CHARLES D. ABLARD

Report
of the

Conference on Administrative Procedure

Called by the
President of the United States
on
April 29, 1953

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LETTER OF TRANSMITTAL

UNITED STATES COURT OF APPEALS
WASHINGTON 1, D. C.

REPORT

TO: THE PRESIDENT OF THE UNITED STATES

FROM: THE CHAIRMAN OF THE CONFERENCE ON ADMINISTRATIVE PROCEDURE

SUBJECT: PROCEEDINGS OF THE CONFERENCE ON ADMINISTRATIVE PROCEDURE CALLED BY THE PRESIDENT ON APRIL 29, 1953

SIR:

Herewith is the Report of the Conference on Administrative Procedure called by you April 29, 1953. Under separate cover, accompanied by separate comment, is a Resolution adopted by the Conference pursuant to your suggestion that "After the program which seems initially possible has been completed, provisions may be made by the conference for further meetings from time to time."

Acting upon your instruction the Attorney General prepared a list of those departments and agencies of the Federal Government which have adjudicatory and rule-making functions. Fifty-seven such departments and agencies were listed. These included the cabinet departments, the major independent administrative agencies, other independent commissions and boards, and a number of bureaus, administrations, and services within the cabinet departments. Each of these organizations named a delegate. All of the members of the judiciary, federal trial examiners, and members of the bar named by you accepted the designation and participated in the work of the Conference. Thus the Conference was composed of seventy-five members and delegates.

As Chairman of the Conference, designated by you, I appointed (with the subsequent ratification of the Conference) a Committee on Organization and Procedure, consisting of the

delegate from the Department of Justice, Mr. Robert W. Ginnane, as Chairman of the Committee, the delegate from the Interstate Commerce Commission, the Honorable Hugh W. Cross, the delegate from the Bureau of the Budget, Mr. William F. Finan, the delegate from the Securities and Exchange Commission, Mr. Roger S. Foster, and Mr. George M. Morris, of the bar. That Committee formulated a plan of organization and a set of rules for procedure. The Attorney General, pursuant to your request, designated as Secretary of the Conference Miss Patricia H. Collins, of his staff.

The first plenary session of the Conference was held June 10-11, 1953. Sixty-seven delegates and members were in attendance. The session was addressed by the late Chief Justice of the United States, the Honorable Fred M. Vinson, by the Attorney General of the United States, the Honorable Herbert Brownell, Jr., and by the Director of the Administrative Office of the United States Courts, the Honorable Henry P. Chandler. On the second day of the session the Conference was addressed by the Honorable John L. Sullivan, the Honorable Robert K. McConnaughey, the Honorable Clyde B. Aitchison, and the Honorable Bradford Ross, all members of the Advisory Committee to the Judicial Conference Committee on Procedure in Protracted Cases; and by Ralph Fuchs, Esquire, Professor of Administrative Law at the University of Indiana, and John W. Cragun, Esquire, Chairman of the Section of Administrative Law of the American Bar Association.

The Chair appointed and the Conference ratified the appointment of nine other committees, as follows:

Committee on Pre-Hearing — HON. JOHN C. DOERFER, Commissioner, Federal Communications Commission, Chairman

Committee on Pleadings — ALLISON RUPERT, ESQ., Office of General Counsel, Treasury Department, Chairman

Committee on Evidence — HON. EMORY T. NUNNELEY, JR., General Counsel, Civil Aeronautics Board, Chairman

Committee on Trial Problems — EDMUND L. JONES, ESQ., of the bar, Chairman

Committee on Hearing Officers — HON. EARL W. KINTNER, General Counsel, Federal Trade Commission, Chairman

Committee on Judicial Review — LAMBERT MCALLISTER, ESQ., Associate General Counsel, Federal Power Commission, Chairman

Committee on Uniform Rules — HON. THOMAS J. HERBERT, Chairman, Subversive Activities Control Board, Chairman

Committee on Office of Federal Administrative Procedure — HON. JOHN A. DANAHER, of the bar, Chairman

Committee on Style — CONRAD E. SNOW, Assistant Legal Advisor, Department of State, Chairman

The Conference adopted for study and consideration a series of topics, including those suggested by the Judical Conference of the United States, those suggested by the Attorney General, and several suggested from the floor of the Conference. These topics were assigned to committees for study and report. George M. Morris, Esquire, of the bar, was elected Vice-Chairman of the Conference.

It was the plan of the Conference that the committees would proceed with intensive studies upon their respective assignments, would carry on such research as could be arranged, and would prepare reports in such detail and style as might be deemed advisable; and that these reports would be distributed to the members of the Conference. It was also the plan that each committee would prepare a succinct "Recommendation" on each topic assigned to it, which would epitomize the view of the committee on the topic, and that these Recommendations would be presented to the Conference for debate and possible adoption. The committee reports, as differentiated from the Recommendations, were not formally submitted for Conference debate or adoption. In order to assist in the work of research and study, the committees were authorized to suggest the designation of consultants, and a number of prominent experts in the field of administrative law accepted designations as consultants to the various committees.

The second plenary session of the Conference was held November 23-24, 1953. Fifty-five members and delegates were in attendance. The Conference was addressed by the Chief Justice of the United States, the Honorable Earl Warren. Proceeding to consideration of calendar, which was made up of the Recommendations submitted by the committees on those topics upon which the work of the committees had been com-

pleted, the Conference adopted twenty Recommendations and ordered the publication of its First Report. This Report included the Recommendations adopted, brief explanatory Comments on the Recommendations, and a roster of the Conference. Several thousand copies were distributed to Government agencies, to organizations of practitioners, to law schools, and to interested individuals, in an effort to secure comment and criticism.

The third plenary session of the Conference was held October 14-15, 1954, and the fourth and final plenary session on November 8-9, 1954. Prior to these sessions the preparation and submission of reports of committees proceeded as had been the case theretofore. The Conference considered and adopted further Recommendations and authorized the publication of its final Report. This Report is a composite and includes all the Recommendations adopted by the Conference, thirty-five in number, two addressed to you, three to the Judicial Conference of the United States, seven to the Civil Service Commmission, one to the General Services Administration, and twenty-two to the various Government agencies.

The first Recommendation addressed to you is that an Office of Federal Administrative Procedure be established in the Department of Justice, to consist of a Director and a staff and to have the duties of studying procedures in the federal agencies, initiating cooperative efforts to develop uniform rules of practice, collecting and publishing statistics concerning procedures, and assisting in the improvement of procedures. The Attorney General no doubt has views concerning the desirability, feasibility, and details of the establishment of such an office. The second Recommendation addressed to you is in support of legislation dealing with the filing of abbreviated records with United States Courts of Appeals in review of orders of federal agencies. This Recommendation is, in effect, an endorsement of a bill prepared and advocated by the Judical Conference Committee on Revision of the Laws, of which Circuit Judge Albert B. Maris, of the United States Court of Appeals for the Third Circuit, is Chairman.

The reports of the committees and their underlying papers have been lodged in the custody of the Secretary of the Conference. These documents are valuable collections of source materials on the several subjects. No extensive research had

theretofore been done on a number of the matters, and thus the Conference materials are, in such instances, the original compilations of data. Comment in this respect should be made concerning the work of the Committees on Hearing Officers, Uniform Rules, Judical Review, Cost of Transcipts, Office of Federal Administrative Procedure, and Pre-Hearing Conferences. The materials thus assembled on these subjects will be invaluable to any officer or organization in the executive branch of Government or to any Congressional committee undertaking to examine into these subjects.

One or two features of the proceedings of the Conference require mention. The debates were thorough and thoughtful. Those participating were all fully acquainted at first-hand with the problems involved. Almost all Recommendations met with a final substantial unanimity of view. The proposal for the creation of an Office of Federal Administrative Procedure was discussed at considerable length, and the Conference exercised meticulous care in its choice of words delineating the functions of such an office, if established. The final vote for adoption, however, was without substantial opposition. The sharpest controversy in the Conference developed over the hearing officer program. The committee on that subject held extensive hearings and made an exhaustive inquiry into every possible point of view. The committee divided four-to-four upon its final Recommendation. Four members of the committee urged that the Office of Federal Administrative Procedure be expanded to consist of five members appointed by you, that it be given the administration of the entire hearing officer program, and that it be independent of any existing agency. The other four members urged that the administration of the hearing officer program be continued under the Civil Service Commission but under a new Bureau of Hearing Examiner Administration to be created within the Commission. After debate the latter proposal was adopted by the Conference by a vote of thirty-five to twenty-three. At the next plenary session a motion for reconsideration of the matter was made and debated at length. Under the Conference rules of procedure such reconsideration required an affirmative vote of a majority of the Conference membership, that is, thirty-eight votes. The motion to reconsider failed of adoption, receiving thirty votes.

The Recommendations of the Conference, with one or two exceptions, are technical suggestions. The problem of reducing delay, expense, and volume of record is a practical problem, and the members of the Conference were technicians in the field. Their suggestions are designed to accomplish results in a practical, effective way.

I wish to express to you, on behalf of all members of the Conference, particularly including myself, a deep appreciation for the opportunity of participating in this assignment. We are in hopes that the Government agencies and the practicing bar will put the Recommendations of the Conference to use and that the result will be an improvement in the procedures of the executive agencies which are engaged in the administration of justice.

With great respect I have the honor to be

Very truly yours,

E. Barrett Prettyman

Chairman

REPLY FROM THE PRESIDENT

HON. E. BARRETT PRETTYMAN
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, D. C.

DEAR JUDGE PRETTYMAN:

I was pleased to receive from you the report of the President's Conference on Administrative Procedure.

While the Conference first undertook to explore methods of reducing delay, expense, and size of records in certain administrative proceedings, I am glad to note that its studies extended to other aspects of administrative procedure. The report of the Conference demonstrates that Federal administrative procedures should be and can be steadily improved.

The recommendations which the Conference has addressed to me will receive careful consideration. I am requesting each agency in the executive branch of the government to consider the ways in which its procedures can be improved.

The work of the Conference has shown that an exchange of experience and views between Federal administrators and between them and members of the practicing bar and the judiciary produces useful results. I am confident that means will be devised for continuing such cooperative effort.

Please accept my thanks for your services as Chairman of the Conference, and transmit to its members my appreciation of their work.

Sincerely,

Dwight D. Eisenhower

THE WHITE HOUSE
MARCH 3, 1955

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Report of the Conference on Administrative Procedure Called by The President of the United States on April 29, 1953.

I FOREWORD

The President of the United States, on April 29, 1953, at the instance of the Chief Justice of the United States in his capacity as Chairman of the Judicial Conference of the United States, called a conference concerning unnecessary delay, expense and volume of records in some adjudicatory and rule-making proceedings in the Executive Departments and Administrative Agencies. To this Conference the Attorney General invited representatives of 56 departments and agencies having adjudicatory and rule-making functions; and at the request of the President, members of the Federal Judiciary, Federal Trial Examiners and members of the Bar participated.

The Conference was directed to study the problems above described, to exchange information, experience and suggestions, and 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. It was not contemplated that the Conference would attempt to impose rules upon the departments, agencies or litigants.

The results of the studies made by the Conference of the problems giving rise to unnecessary delay, expense and volume of records in adjudicatory and rule-making proceedings in the Executive Departments and Adminis-

trative Agencies are contained in the following Report. For the convenience of all, the Conference has formulated certain specific recommendations which are placed in the forefront of the Report. Some of these recommendations are addressed to the President of the United States, some to the Judicial Conference of the United States, some to the Civil Service Commission, some to the General Services Administration, and some to the several Executive Departments and Administrative Agencies having these functions. They are not designed for universal and uniform adoption by all of the departments and agencies, but for such selection and variation as, taking into consideration the particular functions, organization and procedures of each department or agency, may best contribute to the reduction of delay and expense, or of the volume of records, incident to adjudicatory and rule-making proceedings* in so far as consistent with the requirements of justice.

The Conference formulated recommendations at two sessions, the first on November 23–24, 1953, the second on October 14–15 and November 8–9, 1954. A First Report was issued following the first of these sessions. The recommendations of both sessions are now incorporated in this final report.

* The usage in these recommendations and in the comments which follow conforms to the definitions contained in Section 2 of the Administrative Procedure Act of June 11, 1946 (5 U.S.C. 1001), subject to the limitations contained in the foreword. Thus the word "agency" includes all authorities, whether Department, Agency or Commission, having adjudicatory or rule-making proceedings which are subject to judical review.

II

RECOMMENDATIONS ADOPTED

BY THE CONFERENCE ON

NOVEMBER 23–24, 1953
OCTOBER 14–15, 1954
NOVEMBER 8–9, 1954

A. The Conference recommends to the President of the United States:

1. OFFICE OF ADMINISTRATIVE PROCEDURE. The Conference recommends to the President of the United States the establishment of an Office of Administrative Procedure, and that provision be made:

(a) That the Office perform the following functions:

(i) carry on continuous studies of the adequacy of the procedures by which Federal agencies determine the rights, duties, and privileges of persons;

(ii) initiate cooperative effort among the agencies and their respective bars to develop and adopt as far as practicable, uniform rules of practice and procedure;

(iii) collect and publish facts and statistics concerning the procedures of the agencies;

(iv) assist agencies and this Conference in the formulation and improvement of their administrative procedures.

(b) That the Office be established in the Department of Justice under the supervision of the Attorney General.

(c) That the Office consist of a Director and a staff.

(d) That the Director be appointed for an indefinite term.

(e) That the Director make appropriate arrangements for securing the advice of representatives of the agencies, the bar, and other interested persons, in connection with the performance of his duties.

(f) That it be the duty of each agency promptly to furnish to the Director all information on its administrative procedures which he may request and to assist him by all appropriate means.

2. STATUTE AUTHORIZING THE FILING OF AN ABBREVIATED RECORD. That the President recommend to the Congress that legislation be adopted authorizing the filing of an abbreviated record with United States Courts of Appeals in review of orders of agencies of the Federal Government, as follows:

In any proceeding brought in any United States Court of Appeals to enjoin, set aside, suspend, modify, or otherwise review or enforce any order of a department, commission, board, officer, or other administrative agency of the Federal Government, and notwithstanding any other provision of law

(a) The record to be filed may, unless such agency in its sole discretion elects to file the entire record, be confined to such portions of the record before such agency

(i) as the parties to such court proceeding by written stipulation filed with the court agree;

(ii) as the court on motion of any such party or after prehearing conference on its own motion may order;

(iii) provided, that under the procedures prescribed in subparagraphs (i) and (ii) of this section, in an appropriate case no record need be filed;

(iv) if, however, the correctness of a finding of fact by an agency is in question, all the evidence before the agency shall be included in the record except such as the parties by written stipulation filed with the court agree to omit as wholly immaterial to the questioned finding;

(v) in any case where an abbreviated record has been filed, a supplemental record may be filed as the parties by written stipulation designate, or as the court on motion of any party or on its own motion may order.

(b) If such proceedings have been instituted in more than one Court of Appeals with respect to the same order, the agency concerned shall file the record in any one of such courts with due regard for the convenience of the parties, and the other court or courts in which such proceedings are pending shall thereupon transfer all petitions, pleadings, and other papers pertaining thereto to the court in which the record has been filed.

(c) The agency concerned may transmit to the court of appeals either the original papers in the proceeding before it or true copies thereof.

B. The Conference recommends to the Judicial Conference of the United States:

1. EXCLUSION OF EVIDENCE. **That the United States Courts be urged to encourage hearing officers and agencies in formal administrative proceedings to exclude irrelevant, immaterial and repetitious evidence.**

2. CERTIFICATION AND FILING OF AN ABBREVIATED RECORD. **That the several United States Courts of Appeals be urged to adopt a uniform rule providing, in all cases where a petition to review an order of an agency of the Federal Government has been filed:**
   (a) **the time within which the certified record is to be filed;**
   (b) **that except where the applicable statute otherwise requires, the record certified may be shortened or abbreviated**
      (i) **as the petitioner and the agency involved may by written stipulation designate, or**
      (ii) **as the court on motion of any party or on its own motion may order,**

   to encompass only that part of the record before the agency which is necessary to enable the court to pass upon the questions and issues raised by the appeal;
   (c) **that a supplemental record may be certified**
      (i) **as the petitioner and the agency involved may by written stipulation designate, or**
      (ii) **as the court on motion of any party or on its own motion may order.**

3. FILING OF BRIEFS PRIOR TO PRINTING OF RECORD. **That the several United States Courts of Appeals be urged to adopt a uniform rule providing in all cases where a petition to review an**

order of an agency of the Federal Government has been filed:

(a) that there may be filed in the case on stipulation of petitioner and respondent agency, or on order of the court on motion of any party or on its own motion, a joint printed appendix containing the matters of record relied on by the parties in their briefs and which the parties desire the court to read, such joint printed appendix to be filed within the time provided in paragraph (e) hereof;

(b) that when the petitioner or petitioners and the respondent agency so stipulate to the use of the procedure provided in (a) above, or when the court requires its use, such procedure shall be binding on all parties to the proceeding;

(c) that responsibility for the printing of the joint printed appendix shall be upon petitioner, but such petitioner shall have no responsibility to include in the joint printed appendix any part of the record on behalf of any other party when such other party fails or neglects to supply to petitioner, not later than five days after the time prescribed by paragraph (e) hereof for the filing of the final brief in the cause in question, a clear and specific designation of the record to be printed on behalf of such other party; provided, however, that nothing in this rule shall be interpreted as altering any rule or practice with respect to costs;

(d) that the joint printed appendix shall be so indexed and paged as to make ready reference to the certified record accurate and clear;

(e) **that the time for filing briefs and the joint printed appendix under this rule, except as otherwise permitted by the court, shall be as follows: petitioner's brief, within 40 days after the filing of the transcript of record with the court; respondent's brief, within 30 days after the filing of the brief for petitioner; petitioner's reply brief, within 15 days after filing of the brief for respondent; and the joint printed appendix, not later than 10 days prior to the time set for oral argument in the case;**

(f) **that when the above practice is not agreed to by the parties, the court's rules, otherwise applicable, shall govern.**

C. The Conference recommends to the Civil Service Commission:

1. BUREAU OF HEARING EXAMINER ADMINISTRATION. That the Civil Service Commission, under Section 11 of the Administrative Procedure Act, establish a new Bureau of Hearing Examiner Administration, charged with the responsibility for the hearing examiner program; and provide
   (a) that a committee of five persons be placed in charge of the Bureau, at least two of whom are lawyers who are well versed in Federal administrative adjudication, and at least two of whom are officials of the Commission who have the broad gauge view of the hearing examiner program;
   (b) that subordinate personnel be assigned to the Bureau, either on a full time basis, or by detail from other bureaus of the Commission.
2. QUALIFICATION STANDARDS OF HEARING EXAMINERS. That the Civil Service Commission maintain qualification standards of hearing examiners at least as high as those presently established.
3. RECRUITMENT OF HEARING EXAMINERS. That the Civil Service Commission continue recruitment of hearing examiners on an open competitive basis, and concentrate on the most likely source of qualified applicants, such as lawyers with trial experience in administrative law both in and out of Government; and provide
   (a) that a competitive register of candidates for appointment be maintained, on a current basis as far as practicable;
   (b) that the selection for appointment to hearing examiner positions be by the promotion, transfer or reinstatement of hearing exam-

iners, or by appointment from the open competitive register.

4. CAREER-MERIT SYSTEM. That the Civil Service Commission retain the Career-Merit System.

5. SALARY GRADES OF HEARING EXAMINERS. That the Civil Service Commission establish for the hearing examiners in each agency one or more salary grades, taking into account the diversity of the agency's functions, the desirability of minimizing the administration of promotions, and the possibility of recruiting examiners at lower grades and increasing their compensation as, through increased experience and competence, they perform increasingly responsible work.

6. COMPENSATION OF HEARING EXAMINERS. That the Civil Service Commission fix the level of compensation for hearing examiners between $8,300 (GS-13) and $11,800 (GS-15), under the Classification Act, until higher grades are available thereunder; and revise the classification specifications,
   (a) to bring the illustrative examples of cases up to date, and to express the substantive portions of the specifications in less technical and simpler language; and
   (b) to delete the language that erroneously suggests that length of record is of some importance in prescribing the level of compensation of the hearing examiner.

7. COST OF TRANSCRIPTS. That the Civil Service Commission, in order to assist the agencies to secure at lowest cost transcripts of administrative proceedings to meet the needs of the Government and private persons,

(a) give recognition, reflected in job classifications and salaries, to skills and judgment required of government personnel utilized in the reporting, recording, monitoring and transcribing of administrative hearings; and
(b) promote greater use of "stand by" or pooling arrangements to meet emergency reporting needs.

D. The Conference recommends to the General Services Administration:

1. COST OF TRANSCRIPTS. **That the General Services Administration, in consultation with the Office of Administrative Procedure, if established, and with the Bureau of the Budget, assist the agencies to secure at lowest cost, by contract or otherwise, transcripts of administrative proceedings, to meet the needs of Government and private persons, by studying and advising with respect to**

(a) improved techniques in mechanical recording and reproduction, experiments therewith by the courts, by certain Federal agencies and by the States, and their adaptation to various types of administrative proceedings;

(b) feasibility of fixing uniform maximum rates, to apply to all reporting contracts, for different classes of service, for original transcripts and copies of transcripts.

E. The Conference recommends to the agencies:

1. ELIMINATION OF UNNECESSARY DELAY, EXPENSE AND VOLUME OF RECORDS. **That every agency consider unnecessary delay, expense, and volume of records in adjudicatory and rule-making proceedings to be detrimental to the public interest.**

2. STUDY OF PROCEDURE. **That every agency having adjudicatory or rule-making functions make a comprehensive and intensive study of its own procedure in order to discover and eliminate any unnecessary delay, expense, or volume of records which may presently occur in its proceedings.**

3. REMOVAL OF HEARING EXAMINERS. **That the agencies, under the procedures for removal of hearing examiners set forth in Section 11 of the Administrative Procedure Act, study more closely the performance of hearing examiners, and initiate removal proceedings where appropriate.**

4. STATUS OF AGENCY COUNSEL. **That the agencies define by rule the status of agency counsel in the following respects:**
   (a) **the authority of agency counsel to participate in the proceedings;**
   (b) **whether such participation is to be mandatory or permissive;**
   (c) **whether, and under what circumstances, agency counsel need be served with any notices or other papers;**
   (d) **the extent to which agency counsel may or should take an advocate position or should confine himself to development of relevant materials;**

(e) **the authority of agency counsel to stipulate as to facts or testimony; and**

(f) **the authority of agency counsel to settle controversies or transmit offers of settlement to the agency or its authorized officials.**

5. UNIFORMITY IN RULES. **That the agencies, in collaboration with the bar and an Office of Administrative Procedure, if established, undertake a detailed study of the full area within which uniformity in rules is attainable, inasmuch as the Conference finds that it is feasible and desirable to formulate uniform rules for many aspects of administrative procedure.**

6. UNIFORM RULES ON CERTAIN SUBJECTS. **That the agencies collaborate with the bar, and with the Office of Administrative Procedure, if established, in the development and adoption of uniform rules on the following subjects, as to which the Conference finds uniformity to be feasible and desirable, using as a basis for such study (but without approval or disapproval by the Conference of any specific provision thereof) the illustrative rules shown below:**

(a) COMPUTATION OF TIME

Illustrative Rule

In computing any period of time prescribed or allowed by the Agency rules, by order of the Agency or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless

it is a Saturday, Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor a holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and holidays shall be excluded in the computation.

(b) SERVICE OF PROCESS

Illustrative Rule

(i) By Whom Served. **The Agency shall serve all orders, notices and other papers issued by it, together with any other papers which it is required by law to serve. Every other paper shall be served by the party filing it.**

(ii) Upon Whom Served. **All papers served by either the Agency or any party shall be served upon all counsel of record at the time of such filing and upon parties not represented by counsel or upon their agents designated by them or by law. Any counsel entering an appearance subsequent to the initiation of the proceeding shall notify all other counsel then of record and all parties not represented by counsel of such fact.**

(iii) Service Upon Parties. **The final order, and any other paper required to be served by the Agency upon a party, shall be served upon such party or upon the agent designated by him or by law to**

receive service of such papers, and a copy shall be furnished to counsel of record.

(iv) Method of Service. Service of papers shall be made personally or, unless prohibited by law, by first-class or registered mail, telegraph or by publication.

(v) When Service Complete. Service upon parties shall be regarded as complete: by mail, upon deposit in the United States mail properly stamped and addressed; by telegraph, when deposited with a telegraph company properly addressed and with charges prepaid; by publication when due notice shall have been given in the publication for the time and in the manner provided by law or rule.

(vi) Filing with Agency. Papers required to be filed with the Agency shall be deemed filed upon actual receipt by the Agency at the place specified in its rules accompanied by proof of service upon parties required to be served. Upon such actual receipt the filing shall be deemed complete as of the date of deposit in the mail or with the telegraph company as provided in paragraph (e).

(c) SUBPENAS

Illustrative Rule

(i) Form. Every subpena shall state the name of the Agency and the title of the proceeding, if any, and shall command

the person to whom it is directed to attend and give testimony or produce designated evidence at a specified time and place.

(ii) Issuance to Parties. Upon application of counsel (or other representative authorized to practice before the Agency) for any party to a proceeding governed by Sections 7 and 8 of the Administrative Procedure Act, there shall be issued to such party subpenas requiring the attendance and testimony of witnesses or the production of evidence in such proceeding. The agency may issue subpenas to parties not so represented upon request or upon a showing of general relevance and reasonable scope of the testimony or evidence sought.

(iii) Service. Unless the service of a subpena is acknowledged on its face by the witness, it shall be served by a person who is not a party and is not less than 18 years of age. Service of a subpena upon a person named therein shall be made by delivering a copy of the subpena to such person and by tendering him the fees for one day's attendance and the mileage allowed by law. When the subpena is issued on behalf of the United States or its officer or agency, fees and mileage may but need not be tendered, and the subpena may be served by registered mail.

(iv) Fees. Witnesses summoned before an agency shall be paid by the party at

whose instance they appear the same fees and mileage that are paid to witnesses in the courts of the United States.

(v) Proof of Service. The person serving the subpena shall make proof of service by filing the subpena and the required return, affidavit, or acknowledgment of service with the Agency or the officer before whom the witness is required to testify or produce evidence. If service is made by a person other than a United States marshal or his deputy, or an officer of the Agency, and such service has not been acknowledged by the witness, such person shall make an affidavit of service. Failure to make proof of service does not affect the validity of the service.

(vi) Quashing. Upon motion made promptly, and in any event at or before the time specified in the subpena for compliance, by the person to whom the subpena is directed (and upon notice to the party to whom the subpena was issued) the Agency or its authorized member or officer may (1) quash or modify the subpena if it is unreasonable or requires evidence not relevant to any matter in issue, or (2) condition denial of the motion upon just and reasonable conditions.

(vii) Enforcement. Upon application and for good cause shown, the Agency will seek

judicial enforcement of subpenas issued to parties and which have not been quashed.

The following portions of the uniform subpena rule would require legislation:

(viii) Power to Issue. In any hearing, investigation or other proceeding in which an Agency is authorized by law to issue subpenas, such Agency or any member of such Agency, any hearing officer appointed pursuant to Section 11 (of the Administrative Procedure Act), or any officer designated by it may issue subpenas requiring the attendance of witnesses to testify or to produce evidence.

(ix) Geographical Scope. Such attendance of witnesses and such production of evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(x) Enforcement. In case of contumacy or refusal to obey a subpena issued to any person, any court of the United States within the jurisdiction of which such hearing, investigation or proceeding is carried on, or in which the person to whom the subpena is addressed is found or resides or transacts business, upon application by the Agency, may issue an order requiring such person to appear before the Agency or member or officer designated by the Agency, and give

testimony, or produce evidence, or both, touching the matter under investigation or in question.

An order of such court directing compliance with a subpena shall not be subject to appeal. Any failure to obey such order of the court may be punished by the court as a contempt thereof. All process in any such case may be served in the judicial district in which such person resides or in which he may be found.

(xi) Penalties. Any person who shall wilfully neglect or refuse to attend and testify or to produce evidence, if in his power to do so, in obedience to the subpena of the agency shall be guilty of an offense and upon conviction by a court of competent jurisdiction shall be punished by a fine of not more than $1,000 or by imprisonment for not more than one year, or by both such fine and imprisonment.

(d) DEPOSITIONS AND INTERROGATORIES

Illustrative Rule

DEPOSITIONS

(i) Right to Take. Except as otherwise provided, in an order made pursuant to paragraph (d), any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for use as

evidence in the proceeding, except that leave, granted with or without notice, must be obtained if notice of the taking is served by a proponent within thirty days after the filing of a complaint, application or petition. The attendance of witnesses may be compelled by the use of a subpena. Depositions shall be taken only in accordance with this Rule and the Rule on subpenas.

(ii) Scope. Unless otherwise ordered as provided in paragraph (e), the deponent may be examined regarding any matter not privileged, which is relevant to the subject matter involved in the proceeding.

(iii) Officer Before Whom Taken. Within the United States or within a territory or insular possession subject to the dominion of the United States depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held; within a foreign country, depositions shall be taken before a Secretary of an Embassy or Legation, Consul General, Vice Consul or Consular Agent of the United States, or a person designated by the Agency, or agreed upon by the parties by stipulation in writing filed with the Agency. Except by stipulation, no deposition shall be taken before a person who is a party or the privy of a party, or a privy of any

counsel of a party, or who is financially interested in the proceeding;

(iv) Authorization. A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to the Agency and all parties. The notice shall state the time and place for taking the deposition, the name and address of each person to be examined, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. On motion of a party upon whom the notice is served, the hearing officer may for cause shown, enlarge or shorten the time. If the parties so stipulate in writing, depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used as other depositions;

(v) Protection of Parties and Deponents. After notice is served for taking a deposition, upon its own motion or upon motion reasonably made by any party or by the person to be examined and upon notice and for good cause shown, the Agency may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the

scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed, the deposition shall be opened only by order of the Agency, or that business secrets or secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the Agency; or the Agency may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression. At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the Agency may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as above provided. If the order made terminates the examination it shall be resumed thereafter only upon the order of the Agency. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order.

(vi) Oral Examination and Cross Examination. **Examination and cross examination shall proceed as provided in rules governing the reception of evidence at an oral hearing. In lieu of participating in the oral examination, any party served with notice of taking a deposition may transmit written cross interrogatories to the officer who, without first disclosing them to any person, and after the direct testimony is complete, shall propound them seriatim to the deponent and record or cause the answers to be recorded verbatim;**

(vii) Recordation. **The officer before whom the deposition is to be taken shall put the witness on oath and shall personally or by someone acting under his direction and in his presence, record the testimony by typewriter directly or by transcription from stenographic notes, wire or record recorders, which record shall separately and consecutively number each interrogatory. Objections to the notice, qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented or to the conduct of the officer, or of any party, shall be noted by the officer upon the deposition. All objections by any party not so made are waived.**

(viii) Signing Attestation and Return. **When the testimony is fully transcribed the deposition shall be submitted to the**

witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless on a motion to suppress the Agency holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope indorsed with the title of proceeding and marked "Deposition of (here insert name of witness)" and shall promptly send it by registered mail to the Secretary of the Agency for filing. The party taking the

deposition shall give prompt notice of its filing to all other parties. Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent;

(ix) Use and Effect. Subject to rulings by the hearing officer upon objections a deposition taken and filed as provided in this Rule will not become a part of the record in the proceeding until received in evidence by the hearing officer upon his own motion or the motion of any party. Except by agreement of the parties or ruling of the hearing officer, a deposition will be received only in its entirety. A party does not make a party, or the privy of a party, or any hostile witness his witness by taking his deposition. Any party may rebut any relevant evidence contained in a deposition whether introduced by him or any other party;

(x) Fees of Officers and Deponents. Deponents whose depositions are taken and the officers taking the same shall be entitled to the same fees as are paid for like services in the District Courts of the United States, which fees shall be paid by the party at whose instance the depositions are taken.

DEPOSITIONS UPON INTERROGATORIES

(i) Submission of Interrogatories. Where the deposition is taken upon written interrogatories, the party offering the

testimony shall separately and consecutively number each interrogatory and file and serve them with a notice stating the name and address of the person who is to answer them and the name or descriptive title and address of the officer before whom they are to be taken. Within 10 days thereafter a party so served may serve cross-interrogatories upon the party proposing to take the deposition. Within five days thereafter, the latter may serve redirect interrogatories upon the party who served cross-interrogatories.

(ii) Interrogation. Where the interrogatories are forwarded to an officer authorized to administer oaths as provided in paragraph (iii), the officer taking the same after duly swearing the deponent, shall read to him seriatim, one interrogatory at a time and cause the same and the answer thereto to be recorded before the succeeding interrogatory is asked. No one except the deponent, the officer and the court reporter or stenographer recording and transcribing it shall be present during the interrogation.

(iii) Attestation and Return. The officer before whom interrogatories are verified or answered shall (1) certify under his official signature and seal that the deponent was duly sworn by him, that the interrogatories and answers are a true record of the deponent's testimony, that

no one except deponent, the officer and the stenographer were present during the taking, and that neither he nor the stenographer, to his knowledge, is a party, privy to a party, or interested in the event of the proceedings, and (2) promptly send by registered mail the original copy of the deposition and exhibits with his attestation to the Secretary of the Agency, one copy to the counsel who submitted the interrogatories and another copy to the deponent.

(iv) Provisions of Deposition Rule. In all other respects, depositions upon interrogatories shall be governed by the previous Deposition Rule.

(e) OFFICIAL NOTICE

Illustrative Rules

RULE 1—MATTERS OF LAW

The Agency or its hearing officer, with or without prior request or notice, will officially notice:

(i) Federal Law. The Constitution; Congressional Acts, Resolutions, Records, Journals and Committee Reports; Decisions of Federal Courts and Administrative Agencies; Executive Orders and Proclamations; and all rules, orders and notices published in the Federal Register;

(ii) State Law. **The public laws and the decisions of Courts of record of each State of the United States;**

(iii) Governmental Organization. **Organization, territorial limitations, officers, departments, and general administration of the Government of the United States, the several States and foreign nations;**

(iv) Agency Organization. **The Agency's organization, administration, officers, personnel, official publications, and practitioners before its bar.**

RULE 2—MATERIAL FACTS

In the absence of controverting evidence, the Agency and its hearing officers, with or without prior notice or request, may officially notice:

(i) Agency Proceedings. **The pendency of, the issues and position of the parties therein, and the disposition of any proceeding then pending before or theretofore concluded by the Agency;**

(ii) Business Customs. **General customs and practices followed in the transaction of business;**

(iii) Notorious Facts. **Facts so generally and widely known to all well-informed persons as not to be subject to reasonable dispute, or specific facts which are capable of immediate and accurate demon-**

stration by resort to accessible sources of generally accepted authority, including but not exclusively, facts stated in any publication authorized or permitted by law to be made by any Federal or state officer, department, or agency;

(iv) Technical Knowledge. Matters within the technical knowledge of the Agency as a body of experts, within the scope or pertaining to the subject matter of its statutory duties, responsibilities or jurisdiction;

Upon the following conditions:

(i) Request or Suggestion. Any party may request, or the hearing officer or the agency may suggest, that official notice be taken of a material fact, which shall be clearly and precisely stated, orally on the record, at any pre-hearing conference or oral hearing or argument, or may make such request or suggestion by written notice, any pleading, motion, memorandum, or brief served upon all parties, at any time prior to a final decision;

(ii) Statement. Where an initial or final decision of the Agency rests in whole or in part upon official notice of a material fact, such fact shall be clearly and precisely stated in such decision. In determining whether to take official notice of material facts, the hearing officer or the

Agency may consult any source of pertinent information, whether or not furnished as it may be, by any party and whether or not admissible under the rules of evidence.

(iii) Controversion. Any party may controvert a request or a suggestion that official notice of a material fact be taken at the time the same is made if it be made orally, or by a pleading, reply or brief in response to the pleading or brief or notice in which the same is made or suggested. If any decision is stated to rest in whole or in part upon official notice of a material fact which the parties have not had a prior opportunity to controvert, any party may controvert such fact by appropriate exceptions if such notice be taken in an initial or intermediate decision or by a petition for reconsideration if notice of such fact be taken in a final report. Such controversion shall concisely and clearly set forth the sources, authority and other data relied upon to show the existence or nonexistence of the material fact assumed or denied in the decision.

(f) PRESUMPTIONS

Illustrative Rule

Upon proof of the predicate facts specified in the sub-rules hereof without substantial dispute and by direct, clear, and convincing evidence, the Agency, with or without prior

request or notice, may make the following presumptions, where consistent with all surrounding facts and circumstances:

(i) Continuity. That a fact of a continuous nature, proved to exist at a particular time continues to exist as of the date of the presumption, if the fact is one which usually exists for at least that period of time;

(ii) Identity. That persons and objects of the same name and description are identical;

(iii) Delivery. Except in a proceeding where the liability of the carrier for non-delivery is involved, that mail matter, communications, express or freight, properly addressed, marked, billed and delivered respectively to the post office, telegraph, cable or radio company, or authorized common carrier of property with all postage, tolls and charges properly prepaid, is or has been delivered to the addressee or consignee in the ordinary course of business;

(iv) Ordinary Course. That a fact exists or does not exist, upon proof of the existence or non-existence of another fact which in the ordinary and usual course of affairs, usually and regularly co-exists with the fact presumed;

(v) Acceptance of Benefit. That a person for whom an act is done or to whom a trans-

fer is made has, does or will accept same where it is clearly in his own self-interest so to do;

(vi) Interference with Remedy. That evidence, with respect to a material fact which in bad faith is destroyed, eloigned, fabricated, suppressed or withheld by a party in control thereof, would if produced, corroborate the evidence of the adversary party with respect to such fact.

(g) STIPULATIONS AND ADMISSIONS OF RECORD IN PROCEEDINGS INVOLVING NUMEROUS PARTIES

Illustrative Rule

The existence or non-existence of a material fact, as made or agreed in a stipulation or in an admission of record, will be conclusively presumed against any party bound thereby, and no other evidence with respect thereto will be received upon behalf of such party, provided:

(i) Upon Whom Binding. Such a stipulation or admission is binding upon the parties by whom it is made, their privies and upon all other parties to the proceeding who do not expressly and unequivocally deny the existence or non-existence of the material fact so admitted or stipulated, upon the making thereof, if made on the record at a pre-hearing conference, oral hearing, oral argument or by a writing filed and served upon all

parties within five days after a copy of such stipulation or admission has been served upon them.

(ii) Withdrawal. Any party bound by a stipulation or admission of record at any time prior to final decision may be permitted to withdraw the same in whole or in part by showing to the satisfaction of the hearing officer or the agency that such stipulation or admission was made inadvertently or under a bona fide mistake of fact contrary to the true fact and that its withdrawal at the time proposed will not unjustly prejudice the rights of other parties to the proceeding.

(h) FORM AND CONTENT OF DECISIONS

Illustrative Rule

Every decision, whether recommended, initial, tentative or final, shall contain in the following order:

(i) A correct caption of the proceeding;

(ii) Description of the nature and status of the decision;

(iii) Separately identified headnotes of the several points decided;

(iv) Designation of all parties and counsel to the proceeding;

(v) A concise statement of the nature and background of the proceeding;

(vi) A concise statement of the facts but without recitation of the evidence;

(vii) A concise definition of the issues to be decided;

(viii) In separately identified paragraphs (which will correspond to the appropriate headnotes) a concise discussion of each issue, the principles involved and the determination made thereof with reasons and precedents relied upon to support the same;

(ix) A statement of the rule, order, sanction or relief or the denial thereof to be made in accordance with the decision.

(i) APPEALS FROM INTERMEDIATE DECISIONS

Illustrative Rule

(i) Notice of Appeal. Any party may appeal from an initial or recommended decision of a hearing officer or from a tentative decision of the agency by filing a notice of appeal with the Agency within ten days after service upon him of such decision.

(ii) Exceptions. An appeal may be perfected by filing exceptions to such intermediate decision within twenty days after service of the decision.

(iii) Effect of Exceptions. The effectiveness of the intermediate decision shall be

stayed if any party files a notice of appeal and exceptions within the times specified above or if the Agency upon notice to the parties undertakes to review the decision. Otherwise, the intermediate decision shall become the final decision of the agency.

(iv) Replies. Within ten days after service of exceptions, any opposing party may file a reply to such exceptions.

(v) Content. Exceptions shall identify specifically the findings, conclusions, or proposed action to which objection is made, and shall be supported by concise argument and by specific page references to the parts of the record and the legal and other authorities relied upon.

(vi) Enlargement of Time. The time periods prescribed by this rule may be extended by the Agency for good cause.

7. DEFINITION OF ISSUES BEFORE HEARING. That the agencies require that in all proceedings the issues to be adjudicated be made initially as precise as possible, in order that hearing officers may proceed promptly to conduct the hearings on relevant and material matter only. Particularity should be required in complaints, answers, applications for rules or licenses, and petitions to intervene. In proceedings in which there is only one interested party besides the agency, the orders setting hearings should clearly specify the issues to be heard.

8. PREHEARING AND OTHER CONFERENCES. That the agencies encourage hearing officers to call and conduct prehearing conferences and other conferences during hearings, with a view to the simplification, clarification, and disposition of the issues involved, and with a further view to the shortening of the proof on the issues.

9. PREHEARING CONFERENCE RULE. That the agencies adopt the following rule or one of similar import:

In any proceeding the agency or its designated hearing officer upon its or his own motion, or upon the motion of one of the parties or their qualified representatives, may in its or his discretion direct the parties or their qualified representatives to appear at a specified time and place for a conference to consider

(a) the simplification of the issues;
(b) the necessity of amendments to the pleadings;
(c) the possibility of obtaining stipulations, admissions of facts and of documents;
(d) the limitation of the number of expert witnesses;
(e) such other matters as may aid in the disposition of the proceeding.

The agency or its designated hearing officer shall make an order which recites the action taken at the Conference, the amendments allowed to the pleadings and the agreements made by the parties or their qualified representatives as to any of the matters considered, and which

limits the issues for hearing to those not disposed of by admissions or agreements; and such order shall control the subsequent course of the proceeding unless modified for good cause by subsequent order.

10. SUBMISSION OF DOCUMENTARY EVIDENCE IN ADVANCE. **That the agencies require with respect to all classes of proceedings in which it is practicable:**

    (a) **that all documentary evidence which is to be offered during the taking of evidence be submitted to the hearing examiner and to the other parties to the proceeding sufficiently in advance of such taking of evidence to permit study and preparation of cross-examination and rebuttal evidence;**

    (b) **that documentary evidence not submitted in advance in accordance with the requirement of paragraph (a) be not received in evidence in the absence of a clear showing that the offering party had good cause for his failure to produce the evidence sooner;**

    (c) **that the authenticity of all documents submitted in advance in a proceeding in which such submission is required, be deemed admitted unless written objection thereto is filed prior to the hearing, except that a party will be permitted to challenge such authenticity at a later time upon a clear showing of good cause for failure to have filed such written objection.**

11. EXCERPTS FROM DOCUMENTARY EVIDENCE. **That the agencies adopt the following rule or one of similar import:**

When portions only of a document are to be relied upon, the offering party shall prepare the pertinent excerpts, adequately identified, and shall supply copies of such excerpts, together with a statement indicating the purpose for which such materials will be offered, to the hearing examiner and to the other parties. Only the excerpts, so prepared and submitted, shall be received in the record. However, the whole of the original document should be made available for examination and for use by opposing counsel for purposes of cross-examination.

12. EXPERT OR OPINION TESTIMONY. That the agencies adopt the following practice regarding expert or opinion testimony, and testimony based on economic or statistical data:

(a) That the hearing examiner or other appropriate officer in all classes of cases where practicable make an effort to have the interested parties agree upon the witness or witnesses who are to give expert or opinion testimony, either by selecting one or more to speak for all parties or by limiting the number for each party; and, if the interested parties cannot agree, require them to submit to him and to the other parties written statements containing the names, addresses and qualifications of their respective opinion or expert witnesses, by a date determined by him and fixed sufficiently in advance of the hearing to permit the other interested parties to investigate such qualifications;

(b) that the hearing examiner or other appro-

priate officer, in all classes of cases in which it is practicable and permissible under the Administrative Procedure Act, require, and when not so permissible, make every effort to bring about by voluntary submission, that all direct opinion or expert testimony and all direct testimony based on economic or statistical data be reduced to written sworn statements, and, together with the exhibits upon which based, be submitted to him and to the other parties to the proceeding by a date determined by the hearing officer and fixed a reasonable time in advance of the hearing; and that such sworn statements be acceptable as evidence upon formal offer at the hearing, subject to objection on any ground except that such sworn statements shall not be subject to challenge because the testimony is not presented orally, and provided that witnesses making such statements shall not be subject to cross-examination unless a request is made sufficiently in advance of the hearing to insure the presence of the witnesses;

(c) That the hearing examiner or other appropriate officer, in his discretion but consistent with the rights of the parties, cause the parties to make available for inspection in advance of the hearing, and for purposes of cross-examination at the hearing, the data underlying statements and exhibits submitted in accordance with paragraph (b), but, wherever practicable that he restrict to a minimum the placing of such data in the record.

(d) Whenever the manner of introduction of opinion or expert testimony or testimony based on economic or statistical data is governed by requirements fixed under the provisions of paragraph (a) or paragraph (b), such testimony not submitted in accordance with the relevant requirements shall not be received in evidence in the absence of a clear showing that the offering party had good cause for his failure to conform to such requirements.

13. TRIAL BRIEFS. That the agencies require agency counsel to prepare in advance of hearing adequate detailed trial briefs in appropriate cases.

14. INTERLOCUTORY MATTERS AND INTERLOCUTORY APPEALS. That the agencies adopt the following practice:

(a) broad authority should be granted hearing officers to rule upon interlocutory matters which arise during the course of hearings, and interlocutory appeals from rulings should be reduced to a minimum;

(b) interlocutory appeals which the agency may entertain should be disposed of promptly.

15. INDEXING OF RECORDS. That the agencies adopt the following practice:

(a) In any formal proceeding in which it is anticipated that the record will exceed 2,500 pages, provision should be made either through counsel for the parties or the staff of the agency for a daily or current index of the record which will be available to the hearing officer and all counsel;

(b) The index should be topical (not a digest), and as a minimum, each topic of testimony should be the heading of a card on which the name of each witness who testified upon the topic should be entered, the page of the record where each portion of his testimony appeared, and the number of each exhibit relating to the topic. The index should contain, on separate cards, the name of each witness and the topics on which he testified.

16. COST OF TRANSCRIPTS. That each agency develop and make effective a policy designed to assure the furnishing of copies of transcripts with reasonable promptness and at fair cost to persons having a legitimate interest therein.

(a) That the choice of the method of providing for the record and for the transcripts – by contract reporting, by the use of Government personnel, or by a combination of both – be kept flexible;

(b) That the utilization of new types of recording and transcribing devices, and the training of Government personnel in their use, be explored from the standpoint of feasibility and reduction in over-all cost;

(c) That appropriations be sought for the Government's share of the cost of transcripts, as for any other administrative cost, and that legislation be sought to authorize agencies which choose to employ their own reporters to credit to their appropriations receipts from charges made for the furnishing of copies of transcripts;

(d) That when reporting services are secured by contract, the specifications

(i) should so far as possible eliminate speculative factors, and specifically should preclude the consideration of any bid which provides for the payment to the Government of any bonus for the award of the contract;

(ii) generally should require the quotation of rates on the same basis to the Government as to others having an interest in the proceeding;

(iii) may, however, call for free copies, or copies at reduced rates, to the Government when the proceedings are of such a character that as a matter of general policy the cost of reporting the proceeding should be borne by the parties;

(iv) should in the latter case, however, fix maximum rates which may be charged to the parties or to the public;

(v) should set forth, to the greatest extent practicable, the exact basis on which the contract will be awarded, including, if possible, a schedule, based on past experience, showing the relative weight which will be given to prices for various types of copy delivery.

17. UNIFORM PRINTING PRACTICES FOR AGENCY RULES. That the agencies adopt the following printing practices for agency rules:

(a) Rules published in the Federal Register and the Code of Federal Regulations when re-

printed or republished in any form (pamphlet, booklet, book, etc.) shall be identified and numbered in accordance with the following:

(i) The numbers and letters identifying the sections and paragraphs of rules shall be the same as that used in the Federal Register and the Code of Federal Regulations.

(ii) The cover page, or title page, or table of contents, or first page of the pamphlet, or booklet, or book, etc., containing the rules shall identify where these rules are published in the Code of Federal Regulations, by stating title number and subject, and if necessary for clarity, any or all of the following as used in the Code of Federal Regulations: The chapter number and subject, subchapter letter and subject, part number and subject, and subpart number or letter and subject.

(b) In official literature, reports, orders, briefs, and other formal documents, the citations or references to agency rules, which are published in the Federal Register and the Code of Federal Regulations shall be by title number of the Code of Federal Regulations, initials of the Code of Federal Regulations, and section number.

(c) Whenever separate prints of rules published in the Federal Register are required, such prints shall, to the extent practicable, be reproduced directly or photographically from

the official text as printed in the Federal Register or Code of Federal Regulations.

18. ATTORNEYS' MANUAL. That the agencies maintain an adequate and detailed attorneys' manual for the guidance of agency counsel.

19. IN-SERVICE TRAINING. That the agencies establish in-service training for agency counsel, including systematic regular instruction for newly-hired attorneys over a definite period of time and periodic, recurrent "refresher" courses or "trial clinics" for more experienced trial attorneys.

20. PRACTICE MANUALS. That the agencies publish for the use of practitioners before the agency, practice manuals of an advisory nature, detailing the procedural steps involved in all types of proceedings had under each statute administered by the agency, together with customary forms.

21. LAWYERS' INSTITUTES. That the agencies cooperate in all feasible ways with universities and local or national bar associations undertaking to conduct practicing lawyers' institutes or courses in specialized fields of administrative law.

22. CONFERENCES WITH AGENCY BAR. That the agencies sponsor, arrange and conduct more or less informal meetings or conferences on a local, regional or national basis between responsible officials and members of the agency bar as an exercise of good public relations and to facilitate the creation of an atmosphere of understanding and cooperation.

III

COMMENTS ON THE RECOMMENDATIONS

The following comments were prepared by the working committees of the Conference, and have not been considered by the Conference as a whole.

COMMENT ON RECOMMENDATION A. 1.

Office of Administrative Procedure

This recommendation urges the creation of an Office of Administrative Procedure to carry on continuous studies for the improvement of Federal administrative procedures. This is not a new idea. It has been advocated by every group which has made a careful study of administrative procedure. In 1941, the Attorney General's Committee on Administrative Procedure recommended the establishment of such an Office which, in addition to procedural studies, would have carried on the functions with respect to the appointment, compensation, and tenure of hearing examiners which are now vested in the Civil Service Commission by Section 11 of the Administrative Procedure Act. The Commission on Organization of the Executive Branch of the Government recommended in 1949 that such "continuous and painstaking effort" to improve Federal administrative procedures be carried on in the Bureau of the Budget. In 1942, Benjamin recommended the creation of such an office to work for the improvement of New York administrative procedures, while California has actually established a Division of Administrative Procedure following the recommendation of the California Judicial Council in 1942.

The fruitful work of the Administrative Office of the United States Courts and some of the state judicial councils in improving judicial procedures suggests that a

similar continuous study of administrative procedures in action will produce worthwhile results. Much discussion of the administrative process in action suffers from a lack of precise and up-to-date factual information as to how various procedures currently operate. Due to the limitations of time and of other demands, busy administrators and practicing lawyers rarely undertake continuous or comparative study of even a single aspect of procedure. Specific studies, such as those of the Attorney General's Committee on Administrative Procedure in 1939–1941, tend to become obsolete with changed conditions—such as changes in substantive procedural law, increased work loads and agency reorganizations.

The Office of Administrative Procedure should not be empowered to dictate to the administrative agencies on procedural matters. Rather, through continuing studies of the various agency procedures, it will be able to make constructive suggestions for improvement which the agencies will be free to adopt or reject. Perhaps more important, the analysis of problems by statistical and other methods will provide the basis from which administrators and the bar can devise improvements in procedure. It is contemplated that such an office will do much of its work upon a mutually cooperative basis and in conjunction with advisory groups representing the agencies and the bar. Clearly, it can accomplish little without their understanding and support.

The recommendation does not contemplate the transfer to an Office of Administrative Procedure of the functions with respect to hearing examiners which the Civil Service Commission now performs under Section 11 of the Administrative Procedure Act.

Under these circumstances, the Conference recommendation contemplates an Office with a very small

organization limited to research and advisory functions. It suggests that the office be headed by a single Director and that it be located in the Department of Justice. It thus differs from the recommendation of the Attorney General's Committee which would have created such an office as an independent agency headed by a three-man board—presumably reflecting the fact that the Committee would have vested in such an office broad powers over the appointment, compensation and tenure of hearing examiners. While 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. Since its activities will be entirely legal in nature, the Attorney General, as the chief law officer of the Government, is a logical officer to assume responsibility for its support and effectiveness.

COMMENT ON RECOMMENDATION A. 2.

Statute Authorizing the Filing of an Abbreviated Record

This recommendation has as its purpose reducing the labor and expense of judicial review of administrative orders and reducing the bulk of the record in such review proceedings, by means of a proposed statute providing for the filing of less than the entire record before the agency with the court on such review. Although most if not all the courts of appeals now have rules permitting the filing of less than the entire record, few existing statutory provisions expressly authorize the filing with the court of less than the entire record. One such statute is Section 6 of the Judicial Review Act of 1950, 5 U.S.C. 1036, which provides for the filing of "pleadings, evidence, and proceedings before the agency, or such portions thereof as such rules shall require to be included in such record, or such portions

thereof as the petitioner and the agency, with the approval of the court of appeals, shall agree upon in writing." Other statutes, although containing no express provision precluding certification of less than the entire record, do not in terms permit such procedure. Perhaps the commonest type of provision is one requiring the agency to "file with the court a transcript of the record upon which the order complained of was entered," e.g., the Natural Gas Act, 15 U.S.C. 717r(b), the Securities Act, 15 U.S.C. 77i, and Civil Aeronautics Act, 49 U.S.C. 646. Many statutes expressly require the entire record to be filed. The Federal Trade Commission Act, for example, requires the Commission to certify a "transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the Commission." 15 U.S.C. 45(c). Like provisions are contained in the National Labor Relations Act, 29 U.S.C. 160(f), and the Atomic Energy Act relating to patent proceedings, 42 U.S.C. 1811e. And see the Federal Seed Act, 7 U.S.C. 1600; Commodity Exchange Act, 7 U.S.C. 8; Packers and Stockyards Act, 7 U.S.C. 194; and the Sugar Act, 7 U.S.C. 1115(c). Accordingly, it is recommended that Congress enact a statute which would permit the filing of an abbreviated or shortened record on review of administrative orders where such is or might be presently precluded by statute. Such a proposed statute, if enacted, could conveniently constitute a new section of Title 28 of the United States Code.

The opinions of the various agencies of the federal government were sought as to the desirability of such a statutory provision. Although a variety of opinion was expressed, it may be said that the response to the general idea was favorable, subject to the qualification that in the usual case the procedure should not be compulsory, but should be such as to permit the parties to determine whether to employ it. A considerable number of the de-

partments or agencies of the federal government reporting having used such a mode of procedure state that it has proved useful in reducing the size of the record, and to a lesser extent, in reducing costs.

The salient features of this recommendation may be summarized briefly. The objective of the recommended legislation is sought to be attained by means of a statute of general applicability, as in the case of the Administrative Procedure Act, without the necessity for amending each of the some thirty-five existing statutes. This approach has the advantage of keeping changes in existing statutes to a minimum, a most desirable consideration in view of the fairly limited purpose of the statute. The recommended statute would apply only to proceedings brought in the Courts of Appeals and thus would be inapplicable to the review or enforcement of orders in the District Court. The attempt is made to encompass all orders resulting from the wide variety of review proceedings in such courts wherein a record is required to be certified by the administrative agency to the court. Although perhaps not strictly necessary, paragraph (a) of the recommendation, giving the agency the option of filing the entire record, is designed to make it clear beyond any doubt that no abbreviation will be required where the effort and expense involved in segregating those parts not necessary to be filed from the rest of the record is disproportionate to the benefits gained by a shortened record, or where, for any other reason, the agency considers it undesirable to abbreviate the record.

It is considered that, under paragraph (a) (i), in the ordinary case the decision whether to file a shortened record and if so, the content of the record, should rest with the parties, rather than the court. When the parties stipulate to a shortened record, no order by the court

would be necessary. However, provision is made in alternative (a) (ii) for the court on motion of any party to designate the parts of the record to be filed. This provision is designed principally to insure that no single party, possibly with little interest in the proceeding, shall be in a position to thwart the efforts of the real parties in interest to reduce the size of the record. Also this alternative gives the court power on its own motion after prehearing conference to designate the parts of the record to be filed. Although initially, the decision to abbreviate the record should rest with the parties, it is considered that the courts should have the power in an exceptional case to designate by order those parts of the record to be filed; and such action is scarcely feasible except after a prehearing conference.

By paragraph (a) (iii), the stipulation or order may provide that in an appropriate case no record need be filed. Presumably, in most cases at least the order complained of would be filed. Possibly in a few instances even that could be dispensed with, as in the case of a petition for a consent decree enforcing a National Labor Relations Board order. Under paragraph (a) (iv) of the recommended statute all the evidence may be included in the record. Justification for this provision may be found in the Congressional policy disclosed in a number of recent enactments such as the Taft-Hartley Act and the Administrative Procedure Act, requiring the courts in reviewing findings of fact to determine whether they are supported by substantial evidence on the record considered as a whole.

Paragraph (b) of the statute is designed to provide statutory authority for the procedure developed by the courts in this situation. See, *e.g., Columbia Oil & Gasoline Corp. v. Securities and Exchange Commission, 134 F. 2d 265 (C.A. 3, 1943).*

Paragraph (c) of the statute is designed to make it clear that the agencies have the power in an appropriate case to transmit the original papers in their files rather than making and certifying copies of them. Also, it is considered that this provision will clear up any ambiguity arising from the fact that some of the existing statutes require certification of the "transcript of the record," rather than the "record." Although this procedure involving filing the original papers could not be invoked in most agency cases, since there is generally only a single copy of the official files which corresponds to the original papers in the District Courts, and these official files are generally required to be retained at the agency, there may be some proceedings in some agencies in which the procedure would prove useful.

The recommendation sets forth what are considered to be the essential minimum requirements of such a statute. However, the recommendation is not intended to constitute an exclusive prescription of the provisions of such a statute, nor is it intended to preclude the addition of other provisions, if such are determined to be desirable or necessary. In this connection, attention called to the fact that the Committee on Revision of the Laws of the Judicial Conference of the United States submitted a report dated April 8, 1954, on a draft statute to authorize an abbreviated record on the review of agency orders, which statute was approved by the Judicial Conference at its April 1954 session. Within the scope of the problem before the President's Conference, its recommendation is substantially in accord with that of the Judicial Conference proposed statute. Both recommendations have the same basic purpose; and both would affect the agency procedures prescribed in substantially the same statutes.

COMMENT ON RECOMMENDATION B. 1.

Exclusion of Evidence

This Conference concurs in the views expressed by the Judicial Conference when, by adopting the Report of its Advisory Committee on Administrative Procedure on September 24–26, 1951, it stated (on p. 5 of the Report) as follows:

> "* * * The tendency on the part of hearing officers to excessive leniency (in admitting irrelevant and immaterial evidence) has been due principally to the attitude of the regulatory agencies themselves and of the Federal courts, which have criticized hearing officers for excluding evidence of doubtful relevancy in unwarrantedly sweeping terms. For example, in *Donnely Garment Co. v. National Labor Relations Board, 123 F. 2d 215 (1941,) the court stated:*
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> > '. . . we expressed the opinion that the practice which should be followed by a trial examiner in taking evidence and ruling upon objections to evidence is that which applies to special masters in equity proceedings, and "that the record should contain all evidence offered by any party in interest, except such as is palpably incompetent. . ." . . . If the record on review contains not only all evidence which was clearly admissible, but also all evidence of doubtful admissibility, the court which is called upon to review the case can usually make an end of it, whereas if evidence was excluded which that court regards as having been admissible, a new trial or rehearing cannot be avoided.'

The resulting reaction on the part of hearing officers has been an unwarranted degree of liberality in the reception of evidence. In fact, many courts, agencies,

hearing officers, and members of the Bar, both government and private, have had a fixed attitude against any restriction of evidence in administrative proceedings. That attitude is a prime cause of the conditions (excessive delay and expense and unduly voluminous records) here considered. Without a reversal of that attitude on the part of all concerned, no remedial steps can be effective * * *."

In the course of this Conference's work, there has been found confirmation of the marked influence of judicial criticism upon the attitude of hearing officers in admitting evidence. It is believed that much could be accomplished to counteract excessive leniency by the expression of occasional words of encouragement in court opinions directed to the hearing officer who has correctly excluded evidence.

COMMENT ON RECOMMENDATION B. 2.

Certification and Filing of an Abbreviated Record

Section (a) of the rule would achieve a desirable uniformity in all circuits. Section (b) of the rule expresses the principal objective of the recommendation. Section (c) would encourage the parties to keep their initial certification to a minimum, as well as make provision for inadvertent omission.

It is believed that the necessity for and desirability of a rule embodying the procedure outlined in the recommendation is fully confirmed by the fact that the Judicial Conference of the United States, reaching independently the same objective sought to be attained by this recommendation, has recommended such a rule, and a majority of the Courts of Appeals of the United States have already adopted rules with like provisions. Such courts in-

clude the Court of Appeals for the District of Columbia Circuit, Rule 38(g); First Circuit, Rule 16(7); Third Circuit, Rule 18(7); Fourth Circuit, Rule 27(7); Seventh Circuit, Rule 28(7); Eighth Circuit, Rule 27; and Tenth Circuit, Rule 34(7).

A rather full survey of the present practices of the various administrative agencies likewise confirms the necessity and desirability of the recommended procedure. The survey disclosed that, particularly with respect to the large regulatory agencies such as the Federal Power Commission and Federal Communications Commission, with functions resulting in voluminous records and numerous exhibits, the requirement of certification and filing of the entire record often imposes serious burdens of time, effort and expense. Actual experience on the part of such agencies has demonstrated that filing a shortened record with the court can save considerable time and expense in appropriate cases.

Certain agencies, however, report that in connection with their distinctive type of proceedings, the benefits of the procedure in their opinion are outweighed by possible disadvantages. In light of this fact, the recommendation makes the use of the procedure permissive with the petitioner and agency involved, it being contemplated that its use over the objection of any such party would be ordered by the court in the exercise of its discretion only in relatively exceptional circumstances.

COMMENT ON RECOMMENDATION B. 3.

Filing of Briefs Prior to Printing of Record

Necessity for the recommended procedure arises from the generally recognized tendency of the parties as a matter of caution to designate matter not essential to the

determination of the case on appeal, particularly under court rules requiring filing of an appendix prior to filing of briefs. Consequently, the printed record may be unnecessarily enlarged, with resulting unnecessary costs to the parties. The procedure set forth in this recommendation is designed to enable the parties to write their briefs and thereafter designate for printing only those matters referred to or relied on therein, instead of designating in advance all parts of the record to which they might possibly have occasion to refer. One Federal agency, the Federal Power Commission, has used the procedure in about a dozen cases, and has found its use to be productive of substantial savings of effort, expense and volume of record. The Judicial Conference of the United States had adopted a resolution approving the procedure.

By Section (a), use of the procedure would be permissive with the petitioner or petitioners and the respondent agency, it being contemplated that its use over the objection of any such party would be ordered by the court in the exercise of its discretion only in relatively exceptional circumstances. By Section (f), the procedure would be alternative to existing procedures as provided by court rules. Section (b), consistent with the general rule that an intervener takes the case as he finds it, binds all parties to the use of the procedure when petitioner or petitioners and respondent agency stipulate to its use or the court orders its use. Section (c) prescribes responsibility for printing the joint printed appendix, leaving unchanged however existing rules and practice with respect to assessing costs. Section (e) prescribes the time for filing briefs and joint printed appendix, a necessary provision in light of the alternative character of the procedure, and desirable also to achieve uniformity.

Section (d), although referring to the mechanics in the use of the procedure, deserves some comment. Experience

in the use of the recommended procedure has demonstrated that the following serves as an efficient and convenient method of citing to the transcript, and paging the joint appendix. The parties in their briefs would cite to the pages of the transcript of record as certified to the court (such transcript pages having been consecutively numbered in the upper right-hand corner of each page of every document contained therein by the agency certifying such record to the court). The joint appendix would be printed with the page number of the record as certified to the court in bold-face type where each new record page begins on the printed page of the joint appendix, and with running heads in bold-face type at the outer top corner of each page of the joint printed appendix, indicating the record pages appearing on that printed page of the joint appendix. In addition, the usual consecutive pagination of the printed joint appendix would be carried in the center of the page in modern (i. e., light-face) type, at the bottom of each printed joint appendix page.

It is believed, on the basis of actual experience in the use of the recommended procedure involving the printing of a joint appendix, reference in the briefs to the page number of the transcript as filed with the court, and filing of the joint printed appendix after all the briefs have been filed, that substantial savings of effort and expense can be achieved in many cases.

COMMENT ON RECOMMENDATION C. 1.

Bureau of Hearing Examiner Administration

At present the administration of, and responsibility for, the hearing officer program is shared by three Bureaus of the Civil Service Commission. This has led to a division of responsibility and delays which should be corrected.

Recommendation C. 1. has as an object the centralization of all of the work and responsibility in connection with the hearing examiner program within a single new Bureau of the Commission.

One of the criticisms of the past administration of the Commission was found to be that hearing officers, usually lawyers, were being selected, in large part, by non-lawyers. Many persons believed that this weakened the professional competence and attitude necessary for the full success of the program. The Conference expects that Recommendation C. 1. (a), by including at the head of the new Bureau two lawyers well versed in federal administrative adjudication, will remove any ground of criticism along this line. It was also recognized that the administration of a career-merit program including job classification and ranking of individuals requires a professional approach beyond the experience of a lawyer. The Conference therefore recommended that at least two persons at the head of the Bureau be persons with a broad gauge view in these respects.

(b) is self explanatory

In regard to the matters covered by Recommendation C. 1. the Conference had before it for consideration an alternative proposal. That alternative was to establish, by statute, an independent Office of Administrative Procedure and to lodge in that Office all functions relating to the recruitment and qualification of federal hearing officers. Many members and delegates of the Conference favored that approach.

In considering the recommendation that was adopted as well as the alternative proposal the members of the Conference realized that all matters relating to the hearing officer program, i.e. selection and appointment, assign-

ment and rotation, classification and compensation, tenure and removal, were important. It was also clear that these matters had a significant effect in acquiring and maintaining a corps of competent, objective and independent men who would be responsible employees of the several agencies in which they serve.

A basic choice before the Conference was whether to improve the present administration under Section 11 of the Administrative Procedure Act or to start a new administration under a new statute. This choice was determined to a great extent by one's evaluation of the present situation and the past record. The majority of the Conference regarded the present corps of federal hearing officers as generally competent, and the present administration of the hearing officer program under Section 11 of the APA as essentially sound. After considerable discussion and debate, the Conference, therefore, adopted the course of retaining and improving the present program rather than recommending a new program under a new statute.

COMMENT ON RECOMMENDATION C. 2.

Qualification Standards of Hearing Examiners

The present qualification standards for hearing officers are high. Some persons suggest that the standards could be even higher, but specific, concrete proposals in this direction are limited. Any attempt to work out higher standards is a rather detailed and technical task. The Conference concluded that the agency in charge of administration with its day to day experience must do the writing and applying of any further qualification standards, and therefore, the Conference merely established the principle that any changes in the qualification stand-

ards must maintain or raise the requirements applied in selecting federal hearing officers.

COMMENT ON RECOMMENDATION C. 3.

Recruitment of Hearing Examiners

The Conference found that the principle of open, nation-wide recruitment as practiced in the past was desirable. Nearly all suggestions on methods of recruitment were similar to, or identical with, the methods that are already employed by the Commission.

On the other hand, the Conference found that the criticism that the register had been closed too long was valid. In many instances, those on the register were severely handicapped in that the experience that they had acquired during the five years that the register was closed was not reflected in their ratings. Also many additional persons had become qualified and available over that period of time.

It was also found that in some instances the present regulations of the Commission permitted appointments of Federal employees who were not on the register and who were not serving as hearing examiners. It was concluded that this type of appointment resulted in an "inbreeding" of federal employees into the hearing examiner corps that was unfair to incumbents and to candidates on the register. Recommendation C. 3., therefore, removes the basis for two of the valid criticisms of the past administration by the Commission, and at the same time strengthens the career-merit principle of federal employment as it is applied to hearing examiners.

In regard to the matters covered by Recommendation C. 3. the Conference had before it for consideration an alternative proposal. That alternative was for the proposed Office of Administrative Procedure to prepare and

maintain an unranked list of qualified candidates, which would be submitted to the agencies, who would make a selection, and that the selectee upon approval by the Office of Administrative Procedure would be nominated by that Office for appointment by the President. Several members and delegates of the Conference favored that approach. After considerable discussion and debate many members and delegates of the Conference concluded that several elements of this alternative, including an unranked list and Presidential appointment, would not forward federal employment on a career-merit basis, and hence the Conference adopted Recommendation C. 3. rather than the alternative.

COMMENT ON RECOMMENDATION C. 4.

Career-Merit System

The recommendation that the Civil Service Commission retain the career-merit system for hearing examiners is not a recommendation of any change. After a full discussion of all aspects of the problems relating to the status of federal hearing officers, the Conference approved this recommendation as a reaffirmation of faith in a fundamental principle of federal employment.

COMMENT ON RECOMMENDATION C. 5.

Salary Grades of Hearing Examiners

This recommendation lays down general standards for the Commission to follow in establishing a single or multiple grades of hearing examiners in each agency. The first standard is the nature and scope of the agency's work. The second is the desirability of removing, as far as possible, the frictions of promotions. The third is the recognition of the possibility of attracting young able men

for the easier work and increasing their grade as they mature. All of these standards have been utilized in the past.

In recent years there has been a definite trend toward fewer grades and most of the agencies now have but a single grade of hearing examiners. Many feel that this trend is proper, and several of the members and delegates of the Conference supported the proposal that a single salary grade be established for the hearing officers in each agency. One of the strongest points of these advocates was that the stresses and strains of promotions had been the largest single problem in the past administration of the hearing officer program and that the point had been reached where more was to be gained than lost by having a single grade in each agency.

Many members and delegates held the view that it was not feasible at the present time to have but a single grade in several of the agencies. Recommendation C. 5. reflects the view of the majority of the Conference that the time is not ripe for a rigid rule and that the Commission should continue to balance the three standards set forth in establishing one or more grades of hearing examiners in each agency.

COMMENT ON RECOMMENDATION C. 6.

Compensation of Hearing Examiners

This recommendation provides that all hearing examiners throughout government should be paid between $8,300, the minimum of GS–13, and $11,800, the maximum of GS–15. Most persons believe that hearing officers should, at least ideally, be paid at a higher dollar level. The alternative proposal before the Conference was that the level of compensation should be raised to a

range between $12,000 and $14,000. Under present law this would require a statutory change. Many of those who were sympathetic with the dollar amount suggested believed that it was more important to keep the salary position of the hearing officer geared to the salary schedules of the Classification Act applicable generally to those in the government service.

Recommendation C. 6 (a) seems self-explanatory in providing that the classification specifications be brought up to date and expressed in simpler and less technical language. Recommendation C. 6 (b) merely provides for deletion of certain language regarding length of records which has given a false impression in many quarters.

COMMENT ON RECOMMENDATION C. 7.

Cost of Transcripts

A major factor in the production of transcripts, by whatever method, is personnel. The salaries of reporters in the administrative branch of the Federal Government are fixed by the Civil Service classification and should be at rates sufficient to enable the Government to attract and retain qualified individuals. The development of newer recording and transcribing techniques calls also for suitable recognition of the skills employed in monitoring the operation of machines, the handling of exhibits, and in supervising the final production of the transcript.

The establishment by the Commission of a new series entitled the "Closed Microphone Reporter Series" is of considerable significance. It appears that comparatively short periods of training in this new technique, for candidates with adequate basic qualifications, may be the key to a phenomenal expansion of personnel qualified to record proceedings with speed and accuracy. The obvious advantage to the Government will be jeopardized unless

the qualifications of intelligence, basic education, alertness, and ability to carry responsibility under pressure are adequately reflected in the classifications established for positions in which such skills are utilized. Although experimentation with recording devices in connection with formal hearings in the civilian agencies of the Government has been limited, there is some evidence that satisfactory experience has been checked by difficulty in obtaining for Government personnel classifications commensurate with the responsibilities entailed.

One obstacle to the employment of reporters by the Government itself has been the irregular and unpredictable load of administrative hearing procedures in many agencies. The problem is comparable to that which exists with respect to hearing examiners. Section 11 of the Administrative Procedure Act now provides that agencies occasionally or temporarily insufficiently staffed may utilize hearing examiners selected by the Civil Service Commission from and with the consent of other agencies. The Committee on the Judiciary of the House, in its exposition of the Administrative Procedure Act at the time of its enactment, stated that this provision was intended to permit agencies who do not need full-time employees to borrow them as needed as well as to aid those agencies which may become temporarily or occasionally insufficiently staffed. Some agencies already place great stress on the full-time utilization of their reporters within the agency. Extension of the same principle on a systematic interagency basis would tend to reduce transcript costs where Government employees are utilized.

COMMENT ON RECOMMENDATION D. 1.

Cost of Transcripts

The problem of transcripts is primarily one of management, involving the assembly of personnel and equipment at points and times of need. In the administrative branch of the Government it has, however, received little consideration from an overall management standpoint. The General Services Administration has entered into regional contracts of a stand-by type which are available to the agencies as needed and which, with further analysis of agency needs, might be made more effective. The Bureau of the Budget is concerned with management improvement generally and has dealt specifically with the matter of charges made by Government agencies for special services rendered to members of the public, including charges for "copying".

There has been no central point, however, for consideration of the problem of cost of transcripts of administrative proceedings as such. The agencies have coped with it individually and have even lacked information as to their own total needs, including for this purpose the needs of the parties to the proceedings. This is an area in which an Office of Administrative Procedure can be expected to play a role of leadership in bringing to bear on the problem the concerted efforts of those agencies which are concerned with the management functions of Government. The Civil Service Commission as well as the General Services Administration and the Bureau of the Budget are included in this group.

COMMENT ON RECOMMENDATION E. 1.

Elimination of Unnecessary Delay, Expense and Volume of Records

This Recommendation is the underlying philosophical declaration by the Conference. It speaks only of delay, expense, etc., which are unnecessary. It speaks in terms of the public interest—not the interest of parties, governmental or private. It presents a reversal of a growing attitude toward these long proceedings. It emphasizes the public importance of efficiency in the administrative process. Many procedural consequences flow from this basic concept.

COMMENT ON RECOMMENDATION E. 2.

Study of Procedure

This is a declaration recognizing the basic nature of the Conference. It is a conference of the agencies. It is for the purposes of exchange of information and formulation by mutual effort of recommendations. The responsibility for improvement of procedure rests upon the agencies, exactly where it has always rested. The combined call of the agencies is for each agency to examine its own situation. The Recommendation reflects the opinion of the Conference upon the course of good government in those respects.

COMMENT ON RECOMMENDATION E. 3.

Removal of Hearing Examiners

The purpose of this recommendation is to exhort the agencies when, after investigation, charges appear to be warranted, to bring a removal proceeding before the Civil Service Commission as provided by Section 11 of the APA. While most persons believe that the hearing

examiner corps, by the large, is composed of competent men, it is also thought that there may very well be a very small number of hearing examiners who are not fit to hold these positions of importance and responsibility. Yet not one formal proceeding has ever been initiated to remove a hearing officer under Section 11. A fair, judicious type of procedure is available and it should be employed where appropriate.

COMMENT ON RECOMMENDATION E. 4.

Status of Agency Counsel

The suggested rule referred to in Recommendation E. 4. resulted from a study of the status of agency counsel.

This study indicated that, in many instances, there was a lack of understanding as to the status and authority of agency counsel. It was found that in some agencies many days of hearing were consumed in the proof of matters about which there was no dispute merely because agency counsel felt that he had no power to make a stipulation with respect thereto.

It therefore appears that a rule clearly defining the status and authority of agency counsel will be helpful to the agency, its counsel and members of the Bar practicing before said agency.

COMMENT ON RECOMMENDATIONS E. 5. and E. 6.

Uniformity in Rules

Uniform Rules on Certain Subjects

These recommendations reflect the conclusion that it is feasible and desirable to formulate uniform rules for many aspects of Federal administrative procedure. With-

out being intended to preclude immediate revisory action in that direction by individual agencies, they urge that the work of formulating such rules be undertaken by the agencies and the bar, collaborating through an Office of Administrative Procedure.

It is obvious that not all of the business of government can be or should be formalized and channeled in the same procedure. The recommendations of the Conference relate primarily to the development of greater uniformity in the conduct of formal administrative procedures which are already governed by Sections 7 and 8 of the Administrative Procedure Act.

The Administrative Procedure Act and the principles of a few leading judicial decisions provide a certain amount of general uniformity in Federal administrative procedures. However, many aspects of procedure are governed by the varying provisions of regulatory statutes and agency rules. While these provisions reflect considerable copying of earlier statutes and rules, there remains a mass of diversity which reflects not only the needs of particular regulatory programs but also the personal preferences of draftsmen and the varying procedural fashions of different periods of time. Moreover, since 1946, Congress has tended to prescribe for particular agencies procedures which vary substantially from the Administrative Procedure Act.

A considerable step toward uniformity can be taken on some aspects of procedure by the elimination of mere language variations in statutes and rules. Again, some variations which appear significant on their face have been unimportant in practice and, therefore, could be eliminated in the interest of uniformity. Other differences in procedural provisions relate only to the detail in which

particular aspects of procedure are prescribed, and could be compromised without difficulty.

The possibilities of formulating uniform rules will be greatly enhanced if it is recognized that on many aspects of procedure the rules themselves must be flexible—whether they are prescribed for only one agency or for all. Present statutes and rules permit considerable shaping of procedures to fit the needs of particular cases or classes of cases. Uniform rules should preserve this flexibility for various aspects of procedure, as do the Federal Rules of Civil Procedure at many crucial points. Where uniform rules are necessarily general, it might be wise to consider the issuance by particular agencies of supplemental rules, analogous to the local rules authorized by the Rules of Civil Procedure.

Recommendation E. 6. includes the text of nine illustrative rules in support of the general conclusion that it is feasible to have uniform rules for many aspects of administrative procedure. The texts of these illustrative rules were neither approved nor disapproved by the Conference, which merely concluded that it would be feasible to formulate uniform rules on these subjects.

The full extent to which it is feasible and desirable to formulate uniform rules can be determined only by further study, professional discussion, and, best of all, some actual experimentation. This task of initial formulation, together with that of continued study and amendment in the light of experience, should be undertaken by a continuing body, such as the Office of Administrative Procedure already recommended by the Conference, which will act as the nucleus of a cooperative effort of the agencies and the bar.

COMMENT ON RECOMMENDATION E. 7.

Definition of Issues Before Hearing

Any hearing where the subject matter is not well defined is bound to be an inefficient hearing. If the issues are not clear to the hearing officer and to the parties, the hearing must necessarily be time-consuming and expensive and result in a cluttered record. There can be, therefore, no quarrel with the basic proposition that the subject matter of the hearing should be clearly defined as soon as possible.

There are several types of administrative proceedings, and the process of establishing the issues with precision must be tailored to each type of proceeding. In those proceedings which are initiated by a complaint and answer, the allegations and the denials are sometimes broad and vague. Similarly, in many proceedings involving, for example, the granting of licenses, the applications therefor and the petitions to intervene are indefinite and uncertain. The agencies, therefore, should require as much particularity as is practical in complaints and answers, applications, and petitions. Then when the proceeding goes to hearing, the hearing officer and the parties will be in a better position to conduct the proceeding in an orderly, on-course fashion.

In some proceedings where there is only one interested party in addition to the agency, the hearing is likely to commence with no definite indication whatsoever of the subject matter of the hearing. Many of these cases are applications for permission to engage in some form of business activity. The statutory standards for granting such applications are usually very broad public interest ones. If a hearing is called upon any given application, however, it is almost certain that at that time there are

only a certain limited number of matters in question. The hearing officer would be greatly aided if these questions are delineated in the order setting the hearing. Lacking such a specification of issues, it inevitably follows that the hearing officer is not in a position to rule as intelligently as he should and to conduct the further course of the hearing with the expedition that everyone seeks.

In summary, the issues should be sharpened by requiring particularity in the papers that establish the position of the parties, such as complaints, answers, applications, and petitions. In addition, when an agency decides upon a hearing in a single-party case, it is desirable that the order specify the matters to be heard. Caution should be taken against any attempt to define or select issues by any *in camera* process. After the issues are established by the papers of record, the next appropriate time to sharpen the issues is in a prehearing conference with all parties present.

COMMENT ON RECOMMENDATION E. 8.

Prehearing and Other Conferences

The procedure of prehearing conferences has been initiated and developed by several agencies. It is felt that a more general development by all agencies of prehearing conferences, together with conferences during the course of hearings, would result not only in simplification, clarification and possible disposition of many of the issues, but would also aid in the shortening of the record in the trial of the remaining issues.

Agencies' rules vary widely on the matter of prehearing conferences. In some agencies such conferences are mandatory in certain cases. In other agencies, in the absence

of request of the parties, conferences apparently can only be called on motion of the agency. In still others, they apparently can be called only at the request of the parties. All agencies, by rule or otherwise, should urge hearing officers to encourage, at every opportunity, round-table meetings of the parties prior to the commencement of hearings, with the view of culling out those issues upon which there is no real controversy, crystalizing, sorting, simplifying and analyzing the others, and defining so far as possible the evidence to be introduced upon each issue and upon each point under each issue.

It is believed that prehearing conferences could be profitably held in most cases. Frank and informal discussion many times dissipates a reticence and reluctance to agree which exist for no good reason other than the absence of a qualified, disinterested mediator. This service the hearing officer can well perform, thereby not only saving the parties' time and money but reducing his own work-load to a marked degree.

However, such conferences should be held only after thorough preparation by all concerned, such preparation to include compilation of documents supporting the case-in-chief, which documents should be exchanged during the conference. Another significent value to be gained by holding prehearing conferences is the formulation of a plan for the efficient conduct of the hearing. A settlement of such matters as the order of presentation of proof, whether evidence shall be introduced in written form or by oral testimony, and other mechanical matters many times pays well for the efforts expended.

In addition, a more generous use of conferences during the course of hearing would aid in the further narrowing of issues and would stimulate stipulations and agreements between the parties, thereby further shortening records.

COMMENT ON RECOMMENDATION E. 9.

Prehearing Conference Rule

The rule is designed to curtail lengthy or protracted hearings by providing a means for compelling parties to give serious consideration, prior to the taking of testimony, to the simplification of issues and the elimination of merely formal proof and cumulative testimony.

This rule is patterned after Rule 16 of the Federal Rules of Civil Procedure with the necessary changes to adapt it to administrative proceedings. Therefore, the body of precedents established in judicial proceedings under Rule 16 are available as a basis of interpretation of the intent, purpose and scope of this rule.

Although under the rule the calling of a pre-hearing conference is discretionary with the presiding officer or the agency, attendance at the conference is mandatory on the parties or their representatives. The presiding officer may dispense with the hearing summarily in the event of a willful disregard of a notice to appear.

The rule is to be construed as authorizing the presiding officer, irrespective of consent of the parties, to enter an order at the conclusion of the pre-hearing conference with respect to any matter which he is authorized to rule upon during the course of the proceeding, including limiting the issues, stipulations and documents to be admitted and the number of expert witnesses. This order, unless modified for good cause, shall control the proceedings.

In short, the pre-hearing conference is not an empty gesture nor one limited by the will of the contesting parties. It is designed to result in an order with force and effect. Its objective is to reduce needless delays, expense and volume of record.

COMMENT ON RECOMMENDATION E. 10.

Submission of Documentary Evidence in Advance

Recommendation E. 10. has for its essential purpose the improvement of procedures in the handling of documentary evidence in administrative proceedings, particularly those in which there is normally a substantial volume of such evidence. The requirement of advance submission of such evidence will, it is believed, encourage to some extent a reduction in the actual quantity of material submitted for the record in the proceeding. However, greater benefits will be realized from the opportunity thus afforded the other parties to examine the evidence in advance, to organize their cross-examination with respect thereto, and to prepare appropriate rebuttal evidence. Thus this procedure would contribute substantially to a more orderly proceeding, would enable parties to limit cross-examination to material points, thus reducing the size of the transcript and the time consumed in hearing, and would eliminate the necessity of substantial postponements of the hearing in order to afford a reasonable opportunity to examine written material offered by another party. Parties could, in other words, be required to come to the hearing fully prepared to proceed with cross-examination and the presentation of rebuttal evidence without interruption or delay in the taking of evidence. In addition, even if substantial reduction in the volume of material offered and related cross-examination is not realized, the resulting record will reflect a more effective and intelligent exploration of the factual issues, and the evidence will be in a form better organized for use by counsel, the hearing examiner and the agency itself.

As used in this recommendation, the term "documentary evidence" is intended to encompass all evidence

which, pursuant to the rules or established practices of the agency, will be submitted in written form during the proceeding. It includes not only documents which, having come into existence for purposes not related to the proceeding, have become relevant and material to the issues therein, but also any material of whatever nature prepared in exhibit form for submission in writing during the taking of evidence. It includes any testimony which the agency requires be reduced to writing. The recommendation does not, however, propose any change in the requirements of the agency as to what is to be submitted in written form in its proceedings.

The recommendation proposes that agencies having classes of proceedings in which there is customarily a substantial volume of written evidence adopt the requirement of advance submission of such evidence wherever practicable. It is intended that each agency should examine its various types of proceedings, determine those in which it is feasible to impose such a requirement, and provide for its application in such proceedings with a view to giving it the widest possible application consistent with the protection of the rights of parties and of the public interest.

It was thought that the recommended policy would be uniformly applicable in licensing and rate-making proceedings, and that there would be other classes of proceedings to which such a requirement might be applied. It was recognized, however, that there were other classes of cases, especially certain types of adjudicatory proceedings, in which other factors might be present which would make the use of this rule impractical. In particular, a problem might well be presented in cases instituted by a complaint in which the disclosure of the evidence intended to be relied upon either by the complainant or by the

respondent might in some respects unduly jeopardize his case. There may be other situations in which there are overriding factors. Each agency will have to make its determination as to the classes of proceedings to which the requirement should be applied in light of all the circumstances governing its proceedings.

In this connection, it may be noted that this proposed requirement was deemed consistent with the trend toward the elimination of any element of surprise in many classes of proceedings. Such elimination was deemed entirely consistent with administrative proceedings which preserve due process and at the same time afford a better basis for sound decision.

Paragraph (b) of the recommendation provides the necessary sanction to assure observance of the requirement by all parties. Not only will the requirement fail of its purposes if not uniformly observed, but it might work inequities if some parties observed it while others did not. However, it is recognized that undue rigidity in application of the requirement might also on occasion defeat the ends of justice where there was good cause for failure to submit a given piece of documentary evidence in advance. In this context good cause was deemed to include situations in which the party had no reason to anticipate the need for presenting the documents as part of his own case. For example, good cause would exist in a situation where the only purpose for which a document was to be employed was to impeach a witness. The administration of this sanction is, of course, in substantial part in the discretion of the hearing examiner who may be expected to exercise his discretionary authority in such manner as to achieve substantial compliance with the requirement without working an injustice where circumstances warrant a departure.

Paragraph (c) of the recommendation provides a means whereby a party offering documents in evidence will be relieved of the necessity of producing a witness to establish its authenticity in those cases in which opposing parties have no intention of challenging such authenticity. Authenticity is herein used in its usual sense, namely, that the document is what it purports on its face to be. The admission of authenticity pursuant to this rule is in no wise intended to have any bearing on the parties' position as to the relevance or materiality of the document. Provision is made whereby a party may be relieved of his admission of authenticity if by reason of later events, which could not reasonably have been anticipated, it appears that there are good grounds for challenging such authenticity.

COMMENT ON RECOMMENDATION E. 11.

Excerpts from Documentary Evidence

This recommendation was designed to impose on a party intending to offer portions of a document in evidence the burden of preparing copies of the portion intended to be relied on and of distributing them to the other parties accompanied by a statement of the purpose for which the excerpt would be offered. This requirement would be applicable both in situations in which documents were submitted in advance and those in which documentary material was offered for the first time during the hearing. Only the excerpts so prepared would be received in the record, thus eliminating the practice utilized in many instances of offering the entire document in evidence, for incorporation by reference. It is believed that this procedure will require counsel to determine in advance of the offer of evidence exactly which portions of a document are deemed relevant and material with a correspond-

ing reduction in or elimination of the offering of irrelevant or immaterial portions thereof. It will also avoid problems inherent in incorporating the material in the record by reference. Thus, this requirement will contribute to shortening the record and to more orderly procedures, and will have the further benefit of making the relevant materials readily available to the examiner, the agency, and in the event of judicial review, to the court.

This requirement is subject to the safeguard, of course, that the whole document from which the excerpt is taken must be made available at a reasonable time and place in accordance with established practice for such use as may be properly made of it by opposing counsel, which presumably would include preparation of additional excerpts for presentation in evidence and for use in connection with cross-examination.

COMMENT ON RECOMMENDATION E. 12.

Expert or Opinion Testimony

Recommendation E. 12. is an extension of recommendation E. 10. which provides for the submission of documentary evidence in advance of hearing and which is intended to achieve the ends of eliminating delays and shortening the record in administrative proceedings by affording the parties an opportunity to examine the evidence in advance, to organize their cross-examination with respect thereto, and to prepare appropriate rebuttal evidence. Recommendation E. 12. reflects the belief that expert or opinion testimony and testimony based upon economic or statistical data comprise significant areas in which testimony normally lends itself to written form, and hence advance submission, and that the requirement of advance submission should therefore be made applicable to such areas to the greatest extent practicable.

Requiring the advance submission of such testimony in written form may not, however, be permissible under section 7(c) of the Administrative Procedure Act in hearings not involving rule making, determining claims for money or benefits, or applications for initial licenses, and it may not be feasible for all agencies or for all classes of proceedings, but it is intended that each agency should consider adopting the requirement wherever it does not conflict with the APA and to the fullest extent practicable. In recognition of the possible limitation set by the Administrative Procedure Act, the recommendation proposes that the agencies adopt a mandatory rule where both practicable and permissible, and that they make every effort to secure advance written submission by voluntary agreement in those classes of cases in which a firm requirement is not permissible. As in the case of other documentary evidence, there may be classes of cases, such as those instituted by a complaint, in which other factors, such as the possibility of undue jeopardy to either parties' case by disclosure of evidence, may make the use of the recommendation impractical, but it is recommended that in the absence of overriding factors the recommended procedures be given the widest possible application.

Paragraph (d) provides a sanction for failure to observe the requirement of advance submission where a requirement therefor has been established. A sanction of this nature is deemed necessary so that each party to a proceeding will feel the need to comply and will not be able to obtain an unfair advantage by the submission of the written evidence of another party without disclosing his own. The sanction, as stated, vests discretion in the agency or the hearing officer to assure substantial compliance with the rule without unfairly penalizing any party who can make a clear showing of good cause for his failure to conform with the rule of advance submission.

Closely related are the problems of the often large number of witnesses who are to give expert or opinion testimony, and the qualifying of such witnesses. The recommendation proposes that efforts be made to have the parties[1] limit the number of such witnesses, preferably by selecting one witness or a limited number of witnesses to give opinion or expert testimony for all parties or, if such agreements cannot be reached, to have groups of parties who believe they have interests in common select one witness or a limited number of witnesses to give such testimony concerning the common interests of members of such groups. The recommendation that all parties be given timely opportunity by advance submission of a statement of qualifications of each expert or opinion witness to investigate the qualifications of their opposing parties' witnesses is also believed to be in the interest of orderly proceedings and shorter records, and would eliminate unnecessary questioning at the hearings where attempts to reach agreement on common witnesses have been ineffective. Further, requiring the listing of such witnesses in advance of the hearing may tend to reduce the number of such witnesses.

Paragraph (b) of the recommendation contemplates that the testimony be reduced to written sworn statements and accepted as evidence upon formal offer subject to objections normally recognized by the agency conducting the proceeding, but not subject to challenge based upon its submission in written form rather than orally. One of the purposes of the recommendation is to avoid having repeated orally into the record testimony from the prepared statements. The presence of witnesses making such statements would, therefore, not be required except for purposes of cross-examination, and in the

[1]The term parties, throughout the recommendation, includes the Government when it is represented in the proceeding.

interest of convenience it is recommended that they need not appear unless an advance request for an opportunity to cross-examine is made.

Paragraph (c) is an attempt to achieve shorter records by discouraging the placing in the formal record of details underlying statements and exhibits, while at the same time assuring recognition of the rights of the parties by the provision that such underlying data shall, at the discretion of the hearing officer, be made available for inspection by the parties in advance of the hearing and to the extent necessary at the hearing for use in cross-examination.

COMMENT ON RECOMMENDATION E. 13.

Trial Briefs

See Comment on Recommendation E. 18.

COMMENT ON RECOMMENDATION E. 14.

Interlocutory Matters and Interlocutory Appeals

It is believed that some of the delay in agency proceedings is caused by the hearing officer's lack of authority, withheld by rule or by custom, to rule upon matters which arise during the course of hearings. Interlocutory motions to enlarge, limit or delete issues, for example, might well, in some agencies, be directed to and ruled upon by the hearing officer who has been "living with the case." The same is true with respect to motions to intervene. All agencies should explore the feasibility of formulating rules with explicitness of policy sufficient to act as clear guides to hearing officers and then delegating to such officers as broad authority as possible to rule upon interlocutory matters.

Considerable delay is also occasioned by liberality in granting interlocutory appeals from the rulings of hearing officers. Moreover, such liberality, with its overtones speaking a lack of agency confidence in the hearing officer, places him at a psychological disadvantage in making firm rulings. It is felt that the elevation in stature of the hearing officer as expressed in the Administrative Procedure Act is incompatible with a liberal practice of granting appeals from his rulings.

Occasionally, of course, there will arise matters of sufficient importance to warrant interlocutory appeals or certification to the agency by the hearing officer. For example, matters of a substantive nature such as motions which if granted could in effect dispose of the proceedings may fall within this category. In such cases, it is believed that appropriate machinery should be established to insure the expedition of agency decision. In this connection note may be taken of the practice existing at the Federal Trade Commission whereby one member, designated as the Motions Commissioner, has been assigned the duty of considering all interlocutory appeals and presenting them to the full Commission together with recommendations as to whether such appeals are justified under the rules.

COMMENT ON RECOMMENDATION E. 15.

Indexing of Records

Actual experience has clearly demonstrated *(Root Refining Co. v. Universal Oil Products Co.* and the companion case of *American Safety Table Co. v. Singer Sewing Machine Co., 169 F. 2d 514)*, that in long cases a current daily index of the record, available to all parties, permits a more orderly presentation of the case and greatly reduces delay.

Such an index makes possible the prompt preparation of accurate findings and enables counsel to prepare his argument without delay. With such an index, no extended time is needed for a study of the record.

COMMENT ON RECOMMENDATION E. 16.

Cost of Transcripts

This recommendation is based on the concept that the provision of an accurate official record is an integral part of agency responsibility in rule-making and adjudicatory proceedings. As in other aspects of administrative procedure, the Government's responsibility is not limited to its own needs but extends to those of the parties and the public. This should be reflected in the adoption by each agency of an affirmative policy to meet the basic objectives of reasonable promptness and fair cost.

(a) No legislation is recommended which would restrict the agencies as to the method of securing the record and transcripts. It is believed that the agencies should be left free, as they are under existing legislation, to choose between the contract method, the use of Government personnel, or a combination of both. The administrative problems of the various agencies differ widely. With adequate information available, the individual agencies will be in the best position to decide upon the method to use in obtaining transcripts.

When conventional reporting methods are used, better results in terms of cost and service are to be expected if there is available a practical choice between the utilization of Government personnel and contract reporting. Agencies should also be free to avail themselves of the benefits of new technological developments. Whatever method is used, reappraisal of results in terms of service and cost will be highly desirable from time to time;

hence it would be undesirable to give an entrenched position to any particular group, skill or mechanical device, or to any one method of obtaining them.

(b) This is a time of fast-moving developments in the field of electronics as applied to recording the human voice, transcribing the record, and duplicating the transcription. In such developments, it is believed, lies the best hope of ultimately reducing the actual total cost of obtaining records and making copies of transcripts available. They hold additionally the promise of greater accuracy, a factor of prime importance in administrative as well as judicial procedures when legal rights are involved.

The exploration recommended should include the feasibility of greater use of Government personnel, with proper training, in combination with new methods.

(c) This recommendation recognizes that the Government's share of the cost of transcript is an administrative cost to be provided for normally by appropriation as other such costs are provided. The Congress has fully recognized this principle in relation to the Federal courts.

When the agency furnishes to other interested parties and members of the public copies of transcripts for which a charge is made, it is recommended that the agency be permitted to credit the receipts to its own appropriation. This will generally require legislation. Such authority to credit receipts is necessary to give to the agencies a real choice between the utilization of Government personnel and the contract reporting method. For practical purposes this does not now exist for agencies which conduct hearings for which the public demand for transcripts may be substantial. This is because, if the agency itself prepares and furnishes copies of the transcripts, any collections from the charges it makes must under existing legislation

be deposited in the Treasury to the credit of miscellaneous receipts and cannot be credited to its appropriation.

(d) This recommendation is based upon a detailed analysis of the reporting contracts of the agencies for fiscal year 1954, as well as testimony from representatives of the agencies and of reporting companies. The contract reporter system is now utilized by the larger regulatory agencies to the virtual exclusion of other methods.

When there is likely to be a substantial demand for copies of the transcript, the Government under the contract system can generally obtain copies for itself either free or at reduced cost, or may even receive a bonus. This practice is necessarily at the expense of other purchasers. Moreover, when the price is tied wholly to the unpredictable demands of private parties, the speculative risk to the contractor is increased and must be reflected in over-all price.

The bonus system is believed to be particularly unjustified in principle. The official record of administrative rule-making and adjudicatory procedures is too essentially a governmental function to be awarded as a concession to the highest bidder. The practice of awards on such a basis, moreover, may well diminish the agency's concern with price and service to others.

The distribution of the cost of transcripts is only a part of the more general problem of all costs of administrative proceedings, and the principle of a fair share of a fair cost is applicable. Particularly where the Government appears in the role of a party litigant before a hearing agency, it should as a party to the proceeding pay at rates comparable to those charged to other parties, even though the hearing agency as such may receive its copy or copies free. This is the principle followed in the

Court Reporter Act of 1944. It is recognized of course that there may be proceedings the cost of which, in whole or in part, should be assessed against the parties, and there may also be proceedings in which certain parties should be furnished copies free of charge. The recommendation is not intended to preclude variations which reflect controlling over-all policy.

If, however, for any proceeding only private purchasers of transcripts are to be charged, the fixing of rates should not be left wholly to the contractors. Maximum charges should be set in the specifications for all schedules of service reasonably required.

In any case, the basis on which the award is to be made should be stated clearly. This is necessary for a proper operation of the competitive bidding system.

COMMENT ON RECOMMENDATION E. 17.

Uniform Printing Practices for Agency Rules

These recommendations were a by-product of the studies devoted to determining the feasibility and desirability of developing uniform rules of procedure for Federal administrative agencies.

When existing rules were brought together for purposes of analysis and comparison, it was apparent that some agencies were largely following their own tastes as to numbering, citation, and printing practices. Some uniformity had been attained in recent years through imitation of the official form prescribed for the Federal Register and Code of Federal Regulations. Further study disclosed that lack of similarity in form between rules separately published by the agencies and the same rules as published in the Federal Register and Code of Federal Regulations,

led to unnecessary confusion and delay in administrative proceedings.

Similarly, the practice of citing to unofficial prints, instead of uniformly citing to title and section of the Code of Federal Regulations, led to needless uncertainty at various stages of such proceedings.

Study of the procedural benefits flowing from uniform identification and uniform citation of rules, revealed an important collateral benefit attainable through the adoption of uniform printing practices. By setting type for the printing of a given rule only once, and thereafter relying on direct or photographic reproduction from that single master copy, it is possible not only to attain perfect uniformity, but also, as an important collateral, to achieve savings in printing costs ranging between 52% and 97%.

COMMENT ON RECOMMENDATIONS E. 13. and E. 18. through E. 22.

Trial Briefs	**Practice Manuals**
Attorney's Manual	**Lawyer's Institutes**
In-Service Training	**Conferences With Agency Bar**

These recommendations resulted from a study of the question as to how a more adequate preparation of cases could be accomplished and dilatory tactics eliminated or at least reduced to a minimum. It was felt that a case thoroughly prepared and in which a course of procedure was clearly charted in advance of trial would of necessity result in a better record and a shorter presentation and thereby reduce delay, expense and volume of record.

When a case has been carefully and thoroughly prepared in advance, there is usually no occasion for counsel to indulge in dilatory tactics.

IV

ROSTER

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[1]Succeeded Karl D. Loos, Solicitor.

[2]Succeeded Max Halpern, Assistant General Counsel, Litigation Division.

[3]Succeeded H. Struve Hensel, General Counsel, who succeeded Nathaniel H. Goodrich, Acting General Counsel.

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[4]Incorporating, by transfer under Reorganization Plan No. 1 of 1954, the War Claims Commission now abolished.

[5]Succeeded Mrs. Lucy Somerville Howorth, General Counsel, War Claims Commission.

[6]Succeeded Robert C. Ayers, Associate General Counsel.

[7]Succeeded Edward K. Adelsheim, Trial Attorney.

[8]Succeeded Burton C. Bovard, General Counsel.

[9]Succeeded Lawrence Davern, Deputy General Counsel, who succeeded Marshall W. Amis, General Counsel.

[10]Succeeded Mrs. Zelma D. Barrow, Investigator, Legal Staff.

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[11]Succeeded Clarence A. Davis, Solicitor.

[12]Succeeded Harry A. Sellery, Jr., Chief Counsel.

[13]Succeeded Paul Myron, Deputy Director.

[14]Succeeded Donald M. Murtha, Assistant Solicitor, who succeeded William L. Connelly, Director.

[15]Succeeded William R. Consedine, Associate Solicitor.

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[16]Succeeded Louis J. Doyle, Associate Solicitor.

[17]Succeeded Philip Nichols, Jr., General Counsel.

[18]Succeeded Roger Foster, General Counsel.

[19]Succeeded Jerome Plapinger, Acting General Counsel.

[20]Succeeded Mason B. Leming, Assistant Chief Counsel.

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[21]John A. Danaher took his oath of office as Judge of the United States Court of Appeals for the District of Columbia Circuit on November 20, 1953.

[22]Deceased.

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**Deceased.*

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