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THOUGHTS ON ACCOUNTABILITY AND THE ADMINISTRATIVE PROCESS*

Marshall J. Breger†

We celebrate 1986 as a year of anniversaries. Last June we marked the 40th anniversary of the Administrative Procedure Act. From now until 1989 is the long-running seminar and birthday party called the Bicentennial of the Constitution. I find it particularly fitting to talk today about the problem of political accountability and administrative law, a subject that intertwines both documents, taking as my point of departure the 100th anniversary of Woodrow Wilson’s seminal article, “The Study of Administration.” The article’s theme was that the era of constitution-making was over and that “administration” was coming to replace politics as the principal activity and the principal problem of government. Thus Wilson observed, “It is getting harder to run a constitution than to frame one.” He called for the development of “a science of administration which shall seek to straighten the paths of government, to make its business less unbusinesslike, to strengthen and purify its organization, and to crown its duties with dutifulness.”

To Wilson, public administration was to be distinguished from politics. “The field of administration is a field of business. It is removed from the hurry and strife of politics. . . . It is a part of political life only as the methods of the counting-house are a part of the life of society. . . . Although politics sets the tasks for administration, it should not be suffered to manipulate its offices.”

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3Id. at 484.
4Id. at 485.
5Id. at 493–94.
Wilson's views on the separation of politics from administration were not self-spawned. He drew heavily from continental thought and practice in public administration, contrasting in particular the nonpartisan and professional public bureaucracy of Germany and England with the American spoils system. The passage of civil service reform through the Pendleton Act in 1883 undergirded the entire good government effort. Indeed in some respects Wilson's essay represents a coherent theory of public administration legitimizing civil service reform. It stood for the very essence of Progressive politics.

But if public administration is viewed in part as a science, in part as a business, what place did Wilson see for governmental accountability, for democratic politics? He did not ignore the problem. Administrative officials must be responsible for results, but the public must not meddle with their choices as to details. "[L]arge powers and unhampered discretion seem to me the indispensable conditions of responsibility . . ." sayeth President Wilson. "The cook," Wilson tells us, "must be trusted with a large discretion as to the management of the fires and the ovens."

It is easy to find ingenuousness in the thirty-one year old Wilson's sharp distinction between politics and administration. He wrote in what seems to us now a simpler era. The convulsions of civil war and reconstruction were past. The great public issues of the day were the tariff, the currency, and the opening of the American West for settlement and trade.

The young Wilson may have found support for his views in the creation of the Interstate Commerce Commission in the same year his essay was published. The ICC, whose 100th anniversary we mark next year as well, was the first independent regulatory commission, created of bipartisan membership to tackle the then seemingly intractable problem of interstate transportation regulation. It was created on

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7 Ch. 27, 22 Stat. 403 (1883) (Current version at 40 U.S.C. § 42 (1982)).
8 Wilson, supra note 2, at 497–98.
9 J. Rohr, To Run a Constitution: The Legitimacy of the Administrative State 99–100 n. 54 (1986). It is interesting to note that in spite of its status as an independent and bipartisan regulatory commission, the ICC was a very political animal even in its early years. Congressional committees stayed in close touch with the Commission, and the ICC nurtured political support both inside Congress and among the business community. T. McCraw, Prophets of Regulation 63 (1984). Thus while the science of administration may have been the ICC's model, the tension between administration and politics was present even from the start. Id.
Wilsonian principles drawing its membership from wise men insulated from narrow partisan concerns.\footnote{S. Rep. No. 46, 49th Cong., 1st Sess. 267 (1886). Indeed, congressional testimony in support of the new Commission foresaw a prominent membership. For example, A. B. Miller testified in favor of a commission that would correct existing abuses "through appointment of a Commission of the highest possible order, with adequate or large compensation in order that the services of men of the most eminent ability may be retained for that purpose." \textit{Id.}\ Mr. Francis B. Thurber advocated salaries for commissioners that would "commend the services of first-class men." \textit{Id.} at 286. In fact, the salaries of the ICC commissioners were placed higher than all but Supreme Court justices.}

What is striking is not that Wilson viewed administration as an apolitical science, but rather how long that vision persisted. Throughout the period from the turn of the century to the Second World War, regulation expanded in fits and starts and new regulatory agencies were created to carry out new programs.\footnote{See, e.g., Federal Trade Commission Act, 38 Stat. 717 (codified as amended at 15 U.S.C. §§ 41–51 (1982)) (establishing the Federal Trade Commission); Securities Exchange Act of 1934, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 77b–78hh (1982) establishing the Securities and Exchange Commission).} The model utilized during this period was one of an apolitical body applying science or "expertise" to obtain an optimal result as measured by a consensus notion of the "public interest." Indeed, to assure that regulation would be "above politics," legislators generally assigned the task to independent commissions, like the ICC, whose membership was bipartisan and insulated from removal. Further, Commission members were appointed for a term of years that often could overlap administrations. In a typical but more recent use of this model, Commodity Futures Trading Commission members are appointed to serve staggered five-year terms, and by law no more than three Commissioners may belong to the same political party.\footnote{7 U.S.C. § 4(a) (1982). \textit{Compare} 15 U.S.C. § 41 (1982) (governing terms for Federal Trade Commissioners); 15 U.S.C. § 78d (1982) (governing terms for Securities and Exchange Commissioners); and 49 U.S.C. § 1902 (1982) (governing terms for members of National Transportation Safety Board).}

The apolitical paradigm led to the growth of the federal advisory committee system. In 1939 there were 82 advisory committees, mostly science-based.\footnote{Gill, \textit{Permanent Advisory Committees in the Federal Government}, 2 J. of Pol. 411–35 (1940).} Reliance on advisory committees made up of private citizens or experts was later to raise questions about accountability for government decisions, and led to passage of the Federal Advisory Committee Act.\footnote{Pub. L. No. 92–463, 86 Stat. 770 (codified at 5 U.S.C. app. (1982)). As of the end of FY 1984 over 928 committees, governed by the Federal Advisory Committee Act, funneled expert advice to a wide spectrum of agencies. \textit{Federal Advisory Committees, Thirteenth Annual Report of the President, Fiscal Year 1984, at 1} (1985).} While Wilson envisioned an unfettered administra-
tive bureaucracy, he nevertheless saw the bureaucracy as ultimately accountable to its political superiors. Indeed, Wilson himself recognized the two ultimate truths about public administration: 1) that administration cannot be carried on indifferent to or in defiance of public opinion, and 2) that administration must be conducted in accordance with broad policy choices made, not by the permanent bureaucracy, but by “statesmen whose responsibility to public opinion will be direct and inevitable.”

With some one hundred years of hindsight, it is easy to see that the Wilsonian model has not prevailed in its entirety. In Wilson's favor, the Civil Service is largely insulated from politics: the spoils system affects only agency heads while the rank and file bureaucrats retain job security regardless of which party holds power. However, no one today would credibly argue that politics is wholly distinct from administration. As Wilson observed, policy choices are not in the province of bureaucrats. Rather, they reside in the executive and legislative branches, and the distribution of power between the two is anything but apolitical. Whether those who exercise power are statesmen or politicians is another question.

If the apolitical expert administrative agency was, to a degree, over-sold, it was probably due in large part to the need to establish the credibility of administrative justice and to defend its legitimacy against the skepticism of a conservative bar which resisted any and all departures from the judicial model. It must not be supposed, however, that thoughtful defenders of the administrative state were unaware of the degree to which regulation inevitably involved the making of value judgments and decisions to prefer the interests of one group to those of another. They knew perfectly well, to quote Justice Jackson, “It is of the essence of regulation that it lays a restraining hand on the self-interest of the regulated and that advantages from the regulation commonly fall to others.” For this very reason James Landis argued that basic political judgments should be made at the congressional level and not delegated to the agencies. Experience with the National Recovery Act, he observed, “points to the impossibility of delegating to the administrative the responsibility of making policy from the very irresolution of the legislature.” There are organizational strengths in the administrative model, but they do not “dispense with the ultimate

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15Wilson, supra note 2, at 500.
necessity of arriving at some conclusion based upon conscious selection among available and competing postulates. When those postulates have so enlisted the loyalties and faiths of classes of people, the choice, to have that finality and moral sanction necessary for enforcement, must, as a practical matter, be made according to a method which resolves it as if it were one of power rather than one of judgment."

So too with agency independence. The decision in Humphrey's Executor\(^{16}\) seemingly placed the Supreme Court's imprimatur on the independent quasi-judicial, quasi-legislative regulatory commission. But two years later the Brownlow Committee charged, in phrases which have rung down through the years, that the independent commissions:

> constitute a headless 'fourth branch' of the government, a haphazard deposit of irresponsible agencies and uncoordinated powers. . . . The Congress has found no effective way of supervising them, they cannot be controlled by the President, and they are answerable to the courts only in respect to the legality of their activities.\(^{20}\)

Thus, the situation at the end of the 1930s found the apolitical administrative ideal under attack from two sides. While conservatives, led by the organized bar, urged that administrative agencies be required to behave more like courts, apostles of presidential authority bewailed the lack of accountability in the independent commissions and urged greater presidential control. After a truce imposed by World War II, a rough accommodation was achieved which lasted for a generation. The elements of this accommodation were, first and foremost, the Administrative Procedure Act, which sought to define the extent to which agencies were expected to act like courts and the extent to which they were expected to act like legislative bodies. It might be argued that the APA's recognition of the policy element in certain administrative decisions, particularly rulemaking, represented a departure from the Wilsonian model of scientific administration. But, taken as a whole, the Act seems to me to represent a reaffirmation of the notion of the expert technocratic agency, absorbing information, ideas and argument from every side in order to achieve the most rational synthesis.

The APA compromise reflected a deference to experts which permeated much political theory of the postwar period. Democratic

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\(^{16}\)Id.

\(^{19}\)Humphrey's Executor v. United States, 295 U.S. 602 (1935).

\(^{20}\)Report of the President's Committee on Administrative Management 40 (1937).
theorists like Daniel Bell21 and Zbigniew Brzezinski22 held that power in post-industrial society will flow to a technocratic elite based in the universities and the research lab. No less a high priest than John Kenneth Galbraith concurred.23 Like Daniel Bell, many of these writers were democratic pluralists. Nonetheless they revised their views to hold that scientists24 and planners alike should not be fettered by the vagaries of the political process. Conservatives like Jacques Ellul fore-swear democracy completely, given the need for apolitical decision-making in the technological society.25

Unlike Wilson, these political theorists dealt little with the question of accountability. The APA dealt with the question by providing for the independence of hearing examiners (now administrative law judges) and by restating the common law principles of judicial review. Soon, however, the adequacy of those checks was questioned. These concerns were voiced by the Brownlow Committee and addressed, at least to a limited extent, in the round of reorganization plans which followed the second Hoover Commission Report in 1955.26 These plans brought about an increase in political accountability for the independents by empowering the President to designate (and remove) the chairman of each commission and by concentrating administrative functions in the agency chairman.

The period of the late 1960s to the mid-1970s saw a great expansion in the scope and intensity of federal regulation. New programs and agencies were created to deal with such problems as environmental pollution, industrial safety and health, and the safety of consumer products, and older agencies received new and broader grants of rulemaking authority.27 Unfortunately, this legislation too often failed

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22Brzezinski, America in the Technotronic Age, 1 ENCOUNTER 26 (1968) (noting that science and technology already influence social behavior since they "are notoriously unsympathetic to simple, absolute formulas [of traditional thought]").


to reflect Dean Landis’ wise injunction against “delegating to the administra-
tive the responsibility of making policy from the very irresolution of the legislature.”

A prime example is the Occupational Safety and Health Act, which spelled out conflicting considerations to the agency rulemakers requiring the highest priority be given to matters of worker safety, on the one hand, while also adding a “feasibility” test which some interpreted to mean use of cost-benefit analysis. The breadth and inherent conflict of this statutory delegation led to divided Supreme Court decisions in the Benzene and Cottondust cases, and a raising by Justice Rehnquist of the need for invocation of the delegation doctrine.

A reaction was inevitable, and it took several forms. First, there was a call for more elaborate procedural safeguards than the notice-and-comment requirements of the APA. Subsequent statutes required so-called hybrid procedures which borrowed from techniques used in adjudication. The Magnuson-Moss Act governing Federal Trade Commission rulemaking was perhaps the best example of this approach, which allowed the agency to issue sweeping industry-wide rules governing trade practices, but only after jumping through rigorous procedural hoops.
At the same time, the courts were reading new meaning into the APA's requirement that agencies explain the basis and purpose of their rules. Judicial review shifted from a fairly cursory inquiry into statutory authority to the so-called "hard look" at the entire rulemaking process. The impact of the judicial "hard look" forced agencies to devise procedures—where Congress had not already required them—which would satisfy the courts that the agency had considered the range of data and comments presented and that the agency's factual determinations had a rational basis. Given the lawyer's preference for reaching the truth through the adversary process, it is not surprising that these procedures have tended to make rulemaking more like adjudication. And, not coincidentally, they have tended to make the decisionmaking process in appearance, if not in fact, more objective and apolitical.\(^5\)

But while the courts were pulling the agencies in the direction of the Wilsonian model of apolitical, scientific administration, the political branches were pushing for more accountability. Congress sought to make the administrative process more accountable to the legislative branch through oversight hearings, the appropriations process, and the legislative veto. And by controlling the pursestrings Congress controls much agency activity. A case in point is the tightening of the Federal Trade Commission's leash in the late 1970s and early 1980s. Congress effectively halted controversial Commission action by reducing its budget at the same time it imposed even more stringent procedural requirements and removed its jurisdiction to act in certain areas.\(^5\) Similarly the Chadha\(^6\) decision checked the legislative veto, at least for the time being. Nonetheless Congress does not easily acquiesce. For example, legislation\(^7\) introduced in the closing days of the

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\(^{5}\) An excellent discussion of the "hard-look" doctrine can be found in Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177. The author points out that by requiring agencies to justify their actions, the courts are requiring a "technocratic rationality" or a Wilsonian separation of administration from politics. Id. at 211.


\(^{7}\) 2834, 99th Cong., 2d Sess. (1986).
99th Congress would require direct congressional approval of most foreign arms sales, placing Congress in the driver's seat rather than limiting it to a "blocking" role. This legislation would obviate the effect of Chadha on congressional approval of arms exports.

White House efforts to secure greater agency accountability to the President have been more successful. Under Executive Orders 12,291 and 12,498, the Office of Management and Budget has performed a significant, yet controversial, role in reviewing and coordinating agency regulatory initiatives. The executive order program is based on the perceptions that agency decisionmaking tends to be uncoordinated and unnecessarily costly, that agency administrators are not adequately accountable to the public or to the President, and that the political heads of the agencies are too often the captives of their own apolitical staffs.

The general idea of presidential coordination has received broad, though by no means unanimous, approval from observers of the administrative process, including that one-time foe of "political" administration, the American Bar Association. But OMB's coordinating authority has given rise to questions about the nature of the process by which it is exercised and, consequently, has inspired demands that that process itself become more structured, more open and more apolitical.

Last year our former chairman (now Chief Judge of the United States Claims Court) Loren Smith, in a provocative article, took both the courts and Congress to task for saddling the agencies with methods

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40Section of Administrative Law, American Bar Association, Report to the House of Delegates. (Resolution 100, passed February 10, 1986.) The resolution found the Constitution's choice of a "unitary executive" justified presidential involvement in federal agencies' rulemaking activities.


and procedures unsuited to the basically political judgments they were making. He distinguished between "decisions of logic" and "decisions of will" and argued that it was fallacious and dysfunctional to insist that the latter could be made or reviewed in an objective manner. Accordingly, to the extent that government must undertake a given task at all, Judge Smith would opt for greater political accountability and, by implication, less science in administration. It is no surprise that the focus on accountability parallels a concern for constitutional issues of power allocation in the study of administrative law. Just as Wilson denigrated robust readings of the concept of separation of powers for fear it would lead to congressional hegemony, today the Buckley and Synar decisions have honed the notion of separation of powers so as to protect executive autonomy.

I will make no attempt to resolve these competing views of the agency role. My goal is much more modest: to examine the implications of this debate for administrative procedure and for the role of the Administrative Conference.

It is clear that one's view of the appropriate role of the administrative agency must shape one's notion of what is good procedure. If one shares with Judge Smith the view that many or most exercises of delegated discretion are simply decisions of will, one is naturally skeptical of the value of procedural requirements which force the decisionmaker to jump through hoops to justify his decisions. Even so, decisions of will may be informed or uninformed, and requirements designed to ensure some degree of exposure of the decisionmaker to the facts and the arguments cannot be wholly impertinent. But, if agency action is viewed primarily as scientific and apolitical, one would want procedures that emphasize comprehensive and accurate fact-gathering. If the agency is viewed primarily as an arbiter or broker among competing interests, the emphasis might be on ensuring openness and removing barriers to participation. If bureaucratic self-aggrandizement is the motive force for agency decisionmaking, what counts is simplified procedure that lowers an agency's transaction costs.

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4Id. at 430.
4Bowsher v. Synar, 106 S. Ct. 3181 (1986). Buckley and Synar illustrate the difficulty in distinguishing the legislative and executive functions. Thus, in Buckley, the Court invalidated congressional involvement in appointment of Federal Election Commission members as interference with the executive function. 424 U.S. at 140. And in Synar the Court found unconstitutional the delegation of certain powers to the Comptroller General on similar grounds. Id. at 3194. See Cass, Looking With One Eye Closed: The Twilight of Administrative Law, 1986 DUKE L.J. 238, 251, nn. 71 & 72.
The administrative universe is so variegated and so vast that empirical support can doubtless be found for all of these theories of administrative behavior. Agencies sometimes behave in a manner consistent with the Wilsonian ideal, sometimes they reach their conclusions for political reasons, and once in a while they even act out of bureaucratic self-interest. And, indeed, there are doubtless occasions on which these interests coincide. Good government can, after all, be good politics, particularly if one has the luxury of time enough before the next election for policies to bear fruit. Bureaucratic self-interest, on the other hand, is rarely served by identification with a policy which has been a visible failure.

Some have argued that we cannot talk of "good procedure" where there is no consensus as to what such procedure is supposed to accomplish. Indeed, there are some who have gone further, claiming that such a consensus is impossible and that the effort to identify common assumptions of fairness and regularity in a legal order is a blind by which special interests promote particular substantive results. That denigration of procedure as inextricably result-oriented is akin to the savaging of the notion of the "rule of law" now underway by critical legal scholars and others. Indeed, on this view, procedure is simply part of a political struggle, process merely a tool to mask and legitimate disparate power relations in society.

This attempt to denigrate the effort to improve legal and administrative procedure is at best mistaken and at worst mischievous. For, to

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49 The extreme formulation is that of Professor Morton Horowitz: "anyone who attempts to find a realm of neutral craft and law distinct from politics is lying to himself." Morton Horowitz: A Critical Look at Studying Law, Harv. L. Record (Nov. 19, 1982).

50 In this respect procedure can be seen as part of the legal ideology of formalism, 1-3, M. Weber, Economy and Society 699 (G. Roth and R. Wittich, eds. 1968). See also Trubeck, M. Weber on Law and the Rise of Capitalism, 1972 Wisc. L. Rev. 720, 748-9 (arguing that legalism legitimizes the political structure of capitalist society).

51 See, e.g., Simon, The Ideology of Advocacy: Procedural Justice and Professional Ethics, 1978 Wisc. L. Rev. 29 at 45. 48. How to classify the following is left to the reader: "Procedural rules permit people whose claims have no substantive validity to put others to the risk of proof . . . [enabling] people to frustrate enforcement by delaying and by imposing expenses on their adversaries." Id.
any interpretive community\textsuperscript{32} based on western values, good procedure increases the likelihood of just determinations. In many instances it supports efficiency as well as fairness in the administrative process.

There is such a thing as good procedure in the sense I have defined. There are efficient ways to conduct proceedings, there are more and less useful ways to assemble and present relevant information. While fairness is to a certain extent subjective, there are principles upon which a consensus about the meaning of "fair procedure" can be formed. The opportunity to object to, or to seek to influence, proposed government action is one such principle. The Conference—and especially Kenneth Culp Davis, a prominent member—has long supported use of notice-and-comment procedure in rulemaking. Thus, the Conference recommended repeal of the APA's proprietary exemption from Section 553's notice-and-comment requirements, and most agencies voluntarily decline to invoke it.\textsuperscript{53} However, there can be too much of a good thing, even of procedures creating rights to contest agency action. A good example of this is the Administrative Conference's 1972 warning to Congress against mandating trial-type procedures for making rules of general applicability.\textsuperscript{54} Congress failed to heed this warning in the Magnuson-Moss Act,\textsuperscript{55} and I think there is general agreement that this particular experiment in hybrid rulemaking procedures was an egregious failure.

The examples in the preceding paragraph illustrate the importance of procedure to both the efficiency and fairness of the administrative process. As Judge Prettyman has observed: "Some important facets of life are merely procedure. Due Process of law is procedure, and so is getting married and cutting the cards in a bridge game."\textsuperscript{56} Indeed, if put to the choice, as Justice Jackson argued in a broader context, one might well prefer to live under Soviet substantive law applied in good faith by our common law procedures than under our substantive law enforced by Soviet procedural practices.\textsuperscript{57}

Good procedure acts to limit the exercise of discretion by administrative agencies. Both those who desire more government regulation and

\textsuperscript{32}Fiss, Objectivity and Interpretation, 34 Stan. L. Rev. 739, 746–7 (1982).


\textsuperscript{55}See supra note 33 and accompanying text.

\textsuperscript{56}Prettyman, Some Broader Aspects of the Administrative Conference of the United States, 17 Admin. L. Rev. 48, 60 (1964).

\textsuperscript{57}Shaughnessy v. United States, 345 U.S. 206, 224 (1953) (Jackson, J., dissenting).
those who desire less are in favor of procedural checks on agency
discretion. Perhaps this is one reason it is easier to obtain a consensus
on procedure than on substance. To quote Professor Cass, "In some
measure process agreement is easier than substantive agreement be-
cause people make different (and mutually optimistic) predictions
about the probable outcome of a given process. In some measure,
process agreement suggests that most people value the use of certain
procedures in particular circumstances."58

It is quite true that in the political process, whether on Capitol Hill or
in the agency, the "best" procedure may be traded off for a substantive
value, but this does not mean that the effort to identify the best has
been a wasted effort. If nothing else, it has contributed to the operation
of an efficient political market.

The regnant effort to ensure "good" procedure in this country is, as
already stated, the Administrative Procedure Act. The Administrative
Conference, we must remember, was born in the shadow, as it were, of
the Administrative Procedure Act. While the legislation establishing
the present Conference was enacted in 1964, it took as a model the
temporary conferences of 1953 and 1961–62.59 It was intended to be a
nonpartisan, nonpolitical convocation of "experts" in administrative
law—a law commission, if you will, for administrative procedures.
Indeed, legal systems as diverse as those of England, Australia, and
France utilize the concept of a conference albeit under different no-
menclature and with varying responsibilities.60

58Cass, supra note 46, at 254–55, n. 27.
59In 1953, the President's Conference on Administrative Procedure convened to
examine the issues of delay, expense, and volume of records in some adjudicatory
and rulemaking proceedings. Recommendations of the Conf. on Admin. Procedure, 15 F.R.D. 217,
219 (1953). In 1961 a second temporary Administrative Conference was appointed,
and charged with improving existing administrative procedures. It issued some twenty
recommendations: one, proposing creation of a permanent Administrative Conference,
resulted in the Conference's birth.

Both of these conferences were preceded by the suggestion in Administrative Procedure
Gen.'s Comm. on Admin. Procedure) that an office of Federal Administrative Procedure be
established to "devote attention to the agencies' common procedural problems." Id. at
123. The report noted that "knowledge and regularization of procedures should go far
toward creating that confidence in the administrative process which is necessary for its
successful functioning." Id. at 124. This thought echoes Woodrow Wilson's views that
agency administrators must be responsible to the body politic. See supra note 2, at 500.
60Thus, Great Britain's Council on Tribunals has responsibility for adjudication, but
not rulemaking. Australia's "experts" are known as the Administrative Review Council.
And in France, the Section of Reports and Studies of the Council of State exercises
authority comparable to but probably exceeding that of the Administrative Conference.
See generally, L. Brown and J. Garner, France Administrative Law 42–51 (3rd Ed.
1983) (noting the prestige of the Section and the force of its suggestions).
The Conference, since its inception, has engaged in efforts to refine and improve administrative procedure, including reforms in rulemaking, the adjudication process, internal separation of functions, and other issues directly related to the functioning of the APA. However, the need for good procedure exists in other areas where substantive concerns have been so great that the focus on the "right" procedure to implement substantive rules has only just begun.

I believe that the Administrative Conference's emphasis on alternative dispute resolution (ADR) represents an effort to respond to new ideas and go beyond the strict confines of the APA. We have recently begun several projects inquiring into various possible agency uses of ADR. Conference Recommendation 86-3 calls rather broadly for legislation authorizing voluntary arbitration of many agency disputes, and for agencies to take greater advantage of mediation, mini-trials, settlement judges, organizational streamlining and other means now at their disposal to encourage settlement of many proceedings. Previous research projects considering ADR include studies leading to recommendations for using negotiated rulemaking, negotiating Superfund cleanups, making agency handling of tort claims less adversarial, and mediating grant disputes and an evaluation of expedited procedures for employee grievances at the Merit Systems Protection Board. In December 1986, the Conference adopted a follow-on recommendation that gives specific, practical advice on procedures for obtaining the services of neutrals.

The Conference's pioneering research and recommendations provided the impetus for experimentation by agencies with regulatory negotiation (commonly referred to as "reg neg"). This procedure has

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61These include ACUS Recommendations 82-4 and 85-5, Procedures for Negotiating Proposed Regulations, 1 C.F.R. §§ 305.82-4 and 85-5 (1987); 84-4, Negotiated Cleanup of Hazardous Waste Sites under CERCLA, 1 C.F.R. § 305.84-4; 84-7, Administrative Settlement of Tort and Other Monetary Claims Against the Government, 1 C.F.R. § 305.84-7; and 82-2, Resolving Disputes under Federal Grant Programs, 1 C.F.R. § 305.82-2. These recommendations were based in part on the following consultant reports: Harter, Negotiating Regulations: A Cure for Malaise, 71 GEOGETOWN L. J. 1 (1982), 1982 ACUS 301; Perritt, Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States, 74 GEOGETOWN L. J. 1625 (1986), 1985 ACUS 637; Anderson, Negotiation and Informal Action: The Case of Superfund, 1985 DUKE L. J. 261, 1984 ACUS 283; Philip J. Harter, Points on a Continuum: Dispute Resolution Procedures and the Administrative Process, 1986 ACUS 165; Bermann, Administrative Handling of Monetary Claims: Tort Claims at the Agency Level, 35 CASE WESTERN RES. L. REV. 509 (1985), 1984 ACUS 639; Steinberg, Federal Grant Dispute Resolution, 1982 ACUS 137, published in 5 MEZINES, STEIN AND GRUFF, ADMINISTRATIVE LAW § 53 (1987).

since emerged in a few agencies as a leading alternative to more traditional rulemaking techniques. Negotiated rulemaking is based on the premise that if representatives of the different interests affected by a regulatory program are given the opportunity early in the process to confront each other and discuss the problems that have prompted an agency to consider instituting a rulemaking proceeding, they may achieve, through structured negotiation, consensus on an acceptable rule that would, ideally, accommodate fairly the main concerns of the various interests while recognizing the legitimate needs of other affected parts of society. Rulemaking that emphasizes consensus is very likely to reduce the number and complexity of court challenges.

The Conference recommended adoption of negotiated rulemaking procedures in some detail in 1982, and established guidelines for identifying regulatory problems that might be conducive to a negotiated solution. In 1985, the Conference reexamined, and elaborated on, its earlier recommendation in the light of three years of agency experience. I am pleased to tell you that “reg neg” has been tried by the Environmental Protection Agency, the Occupational Safety and Health Administration, and the Federal Aviation Administration. Several other agencies (including the Department of the Interior, Nuclear Regulatory Commission, and Federal Trade Commission) now are beginning to employ the procedure. Both the FAA and the EPA report significant success with negotiated rulemaking. The FAA’s recently completed successful proceeding using “reg neg” on flight and rest time requirements for airline pilots followed three contentious, and unfruitful, attempts over a ten-year period to revise a longstanding rule that had become outmoded. Among the several agencies, EPA has been most active, using the process with over half-a-dozen proposed rules. For example, it has issued a negotiated rule governing the exemption of federal and state agencies from certain requirements for the use of pesticides under emergency conditions.

Negotiated rulemaking, in particular, is an attempt to use market techniques to secure a generally satisfactory, rather than a scientific, result. We are pleased with the growth in interest and in use of negotiated rulemaking. And we are excited about the potential for agency use of minitrials and arbitration as well.

Good procedures, however, still require political will to be implemented. The continuing saga of our “race to the courthouse” legislation is a case in point. Administrative Conference Recommendation

63 C. Pou, Jr., Governmental Uses of Alternative Dispute Resolution, Urban, State and Local Law Newsletter 1, 17-8 (Winter 1986).
Eliminating or Simplifying the "Race to the Courthouse" in Appeals from Agency Action proposes random selection of a court of appeals when parties seeking judicial review of agency action file petitions for review with different courts. Under current law, 28 U.S.C. § 2112(a), the court in which the first petition is filed is the forum court, inciting the "race to the courthouse." Everyone agrees our recommendation is a sound solution to the underlying problem. However, in the last session of Congress, despite early passage in the House and diligent educational efforts by our staff and by our friends at the ABA, the bill encountered a series of procedural misadventures on the Senate side. Eventually it fell victim to the unwillingness of the House to accept non-germane amendments which had been added in the Senate. Previous attempts to secure legislative passage have been similarly fruitless. Legislation introduced in 1980, 1982, and 1983 all failed for reasons not related to the proposed statutory change. I guess we are still building the political will necessary to advance this good government bill that last step.

Several recent pieces of legislation point up the continuing need for the Administrative Conference and suggest areas of future conference research. Immigration reform legislation has at last been passed by Congress. The procedural problems in administering the new statute, particularly the procedure for adjudicating tens if not hundreds of thousands of applications under the bill's amnesty program, promise to be substantial. The Conference has sponsored some research into the basic administrative law issues underlying the immigration program and we anticipate the need to do more in the years to come.

Legislation to deal with fraudulent claims in federal programs was also recently enacted. The Program Fraud Civil Remedies Act includes a provision for administrative imposition of civil penalties that,
as was noted by the Senate sponsors, was derived from Conference Recommendation 72-6, promulgated under Chairman Scalia. We may be called upon to help agencies administer this statute. Finally, Medicare legislation enacted in the closing days of the 99th Congress provides claimants, for the first time, with rights to an administrative hearing and to judicial review in Part B (outpatient) cases. Our extensive study of the Medicare appeals process indicates that a plethora of procedural questions remain to be studied in this important program.

The administration of these statutes will determine their success or failure, for efficiency and fairness in their execution is essential to their acceptance by those regulated. In all these areas the Conference has an important role to play. Our body of advice for Congress and the agencies is more relevant and useful than ever.

One can draw various conclusions about Wilson's vision of a dichotomy between administration and politics, but one cannot deny that even one hundred years later Wilson's ideas retain relevance, as we at the Administrative Conference continue to focus on the science of administration. It is by the slow accumulation of knowledge and of experience that we are most likely to affect, for the better, the course of administration law.

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7ACUS Recommendation 72–6, Civil Money Penalties as a Sanction, 1 C.F.R. § 305.72–6 (1987).