The Administrative Conference of the United States: A Quarter Century Perspective

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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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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. 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. 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." The Judicial Conference subsequently suggested that President Eisenhower convene "a conference of representatives of the administrative agencies having adjudicatory and substantial rulemaking functions." 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).
Conference), comprised of representatives of fifty-seven agencies and departments, three federal judges, three hearing examiners and twelve lawyers with expertise in administrative law. During its two-year existence, the Conference issued thirty-five recommendations 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.” 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.”

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. During its three years existence, the Office lacked adequate resources and never had a full-time professional staff of more than three. 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. Most of its energies were devoted to compiling statistics and reviewing procedural aspects of agency legislative proposals before their submission to Congress. The “project” of rationalizing administrative procedure was not completed.

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.


[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. 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.

Following this advice, President Kennedy established a second temporary Conference 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.” 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. Over three years, the Conference held six plenary sessions and adopted thirty recommendations.

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.


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. 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.

Public response to this suggestion was positive. "The headless 'fourth branch of Government' may soon grow a head," declared the Wall Street Journal. "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." Widespread endorsement of the Conference idea 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.

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.
24. This included the recommendations of both temporary Conferences and the American Bar Association. PRETTYMAN, supra note 3, at 26-29.
Prettyman—convinced us that we needed a permanent agency for continuing re-
view 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.\(^{28}\)

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 responsibil-
ity for improvement of automatic data processing and systems proce-
dures 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 bu-
reaucracies 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 Tribunals\(^{29}\) 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 Confer-
ence of the United States, PUB. PAPERS 68 (Jan. 25, 1968).


\(^{28}\) 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 Judi-
cial 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
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. \textit{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, the Act requires that proposed changes in tribunal procedures be submitted to the Council prior to their adoption.

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

In Australia, the Administrative Review Council 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.


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).
decisions on their merits. 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. The Council does not directly advise agencies on administrative matters, and any guidance from the Council on legislative matters would be given by the Attorney General based on a Council recommendation. More exacting examination of legislative proposals falls within the purview of the Senate standing committees on scrutiny of bills, regulations and ordinances. The Council is free to determine its own research agenda, but it occasionally receives specific requests from the Attorney General.

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

   (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 inquiere 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 inquiere 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.
40. *Id.*
41. *Id.*
42. *Id.* at 448.
the Minister of Justice. 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."

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. Although the section of the Conseil that acts as the supreme administrative court of France is perhaps the most commonly known, four administrative sections continue to perform an advisory role through the General Assembly. 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.

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-

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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.
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.
private sector members. 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; (ii) representatives from additional agencies designated by the President or the Council; (iii) public members appointed by the Chairman with the approval of the Council. In addition, a number of individuals without full voting privileges serve as liaison representatives, senior fellows or special counsels.

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."


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.
specially informed by knowledge and experience with respect to federal administrative procedure.\textsuperscript{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."\textsuperscript{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."\textsuperscript{59} This criticism is, I believe, factually flawed. Members are not appointed to "represent" specific constituencies, such as labor, management or environmental groups.\textsuperscript{60} Rather, in a Burkean vein, members are appointed to provide their best independent insights and intelligence.\textsuperscript{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,"\textsuperscript{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-


\textsuperscript{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).


\textsuperscript{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).


\textsuperscript{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

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\(^{64}\) 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. The Chairman defines the scope of each committee and assigns projects to each. 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. Generally, all committee members vote on committee business.

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

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-

ence recommendations and statements are published in the Federal Register and then codified in the Code of Federal Regulations.\textsuperscript{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.\textsuperscript{73} In addition, the Conference completed a study of the Federal Aviation Administration's ("FAA") civil money penalty process in five months.\textsuperscript{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

\begin{itemize}
  \item[(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;
  \item[(2)] arrange for interchange among administrative agencies of information potentially useful in improving administrative procedure;
  \item[(3)] collect information and statistics from administrative agencies and publish such reports as it considers useful for evaluating and improving administrative procedure; and
  \item[(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).\textsuperscript{75}
\end{itemize}


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

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." 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. 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." To this day, the view persists that the effectiveness of the Conference is due to its purely advisory function. The impact of Conference recommendations relies in great

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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.


The 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.\textsuperscript{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.'"\textsuperscript{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."\textsuperscript{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."\textsuperscript{83} In this manner, the Conference would command wider acceptance among the agencies.\textsuperscript{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: \textsuperscript{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

\textsuperscript{id} (Remarks of Victor Rosenblum) at 151.
\textsuperscript{80} See infra text accompanying notes 89-121.
\textsuperscript{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).
\textsuperscript{82} Id. at 13.
\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{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 counterproductive 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 changed 88 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).


ference-sponsored bill to do so in 1976. 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. 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.

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. 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. ACUS also proposed that agencies make their adjudicatory decisions more readily available to the public. Perhaps most im-

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

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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" whose names appear on a roster maintained by the Administrative Conference.

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. "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. 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(e)(1) (1991).


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 1974\(^{106}\) 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


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


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

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. To assist in this effort, the Conference prepared an interpretive guide to the Act 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. 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.

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.

5. In 1975, the Conference developed six recommendations pertaining to Internal Revenue Service procedures. These recommendations were developed from a report requested by the chairman of the Senate Appropriations Subcommittee on Treasury, Postal Service and General Government. 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.

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


111. 5 U.S.C. § 552b(g) (1988).


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.\textsuperscript{120} The Conference's study approved a continuation of in-house adjudications, but suggested some improvements which FAA subsequently implemented in its procedures.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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, \textit{Judicial Review of Federal Administrative Action: Quest for the Optimum Forum},\textsuperscript{125} Diver, \textit{Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies},\textsuperscript{126} Williams,
"Hybrid Rulemaking" Under the Administrative Procedure Act,

Hamilton, Rulemaking on a Record by the Food and Drug Administration,

Verkuil, Study of Informal Adjudication Procedures,

and Shuck & Elliott, To the Chevron Station: An Empirical Study of Federal Administrative Law.

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.

Despite its many contributions to administrative law scholarship, the Conference was criticized in its early years for sponsoring "aimless and disorganized" projects. 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." 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


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).


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).


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, social security and


medicare 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.

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." This is particularly true in the area of
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

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,


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.


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).


on the record after opportunity for an agency hearing."

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. 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, 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. When the Ninth Circuit upheld the panel decision en banc, it again incorrectly relied on the draft model rules.

In Owens v. Brock, the Sixth Circuit adopted a narrow reading of the EAJA which correctly presented the Conference's position. Thereafter, other circuits followed this narrow interpretation. To resolve the conflict, the Supreme Court granted Certiorari in Ardestani v. INS. 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.

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
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 Confer-
ence 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 Informa-
tion and Regulatory Affairs (OIRA) Administrator Jay Plager have
been strong supporters and participants in Conference affairs.\textsuperscript{161} The
central 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.\textsuperscript{162}

There is a further, related explanation for the Conference's modest
position in relation to its potential. In presidential transitions, an in-
coming 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 administra-
tive law judge program as had been proposed by a Senate committee
report.\textsuperscript{163} Then the transition team takes note of the Chairman's five-
year statutory term. Fearful of dealing with a government official ap-
pointed by the "other" party, they retreat and the Conference is left

\begin{footnotes}

\footnotetext[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.}

\footnotetext[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.}

\footnotetext[163]{In 1988, the Conference offered its regulatory process and procedure expertise as a comple-
ment 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).}

\footnotetext[163]{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 con-
tinue 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, Administra-
tive Conference of the United States, and General Counsel, Department of Transportation). This
too was never acted upon.}

\footnotetext[163]{See Senate Committee on Governmental Affairs, 95th Cong., 2d Sess., Study on Fed-
eral Regulation (Comm. Print, 1978). Volume VI, Chapter 7 discusses ACUS responsibilities and
possible future responsibilities.}
\end{footnotes}
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 principles\(^\text{166}\) and any new record-keeping requirements imposed on the public must be justified.\(^\text{167}\) Additionally, then Vice-President Bush used the Task Force on Regulatory Reform\(^\text{168}\) and Vice-President Quayle has used the Competitiveness Council\(^\text{169}\) to consider regulations within a larger policy framework.


\(^{168}\) 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. 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-

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


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).

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.” 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.” 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, the need for an independent corps of administrative law judges ("ALJs"), the pay, role and status of ALJs, and the success of alternate dispute

179. Administrative courts, legislative courts, or Article III courts.
resolution (ADR). 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. 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. 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." 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).


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 sen-
ior political appointees to the nuances of administrative law.\textsuperscript{184}

ACUS could provide specialized training to introduce new federal regula-
tors 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 com-
prehensive seminar program for newly-appointed senior regulatory of-
officials.\textsuperscript{185} The Conference initiated, with considerable success, a “Regu-
larly Agency Management Seminar” for Carter Administration
appointees in 1977.\textsuperscript{186} No systematic training program in administra-
tive 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 adminis-
trative 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 mil-

\textsuperscript{185} Strengthening Regulatory Agency Management Through Seminars for Agency Official,
\textsuperscript{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
\textsuperscript{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
\textsuperscript{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 sys-
tematic training programs in this area. The Legal Education Institute (LEI) (part of the Depart-
ment 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, the Administrative Dispute Resolution Act and the Negotiated Rulemaking Act 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. 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. It would include the role of "non-rule rulemaking," as presently practiced by agencies issuing "policy guidebooks," manuals and statements of procedure or practice.

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

190. See supra notes 95-101 and accompanying text.
191. Id.
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.\(^{196}\)

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-

\(^{(1990)\text{, for the deference given to administrative agencies in the context of informal adjudication.}}\)


\(^{198.}\) McGowan, *supra* note 87.

reacracies 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.


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.

