



Statement #1

Views of the Administrative Conference on the "Report on Selected Independent Regulatory Agencies" of the President's Advisory Council on Executive Organization

(Adopted May 7, 1971)

A. Agency Structure

The Ash Council recommends that the independent regulatory commissions in the transportation, power, securities and consumer protection fields be transformed into executive agencies headed by single administrators responsible to the President.

The Conference is not persuaded that a case has been made for general application of such a fundamental alteration in structure.

1. The status of the regulatory commissions raises complex issues of political theory and practice that cannot be evaluated solely in terms of managerial efficiency. Those uses may be grouped for convenience under the headings of "independence" and "collegiality" (or multi-membership as distinct from a single chief officer). "Independence"—a matter of degree and in part a state of mind—has both positive and negative aspects. Detachment from external influences in making particularized decisions is generally considered to be desirable. Diffusion of responsibility that may produce hesitant or uncoordinated governmental policies is generally regarded as undesirable. Whether or not an agency is independent in these respects, however, is not exclusively determined by whether the agency is located within or outside the Executive Branch. Persuasive evidence has not yet been adduced to show that the independent commissions, to a significantly greater degree than executive agencies, have achieved the desired detachment or produced the weak or discordant policies.

As for collegiality, consideration must be given to values inherent in an official body that is not dominated by a single will. Among those values are diversity of background and experience, an open decisional process, and a tendency toward moderation in policy.

Further study, including empirical examination of the relative effectiveness of independent commissions and executive agencies performing comparable regulatory functions, is required before it may be concluded that either form is generally the more desirable.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2. The deficiencies of regulation by collegial bodies cannot be attributed solely or primarily to faulty structure; the same deficiencies may be observed in regulatory agencies headed by single administrators responsible to the President. The view that substitution of a single administrator would solve regulatory problems is simplistic, unsupported by empirical data, and overlooks other plausible explanations of regulatory ills, especially the inherent difficulties of regulating activities having a vast impact on the economy and the absence in many areas of legislative definition of regulatory goals. Structural alteration in itself offers only possibilities for limited improvement in regulatory performance; it is no substitute for a thorough and critical reexamination of the statutory framework in which the agencies operate and of the policies they are directed to carry out.

3. We believe, as does the Ash Council, that formulating regulatory policies by rules or other pronouncements of broad applicability rather than by the slow method of case-by-case adjudication is often desirable. The collegial structure of an agency need not, in our opinion, significantly diminish its capability to anticipate problems or to announce conclusions concerning them. Recommendations of the Administrative Conference have pointed the way toward fair and effective use of agencies' policy-making power.

4. While the Conference is not persuaded that the proposed form of agency organization—a single administrator responsible to the President—is generally superior to the collegial form, it may offer advantages in specific areas of regulation, particularly where vigorous departures from existing regulatory techniques are called for. Whether an existing regulatory framework should or should not be continued is largely dependent upon substantive rather than organizational considerations. If a decision were made, for example, to eliminate various restraints that now affect the various modes of transportation, the remaining regulatory controls might practicably be vested in a new agency structured differently from those now in existence. With respect to the other regulatory agencies, a major realignment of regulatory responsibilities is not proposed and a convincing case has not as yet been made for replacement of the collegial form with a single administrator.

5. Prior experience suggests that the quality of personnel in federal regulatory agencies, whether headed by a single administrator or by a collegial body, is highly variable from agency to agency and from time to time. Other factors appear to have a greater influence than agency structure on personnel quality.

6. One traditional ground of attack on the independent regulatory commission, particularly applied to enforcement functions of such agencies as the Federal Trade



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Commission, is the charge that unfairness to respondents may result when agency heads exercise prosecutory and rulemaking functions along with that of adjudication. Whatever the merits of this charge as a general matter, the concentration of regulatory authority in a single administrator increases at least the appearance, though not necessarily the reality, of a merger of inconsistent functions.

7. The advantages of the collegial form, if it is to be retained, can best be achieved with a limited number of members, ordinarily no more than five. A larger complement of members should require an affirmative demonstration of functional advantage and not be justified merely on the basis of tradition.

8. Improved management of the independent regulatory commissions will result from the expansion of present policies that delegate responsibilities for internal agency management to the chairmen and to key subordinate officials of the respective agencies.

B. Agency Decisional Process

The Ash Council recommends that agency review of initial decisions of hearing examiners be limited in scope and in time. The agency head or heads would review cases primarily for consistency with agency policy and would be required to take final action within a period of 30 days, stating reasons for modification or reversal of the hearing examiner. Even if a case were remanded for further action at a lower level, a final decision would have to be made within a further period of not more than 45 days.

The Conference believes that the underlying objectives of the proposed review procedure can be obtained by alternative procedures without the sacrifice of decisional quality and procedural fairness that the proposed procedure would entail.

1. Prior experience with inflexible time periods as a device to expedite decisions in complex matters has proved unsatisfactory. Rigid time limitations of broad application, unrelated to the complexity of individual cases or of types of cases, are likely to be unworkable. The desirability of time limitations tailored to the requirements of particular types of proceedings, however, will be investigated further by the Administrative Conference.

2. Limitation of party participation to the period prior to an initial decision is undesirable as well as unfair. Wise decisions in complex regulatory cases are largely dependent upon the illuminating and sharpening of issues which are most suitably provided by the parties, including agency staff who have functioned as parties in the particular proceeding. Parties who are



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

denied participation in the final decisionmaking through public procedures may be tempted to influence the agency through *ex parte* means.

3. Other procedural devices, such as development of policy through rulemaking rather than adjudication, provision that decisions by hearing examiners are final unless the agency determines that review is desirable, reduction of interlocutory appeals, and use of employee review boards to relieve agency heads of routine cases, have expedited the decisional process, enhanced the status of hearing examiners, prevented repetitious consideration of routine matters, and allowed agency heads to concentrate on important questions of policy. The often imperative need to improve agency functioning calls for sustained efforts to encourage procedural advances like those suggested above. (See Administrative Conference Recommendation 68-6—Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency.)

C. Judicial Review

The Ash Council recommends the creation of a specialized, non-Article III appellate court to hear appeals from the restructured transportation, power, and securities agencies. The new tribunal presumably would perform the same function that is now performed by the various United States Courts of Appeals (and by special three-judge district courts in the case of orders of the Interstate Commerce Commission).

The Conference does not favor the substitution of this new appellate tribunal for the regular courts at this time.

1. The proposed new tribunal would not relieve the regular courts of a substantial burden; less than three percent of the cases making up the current workload of the present reviewing courts would be affected. It is highly doubtful whether such a small caseload justifies the creation of a new tribunal. Moreover, if the courts of appeals must be relieved of some of their present workload, it would be a questionable choice of priorities to relieve them of regulatory cases rather than of other categories of cases, such as diversity litigation, which do not involve significant questions of federal law. Finally, a new tribunal with review authority over the decisions of only a small minority of agencies cannot be expected to make the contributions to uniformity in administrative law which the Ash Council sees as one of the advantages of its establishment.

2. A traditional justification of limited judicial review of regulatory decisions suggests the appropriateness of a non-specialized court of general jurisdiction. Regulatory agencies have a



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

tendency to become preoccupied narrowly with a limited set of policies and concerns; review of the legality of their actions in the light of the broader perspective of the norms and values of the total legal system may outweigh any benefits from specialization. The function of judicial review, in this view, is not to provide a better expert, but to subject the agency's action to independent scrutiny as to its fairness and consistency with statutory and constitutional norms. The contrary position emphasizes the necessity for expert knowledge and specialized judgment in order to perform a meaningful review function in highly complex regulatory cases. If a specialized reviewing court is desired, a number of other methods of organizing and staffing such a court may be preferable and should be considered. The court, however, should be a constitutional (Article III) court and should have a jurisdiction broader than only a few industries.

3. There is a danger that a narrowly specialized reviewing court, concerned with the actions of only a few agencies and the problems of only a few industries, might become or give the appearance of becoming identified with the agency or industry point of view. Appointments to such a court could pose a special problem, because, while of vital importance to the regulated industry, they would be less subject to broad professional and public scrutiny than appointments to the courts of appeals.

4. The Ash Council proposal for a specialized reviewing court bears no resemblance to earlier proposals for an administrative trial court to absorb the adjudicatory functions performed by some agencies, particularly in the tax, labor and unfair trade fields. Evaluation of such proposals involves very different considerations from those discussed here, and we express no opinion with respect to such proposals at this time.

5. It is impossible to foresee what effects adoption of the other Ash Council recommendations would have on judicial review, although it seems likely that they would be in the direction of enlarging the number of cases in which review was sought. Establishment of a specialized reviewing court is separable from the other Ash Council proposals and, if the latter were to be adopted, it could then be considered on the basis of experience under the new system.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Citations

__ FR ____ (2013)

2 ACUS 27

Note: This statement was not published previously in the Federal Register.