Systems* (June 1989).

Appendix C

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Appendix D

AMERICAN BAR ASSOCIATION
RESOLUTION
ADOPTED BY THE HOUSE OF DELEGATES

February 6-7, 1989
Report No. 126A

BE IT RESOLVED, that the American Bar Association supports the reauthorization of the Administrative Conference of the United States (ACUS) and the provision of funds sufficient to permit ACUS to continue its role as the government's in-house advisor and coordinator of administrative procedural reform.

2254f/58

REPORT

The Administrative Conference of the United States (ACUS) was created by Congress in 1964 to serve as the Federal Government's in-house advisor on, and coordinator of, administrative procedural reform. Under its statutory mandate, 5 U.S.C. §§ 571-576, ACUS conducts studies of the fairness and efficiency of the administrative procedures used by federal agencies and makes recommendations to the Congress, the Executive Branch and the Judicial Conference on how to improve the procedural functions of the government. The Conference consists of knowledgeable and influential people from the government and the private sector, including leading academic scholars and lawyers in private practice, who donate their time to the Conference. Included in its membership is a liaison representative from the Section of Administrative Law and Regulatory Practice and the National Conference of Administrative Law Judges, Judicial Administrative Division. The Conference's record of achieving consensus on difficult questions of administrative procedure and persuading Congress, the departments and agencies, and the courts to make needed changes has been exemplary. The cost to the taxpayer has been modest. Indeed, the Administrative Conference has a small, high-quality staff and operates on a budget that is tiny relative to the savings it produces for the rest of the government in terms of procedural efficiencies.

Because the Administrative Conference must be periodically reauthorized by Congress, the American Bar Association has supported the Conference in the past. In June 1979, the Association resolved to support both the retention of ACUS' public members and the addition of certain operational functions then proposed for the Conference.

The Conference will require reauthorization in the 101st Congress. The Association again wishes to lend its full support to that effort. The Association recognizes and salutes the achievements of the Administrative Conference in recent years. Its development of the solution to the race-to-the-courthouse problem, supported by the Association, eventuated in Public Law 100-236, 101 Stat. 1731 (1988). Its innovative advocacy of a code of conduct for Presidential transition workers was adopted by the President-elect shortly after the election. Its proposal to expedite the handling of court challenges to interlocutory agency action has recently been adopted by the D.C. Circuit. The Conference has successfully promoted negotiated rulemaking and alternative means of dispute resolution and has produced highly influential studies on topics as diverse as Medicare procedures, Freedom of Information Act reform, user fees and the procedural aspects of the protection of the health and safety of whistleblowers. In addition, the Conference's production of sourcebooks, manuals, and other educational materials has been of great help to the government and to lawyers who must deal with the government.

The agency has been limited in its current authorizing language to a budgetary ceiling of two million dollars in each of the last four years. The Association urges the Congress, when reauthorizing the Administrative Conference, to avoid use of an unduly restrictive ceiling and to ensure that the agency can seek an appropriation that is sufficient to carry out its important and beneficial functions fully.

Appendix E

PART 305—RECOMMENDATIONS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Sec.
305.68-1 Adequate Hearing Facilities (Recommendation No. 68-1).
305.68-2 U.S. Government Organization Manual (Recommendation No. 68-2).
305.68-3 Parallel Table of Statutory Authorities and Rules (2 CFR Ch. I) (Recommendation No. 68-3).

305.68-4 Consumer Bulletin (Recommendation No. 68-4).
305.68-5 Representation of the Poor in Agency Rulemaking of Direct Consequence to Them (Recommendation No. 68-5).
305.68-6 Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency (Recommendation No. 68-6).
305.68-7 Elimination of Jurisdictional Amount Requirement in Judicial Review (Recommendation No. 68-7).
305.68-8 Judicial Review of Interstate Commerce Commission Orders (Recommendation No. 68-8).
305.69-1 Statutory Reform of the Sovereign Immunity Doctrine (Recommendation No. 69-1).
305.69-2 Judicial Enforcement of Orders of the National Labor Relations Board (Recommendation No. 69-2).
305.69-3 Publication of a "Guide to Federal Reporting Requirements" (Recommendation No. 69-3).
305.69-4 Analytical Subject-Indexes to Selected Volumes of the Code of Federal Regulations (Recommendation No. 69-4).
305.69-5 Elimination of Duplicative Hearings in FAA Safety De-certification Cases (Recommendation No. 69-5).
305.69-6 Compilation of Statistics on Administrative Proceedings by Federal Departments and Agencies (Recommendation No. 69-6).
305.69-7 Consideration of Alternatives in Licensing Procedures (Recommendation No. 69-7).
305.69-8 Elimination of Certain Exemptions from the APA Rulemaking Requirements (Recommendation No. 69-8).
305.69-9 Recruitment and Selection of Hearing Examiners; Continuing Training for Government Attorneys and Hearing Examiners; Creation of a Center for Continuing Legal Education in Government (Recommendation No. 69-9).
305.70-1 Parties Defendant (Recommendation No. 70-1).
305.70-2 SEC No-Action Letters Under Section 4 of the Securities Act of 1933 (Recommendation No. 70-2).
305.70-3 Summary Decision in Agency Adjudication (Recommendation No. 70-3).
305.70-4 Discovery in Agency Adjudication (Recommendation No. 70-4).
305.70-5 Practices and Procedures Under the Renegotiation Act of 1951 (Recommendation No. 70-5).
305.71-1 Interlocutory Appeal Procedures (Recommendation No. 71-1).
305.71-2 Principles and Guidelines for Implementation of the Freedom of Information Act (Recommendation No. 71-2).
305.71-3 Articulation of Agency Policies (Recommendation No. 71-3).
305.71-4 Minimum Procedures for Agencies Administering Discretionary Grant Programs (Recommendation 71-4).
305.71-5 Procedure of the Immigration and Naturalization Service in Respect to Change-of-Status Applications (Recommendation No. 71-5).
305.71-6 Public Participation in Administrative Hearings (Recommendation No. 71-6).
305.71-7 Rulemaking on a Record by the Food and Drug Administration (Recommendation No. 71-7).
305.71-8 Modification and Dissolution of Orders and Injunctions (Recommendation No. 71-8).
305.71-9 Enforcement of Standards in Federal Grant-in-Aid Programs (Recommendation No. 71-9).
305.72-1 Broadcast of Agency Proceedings (Recommendation No. 72-1).
305.72-2 Conflict-of-Interest Problems in Dealing with Natural Resources of Indian Tribes (Recommendation No. 72-2).
305.72-3 Procedures of the United States Board of Parole (Recommendation No. 72-3).
305.72-4 Suspension and Negotiation of Rate Proposals by Federal Regulatory Agencies (Recommendation No. 72-4).
305.72-5 Procedures for the Adoption of Rules of General Applicability (Recommendation No. 72-5).
305.72-6 Civil Money Penalties as a Sanction (Recommendation No. 72-6).
305.72-7 Pre-induction Review of Selective Service Classification Orders and Related Procedural Matters (Recommendation No. 72-7).
305.72-8 Adverse Actions Against Federal Employees (Recommendation No. 72-8).
305.73-1 Adverse Agency Publicity (Recommendation No. 73-1).
305.73-2 Labor Certification of Immigrant Aliens (Recommendation No. 73-2).
305.73-3 Quality Assurance Systems in the Adjudication of Claims of Entitlement to Benefits or Compensation (Recommendation No. 73-3).
305.73-4 Administration of the Antidumping Law by the Department of the Treasury (Recommendation No. 73-4).
305.73-5 Elimination of the "Military or Foreign Affairs Function" Exemption From APA Rulemaking Requirements (Recommendation No. 73-5).
305.73-6 Procedures for Resolution of Environmental Issues in Licensing Proceedings (Recommendation No. 73-6).
305.74-1 Subpena Power in Formal Rulemaking and Formal Adjudication (Recommendation No. 74-1).

305.74-2 Procedures for Discretionary Distribution of Federal Assistance (Recommendation No. 74-2).

305.74-3 Procedures of the Department of the Interior with Respect to Mining Claims on Public Lands (Recommendation 74-3).

305.74-4 Preenforcement Judicial Review of Rules of General Applicability (Recommendation 74-4).

305.75-1 Licensing Decisions of the Federal Banking Agencies (Recommendation No. 75-1).

305.75-2 Affirmative Action for Equal Opportunity in Nonconstruction Employment (Recommendation No. 75-2).

305.75-3 The Choice of Forum for Judicial Review of Administrative Action (Recommendation No. 75-3).

305.75-4 Procedures to Ensure Compliance by Federal Facilities with Environmental Quality Standards (Recommendation No. 75-4).

305.75-5 Internal Revenue Service Procedures: The Audit and Settlement Processes (Recommendation No. 75-5).

305.75-6 Internal Revenue Service Procedures: Collection of Delinquent Taxes (Recommendation No. 75-6).

305.75-7 Internal Revenue Service Procedures: Civil Penalties (Recommendation No. 75-7).

305.75-8 Internal Revenue Service Procedures: Tax Return Confidentiality (Recommendation No. 75-8).

305.75-9 Internal Revenue Service Procedures: Taxpayer Services and Complaints (Recommendation No. 75-9).

305.75-10 Internal Revenue Service Procedures: The IRS Summons Power (Recommendation No. 75-10).

305.76-1 Exception from Mandatory Retirement for Certain Presidential Appointees (Recommendation No. 78-1).

305.76-2 Strengthening the Informational and Notice-Giving Functions of the "Federal Register" (Recommendation No. 76-2).

305.76-3 Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking (Recommendation No. 76-3).

305.76-4 Judicial Review Under the Clean Air Act and Federal Water Pollution Control Act (Recommendation No. 76-4).

304.76-5 Interpretive Rules of General Applicability and Statements of General Policy (Recommendation 76-5).

305.77-1 Legislative Veto of Administrative Regulations (Recommendation No. 77-1).

305.77-2 Judicial Review of Customs Service Actions (Recommendation No. 77-2).

305.77-3 Ex parte Communications in Informal Rulemaking Proceedings (Recommendation No. 77-3).

305.78-1 Reduction of Delay in Ratemaking Cases (Recommendation No. 78-1).

305.78-2 Procedures for Determining Social Security Disability Claims (Recommendation No. 78-2).

305.78-3 Time Limits on Agency Actions (Recommendation No. 78-3).

305.78-4 Federal agency interaction with private standard-setting organizations in health and safety regulation (Recommendation No. 78-4).

305.79-1 Hybrid Rulemaking Procedures of the Federal Trade Commission (Recommendation No. 79-1).

305.79-2 Disputes Respecting Federal-State Agreements for Administration of the Supplemental Security Income Program (Recommendation No. 79-2).

305.79-3 Agency Assessment and Mitigation of Civil Money Penalties (Recommendation No. 79-3).

305.79-4 Public Disclosure Concerning the use of Cost-Benefit and Similar Analyses in Regulation (Recommendation No. 79-4).

305.79-5 Hybrid Rulemaking Procedures of the Federal Trade Commission—Administration of the Program to Reimburse Participants' Expenses (Recommendation No. 79-5).

305.79-6 Elimination of the Presumption of Validity of Agency Rules and Regulations in Judicial Review, as Exemplified by the Bumpers Amendment (Recommendation No. 79-6).

305.79-7 Appropriate Restrictions on Participation by a Former Agency Official in Matters Involving the Agency (Recommendation No. 79-7).

305.80-1 Trade Regulation Rulemaking Under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act (Recommendation No. 80-1).

305.80-2 Enforcement of Petroleum Price Regulations (Recommendation No. 80-2).

305.80-3 Interpretation and Implementation of the Federal Advisory Committee Act (Recommendation No. 80-3).

305.80-4 Decisional Officials' Participation In Rulemaking Proceedings (Recommendation No. 80-4).

305.80-5 Eliminating or Simplifying the "Race to the Courthouse" in Appeals from Agency Action (Recommendation No. 80-5).

305.80-6 Intragovernmental Communications in Informal Rulemaking Proceedings (Recommendation No. 80-6).

305.81-1 Procedures for Assessing and Collecting Freedom of Information Act fees (Recommendation No. 81-1).

305.81-2 Current Versions of the Bumpers Amendment (Recommendation No. 81-2).

305.82-1 Exemption (b)(4) of the Freedom of Information Act (Recommendation No. 82-1).

305.82-2 Resolving Disputes Under Federal Grant Programs (Recommendation No. 82-2).

305.82-3 Federal Venue Provisions Applicable to Suits Against the Government (Recommendation No. 82-3).

305.82-4 Procedures for Negotiating Proposed Regulations (Recommendation No. 82-4).

305.82-5 Federal Regulation of Cancer-causing Chemicals (Recommendation No. 82-5).

305.82-6 Federal Officials' Liability for Constitutional Violations (Recommendation No. 82-6).

305.82-7 Judicial Review of Rules in Enforcement Proceedings (Recommendation No. 82-7).

305.83-1 The Certification Requirement in the Contract Disputes Act (Recommendation No. 83-1).

305.83-2 The "Good Cause" Exemption from APA Rulemaking Requirements (Recommendation No. 83-2).

305.83-3 Agency Structures for Review of Decisions of Presiding Officers under the Administrative Procedure Act (Recommendation No. 83-3).

305.83-4 The Use of the Freedom of Information Act for Discovery Purposes (Recommendation No. 83-4).

305.84-1 Public Regulation of Siting of Industrial Development Projects (Recommendation No. 84-1).

305.84-2 Procedures for Product Recalls (Recommendation No. 84-2).

305.84-3 Improvements in the Administration of the Government in the Sunshine Act (Recommendation No. 84-3).

305.84-4 Negotiated Cleanup of Hazardous Waste Sites Under CERCLA (Recommendation No. 84-4).

305.84-5 Preemption of State Regulation by Federal Agencies (Recommendation No. 84-5).

305.84-6 Disclosure of Confidential Information Under Protective Order in International Trade Commission Proceedings (Recommendation No. 84-6).

305.84-7 Administrative Settlement of Tort and Other Monetary Claims Against the Government (Recommendation No. 84-7).

305.85-1 Legislative preclusion of cost/benefit analysis (Recommendation No. 85-1).

305.85-2 Agency procedures for performing regulatory analysis of rules (Recommendation No. 85-2).

305.85-3 Coordination of public and private enforcement of environmental laws (Recommendation No. 85-3).

305.85-4 Administrative Review in Immigration Proceedings (Recommendation No. 85-4).

305.85-5 Procedures for Negotiating Proposed Regulations (Recommendation No. 85-5).

305.86-1 Nonlawyer assistance and representation (Recommendation No. 86-1).

305.86-2 Use of Federal Rules of Evidence in Federal agency adjudications (Recommendation No. 86-2).

305.86-3 Agencies' use of Alternative Means of Dispute Resolution (Recommendation No. 86-3).

305.86-4 The Split-Enforcement Model for Agency Adjudication (Recommendation No. 86-4).

PART 310—MISCELLANEOUS STATEMENTS

Sec.
310.1 Views of the Administrative Conference on the "Report on Selected Independent Regulatory Agencies" of the President's Advisory Council on Executive Organization (Adopted May 7, 1971).

Sec.
310.2 Statement of the Administrative Conference on the ABA Proposals to Amend the Administrative Procedure Act (Adopted June 7–8, 1973).
310.3 Statement of the Administrative Conference on ABA Resolution No. 1 Proposing to Amend the Definition of "Rule" in the Administrative Procedure Act.
310.4 Strengthening Regulatory Agency Management Through Seminars for Agency Officials.
310.5 Statement on Procedures to Deal with Emergency Shortages of Natural Gas.
310.6 Resolution Concerning Congressional Termination of Pending Administrative Proceedings at the Federal Trade Commission.
310.7 Views of the Administrative Conference on Proposals Pending in Congress to Amend the Informal Rulemaking Provisions of the Administrative Procedure Act.
310.8 Statement of the Administrative Conference on Discipline of Attorneys Practicing before Federal Agencies.
310.9 Statement on Guidelines for Choosing the Appropriate Level of Agency Policy Articulation.
310.10 Statement on Agency Use of an Exceptions Process to Formulate Policy.
310.11 Statement on Hearing Procedures for the Resolution of Scientific Issues.

Appendix F

February 1990

SUMMARY STATUS -- IMPLEMENTATION OF ACUS RECOMMENDATIONS

1968-1989

■ **68-1 Adequate Hearing Facilities**

Substantially implemented. Call for inventory of federal hearing facilities has been fully implemented by ACUS with its *Directory of Administrative Hearing Facilities*. GSA has not implemented call for centralized scheduling facilities for multi-agency hearing sites.

■ **68-2 U.S. Government Organization Manual**

Fully implemented. Call to rewrite the Manual to better describe agencies' programs and functions has been implemented across-the-board, as has recommendation to clarify the Manual and include contacts for further information.

■ **68-3 Parallel Table of Statutory Authority and Rules**

Fully implemented by the Office of the Federal Register and agencies, leading to improved accuracy of CFR.

■ **68-4 Consumer Bulletin**

Fully implemented. Executive Office of the President responded to 68-4 by initiating publication of a bi-weekly *Consumer News and Consumer Register*. Publication was subsequently transferred to HHS, and Office of Consumer Affairs was established in the White House.

■ **68-5 Representation of the Poor in Agency Rulemaking**

Not implemented. FTC, FERC, SBA and USPS responded to 68-5 by making special, continuing efforts to provide better notice to poor persons of rulemakings affecting them. Legislative portions not implemented.

■ **68-6 Delegation of Final Decisional Authority**

Substantially implemented. Call for establishing appeals boards or according increased finality to hearing examiners' decisions was substantially implemented by nearly all agencies conducting significant numbers of formal adjudications.

■ **68-7 Eliminating Jurisdictional Amount Requirement**

Fully implemented. ACUS' call to amend 28 U.S.C. § 1331(a) was fully implemented in 1976 by Pub. L. 94-574 which eliminated minimum amount for suits against the U.S.

■ **68-8 Review of ICC Orders**

Fully implemented. Fully implemented by enactment in 1975 of P.L. 93-584, eliminating three-judge court in cases involving ICC orders.

■ **69-1 Reform of Sovereign Immunity Doctrine**

Fully implemented by Congress in 1976 (Pub. L. 94-574) which amended 5 U.S.C. §§ 702 and 703 to eliminate this, and other, longstanding technical barriers, after ACUS helped persuade the Department of Justice to end its opposition.

■ **69-2 Enforcement of NLRB Orders**

Not implemented, though bills that would have been regularly introduced in Congress to make NLRB orders enforceable automatically unless challenged in court, like the orders of other major agencies. Have brought this to attention of GAO team studying NLRB.

■ **69-3 Publishing a Guide to Federal Reporting Requirements**

Not implemented.

■ **69-4 Subject Indexes to the Code of Federal Regulations**

Partially implemented. The Office of the Federal Register has taken a major role in responding to the recommendation, and has prepared subject indexes and a thesaurus of indexing terms.

■ **69-5 Elimination of Duplicative Hearings in FAA Safety Decertification Cases**

Fully implemented by FAA in May 1970 when it adopted new regulations eliminating its formal hearing procedures. Decertification hearings are now held only before the NTSB, as recommended.

■ **69-6 Compilation of Statistics on Administrative Proceedings by Federal Departments and Agencies**

Partially implemented. The Administrative Conference implemented 69-6's call for compilation of better statistics on agency adjudications by compiling and publishing its *Uniform Caseload Accounting System* volumes for four years (1975-78). The effort was discontinued in 1979 due to inadequate funds.

■ **69-7 Consideration of Alternatives for Licensing Procedures**

Partially implemented by agencies; 69-7 has been largely mooted by subsequent events, such as enactment of NEPA, which go much further than 69-7 in prescribing consideration of alternatives.

■ **69-8 Elimination of Certain Exemptions from the APA Rulemaking Requirements**

Substantially implemented. Almost all major grantmaking and contracting agencies have carried out the Conference's call to waive voluntarily the APA's "proprietary" rulemaking exemption. The "regulatory reform" legislation of the early 1980's would have implemented 69-8 in full, but was not enacted. Recent legislation (Pub. L. 100-687) cited ACUS in subjecting Department of Veteran Affairs' rules to APA requirements.

■ **69-9 Recruitment and Selection of Hearing Examiners; Continuing Training for Government Attorneys and Hearing Examiners; Creation of a Center for Continuing Legal Education in Government**

Partially implemented. The Civil Service Commission responded completely to 69-9's call for revising qualifications for the post of hearing examiner. The call for eliminating veterans preference for hearing examiners was not implemented. 69-9's call for increased

training of government attorney's was met by 1974 creation of the CSC's Legal Education Institute, now part of Department of Justice.

■ 70-1 Parties Defendant

Fully implemented in 1976 by Pub. L. 94-574 which amended 5 U.S.C. § 703.

■ 70-2 SEC No-Action Letters Under Section 4 of the Securities Act of 1933

Fully implemented. The SEC responded positively to all parts of 70-2; included were new SEC rules affecting use of no-action letters and internal directives on use and content of such letters and handling requests for them.

■ 70-3 Summary Decision in Agency Adjudication

Substantially implemented. Approximately one dozen agencies have taken steps to comply with the Conference's call for the use of summary decisions, many of them by adopting in almost verbatim form the model rule developed by ACUS. Only two agencies are in nonconformity.

■ 70-4 Discovery in Agency Adjudication

Substantially implemented. 70-4's call for minimum standards for discovery is now followed substantially by all but a small number of agencies.

■ 70-5 Practices and Procedures Under the Renegotiation Act of 1951

Fully implemented. This call for greater guidance to contractors as to Board interpretations and for improved "proposed opinions" was fully implemented by the Renegotiation Board prior to that body's demise.

■ 71-1 Interlocutory Appeal Procedures

Fully implemented. This recommendation, calling for limits on interlocutory rulings, has been substantially complied with by every agency except one.

■ 71-2 Principles and Guidelines for Implementation of the Freedom of Information Act

Fully implemented. Congress implemented nearly all of the Conference's recommended improvements to the FOIA in the 1974 FOIA Amendments. The Conference was a leading force in the development and passage of this legislation.

■ 71-3 Articulation of Agency Policies

Provides general guidance to agencies. 71-3 calls on agencies to articulate and make known to the public the standards that will guide their regulatory decisions. The Conference has subsequently expanded on this recommendation in a number of more specific recommendations, and conducted a major follow-up study in 1983.

■ 71-4 Minimum Procedures for Agencies Administering Discretionary Grant Programs

Partially implemented. Several of the larger grant-making agencies have enthusiastically carried out 71-4's call for improved public notice of the availability of grant funds, better notification to applicants, and avoidance of conflicts of interest by advisory panel's. These include HHS, Education, and EPA.

■ 71-5 Procedure of the Immigration and Naturalization Service in Respect to Change-of -Status Applications

Partially implemented. INS responded to 71-5 by issuing instructions to its employees giving greater guidance on preparation of decisions, increasing access to operations manuals and instructions, and giving greater information to persons with cases before INS.

■ 71-6 Public Participation in Administrative Hearings

Fully implemented. When adopted in 1971, this recommendation was at the vanguard of then-current practice. Subsequently, 71-6's notions have been fully embraced and implemented by Congress, courts and virtually all agencies. The part urging availability of transcripts, at cost, to parties was implemented by the Federal Advisory Committee Act (§ 11) in 1972.

■ 71-7 Rulemaking on a Record by the Food and Drug Administration

Fully implemented. FDA has carried out all parts of 71-7 by adopting procedures in 1975 that improve its hearing process and enhance citizen participation.

■ 71-8 Modification and Dissolution of Orders and Injunctions

Substantially implemented. Nearly all regulatory agencies now have procedures available for modifying obsolete orders or injunctions as recommended.

■ 71-9 Enforcement of Standards in Federal Grant-in-Aid Programs

Partially implemented. Most of this recommendation's major provisions would have been implemented by an OMB circular that was drafted in 1980 and later shelved after the change in Administration in 1981. Several agencies have taken 71-9's advice on their own.

■ 72-1 Broadcast of Agency Proceedings

Partially implemented. 72-1 calls on agencies to encourage broadcast coverage of proceedings having a broad public interest, and has met a spotty reception. Several agencies, like the FCC and CPSC, have largely complied, but some others expressed considerable opposition.

■ 72-2 Conflict-of-Interest Problems in Dealing with Natural Resources of Indian Tribes

Substantially implemented. Conflicts of interest have been ameliorated by a written understanding between Justice and Interior, as well as creation of an Indian Resources Section at Justice.

■ 72-3 Procedures for the United States Board of Parole

Fully implemented. 1976 legislation implemented 72-3's call for a right to counsel and other improvements. The Parole Commission voluntarily undertook to comply with nearly all other sections.

■ 72-4 Suspension and Negotiation of Rate Proposals by Federal Regulatory Agencies

Substantially implemented. The call for legislation to authorize temporary rate increases was implemented for the FCC. The sections calling for ratemaking agencies to encourage settlements and make other improvements were complied with by most agencies.

■ 72-5 Procedures for the Adoption of Rules of General Applicability

Partially implemented. This recommendation cautioning against imposition of complex, "hybrid" rulemaking procedures has been followed except in a limited number of statutes.

■ 72-6 Civil Money Penalties as a Sanction

Substantially implemented. The Conference's encouragement (in 72-6 and 79-3) of granting agencies' authority to use civil money penalty power has had a major impact on federal administrative enforcement policy. Our model statute has served as a basis for dozens of pieces of legislation, and the Conference has participated in the development of these kinds of legislation, most recently the Program Fraud Civil Remedies Act.

■ 72-7 Pre-induction Review of Selective Service Classification Orders and Related Procedural Matters

Moot. The military draft's termination in 1973 mooted this proposal.

■ 72-8 Adverse Actions Against Federal Employees

Moot. 72-8's call for regularizing part of adverse actions was partly implemented by E.O. 11787 in 1974 as well as related CSC regulations. Passage of Civil Service Reform Act in 1978 mooted the recommendation.

■ 73-1 Adverse Agency Publicity

Substantially implemented. Most agencies that engage in publicity as a regulatory tool have adopted conforming procedures to protect against unfair publicity that could harm a private party.

■ 73-2 Labor Certification of Immigrant Aliens

Substantially implemented. A 1974 field memorandum by the Department of Labor fully implemented almost all of 73-2, thus improving the fairness of the process for issuing labor certificates to aliens.

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

Partially implemented. HHS' component agencies -- the major targets of 73-3 -- have taken significant steps to carry out 73-3.

■ 73-4 Administration of the Anti-Dumping Law by the Department of the Treasury

Substantially implemented. Treasury agreed to carry out most of 73-4's provisions calling for increased access to customs representatives, greater disclosure, and written findings. 1974 legislation carried out the suggested improvements in coordination between Customs and other relevant agencies.

■ 73-5 Elimination of the "Military or Foreign Affairs Function" Exemption from APA Rulemaking Requirements

Substantially implemented. Most affected agencies have issued rules or given notice of their intent to comply with 73-1, though no implemental legislation has been passed.

■ **73-6 Procedures for Resolution of Environmental Issues in Licensing Proceedings**

Substantially implemented. 5 of the 6 affected agencies have adopted rules to meet this recommendation for using "generic" proceedings and increasing disclosures of basic studies and reports.

■ **74-1 Subpena Power in Formal Rulemaking and Formal Adjudication**

Not implemented. Legislation to make agency subpenas available in all APA adjudications and to classify agency power to delegate the issuance of subpenas to presiding officers was introduced as part of APA reform bill in 1970's, but was not enacted.

■ **74-2 Procedures for Discretionary Distribution of Federal Assistance**

Partially implemented. Most major grantor agencies (e.g., HHS, EPA, Education) now follow procedures to hear complaints and take specified steps to ensure the most effective allocation and use of grant funds.

■ **74-3 Procedures of the Department of the Interior with Respect to Mining Claims**

Partially implemented by Interior.

■ **74-4 Preenforcement Judicial Review of Rules of General Applicability**

Partially implemented. Congress has followed the Conference's formulation of the apt standard of review in numerous statutes. The remainder of 74-4, addressed to the courts, has been cited favorably by several court opinions that have looked to it for guidance.

■ **75-1 Licensing Decisions of the Federal Banking Agencies**

Partially implemented. The affected agencies have fully implemented most significant parts of 75-1 (e.g. adoption of statements on chartering policies, explanations of charter denials, written opinions), except for its call to publish their licensing opinions.

■ **75-2 Affirmative Action for Equal Opportunity in Nonconstruction Employment**

Labor and HHS have *partially implemented* this recommendation's call for greater use of graduated sanctions, industry-specific affirmative action formats, and improved coordination in administrative matters.

■ **75-3 The Choice of Forum for Judicial Review of Administrative Action**

Substantially implemented. Many agency and Congressional drafters have taken into account 75-3 in preparing legislation, although a thorough study of its impact has not been conducted. The study has been extraordinarily influential in administrative law scholarship and practice. Most recently cited by Senator Packwood in introducing S. 1436, 101st Congress, concerning appeals of certain Forest Service determinations.

■ **75-4 Procedures to Ensure Compliance by Federal Facilities with Environmental Quality Standards**

Not implemented. This topic continues to be very controversial today due to EPA-DOD disputes.

■ **75-5 Internal Revenue Service Procedures: The Audit and Settlement Processes**

Partially implemented. This call for safeguards to avert abuses of the audit process was accepted by IRS in part.

■ **75-6 Internal Revenue Service Procedures: Collection of Delinquent Taxes**

Substantially implemented. 75-6 sought to curb some harsh consequences of IRS liens, levies and seizures. Many parts were fully implemented by IRS and by subsequent legislation.

■ **75-7 Internal Revenue Service Procedures: Civil Penalties**

Not implemented. IRS has refused to take action on the recommendation. However, in the 101st Congress, a House Ways and Means Committee Task Force has reviewed this recommendation in preparing a reform package.

■ **75-8 Internal Revenue Service Procedures: Tax Return Confidentiality**

Substantially implemented. The Tax Reform Act of 1976 incorporated most major parts of 75-8 on protecting confidentiality of returns.

■ **75-9 Internal Revenue Service Procedures: Taxpayer Services and Complaints**

Substantially implemented. In response to 75-9, IRS instituted a number of initiatives to ensure effective performance of taxpayer services and complaint handling.

■ **75-10 Internal Revenue Service Procedures: The IRS Summons Power**

Substantially implemented. Save for the portions on the content of IRS summons forms, IRS and Congress have acted to implement 75-10.

■ **76-1 Exception from Mandatory Retirement for Certain Presidential Appointees**

Moot. Elimination of mandatory retirement by age discrimination prohibitions has mooted this recommendation.

■ **76-2 Strengthening the Informational and Notice-Giving Functions of the "Federal Register"**

Partially implemented. The Office of the Federal Register has developed rules intended to effectuate much of 76-2, but agencies have been less responsive to its call for publishing some interpretations and adjudicative notices.

■ **76-3 Procedures in Addition to Notice and Opportunity for Comment in Informal Rulemaking**

Provides general guidance for agencies. Recommendation 76-3, even if fully implemented, leaves considerable discretion with agencies as to appropriate rulemaking procedures. While some agencies have had reservations about 76-3's encouragement of cross-examination, many are in substantial compliance. A thorough study would be needed for precise evaluation of implementation.

■ **76-4 Judicial Review Under the Clean Air Act and Federal Water Pollution Control Act**

Not implemented. Congress has not taken the action recommended to rationalize the judicial review provisions under these two major environmental statutes.

■ **76-5 Interpretive Rules of General Applicability and Statements of General Policy**

Provides general guidance to agencies. We have invoked 76-5 frequently in offering comments on proposed agency actions, and they have generally been receptive.

■ **77-1 Legislative Veto of Administrative Regulations**

Moot. Chadha decision by Supreme Court outlawing legislative vetoes has rendered 77-1, which cautioned against general use of such vetoes, inoperative.

■ **77-2 Judicial Review of Customs Service Actions**

Fully implemented. ACUS' recommended restructuring of the powers of the Customs Court and changes in many other aspects of judicial review in such cases were enacted by Congress in three laws implementing almost all of 77-2; Pub. Laws 95-410, 96-39 and 96-417.

■ **77-3 Ex Parte Communications in Informal Rulemaking Proceedings**

Substantially implemented. These related recommendations suggest procedures for agencies in dealing with communications concerning agency rulemaking proceedings. Suggested procedures, calling for placement of ex parte communications in the rulemaking filing and making them publicly available in most cases, are generally followed by agencies and have been influential in court decisions and scholarship.

■ **78-1 Reduction of Delay in Ratemaking**

Substantially implemented. The Conference recommended use of rulemaking for generic policy issues arising in ratemaking, design of better systems of data collection, and greater use of negotiations to settle disputed cases. These concepts have generally been accepted by the major ratemaking agencies.

■ **78-2 Procedures for Determining Social Security Disability Claims**

Partially implemented. Important aspects of the recommendation have been implemented, including the closing of the record after the administrative law judge stage, continuation of an aggressive quality assurance program and articulation of appropriate productivity norms for ALJs. Other aspects are being revived in a Conference report for the Social Security Administration.

■ **78-3 Time Limits on Agency Actions**

Partially implemented. Recommended that reasonable time limits for agency action can be effective in reducing delay, but that, in general, it is better for agencies to set the deadlines rather than Congress. Numerous agencies have reported effective use of this technique.

■ **78-4 Federal Agency Interaction with Private Standard-Setting Organizations in Health and Safety Regulation**

Partially implemented. The Conference urged agencies to coordinate with and participate in the deliberations of privately established organizations that write voluntary consensus standards and to use such standards where appropriate. Parts of the recommendation are incorporated in OMB Circular A-119. Many federal agencies regulating in areas where such organizations exist make an effort to benefit from these activities in ways consonant with the recommendation.

■ **79-1 and 80-1 Hybrid Rulemaking Procedures of the Federal Trade Commission**

Partially implemented. These recommendations constitute the report of the Conference to the Congress, as mandated under the Magnuson-Moss Warranty-FTC Improvement Act of 1975. The Conference found that the procedures in the Act did not prove to be effective in controlling agency discretion in the exercise of a broad delegation of legislative power.

Therefore, the Conference urged that Congress not rely on a similar scheme in the future. In general, we believe that the Congress has followed this advice. The recommendations also contained specific advice to the FTC, which has, in general, followed the recommendations.

■ **79-2 Disputes Respecting Federal-State Agreements for Administration of the Supplemental Security Income Program**

Not implemented. This recommendation urged action by the Department of Health, Education and Welfare. Follow-up required.

■ **79-3 Agency Assessment and Mitigation of Civil Money Penalties**

Substantially implemented. Reaffirmed 72-6's call for greater use of civil money penalties, but urges agencies to publish standards for assessment and mitigation. Many agencies have complied, although follow-up work would be useful.

■ **79-4 Public Disclosure Concerning the Use of Cost-Benefit and Similar Analyses in Regulation**

Partially implemented. Recommended that agencies adopt the practice of addressing publicly the techniques used and the assumptions made in using cost-benefit or similar analyses. The Regulatory Impact Analyses required under Executive Order 12,291, as amplified by OMB guidance documents, include much of the information identified in the Conference recommendation. To the extent that the analyses are made public, the goals of the recommendation would be achieved.

■ **79-5 Hybrid Rulemaking Procedures of the FTC--Administration of the Program to Reimburse Participants' Expenses**

Moot. Funding for the reimbursement program was withdrawn by Congress, thus mooting this recommendation.

■ **79-6 and 81-2 Elimination of the Presumption of Validity of Agency Rules and Regulations in Judicial Review, as Exemplified by the Bumpers Amendment**

Substantially implemented. Recommended that Congress not adopt various proposals to alter or reverse any presumption of validity that attaches to agency rules or regulations. Congress has not enacted any of those proposals. Indeed Supreme Court caselaw has since reaffirmed the appropriateness of such deference. The recommendation also offered alternative language that has not been enacted.

■ **79-7 Appropriate Restrictions on Participation by a Former Agency Official in Matters Involving the Agency**

Partially implemented. Recommended that the problem of post-employment activities of former federal officials be addressed primarily through administrative remedies, with criminal penalties reserved for the most serious cases. Specific legislative changes were proposed to reduce the restrictions in certain instances. Legislation enacted prior to final Conference action contained one of the recommended changes.

■ **80-1 See 79-1.**

■ **80-2 Enforcement of Petroleum Price Regulations**

Moot. This recommendation is not of current interest because the program was terminated.

■ **80-3 Interpretation and Implementation of the Federal Advisory Committee Act**

Partially implemented. Recommended that GSA should issue revised guidelines to assist agencies in following the provisions of FACA, and to clarify applicability of the Act to groups convened on an ad hoc basis without formal structure and to existing privately established groups. GSA adopted interim guidelines in 1983 that were in substantial accord with the recommendation and a final rule in 1987 that withdrew somewhat from the Conference's recommendation. ACUS submitted comments in the 101st Congress on S. 444, the Federal Advisory Committee Act Amendments of 1989.

■ **80-4 Decisional Officials' Participation in Rulemaking Proceedings**

Provides general guidance to agencies. (Follow-up study would be needed to determine agency responsiveness to recommendation.) Proposed minimum standards of propriety for agency officials who make rulemaking decisions, and urged agencies to adopt procedures for challenges.

■ **80-5 Eliminating or Simplifying the "Race to the Courthouse" in Appeals from Agency Action**

Fully implemented. Pub. L. 100-236 fully implements this recommendation to eliminate "races to the courthouse" to obtain judicial review of agency orders in a preferred forum. The new procedure replaces the first-to-file rule with a system of random selection in any case where petitions for review of the same order are received by two or more circuit courts of appeal within ten days after the agency order is issued. ACUS followed up with comments on implementing regulations issued by the Judicial Panel on Multidistrict Litigation.

■ **80-6 Intragovernmental Communications in Informal Rulemaking Proceedings**

Substantially implemented. Opposes blanket prohibition on Presidential and executive branch contacts so long as any material facts are placed in the record and comments serving as a "conduit" for outside sources are identified. Recommendation was cited by leading case of Sierra Club v. Costle, 657 F.2d 298, 401 (D.C. Cir. 1981) and has been generally followed by OMB.

■ **81-1 Procedures for Assessing and Collecting Freedom of Information Act Fees**

Substantially implemented. Recommended revisions to FOIA fees and agency fee collection practices so as to recover costs that are properly charged to requesters. This recommendation was largely implemented by the Freedom of Information Reform Act of 1986, Pub. L. 99-570. Most importantly, requesters of information for a private, profit-making purpose are required to pay fees that capture the agencies' costs of reviewing records to determine whether they contain exempt information.

■ **81-2 See 79-6**

■ **82-1 Exemption (b)(4) of the Freedom of Information Act**

Substantially implemented. Urged that agencies be required to follow uniform procedures when FOIA requesters seek information that may fall within the Act's exemption for confidential business information. The recommendation also urged an expansion of the scope of the exemption and de novo judicial review. Legislation to implement the recommendation was introduced, but did not pass in Congress. However, the President in 1987 issued Executive Order 12600, which requires agencies to follow procedures recommended by the Conference.

■ 82-2 Resolving Disputes Under Federal Grant Programs

Partially implemented. Several large agencies (HHS, Labor, Education) now follow the recommended procedures. A draft OMB circular, that ultimately was not adopted, would have fully implemented 82-2. Recent legislation affecting the Department of Education implements 82-2's call for greater emphasis on mediating grant disputes. A forthcoming ACUS guide to drafting federal grant statutes also will increase awareness and implementation of this recommendation.

■ 82-3 Federal Venue Provisions Applicable to Suits Against the Government

Partially Implemented. Urges Congress not to pass sweeping changes to "localize" venue laws. Such bills received serious consideration in the 97th Congress but were defeated and have not been revived. Portion of the recommendation that urges refinements to venue laws not implemented.

■ 82-4 and 85-5 Procedures for Negotiating Proposed Regulations

Substantially implemented. Set forth criteria for choosing rulemaking proceedings suitable for negotiation of proposed rules, together with procedures for agencies to follow. Legislation was also proposed to facilitate the process. The procedures have been followed in about 18 rulemaking proceedings by EPA, Transportation, FAA, OSHA, Interior, NRC, FTC and Agriculture. Several "reg-negs" have been completed, with final rules in place. Also, Public Law 100-297, the "Hawkins-Stafford Elementary and Secondary School Improvement Amendments of 1988," mandates use of negotiated rulemaking in accordance with these recommendations. Legislation recommended by the Conference was passed by the Senate in the 100th (S. 1504) and the 101st (S. 303) Congress and is being considered by the House (H.R. 743). In addition, the Price-Anderson Amendments Act of 1988, Pub. L. 100-408, also cites the ACUS recommendations and requires the NRC to use reg neg.

■ 82-5 Federal Regulation of Cancer-Causing Chemicals

Degree of implementation unknown. The Conference's recommendation broadly addressed agency procedures for identifying, evaluating, and regulating carcinogens. Various provisions address priority setting, interagency coordination, testing and evaluation, use of advisory panels, generic rulemaking, quantitative assessment of risk, and public participation. The Administration has subsequently adopted a cancer policy, and new agency procedures have evolved. A follow-up study would be needed to determine the degree of implementation of the Conference recommendation.

■ 82-6 Federal Officials' Liability for Constitutional Violations

Implementation in progress. Congress has repeatedly considered implemental legislation to substitute the U.S. government for individual employees in constitutional tort actions, and ACUS has offered its support. Analogous legislation concerning non-constitutional torts was enacted in the 100th Congress.

■ 82-7 Judicial Review of Rules in Enforcement Proceedings

Provides general guidance to Congress. Provides standards for Congress to follow when drafting statutes that limit the judicial reviewability of rules at the enforcement stage. Follow-up study needed to determine responsiveness of Congress.

■ **83-1 The Certification Requirement in the Contract Disputes Act**

Not implemented. Led to introduction of H.R. 3618, Contract Disputes Improvement Act of 1983. ACUS testified in support of bill at hearing. Not passed due to opposition from White House and DOJ. Recent Claims court opinion cites ACUS Recommendation with approval, Clark Mechanical Contractors v. U.S., No. 511-86C (May 13, 1987).

■ **83-2 The "Good Cause" Exemption from APA Rulemaking Requirements**

Provides general guidance to agencies. Provides standards for agency invocation of good cause exemption in rulemaking. Invoked by ACUS to good effect in State Department rulemaking proceeding. Recent follow-up study shows heavy, largely appropriate, use of exemption, by agencies.

■ **83-3 Agency Structures for Review of Decisions of Presiding Officers under the Administrative Procedure Act**

Provides general guidance to Congress and agencies. Provides standard for statutes and regulations governing agency review of ALJ decisions. Follow-up study needed to determine responsiveness of Congress and agencies.

■ **83-4 The Use of the Freedom of Information Act for Discovery Purposes**

Not implemented. Recommends amending FOIA to require a person in litigation with the government to notify government counsel of any FOIA requests relating to the litigation. Sanctions are proposed for failure to comply. Legislation was introduced in the 99th Congress that would have substantially implemented the recommendation.

■ **84-1 Public Regulation of Siting of Industrial Development Projects**

Provides general guidance to federal, state, regional and local agencies. Provides guidance on interagency coordination, public participation, environmental review, permit approvals and decision schedules. Follow-up study needed to determine responsiveness of agencies.

■ **84-2 Procedures for Product Recalls**

Not implemented. Recommended establishment of an interagency liaison group to share information; also suggested ways to make recall notices more effective and better ways to handle consumer inquiries. Follow-up needed.

■ **84-3 Improvements in the Administration of the Government in the Sunshine Act**

Not implemented. Urges Congress to reconsider the Act's exemptions and allow broad policy matters to be considered in closed meetings. Also urges agencies to make open meetings more comprehensible. ACUS successfully encouraged ABA to take similar official position in 1987. So far Congress has not shown interest in the subject.

■ **84-4 Negotiated Cleanup of Hazardous Waste Sites Under CERCLA**

Substantially implemented. In 1985 EPA issued a memorandum on settlement procedures that followed the key points of the recommendation. (See Chairman Smith's congratulatory letter to EPA Administrator, April 15, 1985.) Subsequently the Superfund Amendments and Reauthorization Act of 1986 enacted new settlement procedures consistent with our recommendation.

■ **84-5 Preemption of State Regulation by Federal Agencies**

Provides general guidance to Congress and agencies. Provides considerations for Congress and agencies when confronting issues involving preemption of state and local laws. Follow up study needed to determine responsiveness of Congress and agencies.

■ **84-6 Disclosure of Confidential Information Under Protective Order in International Trade Commission Proceedings**

Not implemented. In 1984, Chairwoman of ITC responded to recommendation by promising to appoint a committee to consider how to implement the recommendation. This did not occur, as present Commission disagrees with thrust of the recommendation.

■ **84-7 Administrative Settlement of Tort and Other Monetary Claims Against the Government**

Not implemented. S. 971 and S. 2497, the Administrative Dispute Resolution Act (101st Congress), would implement the legislative portions of 84-7. Justice Department opposition has hindered the influence of the remainder.

■ **85-1 Legislative Preclusion of Cost/Benefit Analysis**

Provides general guidance to Congress. One sentence recommendation urges Congress to explicitly so state if it intends to preclude agency cost/benefit analysis. Follow-up study needed to determine responsiveness of Congress.

■ **85-2 Agency Procedures for Performing Regulatory Analysis of Rules**

Substantially implemented. Provides guidance to agencies as to how to conduct "regulatory analysis" in rulemaking under Executive Orders. Letters sent to all major agencies requesting description of agency implementation efforts. Most agencies' responses show careful consideration of guidance.

■ **85-3 Coordination of Public and Private Enforcement of Environmental Laws**

Partially implemented. Recommended administrative steps to achieve better coordination of agency enforcement with suits brought by private citizens to enforce environmental laws. These steps included clearer articulation of EPA enforcement policy and improvements in agency information systems.

■ **85-4 Administrative Review in Immigration Proceedings**

Implementation in progress. INS has responded by letter that a "review of appellate jurisdiction in immigration matters is in progress" and that the recommendation is being taken account of (August 13, 1987). In addition, INS responded to a specific ACUS query on reviewability of applications under the Immigration Reform and Control Act of 1986.

■ **85-5 See 82-4**

■ **86-1 Nonlawyer Assistance and Representation**

Partially implemented. The VA, one of the targeted agencies, has proposed revised regulations which would broaden representation by paralegals, law clerks and law students. Other agencies (SSA, INS, IRS) must be surveyed.

■ **86-2 Use of Federal Rules of Evidence in Federal Agency Adjudications**

Implementation in progress. Recommendation urged Congress not to require that agencies use the Federal Rules of Evidence. Congress has so far not done so. Urged agencies to adopt rules giving ALJ flexibility and guidance. ACUS sent recommendation to all adjudicatory agencies and has commented on OSHRC's proposal rules and on the model rules for the Program Fraud Civil Remedies Act. OSHRC declined to follow ACUS, but the model rules did follow ACUS.

■ **86-3 Agencies' Use of Alternative Means of Dispute Resolution**

Implementation in progress. The Conference has undertaken an extensive program of seminars, lectures, consultations, and training with specific agencies to encourage agencies to comply with this recent recommendation. S. 971 and H.R. 2497 (101st Congress), a major part of that effort, would carry out fully the legislative portions of 86-3 and give added impetus to agencies to use ADR. ACUS also sponsored a series of roundtable discussions for high-ranking agency personnel to make them aware of potential uses of ADR and is hosting an interagency working group to discuss implementation of the recommendation.

■ **86-4 The Split-Enforcement Model for Agency Adjudication**

Provides general guidance to Congress. Recommendation urges Congress to clarify enforcement responsibilities whenever it creates a split-enforcement scheme. Congress has not taken such action since the recommendation was issued.

■ **86-5 Medicare Appeals**

Implementation in progress. The agency (Health Care Financing Administration -- HCFA) is taking steps to publish policies that were heretofore not published. Congress has mandated, then stayed, implementation of a new Part B Medicare hearing office in HCFA. Congress has also followed the recommendation by requiring Medicare policy changes to be promulgated by regulation before taking effect, 101 Stat. 1330-78 (1987). In 1987, ACUS co-sponsored with ABA a symposium on Medicare procedures that followed up on this recommendation.

■ **86-6 Petitions for Rulemaking**

Awaiting implementation. Recommendation urges agencies to establish rules governing handling of rulemaking petitions. No implementation activity has been taken, other than to support ABA adoption of ACUS position.

■ **86-7 Case Management as a Tool for Improving Agency Adjudication**

Implementation in progress. Copies of the recommendation and consultant's report have been distributed and made a focal point of several ACUS seminars and work groups. Several training sessions with administrative law judges have focused on the case management recommendations.

■ **86-8 Acquiring the Services of "Neutrals" for Alternative Means of Dispute Resolution**

Implementation in progress. 86-8 calls on ACUS to develop a roster of ADR neutrals, which has now been established, 54 Fed. Reg. 39,721 (Sept. 28, 1989).

■ **87-1 and 87-10 Regulation by the Occupational Safety and Health Administration**

Partially Implemented. In June 1988, OSHA proposed a generic revision of its "Z-table" as advocated by the recommendation. Preamble to the proposed rule relies on ACUS study and recommendation. OSHA adopted a final rule in January 1989, again relying on the

ACUS recommendation (54 Fed. Reg. 2332, 2370). OSHA also is reviewing its rulemaking process in response to ACUS' study (which was requested by OSHA). The ABA adopted these recommendations as well.

■ **87-2 Federal Protection of Private Sector Health and Safety Whistleblowers**

Implementation in progress. S. 2095, introduced in the 100th Congress and S. 436, introduced in the 101st Congress, would fully implement this recommendation. ACUS Chairman Breger testified on S. 2095, H.R. 3812, 4023 and 4113, bills designed to protect aviation industry employees who disclose safety information. The aviation bills, renumbered H.R. 5073, passed the House in the 101st Congress.

■ **87-3 Agency Hiring of Private Attorneys**

Implementation in progress. Based on a survey of federal agency use of private attorneys, a practice costing millions of dollars annually, the Conference set forth guidelines. The guidelines emphasize use of appropriate competitive procedures, agency retention of control over counsel's performance, and the importance of following applicable conflict-of-interest restrictions. Congressional hearings on the banking agencies'hiring of private attorneys were scheduled in 1988 with the aid of the ACUS study, but they have not taken place. Legislation introduced in 1989 (S. 90) accords with the recommendation for agencies to use legal experts available in other agencies for special short-term needs.

■ **87-4 User Fees**

Implemented. The principles set forth in this recommendation were generally followed in OMB's proposed revision of OMB Circular A-25 on User Charges. ACUS, in 1988, sponsored a Symposium on User Fees attended by over 100 agency officials.

■ **87-5 Arbitration in Federal Programs**

Implementation in progress. S. 971 and H.R. 2497 would implement the procedures prescribed in 87-5 to avoid fairness and legal concerns that might otherwise stem from agency arbitration processes. ACUS testified in favor of this legislation.

■ **87-6 State-level Determinations in Social Security Disability Cases**

Implementation in progress. ACUS provided guidance to the Social Security Administration regarding the progress and evaluation of still-pending demonstration projects to improve the disability determination process.

■ **87-7 A New Role for the Social Security Appeals Council**

Implementation in progress. The Social Security Administration is reviewing its Appeals Council procedures in view of the ACUS study (which was requested by SSA).

■ **87-8 National Coverage Determinations Under the Medicare Program**

Implementation in progress. In early 1989 Health Care Financing Administration issued a revised proposed rule concerning its procedures for issuing national coverage determinations, crediting the ACUS study (54 Fed. Reg. 4302). ACUS commented on the proposal. The ACUS study attracted much interest in the medical/legal community and provided information and background for an ABA-ACUS symposium on Medicare procedures.

■ **87-9 Dispute Procedures in Federal Debt Collection**

Awaiting implementation.

■ **87-10 Regulation by the Occupational Safety and Health Administration (See 87-1.)**

■ **87-11 Alternatives for Resolving Government Contract Disputes**

Implementation in progress. S. 971 and H.R. 2497 would implement legislative portions. Office of the Chairman is working on training for contracting officers, administrative judges and others at contracting agencies; has caused a proposed change in the FAR to be undertaken by GSA; and has begun work with interested agencies to develop an executive order to encourage greater ADR use. ACUS-sponsored training has been provided to the judges of the Armed Services Board of Contract Appeals and contracting officers in the U.S. Forest Service. ACUS is working with the National Contract Management Association to increase awareness among agencies and private contractor personnel.

■ **87-12 Adjudication Practices and Procedures of the Federal Bank Regulatory Agencies**

Substantially Implemented. The Financial Institutions Reform, Recovery and Enforcement Act of 1989 (Pub. L. 101-73, 101 Stat. 183) implemented the ACUS recommendation that the banking agencies establish a pool of administrative law judges and adopt uniform rules of procedure for administrative hearings. It also encouraged agencies to use voluntary alternative dispute resolution procedures, again consistent with ACUS positions, see 86-3.

■ **88-1 Presidential Transition Workers' Code of Ethical Conduct**

Fully Implemented. One of President-elect Bush's first actions was to issue a code-of-conduct directive to his transition workers that tracked ACUS's recommendation. On November 18, 1988, President Reagan issued a Memorandum to Heads of Departments and Agencies, which implemented the recommendation.

■ **88-2 Federal Government Indemnification of Government Contractors**

Implementation in progress. Liability for injuries or damage to a third party resulting from products or services of government contractors has been ignored by many government agencies. This recommendation identifies factors agencies should consider when determining whether to indemnify a contractor. It urges interagency cooperation in assessing risk and calls for compilation of existing indemnity clauses and claims.

■ **88-3 The Federal Reserve Board's Handling of Applications under the Bank Holding Company Act**

Recommendation being considered. The Conference recommends that the Federal Reserve Board of Governors should avoid delays in action on applications by preventing the reopening of an applicant's file unless pertinent information of a highly significant nature is received. Also urged the Fed to clarify conditions established with regard to applications under the Bank Holding Company Act and to publicize voluntary commitments, which should be made part of final Fed orders.

■ **88-4 Deferred Taxation for Conflict of Interest Divestitures**

Fully Implemented. The Conference calls for an amendment to the Internal Revenue Code to permit deferred taxation of gains when appointees to high-level government positions are required to divest property to satisfy conflict of interest requirements. The recommendation was endorsed by the President's Commission on Federal Ethics Law Reform

and the National Commission on the Public Service (the Volcker Commission). The ACUS proposal was incorporated in the Ethics Reform Act of 1989, Public Law 101-194.

■ **88-5 Agency Use of Settlement Judges**

Implementation in progress. Another ADR initiative, this recommendation calls for the use of a settlement judge (not the presiding judge) who can conduct negotiations with parties to a proceeding in an attempt to settle cases. ACUS has conducted training sessions for several dozen judges from ten agencies, including a three-day session in conjunction with the National Judicial College. The DOT Board of Contract Appeals has issued a settlement judge rule and has made it available for consideration and use by other agencies.

■ **88-6 Judicial Reivew of Preliminary Challenges to Agency Action**

Substantially implemented. The D.C. Circuit has responded to this recommendation by amending its rules to adopt a new expedited procedure for the handling of claims of unreasonable agency delay.

■ **88-7 Valuation of Human Life in Regulatory Decisionmaking**

Implementation in progress. The recommendation urges that agencies make full disclosure of their human life valuations in regulatory actions and that OMB serve as the central clearinghouse for research and information on life valuation issues. The recommendation received wide publicity and it has been sent to agencies and OMB for their consideration.

■ **88-8 Resolution of Claims Against Savings Receiverships**

Substantially Implemented. The Supreme Court cited the ACUS report approvingly in Coit Independence Joint Venture v. FSLIC, 109 S. Ct. 1361 (1989). The Financial Institutions Reform, Recovery and Enforcement Act of 1989 (Pub. L. 101-73, 101 Stat. 183) subsequently resolved the issues addressed by this recommendation in a way that was generally consistent with the Conference's advice. The final bill (§ 212) gave claimants the choice of pursuing their claims in the courts or through formal agency adjudication followed by judicial review under the Administrative Procedure Act.

■ **88-9 Presidential Review of Agency Rulemaking**

Substantially Implemented. The recommendation endorses continuation of presidential review of agency rulemaking subject to certain guidelines for its implementation. The ACUS procedural guidelines are similar to special procedures announced by the Office of Information and Regulatory Affairs (OIRA) for EPA in 1983. OIRA's head has endorsed the ACUS recommendation to the American Bar Association, which is considering it in 1989.

■ **88-10 Federal Agency Use of Computers in Acquiring and Releasing Information**

Implementation in progress. This recommendation, designed to bring agency information handling efforts into the computer age, contains general guidance to agencies that acquire or release information in electronic form, including guidance on compliance with the Freedom of Information Act. The recommendation is being reviewed by the Office of Management and Budget, agencies, and several Congressional committees.

■ **88-11 Encouraging Settlements by Protecting Mediator Confidentiality**

Implementation in progress. The recommendation urges agencies to establish procedures and policies to ensure appropriate confidentiality to information divulged to mediators and other neutrals in the course of settlement negotiations involving a statute, rule or policy

administered by a federal agency. S. 971 and H.R. 2497 (101st Congress), would fully implement this recommendation. ACUS has prepared a model Notice of Proposed Rulemaking, which EPA's Office of Enforcement and Compliance Monitoring has agreed to use as a basis for rulemaking.

■ **89-1 Peer Review and Sanctions in the Medicare Program**

Implementation in Progress. The recommendation suggests changes to the procedures used by the Medicare program's peer review organizations (PROs) and related procedures of the Department of Health and Human Services. The changes are designed to improve the accessibility of PRO-related policies, the fairness and firmness of PRO-recommended sanctions imposed on providers and practitioners, and the effectiveness of PRO safeguards for beneficiary rights. The recommendation was sent to the Health Care Financing Administration, the HHS Inspector General and to relevant Congressional subcommittees. ACUS staff has met with Senate Finance Committee staff on the enforcement portion of the recommendation.

■ **89-2 Contracting Officers' Management of Disputes**

Implementation in Progress. Recommends steps to increase the ability and authority of contracting officers to resolve contract disputes. Steps include agency encouragement of and training in the use of alternative dispute resolution (ADR) techniques by contracting officers. ACUS is working with the National Contract Management Association to educate agency contracting officers regarding potential uses of ADR in these disputes. OMB Administrator for Information and Regulatory Affairs has indicated willingness to help with implementation.

■ **89-3 Conflict-of-Interest Requirements for Federal Advisory Committees**

Implementation in Progress. Urges Congress to establish special conflict-of-interest disclosure rules for members of federal advisory committees. Some financial interest disclosure would be required of all committee members, regardless of their classification as special government employees or representatives of particular interests. Chairman Breger presented the ACUS position in comments on S. 444, the Federal Advisory Committee Act Amendments of 1989 (101st Congress), and the ACUS staff has consulted with the Senate Committee on Governmental Affairs staff on this issue. It is noted that the Ethics Reform Act of 1989 (P. L. 101-194) established a special exemption in 18 U.S.C. § 208 for advisory committee members; this action partially addresses the concerns addressed in the ACUS recommendation.

■ **89-4 Reforming Asylum Adjudication**

Implementation in Progress. Endorses creation of a new Asylum Board, located within the Executive Office of Immigration Review (DOJ), which would consist of an adjudication division, an appellate division, and a documentation center. These changes to the process for deciding asylum claims are intended to increase the expertise and independence of the adjudicators and to assure expeditious and fair adjudications. The recommendation was welcomed by the Attorney General and sent to relevant committees of the Congress.

■ **89-5 Achieving Judicial Acceptance of Agency Statutory Interpretations**

Implementation in Progress. Recommends that agencies use certain procedures when they adopt interpretations of statutes that are intended to be definitive on judicial review under the deference test set forth by the United States Supreme Court in Chevron U.S.A. v.

Natural Resources Defense Council, 467 U.S. 837. The recommendation has been sent to the Department of Justice and to agencies.

■ **89-6 Public Financial Disclosure by Executive Branch Officials**

Not Implemented. Would amend the Ethics in Government Act's executive branch public financial disclosure requirements, consistent with an appropriate balance of costs and benefits of such disclosure. Includes recommendations to lower the threshold for reporting liabilities, reducing the number of categories of value for the reporting of assets and liabilities, and requiring the reporting of gifts in categories of value instead of actual amount. Although the President's Commission on Federal Ethics Law Reform adopted the recommendation's general approach to reducing unnecessary detail in financial reports, the Conference's proposals were not included in the President's proposed legislation nor in the Ethics Reform Act of 1989, Public Law 101-194.

■ **89-7 Federal Regulation of Biotechnology**

Implementation in Progress. Recommends steps to improve interagency coordination of federal biotechnology regulation, including enlarging the membership of the Office of Science and Technology's Biotechnology Science Coordinating Committee and opening its proceedings to the public unless they involve confidential information. Also advises Congress and the President to monitor interagency coordination and biotechnology developments.

■ **89-8 Agency Practices and Procedures for the Indexing and Public Availability of Adjudicatory Decisions**

Partially Implemented. Calls upon agencies to compile a subject-matter index of their adjudicatory decisions to afford citizens information useful in dealing with agencies and to assist the development of agency standards and policies on general issues and recurring questions. This recommendation has been transmitted to selected agencies. As a result of the recommendation, the Comptroller of the Currency announced in October 1989 that it is making publicly available key documents in adjudications from 1977 to the present.

■ **89-9 Processing and Review of Visa Denials**

Implementation in Progress. Recommends that the Department of State implement changes in its procedures for review of visa applications at United States consulates abroad. The recommended changes include permitting the assistance of attorneys, increased explanation of the basis for denials, and making public advisory opinions of the Visa Office. The Recommendation has been transmitted to the Secretary of State and to relevant Congressional committees.

■ **89-10 Improved Use of Medical Personnel in Social Security Disability Determinations**

Implementation in Progress. Recommends steps that SSA should take to increase the role of medical personnel at the initial decision stage of disability claims, including giving the medical member of the team primary responsibility for developing medical evidence in the record.

Appendix G

U.S. COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NOTICE OF FINAL RULE

In accordance with the provisions of Rule 22 of the General Rules of this Court, notice is hereby given of an amendment to General Rule 7(j). This amendment brings Rule 7(j) into conformity with the Court's current practice under a general order of November 25, 1988. That order is rescinded upon the adoption of the Rule 7(j) amendment.

The amended Rule 7(j) provides that a petition for a writ of mandamus based on a claim of unreasonable delay by an administrative agency shall be treated as a motion for purposes of the General Rules.

Copies of this notice have been published this date by the means specified in Local Rule 22.

/s/ Constance L. Dupré
Constance L. Dupre
Clerk

Issued: December 27, 1989

United States Court of Appeals
for the District of Columbia Circuit

BEFORE: Wald, Chief Judge; Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D.H. Ginsburg and Sentelle, Circuit Judges.

ORDER

It is ORDERED, on the Court's own motion, that the General Order of November 25, 1988, be rescinded and that D.C. Circuit Rule 7(j) be amended as follows:

(j) Petitions for Special Writs

(1) A petition for a special writ to the district court or an administrative agency shall be treated as a motion for purposes of these Rules, except that no responsive pleading shall be permitted unless requested by this Court; no such petition shall be granted in the absence of such a request.

(2) A petition for a writ of mandamus or a writ of prohibition to the district court shall not bear the name of the district judge, but shall be entitled, 'In re _____, Petitioner.' Unless otherwise ordered, the district judge shall be represented *pro forma* by counsel for the party opposing the relief, who shall appear in the name of such party and not that of the judge.

This amendment is effective upon date of publication.

Per Curiam
For the Court
/s/ Constance L. Dupré
Constance L. Dupre
Clerk

1987

February 24
The Role of Legislative History in Judicial Interpretation

Abner J. Mikva, Judge, U.S. Court of Appeals for the D.C. Circuit
Kenneth W. Starr, Judge, U.S. Court of Appeals for the D.C. Circuit

May 14
Use of Specialized Courts of Judicial Review

Robert H. Bork, Judge, U.S. Court of Appeals for the D.C. Circuit
Lawrence Sager, Professor, New York University Law School

July 27
Administrative Law Judges: Should an Independent Corps Be Created?

Benjamin L. Cardin, Congressman (D-Maryland)
Howard Markey, Chief Judge, U.S. Court of Appeals for the Federal Circuit
Victor Rosenblum, Professor, Northwestern University Law School

November 4
Broadcast Deregulation: The Reagan Years and Beyond

Jonathan D. Blake, Former President, Federal Communications Bar Association
Dennis Patrick, Chairman, Federal Communications Commission
Laurence A. Tisch, President, CBS, Inc.
Richard E. Wiley, Former Chairman, Federal Communications Commission

1988

March 15
Transportation Deregulation: Is There a Need For a Mid-Course Correction?

James H. Burnley, Secretary of Transportation
Cornish Hitchcock, Legal Director, Aviation Consumer Action Project
Michael E. Levine, Professor, Yale School of Organization and Management

April 19
Legislative Developments in Administrative Law

William H. Allen, Covington and Burling
Dan Glickman, Congressman (D-Kansas)
Charles Grassley, Senator (R-Iowa)

September 28
"The Aftermath of *Morrison v. Olson*: What Remains of Executive Prerogative?"

Harold Bruff, Professor, University of Texas Law School
Michael Davidson, Legal Counsel to U.S. Senate
Douglas Kmiec, Assistant Attorney General, Office of Legal Counsel

December 5
Ethics in Government: Where Do We Go From Here?

C. Boyden Gray, Counsel to the President
Barney Frank, Congressman (D-Massachusetts)

1989

May 31
Savings & Loan Industry Reform

M. Danny Wall, Chairman, Federal Home Loan Bank Board
Richard C. Breeden, Assistant to the President for Issues Analysis
Lawrence G. Baxter, Professor, Duke University Law School

July 25
The Drug Approval Process in the AIDS Era

Frank E. Young, Commissioner, Food & Drug Administration
James T. O'Reilly, Adjunct Professor, University of Cincinnati School of Law
William B. Schultz, Public Citizen Litigation Group

October 12
Perspectives on *The Economist as Reformer: Revamping the FTC, 1981-1985*

James C. Miller, III, Chairman, Citizens for a Sound Economy
Lewis A. Engman, Partner, Winston & Strawn
Eleanor M. Fox, Professor and Associate Dean, New York University School of Law

1990

January 25
The Ethics Reform Act of 1989: Will It Change the Way Government Conducts Business in the 1990s?

Michael Berman, President, The Duberstein Group
Arthur B. Culvahouse, Jr., Partner, O'Melveny & Myers
Norman Ornstein, Resident Scholar, American Enterprise Institute

March 1
Administrative Law Proposals of the Federal Court Study Committee: A Forum

Harold Bruff, University of Texas Law School
Peter Strauss, Columbia University Law School
Stephen F. Williams, Judge, U.S. Court of Appeals for the D.C. Circuit

April 23
Providing Economic Incentives in Environmental Regulations

E. Donald Elliott, General Counsel, Environmental Protection Agency
Richard B. Stewart, Assistant Attorney General, Land and Natural Resources Division

APPENDIX I

Current Areas of Conference Study

1. Administrative Law Issues in the Immigration Process

The substantive issues affecting U.S. immigration policy were much debated and largely addressed in the Immigration Reform and Control Act of 1986. Because little attention was directed to the administrative procedures developed to determine the rights and privileges of private individuals affected by the immigration laws, and the obligations of the federal government under those laws, the Conference was asked to study those procedures. In response to Congress' directive, we sponsored a Congressional seminar on potential immigration studies in the fall of 1987, at which Representative Albert Bustamante of Texas, on behalf of the Hispanic Causus, was a principal participant. Several projects emerged from that seminar.

First, the Conference engaged David S. North of TransCentury Development Associates, an authority on immigration issues, to prepare two reports on the alien legalization program. The first, submitted in the spring of 1988, evaluated whether the legalization program should be extended beyond its May 4, 1988 deadline, and concluded that it should. Although only one House of Congress adopted this recommendation, Mr. North's study was widely discussed during the course of the debate on the extension issue.

In December, 1988, Mr. North submitted a follow-up report addressing a wide range of questions dealing with the Immigration and Naturalization Service's implementation of the second phase of the legalization program. The report led the Conference in 1989 to issue a formal statement outlining the lessons learned from the legalization program.[1]

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[1]Statement 14, 54 Fed. Reg. 28975 (1989).

Next, in January, 1989, Professor James Nafziger of the Willamette University College of Law submitted a report on the reviewability of visa denials by consular officers. As the subcommittee is aware, almost all aliens who wish to enter the country must first secure visas, which are issued by consular officers at the various U.S. consulates abroad. Review of those decisions by the Visa Office of the Department of State in Washington is largely advisory, however, and the courts have generally declined to review consular officers' decisions. Professor Nafziger's study examined the need for administrative reform of the visa denial process and recommended, among other things, that consular officer denials be accompanied by a more explicit statement of reasons, that the Visa Office play a more active role in the review process, and that Congress and the State Department expand the scope of review. A Conference recommendation on the subject was adopted last December.[2]

Finally, the Conference examined the procedures employed for handling asylum claims -- including hearing procedures, administrative appeals, and the need for judicial review. For the substance of asylum policy as mandated by Congress to work, it is absolutely essential that the procedures employed be as efficient as possible while ensuring the rights of potential asylees. In 1988, the United States received 60,000 asylum applications and the Immigration and Naturalization Service was projecting upwards of 100,000 applications in the near future. Recognizing that there may be a need to adapt existing procedures to cope with this developing workload, the Conference engaged Professor David Martin of the University of Virginia School of Law as a consultant. Relying on his report, in Recommendation 89-4, the Conference proposed a number of significant reforms to the system.[3]

The Conference recommended that the Attorney General create a new Asylum Board within the Executive Office of Immigration Review consisting of an adjudication center, an appellate division, and a documentation center. All claims would be heard exclusively by the adjudication division. Applicants would be encouraged to secure counsel or a qualified

[2]Recommendation 89-9, 54 Fed. Reg. 53496 (1989).

[3]54 Fed. Reg. 28970 (1989).

institutions. The recommendation took no position on the statutory and constitutional questions at issue in litigation then pending in the Supreme Court but urged Congress to examine whether liquidation claims should be handled administratively or in court. The Conference proposed procedures to be followed if Congress decided that an administrative adjudication process is the more desirable way to resolve such claims.[6] Certain of these recommendations were adopted by Congress when it enacted legislation reorganizing the thrift regulatory agencies.

Five projects are pending. The first is an examination of bank failures and risk monitoring by Professor Jonathan Macey of Cornell University and Professor Geoffrey Miller of the University of Chicago. The second is a study of the bank examination process and informal enforcement practices by Professor Roy Schotland of the Georgetown Law School. The third study, by Professor Lawrence Baxter of the Duke Law School, is an examination of the enforcement procedures used by the bank regulators. The fourth study, by Professor Michael Malloy of the Fordham Law School, reviews how the bank regulatory agencies enforce the Securities and Exchange Act of 1934. Finally, the Conference commissioned a study of government-sponsored enterprises, such as Fannie Mae, Sallie Mae, etc. This project will be prepared by attorney Thomas H. Stanton.

The Conference has developed an ongoing liaison with various Senate and House banking committee members and staff to help ensure a thorough study of these issues which will be of benefit to Congress as it examines more general issues affecting the banking and related industries.

3. Procedural Framework for Ethics in Government

The examination of the ethical considerations that implicate the federal administrative process has been a part of the Conference's formal mission from the outset. The Temporary Conference established by President Kennedy expressly recommended that a permanent

[6]Recommendation 88-8, Resolution of Claims Against Savings Receiverships, 1 CFR § 305.88-8 (1989).

cooference establish ao "ethics committee" to render opioions oo ethics issues and the original Committee on Personoel, established io 1968 as part of the permaneot Conference, was charged with the responsibility for eohaociog the professiooalism and effectiveoess of federal persoonel iovolved io the cooduct of admioistrative proceedings. Its mandate iocluded a review of what was described as "ethical standards."[7]

A decade ago, shortly after the passage of the Ethics io Government Act, the Coofereoce examined the so-called "revolviog door" issue.[8] The followiog year it recommeoded rules coocerning recusal of agency rulemakiog officials.[9] But the examioation of matters of ethics and conflict of interest have oot occupied a substantial portion of the Confereoce's time io receot years. Because "ethics io government" issues implicate both the fairness and efficiency of the administrative process, a Special Committee oo Government Ethics Regulatioo was established in 1987 to examioe systematically and recommend improvemeots to the Ethics in Government Act of 1978 aod related cooflict-of-ioterest laws.

Io June 1988 the Conference adopted a recommendation that would establish standards of cooduct for Presidential transitioo workers. The geoesis of this recommeodation was a "working coofereoce" sponsored by the Confereoce io March 1988. At about the same time, the Senate Committee oo Goveromeotal Affairs, reviewing the Presideotial Transition Effectiveoess Act, ackoowledged the need for disclosure of potential conflicts of interest by transition persoonel and ooted the Confereoce's willingness to study the issue in advance of the 1988-89 transition.[10] During debate on the House floor, Congressman Gilman also called for Administrative Conference participation in this area.[11] Following adoption of the Cooference recommendatioo, President-Elect Bush and President Reagan issued directives essentially implementing the Conference's proposal.

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[7] [1969] Annual Report of the Administrative Conference of the United States 16 (1970).

[8] Recommendation 79-7, Appropriate Restrictions on Participation by a Former Agency Official in Matters Involving the Agency, 1 CFR § 305.79-7 (1989).

[9] Recommendation 80-4, Decisional Officials' Participation in Rulemaking Proceedings, 1 CFR § 305.80-4 (1989)

[10] S. Rep. No. 100-317, 100th Cong., 2d Sess. 19 (1988).

[11] 133 Cong. Rec. H 1587 (March 31, 1988).

The Conference also suggested that Congress provide an acceptable means for workers coming into government to divest themselves of financial holdings without suffering adverse tax consequences. This recommendation fleshed out a proposal made several years earlier by the Office of Government Ethics and others. Congress included our recommendation in Public L. 101-194.

In 1989 the Conference studied the relationship between the Federal Advisory Committee Act and the Ethics in Government Act and adopted a recommendation to rationalize the existing conflict-of-interest requirements to bring more individuals within the proscriptions but relax the filing requirements while maintaining needed disclosure provisions.[12]

Finally, the Conference published a sourcebook on government ethics for presidential appointees.

4. Federal Grievance and EEO Procedures

At present, federal employees with employment related grievances have at least six different procedural avenues by which to seek redress. These include internal agency review of some grievances (such as suspensions, reprimands or denials of leave); formal appeal to the Merit Systems Protection Board (MSPB) for a wide range of adverse actions; union grievance procedures, including arbitration in some cases; informal equal employment opportunity (EEO) procedures, coupled with a right to seek review before the Equal Employment Opportunity Commission; so-called "mixed" appeals to the MSPB for grievances which include discrimination issues; and access to the Special Counsel for employees who are "whistleblowers" or allege certain prohibited personnel practices.

Little attention has been given to the substantial overlap among, or redundancy within, grievance procedures. At the request of the Domestic Policy Council, and with the encouragement of Congress, the Conference undertook a comprehensive study of all

[12] 54 Fed. Reg. 28969 (1989).

employee grievance-type procedures with a view toward describing the labyrinthine process and suggesting faster, less costly alternative dispute mechanisms while ensuring that the fundamental fairness of the emplnyee grievance process is maintained.

Professor William Luneburg nf the University nf Pittsburgh Law School served as the Conference's principal consultant on the project. Tn obtain a public administratinn perspective, the Conference also contracted with Professor Jay Shafritz of the Graduate School of Public and International Affairs at the Unlversity of Pittsburgh to provide cnmment on Professor Luneburg's effort. Professor Luneburg submitted a draft of a report last fall which was circulated to affected federal agencies and interested committees of Congress in both Houses. In December 1989 the Conference adopted a formal statement on the subject.[13]

5. Alternative Methods of Dispute Resolution

Over much nf the past fnur years the Cnnference has cnntinued its initiatives fnr encouraging the use nf alternative means nf dispute resolution (ADR) as a way to reduce litigation costs and delay thrnughout government. At the request of EPA, the Conference prepared a model policy statement and draft rule tn ensure apprnpriate cnnfidentiality nf infnrmatinn divulged to mediators and nther neutrals in the cnurse of agency settlement negntiations. The Conference also adnpted a recommendatinn cnncerning the use of dispute resnlutinn tn resolve gnvernment contract disputes and issued a statement nutlining the use nf settlement judges to resnlve commodity reparations cases. With regard to the contract dispute recommendatinn, the General Services Administration is considering a proposed change tn the Federal Acquisitinn Regulations (FAR) cnnsistent with the recnmmendatinns. In addition, the Office of the Chairman is in the process nf cnmpleting a roster nf neutrals fnr use by agencies interested in using ADR. Finally, the Cnnference, pursuant to an interagency

[13] 54 Fed.Reg. 53498 (1989).

agreement with the Department of Commerce, brought its expertise to the dispute handling provisions of the U.S.-Canada Free Trade Agreement.

The Conference has actively sought to support congressional initiatives that would implement its recommendations concerning alternative dispute resolution in general, and negotiated rulemaking in particular. In the 100th Congress, the Conference worked closely with congressional staff in preparing the Administrative Dispute Resolution Act (S. 2274 and H.R. 5101), which would put into effect several Conference recommendations. It later testified in favor of bills in both the House and Senate that would encourage the use of negotiated rulemaking by agencies and clarify how the provisions of the Federal Advisory Committee Act should be applied.

With the financial assistance of a number of federal agencies, the Conference was able to publish a major sourcebook reference for agencies, sponsor several roundtable conferences, and provide ADR training for agency administrative judges and contracting officers. It is currently completing work on a new sourcebook on negotiated rulemaking, which is due out later this year.

6. Procedural Issues in Science and Health Care Administration

The Conference continues its considerable efforts in the area of health care regulation. In 1987 we studied the administration of the state-level disability benefit determination process, the role of the Social Security Appeals Council, and the method by which the Health Care Financing Administration decides what aspects of medical care are covered by, and thus reimbursable by, Medicare. In November 1988 the Conference received from Timothy Jost, Professor of Law and Hospital and Health Services Administration at The Ohio State University, a comprehensive analysis of the numerous administrative law issues involving the Medicare utilization and quality control Peer Review Organization (PRO) programs. The matter was debated at the December 1988 Plenary Session, where the Conference heard presentations from representatives of the American Medical Association, the American

Hospital Association, the American Association of Retired Persons, and the Office of Inspector General at the Department of Health and Human Services. Although these groups did not always agree with each other on every issue, they participated comfortably in the committee deliberations leading to the adoption of the committee's recommendations and cooperated fully in our analysis of the difficult procedural issues presented. The Conference was unable to reach conclusions at its December session but the matter was debated and, eventually, resolved in June 1989. The Conference's Recommendation 89-1 has already received attention in Congress and at the Department of Health and Human Services. The Conference also adopted Recommendation 89-10 urging the improved use of medical personnel in Social Security disability determinations.[14]

In 1988 the Conference examined two novel and nettlesome issues in the vanguard of scientific analysis and technology. In September, it took up the methodologies used to make an estimate of the so-called "value of human life" where a statute or administrative regulation requires an agency to make such estimate as part of a larger analysis of the costs and benefits of particular regulatory approaches. Recognizing that the decision to place a dollar value on human life is a controversial and complex topic beyond its charter, the Conference focused its recommendations on procedures to ensure full public disclosure of the dollar amount used and the underlying empirical information and methodologies employed to reach that dollar figure, and the development of uniform governmental criteria.[15]

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[14] 54 Fed. Reg. 53496 (1989).

[15] Recommendation 88-7, Valuation of Human Life in Regulatory Decisionmaking, 1 CFR § 305.88-78 (1989).

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Jeffrey Lubbers
Research Director

OFFICE OF
THE CHAIRMAN

Pending Research Projects (December, 1989)

The following is a list of pending research projects, arranged according to committee assignment. Unassigned projects are at the end.

Committee on Adjudication

(1) Reviewability of consular officers' denials of visa applications. (Professor James Nafziger) The current limitations on administrative and judicial review of these denials is scrutinized by this study. (Status: Final report submitted; Conference adopted Recommendation 89-9 at December Plenary Session.)

(2) Review of Social Security disability adjudication process. (Professor Frank Bloch) Overview of the appeals process, comparison with other federal disability programs and consolidated set of prior ACUS recommendations prepared at SSA request; transmitted to SSA Commissioner in July. (Status: Final report submitted; Committee considering a possible recommendation that would supplement the three prior recommendations.)

(3) Use of "non-ALJ" adjudicators. (Judge John Frye of NRC, on nonreimbursable detail to ACUS) Survey of agency use of hearing officers who are not administrative law judges. (Status: Data is now being tabulated; follow-up study may result in recommendations).

(4) The FAA's sanction and enforcement procedures. (Professor Richard H. Fallon, Jr.) The Federal Aviation Authority has authority to revoke pilot licenses as well as impose civil money penalties. It is now imposing penalties of less than $50,000 under a two-year statutory demonstration program which authorizes imposition after administrative hearing. The FAA has asked the Conference to evaluate the appropriateness of the procedures established in the demonstration program to assist the agency in preparing its report to Congress. (Status: Outline submitted; draft report due January 15, 1990.)

(5) HUD administrative grievance procedures for public housing tenants (Professor Jonathan L. Entin) The Department of Housing and Urban Development has had regulations providing for administrative grievance procedures for public housing tenants since 1975. Several attempts to revise these rules have failed. In addition HUD has begun invoking a 1983 statute authorizing the Secretary to waive administrative grievance procedures in eviction cases and to seek state-court ordered evictions. This study will attempt to provide recommendations to HUD on its grievance rules and its waiver practices. (Status: Work just begun; due August 1990.)

Committee on Administration

(1) Use of medically-trained deciders in disability cases (Professor Frank Bloch) Evaluation of how doctors aod other medically-trained persoos are or could be used in decidiog social security, VA, black-lung and other disability cases. (Status: Final report submitted; Confereoce adopted Recommeodatioo 89-10 at December Plenary Session.)

(2) U.S. agency participation in international standard setting. (Professor George Bermano) How should U.S. agency officials prepare for, participate in, aod implemeot the standards oegotiated in, international standard-settiog bodies? This case study will focus on the Federal Aviation Administration's participatioo in the Europeao Community's efforts to set standards for airworthioess certification for civil aircraft. (Status: Outlioe submitted; draft report due next spriog.)

(3) Potential uses for ombudsmen in federal programs. (David R. Aoderson, Esq.) The recent establishmeot of ombudsmeo in the IRS (to help resolve taxpayer grievances) and EPA (to resolve Superfund disputes) as well as proposals for a beneficiary ombudsmao in the Social Security Admioistration have fueled interest in a wider use of this dispute resolution techoique. The study will focus on preseot and past attempts to create such a post in federal programs. (Status: Outline submitted; draft report due next spriog.)

(4) Agency procedures for reviewing discretionary grant applications (Professor Thomas O. McGarity) There is oo governmeot-wide statute covering the procedures agencies with discretionary grant authority must use in reviewing applications. This study will examine widely publicized problems in H.U.D. grant programs, which appear to lack a systematic review process, as well as programs of other ageocies, iocluding the National Science Foundation which has a rigorous peer review procedure. This project will look at these and other case studies. (Status: Work just begun; due August 1990.)

(5) OSHRC's "simplified proceedings" and case settlement procedures (Professor Morrell E. Mullins) The Occupatiooal Safety and Health Review Commission's rules of practice provide for use of both simplified proceediogs and settlement judges in appropriate cases. The study will examine how these rules work in practice. (Status: Outline submitted; due September 1990.)

(6) Implementation of the Farmers Home Administration mediation program (Professor Leonard L. Riskin) The Farm Credit Act of 1988 mandates that the FMHA establish a mediation program to resolve farmer-lender disputes. The study will examine the history of the establishment of the program, the types of disputes involved, the implementing rules, the effectiveness of the program and its possible applicability to other government programs. (Status: Work just begun; due December 1990)

(7) The Fish and Wildlife Service's approach to conflict management under the Endangered Species Act (Professors Steven Yaffee and Julia Wondolleck) Recent litigation in the Pacific Northwest over the impact 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 will examine this and other case studies and will seek to propose improvements in the Service's ability to deal with conflicts. (Status: Work just begun; due January 1991.)

Committee on Governmental Processes

(1) Federal employee grievance and personnel appeals process. (Professor William Luneburg) The study of this complex and often redundant system was undertaken at the behest of the Domestic Policy Council and OPM. (Status: Final report submitted; Conference adopted Statement at December Plenary Session.)

(2) Designation of "representative payees" for social security beneficiaries. (Professor Margaret Farrell) Under current law the Social Security Administration (SSA) must designate and monitor the activities of representative payees who receive social security payments on behalf of beneficiaries deemed to be incapable of managing their own financial affairs. At the behest of SSA, the Conference has begun a study of (1) current constitutional and administrative law cases, materials and doctrines pertaining to SSA's obligations in this regard and (2) related state guardianship, custody and competency law. (Status: Outline submitted; report due early 1990.)

(3) Evaluation of the national child vaccine injury compensation program. (Professor Wendy K. Mariner) In 1986 Congress passed a law which attempted to ensure prompt and reasonable compensation to those children who suffer adverse reactions to vaccines (an inevitable result of otherwise highly beneficial immunizations). The law provides for a no-fault compensation program and requires a petition to, and adjudication by, the U.S. Claims Court. Petitioners can then elect to accept the judgment or pursue a tort action in state or federal court -- although with a reduced chance of recovery. The study will describe and preliminarily evaluate the program. (Status: Outline submitted; draft report due next spring.)

(4) Electronic technologies and federal archival practices (Professor Henry H. Perritt, Jr.) This project is, in a sense, a sequel to Recommendation 88-10 which was principally concerned with agency release of computerized information. This study will examine how electronic records are (and should be) covered by current records preservation statutes. (Status: Work just begun; due August 1990.)

Committee on Judicial Review

(1) Judicial remands of cases to administrative agencies. (Professors Donald Elliott and Peter Schuck) What happens to appeals from agency decisions that are remanded to the agency? (Status: Final report submitted; to be considered during spring.)

(2) Allocation of adjudicative responsibilities between agencies and courts. (Professor Harold Bruff) This study will examine the proper allocation of adjudicative responsibilities among Article III courts (especially the D.C. Circuit), Article I courts and administrative agencies. The study will contain a synthesis and analysis of past and recent proposals, in conjunction with the recently created Federal Courts Study Committee created pursuant to Pub. L. 100-72. (Status: draft report received; to be considered during spring.)

(3) Choice of forum in government contract litigation (Professor Robert N. Davis) 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 district court or with the GAO (or in the GSA Board of Contract Appeals in computer-related contracts). In post-award disputes the choice is between the Claims Court or the appropriate agency board of contract appeals. The study will evaluate the impact of this forum choice and the proposals for change. (Status: Outline submitted; due September 1990.)

(4) The Export Administration Act: licensing procedures and judicial review (Professor Howard N. Fenton) With the upcoming reauthorization of the EAA, this study will focus on issues concerning the regularity, accessibility and openness of the process as well as the appropriateness of the current limitations on judicial review. (Status: Work just begun; due September 1990.)

Committee on Regulation

(1) Federal regulation of biotechnology. (Professor Sidney Shapiro) This study examines the need for coordination in this area and for the development of special regulatory procedures. (Status: Final report submitted; Conference adopted Recommenation 89-7 at December Plenary agenda.)

(2) Risk communication as a regulatory approach. (Professor Michael Baram) Examination of "right-to-know" statutes and regulations administered by EPA, OSHA and FDA. (Status: draft report submitted; to be considered this spring.)

(3) FDA's drug approval process for AIDS drugs (James T. O'Reilly) Pressures to more rapidly approve drugs to combat AIDS has spurred the FDA to reexamine its approval process for such drugs. This study will detail the current drug approval process, including any accommodations made for AIDS drugs. It will evaluate the trade-offs involved and also examine the Medicaid reimbursement process for such drugs. (Status: Outline submitted; draft report due February 1990.)

(4) Establishment of revolving funds for remedial and compensatory purposes. (Professor Frederick Anderson) The federal government has increasingly resorted to off-budget revolving funds to clean up environmental pollution, fix highways and airports, compensate fishermen, etc. How these funds are established and administered is the subject of this study. (Status: Outline submitted; draft report due September 1990.)

(5) Division of roles in joint federal/state regulatory programs. (Professor Errol Meidinger) How "regulatory federalism" works--federal oversight of state implementation of federal programs. (Status: Outline submitted; draft report due September 1990.)

Committee on Rulemaking

(1) Agency practices in indexing and making available their adjudicatory decisions. (Professor Margaret Gilhooley) This study examines the most appropriate practices in this regard in light of the Freedom of Information Act's requirements, and the practical burdens of making informal adjudication more precedential. (Status: Final report submitted; Conference adopted Recommendation 89-8 at December Plenary Session.)

(2) Congressional access to confidential agency information. (Professor Peter Shane) This study will examine the history of recent disputes over Congressional access to internal agency memoranda and Commissioners' notes and propose better ways of resolving them. (Status: Outline submitted; draft report due early 1990.)

(3) The Medicaid program: aspects of procedure and federalism. (Professor Eleanor Kinney) A procedural overview and analysis of the federalism aspects of the program will be undertaken. (Status: Outline submitted; draft report due early 1990.)

(4) NLRB's establishment of bargaining units by rulemaking (Professor Mark H. Grunewald) For many years commentators have urged the National Labor Relations Board to, at least occasionally, rely on rulemaking rather than adjudication to make policy concerning bargaining units or unfair labor practices. In April, 1989 the Board issued a final rule concerning bargaining units in the health care industry. This case study will examine the results of this action and evaluate it. (Status: Outline submitted; due September 1990.)

(5) Procedures for making determinations in antidumping and countervailing duty cases (Professors John H. Jackson and William J. Davey) Members of the international trade bar as well as government officials in the area have urged the need for a procedural review of this program. The study will focus on a broad overview of the procedure, both at the Department of Commerce and the U.S. International Trade Commission. (Status: Outline submitted; due August 1990.)

Special Committee on Government Ethics Regulation

(1) Pro bono practice by government attorneys. (Professor Lisa Lerman) Government attorneys may in some circumstances engage in outside employment. They are, however, precluded from representing clients before agencies of the U.S. Government. This restriction has limited the ability of attorneys to take pro bono cases that may involve the government. The study will examine this issue to see if modifications in current practice are appropriate or feasible. (Status: Outline submitted; draft report due in early 1990.)

(2) Role of government and private attorneys in representing federal employees who are under investigation or sued in their official capacity for alleged wrongdoing. (Professor Nancy J. Moore) This study will examine issues such as (1) when it is advisable or necessary for a federal employee to obtain counsel; (2) problems that arise when the government initially represents a federal employee, but later recommends that he or she retain private counsel; (3) limits on a private attorney's representation of a federal employee in agency investigations; and (4) payment of attorneys fees when a federal employee retains private counsel. (Status: Work just begun; due August 1990.)

Special Committee on Financial Services Regulation

(1) Administrative problems of bank failures (Professors Jonathan Macey and Geoffrey Miller) Study of procedural and regulatory problems raised by failing or almost-failing banks. (Status: Final report submitted; Committee recommendation deferred to June Plenary agenda.)

(2) Oversight and regulation of government-sponsored enterprises. (Thomas Stanton, Esq.) The recent financial liability of the savings and loan trust fund has focused attention on other federally chartered national financial institutions whose borrowing and lending powers are backed by federal guarantees. Examples include the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac). These GSEs can expose the U.S. Treasury to heavy liability, but are regulated in a relatively fragmented and sporadic manner. The study will suggest improvements in this regard. (Status: Draft report submitted; Committee to consider whether to take up these issues this spring.)

(3) Administration of the Securities Exchange Act of 1934 by the bank regulatory agencies. (Professor Michael Malloy) The four major banking agencies have significant authority to administer various provisions of the 1934 Securities Act, with respect to the institutions under their purview. This study will focus on the agencies' implementation of this responsibility -- including several agencies' practice of simply incorporating by reference SEC regulations. (Status: Outline received, draft report due early 1990.)

(4) Audit and inspection practices of the banking agencies (Professor Roy Schotland) Study of how bank examiners make "informal" determinations during audits and examinations, disclosure of audit results, etc. (Status: Project reassigned to new consultant; draft report due mid 1990.)

(5) Federal bank regulatory enforcement -- present and future. (Professor Lawrence Baxter) This study will focus on the enforcement procedures, contained in the Financial Institutions Reform, Recovery and Enforcement Act of 1989. (Status: Analysis of banking legislation submitted; draft report due mid 1990.)

Working Group on Model Rules

(1) Model rules of practice for agency adjudication. (Dean Michael 'Cox) As reporter for the working group, Dean Cox will examine existing rules of practice and help develop text and commentary for model rules. (Status: Dean Cox is reviewing agency rules; Working Group continues to meet regularly to review his work.)

Unassigned projects

(1) Inspectors general (Dean Paul Light) With the support of the Governance Institute, this study will examine the role and operations of Offices of Inspector General in carrying out responsibilities of internal oversight of agency programs and in preventing waste, fraud and abuse. IGs' independence, accountability, investigative authority and relationships with Congress, the President, and agency program managers will be studied. (Status: Work just begun; draft report due September, 1990.)

Other projects

(1) Updated Guide to Federal Agency Rulemaking. (Professor Benjamin Mintz) The popular 1983 ACUS Guide to Federal Agency Rulemaking is being updated. Revised draft chapters are under review, with complete manuscript due by end of 1990. Staffed by Michael Bowers and Nancy Miller.

(2) Legislative drafting guide for grant legislation. (Malcolm Mason) The Guide has been submitted and circulated for comments. It is being readied for publication by Charles Pou.

(3) Dispute resolution under the U.S. - Canada Free Trade Agreement. (Professor Andreas Lowenfeld) At the behest of the Department of Commerce, the Conference convened an advisory group to look into the implementation of certain dispute resolution provisions in the Agreement. A seminar of experts was held in January; its proceedings are being published by the Stanford International Law Journal. The advisory group, with the assistance of Professor Lowenfeld, and staffed by Charles Pou and Brian Murphy, will consider what further steps to take.

(4) Sourcebook on Negotiated Rulemaking. Under David Pritzker's direction, the Office of the Chairman is preparing a sourcebook of background materials and guidance concerning negotiated rulemaking. The format will be similar to earlier Sourcebooks on Federal Administrative Procedure and on Federal Agency Use of Alternative Dispute Resolution. It is currently awaiting publication by GPO; a summary is available.

Mr. FRANK. Mr. Edwards.

Mr. EDWARDS. Mr. Chairman, it's my pleasure to introduce our new member. I am delighted to have my neighbor from Santa Clara County, Tom Campbell, as a member of this subcommittee, and I know that he is going to make a valuable addition. He's a former professor of law at Stanford University that I have heard of—my old alma mater, I know all the members join me in welcoming Congressman Campbell.

Mr. FRANK. We are delighted to have component filled—I think we're still short one Democrat, but we are getting closer. The gentleman is welcome.

Mr. CAMPBELL. Thank you.

Mr. FRANK. Let me ask Mr. Breger, I have just a couple of questions on the money. Now I gather—Ms. Potts informed me that there is—how much will your budget have to go up as a result of the salary increases that were covered in the package that was passed late last year?

Mr. BREGER. I think that the salary increases are a figure of about $120,000.

Mr. FRANK. I don't know what that means, let me reask my question.

What will the amount of the salary increases be that was mandated by the statute that was passed last year? That has nothing to do with what—that's a secondary and a tertiary question.

Mr. BREGER. $230,000.

Mr. FRANK. That's mandated by for people covered who were mentioned in the act?

Mr. BREGER. Yes, and, of course, that would not include——

Mr. FRANK. Yes, don't include anybody else—one at a time.

How many people are covered by the act that work for you?

Mr. BREGER. There are four persons—three SES's and——

Mr. FRANK. And the four people are going to get a combined total of $230,000 in increases? That's surprising.

Mr. BREGER. Bill Olmstead is our Executive Director——

Mr. FRANK. OK, why don't you just answer that.

How much is mandated by the statute?

Mr. OLMSTEAD. For those four people it's $120,000.

Mr. FRANK. How did we get to $230,000?

Mr. OLMSTEAD. The $230,000 includes the full increment of salary increases for 24 FTE's.

Mr. FRANK. OK, please, when I ask a question please try to answer it.

Mr. FRANK. What is the amount of——

Mr. BREGER. I apologize, Congressman, he had misunderstood your question.

Mr. FRANK. All right.

So $120,000 for those four people. In other words, an average of $30,000 apiece.

We're talking about for fiscal 1991.

Mr. OLMSTEAD. That's correct for 1991.

Mr. FRANK. And what's your current budget for fiscal 1990?

Mr. OLMSTEAD. $1,865,000.

Mr. FRANK. So $120,000 is needed just to meet that statute, which would bring you up to $2.65 million, I gather?

Mr. OLMSTEAD. That's correct.

Mr. FRANK. And you've asked for how much over that for fiscal 1991? Well, you've asked for no cap at all subject to appropriations; is that correct?

The Chairman has recommended $50,000 over and above that.

Mr. BREGER. Yes, for fiscal 1991 our appropriation request from OMB is for $2,090,000.

Mr. FRANK. But you're $1,090,000?

Mr. OLMSTEAD. Right.

Mr. FRANK. So that would leave you $35,000 over and above what you have to do statutorily, correct?

Mr. OLMSTEAD. Correct.

Mr. FRANK. Now you've just said now however, that you believe that you need another $1,100,000. What would that be for?

Mr. OLMSTEAD. Over the fiscal year 1990, $1,865,000. The total salary increases for the 24 FTE for 1990 and 1991, plus the SES increase——

Mr. FRANK. Please don't answer——

Let me take you step by step.

One hundred twenty is for the statutory mandated one, correct?

Mr. OLMSTEAD. Right.

Mr. FRANK. You said you needed $110,000 over that?

Mr. OLMSTEAD. Right.

Mr. FRANK. Explain to me what that is for; don't go back to the——

Mr. OLMSTEAD. Basically what we're trying to do is restore the traditional levels of research from the appropriations, which if you go back 3 years where we've been at $1,865,000, we had about $200,000 for research activities in the Congress. Because of salary increases and the freeze in the appropriation, has gradually reduced——

Mr. FRANK. Please tell me exactly where the $110,000 would go and then justify it. I don't know where it would go yet, then you justify it.

Mr. OLMSTEAD. OK, it would go into research consultant contracts.

Mr. FRANK. How many people, salary?

Mr. OLMSTEAD. Those average $8,000 to $10,000 each so you're talking——

Mr. FRANK. I don't know what "those" are.

Please, make believe I don't know anything, which would be true, about where the $110,000 is going to go. Are we hiring new people? Are we giving people raises?

Mr. BREGER. I think I understand the confusion.

Mr. FRANK. I don't see why it's hard. If I ask you where $110,000 is going to go, why can't you tell me?

Mr. BREGER. I apologize. Again, I think we had some confusion as to what you were after.

The $230,000 figure that was referred to—first is the $120,000 for the SES and——

Mr. FRANK. That's statutory mandate.

Mr. BREGER. That's statutory increase.

Second, the rest of that figure would go to restore our appropriated research budget. This year we had——

Mr. FRANK. No, no, no.

The one hundred ten thousand—how many people? How much money, whatever?

You give me the justification and I would be glad to have that afterwards.

But I first need to know what you're going to use $110,000 for, and you said it would restore your research effort—that could be to buy books, that could be to hire people.

What will the $110,000 be spent on in very specific terms?

Mr. BREGER. It would be to issue research contracts between 8 and 10, and I can't be——

Mr. FRANK. It's for contracting out.

Mr. BREGER. That would be to law professors to do studies which hopefully will result in recommendations of the Conference.

Mr. FRANK. $110,000. Now, what's your current budget for contracting out research?

Mr. OLMSTEAD. Current this year is we don't have any.

Mr. FRANK. OK. so what $110,000 would do then would be to give you a capacity to contract out research which you don't now have; am I correct when you say you used to have it but——

Mr. BREGER. The situation is the following: The—is its contracting out for research. That's its guts.

Mr. FRANK. You haven't been doing that lately?

Mr. BREGER. No, we haven't been doing it this year because of the budget—now I agree with you, that's not a good idea, and it can't go on because after awhile if you don't sow, you can't reap. However, we have included in our next year's budget request moneys that we can then go back to contracting out research.

Mr. FRANK. That's what I just said, I understand that.

You said something about 3 years ago. Would this be about where you were 3 years ago in that research capacity?

Mr. OLMSTEAD. It wouldn't be exactly there, but it would be moving in that direction.

Mr. FRANK. Not as much?

Mr. OLMSTEAD. Not as much. Now, we do have research that we get from interagency transfers, but that's not appropriated money.

Mr. FRANK. Interagency transfers that—you mean, you borrow people to do the research or you——

Mr. OLMSTEAD. Agencies want us to look into particular issues—and they transfer money under the——

Mr. FRANK. And then you can contract out with that?

Mr. OLMSTEAD. That's right.

Mr. FRANK. But this would give you $110,000—a chance to choose your own topics of research which you don't now have. So the only research has been basically agencies.

But the OMB appropriation request then leaves you only $25,000 for research; is that correct?

You said it was $2,090,000—I make it you need $2,065,000 just to pay your mandated increases and stay where you are.

Mr. OLMSTEAD. Personnel compensation and benefits is $1,439,000. The general administration is $450,000. So the remainder of that goes to publications that we have to do, like the Federal Register, CFR——

Mr. FRANK. How much research could you contract out for under the OMB figure—$2,090,000?

Mr. OLMSTEAD. We could probably do about five projects.

Mr. FRANK. How much in dollars?

Mr. OLMSTEAD. $60,000.

Mr. BREGER. $60,000.

Mr. FRANK. OK.

Mr. BREGER. Now, we don't suggest that this is an optimum situation.

Mr. FRANK. No OMB figure?

Mr. OLMSTEAD. Right. Those are small projects, too, they are not large.

Mr. FRANK. I did want to get a sense of the difference. And you said you got the $110,000 that you would be looking for before you would get 8 to 10 projects?

Mr. OLMSTEAD. Right.

Mr. FRANK. All right. I have no further questions.

Mr. Campbell.

Mr. CAMPBELL. Thank you, Mr. Chairman.

I'd just like to begin by thanking my colleague and neighbor for a kind introduction. If I do as well as you on this subcommittee as well as in Congress I will be a very effective Member of Congress.

I have two questions for the Chairman of the Administrative Conference. First of all, could you inform me to what extent ACUS was involved in research or in any of the briefs in the *Ticor* case, the challenging of the constitutionality of the fourth branch of government?

Mr. BREGER. We have no involvement in briefs in the *Ticor* case. I might add, we don't file amicus briefs as a matter of policy.

Mr. CAMPBELL. Did you do any study or did you participate in that preparation of any materials of that?

Mr. BREGER. We did not participate in the preparation. I think it is fair to say that the issue is such an essential one to the administrative process that we have had, at various times, internal discussions about it. I believe we had at one time a colloquy, public debate or discussion, on the subject, but that's on the general subject. We had no involvement in the preparation of briefs per se.

Mr. EDLES. If I might add, Mr. Campbell, we did, in connection with the alternative dispute resolution statute that came before this committee—we did contract with Professor Bruff at the University of Texas to look into the more general question of separation of powers insofar as it touched on the arbitration aspects. But we did not talk about the independence of regulatory agencies which was at issue in the *Ticor* case.

Mr. CAMPBELL. Did the Conference take any position on that issue?

Mr. BREGER. No.

Mr. CAMPBELL. Last question. In preparation of your materials, I am interested if the Conference prepares any statistical compilations of complaints, resolutions, by agency? I'm speaking here of adjudication as well as a notice of proposed rulemaking.

Mr. BREGER. The Conference did do this in the late 1970's. We have not done this since 1978. I will be the first to tell you that it's, I think, a tremendous problem that the U.S. Government has no

statistical capacity in administrative law and administrative procedure.

We stopped doing it in 1978 solely because of budgetary reasons. To be very blunt, we don't expect to be doing it under the authorization guidelines that are provided us in the present bill; that is to say, the authorization limits of the present bill don't allow us to engage in any new functions. They allow us to continue the present functions that we're doing.

Mr. CAMPBELL. But you would like to if you could?

Mr. BREGER. Let me be very blunt—someone should. If you don't want us to to do and want another agency to do it, fine. It's scandalous that the U.S. Government doesn't have this capacity.

I'll just give you a factual anecdote. In the debate over the Fair Housing Amendments of 1988, I believe, both the Justice Department and a number of members in the Senate came to the Conference and called us up and had their staff members come to our office seeking statistics about ALJ's, because one of the issues in dispute was whether you should use ALJ's in in the first instance or whether the adjudication process for the Fair Housing Enforcement Act should go immediately to the District Court.

We gave them our 1977 and 1978 statistics. We told them, these statistics are out of date but they are the best we have. Those statistics were used on the floor of the Congress and were used in the papers regarding the Fair Housing Act—so people need statistics. They are going to use them. The problem is they are using those that are out of date.

Let me add just as a matter of factual accuracy, that we do prepare under specific congressional mandate statistics on the Equal Access to Justice Act.

Mr. CAMPBELL. Thank you, Mr. Chairman.

Mr. FRANK. Mr. Edwards.

Mr. EDWARDS. Thank you, Mr. Chairman. I appreciate Chairman Breger coming here today.

I was the author of the bill you referred to—the Fair Housing Act. We had quite a lot of information from administrative law judges because they were so heavily involved in the new process that you described. We always were wondering whether or not having the administrative law judges assigned to the agencies resulted in too cozy a relationship and, indeed, a number of them have recommended—I believe there might be pending legislation—that they have their own establishment and not be assigned to desks and offices in agencies where they might be under undue pressure, might form friendships that would get in the way of evenhandedness.

Mr. BREGER. That's correct. This is both a perennial complaint of the administrative law judges—many of them, not all; and I always want to say perennial legislation, but there has been legislation pending on this subject for a number of years.

Mr. EDWARDS. Have you ever studied that or made a recommendation?

Mr. BREGER. We made a study on this subject. And the Conference, after a very heated debate—this is before my chairmanship—voted not to make a recommendation in the area. We have done studies of the separation of functions, which is a similar issue, in

the OSHA and OSHRC—the adjudicatory part of the OSHA—process, and, now my alphabet soup of Washington is about to fail, in the FMSHRC, or adjudicative part of the mine safety process.

We have also proposed in testimony on that subject that there be an experimental ALJ corps set up for certain parts of the ALJ universe to test how this notion of an independent ALJ corps would work.

Further, we did propose, and the new banking legislation did adopt our recommendation, that for the banking agencies, there be a special corps set up. In the past, there had not been any judges in the banking agencies; the banking agencies had borrowed judges elsewhere. And we felt that this meant that the ALJ's were unlikely to build up the requisite—specialized knowledge and expertise which is the very purpose of having ALJ's.

I'm sure we have, in one way or another, addressed this subject in other forums as well. But I can give you a written supplemental answer. I tried to be comprehensive in terms of what we've done in this area.

Mr. EDWARDS. That is adequate.

My last question is: Do you feel independent in making your judgments and recommendations?

Do you ever feel that you're under pressure from Democratic or Republican administrations to tilt it in one way or the other?

Mr. BREGER. One of the things that I have been proudest about and most careful to attend to is what I call the integrity of the Administrative Conference process. The contractors—again, usually law professors—give us their best thinking. I'm not sure we can muzzle them if we wanted to. But they are pretty independent in what they give us.

One of my jobs is to make sure that the process is protected not only from the executive branch but from congressional intervention, and I think we're pretty successful in doing that.

Mr. EDWARDS. Thank you very much.

Thank you, Mr. Chairman.

Mr. FRANK. Mr. James.

Mr. JAMES. First, I'd like to recognize Tom Campbell. He has joined our committee as a lawyer, of course, and he will be a great asset to the committee and I am so delighted to have you here. I think you teach law at Stanford, do you not? He's a Harvard graduate and will be quite an asset to our committee. Thank you so much for joining us.

Can you tell, if you would—and I want to thank you for your testimony and your candor and helping explain to us how it works—but can you tell us what kind of work you do with the Judicial Conference, and basically what the relationship is between you and the Conference?

Mr. BREGER. We have two liaison members from the Judicial Conference who are assigned by the Judicial Conference to participate in the work of the Administrative Conference. One, for many years, has been Judge Breyer from the first circuit, Steven Breyer. The second, I would say, historically, was Judge Carl McGowan, who served until his recent death. Kenneth Starr took over that liaison position—to some measure at his desire. But as you know, he

recently left the court to become Solicitor General of the United States, so that second liaison position is open.

That's our formal relationship with the Judicial Conference, although we have on a number of occasions forwarded to them information about recommendations that we have made that have impact on the Federal court system. Most well known, I think, of which in recent years has been the race to the courthouse recommendation, which resulted, I believe, in this subcommittee in legislation to reduce costly and wasteful races to the Federal courthouse of appeals of Federal agency activities.

Now, our agency was modeled in some respects—and this is clear in the legislative history—modeled on the Judicial Conference, the notion of bringing together agency officials from the different agencies. It was based in some respect on the Judicial Conference concept.

And we were also modeled, to some extent, on the Federal Judicial Center, which, as you know, is the research arm of the Judicial Conference—the research, training, statistics-gathering arm.

Now, historically, and indeed for the first year, we were able to do much of the same work because we received analogous funding. In recent years, however, the Federal Judicial Center, with six or seven times our funding, has been able to do things that we can't do, such as training new Federal judges.

We think it's important that someone in the system train senior officials in administrative agencies about administrative law. That's not being done. If it's being done, it's being done on an ad hoc basis.

Similarly with statistics gathering and with long term empirical research, which we are not in a position to do, given our funding structure and given the authorization limits proposed in this legislation.

Mr. JAMES. Thank you so much, Mr. Breger, for your testimony—most helpful. Thank you.

Mr. BREGER. Thank you.

Mr. FRANK. Let me ask Mr. Campbell, would you spell out for the recorder the case that Mr. Campbell referred to before.

Mr. CAMPBELL. T-i-c-o-r, and it's *Ticor Insurance* versus, is it *Maryland*——

Mr. FRANK. I don't need the whole cite, I only need the spelling.

Mr. CAMPBELL. T-i-c-o-r.

Mr. FRANK. Thank you, appreciate it.

When you make a reference in the transcript, I just want to be able to spell it out.

Mr. Douglas.

Mr. DOUGLAS. I have no questions; thank you, Mr. Chairman.

Mr. FRANK. Mr. Breger, thank you very much, I appreciate it.

If you can submit a numerical breakdown, the comparisons, how you use $110,000, what you could do under OMB—you've got the drift of my questions. The more specific you can get, I think the better off we all are in terms of that.

[The information follows:]

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
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March 19, 1990

OFFICE OF
THE CHAIRMAN

The Honorable Barney Frank
Chairman
Subcommittee on Administrative Law
and Governmental Relations
Committee on the Judiciary
U.S. House of Representatives
B351-A Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Frank:

This responds to the various questions raised during the hearing on the reauthorization of the Administrative Conference for another four years. You have asked that we be as specific as possible.

1. You requested specific figures concerning the costs to the Conference stemming from statutorily mandated salary increases. Pub. L. 101-194, the Ethics Reform Act of 1989, signed by the President on November 30, 1989, provided for small salary increases in 1990 and more substantial increases in 1991. Salary and related benefit increases (benefits are 13% over and above base salary) for the Chairman and the Conference's three Senior Executives stemming from Pub. L. 101-194 are as follows:

	Total Salaries Only	Including Benefits
1989:	$327,400	$369,962
1990:	343,000	387,590
1991:	418,375	472,764
Increase		$102,802

In addition to Pub. L. 101-194, other statutes or executive orders have mandated cost-of-living and associated benefit increases for the remaining 20 Conference employees (i.e., other than the Chairman and the three members of the SES). Taken together, mandated salary and benefit increases for 1991 will be $126,671.

2. The Conference's 1990 budget does not permit us to devote any appropriated funds to independent research. Instead, as noted at page 38 of our February 21 prepared testimony, during 1990 we shall complete projects already in the pipeline or undertake projects, if appropriate, for which satisfactory inter-agency transfers of funds can be arranged. The President's fiscal year 1991 appropriation request includes an increase of $214,000 over the fiscal year 1990 level. As indicated above, almost $127,000 of this amount will be required to offset statutorily mandated or automatic salary and benefits increases. Of the remaining $87,000, $38,000 will be used for inflation-related increases in general administration beyond

the Cnnference's control (e.g., rent, personnel service contract with GSA). That leaves almost $50,000 for programmatic increases in fiscal year 1991, which the Conference plans to devote to independent research, i.e., projects of our own choosing.

$50,000 can fund between 4 and 5 relatively small new projects. This figure breaks down into two principal categories. First, we use nutside consultants to provide the basic research. We typically pay our consultants between $8,000 and $12,000 per project. Second, we pay travel expenses for the consultant (if he or she is from outside Washington, as most are) and provide some funds for research assistance. The $50,000 figure does not include any overhead costs, such as salaries for Conference staff, travel expenses for out-of-town cnmmittee members, or publication expenses, because they are accounted for elsewhere.

You should understand that 4-5 research projects per year is not an optimum use of Conference resources. Nor is it any reflection of the need for analytic work on how to improve the administrative process.

3. With respect to Cnngressman Campbell's questinn regarding our statistics collection responsibility, as nnted in the prepared testimony, apart from our statutorily mandated role in connection with the collection of data under the Equal Access to Justice Act, the Conference will nnt redirect any funds in the next four years to re-enter the statistics collectinn business. Any redirection of existing resources would require the commitment of at least $125,000 of our appropriation annually. This effort would require one professional employee dedicated to statistics collection activities (roughly $75,000 in salary, clerical support and overhead), plus approximately $50,000 in annual publication costs (none nf the Conference's current personnel, however, are trained statisticians). It is important that this task be undertaken somewhere in the federal government, even if it is not undertaken by the Conference.

4. In response to your inquiry as to why the Conference has an appropriations ceiling, I include as an attachment a brief description of the history of the appropriations ceiling. As you will see, the ceiling was originally enacted in some measure because nf the lack of certainty surrnunding likely annual costs of operation when the Conference was in its infancy. Over the years the Office of Management and Budget has been prepared to remove the statutory ceiling and rely, instead, on the annual appropriatinn process to fix the Conference's budget. Four years ago, the Senate was prepared to follow suit. The House subcommittee declined to do so.

5. Finally, you invited me to describe those areas in which the Conference could not redirect resources to increase its activity level absent a change in the ceilings contained in H.R. 3897.

First, as explained in response to Congressman Campbell's question, given the proposed authorization levels, we are in no position tn resume collection of caseload and individual case data. As I noted in my testimony, this government-wide inventory of formal proceedings at almost 30 agencies and departments, discontinued in 1980, provided a unique reference for persons concerned with issues of procedural reform or agency organization and management. In 1987, during debate over what type of civil penalty enforcement should be included in the Fair Housing Amendments Act, the Department of Justice urged that conciliation efforts, if unsuccessful, should lead to court enforcement. An alternate view, preferred by civil rights attnrneys, would have required hearings before administrative law judges with review in the courts of appeals. Both sides asked the Conference for case data on the efficiency of administrative proceedings but we could supply data only through 1978.

Likewise, the committee's present concept of the Conference's responsibilities does not embrace any systematic government-wide training of agency nfficials about the Conference's numerous recommendations -- particularly those recommendations that cross agency lines. While I believe that the training of agency officials about administrative law issues is

important, the present Conference focus is on research and other implementation activity. For the committee's information in evaluating the need to authorize such training for administrative officers, I enclose an article about the Federal Judicial Center and its work in training federal judges. The analogy between new judges and new executive officials is apt because the latter group is responsible for as many or more adjudicatory dispositions affecting the public.

Finally, absent a request from another agency to conduct large-scale studies on a reimbursable basis, we do not plan to undertake any "mega studies" or "procedural audits." In such a study or audit, we examine comprehensively an agency's overall statutory authority, its regulations, and its undocumented practices, with emphasis on procedures affecting individuals who must deal with the agency. Our purpose is to recommend across-the-board improvements in agency procedures.

Sincerely,

Marshall J. Breger
Chairman

Attachment

MJB/gje

History of the Appropriation Ceiling

The ceiling on appropriations has been part of the Administrative Conference Act from the outset. Yet its inclusion resulted almost from happenstance. In the period before the Conference was created, the enabling statutes for independent agencies typically did not contain appropriations ceilings. The legislation in 1967 establishing the Federal Judicial Center likewise did not include an appropriations ceiling.[1] Budget matters were handled through the annual appropriations process.

As introduced in both houses of Congress, the original legislation to establish an Administrative Conference (S. 1664, and H.R. 7200 and H.R. 7201, 88th Cong., 1st. Sess.) did not contain any appropriation ceiling. When the bill was being considered by the House subcommittee, there was concern because no one seemed to know exactly how many members the Conference would actually have and, thus, what its annual cost would be. Congressman Libonati's views are illustrative:

> How much is this going to cost? It is a fact that you can have as many members as are invited. You then must pay travel expenses, and, of course, expenses while they are in the city where you are holding your conferences.
>
> Now, this is a very important item and setting up costs is well known to the Members of the Congress who are well acquainted with that item . . . .
>
> Therefore it would be most preferable if a limitation were made on the membership, "no less than 50, nor more than 200," if you so desire.[2]

The Senate version of the bill had not placed any limit on membership and the Senate committee simply estimated that it would cost between $250,000-500,000 to operate the Conference annually. The Senate passed the bill without any ceiling.

In response to the concerns raised in the House, Conference supporters advised the subcommittee that, based on the operations and costs of the 1961 temporary Conference (the only available data), the agency would likely range from 75-91 members and cost approximately $250,000 per year.[3] These limitations were simply incorporated into the House version of the bill without any further explanation[4] and became part of the original Act.

The $250,000 estimate turned out to be inaccurate and was, in any event, outmoded even before it became effective. To begin with, it had not included any salary for the Conference chairman or any of the full time professional staff because their salaries during the period of the temporary Conference were paid by their own agencies.[5] Moreover, salaries had increased between the enactment of the statute in 1964 and the commencement of Conference operations in 1968.[6] To remedy what was fast becoming a financial crisis, the

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[1]The Federal Judicial Center provides research and training support for the courts in much the same fashion as the Conference's Office of the Chairman provides for the executive branch agencies and departments.

[2]Establishing Administrative Conference, Hearing on S. 1664, H.R. 7200, H.R. 7201 Before Subcommittee No. 3 of the House Committee on the Judiciary, 88th Cong. 2d Sess. 46-47 (1964).

[3]1964 House Hearings at 19-21, 45-47, 49-50, 53-54 (1964).

[4]See H. Rep. No. 1565, 88th Cong., 2d Sess. 4 (1964).

[5]Administrative Conference Authorization, Hearing on S. 1144 Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 91st Cong., 1st Sess. 2-3 (1969).

[6]Id. at 3-5.

Conference in 1969 asked Congress to eliminate the ceiling. The House commiteee decided, instead, to increase the ceiling from $250,000 to $450,000. The lack of experience with Conference activities was cited as the justification. The committee, in the spring of 1969, indicated:

> The Committee is persuaded that the present $250,000 limitation is unduly restrictive. It does not follow, however, that the ceiling on appropriations should be entirely eliminated. The Committee believes that, *especially with regard to relatively new programs like that of the Administrative Conference of the United States*, there is a real advantage in terms of legislative oversight to maintain some limitation on appropriations. (emphasis added)[7]

As 1969 wore on, the Conference's financial crisis became acute. The need to authorize appropriations beyond the original $250,000 became essential. As a consequence, the Conference decided not to press its case for elimination of the ceiling at that time. As the legislative session drew to a close in December 1969, the Senate committee simply approved the House version of the bill, noting:

> A persuasive case was presented in support of S. 1144, as introduced, to eliminate the ceiling entirely and to leave to the Committees on Appropriations the question of justification of funds to carry on the work ot this agency. However, *this is a new agency. We do not write against a clean slate but have a statutory ceiling already contained in the basic statute.* The Chairman of the Conference has advised that a ceiling of $450,000, as authorized in H.R. 4244 will provide adequate latitude for budget requirements for the "next 2 or 3 years." He has urged this committee, in the interest of obtaining legislation now to meet the immediate financial needs of the Conference, to recommend similar legislation. (emphasis added)[8]

Legislation was enacted in late 1969. By 1973, the Conference's actual appropriation had reached the $450,000 ceiling.

Reauthorization legislation enacted in 1972 provided a substantial increase in 1974 appropriations to $760,000 to permit programmatic increases, with gradual increases thereafter for normal inflation and growth to $950,000 by 1978.[9] Legislation enacted in 1977 followed the same incremental pattern as in the past, authorizing gradual adjustments in appropriations up to $2.3 million for fiscal years 1981 and 1982.[10] The 1982 reauthorization legislation retained the $2.3 million ceiling through 1986.[11]

Although the Conference's authorization was $2.3 million from 1981 to 1986, the actual sums appropriated were well below that figure, averaging just over $1 million but reaching $1.48 million in 1985. Clearly the lower appropriations figure colored the Conference's authorization ceiling in 1986. Congress reduced the authorization to $1.6 million for fiscal year 1986 and $2 million for each year thereafter through 1990. House Subcommittee

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[7] H.Rep. No. 91-214, 91st Cong., 1st Sess. 5 (1969).

[8] S.Rep. No. 91-596, 91st Cong., 1st Sess. 2 (1969).

[9] Pub. L. 92-526, 86 Stat. 1048 (1972).

[10] Pub. L. 95-203, 92 Stat. 317 (1978).

[11] Pub. L. 97-330, 96 Stat. 1618 (1982).

Mr. FRANK. We will next hear from Alan Morrison, who is a public member of the Administrative Conference of the United States, and several other things.

STATEMENT OF ALAN MORRISON, PUBLIC MEMBER, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, 1980–89, SENIOR FELLOW, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, 1989–PRESENT, AND DIRECTOR, PUBLIC CITIZEN LITIGATION GROUP

Mr. MORRISON. Mr. Chairman, thank you for the opportunity to appear here today.

In most of my working life I am the director of the Public Citizen Litigation Group where I've been serving for 18 years—the group that Ralph Nader and I founded in 1972.

From June 1980 through June 1989, I was a public, voting member of the Administrative Conference. I have now served my maximum term allowable, and I am now referred to as a senior fellow of the Administrative Conference, which means I have the privilege of speaking on the floor, going to committee meetings, but no longer voting.

I am here today to offer my strong support for the Administrative Conference. I have no particular dollar figures in mind; I simply want to come here and tell you why I believe this is a very valuable governmental body.

To say that the Administrative Conference is valuable is to seriously underestimate its worth. In my view, the Administrative Conference is unique within the Federal Government because much of what it does, if the Administrative Conference did not do it, no one else would. For instance, the Conference routinely makes studies of the Freedom of Information Act on areas such as the relation between the FOIA and discovery; fees and costs; scope of exemption four, third party practices; computer records, and now they are engaging in a study of electronic mail.

Second, they study the questions of attorneys' fees, the Equal Access to Justice, the question of how much outside government consultants should be paid when working for the Government, and also the use of lay persons in lieu of attorneys in the administrative process to reduce costs.

It has also been the only governmental agency looking at questions of alternative dispute resolution and regulatory negotiation across the board.

It has been very much involved in the areas of government ethics. It produced a recommendation on transition ethics that no one else was looking at. It also produced a recommendation on tax deferral, allowing rollovers of investments for persons entering the Government, which was adopted by Congress last year. It has studied financial disclosures for members of the executive branch; and is the only body that has looked at financial disclosures for members of Federal advisory committees.

It has also looked at matters relating to the race to the court, jurisdictional provisions for judicial review of administrative action; and even in the Federal Torts Claim Act area where the Conference took positions rather different from those espoused by

the Department of Justice and the Office of Management and Budget.

The reasons for this, it seems to me, are worth noting also. There is no agency in government that would have the self-interest to undertake most of these studies, and if they had the self-interest, they wouldn't have the time nor the money to do it.

Second, if they had the time or the money, they don't have the expertise that's assembled under aegis of the Administrative Conference.

Third, even for those recommendations which deal with specific problems of specific administrative agencies, agencies would not undertake them in large part because of their lack of credibility. If, for instance, the Social Security Administration undertook a review of its own Appeals Council process, as one recommendation did, or if the Immigration and Naturalization Service reviewed its performance under the recent statutes dealing with questions of political asylum they would not have what the Conference has: Credibility that simply wouldn't be given to recommendations coming out of individual agencies.

Moreover, no private party could ever undertake these kinds of studies in the depth and fullness with which they are done by the Conference. These are not simply legal analyses. Most of the studies engage in empirical research, and one of the key elements of the empirical research is access to the Government decisionmakers and other people who have to actually carry out these administrative statutes. That access is assured through the Administrative Conference but would not be available, for instance, if a law school tried to do it or the American Bar Association section in the area attempted to do it.

In the end, of course, the consultants who prepare those reports simply make the recommendations and do the groundwork. The assigned committees review the matters fully, and the Conference fully debates and often changes the recommendations on the floor.

That gets me to the second point I want to make about the Administrative Conference and its uniqueness. This is an administrative, not an administration, Conference. There are approximately 60 percent Government members and 40 percent private members. Most of the Government members are political appointees, but nonetheless, by tradition and by practice, the President does not call the shots. Each person is there on his or her own, from their own agency, making their best judgments about the problems brought before the Conference. Now, of course, when a matter directly raise to that person's agency, it's unrealistic to think that the individual is likely to go against agency position. But that represents very few of the Conference's recommendations.

In my extensive experience, the members of the Conference listen carefully, they can be persuaded, and they vote their conscience in what they think is the best interest of the Conference and administrative law in general and not what the administration wants.

As someone who has been very outspoken against many of the policies of the Reagan and Bush administration over the last 9 years, I have been in the decided minority on the Administrative Conference. As I look around the plenary sessions I generally find

at most, no more than half a dozen people, I can spot as known allies on a given issue. And yet, time and again, members of the Conference are willing to listen to reason. They will be persuaded by sensible arguments about fairness and about the efficiency of the administrative process and will not take the party line against or for a particular position.

The reason is that the members are professionals. They care about administrative law, and many of them also recognize that they will be back on the outside some day. Then they will no longer be in power, and they may or may not like what's going on. Therefore, they voted what they think is the best interest of long term administrative process.

Finally, let me say one other word about the Conference that makes it unique. I know that with the fall of Drexel Burnham and many of the bankruptcies, the word "leverage" is not a very good word to use around Congress these days. So I use it with some caution, but I believe with a great deal of applicability.

I think I can say without fear of contradiction that there is no agency of the Federal Government that gets as much private funding as the Administrative Conference does in relation to the size of its overall budget. If you look around the Conference, there are probably 40 members who come in regularly; no fee; occasionally some of them take travel expenses, but often not even that. Members work between, I would say, 25 and 100 hours a year, entirely gratis, on Conference business, reading reports, attending committee meetings, attending plenary sessions. These are primarily lawyers or law professors who could command between $200 or $400 an hour for their time on the open market. Yet, each one of them comes and chooses to spend their time assisting the Administrative Conference.

Even Government members who come to the Conference do this as an additional duty that they have to undertake on top of their regular duties. I know of no other governmental body that is so heavily weighted in terms of its budget of having outside contributions beyond the money that's appropriated by Congress.

I think that is important, and the reason that people do this is because they honestly believe that the Conference is doing good, useful, important work, and because the Conference listens and responds. I have been doing this for 10 years; I intend to continue to work for the Conference; and if I thought for a minute that it wasn't worth my time I'd walk out the door.

That concludes my prepared statement. Thank you, Mr. Chairman.

Mr. FRANK. Thank you, Mr. Morrison.

You think the contract-out research is important?

Mr. MORRISON. It's important, it's essential. It enables someone from the outside, often an expert in the area, to pull together all of the materials. And if you didn't contract research, you'd have to have people on the staff doing it at a much greater expense.

Mr. FRANK. You raised this and I just wanted to ask you, because much of my questioning of Mr. Breger was necessarily taken up with the housekeeping, the Ethics in Government Act, or whatever we called it last year, mandated certain increases. You mentioned

your affiliation with Mr. Nader. I am wondering, do you think we should rescind those increases, or do you support them?

Mr. MORRISON. I do not encourage Congress to revisit that issue.

Mr. FRANK. This is an agency with which you are very familiar—you mentioned the Nader affiliation, do you think that the increases for those people in this agency were reasonable?

Mr. MORRISON. Yes.

Mr. FRANK. Thank you.

Mr. James.

Mr. JAMES. No questions.

Thank you so much for your testimony.

Mr. FRANK. Mr. Douglas.

Mr. DOUGLAS. No questions, Mr. Chairman.

Mr. FRANK. Mr. Campbell.

Mr. CAMPBELL. Mr. Chairman, it's going to be great on this subcommittee. I like the way you ask questions.

I do want to ask just one quick comment of Mr. Morrison—and thank you for your testimony, it's a pleasure to see you in this new capacity. I've seen you in at least three others.

The question deals with one of whether your judgment from your position as an advocate for the public interest in litigation might suggest that we should have expertise focused in the judicial system the way we do in the Administrative Conference.

I've seen you before the D.C. Circuit, and the question occurred to me several times whether it might be wiser to restrict the joint jurisdiction in circuit courts in administrative appeals.

What we have presently, as you know, is oftentimes a race to the courthouse. If you have an economic case you might want to get to the seventh circuit as quickly as possible. If it was the days of Judge Basillon and you represented public interest, you may want to get to the D.C. Circuit as quickly as possible.

The question occurs to me—and I'll just use this opportunity to ask you whether it might be wiser to restrict these multiple jurisdiction for appeal of agency rulings, and whether we oughtn't to try to develop expertise in the D.C. Circuit as the administrative court of review analogous to the expertise we've developed in the Administrative Conference?

Mr. MORRISON. Of course, the Administrative Conference is purely an advisory body, and the D.C. Circuit would be a decision-making body, so in that sense they would be different.

My own view is that people who are aggrieved by agency decisions should not be all forced to go into the D.C. Circuit, that there are advantages in people going to different locales. One of the race-to-the courthouse problems that we used to have has been cured by a recommendation from the Administrative Conference because now if there are multiple appeals filed in different circuits, under the race-to-the-courthouse legislation adopted by Congress several years ago, those races are resolved in a seemly rather than an unseemly matter.

Mr. FRANK. If the gentleman will let me intervene, that was a recommendation of the Conference procedure—I think one of the early things this subcommittee acted on and saw into completion in 1987, that piece of legislation that you're talking about.

Mr. MORRISON. I believe that's correct.

The other thing I would say is that there is a committee that was mandated by Congress about 1½ years ago called the Federal Courts Study Committee, chaired by Third Circuit Judge Joseph Weiss. That committee is about to issue its report—I think the due date is April 1.

The tentative draft of the committee recommendation deals with that very question that you raised. A subcommittee chaired by Judge Posner from the seventh circuit, and I think, those views now reflect the views of the full committee, although they haven't finished their deliberations, has been adverse to requiring all administrative law cases to be channeled into a single court. I would commend your review of that report when it's issued. I think it's obviously a question for the committee.

There is another issue which has been raised of whether cases should go to the District Court or the Court of Appeals—that's an issue which also presents a number of interesting jurisdictional problems and the committee might want to take a look at that also.

The Conference has done some studies on that although not in recent years.

Mr. CAMPBELL. I thank you for a thoughtful answer, and I have only one followup, and that is whether you thought it was a wise idea to consolidate Customs, Patent, and Trade cases in the CAFC?

Mr. MORRISON. Of course, they are consolidated with a number of other things as well, that is——

Mr. CAMPBELL. And claims.

Mr. MORRISON. Claims. Some Federal tax cases, Office of Personnel Management cases, veterans' cases, Government contracts cases. And I start to get worried that this is becoming too much of a specialized court—too general, and at the same time too specialized.

Mr. CAMPBELL. So you do express some reservations about that concentration?

Mr. MORRISON. Yes.

Mr. CAMPBELL. Thank you.

Thank you, Mr. Chairman.

Mr. FRANK. Thank you.

Mr. Staggers, do you want to go another turn?

Mr. STAGGERS. No, sir.

Mr. FRANK. Thank you, Mr. Morrison. We appreciate your testifying and this has helped and clarified some issues for me and we will be doing what we can. Obviously, we're constrained overall by budget limits but I think you've made a very good case.

If there are no further questions, the hearing is adjourned.

[Whereupon, at 10:50 a.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

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February 1, 1990

The Honorable Barney Frank
Chairman
Subcommittee on Administrative Law
and Governmental Relations
House Committee on the Judiciary
B351-A Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

The Federal Bar Association is a 15,000 member professional association whose members are employed by every agency and military department of the federal government; hundreds of the nation's most prestigious law firms, corporations, trade associations and law schools; and the courts of the United States. We are firmly dedicated to the promotion of the sound administration of justice in the federal administrative process.

Because the Administrative Conference shares our dedication to the improvement of the federal administrative process and, over the years, has earned a reputation for practical scholarship and objectivity, the FBA petitioned for, and was granted, organizational status recognition in the Conference in 1988. On March 18, 1989, the Association's National Council, our policy-making body representing the membership, adopted the enclosed resolution which urges Congress to reauthorize the Conference at a budget level sufficient to permit it to perform and expand its role as the government's preeminent institutional advocate of reform of the federal administrative process.

I am pleased to transmit the resolution to you and request that it and this letter be included in the record of the Conference's reauthorization hearings. The Federal Bar Association strongly urges the committee to give favorable consideration to the Conference's reauthorization and budget needs.

Sincerely,

William R. Robie

William R. Robie
President

cc: Honorable Dan Glickman
Honorable Bruce A. Morrison
Honorable Harley O. Staggers, Jr.
Honorable Don Edwards
Honorable Craig T. James
Honorable Lamar Smith
Honorable Chuck Douglas

Resolution 89-1

**RESOLUTION IN SUPPORT OF
REAUTHORIZATON OF THE
ADMINISTRATIVE CONFERENCE OF THE UNITED STATES**

WHEREAS the Federal Bar Association is a 15,000 member professional association whose members are employed in every agency and military department of the federal government, hundreds of the nation's most prestigious law firms, corporations, trade associations and law schools, and in the courts;

WHEREAS the Federal Bar Association is dedicated to the promotion of the sound administration of justice in the federal sector;

WHEREAS the Administrative Conference of the United States has performed enormously important work to study, reform and improve the operations of the federal government and protect the public interest by bringing together members of the public and private sectors to analyze the efficiency and fairness of the administrative process;

WHEREAS the Administrative Conference has been highly effective in persuading federal agencies and departments, the President, the Congress and the courts to adopt improvements in their processes to enhance the equitable consideration of public and private interests;

WHEREAS the Administrative Conference has served, in the words of the late Judge Carl McGowan, the "Guardian of the Regulatory Process;"

AND WHEREAS no other public or private agency can perform the work now undertaken by the Conference;

NOW, THEREFORE, the Federal Bar Association strongly urges the Congress to reauthorize the Administrative Conference at a budget level sufficient to permit it to perform and expand its role as the government's preeminent institutional advocate of reform of the federal administrative process.

The President is authorized to communicate this resolution and report to the President of the United States and appropriate members of Congress.

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