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SYMPOSIUM

THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES: A QUARTER CENTURY PERSPECTIVE

*Marshall J. Breger**

I. INTRODUCTION

I have served as Chairman of the Administrative Conference of the United States (ACUS) for a little more than six years. It has been both a fulfilling and a frustrating experience. The Conference has accomplished a great deal, yet it could do much more. I take this opportunity to review the role of the Conference in modern administrative law.

In this article I wish to meet two goals. The first is to illustrate the role of the Administrative Conference—what it does, and how it does it. During my tenure, I have often used the chairmanship as a “bully pulpit” to preach on these subjects to Congress, Federal agencies, the bar and academia. The second objective is to review the role of the Conference and share some thoughts as to what it can accomplish in the future. In keeping with the Conference’s own *modus operandi*, I will review both the etiology and current practice of the Conference before putting forward recommendations for structural improvement.

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I want to thank Seth Zinman at the Department of Labor and Deborah Laufer and Linda Corriea of the Administrative Conference for their research assistance during the preparation of this article. I also want to express my appreciation to Gary Edles, Jeffrey Lubbers, and William Olmstead, whose trenchant insights continue to invigorate all those who study and practice administrative law.

II. ORIGINS OF THE CONFERENCE

The idea of a government-sponsored organization which reviews and recommends improvements in agency procedures is at least forty years old. Indeed, before the establishment of the present Administrative Conference, two Presidents as well as the Judicial Conference appointed temporary entities to perform this function.

With the unanimous passage of the Administrative Procedure Act (APA) in 1946, a significant chapter in administrative law reform had closed.¹ However, it soon became apparent that the APA had not settled all outstanding issues in administrative procedure. Thus, in 1949, the Judicial Conference of the United States, after some prompting from the House Judiciary Committee, designated two committees to review existing administrative procedure and develop expense and time saving procedures.² Through this action, the notion of an Administrative Conference, albeit of a temporary sort, was hesitantly introduced. The second of these committees, the Advisory Committee on Procedures before Administrative Agencies, concluded that it would be inappropriate for the judicial branch to formulate rules for regulatory agencies, stating: "The regulatory agencies themselves must solve this problem. . . . [A] cooperative approach, with mutual exchange of experience and suggestions, seems imperative for the most efficient functioning of the administrative agencies."³ The Judicial Conference subsequently suggested that President Eisenhower convene "a conference of representatives of the administrative agencies having adjudicatory and substantial rulemaking functions."⁴ Its purpose would be to devise ways and means of preventing unnecessary delay, expense, and volume of records in administrative proceedings and of improving generally the efficiency and economy of the administrative process.

Shortly thereafter, in 1953, President Eisenhower established a temporary Conference on Administrative Procedure (the Eisenhower

1. The Act was precipitated by the sudden growth in the importance of administrative agencies which occurred during the New Deal period, and the backlash to this development in the legal and business communities. See Marshall J. Breger, *The APA: An Administrative Conference Perspective*, 72 VA. L. REV. 338-339 (1986).

2. See FINAL REPORT OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, reprinted in SELECTED REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, S. DOC. NO. 24, 88th Cong., 1st Sess. 1 (1963).

3. E. BARRET PRETTYMAN, HISTORY OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, reprinted in *Establishing Administrative Conference: Hearing Before Subcomm. No. 3 of the Comm. on the Judiciary, 88th Cong.*, 2d Sess. 23, 24 (1964).

4. See H.R. REP. NO. 1565, 88th Cong., 2d Sess. 20 (1964).

Conference),⁵ comprised of representatives of fifty-seven agencies and departments, three federal judges, three hearing examiners and twelve lawyers with expertise in administrative law.⁶ During its two-year existence, the Conference issued thirty-five recommendations⁷ and proposed the establishment of a permanent Office of Administrative Procedure, noting that “[w]hile nothing in the functions of the office would compel its location in the Department of Justice, for reasons of economy it should use the administrative or housekeeping services of an existing agency.”⁸ This idea received additional support in 1955 from the Commission on Organization of the Government. This “Second Hoover Commission” recommended creating an Office of Legal Services and Procedure within the Department of Justice “to assist agencies in simplifying, clarifying and making uniform rules of substance and procedure, to insure agency compliance with statutory public information requirements; and to receive and investigate complaints regarding legal procedures and report thereon to the authorities concerned.”⁹

5. The President explained:

It is not contemplated that the conference will attempt to impose rules or procedures upon the departments, the agencies, or litigants. The purpose is to exchange information, experience and suggestions and so to evolve by cooperative effort principles which may be applied and steps which may be taken severally by the departments and agencies toward the end that the administrative process may be improved to the benefit of all.

Memorandum Convening the President's Commission on Administrative Procedure, PUB. PAPERS 219, 220 (Apr. 28, 1953).

6. *Id.*

7. Two recommendations were addressed to the President, three to the Judicial Conference, seven to the Civil Service Commission, one to the General Services Administration and 22 to various other government agencies. See PRETTYMAN, *supra* note 3, at 23, 25. The Conference's first recommendations ranged from the elimination of unnecessary delay, expense, and volume of records in adjudicatory and rulemaking proceedings, and the submission of documentary evidence in such proceedings, to the authority, status, training and guidance of agency counsel. *Id.* at 9-14, 23-34.

8. FIRST REPORT OF THE CONFERENCE ON ADMINISTRATIVE PROCEDURE 17 (1953) (comment on Recommendation A.1). The Conference commented further that such an office “should not be empowered to dictate to the administrative agencies on procedural matters.” *Id.* at 46-48. Rather, it would continue to operate on a mutually cooperative basis with agencies, other advisory groups and the bar.

9. The Commission's recommendation presented a narrower view than that of the Task Force on Legal Services and Procedure. The Task Force had envisioned a broader mandate for the Office of Legal Services, with greater enforcement powers and the then novel role of executive oversight of rulemaking.

Every agency should be required to comply with directives of the Office [of Legal Services and Procedure] with respect to the public information requirements of the Administrative Code. [The Code was a draft revision of the Administrative Procedure Act proposed by the task force and rejected by the Commission.] This requirement will have the practical effect of making the Office the administrative authority for deciding whether or not a rule, regu-

Eighteen months later, Attorney General Brownell established an Office of Administrative Procedure within the Department of Justice.¹⁰ During its three years existence, the Office lacked adequate resources and never had a full-time professional staff of more than three.¹¹ Each of 47 departments and agencies assigned an individual to act as the official liaison to the Office. However, the Office did not have non-government members and was not structured by committee.¹² Most of its energies were devoted to compiling statistics and reviewing procedural aspects of agency legislative proposals before their submission to Congress.¹³ The "project" of rationalizing administrative procedure was not completed.

lation, order, or other written statement needs to be published. . . .

In carrying out its responsibilities under the legislation proposed by the task force [the Administrative Code], the Office must have authority to require agencies to provide information and statistical data relating to legal services and procedures and to this end must have access to agency dockets and files.

Id.

10. Brownell's order (No. 142-57) issued on February 6, 1957. The Justice Department's ambivalence toward the office was clearly communicated in the initial press release notifying the public of its establishment:

It is felt that it is necessary through temporary arrangements to develop experience, thus laying the groundwork for later legislation since the office, while similar in some of its aspects to the Administrative Office of the Courts, has no precedent in the executive branch of the Federal Government. The powers of the new office will be advisory only.

Press release issued on December 4, 1956.

11. The first Director of the new Office of Administrative Procedure was J. Smith Henley, who had served previously as assistant and then associate general counsel of the Federal Communications Commission. He was succeeded by John F. Cushman.

12. ANNUAL REPORT OF THE OFFICE OF ADMINISTRATIVE PROCEDURE 1 (1957) [hereinafter ANNUAL REPORT].

[M]UCH OF THE WORK IS DONE BY INFORMAL DISCUSSION AND PERSONAL CONTACT WITH AGENCY MEMBERS AND STAFF. THROUGH SUCH A PROGRAM OF INFORMAL FACE-TO-FACE MEETINGS WITH ADMINISTRATORS THERE IS ACHIEVED A FULL AND FREE EXCHANGE OF VIEWS AND A MUTUAL STIMULATION.

. . . MANY SUGGESTIONS AND PROBLEMS ARE STATED BY LAW STUDENTS, NON-LAWYER PROFESSIONAL ASSOCIATIONS, AND INDIVIDUAL MEMBERS OF THE PUBLIC. FOR ALL OF THESE DIVERSE GROUPS AND INDIVIDUALS THE OFFICE SEEKS TO ACT AS A CLEARING HOUSE FOR PROCEDURAL INFORMATION. IT DOES SPECIAL STUDY AND RESEARCH WITH RESPECT TO SELECTED PROBLEMS, AND RECOMMENDS AND PROVIDES ADVICE WITH RESPECT TO PROCEDURAL MATTERS, WHENEVER SUCH APPEARS TO BE IN ORDER.

13. See ANNUAL REPORT 1957, 1958 and 1959. The Office compiled statistics by agency on the number of proceedings pending, commenced and terminated annually, as well as the length of time and manner of disposition of each proceeding. *Id.* at Tables.

During the three years of its existence, the Office commented on 158 legislative proposals. See ANNUAL REPORT 1959 at 7 (indicating 52 legislative projects); ANNUAL REPORT 1958 at 1 (reporting 43 legislative proposals); ANNUAL REPORT 1957 at 3 (indicating 63 legislative projects). The Office commented on the procedural aspects of legislative proposals. No comment was made

Immediately following his election in 1960, President-elect John F. Kennedy asked Dean James M. Landis to prepare a report on the regulatory agencies and their problems. The Landis Report recommended the establishment of an Administrative Conference which would assume the duties performed by the Office of Administrative Procedure and the duties performed by the Civil Service Commission concerning the qualifications and grading of hearing examiners.¹⁴ It stated that:

[t]he concept of an Administrative Conference of the United States promises more to the improvement of administrative procedures and practices and to the systematization of the federal regulatory agencies than anything presently on the horizon. It could achieve all that the concept of the Office of Administrative Procedure envisaged by the Hoover Commission and endorsed by the American Bar Association hoped to accomplish, and can do so at a lesser cost and without the danger of treading on the toes of any of the agencies.¹⁵

Following this advice, President Kennedy established a second temporary Conference¹⁶ in 1961, with a council of eleven Presidential appointees and a general membership culled from federal executive departments and administrative agencies, the practicing bar, administrative law scholars, and "other persons specially informed by knowledge and experience with respect to Federal administrative procedures."¹⁷ Research and support staff were supplied by the Office of Administrative Procedure, with the Director of that office assuming the position of Executive Secretary of the Conference.¹⁸ Over three years, the Conference held six plenary sessions and adopted thirty recommendations,¹⁹

on the merits of the legislation. Rather, the Office examined whether the proposals were constitutional and consistent with the requirements of the Administrative Procedure Act. *Id.* The review also focused on whether the procedures were fair, clear, and properly "designed to accomplish the regulatory purpose with economy and dispatch." *Id.*

14. SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY, 86th Cong., 2d Sess., REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 87 (Comm. Print 1960) [hereinafter LANDIS REPORT]. The Secretariat currently is known as the Office of the Chairman.

15. *Id.* at 74.

16. Exec. Order No. 10,934, 26 Fed. Reg. 3,233 (1961); see also Special Message to the Congress on the Regulatory Agencies, PUB. PAPERS 267, 274-75 (Apr. 13, 1961).

17. Exec. Order No. 10,934, 26 Fed. Reg. 3,233 (1961).

18. The Conference thereby assumed the functions of the Office of Administrative Procedure, as Dean Landis had recommended. See LANDIS REPORT, *supra* note 14, at 87. The second temporary conference had a total of 77 members (excluding the Chairman and Council): 46 from federal departments and agencies; 21 practicing lawyers; three law professors, two government professors, two state regulatory commission members, and one accountant. Nine standing committees were organized.

19. See FINAL REPORT OF THE ADMINISTRATIVE CONFERENCE, Dec. 15, 1962, reprinted in

culminating in a final report to the President outlining suggestions for improving administrative processes.²⁰ In particular, the Conference urged that a permanent Administrative Conference be enacted by statute:

The scope of problems is so great that no one official would be able to encompass them; nor, in our judgment, would the agencies respond gladly to the directives of a person who would almost inevitably be characterized as "czar" or "super administrator" regardless of the President's or his own true desires.²¹

Public response to this suggestion was positive. "The headless 'fourth branch of Government' may soon grow a head," declared the *Wall Street Journal*.²² "In effect the Conference would become a mechanism for self-policing on the part of the administrative agencies, with enough outside initiative and influence to assure objectivity."²³ Widespread endorsement of the Conference idea²⁴ prompted Congress in 1964 to pass the Administrative Conference Act. Thus, fifteen years after the first review of administrative procedure by the Judicial Conference, the Administrative Conference of the United States became a permanent independent agency.²⁵

Upon swearing in the first Conference Chairman, Professor (now Circuit Judge) Jerre Williams, 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

S. Doc. No. 24, 88th Cong., 1st Sess. 24, 6-14 (1963) [hereinafter FINAL REPORT]. Among the issues addressed in the Conference's recommendations were plans to collect and publish statistics on administrative proceedings (Recommendation No. 1), judicial review of I.C.C. orders, which at that time differed from traditional judicial review of administrative action (Recommendation Nos. 3 and 4), the right to counsel in agency proceedings (Recommendation Nos. 15 and 25), the problem of ex parte communications between agency personnel and outside parties in pending cases (Recommendation No. 16), and discovery techniques in adjudicatory proceedings (Recommendation No. 30). *Id.*

20. *Id.* at 14-15.

21. Letter from E. Barrett Prettyman to President John F. Kennedy (Dec. 17, 1962).

22. Louis M. Kohlmer, *Kennedy Panel Asks Conference Be Formed to Coordinate Business-Regulating Units*, WALL ST. J., Jan. 7, 1963, at 2.

23. Editorial, *Administrative Helpmeet*, WASH. POST, Jan. 21, 1963, at A14.

24. This included the recommendations of both temporary Conferences and the American Bar Association. PRETTYMAN, *supra* note 3, at 26-29.

25. Pub. L. No. 88-499, 78 Stat. 615 (codified at 5 U.S.C. §§ 571-76 (1988)). See remarks of Frank Wozenkraft at the Symposium presented elsewhere in this volume.

Prettyman—convinced us that we needed a permanent agency for continuing review of the administrative process.

...
 We want the Administrative Conference to be the vehicle through which we can look at the administrative process and can see how it is working and how it could be improved and how it could best serve the public interest.²⁶

Congress modeled the permanent Administrative Conference after the Judicial Conference of the United States in terms of both diversity of membership and structure. Apart from special statutory responsibility for improvement of automatic data processing and systems procedures used by the Administrative Office of the U.S. Courts,²⁷ the Office of the Chairman was charged with performing essentially the same functions for executive departments and administrative agencies that the Federal Judicial Center performed for the judicial branch.²⁸

The concept of an Administrative Conference is not a unique by-product of the American administrative state. What is true for the United States has been true for much of the western industrialized world. Whenever the political leadership has recognized the need for objective and relatively autonomous practical advice on how to navigate the "administrative state," countries with significant administrative bureaucracies have created permanent bodies to monitor administrative procedure and recommend improvements. The bodies in the United Kingdom, France, Australia, and Canada are illustrative.

The United Kingdom's Council on Tribunals²⁹ is responsible for overseeing a wide variety of administrative courts and advising them on the establishment of procedural rules.³⁰ Although the Council has only

26. Remarks at the Swearing In of Jerre S. Williams as Chairman, Administrative Conference of the United States, PUB. PAPERS 68 (Jan. 25, 1968).

27. 28 U.S.C. § 601 (1988).

28. The Federal Judicial Center is the research arm of the Judicial Conference, charged with developing improved methods of judicial administration. The Office of the Chairman of the Administrative Conference and the Federal Judicial Center were established at about the same time: The Conference's first chairman was not sworn in until January 25, 1968; the Federal Judicial Center's first director was sworn in on March 2, 1968.

29. Tribunals and Inquiries Act of 1971, Stats. U.K., 1971, c.62 (consolidation of Acts of 1958 and 1966). See CAROL HARLOW & RICHARD RAWLINGS, LAW & ADMINISTRATION 171 (1984). The Council is appointed by the Lord Chancellor and is therefore considered to be part of the Lord Chancellor's Department. Tribunals and Inquiries Act of 1971, Stats. U.K., 1971, c.62. A majority of the Council's membership consists of non-lawyers. COUNCIL ON TRIBUNALS, THE FUNCTIONS OF THE COUNCIL ON TRIBUNALS 5 (1980). Members have included trade unionists, social workers, and experts in consumer protection, business, and agriculture. *Id.*

30. The mission of the Council is:

(a) to keep under review the constitution and working of the tribunals specified in Schedule 1 to the Act;

an advisory role for tribunals within its jurisdiction,³¹ the Act requires that proposed changes in tribunal procedures be submitted to the Council prior to their adoption.³²

Much of the consultation between the Council and tribunals and departments continues only on a voluntary basis.³³ The Act does not require that the Council be consulted on proposed primary legislation affecting tribunals or inquiries,³⁴ but in practice, such consultations occur voluntarily.³⁵

In Australia, the Administrative Review Council³⁶ monitors all administrative review agencies, including the ombudsman, the courts and the Administrative Appeals Tribunal, which reviews administrative de-

(b) to consider and report on particular matters referred to the Council by the Lord Chancellor and the Lord Advocate with respect to any tribunals other than any ordinary court of law, whether or not specified in Schedule 1; and

(c) to consider and report on such matters as may be so referred, or as the Council may consider to be of special importance, with respect to administrative procedures which may involve the holding by or on behalf of a Minister of a statutory inquiry.

Id. at 3.

31. R.E. WRAITH & P.G. HUTCHESON, ADMINISTRATIVE TRIBUNALS 202 (1973). Tribunals are akin to the independent administrative apparatus of hearing officers and administrative law judges who perform "judicial" functions within U.S. agencies. The spectrum of functions runs from tribunals of first resort to which application must be made to obtain a particular license, to those which hear appeals from the decisions of administrators, to "special courts," which hear disputes between citizens arising under administrative regulations. JUSTICE-ALL SOULS REVIEW, REVIEW OF ADMINISTRATIVE LAW IN THE UNITED KINGDOM 10 (1981). The number of types of tribunals within the Council's jurisdiction exceeds 50. COUNCIL ON TRIBUNALS, *supra* note 29, at 8.

32. Tribunals and Inquiries Act of 1971, § 10. The Council's recommendation may, however, be ignored without explanation, and the Council lacks the authority even to publicize its disagreement. See COUNCIL ON TRIBUNALS, *supra* note 20, at 8, 9; Owen Lomas, *The 25th Annual Report of the Council on Tribunals—An Opportunity Sadly Missed*, 48 MODERN L. REV. 694, 702 (1985). See also ALAN LEADBEATER, COUNCIL ON ADMINISTRATION 26 (1980).

33. Lomas, *supra* note 31, at 696.

34. COUNCIL ON TRIBUNALS, *supra* note 29, at 4, 8.

35. *Id.* at 4.

36. The Administrative Appeals Tribunal Act of 1975 established the Administrative Review Council as part of a comprehensive package of statutory reforms in the area of administrative law. The Council consists of the President of the Administrative Appeals Tribunal, the Commonwealth Ombudsman, the President of the Law Reform Commission, and from three to ten other members. Administrative Appeals Tribunal Act, § 49. In order to qualify for membership, the Act requires that a candidate have "extensive experience at a high level in industry, commerce, public administration, industrial relations, the practice of a profession or the service of a government or of an authority of a government or . . . extensive knowledge of administrative law or public administration." *Id.* § 50. Members have been appointed from legal and government practice and academia. David J. Mullan, *Alternatives to Judicial Review of Administrative Action—The Commonwealth of Australia's Administrative Appeals Tribunal*, 43 REVUE DU BARREAU 569, 575 n.25 (1983).

cisions on their merits.³⁷ The Council is an independent advisory body which reports to the Attorney General through recommendations on the adequacy of procedures and the categories of administrative decisions that should be reviewed.³⁸ The Council does not directly advise agencies on administrative matters,³⁹ and any guidance from the Council on legislative matters would be given by the Attorney General based on a Council recommendation.⁴⁰ More exacting examination of legislative proposals falls within the purview of the Senate standing committees on scrutiny of bills, regulations and ordinances.⁴¹ The Council is free to determine its own research agenda, but it occasionally receives specific requests from the Attorney General.⁴²

Similarly, the Canadian Law Reform Commission monitors the procedures of administrative tribunals, including government departments and agencies,⁴³ making recommendations to Parliament through

37. John Griffiths, *Australian Administrative Law: Institutions, Reforms and Impact*, 63 PUB. ADMIN. 445, 449 (1985).

38. Administrative Appeals Tribunal Act 1975, Austl. Acts No. 91 of 1975, as amended by Administrative Appeals Tribunal Amendment Act 1977, Austl. Acts No. 58 of 1977. Section 51 of the Act sets forth the Council's mandate:

(a) to ascertain, and keep under review, the classes of administrative decisions that are not the subject of review by a court, tribunal or other body;

(b) to make recommendations to the Minister [of the responsible agency] as to whether any of those classes of decisions should be the subject of review by a court, tribunal or other body and, if so, as to the appropriate court, tribunal or other body to make that review;

(c) to inquire into the adequacy of the law and practice relating to the review by courts of administrative decisions and to make recommendations to the minister as to any improvements that might be made in that law or practice;

(d) to inquire into the adequacy of the procedures in use by other tribunals or other bodies engaged in the review of administrative decisions and to make recommendations to the Minister as to any improvements that might be made in those procedures;

(e) to make recommendations to the Minister as to the manner in which tribunals engaged in the review of administrative decisions should be constituted;

(f) to make recommendations to the Minister as to the desirability of administrative decisions that are the subject of review by tribunals other than the Administrative Appeals Tribunal being made the subject of review by the Administrative Appeals Tribunal; and

(g) to make recommendations to the Minister as to ways and means of improving the procedures for the exercise of administrative discretions for the purpose of ensuring that those discretions are exercised in a just and equitable manner.

39. Griffiths, *supra* note 37, at 449.

40. *Id.*

41. *Id.*

42. *Id.* at 448.

43. Law Reform Commission Act, R.S.C., ch. C-23 (1st Supp.) (1970) (CAN). The Act requires that a majority of the Commissioners be individuals with substantial legal experience. Only one non-lawyer has ever been appointed as a commissioner. ALAN LEADBEATER, COUNCIL ON ADMINISTRATION 17 (1980). For examples of the Commission's work, see REPORT 26: INDE-

the Minister of Justice.⁴⁴ However, the Commission's mandate is even broader than those of its Commonwealth counterparts. It monitors statutory or judicial changes in Canada's laws, as well as developments in law reform abroad so that it can make constructive recommendations to Parliament. The Law Reform Commission Act authorizes the Commission to "study and keep under review on a continuing and systematic basis the statutes and other laws comprising the laws of Canada with a view to making recommendations for their improvement, modernization and reform."⁴⁵

The French Conseil d'état was initially constituted as an advisory council whose function was to draft new laws and regulations and to resolve administrative problems.⁴⁶ Although the section of the Conseil that acts as the supreme administrative court of France⁴⁷ is perhaps the most commonly known, four administrative sections continue to perform an advisory role through the General Assembly.⁴⁸ Through these sections, the Conseil identifies pressing problems of administrative procedure and advises the government on all bills it introduces into Parliament, as well as on all delegated legislation.⁴⁹

III. THE STRUCTURE OF THE CONFERENCE

It is easy enough to view the structure of the Administrative Conference as a pyramid, with the Chairman presiding over a Council of ten which oversees, in turn, a membership of ninety-one public and pri-

PENDENT ADMINISTRATIVE AGENCIES—A FRAMEWORK FOR DECISION MAKING (1985); WORKING PAPER 25: INDEPENDENT ADMINISTRATIVE AGENCIES (1980).

44. LEADBEATER, *supra* note 32, at 16.

45. Law Reform Commission Act, *supra* note 42, at s.11. The Commission's statutory authority includes:

- (a) the removal of anachronisms in the law;
- (b) the reflection in and by the law of the distinctive concepts and institutions of the common law and civil law legal systems in Canada, and the reconciliation of differences in the expression and application of the law arising out of those concepts and institutions;
- (c) the elimination of obsolete laws; and
- (d) the development of new approaches to and new concepts of the law in keeping with and responsive to the changing needs of modern Canadian society and of individual members of that society.

46. LIONEL BROWN & JOHN GARNER, *FRENCH ADMINISTRATIVE LAW* 28-29 (1983).

47. *Id.* at 48-49.

48. LEADBEATER, *supra* note 32, at 51. The sections are the Section de l'Intérieur (Home Affairs), Section des Finances (Finance), Section Sociale (Social Matters), and Section des Travaux Publics (Public Works). *Id.* at 51-53.

49. *Id.* at 52-53. The Commission du Rapport et des études of the Conseil d'état is responsible for publishing the Annual Report of activities. Decree No. 63-766 (July 30, 1963). See LEADBEATER, *supra* note 32, at 54.

vate sector members.⁵⁰ But such a diagram fails to capture the two features which make the Conference, as a government-sponsored think tank, a unique government entity—a diverse, committed membership and the Conference's committee system.

A. Conference Membership

The membership of the Conference falls into three groups: (i) representatives from agencies designated by statute;⁵¹ (ii) representatives from additional agencies designated by the President or the Council;⁵² (iii) public members appointed by the Chairman with the approval of the Council.⁵³ In addition, a number of individuals without full voting privileges serve as liaison representatives,⁵⁴ senior fellows⁵⁵ or special counsels.⁵⁶

The purpose of culling members from these groups is to establish a balance between the public and private sectors. The government departments and agencies choose their own representatives, most but not all of whom are lawyers. These representatives include both presidential appointees and civil servants. The Chairman chooses members from the public in accordance with the statutory requirement that he select candidates

in a manner which will provide broad representation of the views of private citizens and utilize diverse experience. "The members shall be members of the practicing bar, scholars in the field of administrative law or government, or others

50. With respect to the decisionmaking authority of the Conference, the structure is really an inverse pyramid, with all ultimate power residing in the Assembly.

51. 5 U.S.C. § 573(b)(2) (1988). These consist of the chairman or designee of each "independent regulatory board or commission."

52. 5 U.S.C. § 573(b)(3) (1988). The President may designate other departments or agencies. 5 U.S.C. § 573(b)(4). The Council may authorize additional seats for statutory or designated agencies.

53. 5 U.S.C. § 573(b)(6) (1988). The Chairman selects not more than 40 other members for terms of two years. The Chairman selects individuals who will "provide broad representation of the views of private citizens and utilize diverse experience." *Id.*

54. 1 C.F.R. § 302.4 (1991). According to the Conference's bylaws liaison arrangements may be made with representatives of the Congress, the judiciary, federal agencies not otherwise represented in the Conference, and professional associations.

55. 1 C.F.R. § 302.2(e) (1991). Former chairmen of the Conference and individuals who have served for eight or more years as members are eligible for two-year appointments as senior fellows.

56. 1 C.F.R. § 302.2(f) (1991). Special counsels do not serve under any of the other official membership designations. They advise and assist the membership in areas of their special expertise.

pecially informed by knowledge and experience with respect to federal administrative procedure."⁵⁷

This echoes the words of President Kennedy in Executive Order 10,934, establishing the second temporary Conference.

One occasional criticism levied against the Conference is that its membership needs more "balance."⁵⁸ That view argues that proportioning membership according to agency or non-agency affiliation of members erroneously presupposes a point of view based on each member's institutional role or place of employment. The criticism suggests that ACUS "has become a closed society where like-minded individuals bolster each other's narrow range of perspectives."⁵⁹ This criticism is, I believe, factually flawed. Members are not appointed to "represent" specific constituencies, such as labor, management or environmental groups.⁶⁰ Rather, in a Burkean vein, members are appointed to provide their best independent insights and intelligence.⁶¹ Having said that, in the last five years, Conference members have included a legal aid attorney, outside counsel to a major union, three members from diverse public interest groups, the former Chief Domestic advisor to a Democratic president, the technical director (an engineer) of a leading consumer organization, and both conservative and liberal academics.

Some might worry that government members will follow a "three-line whip,"⁶² but in practice, overarching agencies like the Office of Management and Budget (OMB) and the Department of Justice rarely if ever lay down the law. In my experience, the more realistic membership balancing act involves the tension between Cabinet departments and independent agencies. For example, the Cabinet departments re-

57. 5 U.S.C. § 573(b)(6) (1988).

58. See the Federal Advisory Committee Act (FACA), Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified at 5 U.S.C. app. (1988)). FACA's broad definition of "advisory committee," 5 U.S.C. app. § 3, includes the Administrative Conference which is thus required to maintain a "fairly balanced [membership] in terms of the points of view represented and the functions to be performed." 5 U.S.C. app. § 5(b)(2).

59. Letter from Rep. Gus Hawkins, Chairman, House Education and Labor Committee, to President Ronald Reagan (quoted in Slavín, *Business as Usual*, COMMON CAUSE MAG. Jan.-Feb. 1988 at 9).

60. Indeed, a long-standing ACUS bylaw provides that "Each member is expected to participate in all respects according to his own views and not necessarily as a representative of any agency or other group or organization, public or private." 1 C.F.R. § 302.2(a)(1) (1991).

61. Edmund Burke, *The Duty of a Representative*, in EDMUND BURKE ON REVOLUTION (R. Smith ed., 1968).

62. This term refers to a directive by British Parliamentary leaders that the strictest form of party discipline be observed in connection with a matter to be voted upon.

cently sided against the independent agencies and with public members in voting to recommend that independent agencies be brought under OMB rulemaking review.⁶³

There is no doubt that the challenge to secure and maintain an active and imaginative membership while accommodating the balance requirement is a continuing one. The initial membership list was extraordinary in its intellectual depth and political breadth.⁶⁴ It is a fair criticism that the Conference has found it difficult to sustain the same level of insight and committed participation.

On the other hand, the Conference is fortunate to have among its members a number of "work horses" who are easily distinguishable from the "show horses." Perhaps counter-intuitively, the government members often (though by no means always) prove to be the "show horses," typically, it is the private sector attorneys who devote an extraordinary number of hours on behalf of the Conference.⁶⁵ Of course, even private sector attorneys have time constraints regarding the amount of time they can devote to Conference activities, and in a sense, the most naturally active members are members from the academy.⁶⁶ On a positive note, government officials, after participating in the work of ACUS, often seek reappointment as public members when they leave government service.

B. *The Committee System*

As specified in its bylaws, the Administrative Conference has six

63. See Recommendation No. 88-9, Presidential Review of Agency Rulemaking, 1 C.F.R. § 305.88-9 (1990).

64. The 1968-69 Conference included such luminaries as Whitney North Seymour, Bernard Segal, Charles Rhyne (all former ABA Presidents), Professors Walter Gellhorn, Kenneth Culp Davis, Clark Byse and Nathaniel Nathanson, as well as many high ranking agency members and officials.

65. During hearings in 1962-63, many argued for a Conference comprised of only government members. The argument was that government members have the greatest stake in the administrative process and that the motivation for honest and vigorous inquiry would be destroyed once criticism came from those outside the "club." *But see Administrative Conference of the United States: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess. 42 (1963) (statement of Nathaniel L. Nathanson, recognizing value of participation of private attorneys in Conference's early work).

66. Members spend between 25 and 100 hours annually on Conference business, studying reports, and attending committee meetings or plenary sessions. See *Reauthorization of the Administrative Conference of the United States: Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 230 (1990) (testimony of Alan Morrison, Public Member, Administrative Conference of the United States).

standing committees: adjudication, administration, governmental processes, judicial review, regulation and rulemaking.⁶⁷ The Chairman defines the scope of each committee and assigns projects to each.⁶⁸ Additionally, with the approval of the Council, the Chairman may establish special ad hoc committees. Currently, there are four such special committees: government ethics regulation, financial services regulation, the future of ACUS, and assistance to foreign countries on administrative procedure. The Chairman, once again with Council approval, Council assigns to each committee a mixture of government and public members, at least one Council member, senior fellows, liaison members, and special counsel.⁶⁹ Generally, all committee members vote on committee business.⁷⁰

The committee system is vital to the Conference's research and review process. This process provides a "quality control" mechanism unique to the executive branch that analyzes research from a variety of different perspectives: governmental, private sector and academic. By virtue of this approach, unexpected pitfalls in the Conference's work rarely if ever emerge. The process starts with the development of research projects, in which the Conference culls ideas from a variety of sources. Congress sometimes mandates projects in either legislation or appropriations committee reports. Academics occasionally submit unsolicited proposals and members bring problems they have experienced to the Conference's attention. The Conference's own research staff develops research proposals, particularly in thematic areas where the Conference has done previous systematic work. Finally, the Conference undertakes studies which an agency may request, either to provide "cover" for the rethinking of its decisional processes or to assist it in problem-solving.

The Chairman, on the advice of the Conference's research director, selects projects for development and proposes a list of research

67. Bylaws of the Administrative Conference of the United States, 1 C.F.R. § 302.3 (1991).

68. *Id.* The titles and actual division of labor between the committees were last revisited in 1982. Recommendations of the Administrative Conference, 47 Fed. Reg. 58,208 (1982). It may well be time to rethink the organization of the present committee system. The specific titles and subject areas of each Committee are not written in stone and may well be ripe for review, given the changes in the direction of administrative law and in the focus of Conference research.

69. 1 C.F.R. § 302.2(e) (Senior Fellows); 1 C.F.R. § 302.2(f) (Special Counsels); 1 C.F.R. § 302.4 (Liaison Arrangements).

70. See 1 C.F.R. § 302.2, *supra* note 69. Although senior fellows, special counsels and committee liaisons may not vote at plenary sessions, they have all other privileges of Conference members, including the power to vote in committee deliberations, although the conferral of voting rights is at the discretion of the committee chairman. *Id.*

projects to the Council. Once projects are placed on an "approved" list, they may be commissioned, subject to finances, time, and the availability of appropriate consultants. The Conference often contracts with law school academics who work with the Conference's staff to define the parameters of the proposed study. There is always a strong emphasis on real world concerns while maintaining a scholarly level of theoretical rigor. The Chairman then assigns the project to a particular committee. On occasion, a researcher will meet with the relevant committee to further refine the study's scope.

After the report is completed, the assigned committee reviews the consultant's report and determines whether it contains sufficient practical value to generate a recommendation. If the committee decides that a recommendation is appropriate, it drafts one with the assistance of the Chairman's staff, the consultant and the interested public. The draft recommendation is distributed for public comment, and a strong effort is made to develop consensus. Alternatively, a committee may agree that a recommendation is not appropriate but the Conference should make what it terms a "statement" to draw attention and generate interest in the consultant's study.⁷¹

Once a committee approves a recommendation, it proceeds to the Council. Once again, the recommendation is reviewed from a variety of perspectives. The Council may approve it or vote out an alternative text. In such cases, both texts are presented to the plenary session. Often, Council changes are easily incorporated into the committee's draft. The Council serves, therefore, not as a gatekeeper, but as a further crucible for refining and improving Conference recommendations.

The recommendations approved by the Council form the agenda for the Conference's semi-annual plenary sessions. At the plenary, the committee chair and consultant present the recommendation. Floor amendments often carry and the debate over seemingly innocuous phrases can easily turn, in the hands of masters, into an extraordinary disputations on the fundamental nature of administrative law. Confer-

71. The Conference has issued 15 such statements since 1971. One example is the report by William Luneburg which generated Statement 15: Procedures for Resolving Federal Personnel Disputes, 1 C.F.R. § 310.15 (1991). See William Luneburg, *The Federal Personnel Complaint, Appeal and Grievance System: A Structural Overview and Proposed Revisions*, 78 Ky. L.J. 1 (1989-90), 1989 ACUS 895. The Conference responded in like manner on the proposed recommendation of appointing an ombudsman to review and report on agency FOIA decisions and to mediate FOIA disputes. Statement on Resolution of Freedom of Information Act Disputes, 1 C.F.R. § 310.12 (1990).

ence recommendations and statements are published in the *Federal Register* and then codified in the Code of Federal Regulations.⁷²

The Conference has been criticized for the length of time it takes from the initiation of a research project to the approval of a recommendation at the plenary session. The typical gestation time is about eighteen months, although the Conference occasionally manages a fast track disposition. For example, the Conference studied the need for a code of ethics for Presidential transition workers in three months.⁷³ In addition, the Conference completed a study of the Federal Aviation Administration's ("FAA") civil money penalty process in five months.⁷⁴ The study had been requested by the FAA and a congressional oversight committee. The nature of the Conference process, however, militates against fast turn-around. The slow ripening of Conference studies provides an opportunity for dispassionate review from myriad perspectives and leaves open the opportunity to build valuable consensus.

IV. STATUTORY MANDATE OF THE ADMINISTRATIVE CONFERENCE

The Conference's mandate is to study administrative processes and recommend improvements when appropriate, to act as a clearinghouse for agencies, and to collect and publish information and statistics on administrative procedure. Section 574 of the Administrative Conference Act states that the Conference may

(1) study the efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies in carrying out administrative programs, and make recommendations to administrative agencies, collectively or individually, and to the President, Congress, or the Judicial Conference of the United States, in connection therewith, as it considers appropriate;

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

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

(4) enter into arrangements with any administrative agency or major organizational unit within an administrative agency pursuant to which the Conference performs any of the functions described in paragraphs (1), (2), and (3).⁷⁵

72. Recommendations of the Administrative Conference of the United States, 1 C.F.R. pt. 305; Miscellaneous Statements, 1 C.F.R. pt. 310 (1991).

73. See Recommendation No. 88-1, Presidential Transition Workers' Code of Ethical Conduct, 1 C.F.R. § 305.88-1 (1991).

74. See Recommendation No. 90-1, Civil Money Penalties for Federal Aviation Violations, 1 C.F.R. § 305.90-1 (1991).

75. 5 U.S.C. § 574(1-4) (1988) as amended in Pub. L. No. 101-422, § 2, Oct. 12, 1990, 104 Stat. 910.

The bulk of the Conference's work has been its research function and it is here that it has performed its most important role as a ventilator of new ideas in administrative procedure. Its work in interchange and statistics collection has unfortunately been far more abbreviated, in large measure due to budgetary considerations.

The Conference does, however, have at least one statutory reporting function: a requirement that it "transmit to the President and Congress an annual report and such interim reports as [the Chairman] considers desirable."⁷⁶ The Conference's annual report to Congress is primarily a recitation of projects pending and completed, not a report card on agency implementation. Indeed, Congress removed language from legislation which would have required the Conference to report on agency compliance with its recommendations.⁷⁷ Rather, the Conference's authority would "derive from the knowledge, the eminence, the stature of its members, and from the thoughtful work and analysis they [would] bring to bear on the problems."⁷⁸ To this day, the view persists that the effectiveness of the Conference is due to its purely advisory function.⁷⁹ The impact of Conference recommendations relies in great

76. 5 U.S.C. § 575(c) (1988). Congress has endowed the Conference with other reporting functions. Under the Equal Access to Justice Act, ACUS reports annually on the amount of fees and other expenses awarded to prevailing parties pursuant to the Act. 5 U.S.C. § 504(e) (1988). Under the Negotiated Rulemaking Act, the Administrative Conference will report to Congress biennially on the progress and effective use by agencies of negotiated rulemaking. Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, § 3 (1990). (adding new § 589(d)(3) to Title 5 U.S.C.).

77. Commenting on the provision in S. 1664, the Committee explained:

The [House Judiciary] Committee was concerned lest this requirement be considered to attribute the weight of law to Conference findings. It believes that this requirement should not be contained in the bill since the purpose of the legislation is to establish machinery through which to formulate, not to impose, recommendations designed to improve administrative procedure.

HOUSE COMM. ON THE JUDICIARY, ESTABLISHING AN ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, H.R. REP. NO. 1565, 88th Cong., 2d Sess. 3 (1964), *reprinted in* 1964 U.S.C.A.N. 3202, 3203.

78. *Administrative Conference of the United States: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess. 28 (1963) (Statement of Herbert Brownell, President, Association of the Bar of the City of New York and Former Attorney General of the United States under President Eisenhower).

79. See American Bar Association, *The Administrative Conference of the United States—Where Do We Go From Here?*, 8 COOLEY L. REV. 147 (1991).

[T]he effectiveness of an organization is not always contingent upon the formality of its power and how in some ways the very powerlessness of the Administrative Conference [is] an asset in the exercise of its influence. One of the Conference's many assets has been its capacity to function within a framework in which no administrator feels threatened that somehow a power play or a game of turf control is going on.

part on the willingness of the participating agencies and departments to implement the Conference's suggested changes voluntarily. Occasionally an ACUS recommendation is incorporated into a statute, and this of course endows it with the force of law.⁸⁰

The authorizing legislation is silent on whether the Conference has any ability to require agencies to implement its recommendations. This omission was deliberate. The Kennedy Conference was sensitive to the concern that the agencies were not likely to "respond gladly to the directives of a person who would almost inevitably be characterized as a 'czar' or 'super administrator.'" ⁸¹ However, the Conference acknowledged that "[i]f recommended procedural changes are to be effectuated, more than a simple announcement of the recommendation is required."⁸² Therefore, short of endorsing specific enforcement authority, the Conference, emphasizing the collegiality of the body, advised that each recommendation should be "followed by education and persuasion looking toward its adoption."⁸³ In this manner, the Conference would command wider acceptance among the agencies.⁸⁴

Reflecting on my own Conference experience, I would argue that there are strong reasons for giving the Conference the express statutory directive to monitor whether a recommendation has been implemented by agencies and to report these findings to Congress. The frustration of a Conference without the mandate to review agency implementation of its recommendations was articulated as far back as 1963 by Webster P. Maxson, Director of the Justice Department's Office of Administrative Procedure.⁸⁵

The [Conference] must have the capability to follow through on its recommendations. The formulation of a recommendation, however conclusive in its terms, is really the lesser part of tangible progress. Even though the organization certainly should have no authority to impose its judgment on the agencies, it should have, first, the facilities necessary to assist the agencies in implementing its recommendations, and second the opportunity to observe and evaluate the consequences of

Id. (Remarks of Victor Rosenblum) at 151.

80. See *infra* text accompanying notes 89-121.

81. Letter from E. Barrett Prettyman, Chairman, Administrative Conference of the United States, to The President of the United States, 10-11 (Dec. 17, 1962) (transmitting the Final Report of the Administrative Conference of the United States).

82. *Id.* at 13.

83. *Id.*

84. *Id.*

85. See *supra* notes 10-13 and accompanying text.

its actions and to conduct such further studies and take such further actions as may be necessary to effectuate the purposes intended.⁸⁶

This wisdom remains true today. No doubt it would be counter-productive if the agencies and departments viewed the Conference as yet another obstacle in carrying out their Congressional mandates. However, the "stick" that I envision for the Conference is very short and made of soft material. The Conference's additional authority would be limited to reporting on whether or not its recommendations have been implemented. Agencies could still refuse to implement a recommendation if they had good reason to refrain from doing so. Additionally, with this stick come bunches of "carrots" in the form of training sessions, roundtables and additional studies to assist agencies in the implementation of Conference recommendations.

V. THE IMPACT OF THE CONFERENCE

A. ACUS Recommendations

Since its establishment, the Conference's recommendations have had a significant effect on the workings of the federal government.⁸⁷ Early Conference studies, for example, documented the government practice of interposing various technical sovereign immunity defenses in suits seeking relief against federal agency action. The Conference recommended that these rules be changed⁸⁸ and Congress passed a Con-

86. *Administrative Conference of the United States: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess. 60 (1963) (Statement of Webster P. Maxson, Director, Office of Administrative Procedure, Department of Justice).

87. For a description of the Conference's early work, see E. Barrett Prettyman, *Some Broader Aspects of An Administrative Conference of the United States*, 17 ADMIN. L. REV. 48 (1964); Warner W. Gardner, *The Administrative Conference of the United States*, 400 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 36 (1972); John T. Miller, Jr., *A Continuing Forum for the Reform of the Administrative Process*, 27 ADMIN. L. REV. 205 (1975); Frank M. Wozencraft, *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); Carl McGowan, *The Administrative Conference: Guardian of the Regulatory Process*, 53 GEO. WASH. L. REV. 67 (1985). For more recent views, see Gary J. Edles, *The Administrative Conference: Entering a Third Decade of Practical Scholarship*, 41 ADMIN. L. REV. 399 (1989) and Marshall J. Breger, *The Administrative Conference of the United States—Where Do We Go From Here?*, 8 COOLEY L. REV. 147 (1991).

88. Recommendation No. 68-7, Elimination of Jurisdictional Amount Requirement in Judicial Review, 1 C.F.R. § 305.68-7 (1989); Recommendation No. 69-1, Statutory Reform of the Sovereign Immunity Doctrine, 1 C.F.R. § 305.69-1 (1989); Recommendation No. 70-1, Parties Defendant, 1 C.F.R. § 305.70-1 (1989).

ference-sponsored bill to do so in 1976.⁸⁹ 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.⁹⁰ Under then Chairman (now Justice) Antonin Scalia, the Conference developed a model statute incorporating an on-the-record hearing before an administrative law judge, review by the agency head, and 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.⁹¹

The Conference has always made significant contributions bearing on fundamental aspects of the governmental process. Following the Presidential election of 1988, the Conference persuaded the new Administration to adopt a first-of-its-kind Code of Conduct for transition team workers.⁹² Later, the Conference actively sought to ensure the integrity of governmental decisional processes by proposing changes in the conflict-of-interest requirements for members of federal advisory committees.⁹³ ACUS also proposed that agencies make their adjudicatory decisions more readily available to the public.⁹⁴ Perhaps most im-

89. Pub. L. No. 94-574, 90 Stat. 2721 (1976).

90. Recommendation No. 72-6, Civil Money Penalties as a Sanction, 1 C.F.R. § 305.72-6 (1989).

91. *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*). For representative statutes, see Civil Monetary Penalties and Assessment Act, 42 U.S.C. §§ 1320a-7a (1988); Department of Housing and Urban Development Reform Act of 1989, 103 Stat. 1987 (1989) (codified at 42 U.S.C. § 3531 note (1988 and Supp. I 1989)); Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 103 Stat. 183 (1989) (codified at 12 U.S.C. 1811 note (1988 and Supp. I 1989)); 132 CONG. REC. S13,009 (daily ed. Sept. 19, 1986) (statement of Sen. Cohen introducing into Record table listing statutes authorizing enforcement through administrative imposition of civil penalties).

92. Recommendation No. 88-1, Presidential Transition Workers' Code of Ethical Conduct, 1 C.F.R. § 305.88-1 (1989); Philip J. Harter, *Proposed Standards of Conduct for Presidential Transition Workers*, 36 FED. BAR NEWS & J. 130 (1989). Congress also incorporated the Conference's recommendation allowing executive branch appointees to "roll over" their assets into neutral investments in order to comply with federal conflict-of-interest law without realizing taxable gains. *See* Recommendation No. 88-4, Deferred Taxation for Conflict-of Interest Divestitures, 1 C.F.R. § 305.88-4 (1991); Ethics Reform Act of 1989, Pub. L. No. 101-194, § 502, 103 Stat. 1716, 1754 (1989).

93. Recommendation No. 89-3, Conflict-of-Interest Requirements for Federal Advisory Committees, 1 C.F.R. § 305.89-3 (1989); RICHARD K. BERG, CONFLICT-OF-INTEREST REQUIREMENTS FOR MEMBERS OF FEDERAL ADVISORY COMMITTEES (1988).

94. Recommendation No. 89-8, Agency Practices and Procedures for the Indexing and Public Availability of Adjudicatory Decisions, 1 C.F.R. § 305.89-8 (1991); Margaret Gilhooley, *The Availability of Decisions and Precedents in Agency Adjudications: The Impact of the Freedom of*

portant has been the Conference's effort to develop legislation to supplement the costly and litigious rulemaking and adjudicatory processes, where appropriate, with faster, less-costly consensual mechanisms.

In 1990, Congress enacted two landmark pieces of legislation—the Administrative Dispute Resolution Act⁹⁵ and the Negotiated Rulemaking Act.⁹⁶ Both statutes are the direct outgrowth of nearly a decade of work by the Conference and a major cooperative effort with the American Bar Association and key members of Congress from both parties. The new legislation provides explicit statutory authority for voluntary use of Alternative Dispute Resolution (ADR) and negotiated rulemaking (“Reg Neg”) in federal agencies where feasible and consistent with the public interest.⁹⁷ These new acts affect the fundamental structure of adjudication and rulemaking by placing increased decisional responsibility in the hands of affected public parties.

The ADR Act does not mandate particular circumstances in which federal agencies may or may not use ADR techniques. Rather, the Act provides for a discretionary review process in which agencies will consider whether ADR techniques will enable them to fulfill their statutory duties more effectively.⁹⁸ Each agency is required to designate a senior official to be its dispute resolution specialist. The Administrative Conference has considerable responsibilities for educating agency personnel regarding ADR and for implementing ADR policies. To facilitate ADR implementation, the Act also authorizes interagency

Information Act Publication Requirements, 3 ADMIN. L.J. 53 (1989).

95. Pub. L. No. 101-552, 104 Stat. 2736 (1990).

96. Pub. L. No. 101-648, 104 Stat. 4969 (1990). See *infra* note 100 and accompanying text.

97. The Executive order on Civil Justice Reform, issued on October 23, 1991, reinforced the need for government agencies to use ADR as a method to reduce the litigation burdens that now impede American efforts to compete in international markets. Exec. Order No. 12778, 27 Weekly Comp. Pres. Doc. 1485 (Oct. 28, 1991). The Executive order emphasized the need to explore simpler, less costly alternative means of resolving disputes before rushing to sue, and directs government lawyers to “make reasonable attempts to resolve a dispute expeditiously and properly before proceeding to trial.” *Id.* The Executive Order implements the 50-point proposal of the Council on Competitiveness that was at the heart of Vice President Dan Quayle’s speech at the annual meeting of the American Bar Association in August, 1991.

98. Pub. L. No. 101-552, § 4(b), 104 Stat. 2736, 2739 (provides that the “[a]lternative means of dispute resolution authorized under this subchapter are voluntary procedures which supplement, rather than limit other available agency dispute resolution techniques”).

agreements for the use of "neutrals"⁹⁹ whose names appear on a roster maintained by the Administrative Conference.¹⁰⁰

The Negotiated Rulemaking Act draws largely on the principles of Conference recommendations 82-4 and 85-5 to establish a statutory framework for negotiations between agencies and affected interests to formulate proposed regulations.¹⁰¹ "Reg Neg," provides agencies and interested parties with an opportunity to arrive at consensus agreements on proposed regulatory policy, while preserving current notice-and-comment rulemaking under the APA. Although the resulting rules remain subject to review, experience suggests that litigation over negotiated rules is minimal compared to regulations drafted entirely by agencies.

The Reg Neg Act formally establishes the Administrative Conference as a clearinghouse of information on negotiated rulemaking. This includes keeping a record of agency-wide negotiated rulemaking efforts and their accompanying documents. The Act authorizes additional appropriations to the Conference of up to \$500,000 for three fiscal years to provide personnel training and resources to encourage agency experimentation and innovation in the rulemaking arena.

ACUS initiatives touch the lives of millions of Americans. In 1989 alone, the Conference examined the procedural mechanisms through which the Medicare program protects its beneficiaries from unnecessary, poor quality, or inappropriate medical care.¹⁰² It also looked at the use of medical personnel to help process the more than 1.5 million requests for disability insurance benefits and supplemental security in-

99. *Id.* 5 U.S.C. § 583(d) (1991) ("An agency may use the services of one or more employees of other agencies to serve as neutrals in dispute resolution proceedings. The agencies may enter into an interagency agreement that provides for the reimbursement by the user agency or the parties of the full or partial cost of the services of such an employee.").

100. Pub. L. No. 101-552, § 4(b), 104 Stat. 2736, 2739-40. Over the past two years, the Administrative Conference has developed a roster of over 700 neutrals—individuals and organizations whose experience and activities include mediation, facilitation, arbitration, or other ADR services. 5 U.S.C. § 583(b), 1 C.F.R. §§ 316.100-316.302, *reprinted in* 5 U.S.C. § 583 (1990). Moreover, the Act authorizes the Conference, in consultation with the Federal Mediation and Conciliation Service, to develop standards for the selection of neutrals including experience, training, affiliations, and actual or potential conflicts of interest. 5 U.S.C. § 583(c)(1) (1991).

101. Procedures for Negotiating Proposed Regulations, 1 C.F.R. § 305.82-4 (1991); Procedures for Negotiating Proposed Regulations, 1 C.F.R. § 305.85-5 (1991).

102. See Recommendation No. 89-1, Peer Review and Sanctions in the Medicare Program, 1 C.F.R. § 305.89-1 (1991); Timothy Stoltzjous Jost, *Administrative Law Issues Involving the Medicare Utilization and Quality Control Peer Review Organization (PRO) Program: Analysis and Recommendations*, 50 OHIO ST. L.J. 1 (1989).

come submitted annually to the Social Security Administration.¹⁰³ ACUS 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 of the Senate Committee on Labor and Human Resources.¹⁰⁴ At the request of the House Appropriations Committee, and with the encouragement of members of the Congressional Hispanic Caucus, the Conference examined the procedures under which the Immigration and Naturalization Service administered the alien legalization program authorized under the Immigration Reform and Control Act of 1986.¹⁰⁵

On a number of occasions, Congress has specifically mandated that the Conference undertake particular activities:

1. The Magnuson-Moss Warranty Act of 1974¹⁰⁶ directed the Conference to study the Federal Trade Commission's so-called "hybrid rulemaking procedures"¹⁰⁷ authorized under the Act. In addition to the typical notice-and-comment rulemaking procedures, the Act required hearings with cross-examination whenever there were "disputed issues of material fact."¹⁰⁸ The Conference found

103. See Recommendation No. 89-10, Improved Use of Medical Personnel in Social Security Disability Determinations, 1 C.F.R. § 305.89-10 (1991); FRANK S. BLOCH, *THE USE OF MEDICAL PERSONNEL IN SOCIAL SECURITY DISABILITY DETERMINATIONS* (1989).

104. *Uniform Health and Safety Whistleblowers Protection Act: Hearing Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources*, 100th Cong., 2d Sess. 75-83 (1988) (testimony of Marshall J. Breger, Chairman, Administrative Conference of the United States); Recommendation No. 87-2, Federal Protection of Private Sector Healthy and Safety Whistleblowers, 1 C.F.R. § 305.87-2 (1991). See also S. 436, 101st Cong., 1st Sess. (1989); S. 2095, 100th Cong., 2d Sess. (1988) (private employees); H.R. 5073, 100th Cong., 2d Sess. (1988) (aviation whistleblowers); *Aviation Whistleblower Protection: Hearing Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 100th Cong., 2d Sess. 48-73 (1988) (testimony of Marshall J. Breger, Chairman, Administrative Conference of the United States).

105. Statement on Mass Decisionmaking Programs: The Alien Legalization Experience, 1 C.F.R. § 310.14 (1991); David S. North & Anne Mary Portz, *Decision Factories: The Role of the Regional Processing Facilities in the Alien Legalization Programs*, 1989 ACUS RECOMMENDATIONS AND REPORTS 819.

106. Pub. L. No. 93-637, § 201(a), 88 Stat. 2183, 2193.

107. The study is published in three parts: Barry B. Boyer, Executive summary of *Barry B. Boyer Report: Trade Regulation Rulemaking Procedures of the Federal Trade Commission*, 1979 ACUS RECOMMENDATIONS AND REPORTS 41; Barry B. Boyer, *Expense-Reimbursing Public Participants in Administrative Rulemaking: The Federal Trade Commission Experience*, 70 GEO. L.J. (1981); 1979 ACUS RECOMMENDATIONS AND REPORTS 437; and Barry B. Boyer, *Phase II Report on the Trade Regulation Rulemaking Procedures of the Federal Trade Commission*, 1980 ACUS RECOMMENDATIONS AND REPORTS 33.

108. 15 U.S.C. § 57(a)(c)(2)(B) (1982).

the use of these trial-type procedures in rulemaking to be largely a failure,¹⁰⁹ and Congress has generally eschewed their use ever since.¹¹⁰

2. The Government in the Sunshine Act required agencies affected by the Act's open meeting requirements to consult with the Conference in developing their regulations.¹¹¹ To assist in this effort, the Conference prepared an interpretive guide to the Act¹¹² that is now considered to be an authoritative handbook.

3. The Equal Access to Justice Act ("EAJA") required agencies to consult with the Conference before establishing uniform procedures for the submission and consideration of applications for awards of fees and expenses.¹¹³ The Act also instructed the Conference to keep records and report to Congress on the amount of fees and other expenses awarded during each fiscal year.¹¹⁴

4. In 1976, the Conference was required to present to Congress its views on proposed Interstate Commerce Commission ("ICC") procedural rules governing adjudicatory and rulemaking proceedings under the Railroad Revitalization and Regulatory Reform Act of 1976.¹¹⁵

5. In 1975, the Conference developed six recommendations pertaining to Internal Revenue Service procedures.¹¹⁶ These recommendations were developed from a report requested by the chairman of the Senate Appropriations Subcommittee on Treasury, Postal Service and General Government.¹¹⁷ The Conference's multi-volume analysis led to many significant changes in IRS practice pertaining to topics such as taxpayer confidentiality, audit and settlement procedures.¹¹⁸

6. In 1988, the Department of Transportation requested that the Conference review an experimental Federal Aviation Administration (FAA) civil penalty adjudication program.¹¹⁹ The Conference's work in this area was based upon earlier

109. See Recommendation 80-1, Trade Regulation Rulemaking Under the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 1 C.F.R. § 305.80-1 (1988).

110. See Benjamin W. Mintz & Nancy G. Miller, OFFICE OF THE CHAIRMAN, ADMINISTRATIVE CONFERENCE OF THE U.S. (OFFICE OF THE CHAIRMAN), A GUIDE TO FEDERAL AGENCY RULEMAKING (2d ed. 1991).

111. 5 U.S.C. § 552b(g) (1988).

112. RICHARD K. BERG & STEPHEN H. KLITZMAN, AN INTERPRETIVE GUIDE TO THE GOVERNMENT IN THE SUNSHINE ACT (1978).

113. 5 U.S.C. § 504(c)(1) (1989).

114. 5 U.S.C. § 504(e) (1989).

115. 45 U.S.C. §§ 801-55 (1989) (as amended).

116. Recommendation No. 75-5, Internal Revenue Service Procedures: The Audit and Settlement Processes, 41 Fed. Reg. 3,982 (1976); Recommendation No. 75-6, Internal Revenue Service Procedures: Collection of Delinquent Taxes, 41 Fed. Reg. 3,982 (1976); Recommendation No. 75-7, Internal Revenue Service Procedures: Civil Penalties, 41 Fed. Reg. 3,984 (1976); Recommendation No. 75-8, Internal Revenue Service Procedures: Tax Return Confidentiality, 41 Fed. Reg. 3,985 (1976); Recommendation No. 75-9, Internal Revenue Service Procedures: Taxpayer Services and Complaints, 41 Fed. Reg. 3,986 (1976); Recommendation No. 75-10, Internal Revenue Service Procedures: The IRS Summons Power, 41 Fed. Reg. 3,987 (1976).

117. REPORT ON ADMINISTRATIVE PROCEDURES OF THE INTERNAL REVENUE SERVICE, S. Doc. No. 266, 94th Cong., 2d Sess. (1975).

118. See ACUS Implementation Status Report (October 1991). Recommendation No. 75-5, 75-6 were substantially implemented. The IRS refused to take action on Recommendation No. 75-7. However, in the 101st Congress, a House Ways and Means Committee Task Force has reviewed this recommendation in preparing a reform package.

119. The Department sought the Conference's assistance in assessing the effectiveness of the demonstration program pursuant to a congressional mandate for such a review. Airport and Air-

recommendations in 1972, when ACUS argued for in-house agency adjudication of civil penalties.¹²⁰ The Conference's study approved a continuation of in-house adjudications, but suggested some improvements which FAA subsequently implemented in its procedures.¹²¹ Congress then mandated that ACUS formulate a recommendation on whether the civil penalty program should be transferred to the National Transportation Safety Board ("NTSB"), left alone, or otherwise modified.¹²² At its forty-fourth plenary session held in December, 1991, the Conference recommended that the FAA and the NTSB convene a conference with representatives of affected interests to seek a consensual agreement on the issue.¹²³ The Conference further recommended that, in the absence of consensus, authority for adjudicating civil money penalties against pilots and flight engineers should be transferred from FAA to NTSB and that all other adjudication authority remain at the FAA.¹²⁴ These mandates reflect an awareness by Congress of the constructive functions that the Conference can perform to help improve the administrative process.

B. Contributions to Legal Scholarship

There can be little doubt that ACUS has had a significant effect of promoting administrative law scholarship. This is especially true for younger academics for whom Conference work is an opportunity to have a significant impact in the field. ACUS provides unique access for those who choose to work on specific agency-oriented, and at times empirical studies.

The Conference's impact on administrative law scholarship has been profound. It has sponsored such seminal pieces as Currie and Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*,¹²⁵ Diver, *Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*,¹²⁶ Williams,

way Safety and Capacity Expansion Act of 1987, Pub. L. No. 100-223, § 204 (adding new § 905, to be codified at 49 U.S.C. § 1475).

120. See Recommendation No. 72-6, Civil Money Penalties as a Sanction, 1 C.F.R. § 305.72-6 (1991).

121. See Rules of Practice for FAA Civil Penalty Actions, 55 Fed. Reg. 27,548 (1990) (codified at 14 C.F.R. § 13.201-.235).

122. Miscellaneous Aviation, Pub. L. No. 101-370, 104 Stat. 451 (to be codified at 49 U.S.C. §§ 316(g) & 905(d)(4)).

123. Recommendations of the Administrative Conference Regarding Administrative Practice and Procedure, Adjudication of Civil Penalties Under the Federal Aviation Act, 56 Fed. Reg. 67,139, 67,142 (1991) (to be codified at 1 C.F.R. § 305.91-8 (1992)).

124. *Id.* at 67,143.

125. 75 COLUM. L. REV. 1 (1975), 4 Recommendations and Reports of the Administrative Conference of the United States, 197 (1975) [hereinafter ACUS]; see Recommendation No. 75-3, The Choice of Forum for Judicial Review of Administrative Action, 1 C.F.R. § 305.75-3 (1991).

126. 79 COLUM. L. REV. 1435 (1979), 1979 ACUS, *supra* note 124, at 203; see Recommendation 79-3, Agency Assessment and Mitigation of Civil Money Penalties, 1 C.F.R. § 305.79-3

"Hybrid Rulemaking" Under the Administrative Procedure Act,¹²⁷ Hamilton, *Rulemaking on a Record by the Food and Drug Administration*,¹²⁸ Verkuil, *Study of Informal Adjudication Procedures*,¹²⁹ and Shuck & Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*.¹³⁰

The legal scholarship spawned by the Conference is an important element of its "implementation" effort. A Conference study is published in the Conference's official *Annual Reports and Recommendations of the Administrative Conference*, which has a circulation of approximately 2,000. Often, studies are refined further and later published in law reviews. These law review articles have an independent impact on the policy-making process. A groundswell of demand for legislative change sometimes develops based on the new contribution to the legal literature. The impact of the Conference's efforts is sometimes obscured when the law review article is cited as the cause of change. One recent example is a shift in judicial application of the *Chevron* doctrine *vis à vis* agency statutory interpretations.¹³¹

Despite its many contributions to administrative law scholarship, the Conference was criticized in its early years for sponsoring "aimless and disorganized" projects.¹³² These critics suggested that the Conference did not set priorities or commission studies on other than a seemingly-reactive basis. Further, little effort was thought to be made "to maximize the impact of individual studies by supporting them with other related efforts or subsequent follow-through studies."¹³³ Although this criticism of the Conference's work may have been accurate in the past, it is less true today. In the past five years, ACUS has tried to

(1991).

127. 42 U. CHI. L. REV. 401 (1975), 4 ACUS, *supra* note 124, at 499; see Recommendation No. 76-3, Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking, 1 C.F.R. § 305.76-3 (1991).

128. 50 TEX. L. REV. 1132 (1973), 2 ACUS, *supra* note 124, at 448 (1973); see Recommendation No. 71-7, Rulemaking on a Record by the Food and Drug Administration, 2 ACUS, *supra* note 124, at 42 (1973).

129. 43 U. CHI. L. REV. 739 (1976).

130. 1990 DUKE L.J. 984, 1990 ACUS, *supra* note 124, at 767; see also Peter H. Schuck and E. Donald Elliotts, *Studying Administrative Law: A Methodology for and Report on New Empirical Research*, 42 ADMIN. L. REV. 519 (1990).

131. See Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts*, 1989 ACUS, *supra* note 124, at 369, 7 YALE J. ON REG. 1 (1990), which has been cited by the Seventh Circuit in *Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901, 908 (7th Cir. 1990).

132. Glen O. Robinson, *The Administrative Conference and Administrative Law Scholarship*, 26 ADMIN. L. REV. 269 (1974).

133. *Id.* at 270.

focus its resources into specific themes and to build follow-up studies upon them. The Conference has developed a series of discrete studies in the areas of alternative dispute resolution,¹³⁴ social security¹³⁵ and

134. See David R. Anderson & Diane M. Stockton, *Ombudsmen in Federal Agencies: The Theory and the Practice*, 1990 ACUS, *supra* note 124, at 105; Recommendation No. 90-2, The Ombudsman in Federal Agencies, 1 C.F.R. § 305.90-2 (1991); Richard J. Bednar, *Government Contracting Officers Should Make Greater Use of ADR Techniques in Resolving Contract Disputes*, 1989 ACUS, *supra* note 124, at 149; Recommendation No. 89-2, Contracting Officers' Management of Disputes, 1 C.F.R. § 305.89-2 (1990); Barry B. Boyer, *Alternatives to Administrative-Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues*, 71 MICH. L. REV. 111 (1972); Harold H. Bruff, *The Constitutionality of Arbitration in Federal Programs*, 1987 ACUS, *supra* note 124, at 533; Recommendation No. 87-5, Arbitration in Federal Programs, 1 C.F.R. § 305.87-5 (1990); Eldon H. Crowell & Charles Pou, *Study, Appealing Government Contract Decisions: Reducing the Cost and Delay of Procurement Litigation With Alternative Dispute Resolution Techniques*, 49 MD. L. REV. 183 (1990); Alternatives for Resolving Government Contract Disputes, 1 C.F.R. § 305.87-11 (1990); John Graham, *New Effort Focuses on Role of Contracting Officer in Deciding Disputes*, 28 CONT. MGMT. 14 (Aug. 1988); Mark H. Grunewald, *Freedom of Information Act Dispute Resolution*, 40 ADMIN. L. REV. 1 (1988); Statement on Resolution of Freedom of Information Act Disputes, 1 C.F.R. § 310.12 (1990); Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1982); Recommendation No. 82-4, Procedures for Negotiating Proposed Regulations, 1 C.F.R. § 305.82-4 (1990); Philip J. Harter, *Neither Cop Nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality*, 41 ADMIN. L. REV. 315 (1989); Recommendation No. 88-11, Encouraging Settlements by Protecting Mediator Confidentiality, 1 C.F.R. § 305.88-11 (1990); Philip J. Harter, *Points on a Continuum: Dispute Resolution Procedures and the Administrative Process*, 1986 ACUS, *supra* note 124, at 165, 1 ADMIN. L.J. 141 (1987) (abridged); Daniel Joseph & Michelle L. Gilbert, *Breaking the Settlement Ice: The Use of Settlement Judges in Administrative Proceedings*, 3 ADMIN. L.J. 571 (1989-90); Recommendation No. 88-5, Agency Use of Settlement Judges, 1 C.F.R. § 305.88-5 (1990); Charles Pou, *Governmental Uses of Alternative Dispute Resolution*, 9 URB., ST. & LOC. L. NEWSL. Winter 1986, at 1 (1986); George D. Ruttinger, *Acquiring the Services of Neutrals for Alternative Means of Dispute Resolution and Negotiated Rulemaking in ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, SOURCEBOOK: FEDERAL AGENCY USE OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION* 891 (Office of the Chairman, 1987); Marianne K. Smythe, *The Reparations Program at the Commodity Futures Trading Commission: Reducing Formality in Agency Adjudication*, 2 ADMIN. L.J. 39 (1988); Statement on Dispute Resolution Procedure in Reparations and Similar Cases, 1 C.F.R. § 310.13 (1990); Ann Steinberg, *Federal Grant Dispute Resolution*, Vol. I, 1982 ACUS, *supra* note 124, at 137; Recommendation No. 82-2, Resolving Disputes Under Federal Grant Programs, 1 C.F.R. § 305.82-2 (1990); Wallace Warfield, *The Implications of Alternative Dispute Resolution Processes for Decisionmaking in Administrative Disputes*, 16 PEPP. L. REV. S93 (1989).

135. Frank S. Bloch, *The Social Security Administration's Administrative Appeals Process*, 1989 ACUS, *supra* note 124, at 731; Frank S. Bloch, *Report and Recommendations on the Social Security Administration's Administrative Appeals Process*, 1990 ACUS, *supra* note 124, at 307; Recommendation 90-4, Social Security Disability Program Appeals Process: Supplementary Recommendation, 1 C.F.R. § 305.90-4 (1991); Robert G. Dixon, *The Welfare State and Mass Justice: A Warning from the Social Security Disability Program*, 1972 DUKE L.J. 681; Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989); Charles H. Koch & David A. Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, 1987 ACUS, *supra* note 124, at 625, *reprinted in* 17 FLA. ST. U. L. REV. 199 (1990); A New Role

medicare¹³⁶ and has developed a substantial body of expertise in these areas. The Conference made a similar contribution on immigration issues during the period of immigration reform efforts in Congress.¹³⁷

I believe the Conference can be faulted for failing to develop "programs for the systematic in-depth study of, and important improvement in, the federal bureaucracy."¹³⁸ This is particularly true in the area of

for the Social Security Appeals Council, 1 C.F.R. § 305.87-7 (1990); Peter W. Martin, *Procedures Used in Forming and Carrying Out Federal-State Agreements under the Supplemental Security Income Program*, 1979 ACUS, *supra* note 124, at 71; Recommendation No. 79-2, Disputes Respecting Federal-State Agreements for Administration of the Supplemental Security Income Program, 1 C.F.R. § 305.79-2 (1990); Jerry L. Mashaw, *Report to the Grants and Benefits Committee, on the Social Security Hearings and Appeals Process*, 1978 ACUS, *supra* note 124, at 81; Recommendation No. 78-2, Procedures for Determining Social Security Disability Claims, 1 C.F.R. § 305.78-2 (1990); Allen E. Schoenberger, *State Disability Services' Procedures for Determining and Redetermining Social Security Claims for the Social Security Administration*, 1987 ACUS, *supra* note 122, at 579; Recommendation No. 87-6, State-Level Determinations in Social Security Disability Cases, 1 C.F.R. § 305.87-6 (1990).

136. Jost, *supra* note 101, at 1; *Peer Review and Sanctions in the Medicare Program*, 1 C.F.R. § 305.89-1 (1991); Eleanor D. Kinney, *The Medicare Appeals System for Coverage and Payment Disputes: Achieving Fairness in a Time of Constraint*, 1 ADMIN. L.J. 1 (1987); Recommendation 86-5, Medicare Appeals, 1 C.F.R. § 305.86-5 (1991); Eleanor D. Kinney, *National Coverage Policy Under the Medicare Program: Problems and Proposals for Change*, 32 ST. LOUIS U. L.J. 869 (1988), 1987 ACUS, *supra* note 124, at 833; Recommendation No. 87-8, National Coverage Determinations Under the Medicare Program, 1 C.F.R. § 305.87-8 (1991); Eleanor D. Kinney, *Rule and Policy Making for the Medicaid Program: A Challenge to Federalism*, 51 OHIO ST. L.J. 855 (1990); Recommendation No. 90-8, Rulemaking and Policymaking in the Medicaid Program, 1 C.F.R. § 305.90-8 (1991); AMERICAN BAR ASSOCIATION AND ADMINISTRATIVE CONFERENCE OF THE U.S., MEDICARE PROCEDURES SYMPOSIUM: REPORT AND RECOMMENDATIONS (October 1987).

137. Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297 (1986); Recommendation No. 85-4, Administrative Review in Immigration Proceedings, 1 C.F.R. § 305.85-4 (1991); Stephen H. Legomsky, *A Research Agenda for Immigration Law: A Report to the Administrative Conference of the United States*, 25 SAN DIEGO L. REV. 227 (1988); Arnold H. Leibowitz, *Comparative Analysis of Immigration in Key Developed Countries in Relation to Immigration Reform and Control Legislation in the United States*, 7 HUM. RTS. L.J. 1 (1986); David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247 (1990); Recommendation No. 89-4, Asylum Adjudication Procedures, 1 C.F.R. § 305.89-4 (1990); James A.R. Nafziger, *Review of Visa Denials by Consular Officials*, 66 WASH. L. REV. 1 (1991); Recommendation No. 89-9, Processing and Review of Visa Denials, 1 C.F.R. § 305.89-9 (1990); North & Portz, *supra* note 104; Statement on Mass Decisionmaking Programs: The Alien Legalization Experience, 1 C.F.R. § 310.14 (1991); Abraham D. Sofaer, *The Change-of-Status Adjudication: A Case Study of the Informal Agency Process*, 1 J. LEGAL STUD. 349 (1972); Recommendation No. 71-5, *Procedures of the Immigration and Naturalization Service in Respect to Change-of-Status Applications*, 2 ACUS, *supra* note 124, at 32; Linda S. Zengerle, *Procedural Deficiencies in Labor Certification of Immigrant Aliens*, 3 ACUS, *supra* note 124, at 129 (1973-74); Recommendation No. 73-2, Labor Certification of Immigrant Aliens, 1 C.F.R. § 305.73-2 (1991).

138. Robinson, *supra* note 131, at 270 (emphasis omitted).

longitudinal empirical studies which cost significant sums of money to undertake but, it is also true as regards theoretical rethinking of the role of administrative law and the administrative state. It is no accident that theoretical efforts at paradigm development, such as Cass R. Sunstein's *After the Rights Revolution: Reconceiving the Regulatory State* (1990) and Christopher F. Edley's book *Administrative Law: Rethinking Judicial Control of Bureaucracy* (1990) were not sponsored by the Conference. Some have faulted ACUS, I as well, for not maintaining a systematic "watch patrol" on agency-wide procedural developments. Once again, this problem is primarily a function of limited resources. Given sufficient funding, I would have assigned, for example, one staff member to serve exclusively as a procedural liaison to HHS and another to work intensively with the financial services agencies. These liaisons would not have simply reviewed Conference studies in a particular area, but would have worked proactively with agency and Congressional staff to develop project ideas, pointing out specific opportunities and possibilities for implementing Conference recommendations.

VI. IMPLEMENTATION

Implementing Conference recommendations is an important activity of the staff of the Office of the Chairman. The Office maintains a separate file on every past recommendation, which includes information received from affected agencies. However, because the Conference has advisory powers only, the staff must monitor 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 aware of the Conference recommendation and will offer Conference assistance. Such assistance often includes the preparation of testimony, the submission of written comments on agency rule proposals, and the development of staff training assistance.

A 1980 General Accounting Office ("GAO") study criticized the Conference for its failures in implementation.¹³⁹ Although overdrawn, there is some truth to this critique, and there is no doubt that implementation is the Conference's main area of weakness. This is due to three restrictions: lack of resources monetary and personnel, lack of

139. UNITED STATES GENERAL ACCOUNTING OFFICE, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES NEEDS BETTER PROJECT MANAGEMENT (1980).

statutory power ("sticks") to compel implementation, and lack of an organized constituency for administrative law reform, even for non-controversial "good government" initiatives. There are no "administrative procedure" PACs. So, if an agency or Congress does not wish to "play," the Conference can go only so far. Despite these restrictions, the Conference's implementation success rate is fairly good.¹⁴⁰

Only in a few areas has the Conference been assigned a statutory responsibility for implementation. One example is in the implementation of the Conference's recommendation on alternative dispute resolution ("ADR"). Here the Conference has continually refined its recommendations in light of agency experience. The Conference has developed colloquia,¹⁴¹ agency roundtables¹⁴² and other informational programs to provide ADR training to agency personnel. It has worked on drafts and pressed successfully for the passage of the Administrative Dispute Resolution Act¹⁴³ and the Negotiated Rulemaking Act¹⁴⁴ to promote the use of ADR techniques and the formation of ADR policies within the federal government. It has also worked to develop ADR activities in both the Federal District Court and the Court of Appeals for the District of Columbia.

Thus far I have addressed the issues of implementing Conference recommendations by Congress or the agencies. Implementation takes on an entirely different meaning when it is carried out through the judicial branch. On occasion this has occurred positively through judicial "policy-making." In at least one instance, a Conference recommendation led the District of Columbia Circuit to change its local rules to conform to recommended Conference principles.¹⁴⁵ In other instances,

140. See Administrative Conference of the United States, *Summary Status—Implementation of ACUS Recommendations 1968-1991* (Oct. 1991).

141. *A Colloquium on Improving Dispute Resolution: Options for the Federal Government*, 1 ADMIN. L.J. 399 (1987); *Summary of Proceedings of the Seminar on Dispute Resolution Under the Canada-United States Free Trade Agreement*, 26 STAN. J. INT'L L. 153 (1989).

142. Since 1987, the Conference has presented 19 programs in its colloquy series. The colloquia explored a wide range of topics. See Colloquium, *The Role of Legislative History in Judicial Interpretation*, 1987 DUKE L.J. 362 (1987); Colloquium, *Broadcast Deregulation: The Reagan Years and Beyond*, 40 ADMIN. L. REV. 345 (1988); Savings and Loan Industry Reform (May 31, 1989); the Drug Approval Process in the AIDS Era (July 25, 1989); *Will the Ethics Reform Act Change the Way the Government Conducts Business in the 1990's?*, 37 FED. BAR NEWS & J. 414 (1990); Colloquium, *Providing Economic Incentives in Environmental Regulations*, 8 YALE J. ON REG. 463 (1991); *The Supreme Court's Administrative Law Docket*, AM. U. ADMIN. L.J. (forthcoming 1991).

143. Pub. L. No. 101-552, 104 Stat. 2736 (1990).

144. Pub. L. No. 101-648, 104 Stat. 4969 (1990).

145. The Administrative Conference recommended that courts of appeals assure that their

such as the "race to the courthouse" problem, the Judicial Conference has joined with ACUS to promote remedial legislation.¹⁴⁶

More often, however, the courts have cited the work of the Conference. Indeed, the courts have relied frequently on the Conference's work, particularly on the Sunshine Act,¹⁴⁷ *Chevron* deference,¹⁴⁸ and venue considerations.¹⁴⁹ All told, the Conference was cited 124 times between 1968 and 1991 by federal courts, in most instances favorably.

There have been instances, however, when courts have confused ACUS interpretations. One example is the ACUS interpretation of the Equal Access to Justice Act (EAJA).¹⁵⁰ The EAJA provides for the award of attorney's fees and other expenses to successful parties in "an adjudication under section 554" of the APA.¹⁵¹ Section 554, in turn, applies to cases of adjudication "required by statute to be determined

procedures provide for prompt and efficient disposition of claims involving alleged lawful agency delay. Recommendation No. 88-6, Judicial Review of Preliminary Challenges to Agency Action, 1 C.F.R. § 305.88-6 (1991). The purpose of the recommendation was to elicit greater clarity in this area, which had fallen into some confusion following the decision in *Telecommunications Research and Action Center v. F.C.C.*, 750 F.2d 70 (D.C. Cir. 1984). The U.S. Court of Appeals for the D.C. Circuit subsequently modified its rules governing treatment of mandamus petitions based on agency delay. General Order dated Nov. 25, 1988, U.S. Ct. of App. D.C. Cir. Rule 7 note, 28 U.S.C.A.

146. 28 U.S.C. § 2112(a) (1988). Pub. L. No. 100-236 fully implements ACUS Recommendation No. 80-5, Eliminating or Simplifying the "Race to the Courthouse" in Appeals from Agency Action (Dec. 12, 1980). See S. REP. NO. 263, 100th Cong., 1st Sess. 2-3, reprinted in 1987 U.S.C.A.N. 3199. The new procedure replaces the first-to-file rule to obtain judicial review of agency orders in a preferred forum, 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.

147. *F.C.C. v. World Communications*, 466 U.S. 463, 471 n.10 (1984) (citing the Interpretive Guide to the Government in the Sunshine Act prepared by ACUS for the standard for deliberations covered by the Act); *Hunt v. N.R.C.*, 611 F.2d 332, 337 & n.4 (10th Cir. 1979) (relying on ACUS Interpretive Guide for basis for non-applicability of Sunshine Act to lower-level agency subdivisions), *cert. denied*, 445 U.S. 906 (1970); *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981) (Intragovernmental ex parte communications); *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9, 57 n.130 (D.C. Cir. 1977) (citing with approval ACUS Recommendation 74-4, urging public disclosure of agency communications), *cert. denied*, 424 U.S. 829 (1977).

148. *Continental Training Serv. v. Cavazos*, 893 F.2d 877, 885 n.11 (7th Cir. 1990) (citing an ACUS study as an "impressive exposition" of the need to ground *Chevron* doctrine in congressional delegation); *Citizens for a Better Environment v. Costle*, 610 F. Supp. 106, 111 (N.D. Ill. 1985) (considering ACUS recommendation to clarify scope of judicial review).

149. *Harrison v. PPG Indus.*, 446 U.S. 578, 591 (1980) (weighing ACUS recommendation on venue rules under the Clean Air Act); *Johnston v. N.R.C.*, 766 F.2d 1182, 1188 (7th Cir. 1985) (relying on ACUS Interpretive Guide for venue requirements).

150. Pub. L. No. 96-481, 94 Stat. 2325, as amended by Pub. L. No. 99-80, 99 Stat. 183 (codified at scattered sections of U.S.C.).

151. 5 U.S.C. § 504(b)(1)(C) (1988).

on the record after opportunity for an agency hearing."¹⁵² When ACUS published its *draft* model EAJA rules, it proposed including within EAJA any formal proceeding in which the agency actually used section 554 procedures, whether voluntarily or under command of law.¹⁵³ However, the *final* model rules limited EAJA awards to adjudications required by statute to be conducted in accordance with section 554.

Subsequently, in *Escobar Ruiz v. INS*,¹⁵⁴ a case involving a deportation proceeding before an immigration judge, a panel of the Ninth Circuit failed to recognize that the ACUS *final* model rules expressly limited EAJA coverage.¹⁵⁵ When the Ninth Circuit upheld the panel decision en banc, it again incorrectly relied on the draft model rules.¹⁵⁶

In *Owens v. Brock*, the Sixth Circuit adopted a narrow reading of the EAJA which correctly presented the Conference's position.¹⁵⁷ Thereafter, other circuits followed this narrow interpretation.¹⁵⁸ To resolve the conflict, the Supreme Court granted Certiorari in *Ardestani v. INS*.¹⁵⁹ The Court affirmed the position of ACUS in the final model rules, holding that administrative deportation proceedings are not adversary adjudications under section 554 and thus do not fall within the category of proceedings for which EAJA waives sovereign immunity.¹⁶⁰

VII. THE FUTURE OF THE CONFERENCE

A. *The Limitations of Intellectual Persuasion*

Because of its independence, the Conference has not always had a ready audience in the Administration. There is a concern that the Conference may not be "politically correct" and to that extent, there are risks in involving oneself with it.

I must mention that I have been surprised at the extent to which

152. 5 U.S.C. § 554(a) (1988).

153. See Implementation of the Equal Access to Justice Act, 46 Fed. Reg. 15,895 (1981) (request for comments on draft model rules).

154. 813 F.2d 283 (1987).

155. The Court relied on *Marcello v. Bonds*, 349 U.S. 302 (1955), which had expressly held that the APA hearing provisions do not apply to deportation proceedings.

156. *Escobar Ruiz v. INS*, 838 F.2d 1020, 1024 (9th Cir. 1988) (*en banc*).

157. 860 F.2d at 1366 (1988).

158. *St. Louis Fuel and Supply Co. v. FERC*, 890 F.2d 446, 451 (D.C. Cir. 1989). While the interpretation of EAJA was correct, the court incorrectly interpreted the Conference's position in reaching its conclusion. *Ardestani v. INS*, 904 F.2d 1505 (11th Cir. 1990), *aff'd*, 112 S. Ct. 515 (1991); *Clarke v. INS*, 904 F.2d 172 (3d Cir. 1990).

159. *Ardestani*, 112 S. Ct. at 515.

160. *Id.* at 519-521.

agency officials resist any enterprise they do not control. One of the Conference's most difficult tasks in discussing studies with agency staff is advising them that if the agency does not like the results of a Conference study, it cannot simply have the study killed by having its release postponed indefinitely.

Even where there is no intention to resist outside ideas, I have found that agencies will simply fail to take seriously promising ideas that are not home-grown. The same tendency often exists at mid-level in the OMB, although I have not found this to be a problem at higher levels. Both former Director Jim Miller and former Office of Information and Regulatory Affairs (OIRA) Administrator Jay Plager have been strong supporters and participants in Conference affairs.¹⁶¹ The concern is that ACUS is in some way operating off an independent script and that it is therefore unwise to vest it with significant authority.¹⁶²

There is a further, related explanation for the Conference's modest position in relation to its potential. In presidential transitions, an incoming administration may fleetingly look to ACUS as a repository for administrative law reform. The Carter transition, for example, thought ACUS might house the Federal Register or administer the administrative law judge program as had been proposed by a Senate committee report.¹⁶³ Then the transition team takes note of the Chairman's five-year statutory term. Fearful of dealing with a government official appointed by the "other" party, they retreat and the Conference is left

161. C. Boyden Gray, while counsel to Vice President and President Bush, has shown a particular appreciation of the value to good government of the Conference's autonomous role.

162. For example, on one occasion the Conference suggested that it could provide a service to OIRA by commenting on procedural aspects of proposed regulations, but the proposal was lost in the bureaucratic shuffle.

In 1988, the Conference offered its regulatory process and procedure expertise as a complement to the substantive economic expertise of OIRA in OMB's rulemaking review process. See Letter from Gary J. Edles, General Counsel, Administrative Conference of the United States to S. Jay Plager, Administrator for Information and Regulatory Affairs, Office of Management and Budget (Oct. 19, 1988).

There was even at one time a discussion on whether the Conference should be linked to OMB's regulatory review process to ensure that agencies contemplating various regulations continue to view Conference recommendations as relevant. See *ABA Section of Administrative Law & Regulatory Practice Program: The Administrative Conference of the U.S.—Where Do We Go From Here?*, 8 COOLEY L. REV. 159 (statement of Philip D. Brady, Council Member, Administrative Conference of the United States, and General Counsel, Department of Transportation). This too was never acted upon.

163. See *Senate Committee on Governmental Affairs*, 95th Cong., 2d Sess., *Study on Federal Regulation* (Comm. Print, 1978). Volume VI, Chapter 7 discusses ACUS responsibilities and possible future responsibilities.

isolated from the conceptual rethinking going on in the new administration. Only once in the Conference's nearly twenty-five year history has a Chairman appointed by a President of one party served for any length of time when the new President was of a different party.¹⁶⁴

The Conference is vulnerable as well to congressional pique. On one occasion a subcommittee proposed elimination of the Conference's appropriation on the grounds that if agencies were interested in supporting the Conference's budget function, they would contract with the Conference or a private contractor for such "counseling" work. The Conference appropriation was rapidly restored, but the need to develop a coalition in Congress in support of the Conference remains. However, before any coalition-building can take place, the Conference must continue to inform Congress about its work. Beyond the Judiciary committees, where the Conference does a great deal of its work, there is a general lack of information among congressional staff about the kinds of procedural issues that comprise our principal focus. It is an unfortunate attitude that if ACUS does not have the power to demand that agencies follow its recommendations, then Congress has no need of such a puny ally. Intellectual persuasiveness, as its tool in trade, does not always command respect or attention.

Many of these tensions are rooted in the problem that the Conference's natural constituency is only fitfully anchored in the traditional power structures of the Capitol. Along with legal academics, the driving force behind the Conference's creation was the American Bar Association and that organization's Administrative Law Section, which has been the Conference's constant companion. In recent years, the Federal Bar Association has been quite supportive as well. Nonetheless, the Conference has not been able to develop a group of consistent supporters among the corporate or even the public interest community. As its claims are those of "good government" alone, they are often put off in the midst of time pressures. As a result, the Conference spent eight years trying to implement its "race to the courthouse" recommendation. While there was no opposition, the support was limited to scholars, a few agency officials, and aficionados of administrative law. Year

164. Robert A. Anthony served as Chairman of ACUS from August 1974 to September 1979. Appointed by President Nixon, Mr. Anthony remained Chairman through half of President Carter's Administration. President Carter's nominee, Reuben B. Robertson, was appointed on September 25, 1980 with the understanding that he would resign if the Republicans regained the White House and wished to replace him. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, 1980 ANNUAL REPORT at 5. President Reagan appointed Loren Smith on June 30, 1981. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, 1981 ANNUAL REPORT at 7-8.

after year, the implementing legislation would pass one House and tarry in the other until the final days of a legislative session, when it would be "Christmas-treed" with unrelated legislative initiatives and ultimately fail passage.

B. *The Options*

Despite these problems, and its very limited resources, the Conference has demonstrated that it is inherently a self-starter and can potentially play important new roles in several areas. For example, in order to make its views and studies known on individual matters pending before Congress, the Conference has instituted a systematic effort to review pending legislation. Since the program began four years ago, the Conference has been asked by fifteen committees or subcommittees to present testimony on thirty-nine separate occasions, not including hearings relating to ACUS appropriations or reauthorization. However, our lack of resources prevents us from participating routinely in the drafting of legislation. No member of the Conference's staff can devote all his or her time to congressional matters.

The broader question of what enhanced role in government ACUS should play involves the issue of how a government contours and controls its burgeoning administrative process. The United States has tried to do this by using the Office of Management and Budget for rulemaking oversight. Under OMB's direction, agency regulations, to the extent consistent with law, must adhere to cost-benefit principles¹⁶⁵ and any new record-keeping requirements imposed on the public must be justified.¹⁶⁶ Additionally, then Vice-President Bush used the Task Force on Regulatory Reform¹⁶⁷ and Vice-President Quayle has used the Competitiveness Council¹⁶⁸ to consider regulations within a larger policy framework.¹⁶⁹

165. Exec. Order No. 12,291, 3 C.F.R. 127 (1982).

166. Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520 (1988). OMB's Office of Information and Regulatory Affairs evaluates the agencies' Regulatory Impact Analyses (RIAs) of proposed rules. See Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533 (1989) for an extensive discussion of OMB's role.

167. Established by Exec. Order No. 12,291, 3 C.F.R. 127 (1982).

168. The Competitiveness Council was established by the President to assume the duties of the Task Force on Regulatory Reform under Executive Order 12,291 and Executive Order 12,498. Presidential press release, June 15, 1990. The permanent members of the Council are the Vice President of the United States, the Secretary of the Treasury, the Secretary of Commerce, the Attorney General, the Chairman of the Council of Economic Advisors, the Director of OMB, and the White House Chief of Staff.

169. Members of Congress and environmental activists criticize the Council as a mechanism

ACUS offers a complementary approach to OMB regulatory coordination—one limited to the least-contentious aspect of public policy—administrative procedure. It uses, moreover, a “kinder and gentler” analogue to coordination—that of advice and consultation. The belief, of course, is that “right reason” will prevail if sufficiently disseminated and discussed and that the process of engaging agency attention on a good government idea will go a long way toward assuring that an agency accepts that recommendation. The Conference thus uses moral suasion as its means of strict control.

However, moral suasion on its own may not suffice. There are a number of mechanisms that could assist the Conference in doing its work better. These include the following options.

1. *Executive Reference*

The administration could as a regular matter refer issues of procedure to the Conference for analysis and review before an administration position is formulated on proposed legislative drafts. The administration would have no responsibility to accept the Conference analysis, but such analysis would provide an opportunity to flesh out procedural questions in an objective manner. The issues one could imagine the Conference dealing with by Executive Reference include: ALJ corps, specialized courts, “non-rule” rulemaking, adjudication procedures, and administrative procedure aspects of civil justice reform.

2. *Enhanced Agency Implementation of ACUS Recommendations*

The missing link in the ACUS process is a systemic implementation effort. The present process assumes that agencies will respond to intellectual argument rather than ignore it. One way to heighten agency sensitivity to ACUS recommendations is for the Conference to report annually to Congress on agency compliance. Such an action-forcing process would require agencies to focus on the concrete response to ACUS proposals.¹⁷⁰ A second method is for OMB as part of its yearly management review to request agencies to review yearly the applicability of ACUS recommendations, specify why they are ac-

for presidential meddling in the rulemaking process under the guise of economic competitiveness. See Kirk Victor, *Quayle's Quiet Coup*, NATIONAL J. 1676 (1991).

170. See discussion *infra* notes 75-85 and accompanying text.

cepting or rejecting each recommendation, and to submit a tentative schedule for implementing the accepted recommendations.¹⁷¹

3. *ACUS As A Procedural Complement to the Office of Information and Regulatory Affairs*

Perhaps the most compelling option for ACUS is to endow it with additional executive responsibilities. This option was fully ventilated during the debate over creation of the Conference¹⁷² and revisited in 1979 by the Senate Governmental Affairs Committee.¹⁷³ At that time, the Committee considered legislation that would have greatly expanded the Conference's responsibilities.¹⁷⁴ Title IV of the legislation included authority for the Conference to monitor more aggressively agency administrative procedures to assure that they are as effective and efficient as possible, to issue and monitor compliance with paperwork reduction guidelines,¹⁷⁵ and to evaluate the performance of administrative law judges.¹⁷⁶

The case for vesting the Conference with additional executive functions is a strong one. Any new duties conferred by the Congress must, however, be compatible with ACUS' strengths and resources, as well as within its natural metes and bounds.

Government decisionmakers need to know how well the administrative process is working. ACUS is the natural agency to gather and report relevant information on an ongoing basis. It has the technical competence required for the job. Its meticulously earned reputation for

171. This is not as onerous a recordkeeping task as it sounds. ACUS Recommendations average 12 per year (six in June and six in December). The agencies have representatives who are members of the Council and are aware of background, reports, and analysis of each recommendation.

172. See *supra* notes 81-84 and accompanying text.

173. See *Regulatory Reform Legislation: Hearings Before the Senate Comm. on Governmental Affairs*, 96th Cong., 1st Sess., pts. 1 & 2 (1979) [hereinafter *Reform Part 1* and *Reform Part 2*] (considering proposed bills S. 262, S. 755, S. 445, and S. 93 during eleven days of Committee hearings). *Reform Part 1* at 133-38 (testimony of Richard B. Smith, Commission on Law and the Economy, American Bar Association); *id.* at 228-30 (testimony of John P. White, Deputy Director, Office of Management and Budget); *Reform Part 2* at 546-65 (testimony of Robert A. Anthony, Chairman, Administrative Conference of the United States).

174. S. 262, 96th Cong., 1st Sess. (1979) (providing for the regulatory analysis of proposed rules and the review of existing rules by the agencies, and reestablishing the Administrative Conference of the United States under an Administrator).

175. Congress enacted the Paperwork Reduction Act the following year and reestablished the function of information policy coordinator under the Office of Management and Budget. 44 U.S.C. §§ 3501-20 (1988).

176. S. 262, 96th Cong., 1st Sess., §§ 401-4 (1979).

fairness will enormously simplify the task of obtaining needed cooperation from Federal agencies and will invest its findings with the credibility essential for success.

The accretion of a new and important information-gathering and reporting role will also greatly help ACUS in performing its current duty to recommend improvements in the administrative process. The collection of a large body of data on the workings of the government will allow a more informed choice of subjects for ACUS studies and help allay the concerns of those who believe that the current issue selection process is a desultory one. More complete information will also improve the thoroughness and reliability of consultant reports.

There are those who may argue that if ACUS is to realize its full potential to improve the administrative process, merely increasing its information-gathering and reporting role is not sufficient. In some areas, ACUS must be empowered to compel agency compliance with sound administrative practices. These commentators believe with the late Max Weber that, "all political structures are based on power."¹⁷⁷ Thus they would outfit the "ACUS tiger" with a set of very sharp teeth.

I believe these critics misperceive both the nature of the beast and the nature of political power. They underrate the influence of the trusted fact-finder and reporter. It was Chief Justice Charles Evans Hughes who reported the musings of a mythical "unscrupulous administrator": "Let me find the facts for the people of my country, and I care little who lays down the general principles."¹⁷⁸ ACUS is now influential because it is trusted as a disinterested but concerned factfinder and reporter. I believe it can contribute even more fully to the public interest in this area.

4. *Statistics Gathering*

It is remarkable and somewhat disturbing that the government completely lacks statistics to determine numerous legislative enforcement issues, including the appropriate venue for adjudication,¹⁷⁹ the need for an independent corps of administrative law judges ("ALJs"), the pay, role and status of ALJs, and the success of alternate dispute

177. MAX WEBER, *WIRTSCHAFT UND GESELLSCHAFT* (1922).

178. Charles Hughes, *Important Work of Uncle Sam's Lawyers*, A.B.A. J. 238 (1931).

179. Administrative courts, legislative courts, or Article III courts.

resolution (ADR).¹⁸⁰ A similar empirical vacuum exists regarding the rulemaking process.

The Federal Judicial Center has used analogous statistical research into Article III case loads and activity to improve significantly the workings of the judicial system.¹⁸¹ The Congress, on the other hand, seems to be unconcerned with the less-visible, "lower" status administrative adjudication systems. The Conference kept statistics on independent agency adjudication from 1975 through 1978.¹⁸² In 1977, the Senate Governmental affairs committee found that this effort "is a step in the right direction, but needs refinement, enforcement, capability, permanence, and adequate funding."¹⁸³ Unfortunately, however, the Conference had to terminate its efforts in 1979 because of fiscal constraints. It is ironic that the Conference has had to curtail its statistics-keeping function, one of the very reasons for which it was created.

5. *More Systematic Training*

The Conference can also have an enhanced training role to fulfill both its clearinghouse function to "arrange for interchange among administrative agencies of information potentially useful in improving ad-

180. Indeed, in 1987, during the debate over the type of civil penalty enforcement that should be included in the Fair Housing Amendments Act, the Conference was unable to provide case data on the efficiency of the administrative proceedings beyond 1978. The Department of Justice argued for judicial enforcement, while civil rights attorneys advocated hearings before administrative law judges with the possibility of review in the courts of appeals. When asked by both sides for guidance, the Conference did not have current data. *See Reauthorization of the Administrative Conference of the United States: Hearing before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 101st Cong., 2nd Sess. 51 (1990) (statement of Marshall J. Breger, Chairman, Administrative Conference of the United States).

181. *See ANNUAL REPORTS OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS* (presenting dozens of detailed statistical tables on federal civil and criminal cases).

182. *See Administration Conference of the U.S., Federal Administrative Law Judge Hearings—Statistical Report for 1976-1978*. Washington, D.C., U.S. Government Printing Office (1980).

183. *Study on Federal Regulation*, Vol. IV, *Delay in the Regulatory Process*, Senate Committee on Governmental Affairs, 95th Cong., 1st Sess., July, 1977 (Committee Print p. 151). The committee's formal recommendation is as follows:

8. The Administrative Conference should have the permanent task of insuring that statistics are generated by the various agencies, and that the statistics are brought together and comprehensively explored. The information compiled should include the deadlines established for proceedings, the rates of success at meeting these deadlines, and the reasons for failures to meet them. *Id.* 152.

ministrative procedure" and particularly in its function sensitizing senior political appointees to the nuances of administrative law.¹⁸⁴

ACUS could provide specialized training to introduce new federal regulators to methods of dealing with regulatory and policy problems as well as general agency management issues. In 1975, the Conference adopted a policy statement recommending the institution of a comprehensive seminar program for newly-appointed senior regulatory officials.¹⁸⁵ The Conference initiated, with considerable success, a "Regulatory Agency Management Seminar" for Carter Administration appointees in 1977.¹⁸⁶ No systematic training program in administrative law currently exists for senior administration officials, although the Office of Presidential Personnel has intermittently put together one-day programs for appointees on both political and management issues.

Similarly, there is a lack of systematic training for Federal administrative law judges. Although some agencies engage in ad hoc training of their ALJs and courses are offered for federal and state ALJs at the privately-funded National Judicial College in Reno, Nevada, there is no training for ALJs approximating the training that new federal judges receive at the Federal Judicial Center.

Senior civil servants should also be trained in administrative law. Their errors in managing the bureaucracy can cost the government millions in fines¹⁸⁷ and even more in wasted resources if administrative action is reversed or remanded. While agency officials will rely on the legal advice provided by their general counsels, it is important for them to appreciate in lay fashion the trends and complexities in administrative law.¹⁸⁸

184. 5 U.S.C. § 574 (1988).

185. Strengthening Regulatory Agency Management Through Seminars for Agency Officials, 40 Fed. Reg. 27,928 (1975).

186. See Robert S. Adler, Stephen H. Klitzman & Richard A. Mann, *Shaping Up Federal Agencies: A Basic Training Program for Regulators*, 6 J. LAW & POL. 343, 360 (1990). See also Robert Paglin, Initial Report on Regulatory Agency Management Seminars (RAMS) Program (1977) (on file in the office of the Administrative Conference of the United States).

187. Under the Equal Access to Justice Act, a prevailing party against whom an agency has brought an adversary adjudication is entitled to receive attorney fees and other expenses from the agency in cases where the agency's position was not "substantially justified." 5 U.S.C. § 504; 28 U.S.C. § 2412 (1988).

188. There is one other area of training that has become increasingly important—training of government lawyers in the complexities of administrative law. The government offers no systematic training programs in this area. The Legal Education Institute (LEI) (part of the Department of Justice advocacy program) fills some of this gap but only in small degree. The Advocacy Institute, moreover, is due to move to Columbia, South Carolina, and the fate of the LEI is uncertain. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies

6. *APA Reform*

The APA, the "bible" of administrative law, was passed in 1946 and, apart from the Freedom of Information Act and companion openness laws,¹⁸⁹ the Administrative Dispute Resolution Act¹⁹⁰ and the Negotiated Rulemaking Act,¹⁹¹ has seen only minor amendments in the last forty-five years. Nonetheless, the post-war years have seen substantial changes in the field of administrative procedure. It is time for the Conference, preferably at the request of Congress, to review the APA experience in a systematic manner and to consider revision where necessary. Such a task is not alien to the Conference.¹⁹² Much of its work bears on issues central to the APA. Indeed, the Conference traditionally has been seen as the guardian of the Administrative Procedure Act.

Such a review would focus on the relative atrophy of formal "trial-type" rulemaking and its replacement by informal "notice and comment" rulemaking which is merely adverted to in the APA.¹⁹³ It would include the role of "non-rule rulemaking," as presently practiced by agencies issuing "policy guidebooks," manuals and statements of procedure or practice.¹⁹⁴

Similarly, it would consider the growth of informal adjudication,¹⁹⁵ a form of proceeding with only the scantest APA backdrop. It

Appropriations Act, 1992, Pub. L. No 102-140, 105 Stat. 782, 786 (1991).

189. Pub. L. No. 89-554, 80 Stat. 381 (1966); (Freedom of Information Act) Pub. L. No. 94-409, 90 Stat. 1241 (1976) (providing for open meetings and limiting ex parte communications); Pub. L. No. 95-251, 92 Stat. 183 (1978) (reclassifying hearing examiners as administrative law judges).

190. See *supra* notes 95-101 and accompanying text.

191. *Id.*

192. The Conference reviewed major regulatory reform proposals pending in Congress in 1982 which would have substantially altered APA informal rulemaking procedures. See *Views of the Administrative Conference on Proposals Pending in Congress to Amend the Informal Rulemaking Provisions of the Administrative Procedure Act*, 1 C.F.R. § 310.7 (1991). The Conference also participated in Senate hearings on regulatory reform in 1979. See *Regulatory Reform, Hearings Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess., pt. 1, 362 (1979) (letter from Robert A. Anthony, Chairman, Administrative Conference of the United States to Edward M. Kennedy, Chairman, Committee on the Judiciary, commenting on proposed Administrative Practice and Regulatory Control Act of 1979); *Regulatory Reform, Hearings Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess., pt. 2, 374-403 (1979) (testimony of Robert A. Anthony, Chairman, and Richard K. Berg, Executive Secretary, Administrative Conference of the United States, on proposed changes in selection and removal of administrative law judges).

193. See 5 U.S.C. § 553.

194. See 5 U.S.C. § 553(b)(A).

195. See *Pension Benefit Guaranty Corporation v. LTV Corporation*, 110 S. Ct. 2668

would encompass a reanalysis of the administrative law judge's role and a possible codification of the largely-unexplored world of non-ALJ adjudication in Federal agencies.¹⁸⁶

Finally, it would consider the value of ALJ adjudication, noting that agency heads now have free rein to second-guess the decisions of administrative law judges. In the interests of bureaucratic efficiency, should the scope of the agency head's review be diminished? Conversely, should changes in the law make ALJs more responsive to agency policy or management initiatives? Should administrative adjudication be viewed as a stripped-down version of the "real" thing or something other than a junior federal court?

Such an effort, reminiscent of the magisterial Attorney General's manual on the Administrative Procedure Act,¹⁹⁷ if begun now, could well culminate in a revision of the APA by 1996, its fiftieth year.

VIII. CONCLUSION

In an earlier summing-up of the Conference and its work, the late Judge Carl McGowan, has referred to the Administrative Conference as the guardian of the administrative process.¹⁹⁸ As one who has seen the Conference's work at close hand, I share Judge McGowan's enthusiasm for the constructive role that the Conference has played. Nevertheless, it is only fair to ask why this pivotal role should be entrusted to ACUS? Why not leave the job to those that know the most about it, namely the administrative agencies themselves? Indeed, it was Max Weber who explained that specialized knowledge is the distinctive attribute of bureaucratic institutions within their spheres of authority.¹⁹⁹

On the other hand, it was also Weber, Robert Merton, and others who showed us why these institutions sometimes stray from their basic objectives and why, paradoxically, the most successful bureaucracies can be incapable of correcting themselves when they do. Successful bu-

(1990), for the deference given to administrative agencies in the context of informal adjudication.

196. See Jeffrey S. Lubbers, *Federal Administrative Law Judges: A Focus on Our Invisible Judiciary*, 33 ADMIN. L. REV. 109 (1981).

197. *Attorney General's Manual on the Administrative Procedure Act*, prepared by the United States Department of Justice (1947), reprinted Wm. W. Gaunt & Sons, Inc. (1979).

198. McGowan, *supra* note 87.

199. Max Weber, *Authority and Legitimacy*, printed in the anthology, POLITICS AND SOCIETY, STUDIES IN COMPARATIVE POLITICAL SOCIOLOGY, edited by Eric A. Nordlinger, Prentice-Hall, Englewood Cliffs, New Jersey (1970) at 36-38. This material was reprinted from Max Weber, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION, New York: The Free Press (1947), by permission of the Macmillan Co.

reaucracies stress reliability, discipline, and conformity to established ideal patterns. The problem, according to Merton is that: "Adherence to the rules, originally conceived as a means becomes transformed into an end-in-itself; . . . This emphasis, resulting from the displacement of the original goals, develops into rigidities and an inability to adjust readily."²⁰⁰

One prescription for this atherosclerotic tendency of bureaucratic institutions is a large dose of fresh ideas coming from the outside. The Administrative Conference is well positioned to administer the treatment. As in the case of other institutions, the Conference itself possesses a considerable body of specialized knowledge about the workings of the administrative process. This expertise has given credibility to the gently adversarial role which the Conference has traditionally played.

In my experience as Chairman, the Conference has used its expertise and its position in various ways. It has broken new ground in understanding the administrative process. It has sounded the alarm when, in its view, our governmental institutions have allowed original goals to be displaced by procedures which are not suitable to their achievement. It has helped to fine-tune the administrative process.

The forte of the Conference has and will continue to be less-radical restructuring of the Christopher Edley²⁰¹ or Cass Sunstein²⁰² varieties.²⁰³ It may never become the prime mover for new paradigm shifts in the legal process. Rather, its role may remain the more modest, if equally vital one to review and reevaluate existing procedures and to seek ways in which it can improve the practical operation of government, given its twin lodestars of efficiency and fairness. In that regard the Conference has done much. It can, I believe, do far more.

200. Robert K. Merton, *Bureaucratic Structure and Bureaucratic Behavior*, printed in the anthology, *POLITICS AND SOCIETY, STUDIES IN COMPARATIVE POLITICAL SOCIOLOGY*, edited by Eric A. Nordlinger, Prentice-Hall, Englewood Cliffs, New Jersey (1970) at 62. This material was reprinted from Robert K. Merton, *SOCIAL THEORY AND SOCIAL STRUCTURE*, (New York: The Free Press, 1949) by permission of the Macmillan Company.

201. Edley espouses a doctrine of "sound governance" in administrative law, a euphemism for judicial activism. See CHRISTOPHER F. EDLEY, *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* (1990), *supra* at text accompanying note 137.

202. Sunstein suggests greater emphasis on the reform of administrative structure and substance and on congressional processes. See CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* (1990), *supra* at text accompanying note 137.

203. See Marshall Breger, *A Conservative's Response to Edley & Sunstein*, 1991 *DUKE L.J.* 671.

