

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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HEARINGS BEFORE THE SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE EIGHTY-EIGHTH CONGRESS FIRST SESSION

PURSUANT TO

S. Res. 55

ON

S. 1664

TO PROVIDE FOR CONTINUOUS IMPROVEMENT OF THE
ADMINISTRATIVE PROCEDURE OF FEDERAL AGENCIES
BY CREATING AN ADMINISTRATIVE CONFERENCE OF THE
UNITED STATES

JUNE 12, 13, 14, 1963

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ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

WEDNESDAY, JUNE 12, 1963

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND
PROCEDURE OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to call, at 10 a.m., in room 2228, New Senate Office Building, Senator Edward V. Long (chairman of the subcommittee) presiding.

Present: Senator Long.

Also present: Bernard Fensterwald, Jr., chief counsel; Cornelius B. Kennedy, minority counsel; Carlile Bolton-Smith, assistant counsel.

Senator Long. The committee will come to order.

I say to you first, the committee appreciates the presence of all of you who appear here this morning. We are happy that some of our leaders in this field are here to testify as the day goes on. We recognize, too, that Mr. Joseph Hyman has done a great deal of work in this field as counsel of the Subcommittee on Administrative Procedure over in the House. Joe, we are happy to have you here.

At this point in the record we shall print the text of the bill before us (S. 1664):

[S. 1664, 88th Cong., 1st sess.]

A BILL To provide for continuous improvement of the administrative procedure of Federal agencies by creating an Administrative Conference of the United States, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Administrative Conference Act".

FINDINGS AND DECLARATION OF POLICY

SEC. 2. The Congress finds and declares that—

(a) administration of regulatory and other statutes enacted by Congress in the public interest substantially affects large numbers of private individuals and many areas of business and economic activity;

(b) the protection of public and private interests requires continuing attention to the administrative procedure of Federal agencies to insure maximum efficiency and fairness in achieving statutory objectives;

(c) the diversity of Federal activities frequently precludes the establishment by statute of administrative procedure which would be generally suitable for use by all agencies;

(d) responsibility for assuring fair and efficient administrative procedure is inherent in the general responsibilities of officials appointed to administer Federal statutes;

(e) experience has demonstrated that cooperative effort among Federal officials, assisted by private citizens and others whose interest, competence,

and objectivity enable them to make a unique contribution, can find solutions to complex problems and achieve substantial progress in improving the effectiveness of administrative procedure; and

(f) it is the purpose of this Act to provide suitable arrangements through which Federal agencies, assisted by outside experts, may cooperatively study mutual problems, exchange information, and develop recommendations for action by proper authorities to the end that private rights may be fully protected and regulatory activities and other Federal responsibilities may be carried out expeditiously in the public interest.

DEFINITIONS

Sec. 3. As used in this Act—

(a) "Administrative program" includes any Federal function which involves protection of the public interest and the determination of rights, privileges, and obligations of private persons through "rulemaking" or "adjudication" as those terms are defined in section 2 of the Administrative Procedure Act (5 U.S.C. 1001), except that it shall not include—

(1) any function or matter specified in section 4 (1) or (2) of the Act except to the extent that such function or matter consists of proceedings and decisionmaking required to be conducted in conformity with sections 7 and 8 of the Act or the imposition of penalties on private persons through agency action not subject to sections 7 and 8; or

(2) any matter specified in section 5 (1), (3), (5), and (6) of the Act.

(b) "Administrative agency" includes all executive departments and any other Federal agency, including a constituent agency of an executive department, which carries out an administrative program.

(c) "Administrative procedure" means procedure used in carrying out an administrative program and shall be broadly construed to include any aspect of agency organization, procedure, or management which may affect the equitable consideration of public and private interests, the fairness of agency decisions, the speed of agency action, and the relationship of operating methods to later judicial review, but shall not be construed to include the scope of agency responsibility as established by law or matters of substantive policy committed by law to agency discretion.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Sec. 4. (a) There is hereby established the Administrative Conference of the United States (hereinafter referred to as the "Conference").

(b) The Conference shall be composed preponderantly of Federal officials and personnel, including—

(1) a full-time Chairman, who shall be appointed for a five-year term by the President, by and with the advice and consent of the Senate. The Chairman shall receive compensation at the highest rate established by law for the chairman of an independent regulatory board or commission, and may continue to serve until his successor has been appointed and has qualified;

(2) the chairman of each independent regulatory board or commission;

(3) the head of each executive department of other administrative agency which is designated by the President;

(4) when authorized by the Council, an appointee from any such board, commission, department, or agency, designated by the department or agency head or, in the case of a board or commission, by the Chairman with the approval of the board or commission;

(5) persons appointed by the President to membership upon the Council hereinafter established who are not otherwise members of the Conference; and

(6) other members in such number as will assure adequate representation of the viewpoints of private citizens and the utilization of diverse experience, who shall be appointed by the Chairman, with the approval of the Council, for terms of two years. Members appointed by the Chairman shall be members of the practicing bar, scholars in the field of administrative law or government, or others specially informed by knowledge and experience with respect to Federal administrative procedure.

(c) Each member under paragraphs (b) (2) and (b) (3), above, may designate an alternate member to represent him, as occasion requires, in plenary

sessions or other activities of the Conference. The alternate member shall have all the obligations and privileges of full membership in the Conference on such occasions.

(d) Members of the Conference other than the Chairman shall receive no compensation for service, but members appointed from outside the Federal Government shall be allowed travel expenses, including per diem in lieu of subsistence, as authorized by law (5 U.S.C. 73b-2) for persons serving without compensation.

DUTIES AND POWERS OF THE CONFERENCE

SEC. 5. To carry out the purposes of this Act the Conference is authorized to—

(a) study the efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies in carrying out administrative programs;

(b) make recommendations to administrative agencies, collectively or individually, and to the President, the Congress, or the Judicial Conference of the United States, as it deems appropriate;

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

(d) collect from administrative agencies and publish such reports of operating statistics as it deems useful for evaluating and improving administrative procedure.

ORGANIZATION OF THE CONFERENCE

SEC. 6. (a) The membership of the Conference meeting in plenary session shall constitute the Assembly of the Conference. The Assembly shall have ultimate authority over all activities of the Conference. Specifically, it shall have power to (1) adopt such recommendations as it deems appropriate for improving administrative procedure: *Provided*, That any member or members who disagree with a recommendation adopted by the Assembly shall be accorded the privilege of entering dissenting opinions and alternative proposals in the record of Conference proceedings, and the opinions and proposals so entered shall accompany the Conference recommendation in any publication or distribution thereof; and (2) adopt bylaws and regulations not inconsistent with this Act for carrying out the functions of the Conference, including the creation of such committees as it deems necessary for the conduct of studies and the development of recommendations for consideration by the Assembly.

(b) The Conference shall include a Council composed preponderantly of Federal officials and personnel. The Council shall consist of the Chairman of the Conference, who shall be the Chairman of the Council, and ten other members appointed by the President for three-year terms, except that the Council members initially appointed shall serve for one, two, or three years, as designated by the President, and each member may continue to serve until a successor is appointed. The Council shall have power to (1) determine the time and place of plenary sessions of the Conference and the agenda for such meetings; (2) propose bylaws and regulations, including rules of procedure and committee organization, for adoption by the Assembly; (3) make recommendations to the Conference or its committees upon any subject germane to the purposes of the Conference; (4) receive and consider reports and recommendations of committees of the Conference and transmit them to members of the Conference with the views and recommendations of the Council; (5) designate a member of the Council to preside at meetings of the Council in the absence or incapacity of the Chairman and Vice Chairman; (6) designate such additional officers of the Conference as it may deem desirable; (7) approve or revise the Chairman's budgetary proposals; and (8) exercise such other powers as may be delegated to it by the Assembly.

(c) The Chairman shall be the chief executive of the Conference. In that capacity he shall have power to (1) make preliminary inquiries into matters he deems important for Conference considerations, including matters proposed by persons inside or outside the Federal Government; (2) be the official spokesman for the Conference in relations with the several branches and agencies of the Federal Government and with interested organizations and individuals outside the Government, including responsibility for encouraging Federal agencies to effectuate the recommendations of the Conference; (3) request agency heads to provide information needed by the Conference, which information shall be supplied to the extent permitted by law or agency regulations; (4) recommend

to the Council appropriate subjects for action by the Conference; (5) appoint, with the approval of the Council, members of the committee authorized by the by-laws and regulations of the Conference; (6) prepare, for approval of the Council, estimates of the budgetary requirements of the Conference; (7) appoint employees, subject to the civil service and classification laws, define their duties and responsibilities, and direct and supervise their activities; (8) rent office space in the District of Columbia; (9) provide necessary services for the Assembly, the Council, and the committees of the Conference; (10) organize and direct studies ordered by the Assembly or the Council, utilizing from time to time, as appropriate, experts and consultants, who may be employed as authorized by section 15 of the Administrative Expense Act of 1946, as amended (5 U.S.C. 55a), but at rates for individuals not to exceed \$100 per diem; (11) upon request of the head of any agency, furnish assistance and advice on matters of administrative procedure; and (12) exercise such additional authority as may be delegated to him by the Council or the Assembly. The Chairman shall preside at meetings of the Council and at each plenary session of the Conference, to which he shall make a full report concerning the affairs of the Conference since the last preceding plenary session. The Chairman shall, on behalf of the Conference, transmit to the President and the Congress an annual report and such interim reports as he deems desirable.

(d) The President may designate a member of the Council as Vice Chairman, who shall serve as Chairman in the event of a vacancy in that office or in the absence or incapacity of the Chairman.

APPROPRIATIONS

SEC. 7. There are hereby authorized to be appropriated such sums as may be necessary to accomplish the purposes of this Act.

Senator LONG. Today we begin hearings on S. 1664, a bill to establish a permanent Administrative Conference.

Although it was my honor to introduce this legislation in the Senate, it is important to recall that it was drafted by the Bureau of the Budget for the Kennedy administration, and has the broad support of the departments and agencies of our Government.

This latter support is most crucial, because any Administrative Conference which does not have their active support is doomed to failure, regardless of whether it be permanent or temporary.

It must also be made crystal clear that this bill would not create a "superagency"; it would not create another administrative agency for purposes of regulation; it would create a new body to review the procedures of the existing agencies and to seek to effectuate much needed and frequently recognized reforms within those agencies. Its powers would be purely recommendatory.

It would be to the administrative agencies roughly what the Judicial Conference of the United States is to the Federal courts.

This new body would be called the Administrative Conference of the United States. Its purpose would be to provide a means for a continuing assault on the problems of assuring fairness, obtaining greater uniformity of procedure, and avoiding undue delay and expense.

For more than 25 years there has been increasing public concern over the problems created by the growth in the number and importance of matters governed by administrative agencies in the Federal Government. The need for expedition, reduced expense, and greater uniformity of procedures, without sacrificing fairness continues to be studied and discussed in many quarters.

Public demand for improvement of the administrative process has come from the citizens, individual members of the bar, State bar associations and the national bar associations. The history of much

of this ferment was recorded in Senate Report 108 filed by this subcommittee with the Committee on the Judiciary on April 3, 1963. Therefore, I shall not repeat it in detail at this time.

The latest and most important impetus has come, however, from the temporary Administrative Conference which expired on December 31, 1962.

Shortly before it expired, that Conference made a final report to the President containing 30 recommendations for action. In an accompanying letter, it recommended to the President that a Conference be established on a permanent basis by legislation. The bill which is introduced is directed to that end.

The problem is not a lack of knowledge of procedural problems within the administrative agencies. There have been two Conferences within the past 10 years. Much work has been done in the Congress and in the bar to isolate problems and to obtain improvements in practice and procedure.

The principal problem has been, and is, that there is no stimulation and no continuing effort on the part of any group in the Government effectively to encourage the agencies to make the necessary reforms and to implement the recommendations which have been made by the two previous Conferences and by others.

S. 1664 would establish an Administrative Conference with responsibility cooperatively to study problems of the agencies, to develop recommendations for action to protect private rights, and to help accomplish the purposes and responsibilities of the agencies expeditiously and in the public interest.

The Conference would be composed of a Chairman, a Council, and an Assembly.

The Chairman would be appointed by the President for a term of 5 years. It would be his job to serve continuously in encouraging the agencies to act in accordance with the general purposes of the Conference and to put into effect recommendations which had been made by the Conference.

The Council would consist of 11 members appointed by the President, including the Chairman. To assure adequate reflection of diverse experience and public interest, the Council would include some agency personnel, some members of the bar and, in all likelihood, some scholars in the field of administrative law.

The members of the Assembly of the Conference would be from the agencies, the practicing bar, scholars in administrative law and government and others specially qualified to serve.

It is most encouraging to note that the idea of a permanent Administrative Conference has the almost unanimous support of the bar—National, State, and local.

After extensive work in revising draft legislation and coordination by the various interested sections and committees of the American Bar Association, its house of delegates on February 5, 1963, adopted a resolution in support of a bill to establish a permanent Administrative Conference and authorized three sections and one committee to coordinate their efforts in obtaining passage of that bill or a bill equivalent in purpose and effect. The action of the house of delegates represented greater unanimity on this project than on any other proposal in the field of administrative law in the recent history of the

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American Bar Association. Other bar associations including the Federal Bar Association and the Bar Association of the District of Columbia also support the concept of a permanent Administrative Conference. Thus, the bar of the country appears solidly behind this proposal.

There have been many other supporting endorsements for the establishment of a permanent Administrative Conference. There have been two Conferences of short duration which have supplied many worthwhile recommendations to the agencies and to the President. Unfortunately, those recommendations have not received the acceptance which should have been accorded them.

A permanent Administrative Conference could do much to obtain adoption of these recommendations and develop others for solving the perplexing problems of administrative procedure.

The problems are more likely to increase and multiply than they are to diminish.

Unless something is done soon, such problems as delays and absence of fairness, may grow to the point where there will be no mechanism capable of achieving solutions.

This proposal offers a promising means for solving the problems.

Speedy action on this proposal is in the public interest.

Let me say at this time that I have a memorandum from Senator Bayh, who is a member of this subcommittee, and I believe is a former student of Professor Fuchs, that he is unable to be here this morning due to the fact that he has three committee conflicts—Appropriations, Constitutional Rights, and Administrative Practice. He is testifying at Appropriations and regrets that he cannot attend, but he does hope to be with us sometime later in the day.

The first witness this morning is Judge E. Barrett Prettyman, a senior circuit judge, distinguished member of the judiciary of this country. He has always taken a great deal of interest in problems of this kind. He has been Chairman of the past two Conferences, and we are very pleased to have him here.

We have a copy of Judge Prettyman's biographical sketch which we will include at this point in the record.

(Judge Prettyman's biographical sketch is as follows:)

Prettyman, E. Barrett, judge. Born Lexington, Va., August 23, 1891; son of Forrest Johnston and Elizabeth Rebecca (Stonestreet) P. A.B., Randolph-Macon College, 1910; A.M., 1911; LL.D., 1961; LL.B., Georgetown University, 1915; LL.D., 1946; LL.D., William Mitchell College of Law, 1961; married Lucy C. Hill, September 15, 1917; children—Elizabeth Courtney, Elijah Barrett. Admitted Virginia bar 1915; member, Potter, Prettyman & Fisher, Hopewell, Va., 1915-17; special attorney, Internal Revenue Department, Washington, D.C., and New York City, 1919-20; associate and member, firm of Butler, Lamb, Foster & Pope, Chicago, and Washington, D.C., 1920-33; General Counsel, Bureau of Internal Revenue, Washington, 1933-34; Corporation Counsel of the District of Columbia, 1934-36; member, Hewes, Prettyman & Awalt, Washington, D.C., and Hartford, Conn., 1936-45; professor of taxation, Georgetown University Law School; judge, U.S. Court of Appeals of the District of Columbia, 1945—chief judge, 1958-60—senior circuit judge, 1962-. Chairman, President's Conference on Administrative Procedure, 1953-54; Chairman, Administrative Conference of United States, 1961-62. Served in U.S. Army, 1917-19, advancing to captain of infantry. Trustee, Randolph-Macon College, American University. Member, American, Federal and District of Columbia (past president) Bar Associations; Washington Board of Trade (past president). Phi Beta Kappa, Order of Coif, Sigma Upsilon, Kappa Sigma, Gamma Eta Gamma, Omicron Delta Kappa. Dem-

ocrat, Methodist. Clubs: Civitan International, Burning Tree, Metropolitan, Chevy Chase, Lawyers. Author: articles on taxation and administrative practice of law. Home: 5306 Woodlawn Avenue, Chevy Chase, Md. Office: U.S. Court of Appeals, Third Street and Constitution Avenue, Washington, D.C.

STATEMENT OF HON. E. BARRETT PRETTYMAN, SENIOR CIRCUIT JUDGE, U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Judge PRETTYMAN. Senator, I am very happy to be here this morning.

For the record, my name is E. Barrett Prettyman. I am a senior judge of the U.S. Court of Appeals for the District of Columbia Circuit, and I am here this morning because of having been Chairman of the Administrative Conference of the United States held under an Executive order in 1961-62.

Senator LONG. May I interrupt you. If you served on that court you might know Bennett Champ Clark, who is from my hometown.

Judge PRETTYMAN. We were appointed on the same day. I had been a friend of his a long time before that. As a matter of fact, we were at Fort Myer training for World War I at the same time.

Senator LONG. You are probably a member of the American Legion.

Judge PRETTYMAN. Yes. I was a charter member of my post.

There has been prepared, with some care, for the use of this committee a detailed and authoritative history of this measure from its inception. I have this statement here in writing, with copies, and I proffer it for insertion in the record.

Mr. FENSTERWALD. Thank you very much. We will include the history of this Conference in your remarks.

Judge PRETTYMAN. Thank you very much.

(The described document is as follows:)

THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

In July of 1949 there was testimony before a special subcommittee of the Judiciary Committee of the House of Representatives relating to delays in the trial of certain cases. In the course of these hearings the chairman announced: " * * * we have communicated with Chief Justice Vinson and we have asked him to request the Senior Council of Circuit Judges, when they meet in September, to endeavor to develop some timesaving procedures, procedures especially in the antitrust laws." Thereafter, at its September meeting, 1949, the Judicial Conference of the United States adopted a resolution which read, in part:

"The conference was of the opinion that experience has indicated the desirability of examining the present procedure governing controversies arising under the antitrust laws and the various statutes establishing regulatory agencies with a view to advancing their effective, expeditious, and economic disposition, and authorized the designation of a committee of the Conference to consider [means by which these ends might be achieved]."

The Chief Justice appointed a committee of 10 judges, Circuit Judges Stone, Magruder, Augustus Hand, Lindley, and Prettyman, and District Judges Chesnut, Kloeb, Leahy, Rifkind, and Yankwich.

At its first meeting the committee took action which is reflected in the following extract from a letter from the committee to the Chief Justice:

"The committee was troubled by the assignment to it of the administrative agency phase of the general problem. The members of the committee were of the view that their own limited experience in this field would place a limited value upon their recommendations in the field.

"After careful discussion the committee unanimously instructed me to suggest respectfully to you the appointment of a second section to this committee, to be composed of persons familiar with the problems of the administrative agency

procedure, for example, members or general counsel of commissions or experienced private practitioners before the agencies, or both."

Thereupon the Chief Justice authorized the appointment of "an Advisory Committee, composed of persons in and out of the Government familiar with the problems of administrative agency procedure." On June 20, 1950, such an Advisory Committee was appointed. It had 12 members—3 members of administrative agencies, 3 general counsel for agencies, two private practitioners who had then recently left membership on administrative agencies, and 3 lawyers in the general practice with prior administrative law experience. In a footnote are the names of the members of that committee.¹

This Advisory Committee spent 9 months in "a firsthand investigation of the causes of excessive delay and expense and unduly voluminous records in the procedures of Federal regulatory agencies, and possible remedies therefor." On March 30, 1951, it submitted its report, which contained a dozen recommendations. The first was for an "Administrative Agency Conference." The idea was first suggested by Clyde Aitchison, of the ICC, a member of the Committee, and at that time the dean of all commissioners in the Government. At any rate he made a speech during that time to the ICC Practitioners Association, which was later published in its Journal of November 1950 (vol. XVIII, pp. 118, 120-122). In that talk the Commissioner stressed the responsibility of the Commission and of its practicing bar in the formulation of remedies for the problems of cumbersome, costly, and overly detailed procedures. Here the germ of an idea can be readily detected. The Advisory Committee said:

"The regulatory agencies themselves must solve this problem. The solution may best be accomplished by the cooperation of all agencies involved; in fact, a cooperative approach, with mutual exchange of experience and suggestions, seems imperative for the most efficient functioning of the administrative agencies. With such an approach to this problem in mind, your Committee's primary recommendation is that the Judicial Conference suggest to the President that he call or cause to be called, a conference of representatives of the administrative agencies having adjudicatory and substantial rulemaking functions, for the purpose of devising ways and means for achieving the objectives with which this Committee is concerned."

The Judicial Conference Committee to which this report was addressed approved it, and the Judicial Conference itself approved it. At its meeting in September 1951, the Conference adopted a resolution as follows:

"Upon consideration, the Conference ordered that the Committees' suggestions and recommendations with respect to the call of a conference of representatives of the administrative agencies having adjudicatory and substantial rulemaking functions, be approved with this additional recommendation:

"That representatives from the Federal judiciary and the bar as may be desired be designated to attend said conference and to serve in such capacity as the President may determine."

Chief Justice Vinson duly transmitted this suggestion to the President.

On April 29, 1953, President Eisenhower issued a document addressed, "to all executive departments and administrative agencies." He said, in part: "Accordingly, I am happy to call a conference of representatives of the departments and agencies, and of the judiciary and the bar, for the purpose of studying the problems thus described."

He requested the Attorney General to cause a list to be prepared of the departments and administrative agencies having adjudicatory and rulemaking functions. He requested each department and agency thus listed by the Attorney General to designate a representative to meet with other such representatives in a conference. With the agreement of the Chief Justice he invited 3 Federal judges to participate. He named 3 trial examiners and 12 practicing lawyers to participate.

The Attorney General listed 57 agencies. Thus the Conference was composed of 75 members. This Conference came to be known as the President's Conference on Administrative Procedure. It operated in the following fashion: A Committee on Organization and Procedure, consisted of six members, was appointed and acted as an Executive Committee, planning the organization and the rules of procedure. Nine other standing Committees were appointed—on Prehearing,

¹ E. Barrett Prettyman, chairman; Clyde B. Aitchison, John Carson, Benedict P. Cottle, Robert K. McCannaghey, E. L. Reynolds, Paul L. Styles, Preston C. King Jr., Joseph J. O'Connell, Jr., Bradford Ross, John L. Sullivan, Roger J. Whiteford.

Pleadings, Evidence, Trial Problems, Hearing Officers, Judicial Review, Uniform Rules, Office of Federal Administrative Procedure, and Style.²

These Committees conducted studies of the subjects assigned to them by the Conference. Some of them conducted extensive hearings. They summoned to their assistance prominent experts in the field, who were denominated consultants. The Committees prepared reports, some of which were extensive and contained much basic material. These reports were circulated to the members of the Conference but were not debated or acted upon by the Conference. The Committees also submitted "recommendations," which were direct and succinct and based upon or drawn from reports. The recommendations were placed on the agenda of the Conference and were debated and adopted or rejected. When adopted, they were referred to the Committee on Style for editorial revision. This procedure was, generally speaking, the procedure usually followed by legislative bodies.

The Conference held four plenary sessions, June 10, 11, 1953, November 23, 24, 1953, October 14, 15, 1954, and November 8, 9, 1954. It adopted 35 recommendations, 2 addressed to the President, 3 to the Judicial Conference, 7 to the Civil Service Commission, 1 to the General Services Administration, and 22 to the various Government agencies. It adopted a final report, which was duly transmitted to the President. As its final action the Conference adopted a resolution recommending that a similar Conference be established on a permanent basis. President Eisenhower acknowledged receipt of the report on March 3, 1955, and said, in part:

"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."

The resolution respecting a permanent Conference was referred by the President to the Attorney General.

Thereafter several parallel series of events ensued. The Judicial Conference of the District of Columbia Circuit, the American Bar Association, the Federal Bar Association, and the chairmen of the large independent agencies all studied and took action in respect to the proposal for a permanent Conference of the agencies respecting their procedure and other problems.

In the fall of 1958, in preparing for the Judicial Conference of the District of Columbia Circuit to be held in the spring of 1959, the Committee on Arrangements listed as one topic for the consideration of the Conference "Problems of Administrative Law."

This Circuit Judicial Conference consists of all the Federal judges on the district court and the circuit court of appeals, various Federal and municipal law officials, and about 120 members of the practicing bar who are selected by a committee of judges and lawyers. Several months before a meeting of the Conference its Committee on Arrangements selects topics for debate, consideration, and action. Study groups, usually composed of 20 or 25 members each, are assigned to study and present recommendations on these topics. The membership of the 1959 Conference included a number of Government attorneys and a large number of attorneys engaged in practice before the administrative agencies.

The study group on the administrative law topic was chairmanned by William C. Koplovitz, Esquire. It presented three reports. All reports recommended the establishment of a permanent Conference on Administrative Procedure but they differed on machinery.

One report recommended that the Attorney General call together a group to formulate plans for the Conference and to make appropriate recommendations to the President for its establishment. Another report recommended that the President call an interim Conference pending enactment of a statute, and that the permanent Conference be established by legislation. The third report recommended that the chairmen of the seven large independent agencies meet and establish the Conference.

After extensive debate the Judicial Conference adopted the second of these proposed recommendations; that is, an interim conference to be established by the President and a permanent conference to be established by an act of

² The Chairmen of these Committees were John C. Doerfer, Allison, Rupert, Emory T. Nunneley, Jr., Edmund L. Jones, Earl W. Kintner, Lambert McAllister, Thomas J. Herbert, John A. Danaher, and Conrad E. Snow.

Congress. That recommendation was transmitted to the Judicial Conference of the United States, which at its September 1959 meeting appointed a committee to consider the matter. At its meeting in March 1960, this Conference—i.e., the Judicial Conference of the United States—adopted the following resolution:

“Resolved, That this Conference approves the establishment of a permanent conference on the procedures of executive departments and administrative agencies in adjudications and rulemakings, in which conference representatives of the departments, the agencies, and the practicing bar would participate, for the purpose of exchanging information and making recommendations to the several agencies and departments for the improvement of the administration of justice by them. The Chief Justice, as Chairman of this Conference, is authorized to communicate this action, at such times as he deems appropriate, to the President and to such other officers, including Members of the Congress, as may be concerned with this subject from time to time; and the Chief Justice is further authorized to implement this action further in such other ways as he may deem appropriate.”

Chief Justice Warren thereafter transmitted the resolution to President Eisenhower, together with his own strong personal recommendation for such a conference.

In the meantime, coincident with the study undertaken by the Judicial Conference (District of Columbia) a special committee of the Federal Bar Association began a study of the matter and made a report to the national council of that association. On May 20, 1959, the day before the meeting of the District of Columbia Judicial Conference, the national council of the Federal bar unanimously adopted a resolution which endorsed the concept of a permanent conference, and called upon the Attorney General to invite a committee of representatives of the agencies and the practicing bar to formulate plans to be presented to the President for such a conference. The Federal bar, it can be safely said, was opposed to legislation as an initial step.

On September 24, 1959, Chief Justice Warren addressed the annual convention of the Federal Bar Association in a speech which was one of the key events in the development of administrative law in recent years. Among other things he said:

“Today it is generally recognized that far too many administrative proceedings in Federal agencies are also subject to excessive and unnecessary delay. Perhaps even more discouraging in the agency proceedings is the fact that meaningful information on the state of the backlog, and the extent of the delay, is not even available.

“This is true because there presently exist few criteria or standards for determining how long it should normally take to get final agency action on the ordinary administrative case.

“If there is anything which symbolizes the disillusion of the American people—of the lay public—in our legal system, it is the factor of unconscionable delay.

“Turning briefly to the legal services performed in the administrative agencies, I know that many of you are aware that last year 21 Federal administrative agencies terminated in excess of 25,000 proceedings, and that the trend is continually upward. * * *

“For this reason, I am particularly glad to inform you that the Judicial Conference of the United States, at its meeting last week, approved in principle the proposal for a Permanent Conference on Administrative Procedure—which the Federal Bar Association and judges have been advocating.

“Such a conference—composed basically of agency representatives, but with practicing lawyers and other participants as well, is sorely needed to conduct continuing and practical studies of ways to eliminate undue delay, expense, and volume of hearing record; to develop uniform rules of practice and procedure; and generally to promote greater efficiency and economy in the administrative process.”

Also in the meantime, at the meeting of the Council of the Administrative Law Section of the American Bar Association at Miami in August 1959, a resolution was adopted endorsing the idea of a Permanent Conference on Administrative Procedure, the steps to be an interim conference to be set up by the President and a permanent conference to be created by the Congress. This, we may note, was

the same as the view taken by the Judicial Conference (District of Columbia). That resolution was adopted by the section, transmitted by special order to the house of delegates, and there adopted. Transmission to the Judicial Conference (United States) and to the President was authorized. At the same time the house of delegates designated the council of the administrative law section and the special committee on procedure, chairmanned by Smith W. Brookhart, Esq., to act jointly in the preparation of legislation on the subject. Proposed legislation was prepared for presentation to the midwinter meeting of the house of delegates in Chicago in February 1961. On account of then pending events, action on that report was postponed until the August meeting, 1961.

In February 1960, the Subcommittee on Legislative Oversight, of which Congressman Oren Harris was the chairman and Robert W. Lishman was chief counsel, submitted an interim report (H. Rept. 1258, 86th Cong., 2d sess.), in which attention was called to the steps being taken in the process of the formulation of a proposed permanent group to study the overall problems of the agencies. The subcommittee said:

"Current thinking is that this new organization, to be known as the Conference on Administrative Procedures, will perform, in the administrative law field, the present functions in the judicial field which are performed by the Conference on Judicial Procedures."

Still in the meantime, the chairmen of six of the large independent agencies (Civil Aeronautics Board, Federal Trade Commission, Federal Power Commission, Federal Communications Commission, Securities and Exchange Commission, and Interstate Commerce Commission) jointly prepared a letter to the President. This was a long, detailed statement, in which the need for a permanent conference was stated and the composition of such a conference suggested. The letter further proposed that an organization committee prepare an agenda for the conference and suggested further that consideration of legislation not be undertaken until after organization of the conference and that recommendations respecting legislation be adopted by the conference itself. In this letter it was proposed that eight of the Cabinet departments, the Civil Service Commission, the Atomic Energy Commission, the Federal Aviation Agency, and the seven large independent agencies send representatives to the conference, and that certain bar associations nominate members. "Such associations," said the letter, "might well include" the American Bar, the Federal Bar, the I.C.C. Practitioners, the Motor Carrier Lawyers Association, the Federal Power Bar, the Federal Communications Bar, the Federal Trial Examiners' Conference, "and similar organizations." That letter was eventually completed and dated August 25, 1960.

Under date of August 29, 1960, President Eisenhower concurred in the proposal and authorized arrangements for the initial organization of such a conference. A committee, which came to be known as an organization committee, was thereupon appointed³ and after several weeks of work completed a proposed set of bylaws.

The Conference envisioned by that set of bylaws was an assemblylike body of 65 delegates, 40 of whom would be from the Government and 25 from outside the Government. One delegate would be designated by the Secretary of each of nine Cabinet departments, two from each of the seven big agencies, two trial examiners, and six to be appointed at large by the Chairman, with the approval of the Executive Committee. The plan envisioned that five delegates be named by the president of the American Bar Association, two by the President of the Federal Bar Association, eight from the practicing bar, five from university faculties, and five experts in nonlegal fields, all to be named by the Chairman, with the approval of the Executive Committee. The plan provided for standing committees, for a permanent secretariat, and for liaison with the Congress through the naming of six Representatives, three from each house, by the Vice President and Speaker, respectively.

The proposed bylaws described in some detail the subjects which would be considered by the Conference. About this time the national election occurred, and action looking toward a call of the Conference was postponed.

³ The names of the members of this committee were Donald C. Beelar, Marver H. Bernstein, Kent H. Brown, John L. Fitzgerald, Robert W. Ginnane, Earl W. Kintner, Robert Kramer, John C. Mason, Thomas G. Meeker, Carl R. Miller, E. Blythe Stason, Theodore F. Stevens, Jerrold G. Van Cise, Franklin M. Stone; E. Barrett Prettyman, chairman; and William C. Kopolovitz, secretary.

Promptly after the election, President-elect Kennedy named Dean James M. Landis to prepare for him a report on the administrative agencies and their problems. Dean Landis submitted his report on December 26, 1960. In it he referred to the President's request of August 29, to the Organization Committee, and to the preliminary draft of bylaws. He recommended that this work be encouraged and continued. He said, in part:

"* * * Much can come from this effort, including not merely revisions in our administrative procedures but also the making of our regulatory agencies into a system just as the Judicial Conference of the United States has made a system of what were once isolated and individual Federal courts. * * *

* * * * *

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

On April 13, 1961, President Kennedy sent to the Congress a special message on regulatory agencies. In the course of that message he discussed the establishment of an Administrative Conference of the United States. He said, in part: "The process of modernizing and reforming administrative procedures is not an easy one. It requires both research and understanding. Moreover, it must be a continuing process, critical of its own achievements and striving always for improvement." He announced that he had issued an Executive order calling at the earliest practicable date the Conference, to be organized by a council of lawyers and other experts from the agencies, the bar, and university faculties. He said that the Council would consider questions concerning the effective dispatch of agency business, "along with the desirability of making this Conference, if it proves itself, a continuing body for the resolution of these varied and changing procedural problems." He further said:

"The results of such an Administrative Conference will not be immediate but properly pursued they can be enduring. As the Judicial Conference did for the courts, it can bring a sense of unity of our administrative agencies and a desirable degree of uniformity in their procedures. The interchange of ideas and techniques that can ensue from working together on problems that upon analysis may prove to be common ones, the exchanges of experience, and the recognition of advances achieved as well as solutions found impractical, can give new life and new efficiency to the work of our administrative agencies."

In his Executive Order No. 10934 President Kennedy established the Administrative Conference of the United States, to consist of a council of 11 members named by him and a general membership from the executive departments, the administrative agencies, the practicing bar, and other persons specially informed. "The purpose of the conference," says the Executive order, "shall be to assist the President, the Congress, and the administrative agencies and executive departments in improving existing administrative procedures." The order provided that the composition of the membership should be determined by the council; that the total membership be not less than 50 persons, a majority of whom should be from the executive departments and administrative agencies; that the Government members be designated by the heads of their respective departments and agencies; and that the other general members be named by the Chairman, with the approval of the Council. The order provided that the Director of the Office of the Administrative Procedure, which is in the Department of Justice, should act as the executive secretary of the Conference. It authorized the making of arrangements with the President of the Senate and the Speaker of the House for participation by interested committees of the Congress.

The next day after the foregoing events the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee returned a report (S. Rept. No. 168, 87th Cong., 1st sess.) in the course of which it said, in part:

"VI. The subcommittee recommends that every assistance should be given in making permanent an Administrative Procedure Conference, and that Congress should provide the Office of Administration and Reorganization with funds to provide a permanent secretariat for that Conference.

* * * * *

"That such an assembly of the persons most directly concerned with the functioning of administrative agencies offers a continuing possibility of improvement in procedures through interchange of ideas is a matter of universal agreement. * * * The subcommittee recommends that every congressional encouragement be given to the establishment and continuation of the Conference. Since, as we have pointed out elsewhere, we believe that the guidance of the President is necessary for the improvement of the administrative process, we recommend that the permanent staff should be a part of the Office of Administration and Reorganization, and, therefore, a part of the President's own staff."

On April 29, 1961, the President announced the appointment of the Council of the Administrative Conference. In so doing he called attention to the fact that the Council membership, apart from the Chairman, was equally divided between those from the Government and those from outside the Government. The members, besides the Chairman, were Manuel F. Cohen, member of the Securities and Exchange Commission; Walter Gellhorn, professor of law, Columbia University, New York City; Joseph P. Healy, vice president-general counsel, Boston Edison Co., Boston, Mass.; Everett Hutchinson, Chairman, Interstate Commerce Commission; James M. Landis, Special Assistant to the President; John D. Lane, of the firm of Hedrick & Lane, Washington, D.C.; Earl Latham, Eastman professor of political science, Amherst College, Amherst, Mass.; Carl McGowan, of the law firm of Ross, McGowan, & O'Keefe, Chicago, Ill.; Nathaniel L. Nathanson, professor of law, Northwestern University, Evanston, Ill.; and Max D. Paglin, General Counsel, Federal Communications Commission. Webster Maxson, Director of the Office of Administrative Procedure, was Executive Secretary.

The Council thus constituted included, besides the Chairman, three practicing lawyers, three professors (one of whom is an outstanding authority in political science and two are outstanding professors of administrative law), and three are from Government agencies. The 10th member of the council, Dean James M. Landis was highly experienced in the chairmanship of regulatory agencies, highly experienced in the teaching of law, and highly experienced in the practice of the law.

The Council was immediately called into session and met in three sessions, Monday and Tuesday, May 8 and 9, Monday and Tuesday, May 22 and 23, and on Monday, June 26, 1961. On May 23 it finalized plans for the institution and operation of the Conference. It named the agencies to be invited, approved a list of non-Government members to be named, adopted bylaws to be proposed to the Conference, adopted in general terms a program of work for the Conference, and adopted a budget to be submitted to the Congress. It called the first meeting of the Conference for Tuesday, June 27, in Washington. That first plenary session was held as scheduled.

The conference thus set up was composed of a Chairman and 85 members. Of these, 10 were the Council named by the President; 44 members were named by the heads of executive departments and agencies, 29 were named from outside the Government, and 2 trial examiners were designated. The members not named by the departments and agencies were named by the Chairman of the Conference with the approval of the council. The composition of the Conference was 60 percent from the Government agencies and 40 percent from the outside (5 plus 44 plus 2 equals 51; 5 plus 29 equals 34). Members named by the heads of Government agencies were as follows: By the Secretaries of the Cabinet departments each one member, and by some whose departments include several agencies, two members; by the heads of each of the so-called Big Seven independent agencies, two members; by the heads of 14 other agencies having rulemaking or adjudicatory functions, one member each. Of the members from outside the Government service, 21 were practicing lawyers, three were from law school faculties, two were from faculties of schools of government, and one was an accountant.

In the selection of the members from the practicing bar, a major effort was made to produce a cross section of all shades of interest in administrative law procedure. A list was made of the names of over a hundred thoroughly qualified people from which to choose. Specialists in each of the major areas of Federal regulation were named. Some others with broad general experience in several areas were included. Some lawyers not specialists were named. Geography, both of the lawyers and of their major clients, was a factor, although of course several from Washington, D.C., were necessarily on the list. Not more than one member of any one law firm, or from any one university, was named. Different interests in the several areas of interest are represented

as, for example, shippers as well as the railroads and motor carriers in the field of interstate commerce. A mixture of political affiliations was sought. Every invitee accepted. The roster of the Conference is attached.

No member of the Conference, either from the Government or from outside, appeared in a representative capacity. Each appeared as an individual, and while, of course, each gained assistance by inquiry and consultation, the views expressed and the votes cast by each were understood to be his own.

The Conference operated on an assembly or legislative basis. Subjects for study and recommendation were immediately assigned to committees. Nine standing committees were established. Their principal areas of interest were respectively: (1) personnel; (2) rulemaking proceedings; (3) licensing and certificating proceedings; (4) compliance and enforcement proceedings; (5) the adjudication of claims; (6) statistics and reports; (7) internal operation and procedure; (8) education and information, meaning the preparation of manuals on procedure and the holding of seminars in the field; and (9) judicial action of various sorts. Specific topics were assigned for study and recommendation, ranging from recruitment programs for lawyers in Government, through improvements in procedure for all sorts of cases, formulation of criteria for measuring delay and backlogs, better internal operations, grassroot informational meeting, manuals in craftsmanship, the massive complex which is delay and expense, all the way to better means for judicial review.

The chairmen of these committees are Ashley Sellers, Esq.; Commissioner Gilliland of the CAB; Commissioner Hyde of the Federal Communications Commission; Messrs. Robert W. Ginnane, James McI. Henderson, and Cyrus R. Vance, who were, respectively, General Counsel of the Interstate Commerce Commission, the Federal Trade Commission, and the Department of Defense; Messrs. Charles W. Bucy and David Ferber, who were Associate Counsel of the Department of Agriculture and the SEC; and Professor Emmette S. Redford of the University of Texas.

Liaison with Congress by means of Members of each house, designated by the Vice President and the Speaker, respectively, which designees are invited to attend the sessions of the Conference and to enjoy the privilege of the floor. These designees are Senator Hart, Muskie, and Dirksen, and Congressmen Oren Harris, Walter Rogers, and John B. Bennett.

The committees were fortunate in obtaining the services of educators in leading law schools in the country, who acted as full-time staff directors and as consultants as the need appeared. The names of these scholars were: Auerbach of Wisconsin and Minnesota, Cramton of Michigan, Jones of Columbia, Kramer of George Washington, Lester of Cincinnati, McKay of New York University, and Metzger of Georgetown. And the committees were authorized to secure the services of research directors, upon a retainer basis of employment, but members of the Council and of the Conference and most of the consultants served without compensation. Administrative and secretarial services were supplied the Conference and the committees by the Office of Administrative Procedure of the Department of Justice.

The Conference, as a whole, operated in the form of a legislative assembly. The course of operation was: (1) A subject was suggested for study. Such suggestion might come from anywhere or anybody. (2) The Council adopted the suggestion and proposed its assignment to a committee. (3) The assembly approved the Council assignment. (4) The committee considered the subject and directed research into it. (5) A staff director made or directed the research and formulated the data thus accumulated into a staff report. (6) The committee considered the staff report and prepared a recommendation of action on the subject. It formulated a report—usually, of course, based upon the staff report—in support of its recommendation. These—the committee report and its recommendation—were two separate documents, one somewhat extensive and the other succinct. (7) The Council considered the recommendation and passed it along to the assembly. Both the report and the recommendation were circulated to the entire membership. (8) The assembly debated the recommendation in a public plenary session and voted on it. (9) If adopted by the assembly, the recommendation was transmitted to the President. A total of 30 recommendations were adopted, covering a wide variety of matters, more importantly the following:

“Jurisdiction and procedures for review orders of the Interstate Commerce Commission, production of records and briefs by means more economical than printing, and designation of record after the filing of briefs, unification of the

Armed Services Board of Contract Appeals, and elimination of subsidiary boards, reexamination by agencies of their procedural rules, and creation of machinery within the agencies for continuous observation of procedures, delegation of final decisional authority, subpoena practices, licensing of truck operations by the Interstate Commerce Commission, right to counsel of persons compelled to appear, improper ex parte representations, statistics on administrative proceedings (1962), judicial enforcement of orders of the National Labor Relations Board, ratemaking procedures, Civil Aeronautics Board procedures for the consideration of domestic route applications, Federal Communications Commission procedures for the consideration of mutually exclusive applications for broadcast facilities in the same community, Federal Communications Commission procedures for broadcast licensing, right to counsel of persons who appear voluntarily, continuing statistical study, advanced training of agency professional personnel; examiners; legal career service, debarment of contractors, discovery in administrative proceedings."

The Conference met in six plenary sessions. The first was held on June 27, 1961. The five later sessions convened on December 5 and 6, 1961, April 3, 1962, June 29, 1962, October 16, 17, and 18, 1962, and December 4 and 5, 1962. The first session was attended by 76 members, the second by 74 members, the third by 77 members, the fourth by 69 members, the fifth by 81 members, and the final session by 72 members.

The nine standing committees met for the first time immediately following the first plenary session. During the 18 months which followed there were a total of 93 such committee meetings.

Initial arrangements for the operation of the Conference included the establishment of an interagency group fund, pursuant to authority contained in the Executive order and 31 U.S.C. 691. In this way \$60,000 was made available for the first few months of Conference operation. In September 1961, Congress added an appropriation of \$150,000 for Conference operations during the remainder of the fiscal year 1962, and in October 1962 an additional \$100,000 was appropriated for the 6 months of fiscal year 1963 in which the Conference would be in operation.

At the end of fiscal year 1961, \$28,018.09 of the funds contributed to the interagency group fund remained unobligated. At the end of fiscal 1962, \$57,543 remained unused from the total funds available. These unobligated balances were released to the Treasury of the United States.

The Conference rendered a final report of its activities under date of December 15, 1962. The report was made public.

At the same time, under date of December 17, 1962, the Conference, pursuant to section 2 of Executive Order 10934, reported its suggestions of appropriate means to be employed in the future for the purpose of improving the processes of administrative agencies. It said, in part:

"We recommend the establishment of means by which agencies in the Federal Government may cooperatively, continuously, and critically examine their administrative processes and related organizational problems. Believing that the main sources of information as well as the resolve to couple fairness with efficiency lie within the agencies themselves, we urge that the proposed organization be composed largely of governmental personnel, but with a sufficient infusion of outside experts to assure objectivity and variety of views."

It recommended the creation, on a permanent footing, of an Administrative Conference of the United States, to be composed of a council and an assembly. The Council, it said, should consist of a Chairman and 10 other members, the Chairman to be appointed by the President, by and with the advice and consent of the Senate, for a term of 5 years, and other councilors to be appointed by the President to serve 3-year terms.

The Assembly, the Conference said, should be composed of the members of the Council and, in addition, not more than 80 members, to be named preponderantly from among Government personnel by the heads of agencies designated by the Council, and, in lesser numbers, chosen by the Council from the bar, the universities, and other sources. The Administrative Conference, the recommendation said, should have power to inaugurate and conduct studies of any phase of any agency's procedures, giving "procedures" the broadest meaning, and should have power to submit recommendations to the President, the Cabinet departments, the administrative agencies, the Congress and its committees, and the Judicial Conference of the United States.

The report related the recommendation in considerable detail, and recited at length the reasons which impelled the recommendation. The report was made public.

Thereafter the Bureau of the Budget translated the recommendation of the Conference for a continuing Conference into the form of a proposed bill. The draft was introduced in the Senate by Senator Long of Missouri as S. 1664, 88th Congress, 1st session, and was referred to the Committee on the Judiciary.

APPENDIX

IDENTIFICATION OF COUNCIL MEMBERS

- Judge E. Barrett Prettyman (Chairman), senior judge of the U.S. Court of Appeals for the District of Columbia Circuit.
- Max D. Paglin (Vice Chairman) General Counsel, Federal Communications Commission, formerly Assistant General Counsel and staff member.
- Manuel F. Cohen, member of the Securities and Exchange Commission, formerly Director, Division of Corporation Finance, Securities and Exchange Commission.
- Walter Gellhorn, professor of law, Columbia University, 1933 to date; Director, Attorney General's Committee on Administrative Procedure, 1939-41; Office of the Solicitor General, U.S. Department of Justice, 1932-33; author of various books on administrative law.
- Joseph P. Healey, vice president-general counsel of Boston-Edison Co.; former commissioner of corporations and taxation for the Commonwealth of Massachusetts; former law partner in law firm of Hemenway & Barnes, Boston, Mass.; professor of corporate law at Boston College Law School since 1947.
- Everett Hutchinson, member and former Chairman of the Interstate Commerce Commission.
- James M. Landis, partner in the firm of Landis, Brenner, Feldman & Reilly; formerly special assistant to the President; Chairman of the Civil Aeronautics Board; Chairman of the Securities and Exchange Commission; dean of the Harvard Law School.
- John D. Lane, member of the firm of Hedrick & Lane, Washington, D.C.; formerly administrative assistant to Senator Brien McMahon, of Connecticut.
- Earl Latham, Eastman professor of political science, Amherst College, Amherst, Mass.
- Carl McGowan, member of the firm Ross, McGowan & O'Keefe, Chicago, Ill.; general counsel, Chicago & NorthWestern Railroad; formerly professor of law, Northwestern University Law School; formerly counsel to the Governor of Illinois.
- Nathaniel L. Nathanson, professor of law, Northwestern University; consultant to the Justice Department with respect to administrative procedures, 1961; Office of Price Administration, Associate General Counsel, 1942-45; Securities and Exchange Commission, 1935-36; law clerk to Justice Louis D. Brandeis, 1934-35; author of casebook on administrative law.

GENERAL MEMBERSHIP OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- Robert E. Adams ⁴ of the Department of Commerce.
- Karl E. Bakke of the U.S. Tariff Commission.
- Donald C. Beelar of the firm Kirkland, Ellis, Hodson, Chaffetz & Masters, Washington, D.C.
- James H. Benney of the firm Orrick, Dahlquist, Harrington & Sutcliffe, San Francisco, Calif.
- Marver H. Bernstein of Princeton University.
- Carman G. Blough of Harrisonburg, Va.
- J. D. Bond of the Atomic Energy Commission.
- Reva Beck Bosone of the Post Office Department.
- Cyril F. Brickfield ⁵ of the Veterans' Administration.
- Kent H. Brown of the State of New York Public Service Commission.
- Charles W. Bucy of the Department of Agriculture.
- Clark Byse of the Law School of Harvard University.

⁴ Succeeded Paul A. Johnston of the Department of Commerce.

⁵ Succeeded William J. Driver of the Veterans' Administration.

John T. Chadwell of the firm Snyder, Chadwell, Keck, Kayser & Ruggles, Chicago, Ill.
 G. Howland Chase of the Board of Governors of the Federal Reserve System.
 Cyrus J. Colter of the Illinois Commerce Commission.
 John F. Cushman of the Federal Communications Commission.
 Richard M. Davis of the firm Lewis, Grant & Davis, Denver, Colo.
 George S. Dixon of the firm Matheson, Dixon & Bieneman, Detroit, Mich.
 Charles Donahue of the Department of Labor.
 Thomas J. Donegan of the Subversive Activities Control Board.
 Bernard Dunau of the firm Jaffee & Dunau, Washington, D.C.
 David C. Eberhart of the General Services Administration.
 Irvin Fane of the firm Spencer, Fane, Britt & Browne, Kansas City, Mo.
 Joseph A. Fanelli of the firm Fanelli & Spingarn, Washington, D.C.
 Roland J. Faricy⁶ of the firm Faricy, Moore, Costello & Hart, St. Paul, Minn.
 William Feldesman of the National Labor Relations Board.
 David Ferber of the Securities and Exchange Commission.
 Edward W. Fisher of the Department of the Interior.
 Thomas J. Flavin⁷ of the Department of Agriculture.
 Abe Fortas of the firm Arnold, Fortas & Porter, Washington, D.C.
 Ralph Fuchs of the University of Indiana Law School.
 Myles F. Gibbons of the Railroad Retirement Board.
 Robert E. Giles of the Department of Commerce.
 Whitney Gilliland of the Civil Aeronautics Board.
 Robert W. Ginnane of the Interstate Commerce Commission.
 Nathaniel H. Goodrich⁸ of the Federal Aviation Agency.
 Frank C. Hale⁹ of the Federal Trade Commission.
 Lawrence E. Hartwig of the Renegotiation Board.
 James McI. Henderson of the Federal Trade Commission.
 Harold W. Horowitz of the Department of Health, Education, and Welfare.
 Thomas T. F. Huang¹⁰ of the Department of State.
 Leo A. Huard of the University of Santa Clara College of Law.
 Rosel H. Hyde of the Federal Communications Commission.
 John A. Johnson of the National Aeronautics and Space Administration.
 T. C. Kammholz of the firm Vedder, Price, Kaufman & Kammholz, Chicago, Ill.
 R. Keith Kane of the firm Cadwalader, Wickersham & Taft, New York, N.Y.
 Sidney G. Kingsley¹¹ of the Atomic Energy Commission.
 Earl Kintner of the firm Arent, Fox, Kintner, Plotkin & Kahn, Washington, D.C.
 John W. Kopecky of the Housing and Home Finance Agency.
 William C. Koplovitz of the firm Dempsey & Koplovitz, Washington, D.C.
 Sol Lindenbaum of the Department of Justice.
 Karl D. Loos of the firm Pope, Ballard & Loos, Washington, D.C.
 Dominick L. Manoli of the National Labor Relations Board.
 John C. Mason of the Federal Power Commission.
 Joseph E. McElvain of the Department of Health, Education, and Welfare.
 Thomas G. Meeker of the firm Schnader, Harrison, Segal & Lewis, Philadelphia, Pa.
 Lawrence V. Meloy of the Civil Service Commission.
 James L. Pimper of the Federal Maritime Commission.
 John B. Prizer of the Pennsylvania Railroad Co., Philadelphia, Pa.
 Edwin F. Rains¹² of the Department of the Treasury.
 Sidney Rawitz of the Department of Justice.
 Emmette S. Redford of the University of Texas.
 Hubert A. Schneider of Pan American World Airways, New York, N.Y.
 David Searls of the firm Vinson, Elkins, Weems & Searls, Houston, Tex.
 Harold Seidman of the Bureau of the Budget.
 Ashley Sellers of the firm Cummings & Sellers, Washington, D.C.
 Edward F. Sloane of the Federal Home Loan Bank Board.
 Fred B. Smith¹³ of the Department of the Treasury.

⁶ Deceased.

⁷ Succeeded Neil Brooks of Department of Agriculture.

⁸ Succeeded Daggett H. Howard of the Federal Aviation Agency.

⁹ Succeeded Philip R. Layton of the Federal Trade Commission.

¹⁰ Succeeded William L. Griffin of the Department of State.

¹¹ Succeeded John S. Graham of the Atomic Energy Commission.

¹² Succeeded Robert H. Knight of the Department of the Treasury.

¹³ Succeeded John K. Carlock of the Department of the Treasury.

Bertram E. Stillwell of the Interstate Commerce Commission.
 Fredric T. Suss of the Small Business Administration.
 Joseph C. Swidler¹⁴ of the Federal Power Commission.
 Earl J. Thomas of the Department of the Interior.
 Cyrus R. Vance, Secretary of the Army.
 John H. Wanner of the Civil Aeronautics Board.
 Howard C. Westwood of the firm Covington & Burling, Washington, D.C.
 Edmund H. Worthy of the Securities and Exchange Commission.
 Joseph Zwierding of the Federal Power Commission.

CONGRESSIONAL REPRESENTATIVES

Everett McKinley Dirksen, Senator from Illinois.
 Philip A. Hart, Senator from Michigan.
 Edmund S. Muskie, Senator from Maine.
 John B. Bennett, Representative from Michigan.
 Oren Harris, Representative from Arkansas.
 Walter Rogers, Representative from Texas.

ALTERNATE CONGRESSIONAL REPRESENTATIVES

Thomas B. Collins of the Senate Committee on the Judiciary.
 Franklin B. Dryden of the Senate Committee on Appropriations.
 Cornelius Kennedy of the Senate Subcommittee on Administrative Practice and Procedure.
 Kurt Borchardt of the House Committee on Interstate and Foreign Commerce.
 Charles P. Howze of the House Special Subcommittee on Regulatory Agencies.
 Andrew Stevenson of the House Committee on Interstate and Foreign Commerce.

CONSULTANTS

Robert M. Benjamin of the firm Parker, Duryee, Benjamin, Zunino & Malone, New York, N.Y.
 Kenneth Culp Davis of the University of Chicago Law School.
 J. Forrester Davison of the George Washington University School of Law.
 Roger S. Foster of Westinghouse Air Brake Co., Pittsburgh, Pa.
 Louis L. Jaffe of the Law School of Harvard University.
 John D. Millett, President of Miami University, Oxford, Ohio.
 J. Lee Rankin of New York, N.Y.
 Robert L. Stern of the firm Mayer, Friedlich, Spiess, Tierney, Brown & Platt, Chicago, Ill.

Judge PRETTYMAN. The problems at which this bill is aimed are the delay, the expense, the needlessly voluminous records, the technicalities, the cumbersome redtape, which plague so much of the proceedings before administrative agencies in the Federal Government. These problems have engaged the attention of the public, particularly the bar, the Congress, the executive branch of the Government, the judiciary and special commissions and committees for many years. Many devices have been designed and tried. Many improvements have been made. But as we all know, these problems still persist in troublesome measure.

I find myself repeating a considerable portion of what Senator Long has said in his opening statement, but since I have prepared it this way, and it is not very long, I will repeat it.

The importance of the matter arises from the fact that these agencies touch every phase of American economic life. A businessman scarcely make an important move in his business today without coming at least to some degree within the regulatory authority of a Federal agency. Except for the universal unpopularity of taxes, a natural human trait, I suspect that businessmen complain about nothing

¹⁴ Succeeded Jerome K. Kuykendall of the Federal Power Commission.

more frequently or more vehemently, more profanely, than they do about the delays, the costs, the involved redtape and the sometime seeming capriciousness of Government agencies.

Mr. Theodore H. White in his Pulitzer Prize winning book "The Making of the President 1960," at one point described a conversation he had with a one-time personal aid to President Truman concerning the baffling perplexities encountered by every President. Among his troubles he listed:

"And those"—I will insert blanks—"those blank blank bureaucrats controlling them. Those regulatory agencies are so important now that they really control the whole economy."

The fact of the matter is that inefficient agency operation is a drag on the operation of the economy.

The problem is an amazingly baffling one. This is so for a number of reasons. In the first place, there are so many agencies which conduct formal proceedings for the purpose of determining rights, making rules or adjudicating disputes. Thirty-three of them were listed on the roster of the recent Conference, and a study revealed 108 Federal agencies which conduct hearings on open records for the purpose of determining rights and privileges of private people. The Conference study indicated that these agencies conduct 268 different kinds of proceedings. In 1962, these agencies disposed of, that is, completed, 67,500 cases.

In the second place, differences between these proceedings are enormous. They include applications for gas pipelines a thousand miles long involving 90 to 100 parties, railroad rate proceedings involving scores of railroads, area airline route proceedings involving dozens of cities and towns, and other vast problems. At the same time they include consideration of claims for veterans insurance, hearings concerning the discharge of a single employee, reparations for a single shipper, complaints against a single broadcast station. Between these extremes are proceedings concerning all sorts of variegated perplexities.

Delays are different; costs are different; records are different; technicalities are different. And yet surprisingly enough, in the midst of this welter of dissimilarities, many similarities appear if a comprehensive view is taken. Pipelines and railroads and unfair competitive business practices are wholly different, but protracted trials on open records in all these areas have common problems of procedure. The similarities increase the bafflement initiated by the dissimilarities.

In the third place, the difficulties sought to be attacked are not single, solid blocks. They arise from complex interrelated small parts. Delay, for example, is not one single all-inclusive malfunction which can be corrected by a mighty sledge hammer or cured by a single injection of a specific wonder drug. It arises from the malfunction or the maladjustment of parts, many of them small, which ought to function in smooth correlation in order to achieve efficiency. Delay arises from inept pleadings, failures to crystalize issues, from too many or not the proper parties—who should be allowed to intervene?—from lack of advance organization, from cumbersome presentation of direct evidence, from unnecessary cross-examination, from repeated continu-

ances, from the manner of handling interlocutory rulings, from bulk material, from the manner of preparing findings, and from a myriad more of seeming minutiae apart from the main issues. The task of eliminating delays is not dramatic or exhilarating. It takes patience, persistence, and expertise—like an automobile, gears, tubes, filters, electronic connections or timing devices—all sorts of connections—may cause the machine to stall.

Several years ago the Judicial Conference of the United States became concerned about this situation in the administrative agencies. Its concern arose, in part, from its general concern over the effectiveness of the administration of justice in the system of government which is our invention. And its concern arose, in part, from the fact that the courts must review these proceedings. Long records, inaccuracies, costliness, are practical matters to reviewing courts. The Judicial Conference appointed a committee and adopted that committee's conclusion. It said that the way to attack these problems is to have the agencies themselves do it, and the way to have them do it is to call them together in a conference, with the practicing bar and the academic authorities participating, and embark upon studies and searches for solutions. The Judicial Conference, through the Chief Justice, suggested to the President that he call such a conference. The basic idea for the bill which is now before this subcommittee, S. 1664, came originally from the Judicial Conference of the United States.

It was a natural suggestion for the Judicial Conference to make, because it was a reflection of itself. While, of course, the similarities between that Conference and the one provided in this bill are not many and the analogy cannot be pursued very far, if you look at the statute, which is section 331 of title 28, which created the Judicial Conference, you will see that it directs the Chief Justice to summon annually to a conference the chief judges of the Federal circuits and an equal number of district judges; it directs that Conference to "make a comprehensive survey of the condition of the business of the courts," to "carry on a continuous study of the operation and effect of the general rules of practice and procedure," and to recommend such changes and additions as "the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation and the elimination of unjustifiable expense and delay."

The Judicial Conference has a full-time administrative director and staff. From those few provisions, the Judicial Conference derives its life and its guidelines, but everybody knows what magnificent results have flowed from it. Those same provisions are the essence of this bill S. 1664. Perhaps the same sort of results will flow from it.

When President Kennedy came to office, he immediately turned his attention to the problems of the agencies. On April 13, 1961, he sent a special message to the Congress on this subject. In that message, he announced that he had called a conference of the agencies, with nongovernment participation. There was at that time in the minds of everybody interested in these problems a question as to whether such a plan as this one would work. Would the agencies really put major thought on their own procedural defects? Would outsiders really devote their time and energy? Nobody was to be

paid except the Executive Secretary and his staff and experts employed to make special studies. Would all these people give the required effort without compensation? Would such a body really produce worthwhile results, or would it be merely a debating society? And so, the President wisely set the Conference up on an experimental basis. He instructed it to work at its task for 18 months and at the end of that time to report to him what it had accomplished. And he instructed it to report to him also what these people, after this period of experimentation, thought ought to be done as a long-range program. What did they think was the best means and method for achieving the ends sought—the reduction of delay and expenses, the increase in efficiency; accuracy and fairness?

That Conference was composed of 88 members, including the council. The assembly held six plenary sessions. Its 9 committees held a total of 93 meetings. The council of 10 met 15 times. The Conference adopted 30 recommendations and launched several additional projects.

The recommendations varied in importance and in the complexity of their respective subjects. They concerned on the one hand rate-making proceedings, ex parte contacts, the debarment of contractors from Government business, the problems of hearing examiners, the delegation of decisional authority, and at the same time, on the other hand, they concerned such matters as language in the Federal Register, economical reproduction of briefs and such, subpoena practices, and other similar matters. It procured the preparation of a number of studies in depth by outstanding authorities of specific phases of agency procedures. It accumulated much in valuable data about agency processes. The report reflects a feeling that the Conference had only begun on the work to be done.

I believe I speak accurately when I say it was the unanimous opinion of those who participated in the Conference and those who observed it, that the plan would work, that it would produce results, that its potential was tremendous and that the doubts and fears about its feasibility were unwarranted.

I hope this committee will deem it advisable to direct that the report of that Conference on its work be printed.

The Conference of 1961-1962 not only reported to the President the results of its experimental operation, but, as he had instructed it to do, evaluated the need for further studies and suggested "appropriate means to be employed for this purpose in the future." In other words, the Conference advised the President what it thought should be done as a long-range program. And because of the importance of that recommendation to the present consideration of this committee, I ask you to consider the personnel of the Conference and its associated consultants.

The general counsel of almost every Federal administrative agency was a member, as were the general counsel of the executive departments. Members of a majority of the larger commissions were members of the Conference. In all 46 general members were from the agencies.

The general counsel of a number of important regulated industrial and business organizations were on the roll. Outstanding practitioners of administrative law were members. Also included were senior

partners in a number of the best-known law firms of the country, men without special interest in administrative law, but with vast experience in the basic principles which govern legal procedure. Many—indeed I would say most—of the nationally known authorities in the academic world of administrative law participated. Three outstanding authorities on the science of Government took part as members. Two participants were from State regulatory agencies. In all, 29 general members, that is, outside from the Council, were from outside services. Attendance at the Conference, all of which was public, was almost unbelievably full.

In short, the recommendation which went to the President as the best means to be adopted for the future was not the product of a small committee, theorizing behind closed doors or working with limited knowledge or material. This recommendation was the considered product of an assemblage of the real workmen in the field of administrative procedure, formulated after 18 months of laboratory experimentation.

The recommendation for the future was described on detail in a long report debated and adopted at a plenary session of the Conference. It was epitomized in a single introductory sentence which read:

We recommend the establishment of means by which agencies in the Federal Government may cooperatively, continuously and critically examine their administrative processes and related organizational problems.

I emphasize the precise statement in that sentence because that is the sum and substance of the plan which is in the bill before you.

There are other plans designed by other people—plans for a one-man director, for a one-man office, for a private commission, for a small governmental committee, for 50-50 government-nongovernment commission, for a congressional committee. None of these are this plan. This plan is specific and plain. It is that the agencies be supplied with a means, a machinery, by which they can cooperatively, continuously, and critically examine their own procedures.

The White House translated the recommendation of the Conference, with a few variations, into a draft of a bill, which is now S. 1664, before you for consideration.

I have in my prepared statement a description of the bill and the Conference which would be created, but I believe that is clear enough on the fact of the bill, and where it isn't clear, it has been clarified by the chairman of this committee; I will omit that portion of my statement.

In most fields and in most instances S. 1664 coincides with the recommendation of the Conference to the President. In three respects, however, it varies from that recommendation. I mention those respects without extended discussion, content to leave the matter to the judgment of the committee. At the same time I express the hope that you will agree with the Conference. These variant provisions of S. 1664 are:

1. The limitations on the jurisdiction of the Conference. It seems to us that the jurisdiction of the Conference could well be as broad as the Administrative Procedure Act.

2. The requirement that the heads of the agencies and the departments comprise the membership of the Conference. While this provision has some advantages prestigewise, it seems to us that the

heads of agencies and commissions have too many duties unrelated to procedure to permit them to devote time for consultation necessary for the purposes of this Conference. The general counsel are really the workmen in this area.

3. That alternates or substitutes be permitted. We believe very firmly that to permit alternates would destroy the coherence and the continuity essential to the success of the Conference.

I suppose it is obvious that I favor the bill. I do so for two fundamental reasons:

1. I believe our democratic system of Government can be made to work effectively even in the hurly-burly world of modern industry and business.

2. I believe this plan reflected in S. 1664 is not only the best but the only plan which holds promise of yielding actual practical results toward elimination of these vital defects in Government agency procedures.

With your indulgence, I would like to mention, in just a few words, the reasons which underlie this latter conclusion. I name 15 in 1 sentence each.

1. This Conference would be the agencies themselves in action in respect to their own procedures, just as the Judicial Conference is the courts in action.

2. The Conference would command, within its own membership, a vast reservoir of ideas and suggestions.

3. It would embody a vast reservoir of varied experience.

4. The judgments of the Conference would be composite judgments.

5. The studies of the Conference would be continuous, not one spot study with a single report to be printed, bound, and filed.

6. An officer of the Conference would be a full-time dutyseeking implementation of recommendations.

7. The suggestions of the Conference would go to the agencies as from the agencies themselves, and not as from some outside critic.

8. The Conference would be a ready vehicle for the use of the Congress in its frequent duty of ascertaining the views of the administrative agencies on technical problems of procedure.

9. The Conference would not be a matter of temporary appointment, subject to possible partisan pressures, but would be a continuous operation in its major aspects, a technical nonpartisan effort.

10. No new agency is created, no superbureau; it is a Conference machinery for existing agencies.

11. It provides an exciting forum for the exchange of ideas and experiences.

12. It would bring, as the past Conference brought, a sense of unity, a semblance of systemization, to the widely sprawling Federal agencies.

13. It would bring under realistic test the possibility of uniformity in some aspects of agency procedure.

14. It would develop information in areas now totally unknown, such as overall statistics on agency proceedings and efficient methods of trying agency cases.

15. The Conference would be a relatively inexpensive undertaking, the costs being travel expenses, per diem fees of research experts, and the salary of the Chairman and the secretarial staff.

Mr. Chairman, I very respectfully but earnestly urge that this committee report the bill, S. 1664, favorably. I would hope you would change it in the respects I have mentioned as variations from the Conference recommendation, but my most earnest wish is that you report the bill.

Senator LONG. Thank you, Judge, for a very helpful statement. Certainly this statement indicates your interest in this matter and the great study you have given to this problem.

You mentioned the Judicial Conference a number of times and, of course, the Chief Justice of the United States is the Chairman of that Conference, so I thought perhaps it would be interesting at this time to go in the record that we have a copy of a letter here from the Chief Justice in regard to this bill.

(The letter is as follows:)

SUPREME COURT OF THE UNITED STATES,
Washington, D.C., June 11, 1963.

HON. EDWARD V. LONG,
Chairman, Subcommittee on Administrative Practice and Procedure,
Committee on the Judiciary,
U.S. Senate
Washington, D.C.

MY DEAR SENATOR LONG: This is in response to your letter of yesterday requesting my views concerning S. 1664, which would establish a permanent Administrative Conference.

I am pleased to report that the Conference and I personally endorse heartily the purposes of S. 1664. It is our considered opinion that the need for an Administrative Conference is much the same as that which called for the establishment of the Judicial Conference, and we believe that it could accomplish for the administrative agencies what ours is accomplishing for the Federal judiciary.

The Judicial Conference has long been interested in the efforts to establish such a permanent Conference and has received and considered reports of Judge Prettyman's Conference since 1954. In 1959 and 1960, it adopted resolutions recommending the establishment of a permanent Commission. This was transmitted to the President with my personal endorsement on May 6, 1960.

The interest manifested in those resolutions continues, and I feel that such a Conference could, in addition to expediting the business of its own agencies, also better coordinate their activities with those of the courts.

With best wishes, I am

Sincerely,

EARL WARREN.

Judge PRETTYMAN. That comes as very, very, exciting news to us, to have the Chief Justice express to you the interest which he has already expressed to us from time to time.

He came to the Conference at one session and spoke to us.

Senator LONG. This letter certainly indicates his personal interest in the problem.

Mr. Fensterwald, do you have any questions?

Mr. FENSTERWALD. I have two questions, Mr. Chairman.

What would you consider an optimum size assembly for the Conference?

Judge PRETTYMAN. I'd think that a total of about 75, maybe as much as 80.

Mr. FENSTERWALD. That's slightly fewer than the recent Conference.

Judge PRETTYMAN. Yes.

Mr. FENSTERWALD. I don't know if you have had a chance to see this morning's Wall Street Journal. There is a long article in it.

I am not going to ask you about the article in detail, but I wanted to note the phrase "superagency."

In your statement, I think that you referred to this, but I just want to get your comment as to whether or not this would be a superagency.

Judge PRETTYMAN. I haven't seen the Wall Street Journal article, but this proposal in this bill which follows so closely—the suggestions the Conference made, is exactly the opposite to a superagency. The heart of this plan is that you do not have a superagency. You do not have some outside body advising the agencies what to do. This plan is that you provide a machinery and a forum so that the agencies themselves can get together, consider their problems, talk about their problems and agree among themselves as to what they think is the best thing to do.

We hear the expression "superagency" every once in a while—I think the Wall Street Journal has used that headline once or twice before. I get a little wrought up on it. We have not done that. It would be easy to create a director or some kind of a committee and tell them, "You tell the agencies what to do." That is what we very carefully avoided.

I can't emphasize it more than it is in the first sentence of the Conference recommendation which I quoted to you a moment ago.

We think the agencies themselves ought to have a machinery, a forum, where they, themselves, can continually, cooperatively and critically examine their own procedures. That is the precise opposite of a superagency.

Mr. FENSTERWALD. Judge, I don't think anyone can state it more clearly than that.

Those are the only questions I have.

Senator LONG. Thank you. Mr. Kennedy?

Mr. KENNEDY. I was going to read one sentence from this article because it refers to the bill, and although Judge Prettyman has given an answer—under the subheading "Superagency Plan Described," the article states:

The bill under consideration today would superimpose an agency to be called the Administrative Conference of the United States.

Now, that is inaccurate I gather.

Judge PRETTYMAN. That's just plain not so, if I can be blunt about it.

Mr. KENNEDY. That's the only question I have.

Senator LONG. I think that states it clearly enough.

Judge PRETTYMAN. I don't want to leave any doubt on the subject.

Senator LONG. Thank you for your very strong statement. It has been very helpful. We appreciate it very much.

Senator LONG. Our next witness is Herbert Brownell, former attorney General of the United States under President Eisenhower and a very distinguished lawyer. We are grateful for Mr. Brownell's coming here this morning.

We have a biographical sketch of you, too, to be put in the record at this time.

(Biographical sketch of Herbert Brownell is as follows:)

Brownell, Herbert, former Attorney General of the United States; born in Peru, Nebr., February 20, 1904; son of Herbert and May A. (Miller) B.; A.B., University of Nebraska, 1924, LL.D.; L.B., School of Law, Yale University, 1927; married Doris A. McCarter, June 16, 1934; children—Joan, Ann, Thomas McCarter, James Barker. Admitted to New York Bar, 1927, with Root, Clark, Buckner & Ballantine, 1927–29; Lord, Day & Lord, 1929–53, 57–; Attorney General of the United States, 1953–57, Member American and New York State Bar Associations, Association Bar of the City of New York, Order Mayflower Dees., Phi Beta Kappa, Delta Upsilon, Sigma, Delta Chi, Phi Delta Phi, Order of the Coif, Republican, Methodist, Clubs: Century Association, Downtown Association, New York City. Office: 25 Broadway, New York City, 4.

STATEMENT OF HON. HERBERT BROWNELL, FORMER ATTORNEY GENERAL OF THE UNITED STATES UNDER PRESIDENT EISENHOWER; PRESIDENT, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

MR. BROWNELL. Senator, gentlemen, I appear this morning primarily speaking for the Association of the Bar of the City of New York, of which I am the current president, and I would like to express our appreciation for the opportunity of being here and presenting our views on the subject of a permanent Administrative Conference.

When you read that letter from the Chief Justice, it reminded me that just 10 years ago I met with his predecessor, the late Chief Justice Vinson, and Judge Prettyman, joining in his recommendations to President Eisenhower about the then organized Conference.

When the Administrative Conference was convened in 1953 under the exceptionally able leadership of Judge E. Barrett Prettyman, it was for the purpose of studying and attempting to formulate remedies for the problems of delay, costliness, and overly detailed procedures which had been plaguing the Federal administrative process for many years.

The Conference made an extensive study of these problems during the years 1953 and 1954 and after a series of periodic meetings it adopted 35 specific recommendations. One of the recommendations most greatly stressed was the establishment in the Department of Justice of an Office of Administrative Procedure. The recommended functions of the Office were to study the adequacy of the procedures of the agencies, to encourage cooperation among the agencies and their respective bars to adopt uniform rules of practice and procedure, and to assist the agencies in the improvement of administrative procedures. The Office was also to collect and publish facts and statistics with respect to agency procedures.

In accordance with the recommendations of the Conference, the Office of Administrative Procedure was established.

However, despite the excellent work of the Office, such as the preparation of the first statistical comparative data on the work and time consumed in various stages of the procedures of the agencies, the persistence of the problems and their aggravation by the increased volume and complexity of the matters before the various agencies in recent years has demonstrated the need for the bringing together of the most active and informed men within the administrative process itself, as was done in the establishment of the temporary Administrative Con-

ferences in 1953 and 1961. For this reason, The Association of the Bar of the City of New York strongly endorses the adoption of a bill establishing the Administrative Conference on a permanent basis.

The problems which have beset our regulatory agencies in the past and which continue to do so today are problems of a most serious nature.

Although the agencies were created to relieve the courts of a burdensome workload and to prove an expeditious forum for the settlement of disputes, they themselves have been unable to handle the great volume of complex matters with which they much deal. Some cases take up to 5 and even 10 years before a disposition is reached. No matter what substantive result is reached in a case, it is impossible to do true justice to the parties in the face of this kind of obstacle. And even when the agency has reached a final determination, this is, in many instances, nothing but a prelude to further consideration by the courts.

If the agencies cannot fulfill the very purpose for which they were created—the expeditious settlement of disputes—then we are obviously faced with a very critical problem—a problem demanding the painstaking and persistent scrutiny of the men closest to the administrative process—the members of the agencies themselves, the members of the bar who practice before these agencies, and those in the government and academic communities who are familiar with the problems of administrative law and procedure.

These would be the people who would make up the Administrative Conference.

Their goal would be not only to speed up the administrative process, but would also include finding some way of reducing the costs of an administrative proceeding. Proceedings such as an application for a television channel or a small airline route can easily cost over \$100,000.

One of the strongest arguments that was advanced in favor of administrative agencies was that relating to the expertise the personnel of these agencies would possess. As the process has developed, questions have been raised as to the degree of expertise that actually exists at the top level of many of our agencies, where the responsibility for decision rests. The extent to which work should be done by a staff of opinion writers rather than the members of the agency themselves has been a matter of concern to many concerned with the functioning of the administrative process. It is a matter deserving of the critical attention of the best minds in the field. And, for this reason, study of the problem by a group such as would comprise the Administrative Conference would be invaluable.

The Conference, as we hope to see it, would consist of the chairman of each independent regulatory agency or his designee, the head of executive departments or other administrative agencies selected by the President, or his designee, and members of the practicing bar and academic community who are specially well informed and well acquainted with Federal administrative procedure.

As in the case of the two previous Conferences, it would be the job of the permanent Conference to study the procedures used by the agencies with a view to improving their efficiency, adequacy, and fairness when shortcomings are found, and to make recommendations

to these agencies, and to the President, the Congress, or the Judicial Conference, as may be appropriate.

The function of the Conference will not be to coerce. Its authority will derive from the knowledge, the eminence, the stature of its members, and from the thoughtful work and analysis they will bring to bear on the problems. Because of the high caliber of the members of the Conference, its recommendations are certain to be given great weight by those to whom they are addressed.

The Conference will also provide a forum for the interchange of ideas and information among the various agencies and those connected with and concerned with the agencies. The success of the Judicial Conference demonstrates clearly the desirability of this feature of the plan.

Like the two Conferences previously convened, it is envisioned that the permanent Conference would be composed of an Assembly, made up of the entire Conference membership, and a Council, which would do most of the initial groundwork, such as proposing bylaws and rules of procedure and committee organization, and which would receive and consider committee reports and transmit them to the members of the Conference with the Council's own views and recommendations.

As has been the case in the past, the committees would, with the help of a professional reporter, such as a law school professor, make the actual studies of the agencies' problems and attempt to find ways and means to solve them.

This, of course, is no small task. The problems facing the administrative process are immense. It will take years of continuous effort, patient determination, and dogged perseverance to achieve the goals we seek. This is not a starry-eyed attempt to perfect the process. It is an attempt to reach practical solutions to practical problems. It is a difficult job, but one which we believe, with the caliber of the men who will be involved, is a job capable of being accomplished.

That the problems exist and have existed for many years there can be no doubt. The report of the task force of the second Hoover Commission, the report of the first two Administrative Conferences, the 1960 report of Dean Landis, and the continuous work in this area by organizations such as the American Bar Association and the Association of the Bar of the City of New York have demonstrated the shortcomings of the existing system.

Over the years there have been many reports and many recommendations. And there have been many changes made—some successful, others not. But persistence of the problems in the face of continual efforts to solve them is no reason to abandon hope of solution. On the contrary, it is only a greater reason to press for new solutions.

The administrative process is likely to grow rather than diminish. As our population expands and the complexity of our already complex society increases, so too do our problems grow in number and intricacy. Now more than ever is there a need for a forum which will provide a fair, and yet speedy determination of the disputes engendered by these problems.

The Association of the Bar of the City of New York strongly urges that the Congress enact into law a bill establishing an Administrative Conference on a permanent basis.

If the committee desires specific comments on the bill, S. 1664, I would make the following observations:

1. The power of the Chairman to initiate studies within the jurisdiction of the Conference should be clear. This power appears to be restricted by section 6(c) (10) to such studies as are "ordered by the Assembly or the Council." In my experience, this limitation on the powers of the Chairman should be eliminated.

2. The bill—sections 4(b) and 6(b)—states that the membership of the Conference and of the Council shall be "preponderantly of Federal officials and personnel." This appears to be an unwarranted restriction on the authority of the President to make appointments which, in his opinion, will provide a workable and well-balanced membership.

3. In order to obtain the best caliber of members outside the Government service, there should be an exemption for them from the conflict-of-interest laws. This exemption should be placed in section 4(d).

Thank you.

Senator LONG. The committee is indebted to you for a fine statement.

Do you have any questions, Mr. Fensterwald?

Mr. FENSTERWALD. You mentioned a question of the power of the Chairman to initiate studies. Do you think it might be wise also to give him the power to make reports on specific subjects on his own authority?

Mr. BROWNELL. I would think—and of course, you would be perfectly free to make public statements from time to time, but that any report that came out should be an official report of the whole body or of the Council, as the case may be.

Mr. FENSTERWALD. In other words, you think the report should be limited to reports of the Assembly or the Council, but not reports of the Chairman, even if labeled as such?

Mr. BROWNELL. I think that in the beginning that ought to be the case to see how it worked; that would be advisable.

Mr. FENSTERWALD. The only other question I have, and I think I know the answer to this—in your view, are there any partisan aspects to the establishment of this Conference?

Mr. BROWNELL. I can't imagine a more nonpartisan question that would ever come before the committee. In the 10 years I have had some experience in this problem, I have never known any partisan questions to arise, and I have never seen any member of the two temporary Administrative Conferences that has attempted to exploit any of these questions in the spirit of partisanship.

I think this is a problem that is of special interest to the bar as a whole, and should be approached and will be approached in a nonpartisan spirit if this bill is enacted. I am confident that entirely nonpartisan spirit would prevail and I think it can do untold good to the proper functioning of our Government.

Senator LONG. Mr. Kennedy, any questions?

Mr. KENNEDY. Thank you, Mr. Chairman, I have no questions.

Senator LONG. Thank you again for your statement.

(Subsequent to the close of the hearings, the following letter was received from Mr. John Trubin, chairman, Committee on Administrative Law, the Association of the Bar of the City of New York:)

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK,
New York, June 17, 1963.

Re Administrative Conference of the United States.

HON. EDWARD V. LONG,

Chairman, Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATOR LONG: With reference to the current hearings before your subcommittee with respect to proposed legislation creating a permanent Administrative Conference of the United States, this is to advise you that the Committee on Administrative Law of the Association of the Bar of the City of New York endorses the principle of a permanent Administrative Conference. In this matter, the committee speaks on behalf of the association.

For your information, I enclose relevant excerpts from the minutes of the meeting at which action was taken on this matter. You will note that the association has reaffirmed its position as to the need for the establishment of an independent Office of Administrative Practice.

Thank you for your attention to this matter. If we can be of assistance in the effort to secure legislation creating a permanent Administrative Conference, please do not hesitate to call on me.

Very truly yours,

JOHN TRUBIN,
Chairman, Committee on Administrative Law.

EXCERPTS FROM MINUTES OF MEETING OF COMMITTEE ON ADMINISTRATIVE LAW
HELD ON APRIL 16, 1963

Resolved, That the committee on administrative law endorses the establishment of an Administrative Conference of the United States by legislation substantially in the form of the proposed legislation annexed to the minutes of this meeting as appendix A, or its equivalent in purpose and effect; and

Resolved, That the committee on administrative law reaffirms its position as to the need for the establishment of an independent Office of Administrative Practice with a Director of stature and independence whether that office be a separate agency or combined with the Office of Director of the Administrative Conference.

PROPOSED LEGISLATION

A BILL To establish an Administrative Conference of the United States

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby established an Administrative Conference of the United States (referred to in this Act as the "Conference"), composed of a general membership, a council, and a director, constituted in the manner hereinafter provided.

SEC. 2. PURPOSE AND FUNCTIONS OF CONFERENCE. The purpose of the Conference shall be to improve the administrative procedures and related operations of Federal executive departments, commissions, and agencies (such departments, commissions, and agencies are referred to in this Act as "agencies"). To that end, the Conference shall, among other functions, (a) conduct studies of the efficiency, adequacy, and fairness of the procedures by which agencies protect the public interest and determine the rights, privileges and obligations of persons; (b) collect and publish information concerning agency procedures; (c) recommend improvements in such procedures and in the statutory provisions relating thereto, including measures to prevent undue delay and expense and unduly long records and to establish insofar as practicable uniform procedures and rules of practice, and (d) foster cooperative efforts among the agencies and their respective bars to bring about such improvements.

SEC. 3. DIRECTOR. (a) The Conference shall have a director appointed by the President with the advice and consent of the Senate, who shall serve for a term of five years subject only to removal by the President for cause.

The Director shall receive basic compensation at the rate of \$22,500 per annum.

(b) The Director shall be the Chief Executive and administrative officer of the Conference and devote his full time and energies to the duties of his office. He shall—

(i) have primary responsibility for effectuating the purposes and functions of the Conference set forth in Section 2 and implementing recommendations of the conference;

(ii) make inquiries into matters for Conference consideration;

(iii) serve as spokesman for and representative of the conference in discussions with the several branches and agencies of the Government as well as in the relations of the conference with persons outside the Government;

(iv) when deemed appropriate by him, make reports to the Congress and to the President;

(v) receive proposals of matters of practice and procedure for Conference consideration and make investigations or recommendations as deemed appropriate;

(vi) furnish assistance and advice upon request of any agency;

(vii) obtain information from the agencies needed by the Conference or the Director in effectuating the purposes and functions set forth in section 2, which information shall be supplied by the agencies upon request of the Director; and

(viii) perform such other duties as are assigned to him from time to time by the Council or the Assembly.

SEC. 4. THE COUNCIL. The Council of the Conference shall consist of the Director and ten members appointed by the President of the United States. The Director shall also be Chairman of the Council. The Council shall include not more than five persons from among the agencies and at least five persons who are members of the bar in private practice. The membership of the Council shall reflect diversity of experience in the field of Federal administrative procedure.

Not more than six members of the Council shall be members of the same political party. The members of the Council shall be appointed for terms of three calendar years except that the terms of six of the members first appointed shall end December 31, 196-, and the terms of the remaining members first appointed shall end December 31, 196-, the term of each member to be designated by the President. Each of their successors shall be appointed for a term of three years from the date of the expiration of the term for which his predecessor was appointed, except that any person appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the unexpired term of such predecessor. Each member of the Council shall serve until his successor is appointed and qualified. Members of the Council may be reappointed. Any vacancy on the Council shall be filled by the President by appointment from among persons eligible for original appointment to the vacant position. The Conference shall elect a member of the council Vice Chairman of the Council. In the event the Office of Director becomes vacant, the Vice Chairman shall serve as Director and Chairman of the Council unless and until the President shall designate a new director.

SEC. 5. MEMBERSHIP OF CONFERENCE. (a) The general membership of the Conference shall consist of members of the Council and persons from the agencies and members of the practicing bar, scholars in the field of administrative law and government, and others specifically informed by knowledge and experience with respect to Federal administrative practice and procedures. The composition of the membership and its total number shall be determined from time to time by the Council: *Provided*, That not more than fifty percentum of the membership shall be persons from the agencies nor shall more than fifty percentum of the membership be attorneys at law in private practice. The Council shall designate the agencies from whom members shall be named and the number of such persons from each, having due regard to the extent of the adjudicatory and rulemaking functions of the respective agencies. The head of the agency shall name a member or members from such agency. Other members (except as provided in section 6) shall be named by the Council. Each member shall participate in his individual capacity and not as a representative of any governmental or nongovernmental organization. All members of the Conference except the members of the Council shall be appointed for terms of two calendar

years, without restriction as to reappointment, except that the terms of initial members of the Conference shall end December 31, 196-.

(b) A member designated from an agency shall become ineligible to continue as a member of the Conference under that designation if he leaves the service of such Agency. A nonagency member shall become ineligible to continue as a member of the Conference in that capacity if he enters the regular service of the Federal Government. If a member resigns, becomes ineligible, or is otherwise unable to continue as a member of the Conference, the Council or the agency head, as the case may be, shall designate a successor for the remainder of his term.

SEC. 6. CONGRESSIONAL AND JUDICIAL PARTICIPATION. There shall be appointed from each Congress as members of the Conference (a) by the President of the Senate, three Members of the Senate and as alternates three members of the staffs of committees of the Senate, and (b) by the Speaker of the House of Representatives, three Members of the House of Representatives and as alternates three members of the staffs of committees of the House of Representatives. The Chief Justice of the United States shall be invited by the Council to appoint from the Judicial Conference of the United States three members of the Conference and three alternate members.

SEC. 7. OFFICE OF CONFERENCE. The Conference shall maintain a permanent office at the seat of government. The Director, subject to the civil service laws, shall appoint such employees as are necessary for the performance of the duties and functions of the Office of the Conference and shall fix the compensation of such employees according to the Classification Act of 1949, as amended.

SEC. 8. FUNCTIONS OF COUNCIL. The functions of the council, in addition to those authorized in sections 5, 9, and 11 of this Act, shall be to: (i) determine the time and agenda of sessions of the conference; (ii) propose bylaws and rules of procedure, including committee organization, for approval by the conference; (iii) appoint members of committees from the general membership of the conference; (iv) propose to the conference matters concerning which the conference and its committees shall conduct investigations and studies; (v) receive and consider reports and recommendations of committees of the conference and transmit them to the conference with the views and recommendations, if any, of the council; (vi) transmit to the President, Congress, and agencies concerned reports and recommendations adopted by the conference; and (vii) exercise general supervision over the affairs of the conference. The council shall not entertain requests from committees of Congress to study particular bills, but this shall not be deemed to limit the subject matter of any study or report of the conference.

SEC. 9. MEETINGS AND REPORTS OF CONFERENCE. (a) The members of the conference shall meet in plenary session at the seat of government at least once each year and at such other times as may be determined by the council. At meetings of the conference, the director of the conference shall preside but shall have no vote unless the conference shall be equally divided.

(b) The conference shall submit annually a report to the President and the Congress covering the work of the conference for the preceding year and containing such information and recommendations, including recommendations for legislation, as it may deem advisable. Supplemental and interim reports and recommendations may also be submitted by the conference or the director to the President and the Congress and, where deemed appropriate, to the agencies.

SEC. 10. STATUS OF COUNCIL MEMBERS, GENERAL MEMBERS, CONSULTANTS AND ADVISERS. Service of an individual as a member of the council, a general member of the conference, or a consultant or adviser to the conference or any committee thereof, whether compensated or not, shall not be considered as service or employment bringing such individual within the provisions of section 203, 205, 207, 208, or 209 of chapter II of title 18 of the United States Code.

SEC. 11. EXPENDITURES AND APPROPRIATIONS. (a) All members of the conference shall serve without compensation but shall be reimbursed for actual expenses incurred in connection with the functions of the conference.

(b) The director, with approval of the council, may procure, without regard to the civil service laws and the classification laws, the services of consultants and advisers to the conference and its committees.

(c) The director may make such expenditures (including expenditures for rent and personal services, office employees, travel, law books, periodicals, books of reference, printing and binding, and studies or investigations) as may be necessary for the execution of his functions and the functions of the council and the conference, out of appropriations made from time to time by Congress.

Expenditures of the director, the council, and the conference shall be allowed and paid only on presentation of itemized vouchers therefor approved by the director or such other person or persons as may be designated for that purpose by the director with the approval of the council.

(d) There are hereby authorized to be appropriated such sums as may be necessary for carrying out the provisions and purposes of this Act.

Senator LONG. The next witness is Dean Landis. Dean Landis is a former dean of Harvard Law School. He served as President Kennedy's Special Assistant, dealing with agencies. He has had an unusually long and very distinguished career in the practice of the law, as well as in government service—state and nationwide. A biographical sketch of you will be inserted in the record at this point.

Landis, James McCauley, born of American parents, Tokyo, Japan, September 25, 1890; son of Henry More and Emma Marie (Stieffer) L.; student Mercersburg Academy, 1914-16; A.B. Princeton, 1921; LL.B. Harvard, 1924, S.J.D. 1925; LL.D. Fouad University, Cairo, Egypt; married Stella Galloway McGehee, August 23, 1926; children—Stella Ann, Ellen McGehee; married (second), Dorothy Purdy Brown, July 3, 1948.

Law clerk to Justice Brandeis, U.S. Supreme Court, 1925; assistant professor of law, Harvard, 1926-28; professor of legislation, 1928-34; member of Federal Trade Commission, 1933-34; member of Securities and Exchange Commission, 1934-37 (chairman, 1935-37); dean of Harvard Law School, 1937-46; partner, law firm, Landis, Brenner, Feldman & Reilly; general counsel, New York Mercantile Exchange, 1958-61; special assistant to the President, 1961; director, Skouras Theaters, United Artists Theater Circuit, Skiatron Electronics & Television Corp.; member, firm, Landis, Feldman, Reilly & Akers, New York. Acting chairman, New York Furniture Manufacturing Industry, 1949. Director Jet-Missiles Automation Foundation, International College, Beirut, Syria; chancellor, Asia Institute, New York, 1953. Supervisor, town of Harrison, New York, 1955-57; member, New York Public Service Commission, 1958. Member, Commission on Uniform State Laws, Massachusetts, 1931; member, National Power Policy Commission, 1937; member, President's Emergency Board on National Railway Strike, 1938; special trial examiner, U.S. Department of Labor, 1939; consultant to advisory committee, Council of National Defense, 1940; consultant, War Department, 1941; regional director, U.S. Office of Civilian Defense, 1941-42, director, 1942-43; director of American Economic Operations and Minister to Middle East 1943-45; chairman, Civil Aeronautics Board, 1946-47; cochairman, Air Coordinating Commission, 1946-47; member, Board of Trustees, F. D. Roosevelt Memorial Library, 1946. Chairman, President's Special Board on Air Safety, 1947. Awarded Medal for Merit; Order of Leopold (Belgium). Member, American Academy Arts and Sciences; American Philosophical Society; Institute for Aeronautical Sciences, Phi Beta Kappa, Delta Sigma Rho, Democrat, Presbyterian. Clubs: Harvard (Boston) Harvard, Economic (New York). Editor, "Selected Readings on the Law of Contract," 1931. Author: (with Felix Frankfurter) "The Business of the Supreme Court," 1927; "Cases on Labor Law," 1934, second edition, 1942; "The Administrative Process," 1938; "The Surrender of King Leopold" (with Joseph P. Kennedy) 1950. Home: Griswold Road, Rye, N.Y. Office: 415 Madison Avenue, New York 17, N.Y.

Senator LONG. We are happy to have you here this morning. We are grateful to you for coming down.

STATEMENT OF JAMES M. LANDIS, FORMER DEAN OF HARVARD LAW SCHOOL; FORMER SPECIAL ASSISTANT TO PRESIDENT KENNEDY

Mr. LANDIS. I am grateful for this opportunity to appear before this committee. In behalf of the pending bill, I think I might say that over the past 25 years I have been quite a protagonist of the administrative process and also perhaps its severest critic too. It was early in the thirties when, I think, many of us came to a realization that the growing necessity for delegating quite a bit of work to adminis-

trative agencies was creating a serious problem. I think we began to realize that this administrative process as it was then expanding in the thirties and forties covered almost every important facet of our life. You look around you and you find again and again what I would call the material rights under which we live are guarded by the administrative process. The right of collective bargaining, the right to be assured of some degree of truth in the securities markets, the cost of electricity that is burning up here, the insurance of our savings bank deposits. Almost every facet of our life is tied up in some way with the administrative process.

I felt rather deeply at the start of this administration, even before the start of this administration, that generally, if we wanted to assure ourselves of economic growth such as we deserved, in large part the administrative process was the key to that growth.

An examination of the situation that I made a couple of years ago indicated too much in the way of things being held up by the failure of the administrative procedure to work smoothly. Take, for example, the situation 2 years ago in the Federal Power Commission. I think the figures would have shown—the figures did show—that there were over a billion dollars in rates that had not been settled or determined as of that period, and something close to a billion dollars in pending construction in the natural gas field for which permits were pending, which had been pending for quite some time. Whether all these projects should be constructed or not, nobody knows, but still decisions as to whether they should be should move fast so that people can get worthwhile projects underway. I say that because I would like to impress upon you the fact that this isn't a problem that can be solved at one session of a committee, but the questions involved present a continuing problem that will characterize the growth of the administrative process and its functioning over—certainly over the next few decades.

It was that thought that led to the development of the idea of the Administrative Conference of the United States, modeled appropriately upon the Judicial Conference, and this bill is the result of that thinking and also the result of practical experience with the operations of an actual conference built generally along these lines.

I would like to say a few words on the practical results of the Administrative Conference created under the Executive order of 1961. I happen to have been selected as a member of the Council of that Conference, and as such, of course, became a member of the Conference itself, and I assume that your committee has received the final report of the Conference contained—that was submitted to the President on December 15, 1962.

Senator LONG. You might be interested to know that that is being printed as a Senate document at this time.

Mr. LANDIS. Oh, I am very happy to know that.

A perusal of that report will show that the actual work in those 18 months by the Administrative Conference was very, very significant. Besides the recommendations that are contained there, some 30 in number, some very important studies were undertaken by that Conference, and I can say, without hesitation, that some of those studies are perhaps the finest work in their fields that has been done. I refer, for example, to some of the studies regarding licensing pro-

cedures, ratemaking procedures, and the like, and the reason that I think they were as good as they are—they are better than, shall I say, the normal scholastic piece of research in those fields—is because they were done with the help and assistance of the agencies themselves. The men who undertook those studies got firsthand data by examining, in the agencies, the very procedures that they were researching. I would like to say this also with reference to the experience of that Conference.

The debates on the floor of the Administrative Conference were good, and there was by no means always unanimity of thinking among the members of the Conference. Some of these resolutions passed with considerable negative votes, and aroused quite a bit of opposition from some agencies, but there never was a schism between the members of the agencies and the members of the bar. You could never find either one of those groups lining up any particular way about any resolutions that came before the Conference. That's an important thing. There is no dichotomy between the members of the agency and the members of the bar, at least, there was none in the entire record of the Administrative Conference.

The second thing I would like to call your attention to is that the Conference afforded an opportunity for the members of the various agencies of the Federal Government to know each other, meet each other, and find out that very frequently their problems were mutual. Sometimes not, but again and again they discovered to their surprise that a problem that was bothering one agency had already been dealt with in quite a satisfactory manner by another agency. On the other hand, some agencies were shocked into discovering how unfair some of their procedures were. I recall the debate on one of these resolutions dealing with the disbarment of contractors by the General Service Administration, and by the Department of Defense, and I think every agency outside those two were surprised and rather shocked by the procedures that were followed in that connection.

The recommendation to change those procedures was passed almost unanimously by the Conference itself, the members of which wouldn't go along with the desire of the General Services Administration and the Navy Department who felt that they were not required to give a man a hearing on the question of whether he should be debarred from bidding on Government contracts. The Conference, as a whole, would not accept that position at all, and these are men who are the very bureaucrats who were supposed to be somewhat autocratic in their handling of affairs. I make that point because I would also like to make this point, that the success of a Conference of this nature depends upon the members of the agencies much more so than upon the members of the bar. That is important to the very ideals of this Conference that the responsibility for improving procedures must lie with the people who are administering those procedures. They should have the benefit of consultation with the bar in order to discover the problems of the practicing lawyers who come before them, but they have, and that is what this Conference does, it places upon the agency members the responsibility to go ahead and seek improvement of those procedures.

Now, to go into details for a moment, no bill that I have ever seen is ever perfect even after it passes the Congress and is signed by the President. There is always a chance of perfecting any kind of a draft that comes before a committee, and there are certain suggestions that have been made to this committee. I call your attention particularly to a letter addressed to the Chairman by Prof. Walter Gelhorn of Columbia, who makes a few technical suggestions to the bill. There is also a draft, which I am sure the committee has, by the American Bar Association which differs, I think, only in minor respects from the bill itself. The one major respect in which it perhaps does differ is that it looks to a 50-50 Conference; that is, 50 percent members of the Federal agencies, and 50 percent members of the bar. I don't think that is too material. I think inevitably you will have a preponderance of the members of the agency, and I say that because it follows from my thinking that the responsibility for the operation of the Conference, the responsibility for initiating changes in procedures lies with members of the Federal agency who can be prodded into doing something, but they have to take that responsibility themselves.

I am not suggesting any particular wording for this bill. The committee, can make its choices between the various provisions that it has before them, and whatever choice it makes, I think will be the right one. The basic thing is, as I say, the Conference itself—the existence of machinery which will produce a continuing survey of the fairness and the efficiency and the expeditiousness of administrative proceedings in the various different agencies.

I'd like to say one word about a subject that came up this morning, namely, the talk of a superagency being created by this bill. It's so easy to make assertions of that type, but they are utterly untrue. The Executive Officer of the Administrative Conference, Director, if you choose to call him that, is by no means a so-called czar. His consideration of any problem is tempered both by the Conference itself and by the Council. His powers are recommendatory and nothing else, and I agree with Mr. Brownell that he should have the power to suggest subjects for study by the Council and by the Conference, and not be dependent upon the Conference, as such, for initiating every subject that is worthwhile considering. The great thing is the existence of some kind of machinery for the betterment of administrative procedures—a machinery that can prod people into action.

I recall testifying in this room, I think it was 2 years ago, and discovering, for example, that there was practically no cross-fertilization between agencies having essentially common problems, like the Interstate Commerce Commission, the Civil Aeronautics Board, and the Maritime Commission; they are all part of our general transportation picture, and yet they all traveled alone. Now, fortunately, changes are taking place in that area, but that kind of contact and cross-fertilization is one of the important products that can be derived from this Conference and it can be derived from a conference if the Conference also is not merely a one-shot operation, but has the responsibility to continue its activities and has to discharge its responsibilities in the light of publicity, and make its reports to the Congress, to the President, and to such agencies as may be concerned.

I think also that the existence of a conference of this nature will be very valuable to the Congress, because many of these recommendations that have already been made, and many of the recommendations that

will be made, will call for legislative action. To take a very simple example, one of these recommendations, namely changing the method of judicial review over actions of the Interstate Commerce Commission to make it comparable to judicial review over activities of the Civil Aeronautics Board, Federal Trade Commission, and so forth, is a piece of legislation that has been kicking around Congress for, I think, 15 years. The old system of review of Interstate Commerce Commission decisions is an historic anachronism that just has no particular purpose. There is no reason why the judicial review over the ICC shouldn't be handled the same way as review of the other larger commissions, is and I think the committee will benefit by it by the making of this suggestion.

That, Mr. Chairman, is my general thinking on the subject. I have been concerned with it. I have served with Mr. Brownell on the task force of the Second Hoover Commission where we also considered this issue, so this is not a new subject to me. It has had the consideration, I think, of the bar as a whole, and scholars as a whole, and I know of no one who is really antipathetic toward the conference idea. People have a few different ideas as to just how it should be set up, but the experience of the last Administrative Conference during its 18 months of life indicated a very workable organization.

Certain things that I think were important, and you may think they are too, namely the question of alternates. Not allowing people to send a substitute to act for them in the Administrative Conference is important. I agree with Judge Prettyman that the agencies should designate their members themselves, and that the Chairman of the agencies should not automatically become members of the Conference. They can if they choose, but they should not be made members merely because they are Chairman.

We had very effective men who were Chairmen of the various Commissions in the last Conference, and some of them were good. But, it may be that the General Counsel or somebody else would be the most effective delegate of that agency to the Conference.

On the Council, for example, we had the General Counsel of the Federal Communications Commission; we had the General Counsel of the SEC, and they devoted a lot of time to this work. I don't like the idea of just automatically making the Chairman of a Federal agency a member of this Conference. I think they ought to take the problem of becoming a member of this Conference as a very serious matter, and fortunately, Judge Prettyman impressed that on the members of the Conference. He wouldn't allow an alternate to vote and the bylaws of the Conference didn't permit that. They could speak, but they could not vote, so that the members themselves generally attended the Conference.

One other point which I would like to make, and which Mr. Brownell made, and which is also made in the American Bar Association proposal. It is a small point, but that is, that members of the Conference should not be paid, but even for them to take money for their railroad fare to attend meetings of the Conference can possibly be construed as a violation of the Conflict of Interest Act, and they should be protected against that kind of thing. They come and they will spend a day or 2 days here in Washington, and will hesitate to be reimbursed for their expenses. I know for myself, I felt that I couldn't even accept money for train fare because of the Conflict of In-

terest Act since, as a member of a firm and also individually, I have a number of cases pending for and against the Government. This minor thing was cured in connection with the Second Hoover Commission. There was a special provision in that statute which cured that problem and I think that problem should be taken care of.

That is about all I think I would like to say on this bill. I would like to urge upon you, Mr. Chairman, that this in my mind is as important a piece of legislation and perhaps more important than the Administrative Procedure Act of 1946. That was an important piece of legislation. You will recall that it took some 6 or 7 years to produce that legislation in satisfactory form, and I think this legislation will start a type of inquiry and the writing of precedents which has already shown itself valuable. With a statutory base behind it, I think will show even more value than is indicated by the last report of the former Administrative Conference.

Thank you very much.

Senator LONG. Thank you very much. Your statement has been very interesting and very helpful to us.

Mr. Fensterwald, any questions?

Mr. FENSTERWALD. I am in a predicament. I have been waiting for years to examine the dean of my law school, and now that that occasion arises, I have only one question.

Is it your view that the Conference will be and should be predominantly made up of agency people, whether that language is in the bill or not?

Mr. LANDIS. I think so. I don't think any specific language to accomplish this is necessary in the bill. As I say, it will be inevitable. It is essential, for example, that the major Federal agencies be represented in that Conference, and of those there are at least 40 that should be represented, and when you think in terms of a full membership of the Conference being somewhere in the neighborhood of 80, you are bound to have a preponderance of Government people. I think it's a good thing, and I don't feel any necessity for indicating that half of the Council should be members of the bar and half should be members of the agencies. Moreover, I don't feel that political affiliation is a matter of any concern with regard to the formation of the Council or formation of the Conference. It will probably be true in a Democratic administration that you will have more Democrats than Republicans. The reverse, of course, will be true when you have a Republican administration. This is nonpartisan work. I have never seen any indication of a partisan attitude exhibited at any time, either in the Council or the Administrative Council. It happened that the Council, although originally primarily made up of Government personnel, became the other way within about a year's time. I left the Government, but I stayed with the Council and other changes took place, but it didn't alter the fundamental attitude of the group that constituted the Council.

Mr. FENSTERWALD. One additional question: Did you find in any voting on the recommendations in the Assembly that there was necessarily any split between the agency people on the one hand and non-agency people on the other?

Mr. LANDIS. No; there was never that. Some agencies are accustomed to certain basic standards with regard to administrative procedures; others are not accustomed to them. As you know, for exam-

ple, the procedure in the field of immigration and deportation cases is quite different from what it is, say, in a rate case before the ICC. And, there may be good reasons for those differences; sometimes there are not, and when people find that there are no good reasons to eliminate a standard, that really calls for a certain degree of fairness. They will become convinced to change it and realize that they can do a job the way the other fellows do it.

Mr. FENSTERWALD. Thank you.

Senator LONG. Mr. Fensterwald, I am amazed that you didn't take more advantage of this opportunity.

Dean, I have a distinguished gentleman to my left who is counsel to the minority and who I believe is a graduate of another law school; I think that Mr. Kennedy is from Yale.

Mr. KENNEDY. I suppose I should correct that; I am a Yale College Man, but I did go to the dean's law school.

I have only one question, and that is to clarify further the point that Mr. Fensterwald just asked you about as to whether in the voting in the last Conference there was any division between agency and non-agency personnel. I wonder if the records of the Conference would reflect that.

Mr. LANDIS. I am sure they would reflect my opinion as to what occurred there. I don't recall any rollcall votes that were taken. There were close votes and they were taken by the teller technique, so I don't believe there would be any rollcalls which would show exactly how each man voted. You knew how a man voted by the way they put up their hands or the way in which their votes were counted, and you also could get a good idea of it in the way they spoke with regard to certain recommendations. I would say this, that if you deal—if you have a man who is just generally conservatively inclined, his voting record will reflect that, and vice versa, if a man is liberally inclined, his voting record will reflect that. You have conservative and liberals in the bar.

Mr. KENNEDY. It was my recollection that there was no record vote by names.

Mr. LANDIS. I don't recall any.

Mr. KENNEDY. Thank you very much.

Senator LONG. Thank you, Dean.

Mr. LANDIS. Thank you.

Senator LONG. You mentioned Professor Gellhorn at Columbia University. We have a letter from him. This letter will be put in the record at this time.

Mr. LANDIS. Thank you. You will find him pretty helpful.

Senator LONG. I am sure it will be helpful to us.

(The letter referred to is as follows:)

COLUMBIA UNIVERSITY,
SCHOOL OF LAW
New York, N.Y., June 7, 1963.

HON. EDWARD V. LONG,
U.S. Senate,
Washington, D.C.

DEAR SENATOR LONG: I enthusiastically support the purposes of S. 1664, now under consideration by the Subcommittee on Administrative Practice and Procedure. The Administrative Conference contemplated by that bill could contribute powerfully to improving governmental processes that bear upon the interests of persons outside the Government. This would be of advantage not only to the immediately affected persons, but to the Government as well.

In its main outlines, S. 1664 gives effect to the principal recommendations made to President Kennedy last December by the then disbanding Administrative Conference. Those recommendations and the accompanying explanatory report have of course been laid before your subcommittee for its information. My views are in accord with them, and I shall not burden you by repeating what has there been said. I reaffirm my belief however, that the Administrative Conference, led by a strong executive, can do much good. A chairman with the powers and duties prescribed by S. 1664 is an essential element.

In certain matters of detail, I think that S. 1664 can be advantageously clarified. As an addendum to this letter I have taken the liberty of setting forth several minor suggestions which I hope may be considered.

Respectfully yours,

WALTER GELLHORN.

SUGGESTIONS OF WALTER GELLHORN CONCERNING S. 1664

I. SECTION 3

1. The definition of "administrative program" in section 3(a) is unnecessarily constricted. It might very possibly be deemed to exclude from Administrative Conference consideration such matters as Government procurement procedures, selection and tensure of hearing officers, recruitment and training of Government attorneys, social security administration, land patents, grazing permits, steamship, locomotive, and aircraft inspection, proceedings involving determination of appropriate units for collective bargaining, and passport issuance, among other administrative activities important to persons outside the Government.

Bearing in mind that the Administrative Conference has absolutely no power other than to make procedural recommendations, I see no reason to define "administrative program" in the first place. The term is not used significantly elsewhere in the bill other than in the balance of section 3 itself. Its inclusion does no more, in my judgement, than place an artificial constriction upon the future play of commonsense. I recommend deletion of section 3(a).

2. Section 3(b) seems to me to be an unnecessary technicality. The membership of the Conference is to include persons employed in this or that "agency" designated by the President. Surely, the President can determine what is and what is not an "agency" that should be represented in the Conference.

The definition serves no purpose other than to tell the President what he would be able to deduce in any event.

3. If, as I believe should be done, both sections 3(a) and 3(b) were eliminated, section 3(c) could be improved by simply striking out the words "means procedure used in carrying out an administrative program and."

The subsection would then read as follows: "Administrative procedure shall be broadly construed to include any aspect of * * *."

II. SECTION 4

1. Section 4(b) insists that the Administrative Conference be composed "preponderantly" of Federal officials and personnel. This seems to be an unnecessarily provocative direction. In the very nature of things the Conference will—and, in my view, should—be a conference in which Federal personnel have the major role. But the emphatic statement of the obvious serves no purpose. I suggest instead: "(b) The Conference shall be composed of (1) a full-time Chairman * * *."

2. Section 4(b) (3) calls upon the President to designate the executive departments and other administrative agencies from which Conference members are to be drawn. This is a picayune task to impose upon the Chief Executive. I believe that the Council could well be entrusted with entire responsibility for determining the size of the Assembly and for identifying the agencies from which members should be named (though the selection of the members themselves, should of course, lie with the agencies, not with the Council).

3. Section 4(b) (4) contemplates the possibility of an additional appointee from each administrative body identified by the Council. This is a wise provision, since it authorizes a differentiation according to the range of the respective agencies' responsibilities. I suggest, however, that in some instances more than one additional appointee might be deemed desirable. The addition of

the words "or appointees" after the word "appointee" would increase the desirable flexibility this subsection contemplates.

4. Section 4(d) provides that Conference members other than the Chairman are to be uncompensated. The following sentence would be a desirable addition:

"Membership in or service to the Conference by persons outside the Federal Government shall not be considered as service or employment within the meaning of section 203, 205, 207, 208, or 209 of chapter II of title 18 of the United States Code."

This would give added assurance that participation in Conference activities would not create problems under the conflict-of-interests statute.

5. At the end of section 4, a provision might advantageously be added to provide for changes in status of Conference members, as follows:

"A member designated from an agency or by reason of his office shall become ineligible to continue as a member of the Conference under that designation if he leaves the service of that agency or ceases to occupy the office giving rise to his membership. A nongovernmental member shall become ineligible to continue as a member of the Conference in that capacity if he enters the regular service of the Federal Government. If a member resigns, or becomes ineligible, or is otherwise unable to continue as a member of the Assembly, the appointing authority that named him shall designate a successor for the remainder of his term."

III. SECTION 5

1. Section 5(d) seems to me to be too narrowly drawn, in providing for collection and publication of statistical materials. The subsection would be improved, I think, if the words "and other data" were added after the word "statistics." Statistical material is indeed often valuable, but the Conference should not be confined to collating statistics when, in some circumstances, other types of data are deemed more useful.

A cleaner change would be to redraft section 5(a) as follows:

"Collect information from the agencies and publish such reports as it seems useful for evaluating and improving administrative procedure."

IV. SECTION 6

1. The first sentence of section 6(a) should be changed to read:

"The entire membership of the Conference shall constitute the Assembly of the Conference, which shall meet in plenary session at least once each year."

The prescription of at least an annual meeting may guard against the Assembly's falling into a state of innocuous desuetude.

2. Section 6(b) prescribes that the Council of the Conference shall be composed "preponderantly of Federal officials and personnel." I believe that the introductory sentence of this subsection could be advantageously eliminated, leaving to the President's selection the persons who will be Councilors, as was the case with the Administrative Conference that served in 1961 and 1962.

3. Section 6(c)(10) authorizes the Chairman or organize and direct studies "ordered by the Assembly or the Council." The quoted phrase should, in my opinion, be deleted. The Chairman should be free to initiate studies for Conference purposes without being first ordered to do so. This would in no way limit the Assembly's or the Council's power to direct that studies be launched, but would permit work to be undertaken as need might arise, without awaiting a meeting of one of those bodies.

4. The provision in section 6(a) that dissenting opinions and alternative proposals must accompany every publication or distribution of a Conference recommendation imposes an awkwardly cumbersome requirement of doubtful value. A better plan, I think, would be to eliminate this phrase of section 6(a) and to add a new subsection, section 6(e), providing as follows:

"Any member of the Conference may express to the Congress or to the President, or otherwise, his own views concerning matters within the cognizance of the Conference."

This will make abundantly clear that the Conference, unlike a caucus, does not bind its members by a majority vote. Individual members remain free to speak for themselves if they feel called upon to disagree with Conference action or inaction. At the same time it avoids the bulky and sometimes irrelevant documentary additions that would be commanded by the present phraseology.

Senator LONG. Our next witness is Professor Nathanson of the School of Law, Northwestern University, who, is one of the recognized authorities on administrative law. I believe you too were on the Council of the other Conference.

We have a biographical sketch of you, which will be placed in the record.

(The biographical sketch of Professor Nathanson is as follows:)

Nathanson, Nathaniel L(ouis), professor of law; born New Haven; December 21, 1908; son of Samuel Jacob and Lillian (Dante) N.; A.B., Yale, 1929, LL.B., 1932; S.J.D., Harvard, 1933, Rosenwald fellow, 1932-33; married Leah Smirnow, June 22, 1941. Admitted to Massachusetts bar, 1933, U.S. Supreme Court bar, 1942, Illinois bar, 1946; law clerk, U.S. Circuit Judge Julian W. Mack, 1933-34, U.S. Supreme Court Justice Louis D. Brandeis, 1934-35; attorney SEC, 1935-36; assistant professor of law, Northwestern University, 1936-41, associate professor, 1941-45, professor, 1945-; associate general counsel, OPA, Washington, 1942-45; visiting professor of law, Stanford, 1948, Rutgers University 1954; Fulbright professor, University of Tokyo, 1954-55; associate Sonnenschein, Berkson, Lautmann, Levinson, & Morse, 1949; cons. Indian Law Institute, New Delhi, 1958; member Public Utility Laws Commission of Illinois, 1951. Executive committee Anti-Defamation League, Chicago, 1950-56; vice-chairman, Illinois Division, American Civil Liberties Union. Member American, Chicago bar associations, American Association University Professors, Order of the Coif. Jewish religion. Coauthor: Federal Regulation of Transportation, 1953; Administrative Law: Cases and Materials, 1961. Editor-in-chief, Yale Law Journal, 1931-32. Contributed articles to legal journals. Home: 115 Third Street, Wilmette, Ill. Office: 357 East Chicago Avenue, Chicago.

**STATEMENT OF PROF. N. L. NATHANSON, SCHOOL OF LAW,
NORTHWESTERN UNIVERSITY, CHICAGO, ILL.**

Professor NATHANSON. Thank you, Mr. Chairman. I appreciate the opportunity to appear before you. I didn't prepare any elaborate statement because I was pretty sure that Judge Prettyman and Dean Landis would cover almost everything I might think of saying. Consequently, I want only to make some comments on the comments that they have already made.

I might say, to begin with, that I came to this whole operation of the Conference with some skepticism as Judge Prettyman may remember, and perhaps therefore it might be of some special interest to indicate how my skepticism was gradually overcome.

In the first place, I had some skepticism born of my previous experience with Government work and also of my own academic work, that the problems of administrative law were sufficiently general and common, you might say, to the various agencies, to warrant the belief that a Conference of all the agencies together would contribute substantially to the solution of difficult problems of administrative procedure.

In the second place, I had some doubt that the agencies themselves could seriously engage in self-examination of what they were doing.

In the third place, I had some doubt that lawyers from private practice could give enough time and effort to the problems involved, and also could disassociate themselves from the attitudes naturally born of their private practice to examine with some objectivity the problems that had to be faced.

I can say quite sincerely that although my original skepticism had some justification, I was very much enlightened and pleased to find how much those grounds of skepticism could be overcome by the actual experience of the Conference.

In the first place, with respect to common problems, I found that there were many areas where bringing the agencies together and concentrating on the kind of problems which a number of the agencies did have to face, that there could be a very enlightening comparative examination for all concerned.

Dean Landis has mentioned, for example, rate proceedings of a number of agencies, licensing proceedings of a number of agencies and the problems of Government contracts. Although these areas do not lend themselves to easy uniform generalizations, and the law involved doesn't cut across all the operations of the Government, they do concern many different agencies with different substantive problems, but with common procedural problems.

In the second place, I was amazed at the amount of entirely uncompensated time and effort which was put into the operation by the private attorneys. It was really exciting to see that, and I think that that contributed a great deal to the work of the Conference. In that connection too, I was interested to see how the attitudes of both the Government personnel and private attorneys developed, and to some extent changed during the course of the examination of particular problems. One of the things that made possible effective studies of the agencies was the active cooperation of agency members with academic people who were doing the spade work of the examination together with the contributions made by practicing attorneys from their own varied and intensive experience.

With respect to the question of whether there was a split between the Government personnel and the private attorneys, I would like to say that, of course, we shouldn't minimize some difference of attitudes or points of view born from particular experience; that the Government people have very much and properly in mind the interests of the Government in protecting the general public interest, and private attorneys have frequently very much in mind the impingement of Government activities upon private persons. However, the truth is that as our administrative law has developed, there has been such a growing and continuous shift back and forth between Government and private practice, that we get many people with a variety of experience.

Also, it was interesting to note how continuous committee work, during which Government personnel and private attorneys were closely associated over a period of time in the examination of particular problems, gradually changed original viewpoints or brought about some common points of view. In that connection, I think that's why it is perhaps particularly important to emphasize the point that both Judge Prettyman and Dean Landis made, that it is desirable to have continuous participation by a particular member of the Conference, whether he be a Government person or a private person; that the use of alternates who come in for an occasional meeting without having continuously participated, sacrifices that sort of continuous development which may really lead to the substantial contributions toward solution of problems.

With respect to the positions taken, I think one of the most interesting things was to hear a private attorney say with respect to a particular problem:

Of course, in my private practice I find it very useful to have some particular procedure available, and I have used it frequently, but from the point of view

of the public interest, I am not at all convinced that it should be available in this particular way.

That would not happen so very often, but it would happen sufficiently to indicate its possibility, and I am sure such things would continue to grow and increase as the Conference continues.

With respect to some of the particular questions about this bill, I also think that the jurisdiction of the Conference could very profitably be expanded so as to include all of the subjects generally covered under administrative adjudication and rulemaking without the particular exceptions which are now included in the proposed bill. I recognize that those exceptions have good and carefully thought out reasons so far as the Administrative Procedure Act itself is concerned.

Senator LONG. Mr. Fensterwald has a question.

Mr. FENSTERWALD. I want to ask you if your suggestion and change relate to section 3 (a) of the bill.

Professor NATHANSON. I think that is the definition section.

Mr. FENSTERWALD. Yes.

Professor NATHANSON. That would be directed particularly to 3 (a) 1 and 2. I would be happy to see that definition left entirely as it is without the exceptions.

Mr. FENSTERWALD. What is your reason for wanting to take the exceptions out?

Professor NATHANSON. Well, I would say that the exceptions tend to freeze what are now some of the particular exceptions of the Administrative Procedure Act which may be desirable from the point of view of the Administrative Procedure Act itself as a statute which actually imposes certain procedural requirements, but, from the point of view of study and examination, which is all that this bill is concerned with, I see no reason why the scope of investigation should not be as broad as the administrative process itself. Out of that study and investigation, there then may come appropriate determinations as to what should be excepted from general procedural regulations, and what should not be. In other words, I cannot see any harm done from a broad power and a spirit of inquiry, which is what this bill is concerned with. There is also the additional consideration that the definitions now suggestions with respect to the exceptions will involve some rather difficult legal questions as to just what proceedings must be conducted in conformity with sections 7 and 8 of Administrative Procedure Act. This itself is an evolving area of the law. There have been considerable doubts, some of which have been resolved by decisions of the courts and some of which are still pending. This is necessary and appropriate for the Administrative Procedure Act itself, but it seems strange to me that a subject of inquiry should be foreclosed by a doubtful problem as to whether this particular question comes within or does not come within section 7.

Mr. FENSTERWALD. Is it your opinion, if it is left the way it is, that the Conference might spend a great deal of time deciding whether it should or should not consider a particular problem?

Professor NATHANSON. Yes, although I would assume that the Conference would show some good sense about this, I would not like there to be a stumbling block which really has nothing to do with the major work of the Conference.

I think that the only other particular subject that I might mention is the one mentioned by Attorney General Brownell, with respect to the authority of the Chairman to initiate studies. I, myself, would also be in favor of giving the Chairman a little more leeway to initiate studies. Perhaps it would be put in terms of preliminary determinations so as to distinguish between a full-scale study authorized by the Council or the Conference, and preliminary investigations which the Chairman might very properly initiate in order that he might recommend whether a full-scale study should be made.

The only other point I would like to make is that I believe that there is a real public interest in a speedy enactment of a bill along the lines of S. 1664, because the Conference, which has just ended, developed a great deal of momentum, and there were many things which had to be suspended in midair, you might say, because of the expiration of the Conference period. That momentum should be, I think, recaptured as soon as possible, and also the work of implementing the recommendations of the Conference should be continued as effectively as possible, and I think that the establishment of a permanent Conference with a permanent Chairman would contribute a great deal to that end.

I think that's all that I would like to say.

Senator LONG. Thank you very much.

Mr. Fensterwald, do you have any further questions?

Mr. FENSTERWALD. I have no further questions.

Senator LONG. Mr. Kennedy?

Mr. KENNEDY. I have no questions.

Senator LONG. Thank you, Professor, for coming.

Our next witness, and I believe our last today, is Prof. Ralph F. Fuchs, who was born in St. Louis, Mo., and is now a professor of law at the University of Indiana. We are happy to have you here, as you are another one of the authorities on administrative law. Your biographical sketch will be put in the record at this time.

(Biographical sketch of Prof. Ralph S. Fuchs is as follows:)

Fuchs, Ralph F(ollen), professor of law; born St. Louis, March 8, 1899; son of Walter Herman and Paula (Follenius) F.; A.B., LL.B., Washington University (St. Louis), 1922; Ph. D., Robert Brookings Graduate School (Washington), 1925; J.S.D., Yale, 1935; research fellow, Columbia School of Law, 1937-38; married Gladys Alexander, September 22, 1922 (died 1934); married, second, Annetta Gross Zillmer, June 7, 1939; children—Martha (Mrs. John H. Ferger), Hollis Alexander. Admitted to bar in State of Missouri, 1922; research assistant, Institute of Economics, Washington, 1922-25; staff, War Transactions Section, U.S. Department of Justice, 1925-26; practiced law, St. Louis, 1926-27; assistant professor, professor of law, Washington University (St. Louis), 1927-41; assistant secretary, secretary, Board of Legal Examiners, U.S. Civil Service Commission, 1941-44; special assistant, U.S. Attorney General, Solicitor-General, 1944-46; consultant, Federal agencies; member, U.S. Attorney General's Committee on Administrative Procedure, 1938-41; professor of law, Indiana University, since 1945; member, National Enforcement Commission, Economic Stabilization agency, 1951-53; adviser, Indian Law Institute, New Delhi, 1960-61. Chairman, Missouri NRA Labor Compliance Board, 1933-35; commissioner, Missouri National Conference of Commissioners on Uniform State Laws, 1936-45. Served as private, Field Artillery Reserve, 1919-29. Member, American Bar Association, American Association of University Professors (first vice president, 1950-52; president, 1960-62; general secretary, 1955-57), Phi Beta Kappa. Unitarian. Editor: vol. IV, Selected Essays on Constitutional Law, 1938; coeditor: "Cases and Materials on Introduction to Law," 1952; contributor, professional journals, Home: 1410 East University Street, Bloomington, Ind.

Senator LONG. I don't believe you were here this morning, so I will mention it to you now, that Senator Bayh sent a note stating that he regretted that he could not be here. I believe he was a former student of yours.

Professor FUCHS. Yes; he is, I am proud to say.

Senator LONG. He expressed regret not being able to be here, but hopes to be here before we recess.

Professor FUCHS. Thank you very much.

**STATEMENT OF PROF. RALPH F. FUCHS, SCHOOL OF LAW,
UNIVERSITY OF INDIANA, BLOOMINGTON, IND.**

Professor FUCHS. I, too, appreciate greatly the opportunity to come and offer such testimony as I can with regard to the pending S. 1664 on the basis of what knowledge and experience I have. These include membership in the Administrative Conference, which recently sat and has reported, and I wish to confirm the points that have been made by Dean Landis and Professor Nathanson, and no doubt also by Judge Prettyman, whom I didn't have the chance to hear this morning, with regard to the way in which that Conference functioned.

I have made some of the same points in a summary of the work of the Conference which was published in the last issue of the Administrative Law Review; and I think they are very important, indeed. The excellence, as I see it, of the pending bill as a whole, results from the kind of agency it sets up to perform the particular functions that would be performed. These are, of course, research into the operations of the administrative agencies, the application of a critical judgment to those operations, and proposing improvements in the operations. These functions are obvious, but worth mentioning, because there has been expressed at times some feeling that a conference is not the ideal device to carry on these functions because whatever agency does perform them ought to be tied to the Executive somewhat more closely than, perhaps, the Conference would be.

I think that view overlooks the collateral nature of these three functions, which are not in the main line of the performance by the executive branch of its duties, although, of course, they bear very closely on the work of the Executive, and are linked to the Executive. The Conference device, which I think is the best device that has been proposed for performing these functions, operates by bringing a professional judgment to bear from both within and without the Government, calling for a different kind of relationship to the Chief Executive from that which other agencies of Government have. It is for this reason that I think it would be desirable to have the members of the Conference designated by the agencies rather than consist in considerable part of agency heads, because those designated would doubtless be selected with reference to their qualifications to perform this kind of collateral duty. The permanence of the Conference would secure the performance of its functions continuously on a planned basis, and this obviously is what is needed if we are going to bring about the improvements in agency operations which all are interested in achieving.

The Conference device, it seems to me, has several characteristics that are important. One of them is its representativeness of the

agencies and of outside elements in the legal profession and among persons with experience in the Government or knowledge of government. There is provision through the Chairman and the Council for leadership and initiative. In the composition of the Council and of the Conference as a whole there is a basis for strength in the recommendations that result, and also for strength in securing the provision of funds and staff for the needs of the Conference. If, back of the recommendations, there lies the judgment of the people composing such a body, they are going to have greater force than if they emanate from a smaller office that is not similarly representative; and the needs of the Conference are going to receive attention in the budgetary process, which I think is very important.

With respect to the leadership aspect, the point that has been made with regard to the functions of the Chairman is, I think, a very important one, and I agree that the Chairman should have the authority to initiate inquiries and carry them forward in a manner that will present forcibly to the Conference the problems that the Chairman wants it to consider. I am not so sure myself that the provision of the bill in section 6(c), that he shall have power to make preliminary inquiries into matters he deems important for Conference consideration, including matters proposed by persons inside or outside the Federal Government, would not be adequate for the purpose; but if there is any doubt about it, then I think the language at that point should be strengthened.

With respect to the preponderance of agency representatives in the membership of the Conference, I agree very thoroughly with Dean Landis, that inevitably the personnel of the Conference will preponderantly be agency representatives, both because of the availability of their experience and the interest of the agencies, and because there probably are not going to be available enough persons from private life to constitute a preponderance of the membership of the Conference and at the same time devote the effort and dedicate the time to the work which it calls for.

With Professor Nathanson, I have been enormously impressed with the contribution of the practicing lawyers to the recent Conference. I think the number that can make such a contribution at any one time is limited. Hence I believe the purpose of the bill would be carried out for practical reasons, even if the word "preponderance" were deleted from the provision for the membership of the Conference. Its presence there is not objectionable, except perhaps psychologically with relation to the consideration of the bill and the support that it can receive.

With Professor Nathanson, I think it is urgent that this measure be adopted soon, if at all possible, because of the momentum that the recent Conference has attained and the importance of bringing together the products of the Conference in the form of research reports and other documents, and of making them generally available, and the importance of implementing the recommendations through the further consideration that they are to receive at the hands of the agencies and in some instances of the Congress.

I think, Mr. Chairman, that that is really all I have to say.
 Senator LONG. Thank you, Professor. Mr. Fensterwald.

Mr. FENSTERWALD. Professor, is it your feeling that section 4, as previously drafted, might result in too large a conference?

Professor FUCHS. No; I don't think so. I do think that a conference of the size generally contemplated could hardly have a preponderance of nonagency members, and I was trying to make the point that a large conference would inevitably have a preponderance of agency members, and I think that's the way it should be.

Mr. FENSTERWALD. Do you agree with the previous witnesses, that there should be a preponderance of the membership by agency people?

Professor FUCHS. Yes; this is Government business. I think the interest and experience and knowledge that are needed to carry it forward exist most largely among the agencies, but I don't think it is necessary to tie that point down legislatively.

Mr. FENSTERWALD. Do you have any comments on Professor Nathan's remarks with respect to section 3(a)?

Professor FUCHS. Well, that disturbs me. It seemed to me undesirable, but the exceptions are quite limited and they don't do any great harm. I would prefer to see them omitted.

Mr. FENSTERWALD. You do think it a matter of particular importance?

Professor FUCHS. No.

Mr. FENSTERWALD. Thank you.

Senator LONG. Mr. Kennedy.

Mr. KENNEDY. Thank you; I have no questions.

Senator LONG. Thank you, Professor, for being here this morning.

Professor FUCHS. Thank you.

Senator LONG. Tomorrow we will have another session of the committee. We will have Mr. Maxson, Director, Office of Administrative Procedure, Department of Justice; Mr. Hutchinson, Commissioner, Interstate Commerce Commission; Mr. Cohen, Commissioner, Securities and Exchange Commission; Mr. Paglin, General Counsel, Federal Communications Commission; and Mr. Kintner, attorney, Washington, D.C.

The committee will stand recessed until 10 a.m. tomorrow.

(Whereupon, at 12:30 p.m., the committee recessed, to reconvene at 10 a.m., Thursday, June 13, 1963.)

(Subsequent to the close of the hearings, the following letter was received from Professor Fuchs:)

INDIANA UNIVERSITY,
SCHOOL OF LAW,
Bloomington, Ind., June 14, 1963.

HON. EDWARD V. LONG,
U.S. Senate,
Washington, D.C.

MY DEAR SENATOR LONG: Because my appearance before your subcommittee of the Senate Committee on the Judiciary on June 12 was arranged on such short notice, I did not have an opportunity to see in advance the proposed draft of a substitute for S. 1664, which has been prepared on behalf of the American Bar Association. A draft of the substitute has now come into my hands, and I should like, if I may, to comment on a few of its provisions.

1. Section 3 of the substitute seems to me to contain an excellent means of overcoming the limitations in section 3 of S. 1664. Although, as I stated orally, I construe these limitations more narrowly than some others apparently have, their removal in the manner proposed by the bar association draft would certainly be desirable.

2. The provision in section 6 of the bar association draft that at least five members of the Council of the Conference be members of the bar in private practice seems to me to be undesirable. Although the factors I mentioned orally, which I think render it almost inevitable that the Assembly would be composed preponderately of agency representatives do not apply to the Council, and the membership of the Council might therefore be prescribed in various ways, it seems undesirable to require such a large non-Government representation. If a prescription were to be included in the bill, it probably should be for at least a given number to be agency representatives; but it seems to me that the composition of the Council, like that of the Conference, should not be so restricted. Wherever they may come from, the members of the Council should function in their individual professional capacities, and it should be beneficial to permit considerable flexibility in the choice of members. For the same reasons, a specification with regard to the political affiliations of members of the Council seems to me to be unnecessary. I continue to believe, also, that the composition of the Assembly should not be prescribed in mathematical terms.

3. The sentence in section 7(a) the bar association draft, that "The Council shall designate the agencies from which members shall be named and the number of such members from each, having due regard for the extent of the administrative programs of the respective agencies," is, I think, a good way to provide for the membership from the agencies.

4. The sentence in section 7(a) of the bar association draft that "Each member of the Assembly shall participate in his individual capacity and not as a representative of any governmental or nongovernmental organization," would, I think, be a desirable feature of the act establishing a Conference, emphasizing the intended nature of the body to be established.

5. The provision of section 9(a) of the bar association draft with regard to the authority of the Chairman to make inquiries, which eliminates the word "preliminary" from the corresponding provision of section 6(c) of S. 1664, would, I think, be a satisfactory substitute. The inquiries would still be "into matters for Conference consideration." I also prefer paragraph (d) of section 6 as proposed in the substitute to the provision of section 6(c) (3) of S. 1664 which would permit "agency regulations" to limit the information which agency heads might supply to the Conference. I see no reason why the agencies should be encouraged to limit by independent action the information they are willing to supply.

6. It seems to me to be desirable to provide, as section 11(b) of the bar association draft would do, that the Assembly shall meet at least once each year. The possibility that meetings of the Assembly might lapse ought probably to be foreclosed by law.

7. The provision of section 12 of the bar association draft, eliminating conflict-of-interest questions that might otherwise surround the service of members of the Conference from outside the Government, is desirable. Questions of this kind are often exceedingly troublesome, and there seems to be no good reason for permitting them to arise in this connection.

Respectfully submitted.

RALPH F. FUCHS.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

THURSDAY, JUNE 13, 1963

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND
PROCEDURE, OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Subcommittee met, pursuant to recess, at 10:10 a.m., in room 2228, New Senate Office Building, Senator Edward V. Long (chairman of the subcommittee) presiding.

Present: Senators Long and Hart.

Also present: Bernard Fensterwald, Jr., chief counsel, and Cornelius B. Kennedy, minority counsel.

Senator LONG. The committee will come to order.

Before the testimony starts this morning, I want to put in the record a letter that I received as the chairman of the subcommittee, dated June 10, 1963, from the chairman of seven important regulatory agencies. It will be placed in the record.

JUNE 10, 1963.

HON. EDWARD V. LONG,
*Chairman, Subcommittee on Administrative Practices and Procedure of the
Committee on the Judiciary, U.S. Senate, Washington, D.C.*

DEAR SENATOR LONG: Although our agencies will send their comments on S. 1664 in due course, before the hearings are held on this bill we wished you to know that we individually and collectively favor the establishment of a permanent Administrative Conference at the earliest practicable date.

Sincerely yours,

ALAN S. BOYD,
Chairman, Civil Aeronautics Board.
E. WILLIAM HENRY,
Chairman, Federal Communications Commission.
JOSEPH C. SWIDLER,
Chairman (see note), Federal Power Commission.
PAUL RAND DIXON,
Chairman, Federal Trade Commission.
LAURENCE K. WALRATH,
Chairman, Interstate Commerce Commission.
FRANK W. MCCULLOCH,
Chairman, National Labor Relations Board.
WILLIAM L. CARY,
Chairman, Securities and Exchange Commission.

Mr. Swidler's note: My endorsement is based on the assumption that the Administrative Conference is established along the lines proposed in S. 1664. J.C.S.

Senator LONG. Our first witness this morning is one of the signers of this letter, Chairman Walrath of the Interstate Commerce Commission. Mr. Walrath, will you come to the witness table, please.

STATEMENT OF LAURENCE K. WALRATH, CHAIRMAN, INTERSTATE COMMERCE COMMISSION; ACCOMPANIED BY EVERETT HUTCHINSON, COMMISSIONER, INTERSTATE COMMERCE COMMISSION; ROBERT GINNANE, GENERAL COUNSEL, INTERSTATE COMMERCE COMMISSION; AND BERTRAM E. STILLWELL, DIRECTOR, BUREAU OF OPERATING RIGHTS, INTERSTATE COMMERCE COMMISSION

MR. WALRATH. Good morning, Mr. Chairman.

Senator LONG. We are happy to have you here this morning.

MR. WALRATH. Thank you, sir. And on my left, as you will notice, is Commissioner Hutchinson, also of the Interstate Commerce Commission. We also have here Robert Ginnane, Esq., General Counsel for the ICC, and also a member of the Administrative Conference of which Commissioner Hutchinson was a member, and then Bertram E. Stillwell, Director of the Bureau of Operating Rights, Interstate Commerce Commission. He, too, served as a member of the Administrative Conference under Judge Prettyman's chairmanship.

I have a very happy responsibility this morning of saying that our Commission had the benefit of a draft of Commissioner Hutchinson's testimony that he proposes to give before your committee, and rather than burden your record with two witnesses from our group, we have officially—we asked him to speak officially for us as well as his own views and to answer your questions. So my appearance at the moment, Mr. Chairman, is simply to say that the ICC endorses and supports the testimony which Commissioner Hutchinson will give and to call your attention to our letter of June 12, which was delivered yesterday stating in writing the official position of the ICC.

I think it will be entirely consistent with Commissioner Hutchinson's testimony.

Senator LONG. Thank you, Mr. Chairman. We have a copy of that letter and it will be placed in the record at this time.

(The letter referred to follows:)

INTERSTATE COMMERCE COMMISSION,
OFFICE OF THE CHAIRMAN,
Washington, D.C., June 12, 1963.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR CHAIRMAN EASTLAND: This is in response to your letter of June 10, 1963, requesting comments on a bill, S. 1664, introduced by Senator Long of Missouri, to provide for continuous improvement of the administrative procedure of Federal agencies by creating an Administrative Conference of the United States, and for other purposes. This matter has been considered by the Commission and I am authorized to submit the following comments in its behalf:

In principle, we agree with the bill's overall objective to establish a continuing Administrative Conference of the United States. Accordingly, our comments will be confined to particular provisions therein which, in our opinion, appear either unclear or otherwise unsatisfactory.

At the outset, we wish to register our specific approval of section 4(b) which provides that "The Conference shall be composed preponderantly of Federal officials and personnel" and of a similar provision in section 6(b) relating to Council membership. Otherwise, there always would be the possibility that outside interests could dominate operations and recommendations. So conditioned, however, we believe that the broad grant of jurisdiction conferred in the bill would enable the Conference to carry out its intended mission.

Section 6(a) vests in the Conference Assembly ultimate authority over all activities of the Conference. We assume that the authority conferred upon the Chairman by paragraph (c) of that section would be effectively controlled by the Conference Assembly. If there is any doubt as to the validity of that assumption, we believe that subsections (c) (1), (c) (2), and (c) (3) should be amended by limiting in certain respects the Chairman's power and discretion.

We assume that the committee will be advised by the Department of Justice whether the nongovernmental members of the Conference will need an exemption from the conflict of interest laws.

Subject to the foregoing comments and qualifications, we favor enactment of the bill.

Sincerely yours,

LAURENCE K. WALRATH, *Chairman.*

Mr. WALRATH. Thank you, sir.

Senator LONG. Thank you, Mr. Chairman.

Commissioner Hutchinson, we will be happy to hear from you at this time. We have a biographical sketch of you which will also be placed in the record at this time.

(The document referred to follows:)

BIOGRAPHICAL DATA ON EVERETT HUTCHINSON, OF TEXAS, COMMISSIONER, INTERSTATE COMMERCE COMMISSION, WASHINGTON, D.C.

Born: Hempstead, Waller County, Tex., January 2, 1915.

Education: Public schools, Hempstead, Tex.; the University of Texas, B.B.A. and LL.B. degrees. Honors: Friar Society; president, Interfraternity Council.

Bar associations and special activities: State Bar of Texas; American Bar Association; attorney and counselor, Supreme Court of the United States; practitioner, Interstate Commerce Commission; member of the Council, Administrative Conference of the United States.

Experience: Practice of law, Hempstead, Tex., and Austin, Tex., beginning 1940; investment counsel, Texas Permanent School Fund; executive assistant attorney general of Texas, resigned December 31, 1951, to reenter practice in Austin; appointed Commissioner, Interstate Commerce Commission, February 1, 1955; member, Operating Rights Division 1955, Chairman 1957-58; Rates, Safety and Service and Finance Divisions, 1956; Chairman, Rates, Safety and Service, 1960; member, Rates, Tariffs, and Valuation Division, 1959; Chairman of the Commission, 1961; Commissioner in charge, Transport Mobilization Activities, 1960-61; Chairman, U.S. delegation to International Conference on River Navigation, Paris, France, 1961; member, Finance, Safety and Service Division since January 1, 1962; member, Harriman Memorial Awards Committee.

Legislative service: Member, Texas Legislature, two terms; member, ICC Committee on Legislation since 1960.

Military service: Commander, U.S. Naval Reserve; active duty, World War II (22 months in South Pacific); member, Law Reserve Co. 5-11, Washington, D.C.; graduate, U.S. Naval School (Naval Justice), Newport, R.I., and of the National War College, Washington, D.C.

Organizations: American Legion; Post Mortem Club; Veterans of Foreign Wars; Naval Reserve Association; Texas State Society of Washington, D.C.; University of Texas Ex-Students' Association of Washington, D.C., president, 1957-58; formerly member Rotary Club, Austin, Tex.

Clubs: Congressional Country Club; National Lawyers Club.

Church: All Saints Episcopal, Chevy Chase, Md.

Family: Married former Elizabeth Stafford, Palestine, Tex.; two children, Stafford 16, Ann 14.

Legal residence: Austin, Tex.; Washington address: 5401 Albemarle Street, Washington 16, D.C.

Mr. HUTCHINSON. Thank you, Mr. Chairman.

Mr. Chairman and members of the subcommittee, I am Everett Hutchinson. I am a member and former Chairman of the Interstate Commerce Commission and was a member of the Council of the Administrative Conference of the United States established by the President by Executive Order 10934 dated April 13, 1961.

I appreciate this opportunity to appear before the subcommittee and present my individual views on S. 1664 to make the Administrative Conference a permanent organization.

My appearance here today is to urge passage of S. 1664 creating a continuing Conference. I am confident that there is much to be gained by the establishment of a permanent Conference on a legislative foundation by the enactment of appropriate legislation.

During recent years, more and more attention has been focused on the problems of the regulatory agencies. Various groups which have studied the problems of the agencies in recent years have recommended establishment of a permanent Conference. The Judicial Conference of the United States, the American Bar Association, the Federal Bar Association, and finally the Conference established by the President have favored a permanent organization to provide a concerted and continuing effort toward improving the administrative process.

Creation of the Administrative Conference established by Executive Order 10934 was proposed in a letter to the President dated August 25, 1960, signed by the Chairman of the Civil Aeronautics Board, the Federal Trade Commission, the Federal Power Commission, the Federal Communications Commission, the Securities and Exchange Commission, and the Interstate Commerce Commission. In this letter it was suggested that legislation might eventually be required to create a continuing Conference on administrative procedure.

The Conference established by the President in 1961 made its final reports as directed in the Executive order after 19 months of intensive study. One of these reports is dated December 15, 1962, and contains 30 recommendations concerning various phases of agency procedures and activities. Seventeen of these recommendations pertain to matters in which my own agency has a direct and vital interest.

Some of the recommendations, such as recommendation No. 16 respecting ex parte communications, are currently being studied by the Commission with a view toward implementing them by appropriate administrative action.

Another example of a matter under consideration as the result of the work of the Conference is ICC docket No. 34013 instituted by the Commission early in 1962. One of the objectives of this proceeding is to develop standardized cost data which would be admissible in rate cases and possibly constitute prima facie proof.

Thus, the work and recommendations of the Conference established by the President have generated considerable interest and study in particular areas of agency activity.

The other report of the Conference on the matter of a continuing body dedicated to the improvement of the agencies is in the form of a letter to the President dated December 17, 1962, over the signature of the Chairman of the Conference. The letter urges enactment of legislation creating a permanent Conference.

The primary reason for this recommendation is the need for a means or vehicle by which agencies in the Federal Government may cooperatively, continuously, and critically examine their administrative processes and related organizational problems.

Believing that the main source of information, as well as the resolve to couple fairness with efficiency, lie within the agencies them-

selves, the Conference urged that the proposed organization be composed largely of Government personnel, but with a sufficient number of outside experts to assure objectivity and a variety of views.

Individual agencies themselves, of course, have the primary and major responsibility for maintaining fairness while, at the same time, improving the decisional process. Indeed, one of the recommendations contained in the first of the two final reports of the Conference to the President proposed the creation of an office within the agencies to continually study procedures and commended those agencies which had already undertaken a continuing study of their practices and procedures.

At my own agency we continuously reexamine our policies and procedures and rules of practice and have done so for many years. As a result of this continuing study, major organizational and procedural changes have been put into effect in recent years.

I am sure that other Federal regulatory agencies are likewise constantly striving to improve their organization and procedures.

However, the experience gained in the present Conference demonstrates that collective and cooperative consideration of mutual problems produces significant, worthwhile results, both tangible and intangible.

S. 1664 follows the general outline suggested in the letter report of the Conference to the President with respect to the composition, organization, and structure of the proposed continuing Conference. Section 4(b) of the bill provides that the proposed Conference be composed preponderantly of Federal officials and personnel as recommended in the letter report to the President.

In this regard, S. 1664 differs drastically from some other proposals which would not insure dominant representation of Federal officials and personnel. Section 6(b) of the bill provides that the Council be composed preponderantly of Federal officials and personnel.

I believe this provision represents an improvement over the Conference recommendation which did not specifically call for a preponderance of agency officials and personnel on the Council. Any proposal that personnel outside the agencies should dominate the proposed Conference would be undesirable in my view.

I believe legislation creating a permanent Conference should provide that personnel from the agencies play a major role in the organization. There is no real substitute for the firsthand knowledge and experience of agency officials and personnel.

Mutual consideration of related problems by the regulatory agencies is the keystone of the proposal of the Conference for the establishment of a permanent organization.

As suggested in the letter of the Conference to the President, the agencies ought in all fairness be afforded the opportunity and supplied the machinery to collectively attack their own problems. Moreover, recommendations for changes in agency procedure are more likely to be adopted if they come from an organization that is agency oriented.

Under S. 1664 the total membership and composition of the Conference is to be determined by the Chairman with the approval of the Council. This provision is sound and would provide the flexibility needed to facilitate organization of the continuing Conference.

This is essentially the procedure followed in determining the membership of the Conference established by the President. It worked well and is, I believe, superior to an approach whereby the 11-member Council would have sole responsibility for selecting the membership of the Conference.

In conclusion, Mr. Chairman, I would like to invite the subcommittee's attention to a second recommendation contained in the letter of the Conference to the President. This recommendation urges the establishment within the Conference of a committee of five to be known as the committee on agency ethics. Such a committee would provide a readily available vehicle for securing authoritative, impartial published opinions for guidance in difficult ethical questions that sometimes arise in administrative proceedings and in agency operations.

I am convinced that this is a sound approach to problems in a rather delicate and complicated area. This proposal contemplates that the committee on agency ethics would be established by the Assembly of the Conference without a specific statutory provision.

If the subcommittee agrees with this recommendation, it would seem desirable to make this known in the report on the bill, thus making your approval a part of the legislative history of the bill, S. 1664.

I hope the views I have expressed will be of assistance to the subcommittee in its consideration of this important matter, Mr. Chairman.

Let me again thank you and the members of the subcommittee for affording me this opportunity to appear before you today. If there are any questions at this time, I will be glad to try to answer them for the record.

Senator LONG. Thank you, Mr. Commissioner.

Mr. Fensterwald, any questions?

Mr. FENSTERWALD. Mr. Commissioner, I want to thank you first for a very helpful statement.

I wondered if you would have any comments on section 3(a) of the bill which is the definition of administrative program.

Mr. HUTCHINSON. Not any specific comment, but if there are specific questions, perhaps I could be helpful.

Mr. FENSTERWALD. Well, there are certain exceptions made to the jurisdiction of the Conference, and in view of the fact that the Conference's powers are to be purely recommendatory, it has been suggested that the definition of administrative program should be as broad as the definition in the Administrative Procedure Act itself, and we should not put these exceptions in. I just wondered if you had any views on that question.

Mr. HUTCHINSON. Well, as a start, I think the limited jurisdiction is fine, although my personal view is that there are some areas perhaps beyond this where very useful work could be done. But I think within the framework of the section with the exceptions as drafted, there is plenty of room for fruitful endeavor.

Mr. FENSTERWALD. You wouldn't see any particular danger if the definition were slightly broadened to cover or be coexistent with the Administrative Procedure Act itself?

Mr. HUTCHINSON. No. I would not see any danger. On the other hand, I would not see a need at this time for a definition broader than that contained in the draft bill.

Mr. FENSTERWALD. Thank you.

Senator LONG. Mr. Kennedy?

Mr. KENNEDY. Thank you, Mr. Chairman.

Mr. Commissioner, you gave as one of your reasons for having the Conference composed predominantly of Federal personnel that recommendations for changes in agency procedure are more likely to be adopted if they come from an organization predominantly agency oriented. I wonder if you would give us some of the reasons for that conclusion on your part.

Mr. HUTCHINSON. Well, we have had other groups function in the past that were not preponderantly agency as was the Conference established by Executive order, by President Kennedy, and I don't believe the recommendations of those bodies were as well received as the recommendations of this Conference. And it seems to me, therefore, that this offers the best approach for solutions to agency problems than any other that has been suggested.

Mr. KENNEDY. Well, would that be because the agency was reluctant to accept the recommendations by nonagency dominated bodies or because the recommendations themselves were not as suitable?

Mr. HUTCHINSON. I think the latter is the answer. I don't think it is because of any natural or other resistance to ideas from the outside. It is just that the agencies, if I might be able to speak from experience with one of them, tried the proposals and found them not sound, and I think you have a better chance of producing sound recommendations when you have a good foundation in the Conference of agency officials and personnel who know or certainly should know the workings and problems of the agencies in depth better than anyone else.

Mr. KENNEDY. Thank you.

Senator LONG. Thank you, Mr. Commissioner and Mr. Chairman. We are grateful to both of you gentlemen for coming here and for your cooperation.

Mr. HUTCHINSON. Thank you very much.

Mr. WALRATH. Thank you, sir.

Senator LONG. Before I call the next witness, I would like to note that yesterday we had a former dean of Harvard Law School, and we had law professors from Indiana and Northwestern. The two gentlemen on my right and left were very happy to have the Harvard dean here. And, I didn't want them to feel that Missouri was completely left out of the picture; we have here in our audience this morning the dean of the University of Missouri Law School, Dean Joe Covington, who is in the back of the room this morning.

Dean, stand up.

He is not going to testify, but I am happy to have him here this morning to lend me some moral support.

Our next witness is Mr. Webster Maxson, Director of the Office of Administrative Procedure, Department of Justice. He was the Executive Secretary of the Administrative Conference of the United States in 1961-62. Mr. Henry Williams is with you, Mr. Maxson, as a member of your staff, I assume.

Mr. MAXSON. That is correct.

Senator LONG. We are glad to have you both here this morning.

**STATEMENT OF WEBSTER P. MAXSON, DIRECTOR, OFFICE OF
ADMINISTRATIVE PROCEDURE, DEPARTMENT OF JUSTICE;
ACCOMPANIED BY HENRY WILLIAMS, DEPARTMENT OF JUSTICE**

Senator LONG. I also have a biographical sketch of you that will be placed in the record at this time.

(The document referred to follows:)

BIOGRAPHICAL SKETCH ON WEBSTER P. MAXSON

Born September 24, 1916, Rockford, Ill., the second of four sons of Harold S. and Bertha (Kapple) Maxson.

Attended the public schools in Longmeadow, Mass.

Graduated from Amherst College (1939) and the University of Cincinnati Law School (1949) and studied accounting at George Washington University (1950).

Served 5 years in the U.S. Army Air Forces (1940-45).

Admitted to the bar of the State of Ohio, 1949.

Trial attorney and presiding officer, Department of Agriculture, 1949-1956, 1957.

Trial attorney, Federal Communications Commission, 1956.

Attorney Adviser, Office of Administrative Procedure, Office of Legal Counsel, Department of Justice, 1957-59.

Acting Director, Office of Administrative Procedure, 1959-60.

Staff, President's Committee on Ethics in Government, 1961.

Director, Office of Administrative Procedure, 1961-—.

Executive Secretary, Administrative Conference of the United States, 1961-62.

Mr. MAXSON. Some time ago a decision was made by the Attorney General to testify when this bill came on for hearing because he is very much interested in this Conference idea. I, as a lawyer whose particular field is administrative law, have been deeply gratified to observe this interest since the discussions of the Conference idea early in the Attorney General's tenure.

When it appeared that the Attorney General was going to be pre-occupied at this time, Mr. Katzenbach decided to testify. He, too, is otherwise busy today, and so I am here to express their regrets and to testify on behalf of the Department.

The Department of Justice strongly supports the proposal under consideration by the subcommittee to create an Administrative Conference on the United States on a continuing basis.

According to information developed by the temporary Administrative Conference of 1961-62, there were pending before 32 Federal agencies during the past fiscal year a total of 93,473 formal administrative proceedings.

Senator LONG. Pardon me, Mr. Director. I hate to break in on you like this, but it is very important that I go for a few minutes into an executive committee meeting that is being held over in the old building. So I would like to recess for 15 or 20 minutes, and just as soon as I finish there, we will be back. Sorry to have to break in on you and the other witnesses.

The committee will be in recess.

(At this point a recess was taken.)

Senator LONG. The committee will be in order.

Mr. Maxson, I again apologize to you and the other witnesses for this delay. It was very important that I attend this executive session of this committee.

We will be happy now if you will continue your presentation.

Mr. MAXSON. Mr. Chairman, I have a very short statement, and then I would like to comment briefly on one or two of the issues which have been raised by previous witnesses.

Last year, that is, during fiscal year 1962, there were 93,473 formal cases before 32 Federal agencies. A good many of these were very unimportant cases in terms of the number of people involved and the amount of money involved. A substantial number were of significant impact upon the economy.

Here we are in a period of unusual, perhaps, sensitivity to our national growth and to the national economy's well-being. As Dean Landis has gone around saying for a long time, the impact of the Federal administrative process upon the national economy and the whole business community is a very tremendous thing. If, for example, a group intends to build a hydroelectric plant on a navigable stream and if they could somehow go through the necessary process to get the licenses required in a reasonable time, they could hire the labor force, purchase the materials, build the facility, render the service, and provide the asset to the area that added power would provide and contribute to the national economy to the extent that this asset promotes business development in that area.

However, if they go to the Securities and Exchange Commission, to the Chief of the Engineers, to the Federal Power Commission, and are forced to spend 1, 2, or 3 years to get the license to even begin, that means that for 1, 2, or 3 years the hiring of the labor force, purchase of the materials, the asset of the service rendered, the economic activity it will generate—all of these things are inordinately delayed, and this is an encumbrance upon the national development.

Now, that is only one case that may be duplicated thousands of times in this 93,000 figure.

As I say in my statement, the 93,000 figure only suggests the magnitude of the whole process because these are only formal cases. There are countless thousands of informal cases, for example, our 14,000 a year in the Department of Justice which determine exclusion and expulsion in the Immigration and Naturalization Service.

In spite of the concern over the whole process, in other words, the concern over the adequacy of procedures in this area of governmental activity over a long period of time, at least since Lord Chief Justice Hewart inveighed against the "New Despotism" in 1929, it is only recently that there has been anything close to a full appreciation of the impact of the administrative process upon the lives of countless thousands of people and upon the business community at large.

As the legal department of the executive branch, of course, the Justice Department has played a vital role through the years in all of the organized efforts toward improving the administrative process. The Attorney General, under 28 U.S.C. 507(b), has responsibility for the supervision of all litigation to which the United States or any agency thereof is a party. It is because of that responsibility that the Department of Justice has more than an agency interest. In fact, the proper discharge of agency processes has a direct and immediate effect upon the proper functioning of the Department of Justice.

In 1939, the Attorney General, then fully aware of the problems created the Attorney General's Committee on Administrative Pro-

cedure. The work of that committee culminated in the enactment of the Administrative Procedure Act. The Department's role in that activity was important, and conforming agency processes to the requirements of that act was aided greatly by Justice Department efforts. We were active participants in the subsequent organized efforts of the two Hoover Commissions and the President's Conference on Administrative Procedure.

Finally, in the midfifties the Attorney General, then Mr. Brownell, working with Lee Rankin, Solicitor General, decided that this kind of sporadic effort wasn't going to be enough to meet the problems.

This is a viable area. There are very few ultimate solutions. Almost anything you decide is going to have to be tested and inevitably, almost, modified as you go along. Therefore, the Department of Justice established a continuing organization, but only on a very limited and experimental basis. That is the Office of Administrative Procedure in the Department of Justice.

Its experience has generally been deemed by all who have evaluated it, including the recent Conference, as a contribution and a valuable experience. I think it bears somewhat upon the question before the subcommittee today.

From its total experience in the whole area of efforts to improve administrative procedures, the Department now feels that there can no longer be any doubt as to the need for a continuing organization for consideration of the procedures by which Federal agencies regulate the activity of private interests and otherwise determine private rights.

The special insight needed to deal effectively with the many perplexing problems of Federal administrative procedures requires a kind of momentum which is lost in these occasional or sporadic efforts.

Moreover, the organization, as I say, must have the capability to follow through on its recommendations. The formulation of a recommendation, however conclusive in its terms, is really the lesser part of tangible progress. Even though the organization certainly should have no authority to impose its judgment on the agencies, it should have, first, the facilities necessary to assist the agencies in implementing its recommendations, and second, the opportunity to observe and evaluate the consequences of its actions and to conduct such further studies and take such further actions as may be necessary to effectuate the purposes intended.

The administrative process still is developmental, indeed, still in its infancy. It is far from maturity. There are likely to be very few solutions which we can promulgate and walk away from with no further concern. Even the most perceptive recommendations are going to require following up.

Therefore, there must be a continuing body.

Now, as to the nature of such continuing body, it is clear that the difficulty and complexity of the problems makes imperative the application of combined experience and combined judgment and efforts toward their solution. The continuing organization needed, therefore, must provide the machinery for applying to the problems the accumulated insights of the several agencies, lawyers who handle matters before them, scholars from universities, and others who have special knowledge and experience in Federal administrative procedures.

For these reasons the Department of Justice feels that the organization contemplated by the bill appropriately fulfills the needs and we therefore support enactment of S. 1664.

Now, Mr. Chairman, if I may speak to a matter or two which were brought up yesterday, I understand that Mr. Brownell and Dean Landis have suggested that there be added to the bill an exemption from the conflict-of-interest statutes for members of the Conference.

I further understand that Professor Gellhorn would go even further and would extend such exemption to per diem staff assistants to the Conference.

The Department of Justice strongly opposes adding to the bill any such exemptions. I respectfully refer to the memorandum prepared in our Office which was distributed as a committee print of this committee dated March 1, 1963, analyzing the new conflict-of-interest statute, Public Law 87-849, effective January 21 of this year. As is explained in that memorandum, the new statute, at 18 U.S.C. 202, creates a new category of Government employees termed "special Government employees," and relieves them from certain of the prohibitions which apply to regular Government employees.

It is clear that both the Conference member and the per diem staff assistant would come within the definition of special Government employee. Also it is evident that if one examines the restrictions against special Government employees as they are listed on page 15 of the committee print, there is no need for special exemption for persons participating in Conference activity. Specifically the restrictions in the new statute are as follows, and I defer, of course, to the precise language as it is printed in the committee print. These are characterizations.

First, a special Government employee, under sections 203 and 205 of title 18, cannot act as an attorney or agent before a court or Federal agency in a particular matter involving specific parties in which he has participated personally and substantially on behalf of the Government.

Now, obviously in the Conference activity there is going to be no participation personally and substantially by Conference members or by staff in particular cases involving specific parties.

If there is, there is something wrong with the operation and we think the restrictions should apply.

Secondly, under the same sections, that is, 203 and 205 of title 18, the special Government employee cannot, except on behalf of the Government, represent anyone as an attorney or agent in a particular matter involving specific parties before his agency.

Obviously there are going to be no specific cases before the Administrative Conference.

Under 18 U.S.C. section 208 a special Government employee cannot in his official capacity participate in any particular matter in which his family, business associates, or persons with whom he is negotiating for employment have a financial interest. Again, it has only the remotest chance of any application, and to the extent there is a chance, we think the new statute is appropriate and it should apply.

Fourth, after his Government service has ended, the special Government employee cannot act as an attorney or agent in a particular

matter involving specific parties in which he participated personally and substantially for the Government. This is section 207(a).

Fifth, for 1 year after his service is ended, he cannot represent anyone in a particular matter within his official responsibility during the last year of his Government service.

I think it is clear, if you take a look at these provisions, that there is no danger of unfairly subjecting either members of the Conference or staff assistants to jeopardy of conflict-of-interest provisions which should not apply. We think that the new statute is appropriate.

We would like to see it applied without exception in this bill.

Thank you, Mr. Chairman.

Senator LONG. Thank you, Mr. Maxson, for your helpful statement.

Mr. Fensterwald, do you have any questions?

Mr. FENSTERWALD. I just have one or two questions, Mr. Chairman.

I would like in the record to have it noted what a fine job I think Mr. Maxson did with the previous conference and also to thank him for his assistance to this subcommittee in editing documents of that conference which we hope to print in the next few days as a Senate document.

Mr. MAXSON. Thank you, sir.

Mr. FENSTERWALD. We appreciate very much his work.

In his testimony he also mentioned the former Solicitor General of the United States, Mr. Lee Rankin. Yesterday I had a talk with Mr. Rankin and he is going to supply us with a statement with respect to this legislation, and I would like to get permission to have it printed at an appropriate place in the record.

Senator LONG. Without objection, so ordered.

Mr. FENSTERWALD. Mr. Maxson, do you have any comments with respect to the limitations in section 3(a) of the bill as drafted?

Mr. MAXSON. Mr. Fensterwald, I am inclined to agree with Professor Nathanson in his remarks yesterday wherein he indicated that he felt that the exceptions carved out from the scope of inquiry perhaps froze in their present posture in the Administrative Procedure Act and otherwise the matters there carved out. If you look to the reasons for exemptions from the Administrative Procedure Act, surely military and naval functions are executive functions which should not be inquired into by this Conference. I don't think it would serve to inquire as to how the President nationalizes the Guard or how he engages in the negotiation of treaties allocating broadcast facilities in the Caribbean, and this sort of thing.

However, there are other exceptions in the bill, for example, the exception of matters which are subject to trial de novo upon appeal. There is no reason at all that such matters should be excluded from conference inquiry. Typical of such a matter are reparation proceedings before the ICC or before the Department of Agriculture.

It is a speedy remedy, not in place of the courts, for he may go to court instead of going to the agency. However, it does constitute an administrative proceeding which I think would be greatly improved by conference study. There seems to me to be no reason why we shouldn't take a good look at the reparation proceedings in the Department of Agriculture and in the ICC. So I think you have to look, Mr. Fensterwald, to the reasons for the exceptions and you will find that in some

cases certainly the reasons for the exceptions from the administrative act requirements just don't hold as a reason for excepting them from our inquiry.

Mr. FENSTERWALD. Thank you, Mr. Maxson.

Senator LONG. The Chair would like to note the presence of Senator Hart who is a member of the subcommittee. Since he was attending the meeting of another committee, it was impossible for him to be here.

Any questions?

Senator HART. No. I should apologize to the chairman of this subcommittee by explaining that I was responsible for his having to take a recess.

Senator LONG. Thank you, sir.

Mr. Kennedy?

Mr. KENNEDY. Thank you, Mr. Chairman. I don't have any questions.

Senator LONG. Thank you, Mr. Maxson, for your statement. It will be very helpful to us.

(The following letter from Hon. J. Lee Rankin was received by Senator Long after the close of the hearings:)

NEW YORK, N.Y., June 19, 1963.

HON. EDWARD V. LONG,
Chairman, Subcommittee on Administrative Practice and Procedure,
Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR SENATOR LONG: In response to your letter requesting my views concerning S. 1664 which would establish a permanent Administrative Conference, I wish to advise that I strongly endorse the purposes of S. 1664. I should like to join Prof. Walter Gellhorn in his proposed changes of S. 1664 as set forth in his suggestions of June 7, 1963. I should also like to approve the statements of Prof. N. L. Nathanson, of the School of Law, Northwestern University, and Prof. Ralph S. Fuchs, of the School of Law, University of Indiana, and associate myself with their remarks.

When it is realized that administrative matters of serious concern are more numerous than those litigated before Federal courts, it points up the great importance of a progressive improvement of administrative procedures. My experience as a consultant to the Administrative Conference of the United States in 1961 satisfied me that there were many improvements that should be made and that the Conference was most beneficial in its recommendations and its enlightening influence for the agencies and all participants.

I should be hopeful that the Administrative Conference, once established on a permanent basis, would have a beneficent influence on the improvement of administrative procedures comparable to that of the Judicial Conference with regard to the courts.

I hope that you and the other members of the committee will be successful in your efforts on behalf of this legislation.

With best wishes, I am,

Sincerely,

J. LEE RANKIN.

Senator LONG. Our next witness is Mr. Manuel F. Cohen, Commissioner of the Securities and Exchange Commission.

The biographical sketch of Mr. Cohen will be placed in the record.
(The document referred to follows:)

Manuel F. Cohen has been a member of the Securities and Exchange Commission since October 11, 1961. He received a bachelor of science in social science from the Brooklyn College of the College of the City of New York in 1933 and a bachelor of laws cum laude from the Brooklyn Law School of St. Lawrence University in 1936, LL. D. (honorary) 1962. He was admitted to the New York Bar in 1937.

Commissioner Cohen has been employed by the Securities and Exchange Commission since 1942, serving as Chief Counsel to the Division of Corporation Finance from 1952 to 1959, as adviser to the Commission in 1959 and 1960, and as Director of the Division of Corporation Finance in 1960 and 1961.

In 1956, Commissioner Cohen was awarded the Rockefeller Public Service Award by the trustees of Princeton University which made possible a 1-year study of the capital markets in the principal financial centers of Western Europe. He was also awarded the Career Service Award by the National Civil Service League in 1961. In April 1961, the President appointed Mr. Cohen to the Council of the Administrative Conference of the United States. He is a member of the American Bar Association, the Federal Bar Association, and the American Society of International Law. Since 1958 he has been a lecturer in law at the George Washington University Law School. He has published a number of law review articles on various aspects of the Federal securities laws.

Senator LONG. Mr. Cohen, will you introduce to the committee the members of your staff or your assistants.

STATEMENT OF MANUEL F. COHEN, COMMISSIONER, SECURITIES AND EXCHANGE COMMISSION; ACCOMPANIED BY DAVID FERBER, ASSOCIATE GENERAL COUNSEL, AND DOLPH SIMON, ATTORNEY IN THE OFFICE OF GENERAL COUNSEL

Mr. COHEN. I am very pleased to do so. Mr. David Ferber on my right is our associate general counsel. He was a member of the conference and chairman of the Committee on Internal Organization and Procedure, a committee which made important recommendations. On his right is Mr. Dolph Simon, who is one of his assistants.

Mr. Chairman, my name is Manuel F. Cohen. I want to thank you and the members of this subcommittee for the opportunity to appear before you with respect to S. 1664, which would create a permanent Administrative Conference of the United States.

I was privileged to serve as a member of the Council of the temporary Administrative Conference from the time it was established on April 13, 1961. Although I am a member of the Securities and Exchange Commission, I appear here in my personal capacity. The views I shall express are my own, and do not necessarily reflect those of my colleagues on the Commission, or on the Council of the Administrative Conference.

However, I am authorized to state that the Commission unanimously favors the establishment of a permanent Administrative Conference.

There can be little dispute over the importance of effective administrative regulation. Ten years ago the late Mr. Justice Jackson noted that, "the rise of the administrative bodies probably has been the most significant legal trend in the last century and perhaps more values today are affected by their decisions than by those of all the courts. . . ." To an ever-increasing extent, the Congress has entrusted to the so-called independent commissions, and to agencies in the executive branch of our Government far-reaching administrative, legislative, and judicial powers over vital aspects of our national life. It has been stated that, in volume, administrative rules and regulations promulgated by Federal agencies now dwarf the statutes enacted by the Congress; that the output of formal administrative adjudications exceed substantially the number of decisions rendered each year by the Fed-

eral judiciary. And these formal functions constitute only a small part of agency activities.

It is now generally accepted that effective solutions to the many-faceted problems generated by our complex society can be reached only by the concentrated and continuous study made possible by the administrative process. The familiarity so developed provides the flexibility necessary to adjust policy interpretation or procedure to meet the innumerable problems presented and the changes wrought by technological advances. It requires no argument to establish that the maintenance of a viable administrative process, responsive to the changing needs of the social and economic institutions it must regulate in the public interest, is of paramount concern to all interested in sound and effective government.

I do not believe it necessary to remind this subcommittee that in recent years certain agencies and administrators have been objects of criticism. Indeed, the very structure of the administrative agencies has been the subject of some debate. Unfortunately, these criticisms have tended to obscure the many notable achievements of administrative agencies in implementing effectively intricate patterns of regulation in accordance with the policies and criteria of public interests as laid down by the Congress. Nevertheless, it must be conceded that the ever-quickenning pace of industrial and social development poses a continuing challenge to the adequacy of existing practice and a demand for the development of more effective and efficient procedures.

Throughout the years this subcommittee has had before it many proposals for administrative reform. Many of these proposals, however, have consisted merely of attempts to introduce into the administrative process a high degree of uniformity under procedures similar to those which govern our judicial system.

About a year ago I had occasion to suggest that—

an attempt to confine a process deliberately withdrawn from the judicial arena and unsuited to it may serve only to defeat the aims of its sponsors. Those who have had occasion to appear before more than one of our Federal regulatory agencies must have been struck by their widely differing nature and functions. While certain common procedural requirements are susceptible of, and should receive, more uniform treatment, the problems involved in ratemaking, in awarding monopoly air rights, in revoking a broker-dealer registration, or in authorizing changes in the capital structure of a large enterprise, have little in common and provide little basis for a common framework. To encompass the full range of the administrative process within detailed and undifferentiated rules of procedures would afford administrative agencies and practitioners no latitude for the use of their specialized experience to achieve fairer results by simpler methods. Such proposals in my opinion have a large potential for unnecessary delay and complexity.

The point I wish to make here is simply that changes in administrative practice must be carefully tailored to meet the special problems which each agency faces. Flexibility rather than uniformity is the key that will unlock solutions to the many problems of administrative regulation.

For these reasons I believe that the primary task of reevaluation of administrative procedure and problems must be left in the hands of the various agencies which, with the assistance of the business communities and the professions directly affected by their activities can most effectively adapt old procedures and create new ones in the particular context of their substantive regulatory problems. In these efforts, however, the agencies can benefit from exposure of their problems and practices to the varying experience of other Federal regulatory agencies and of private individuals. S. 1664 in establishing a permanent Administrative Conference would provide for continuous study of these problems within a framework which would necessarily require an interchange of experience by the entire Federal Government. I think it fair to say that the bill before you reflects the comments of Government agencies most affected and the views of interested organizations and persons outside the Government.

The concept of creating a permanent Administrative Conference with a full-time Chairman and an adequate staff has, of course, been the subject of much comment over the past 10 years. I am sure that Judge Prettyman, under whom I had the honor to serve, has recounted for you the previous efforts to achieve such a permanent conference. The success of the Judicial Conference of the United States has spurred interest in the creation of a similar organization concerned with the administrative process.

It is noteworthy that private practitioners in the field of administrative law, although perhaps disagreeing in certain details, have joined in urging that the Congress adopt this type of legislation as an effective means to assure maximum efficiency and fairness in administrative procedure in the Federal agency.

If I may, I should like to take a minute or two to discuss the temporary conference which was established by Executive order of the President. It was, as you know, composed of more than 80 members drawn from the Government, the professions, and the academic world based on their broad experience and keen interest in the administrative process. Sparked by the Chairman, Judge E. Barrett Prettyman, these persons devoted countless hours in committee and council meetings and in plenary sessions, exploring ideas, probing the strengths and weaknesses of various approaches and reaching a consensus of agreement on effective solutions to a large number of vexatious problems. A total of 30 recommendations were forwarded to the President who submitted them to the various agencies for consideration. Some of the recommendations affected one or a few of the agencies. Others were designed to deal with problems common in greater or lesser degree to all of them.

The success of the Conference efforts, however, should not be measured by the number of specific recommendations made or which have been or may be implemented by the various agencies. It should also be measured by the reexamination of, and the renewed efforts to find solutions for, problems within each agency which were stimulated by the Conference. Speaking from my own experience as a member of the Securities and Exchange Commission, I believe that the work of the Conference has produced important results.

A number of the recommendations made by the Conference were applicable to and could be implemented by the SEC. One of them

dealt with the delicate and difficult problem of ex parte communication between persons in and persons outside the Government with respect to pending cases.

The Conference concluded that a single code of behavior applicable to such problems in every Federal agency was not feasible for the obvious reason that the factual circumstances giving rise to the problem vary too greatly among the agencies to be susceptible of common treatment except in the most generalized terms. The Conference did, however, promulgate a set of principles and recommended that each agency formulate a code of behavior which would adapt these principles to its activities and problems.

Thanks to the exploratory work done by the Conference and to the guidelines it furnished, the Securities and Exchange Commission was able to develop and has adopted a specific code of behavior with respect to ex parte communications more comprehensive than any of our earlier rules or canons.

We have also adopted certain recommendations relating to service of pleadings on attorneys and to the right to counsel for persons subpoenaed or who appear voluntarily to testify. Perhaps most important of all, pursuant to a recommendation of the Conference, we have created a permanent staff committee for the continuous observation and evaluation of Commission procedures. Under the guidance of this committee, our rules of practice relating to these many matters including, for example, the issuance of and motions to quash subpoenas are now being reexamined with a view toward possible implementation of conference recommendations on these matters. As a result of another recommendation of the Conference, we are exploring the feasibility of publication of an official index of all opinions issued by the Commission since its establishment. Other recommendations made by the Conference or stimulated by these activities are now under study.

I am unable to speak for the activities of other agencies in any detail. I understand, however, that our efforts at the Commission are being duplicated elsewhere. I think it is remarkable that within less than 6 months since publication of the final report of the Conference, so much has been accomplished. This should prove beyond doubt the readiness of the regulatory agencies to accept criticism of their procedures, and to initiate changes necessary to meet these criticisms, developed in a cooperative undertaking in which each has had an important opportunity to learn, to explain, and to participate.

Too often in recent years the rising tide of day-to-day workload has permitted administrators little time for critical and objective analysis of recognized problems and has deflected efforts to reevaluate the adequacy of existing procedures. The activities of the Administrative Conference served, first, to focus attention on these problems, and then to facilitate the task of finding solutions by furnishing objective guidelines and criteria for adaptation to individual requirements.

Although the work of the Conference bore fruitful results in a number of important areas, its short duration necessarily left untouched many other complex problems. For example, the principles formulated by the Conference with respect to ex parte communications were limited to off-the-record contacts between private litigants and mem-

bers of the agency or its staff who might be participating in the decisional process. The Conference noted that limitations of time precluded consideration of the equally important problem of intra-agency communications between members of the agency or its staff performing decisional functions and other agency employees.

The experience of this Conference as well as the experiences derived from the work of earlier conferences point to many additional areas in which there is a need for continuing interagency cooperation. A piecemeal attack on problems of such intricate nature and such extensive scope is less likely to satisfy this need than a continuous conference.

In my view the provisions of S. 1664 are well designed to meet this need. They would provide a clearing house through which Federal agencies, assisted by experts from the academic world, the legal profession and the business communities, might cooperatively study mutual problems, exchange information, and develop recommendations for action by the agencies.

The bill emphasizes that the purpose of the Conference is to "study," to "exchange" and to "develop." The Administrative Conference thus envisioned would be a factfinding advisory organization designed to stimulate thinking about procedural problems and to recommend solutions.

The bill leaves flexible the determination of the relative representation in the membership of the Conference as between agency personnel and private individuals. There can be no reasonable question whether members of the practicing bar, scholars in the field of administrative law, and political science, and members of the business community have a legitimate interest in and can make important contributions to the task of reviewing and improving administrative procedures. Persons outside the Government can and do bring their varied experience to the consideration of these problems and focus the attention of the Conference on troublesome aspects of procedure which have a significant impact on private parties. However, I believe that the Administrative Conference can best accomplish its purposes if it is composed predominantly of personnel from the various Government agencies. The function of the Conference is to assist other Government agencies in the study of their procedural problems. It should be essentially a study and advisory organization of and by the agencies. Agency members who participate in its deliberations will undoubtedly, however, provide a powerful force for implementation of its recommendations.

I am not unmindful that the concept of making the administrative agency an agency Conference has been criticized as "stacking" the Conference in favor of the Government. The assumption is that agency personnel can be counted on to vote together to resist change designed to eliminate procedures which may be unnecessarily time consuming or burdensome to private individuals. In my view such criticism is unfairly leveled at public servants interested only in fulfilling statutory mandates in the public interest. In any event, it is contradicted by the experience of the last Administrative Conference. Were a study made of the views expressed and the votes taken during the Conference, it would reflect a wide diversity of opinion among agency personnel and among persons from outside the Government.

There is no more unanimity of opinion among agency personnel than there is among Members of the Congress.

In closing I think it important to note that settling issues of procedural organization will not fulfill all of the basic needs of the regulatory process. However, procedures do have an important influence on the equities and efficiency of Government activities. They can provide important assistance or a powerful hindrance to the effective resolution of vital issues of policy confronting many agencies. Enactment of the Administrative Conference bill would be an important step forward toward the solution of these problems.

Thank you again, Mr. Chairman, for the opportunity to appear here.

Senator LONG. Thank you, Mr. Cohen. We appreciate your being here and your helpful statement. It has been very fine.

Mr. FENSTERWALD. I just had one question, Mr. Cohen, and that is with respect to section 4(c) and the general problem of alternate members, I wondered if you saw any—at least it had been suggested to the subcommittee that instead of having alternates, that we have either the head of an agency or someone designated by the agency as a member but not the agency head automatically and then an alternate in addition.

Do you have any comments on that suggestion?

Mr. COHEN. Yes, sir. In doing so I believe I should comment on provisions of section 4(b) (2). That subsection provides that the chairman of each independent regulatory board or commission shall be a member of the Conference. I understand that this provision is designed to emphasize the point that I was making; that this should be a Conference of the agencies; and there is probably no better way of emphasizing this point than having the chairman of the agency or the department a member of the Conference.

Nevertheless, I am not altogether sure that this is a realistic approach. The chairman of the agency not only is the leader of the agency in regard to the development of the policies of the agency; he has many duties that other members of the Commission or the Board do not have. He usually represents the agency before the Congress and other agencies and in other respects. He is also by law charged with all of the administrative detail and responsibility of an agency.

In that context I have some questions whether realistically one can expect that the chairman of an important agency—and all the important agencies would be represented—would have the time to devote to regular attendance. If that suggestion is a valid one, it then raises a further question. Since by law the chairman would be a member of the Conference, I think he would personally feel some responsibility to it. He would therefore try to give to it as much time as he could in the context of the problems I have enumerated. But necessarily he would have to find a delegate from time to time. This might mean the chairman and his delegate would act on a sporadic basis. Participation should be as continuous as possible not only in the Conference but on important committees of the Conference, where the work of the Conference in large measure is initiated and developed. I feel, therefore, in response to your question, that it would be desirable that the members of the Conference from the agencies be permanent members serving on a continuous basis.

Mr. FENSTERWALD. Well, can you envisage a situation where the chairman of a particular agency might be an expert in administrative law and might want to sit and in other agencies he may have neither the time nor the training and would like to designate someone else as a permanent member?

Mr. COHEN. I am glad you asked me that question. I think perhaps I may have overstated the point. I did not mean to suggest that the chairman of the agency should not have the privilege of being a member of the Conference. He may well be the most expert person in the agency. He may well have a great personal interest in it, and if he can find the time and he feels that the problems are great enough, even at the expense of delegating some of his other responsibilities, he should, of course, have that opportunity.

My concern was that under the statute he is a member *ex officio* whether or not he has this expertise and whether or not he has the time and interest.

Mr. FENSTERWALD. Thank you.

Senator LONG. Mr. Kennedy?

Mr. KENNEDY. Mr. Chairman, I have no questions. Thank you.

Senator LONG. Thank you, Mr. Cohen. We appreciate your being here.

The next witness is Mr. Max Paglin, who is General Counsel of the Federal Communications Commission.

STATEMENT OF MAX D. PAGLIN, GENERAL COUNSEL, FEDERAL COMMUNICATIONS COMMISSION

Senator LONG. I notice in the biographical sketch which will be placed in the record at this time that he was also a member of the Council of the Administrative Conference in 1961 and was elected Vice Chairman of the Conference by the Council.

Mr. Paglin, we appreciate your being here and we will be happy to hear your statement at this time.

(The biography referred to follows:)

Max D. Paglin, General Counsel of the Federal Communications Commission, was born in New York City on May 1, 1914, and was educated in the public schools of that city. He attended the College of the City of New York and received the degree of bachelor of science in social science (B.S.S.) in 1936. His law training was taken at Columbia University Law School from which he was graduated and received his bachelor of laws degree (LL.B.) in 1939. He was admitted to the bar of the State of New York in the same year.

From 1939 to 1942 he engaged in private law practice in New York City. In December 1942, Mr. Paglin accepted a position in the General Counsel's Office of the Federal Communications Commission, as an associate attorney in the Hemisphere Communications Unit, working on the development and integration of Latin American communications facilities for Western Hemisphere defense. His 20 years of service with the Commission cover a wide range of regulatory experience, including the fields of international common carrier communication (1943-48); FM broadcasting (1948-50); AM broadcasting (1950-51); and the trial of broadcast cases (1951-53). In 1953, Mr. Paglin was appointed by Commissioner Robert T. Bartley to serve as his personal legal assistant. In that position, which he held for more than 5 years, he worked closely with the Commissioners in matters affecting relations with Congress on pending legislation, investigatory hearings and inquiries into the administrative process as well as dealing with the many complicated legal and policy questions in all phases of the Commission's regulatory and quasi-judicial activities in the field of communications.

In February 1959, Mr. Paglin was appointed by the Commission to be Assistant General Counsel in charge of the Litigation Division, in which position he was responsible for advising and representing the Commission in all matters of litigation to which the Commission was a party, and defending the actions and orders of the Commission when judicial review thereof was sought before the courts.

In March 1961, Mr. Paglin was appointed General Counsel of the Commission, which position he now holds.

In April 1961, Mr. Paglin was appointed by President Kennedy to be a member of the Council of the Administrative Conference of the United States, set up by Executive order, which is designed to study the administrative procedures of various departments and agencies of the Federal Government and to develop recommendations for their improvement. He was elected Vice Chairman of the Conference by the Council.

Mr. Paglin is married to the former Sally Kobak of South Norwalk, Conn., and they have two sons, David, age 17, and Eric, age 14. He is a legal resident of the State of New York, but currently lives in Silver Spring, Md.

Mr. Paglin is a member of the Federal Bar Association, National Lawyers Club, Phi Epsilon Pi Fraternity, Columbia Law School Alumni Association, the City College of New York Alumni Association, and is also active in community and neighborhood groups, being a member of the Westchester Civil Association, and the Sligo Junior High School Parent-Teacher Association.

Mr. PAGLIN. Thank you, Mr. Chairman, and I, in turn, do really appreciate the opportunity to appear before this subcommittee on this bill.

As you have indicated, Mr. Chairman, my official position in the Government is that of General Counsel of the Federal Communications Commission. However, today I appear here in a slightly different role, as you have indicated, as former Vice Chairman and Member of the Council of the recently concluded Administrative Conference of the United States, which was established by the President under Executive Order 10934 of April 13, 1961. It is in this latter capacity that I propose to discuss the bill that your subcommittee is considering today; namely, the bill which you, Senator Long, have introduced calling for establishment of the Administrative Conference of the United States on a permanent basis.

However, lest it appear that the Federal Communications Commission itself has no interest in this matter, let me hasten to say that this is not the case at all. Therefore, with your permission, I would like to have introduced at an appropriate place in the record of these hearings, a letter which I am authorized to submit to you from the Chairman of the Commission addressed to yourself, Senator Long.

This letter makes clear that the Commission fully supports establishment of the Administrative Conference on a permanent basis.

I have already turned over to your counsel the original of this letter together with the necessary copies.

Senator LONG. The letter will be included in the report at the conclusion of your remarks.

Mr. PAGLIN. Now, turning to the bill itself, I think it can be said without much fear of contradiction that there is fairly common agreement on one thing: we have long since reached the point where some kind of organization or body is needed to provide coordinated leadership in the field of administrative procedure reform.

Of course, understandably enough, the question of just what type of organization can best perform these important duties has been the subject of much discussion. And the problems implicit in any proposal for such an organization have been approached from every

conceivable angle, studied and debated, back and forth, over the past few years.

But it is not my intention here to compare the advantages and disadvantages of the various types of agencies which have been proposed over the years, not only because I do not set myself up as an historian in this area, but more, because I sincerely believe that the form of organization proposed here—establishment of the Administrative Conference of the United States on a permanent basis—represents a synthesis of the best features of the various agencies previously considered.

Here, the high degree of autonomy of the proposed Conference, specific exclusion of the Conference from matters of substantive policy committed to agency discretion, the provision for a Chairman with an expanded role and meaningful authority, the provision for an adequate staff to assist the Conference in recommending procedural reforms, and, finally, the provision that recommended practices are to be formulated through mutual cooperation and only after agency members have been afforded an opportunity to appraise the effects of such standards on their operations—all these features of S. 1664 speak well for the proposed Conference.

And, at the same time, they serve to lessen the concern which really lay at the heart of most agency objections to previous proposals in this area—the fear, whether justified or not, that some administrator, though well-intentioned, might try to force all agencies into the same rigid mold.

But under the safeguards provided by this bill, I think such fears would be unjustified. And, in my judgment, the bill is a good one which carries a high degree of promise for bringing about much-needed reforms.

Now, in light of the fact that the previous witnesses have so ably discussed the work of the recent Administrative Conference and the background of this bill, what I should like to do, if I may, would be to direct the balance of my remarks to a somewhat different matter—that is, discuss briefly the benefits which agencies could expect to derive from participating in the Conference.

I think this aspect of the bill deserves some attention, because, human nature being what it is, there is a regrettable tendency for all of us, immediately upon seeing a new piece of legislation, to think solely in terms of new obligations and duties, viewing the plus factors of such legislation with a certain amount of skepticism.

At this point, one of my associates, Mr. Chairman, in the draft of this statement, indicated that perhaps I might express this thought by saying that some people, when they are faced with a new piece of legislation, take the so-called attitude of the fellow who says, "I'm from Missouri, show me." And I told him I thought that might be a little inappropriate in view of the identity of the chairman of this subcommittee.

However, this is a problem.

What, then, can agencies expect to derive from participating in the Conference?

To my mind, the most important, and also the most obvious, benefit will be to obtain a combined marketplace, forum, and testing laboratory for the assembling and exchange of ideas and information useful to procedural reform.

The importance of this cannot be overemphasized, for it is the past lack of an organization which could perform these combined functions which has, in large measure, precluded effective solution of many of the procedural problems now besetting agencies. In this connection, I should like to take the liberty to refer to my own experience as Vice Chairman and Council member of the Administrative Conference which recently ended.

What that Conference afforded me, and the other participants therein, was a means to meet with other representatives of Government agencies, members of the bar, and scholars, and to discuss problems of mutual concern.

This we did in an atmosphere of reasonableness and cooperation, without any sense of coercion, and on a completely frank basis. Here we were able to exchange information regarding our experience with given procedures, to suggest (in light of our own particular statutes) why certain procedures could not apply to the agencies we represented, for example, and to suggest for consideration by other agencies reforms which had already been achieved at, say, the FCC.

This was accomplished through what I have characterized as a system under which there was "cross fertilization through cross section;" that is, that there was a cross fertilization of ideas through a cross section of representation from the various areas of people knowledgeable in this field.

But this was only a small part—indeed, the lesser part of what those who participated in the Conference gained. Because it was my observation—and I think other participants in the Conference will back me up on this—that the most important thing all of us derived from the Conference, and that was most significant, it seemed to me, to the members representing the agencies, was a revitalized recognition of the need for searching out solutions to procedural problems.

So, speaking from my personal observation, the spirit of cooperation which prevailed at the Conference, and which served as a remarkable catalyst for inspiring fresh perspectives to problems of administrative procedural reform, is perhaps the most important benefit which agencies can expect to derive from participating in a Conference established on a permanent basis.

Of course, the Conference being the joint venture that it is, what agencies will actually derive therefrom will depend, in good measure, on the attitude with which they approach the work and recommendations of the Conference.

By approaching their participation in the Conference with an attitude of openmindedness and receptiveness to desirable changes, it seems to me that the agencies can profit in the same manner as the courts have, through the Judicial Conference of the United States, the body most analogous to the proposed Administrative Conference.

And by openmindedness, I mean that agencies and participants in the Conference should be willing to approach their problems with what Warner Gardner has referred to in his paper, "The Administrative Process," presented during the Columbia University Law School Centennial, and I quote:

A concern more with the pathology of the administrative process—with the areas where it doesn't work as well as it might—rather than with the much larger areas where it works either adequately or exceedingly well.

But, assuming agency participation in the Conference in the spirit of openmindedness and cooperation I have just mentioned, I believe that what the agencies will quickly find is that they have a sympathetic forum to which they can bring their problems. Certainly, this was my personal experience in connection with the Conference.

I think also that agencies will discover that a great many of the procedural problems they are confronted with are shared by other agencies, and that by a free and frank discussion of such problems, useful information can be obtained as to which approaches have succeeded and which have failed.

With respect, for example, to suggested new procedures, mutual discussion can make of the Conference a kind of testing laboratory, through which time and effort can ultimately be saved by pretesting and preexamining ideas before they are formulated into practices.

Further, by the use of committees and persons knowledgeable in the field of administrative law, including not only Government officials, but also members of the bar and scholars, agencies will obtain fresh, objective viewpoints not always available within the agency itself.

For it has been my experience that such analysis and constructive criticism, coming as they do from persons learned in a particular field, generally reflect a perspective which it is difficult to obtain from those engaged in the day-to-day operations of an agency.

Thus, such persons outside the Government can provide extremely useful assistance to agencies, especially in the area of conducting in-depth studies of problems, studies for which agencies rarely have sufficient time or funds.

Finally, I am reminded of several factors which I believe are highly important to success of the Conference. One of these factors is already implicit within the framework of S. 1664—the provision for a Chairman of sufficient stature and authority to provide the type of leadership needed to make the Conference truly effective.

The other factor depends on the agencies, i.e., an obligation to send to the Conference experienced representatives, who have an understanding of their own procedures and a breadth of mind and vision to recognize areas of possible improvement by adaptation and changes in the field of procedure.

So, it is with the firm conviction that the proposed Administrative Conference of the United States will provide the best means for meeting these problems, that I strongly urge enactment of S. 1664.

With this legislation, there will be progress. I am convinced of that. Perhaps not miraculous progress at first, for the problems here are difficult and do not admit of a quick solution. But such a continuing progress in the solution of procedural problems is vital to the ability of agencies to discharge their specific functions; namely providing flexible solutions to substantive problems within their respective jurisdictions.

Thank you, Mr. Chairman.

Senator LONG. Thank you, Mr. Paglin, for a very fine statement.

Mr. Fensterwald?

Mr. FENSTERWALD. Mr. Paglin, do you consider that the Administrative Conference will be a superagency?

Mr. PAGLIN. Mr. Fensterwald, I certainly do not, and I cannot express it any better than did Judge Prettyman yesterday. I agree with him wholeheartedly. The entire concept of the past conference and the concept of this bill is the antithesis of any idea such as a superagency.

Mr. FENSTERWALD. Do you have any views on the question of alternate members?

Mr. PAGLIN. I do, and here again, coming at this stage in the hearings, I must say, in order to save the time of the subcommittee, that I agree with the views expressed by Commissioner Cohen and for the same reasons that he gave. I believe that it would be unrealistic to require the chairman of an agency, a large agency, or a department head, officially and as a matter of statute to be a member of the Conference. Certainly, as you have already heard, the Conference recently concluded took a great deal of time. And to me, the key to all of this and the key to the success of that Conference such as it has been, and I believe it has been, was a continuing and a concentrated participation by the various members of that conference. The Conference did, of course, include members of the agencies, particularly in the case of the Federal Communications Commission, where we had as the delegates to the Conference a member of the agency, Commissioner Rosel Hyde, and an Assistant General Counsel, Mr. John Cushman. They were able, with all of their other duties, however, to participate on a continuing basis, and, as Mr. Cohen stated, particularly in the work of the committees; this was where the real important work was done, the groundwork, and it seems to me, as Mr. Cohen said, unrealistic to regard a chairman of a large agency, with all of his duties, to be able to give that much time to it.

However, I also agree that if you do have a head of an agency who has the expertise, such as he described, he ought not to be barred.

Mr. FENSTERWALD. It seems to me you had several agency heads, including the present head of the Federal Power Commission, who were members and who did take a great deal of interest and were active in the Conference, and I don't think there is any suggestion that they shall be barred, but, if they do not feel that they have the time or the inclination, that they should designate someone in their place but not an alternate member.

Mr. PAGLIN. That is correct. I do have reference to the particular language in the statute in section 4 which deals with this problem of alternates, and if I recall correctly, the language states "as occasion requires."

This would seem to me to lead to the problem of spotty representation, such as Mr. Cohen mentioned. I would likewise have the fear that if the chairman of an agency was unable to attend committee meetings or plenary sessions, and chose just whoever happened to be free at the time, we would lose the benefit of this continuing participation, this interest and familiarity with the background of what the Conference has been doing, especially when you are thinking in terms of a permanent Conference.

Mr. FENSTERWALD. Thank you.

Senator LONG. Mr. Kennedy?

Mr. KENNEDY. Mr. Chairman, thank you. I have no questions.

Senator LONG. I have a very important telephone call that I must take. I understand the next witness can't be here tomorrow and we will recess now for about 10 minutes and we will come back to hear the next witness. Let me say—I didn't notice you had finished, but we do thank you, Mr. Paglin, for your statement.

Mr. PAGLIN. Thank you, Mr. Chairman.

Senator LONG. Before I call the next witness I want to call a recess for about 10 minutes. Before doing so, I shall place in the record the letter from the Chairman of the FCC, the Honorable E. William Henry.

(The letter is as follows:)

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C., June 12, 1963.

HON. EDWARD V. LONG,
Chairman, Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATOR LONG: The Commission would like to take this opportunity to endorse enactment of S. 1664, a bill to provide for continuous improvement of the administrative procedure of Federal agencies by creating an Administrative Conference of the United States. Enactment of this legislation would provide the " * * means by which agencies in the Federal Government may cooperatively, continuously, and critically examine their administrative processes and related organizational problems," as recommended by the Hon. E. Barrett Prettyman in his letter of December 17, 1962, transmitting to the President the final report of the interim Administrative Conference of the United States.

The Commission fully supports establishment of the Administrative Conference on a permanent basis. We believe that the continuing study of procedural problems common to all Federal agencies in light of the need for maximum efficiency on the part of the Government, and of the necessity for affording fairness to those affected by governmental action—will do much to improve administrative practices.

In supporting this legislation, we note with approval several distinctive aspects of S. 1644—the high degree of autonomy of the proposed Conference, specific exclusion of the Conference from matters of substantive policy committed by law to agency discretion, and the formulation of recommended new standards of practice through mutual cooperation and only after agency-members of the Conference have been afforded an opportunity to assess the effect of such standards on their operation. We believe that these features of the bill strike a sensible balance between the divergent needs of agencies to tailor their procedures to particular operational problems and the admitted need for some means by which procedural problems can be continuously appraised and approved.

By direction of the commission:

E. WILLIAM HENRY, *Chairman*.

(The following letter and memorandum were received from Mr. Paglin subsequent to the close of the hearings:)

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D.C., June 24, 1963.

HON. BERNARD FENSTERWALD, JR.,
Chief Counsel, Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary, U.S. Senate, New Senate Office Building, Washington, D.C.

DEAR MR. FENSTERWALD: Following my testimony before the subcommittee on June 13, 1963, on S. 1664, calling for establishment of an Administrative Conference of the United States on a permanent basis, you suggested that it might be useful if there were some further information in the record regarding the questions asked other witnesses about the existence of "bloc voting" in the recently concluded Administrative Conference established by the President under Executive Order 10934.

Accordingly, I have prepared a short memorandum which is based on my participation in the proceedings of that Conference, and which, to my mind, negates any concern over "bloc voting." Of course, you will appreciate that this memorandum is based, in large part, on events which took place some time ago,

and that, because no rollcall votes were taken at the plenary sessions of the Conference, it is impossible to trace precisely the instances in which Conference participants "crossed the line," as it were, by taking a position contrary to that which might be expected of them. Nevertheless, it remains my feeling that the proceedings of the former Conference gave no evidence of "bloc voting." The reasons for this conclusion are discussed in the attached memorandum.

If I can be of any further assistance to your subcommittee in this matter, please do not hesitate to let me know.

Sincerely yours,

MAX D. PAGLIN, *General Counsel*.

MEMORANDUM

A question has arisen as to whether there was any evidence of "bloc voting" in the proceedings of the recently concluded Administrative Conference of the United States.

In my opinion, based on my participation in the proceedings of that Conference, there were no indications that the Conference participants divided themselves into "blocs" representing their particular interests. Quite to the contrary, as recognized by the Conference in its final report to the President, of December 15, 1962, and for the reasons hereinafter enumerated, it is my belief that the Conference participants faithfully complied with the mandate of section 5 of Executive Order 10934, enjoining each member of the Conference to participate in all respects " * * * according to his own views, and not necessarily as a representative of any department or agency or other group from which he may have been chosen."

In this connection, the final report of the recently concluded Conference notes (p. 11) :

"4. *Unanimity in basic interest.*—In this Conference bloc division was not discernible between practitioners and Government personnel, or between big agencies and small agencies, or between departments and independent agencies. Specters of such divisions were exorcised by an all-pervading interest in the better administration of justice and better government, and by the active presence of strong personalities from many points of origin."

I believe that the absence of bloc voting was due to a number of reasons, including (a) the makeup of the Conference committees, (b) the nature of the recommendations made by the Conference, (c) the action of Conference members, as evidenced by the debates at the plenary sessions, and (d) the mandate of section 5 of Executive Order 10934, quoted above.

The first factor, the makeup of the committees, is largely self-explanatory. Since the committees of the Conference consisted of a cross section of representatives from the Government, the bar, and the academic world, this composition by itself tended to discourage bloc division.

Here, it seems to me, that once the participants became aware of an operation which encompassed the interests of all those who have a concern with procedural problems, they took a broader view of their roles, at the same time rejecting the sharply partisan viewpoints which it might have been expected self-interest would dictate.

As to the nature of the Conference's recommendations, the procedural nature of such recommendations also had an important effect in blurring lines of self-interest, thus again permitting Conference participants to view recommendations in terms of their overall effect. Of course, this is not to say that simply because the Conference's recommendations were procedural, there were no sharply expressed viewpoints, for there were. Still, to my mind, there was none of that rigidity of views which, carried to its logical limits, could be expected to make for bloc voting. For instance, many of the recommendations of the Conference, such as those dealing with the right to counsel, subpoena powers, contract disputes, debarment of contractors, and ex parte communications would result in the imposition of new and more stringent standards of practice upon the Government. The cleavage along lines of self-interest which might normally be expected here—i.e., flat opposition by Government representatives; strong advocacy for the new standards by non-Government conferees—simply did not develop. In fact, in some instances, surprising as it may seem, strong support for the new standards came from Government personnel, who were entirely willing to agree and urge that the need for greater fairness dictated the new requirements. Further, opposition to these recommendations came from a cross-section of the participants, not from the Government side alone.

With respect to the extent to which the foregoing conclusion are borne out by the records of debate at the plenary sessions of the Conference, the absence of rollcall votes makes it impossible to tabulate the number of instances in which a participant took a position contrary to that to be expected of the primary group (i.e., Government, private practice, academic world) in which he belonged. However, a number of instances which negate the existence of bloc voting can be found in the reports of the plenary sessions, identified in the footnote below.¹

Senator LONG. The committee will be in order.

Mr. Kintner, I again apologize to you for having to have this break, but the call was from a gentleman out on Pennsylvania Avenue that you talk to when he calls you.

Mr. Earl W. Kintner is an attorney here in Washington with a very distinguished law firm, and he is a former Chairman of the Federal Trade Commission.

I believe he is also a member of the Federal bar and was a member of the Administrative Conference.

STATEMENT OF EARL W. KINTNER, ATTORNEY, WASHINGTON, D.C.

Senator LONG. There shall be included a biographical sketch of Mr. Kintner which will be placed in the record at this time.

(The biographical sketch referred to follows:)

Born November 6, 1912, at Corydon, Ind., and grew up on farm in Gibson County, Ind., near Princeton. Supported self from age of 8, successively doing farm, restaurant, and newspaper work. Attended public schools in Princeton, Ind.; A.B., DePauw University, Greencastle, Ind., 1936; J.D., Indiana University School of Law, Bloomington, Ind., 1938. General law practice, Princeton, Ind., 1938-44; city attorney, Princeton, 1939-42; prosecuting attorney, 66th Indiana Judicial Circuit, 1943-44, reelected 1944 and 1946 but resigned due to military service. U.S. Navy, ensign to lieutenant, 1944-46; Amphibious Forces, 1944-45; 1946-48 Deputy U.S. Commissioner, United Nations War Crimes Commission, serving as Cochairman of Committee reviewing Allied war crimes matters; Chairman, Legal Publications Committee, and editor, law reports; edited official volume on "Development of Laws of War" and privately edited volume "The Hadamar Trial." Federal Trade Commission, 1948, trial attorney on antimonopoly; 1951, legal adviser; 1953-54, delegate to President's Conference on Administrative Procedure, Chairman, Committee on Hearing Officers; planned and edited Commission's Manual for Attorneys; 1953-59, General Counsel; sworn in June 9, 1959, as member of Federal Trade Commission for unexpired term ending September 1960; designated Chairman by President Eisenhower June 11, 1959; served as Commissioner and Chairman until expiration of Government service on March 21, 1961, becoming on that date a member of Washington, D.C., law firm of Arent, Fox, Kintner, Plotkin & Kahn, 1961 to present, member, Administrative Conference of the United States.

President, Federal Bar Association, 1956-57, 1958-59; president, Foundation of Federal Bar Association, 1957 to present; president, Federal Bar Building Corp., 1958 to present; president, National Lawyers Club, 1959 to present; chairman, section of Administrative Law, American Bar Association, 1959-60; House of Delegates, American Bar Association, 1957-58 and 1959-60; member, Council, Section of Antitrust Law, ABA, 1958 to present; board of directors, American Judicature Society, 1960 to present; member, executive committee, New York State Antitrust Law Section, 1957-60; adjunct professor, New York University School of Law, 1958; admitted to practice Indiana and District of Columbia, U.S. Supreme Court and other bars. Distinguished Alumni Service Award, Indiana University, 1960. Member, Cosmos, Capitol Hill, and National Press

¹ Report of Second Plenary Session of the Administrative Conference of the United States, Jan. 31, 1962: Recommendations regarding unitary board of contract appeals for armed services and publication of decisions of boards of contract appeals, pp. 38-39. Report of the third plenary session, Apr. 3, 1962: Establishment of unitary board of appeals in Defense Department, p. 25; debarment of contractors, p. 34; agency subpoena practices, p. 35. Report of the fourth plenary session, June 29, 1962: Recommendation regarding code to govern ex parte communications, pp. 73, 74.

Clubs, Washington, D.C. Member, American Legion; DAV (life member); Federal Club of Washington; Masons (Shriner and past master); Phi Delta Phi; Pi Sigma Alpha; Delta Sigma Rho; Sigma Delta Chi, Washington Professional Chapter; American Bar Association; American Judicature Society, and other legal organizations. Member, St. Thomas Episcopal Church, Washington, D.C. (vestryman); married to Valerie Patricia Wildy and lives at 3037 Dent Place, NW., Washington D.C., with wife and son Christopher, age 7.

Senator LONG. I don't have a copy of the remarks you will make. We are running, I would like to suggest to you, on a very close schedule now. I will be very happy if you can summarize your remarks and still do the subject proper justice.

Mr. KINTNER. Mr. Chairman, I can be very brief. I am here to support wholeheartedly your bill which I think is very much in the public interest and I congratulate you and your subcommittee for undertaking this activity, which, I think, promises to do a great deal to improve the administrative process—

Senator LONG. Thank you, Mr. Kintner.

Mr. KINTNER (continuing). Perhaps more than any piece of legislation since the passage of the Administrative Procedure Act.

My appearance here is truly a labor of love.

I was involved in the Administrative Process as a staff member of the Federal Trade Commission beginning in 1948, as a trial lawyer, and then as legal adviser, in 1953 as General Counsel, and from 1959 to March 1961 as Commissioner and Chairman of the Federal Trade Commission.

In 1953, at the time I was General Counsel, I was a member of the first Administrative Conference called by President Eisenhower. I had the honor of serving under the inspired leadership of Judge Prettyman in the first Conference and also serving as chairman of the hearing officer committee of that Conference.

I thought that that Conference accomplished a great deal. I have heard it said since that most of the recommendations were not followed by most of the Government agencies. I know that in the instance of the Federal Trade Commission the Chairman of the Commission directed that the recommendations of that first conference be implemented at the Trade Commission to the extent that implementation would be practicable, and I saw a great many changes at the Trade Commission for the good as a result of that first Administrative Conference.

I feel that other agencies likewise made changes, perhaps not to the same degree, but nevertheless they made changes, and I always felt that had the President followed the recommendation of the first conference, that it be renewed, many more improvements would have come as a result of the first conference.

I was active with Judge Prettyman in attempting to persuade the Eisenhower administration to call a subsequent conference. In 1959 I served as president of the Federal Bar Association for the second time and the Federal Bar Association recommended to the President that such a conference be called. I served also as a member of the Judicial Conference for the District of Columbia and that conference concurrently recommended that the Administrative Conference be renewed.

I was also serving as chairman of the Administrative Law Section of the American Bar Association that same year, 1959, and that section

recommended to the House of Delegates of the American Bar Association that the concept of an administrative conference be approved. It was so approved by the American Bar Association.

I participated with Judge Prettyman in Conferences at the Department of Justice and the White House which finally led to President Eisenhower's setting up machinery for the development of this Conference in August of 1959. I served on the organizing committee of that group with Judge Prettyman, and I had the privilege of serving in the second Conference as a delegate and as Vice Chairman of the Committee on Practice and Procedure. I felt that the second Conference was even more successful than the first and that the experience of these two Conferences demonstrated beyond any question, at least to my mind, that it was essential that some machinery be set up for a permanent Conference.

I think that if we expect improvement in the Government, and we must always expect this and demand it, it is important that a large measure of this improvement be self-improvement, that it be voluntarily undertaken by the agencies of the Government and their officers responsible for maintaining our form of society. It is important because those who are persuaded, rather than pushed, are apt to operate and to improve in a more efficient way. This is always so. The man who is pushed too far is apt to be resentful, and I think that Government agencies can be likewise resentful if they are pushed too far without the privilege of participating in matters of this sort.

And therefore I feel strongly that the Administrative Conference should have a preponderance of its members among the administrative agencies from the Federal Government itself.

But there is a vast segment of the bar that is likewise, vitally interested in improvement of the administrative process. They sit on the other side of the council table and they, too, should be counted in and counted in in an important manner. There are those in the universities who are interested in improvement, and they, too, should have a role in this Conference.

I feel, Mr. Chairman, that your bill strikes a happy medium between these various interests, a balancing need, and I believe that, in principle it is wholly sound.

I, therefore, have no suggestions to offer for amendments. I have no doubt that the bill can be improved but I feel that in the main thrust, it is a bill that is very much in the public interest. It is a bill to which the Congress this session should give its attention.

There is no more pressing problem in Government in these days than that of improving the administrative process. And I reiterate, sir, my congratulations to you for your great leadership of this cause. You have the opportunity here, as do other Members of the Senate and the Congress, for making the most significant contribution to improvement to Federal Government since the passage of the Administrative Procedure Act.

I thank you, sir, for the opportunity of appearing here in support of this legislation.

Senator Long. Thank you, Mr. Kintner. The Chair would like to note that this fine statement was made without manuscript or without notes as far as I can determine.

Mr. Fensterwald?

Mr. FENSTERWALD. I have no questions, Mr. Chairman. I would like to thank Mr. Kintner for an extremely helpful statement.

Senator LONG. Mr. Kennedy?

Mr. KENNEDY. Thank you, Mr. Chairman. I have no questions.

Senator LONG. Thank you.

At this time I would like to put in the record a letter from Mr. Swidler, Chairman of the Federal Power Commission, and a letter from Mr. Smith, General Counsel of the Treasury Department, addressed to Senator Eastland.

Without objection they will be placed in the record at this point.

(The letters referred to follow:)

FEDERAL POWER COMMISSION
Washington, D.C., June 12, 1963.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: In response to your June 10 request for our views on S. 1664, we are wholeheartedly in favor of the creation of a permanent organization to improve administrative procedures. The participation of the Commission in the recently concluded Conference has aided our own efforts to revitalize our procedures. The investigations of those procedures made by the various committees of the Conference pointed up areas in which improvements were shown to be desirable and they have been adopted. The Conference also provided a forum in which procedural innovations made by one agency were evaluated and brought to the attention of other agencies, and we were gratified that some of the FPC's recent procedural reforms were recommended by the Conference for adoption by other agencies. We expect that similar studies and information would be of value in the future.

The Conference can be of considerable assistance to the executive branch and to the committees of Congress by providing a knowledgeable and impartial body to suggest and evaluate proposals for administrative improvement.

The bill, correctly, we believe, provides for a Conference without authority to direct agency action. Every agency has its own responsibilities and, as such, should be the judge of its own procedures. We think it would be a mistake to dilute the responsibility of an administrative agency for improving the dispatch of its business. This will follow the pattern of the Judicial Conference which has no power to direct action but whose recommendations to the President, the Supreme Court, and the Congress have resulted in an improvement of the judicial process. We believe an Administrative Conference established in accordance with the provisions of the bill should in time attain the stature of the Judicial Conference.

Sincerely,

JOSEPH C. SWIDLER, *Chairman.*

THE GENERAL COUNSEL OF THE TREASURY.
Washington, D.C., June 12, 1963.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Reference is made to your request for the views of this Department on S. 1664, to provide for continuous improvement of the administrative procedure of Federal agencies by creating an Administrative Conference of the United States, and for other purposes.

The Department believes it would be desirable to establish a permanent Administrative Conference of the United States and consequently favors the enactment of the proposed legislation. However, the Department recommends that the words "and the availability of funds" be added at the end of clause (3) of section 6(c) of the bill. The compilation of information necessarily entails the use of manpower and the Department feels that compliance with requests for information should be limited in terms of the availability of staff and budget.

The Department has been advised by the Bureau of the Budget that there is no objection from the standpoint of the administration's program to the submission of this report to your committee.

Sincerely yours,

FRED B. SMITH,
Acting General Counsel.

Senator LONG. Mr. Staats of the Bureau of the Budget, Mr. Russell of the American Bar Association, Mr. Sellers of the American Bar Association, Mr. Foster, of the American Bar Association, and Mr. Lane, an attorney here in Washington, will be our witnesses tomorrow.

At this time the committee will recess until 10 a.m. tomorrow.

(Whereupon, at 12:50 p.m., the committee was recessed, to reconvene at 10 a.m., Friday, June 14, 1963.)

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

FRIDAY, JUNE 14, 1963

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND
PROCEDURE OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:12 a.m., in room 2228, New Senate Office Building, Senator Edward V. Long (chairman of the subcommittee) presiding.

Present: Senator Long.

Also present: Bernard Fensterwald, Jr., chief counsel; Cornelius B. Kennedy, minority counsel; and Carlile Bolton-Smith, assistant counsel.

Senator LONG. The committee will be in order.

Our first witness this morning is Mr. Elmer Staats, the Deputy Director of the Bureau of the Budget.

Mr. Staats, if you will come around, we will be happy to hear you at this time. Bring your colleagues with you, and we will be happy to have them at the table.

Mr. STAATS. Thank you.

STATEMENT OF ELMER B. STAATS, DEPUTY DIRECTOR, BUREAU OF THE BUDGET; ACCOMPANIED BY HAZEL GUFFEY AND HAROLD SEIDMAN, ACTING ASSISTANT DIRECTOR FOR MANAGEMENT AND ORGANIZATION, BUREAU OF THE BUDGET

Senator LONG. We have a biographical sketch of you here, Mr. Staats, which shows your very distinguished record in Government service. It will be placed in the record at this time.

(The biographical sketch referred to follows:)

Elmer B. Staats has been Deputy Director of the Bureau of the Budget under three Presidents. Prior to his service under President Kennedy beginning in January 1961, he had held this position under President Eisenhower from March 1959 to January 1961, and under President Truman from April 1950 until January 1953.

Mr. Staats first joined the Bureau of the Budget in 1939, and served in various capacities until 1953, including the positions of Assistant Director for Legislative Reference, and Executive Assistant Director. During World War II he was in charge of the Bureau's budget estimates work covering the major war agencies.

He left Government service early in 1953 to serve for approximately a year as research director for Marshall Fields & Co. in Chicago. He returned to Washington as Executive Officer of the newly established Operations Coordinating Board under the National Security Council. He held this post until September 1958 when he returned to the Bureau of the Budget as an Assistant Director,

becoming Deputy Director in March 1959. Before coming to the Bureau in 1939, he was with the Kansas Legislative Council in Topeka, Kans., and the Public Administration Service in Chicago.

Mr. Staats has been a member of the National Council of the American Society for Public Administration since 1957 and its president in 1961-62. He was chairman of the Conference on the Public Service in 1959-60. He is also a member of the advisory committee of the University of Chicago's Center for Programs in Government Administration, and a member of the Advisory Council of the Brookings Institution's Conference on Public Affairs.

He received an A.B. degree from McPherson College, McPherson, Kans.; an M.A. degree from the University of Kansas; and a Ph. D. degree from the University of Minnesota. He was a fellow of the Brookings Institution from 1938 to 1939. He is a member of Phi Beta Kappa and was a recipient of the Rockefeller Public Service Award in 1961.

He was born in Richfield, Kans., on June 6, 1914. He is married and has three children.

Mr. STAATS. Mr. Chairman, I have with me this morning on my left Miss Hazel Guffey, and on my right Harold Seidman of the Office of Management and Organization.

Mr. Chairman, I have a statement which with your agreement I would like read, and I will be happy to answer any questions which you might have.

I appreciate this opportunity to give you the views of the Bureau of the Budget in support of S. 1664. The bill would establish an Administrative Conference of the United States to study the administrative procedure used by Federal agencies and to make recommendations for improving the efficiency, adequacy, and fairness of that procedure.

The Conference would consist of a full-time Chairman, Federal officials and personnel from the agencies primarily concerned, members from the practicing bar, university faculties, and other persons especially informed with respect to administrative procedure. A Council, composed of the Chairman and 10 other members of the Conference, would provide a small Executive Board to guide the work of the Conference and its committees, subject to the ultimate authority of the Conference membership, acting in plenary session through the Assembly.

The creation of a permanent organization to provide for continuous study and improvement of administrative procedure has been advocated for many years by many different groups. Specific proposals have taken a variety of forms.

In 1941 the Attorney General's Committee on Administrative Procedure recommended establishment of a permanent Office of Federal Administrative Procedure, which the Committee compared to the Administrative Office of the U.S. Courts. The Office would have been headed by a board, one of whom would have been a Director of the Office. The Director would have devoted full time to studies and recommendations, assisted by an agency advisory committee and ad hoc study groups composed of agency personnel and private citizens.

In 1949 the First Hoover Commission recommended that the Bureau of the Budget, with the aid of carefully selected legal consultants, undertake the "continuous and painstaking effort" deemed necessary to eliminate cumbersome and costly administrative procedure.

Later in 1949 a Special Subcommittee of the Judiciary Committee of the House of Representatives requested the Judicial Conference of the United States to recommend improved procedures for certain

classes of cases, including those before the regulatory agencies. The Conference created an Advisory Committee on Procedure Before Administrative Agencies, chaired by Judge E. Barrett Prettyman. After a firsthand investigation of the causes of excessive delay and expense and unduly voluminous records the Committee reported its conclusions and recommendations to the Conference in September 1951.

Because I believe that Committee made a significant contribution to a general understanding of the problem which S. 1664 attempts to meet, I would like to quote certain brief excerpts from the report of the Judicial Conference of Senior Circuit Judges, as follows:

* * * unduly voluminous records and unreasonable delay constitute a hindrance to the success of the administrative process * * *.

The contributing causes of these difficulties vary from proceeding to proceeding and from agency to agency * * *. Necessarily, the remedies for these causes must also vary.

* * * * *
The regulatory agencies themselves must solve this problem. The solution may best be accomplished by the cooperation of all agencies involved; in fact, a cooperative approach, with mutual exchange of experience and suggestions, seems imperative for the most efficient functioning of the administrative agencies.

The Committee recommended that the Judicial Conference suggest to the President that he call a Conference of Representatives of the Administrative Agencies having adjudicatory and substantive rule-making functions to devise ways to meet the problems identified above. The Judicial Conference adopted that recommendation, and added a recommendation that representatives of the Federal judiciary and the bar be designated to attend the Conference and to serve in such capacity as the President might determine.

The proposed Conference was established by President Eisenhower on April 29, 1953. The final report of that Conference recommended establishment of an Office of Administrative Procedure in the Department of Justice. Such an Office was created by administrative action of the Attorney General and has made a valuable contribution with limited resources. Many continued to hold the view, however, that other organizational arrangements would be preferable, with strong support for the Administrative Conference approach.

In March 1960 the Judicial Conference renewed its recommendation for a permanent Conference in which representatives of Federal agencies and the practicing bar would participate. The proposal was strongly supported by the Chief Justice in a letter to the President on May 6, 1960. On August 25, 1960, the chairmen of six of the major regulatory boards and commissions jointly recommended to the President a detailed proposal for the creation of such a Conference.

President Eisenhower appointed a committee to formulate plans, and the Conference was established by Executive Order 10934, issued by President Kennedy on April 13, 1961.

S. 1664 is a direct outgrowth of a recommendation of that Conference, transmitted to the President on December 17, 1962, pursuant to his directive that the Conference evaluate the need for further studies of administrative procedure and suggest appropriate means to be employed for this purpose in the future.

I have reviewed this background, Mr. Chairman, in some detail to illustrate the careful study by many interested groups and the long experience which lies back of the proposal in S. 1664.

As a result of its own observations and studies over the years, the Bureau of the Budget recognizes that a new permanent organization is needed to work continuously on the improvement of administrative procedure. Many worthwhile recommendations were made by the temporary conferences created in 1953 and 1961, but each conference came to an end while much remained to be done. Improvement in administrative procedure and achievement of a desirable degree of uniformity among the agencies is a tedious, time-consuming process for which temporary, ad hoc efforts are essentially unsuitable and wasteful.

The Bureau also believes that the form of organization proposed in S. 1664 is desirable for a number of reasons:

1. In our view it combines desirable features from the various proposals that have been made and builds upon successful past experience, which the Bureau, as participant in the recent conferences, has been able to observe at first hand. The last Conference, which transmitted its final report to the President on December 15, 1962, demonstrated the practical benefits to be gained from a cooperative effort along the lines proposed in S. 1664. At the President's request the Bureau of the Budget, on February 27, 1963, asked agencies to report their views and the status of agency actions with respect to the Conference recommendations. A partial analysis of the replies indicates widespread approval of the recommendations. Many of them have already been put into effect in many agencies, and in nearly all agencies definite time schedules have been set for following through on unfinished matters which can be dealt with under existing agency authority. The results are not expected to be dramatic, but we believe that they will be important, particularly to those persons whose private interests are affected. A sustained effort through a permanent Conference can result in a wide variety of improvements which, added together, will greatly increase the speed and efficiency of the administrative process while maintaining essential fairness.

2. A full-time Chairman of recognized stature and prestige is needed to assure that the Conference pursues its objectives energetically and that its recommendations are fully understood and appropriately considered by responsible authorities. However important these problems of administrative procedure may be, they often are forced into the background of agency effort by the pressures of even more important agency responsibilities. The Chairman should be free to concentrate on these matters and to help the agencies pool their resources for an attack on common problems. Over a period of time he and his staff should acquire unprecedented knowledge and understanding of the administrative process throughout the Federal Government. This would be an invaluable resource for the Conference and its committees, and also for each individual agency as it reviews and evaluates its internal processes from time to time. In addition to his responsibilities as a member and Chief Executive of the Conference, S. 1664 would authorize the Chairman, upon the request of the head of any agency, to furnish assistance and advice on matters of administrative procedure. In this respect and others, such as the collection and dissemination of statistics deemed helpful in improving administrative procedure, he would carry out responsibilities now carried out in a more limited way by the Office of Administrative Procedure in the Department of Justice.

3. Since improvement is primarily dependent upon action by the agencies themselves, the bill would make agency officials and personnel primarily responsible for the success of the Conference effort. It is anticipated that members would be drawn from those agencies which have common types of responsibility, so that Conference activities will hold the interest and effective participation of all members.

4. The members drawn from the bar, the universities, and other sources, would be able to emphasize problems as they are seen from outside the agencies and bring fresh insight and new ideas to bear on their solution.

5. The form of the organization is similar to those of the Judicial Conference of the United States and the Judicial Conferences of the Circuits. Although the Judicial Conference of the United States consists entirely of Federal judges (28 U.S.C. 331), practicing lawyers and others participate in the work of its committees, which develop recommendations for its consideration. The Judicial Conferences of the Circuits, which also develop recommendations for consideration by the Judicial Conference of the United States, provide for representation and active participation by practicing lawyers (28 U.S.C. 333). Recommendations of the Judicial Conference of the United States are transmitted to the Chief Justice for consideration by appropriate authorities, including the Congress, if legislation is required. The workability and value of those Conferences have been demonstrated over many years.

6. The Conference would have no authority to direct changes in administrative procedure, but would function solely in an advisory capacity. I would like to emphasize this point, Mr. Chairman, because I have noted in the press references to superagency and suggestions that the agency would have authority to direct the work of regulatory agencies. I think that this is a misunderstanding of the intent and the wording of the bill itself.

Senator LONG. Mr. Staats, you find nothing in the bill at all that would indicate that it is to be a superagency as—

Mr. STAATS. We have tried to eliminate any language which might leave that impression, and we would just like the record to be very clear on this point, Mr. Chairman.

Senator LONG. Thank you.

Mr. STAATS. Its recommendations would be made to the appropriate Federal authority, either the agencies, the President, the Congress, or the Judicial Conference of the United States, depending upon the action necessary in any instance and the locus of authority to take such action. Each responsible authority would be expected to exercise its own independent judgment with respect to a Conference recommendation. This is an essential safeguard because of the great diversity in the functions and programs which would come within the purview of the Conference; while a recommendation may be widely applicable and highly desirable in most situations, a unique situation or responsibility in a particular agency may make it equally undesirable in that agency. Hence the Conference would not be a superagency interposed between the agencies and the President or the Congress, and would in no sense relieve the agencies of a continuing, independent responsibility to make all possible improvements in their own administrative procedure. In fact, one of the first recommendations of the last Conference was that each executive department and administra-

tive agency having functions which require rules of procedure establish means for continuous observation and evaluation of its procedures.

The Bureau of the Budget is aware that there is not unanimous agreement on all details as set forth in S. 1664. As a result of views received from a number of sources in the course of preparing the draft bill, extensive consideration was given to alternatives, particularly with respect to the scope and composition of the Conference.

In general, S. 1664 would bring within the scope of the Conference all Federal functions involving rulemaking and adjudication which determine the rights, privileges, and obligations of private persons; exceptions to the scope of the bill are specifically spelled out in the definition of "administrative program" in section 3(a) of the bill. The definition would place outside the scope of the Conference any military, naval, or foreign affairs function of the United States and any matter relating to agency management or personnel or to public property, loans, grants, benefits or contracts except to the extent that such function or matter consists of proceedings and decisionmaking required by law to be conducted in conformity with sections 7 and 8 of the Administrative Procedure Act or the imposition of penalties on private parties through agency action not subject to sections 7 and 8 of the act. The definition also excludes any matter subject to a subsequent trial of the law and the facts *de novo* in any court; proceedings in which decisions rest solely on inspections, tests, or elections; cases in which an agency is acting as an agent for a court; and the certification of employee representations.

These exclusions incorporated in S. 1664 are based on the exclusions which Congress incorporated into sections 4 and 5 of the Administrative Procedure Act for reasons which we believe are generally understood. They will make the coverage of S. 1664 consistent with the coverage of sections 4 and 5 of that act, which prescribe procedures for rulemaking and adjudication, respectively, except with respect to imposition of penalties, as described above, where the coverage of S. 1664 is broader than the coverage of the act.

The effect will be to enable the Conference to concentrate very largely on the procedure used in formal proceedings. This is the area about which there has been widespread concern for many years with respect to excessive delays and costs and unduly voluminous records. It is the area in which a Conference composed of the membership proposed in S. 1664 can make a unique contribution because of the general background and experience which the members could bring to bear.

We believe it is essential, for this organization as for other Federal bodies, to define the scope of its responsibilities with sufficient clarity to guide its activities into useful channels. The scope as defined is sufficiently broad to enable the Conference to consider all matters which have a bearing on its primary objectives without dissipating its efforts through expansion into areas which are essentially unrelated and fundamentally different.

The composition of the Conference as proposed in S. 1664 underscores the fact that the Conference would be an official agency of the Federal Government. And I would like to emphasize here again, Mr. Chairman, that we feel it is fundamental to the central purpose of this

legislation to provide a mechanism by which the Federal agencies themselves, working cooperatively, can attack some of these difficult problems.

As such, the Conference would appropriately be composed preponderantly of Federal officials and personnel from the agencies primarily concerned—and this next, I think, is also a fundamental point—with a sufficient number of other members to assure that the viewpoints of private citizens are presented for consideration and that the knowledge gained through diverse experience in administrative procedure is brought to bear in its deliberations.

In summary, the Bureau of the Budget believes that enactment of legislation along the lines of S. 1664 would meet a long-recognized need in an effective and appropriate manner. The bill is directed toward the solution of problems to which committees of the Congress have devoted much energy in recent years and which received immediate attention by the President-elect in 1960 because of widespread public concern. But neither the Congress nor the President can deal effectively with all the diverse problems inherent in the administrative procedure of Federal agencies which administer a great variety of programs. Fundamental improvement must come primarily through agency action. S. 1664 would provide the organization and the resources to help the agencies to discharge their responsibilities in this area.

Now, in concluding, Mr. Chairman, I would like to pay tribute and my strong compliments to the excellent work which has been done in this field by Judge Prettyman. We have worked closely with him and the Council of the last Administrative Conference in developing the ideas which have been incorporated in the draft.

We also would like to express our appreciation for the excellent cooperation we have had from many people outside of the Government—the American Bar Association Committee which will be presenting their views here this morning. We have had meetings with them.

We have also had the opportunity to have the views of a large number of agencies. I believe all of the agencies who have any concern directly or indirectly with this matter have written us letters, and we believe that we have now, for the first time, a very encouraging degree of consensus about this matter.

Senator LONG. Mr. Staats, would it be possible for the committee to have copies of those letters to you for our own use?

Mr. STAATS. I think we could work informally with Mr. Fensterwald here and indicate the kinds of responses that we have.

A number of the points made in the agencies' letters have been incorporated in this bill that we are now discussing.

Senator LONG. I think it would be fine and it would be helpful if the committee could have copies of those letters.

Mr. STAATS. We would be happy to work with you on this matter, and we have had good cooperation. I am sure this can be worked out.

This concludes my statement, Mr. Chairman.

Senator LONG. Mr. Staats, we certainly express our appreciation to you for appearing and express to you our appreciation for the very fine statement which indicates a great amount of work and thought.

I am sure that you have gone to a tremendous amount of work, or your Department has, in preparing the statement and getting this information from the other agencies, and it is very helpful to us.

We are certainly grateful to you for your cooperation. We appreciate it very much.

Mr. Fensterwald, do you have any questions?

Mr. FENSTERWALD. I had one or two questions, Senator, but I would just like to say to Mr. Staats that I think both he and his colleagues, Mr. Seidman and Miss Guffey, are being unusually modest about their role in the preparation of the bill.

I know that they have all worked very hard on it and speeded up the process—much more than you would normally think possible—to get this bill up in time, so we could have these hearings. And I know that all the members of the committee are very grateful to all three of them for their cooperation in the past.

Mr. STAATS. Thank you very much.

Mr. FENSTERWALD. I had one question, Mr. Staats, with respect to section 3(a) and, in particular, to a statement that you made on page 10 of your prepared remarks.

You say these exclusions incorporated in S. 1664 are based on the exclusions which Congress incorporated in sections 4 and 5 of the Administrative Procedure Act for reasons which we believe are generally understood.

I think I know what you mean there, but, for the sake of the record of these hearings, I wondered if you could just briefly set forth what you think those reasons are.

Mr. STAATS. Mr. Fensterwald, the effort that we have made here was to try to bring the definitions in S. 1664 as closely as we could into line with the coverage set forth in sections 4 and 5 of the Administrative Procedure Act.

We have excluded various specific functions from the scope of the act. Miss Guffey and Mr. Seidman can comment in more detail on this, but I believe that it is our feeling that we make better progress here if we try to follow the coverage set forth in that act with request to rulemaking and adjudicatory functions.

Would you like to comment further on this, Miss Guffey?

Miss GUFFEY. The reasons for the exceptions to section 4 and section 5 are explained in the Attorney General's manual on the Administrative Procedure Act and in the reports of congressional committees on the bill which became the act. It is pointed out, for example, that there are certain proprietary functions of the Government; that these do not primarily involve substantive rulemaking or adjudication affecting private rights, privileges, or obligations; and that the intent of the Administrative Procedure Act was to get at those administrative processes which affect private persons in the conduct of their private business.

Therefore the exclusions from section 4 are based on that kind of a concept.

The exclusions in section 5 are more directly related to procedures. The one which excludes matters subject to de novo review on law and facts in the court is based on the idea that there is already in existence a method for the private citizen to have a fair trial-type hearing, and therefore the formal process prescribed in the Administrative Procedure Act is not necessary in order to safeguard his interests..

And if the agency is not careful to make its findings in a perfectly sound and just manner, it stands to lose its case when the court looks at it. This is a safeguard imposed upon the agency through the fact that its decision is reviewable from the beginning.

Then I think it is obvious why proceedings in which decisions rest solely on inspections, tests, or elections are excluded. These are not subjects in which people who are expert in the rules of law and how they are applied in protecting private rights would necessarily be expert, and they do not lend themselves to formal hearing processes.

I think that is all.

Mr. STAATS. I would like just to add, Mr. Chairman, two thoughts with respect to this. The concern, if any, which I think we have found among the agencies is that in setting up a new agency permanent in character, we would get into policy and program.

We feel very strongly that the focus here should be on administrative processes and procedures. The President has indicated to us a number of times that his central interest is in the matter of expediting the work of the regulatory agencies and improving the efficiency of their operations. There are many ways in which problems in this area can be attacked. The committees of Congress and the General Accounting Office make studies. The Bureau of the Budget has had a very active role, as you know, through contracts with management consulting firms. We have had contracts on the organization and management of all the regulatory agencies over the past few years, and the private consulting firms have made many suggestions, and much has been done in this way.

But I think what we are trying to accomplish here is to set up a permanent body, made up of the agencies themselves primarily, which would be concerned with expediting work, increasing efficiency, and advancing the public interest in that manner.

We think we ought to be very careful not to create the impression that we are establishing an agency here which will be concerned with policy or with program.

Mr. FENSTERWALD. Thank you.

I have no further questions.

Senator LONG. Thank you, Mr. Fensterwald.

Mr. Kennedy?

Mr. KENNEDY. Thank you, Mr. Chairman.

There is one point on which the committee has received no information yet and since this bill was drafted by the Bureau of the Budget and we are fortunate to have representatives from the Bureau here now, I might ask if they could give us some idea of the cost of this agency.

Mr. STAATS. The cost, we think, will be quite nominal. It is not possible, I think, to forecast a precise figure, but we have given some consideration to this point. We think that certainly less than a half million dollars a year, and much more likely in the neighborhood of \$250,000 a year, would take care of the costs.

We are talking about a permanent Chairman, who would be compensated. We are talking about a small staff. The Conference would need to have funds for the travel of the members of the Conference. There need to be adequate facilities for Conference space and funds for publications, but all of this, we think, could be accomplished probably somewhere in the neighborhood of \$250,000 to \$500,000.

MR. KENNEDY. On that point, I wonder, then, in view of the statement which Judge Prettyman submitted for the record, because this problem of cost does concern us some, that Congress appropriated about a quarter of a million dollars, which is your approximate figure, and, in addition to that, it is my understanding the agencies contributed some funds to get the Conference started, and that would be about \$30,000. Then, as I understand it, the Department of Justice absorbed quite a bit of the payroll of the executive staff of the Conference.

So would we be safe in assuming that in view of all those additional expenses and the appropriations, that it would still be around \$250,000, or is it more likely to be over that amount?

MR. STAATS. Well, my guess would be—and I would want to stress the tentative character of this because until the Chairman were designated and had formulated his plans, it would be hard to be too definitive—but I certainly think we would be safe in assuming it would be less than a half million dollars a year.

I think that once the Conference is set up, you would not have the same kind of expenditures involved that we had in the temporary Conference, getting it organized, getting it underway. They had more meetings than you would probably have during the course of the year.

I am talking about an annual cost, I think you are clear on that.

MR. KENNEDY. Yes; that is one of the concerns of the budget-minded Republicans.

Another question that was suggested to me, and I think the Bureau of the Budget is peculiarly well able to answer, is whether the purposes of this Conference and the establishment of it could not be achieved under the reorganization act, the authority given to the President.

MR. STAATS. I do not believe that you could do it technically under the reorganization act. I think there would be some problem of accomplishing all we wanted to do.

Mr. Seidman here is very familiar with all of the aspects of the reorganization authority.

MR. KENNEDY. Perhaps Mr. Seidman could give us the answer.

MR. SEIDMAN. First, as you know, at the moment we do not have a reorganization act. We hope that the Senate will act favorably on the bill that has passed the House.

MR. KENNEDY. Assume that it is extended—

MR. SEIDMAN. Under the reorganization act we cannot provide for the establishment of any new functions. I think that some of the authorities of the Conference would be construed to be new functions.

MR. KENNEDY. What parts of it would be a new function? I think we ought to get clear just what the actual scope of this proposed Conference is.

MR. SEIDMAN. Well, the function of bringing people from outside of Government together to provide advice to agencies.

Now, some of this work, it is true, is now in the Office of Administrative Procedure in the Department of Justice, and without, of course, analyzing all of the functions here, it perhaps would be possible under the reorganization act, but would be extremely awkward. I don't know, for example, whether under the reorganization authority we would be able to authorize the participation of outside people in such a Conference. This would be a key point.

There are very stringent limitations in the reorganization act providing for offices and appointments. You can only provide for appointment either by the President with Senate confirmation or under the Classification Act. Now, that, in itself, might create a problem in establishing such a Conference.

Mr. KENNEDY. On the other hand, even the Bureau of the Budget in the past has hired outside consultants to make studies of agency procedures; have they not?

Mr. STAATS. Oh, yes; we have.

Mr. SEIDMAN. By contract.

Mr. KENNEDY. So that everything this Conference is going to do in the way of studying and recommending has been done in one fashion or another prior to this time. Is that right?

Mr. STAATS. Well, as I indicated in my statement, there is no single road to Rome in this area as in many others. This is an area in which the Bureau of the Budget has had a great deal of interest and concern, obviously. It is a matter in which the congressional committees having jurisdiction have had a proper concern. Many of the outside organizations have been concerned, and I think there has been much new public attention, and therefore interest on the part of the regulatory agencies themselves in improving their procedures.

I think that the thing which is unique here is that you would have a congressionally approved, permanent body, made up predominantly of the agencies themselves which are concerned with this problem and patterned very largely on the experience of the Judicial Conference, which, I believe, has been recognized as having been quite successful in improving procedures in the courts.

We really borrowed the central idea from that experience. We would be very happy to explore what we could accomplish under the reorganization powers. I would have some doubt that from the point of view of Congress this would be the happiest approach to it, but certainly, we would be glad to furnish you a memorandum as to what could be done technically within the authority there.

Mr. KENNEDY. But your thinking is that that would not be the best approach?

Mr. STAATS. That would be my feeling; yes.

Mr. KENNEDY. One other point, Mr. Chairman. I know that Mr. Staats mentioned in his statement that there was not unanimous agreement on all the details of the bill, and you will recall Judge Prettyman suggested several changes that he would like. Professor Gellhorn and other members of the Council of the last Conference have also suggested changes.

Now, do I understand you correctly, Mr. Staats, to say you have already given account to those suggestions and rejected them?

Mr. STAATS. Mr. Chairman, on this point, I would like to emphasize that very seldom do you have any significant proposal where you could get complete unanimity of views, either within the executive branch or elsewhere, and that, of course, is a proper role for the Congress in assessing these differences and coming to a conclusion.

We do feel, however, that here a large amount of discussion has taken place. With respect to some of the details—I would consider them details—with respect to some of the details of this bill it has

not been possible to take into account and fully reflect in the draft all the divergencies of view.

There are some fundamental points, however, that we feel are highly important from our point of view in any legislation on this subject. I have tried to point those out in my statement—the official character of it; the primary emphasis upon it being a device whereby the agencies themselves can improve their procedures; the strong role the chairman would have to play in this picture. These are some of the fundamental points, it seems to me, with respect to any discussion on this subject.

Mr. KENNEDY. Mr. Staats, the only thing I wanted to get clear in my mind is whether the Bureau of the Budget has considered the suggestions made by Judge Prettyman and Professor Gellhorn and people from civic organizations like the American Bar Association and rejected them or not so that we know what the Bureau's position is on these various matters.

Mr. STAATS. I do not want to be too definitive on this point, because I think you still have some testimony to be presented here, and we have never attempted to really formally come into agreement with all of the interests here.

We have had discussions. We think we have a meeting of the minds on most of the points, but I think that they should be free to state what differences they have.

But to the extent that we are aware of specific changes—I am trying to give you as definitive an answer as I can—I think we have considered all of the viewpoints, and we feel that this represents a better approach.

Mr. KENNEDY. Well, then, let me just read one or two sentences from Judge Prettyman's testimony which is typical of my concern with it. He says:

At the same time, I express the hope that you will agree with the Conference—of which he was speaking—

with respect to varying provisions of the bill.

Now, do I understand the Bureau of the Budget does not favor the variance that Judge Prettyman sets out?

Mr. STAATS. Does not—

Mr. KENNEDY. The variance as Judge Prettyman describes it.

Mr. STAATS. I am not sure what the specifics are here. You are talking about—

Mr. KENNEDY. Well, he listed three of them in his testimony; for example, the limitations on the jurisdiction of the Conference; two, the requirements that heads of the agencies and departments comprise the membership of the Conference; and, three, that alternatives or substitutes be permitted.

Now, those are suggestions which have already been made, and I am not clear whether the—

Mr. STAATS. Yes. Well, I will be happy to comment on each of these points because we have discussed them.

First, I would like to take up the matter of the membership. I believe he indicated a question with respect to the requirement that the heads of the agencies and departments comprise the membership of the Conference.

We think this is a very fundamental point, Mr. Chairman. We are dealing here with the question of who is responsible in an agency. We hold to the view, I think Congress holds to this view, that an agency head has that responsibility for management of his agency. This applies, I think, across the board.

And, now, we have no problem with a delegation or with an alternate with respect to the chairman of the regulatory agencies or the heads of the agencies.

Mr. KENNEDY. You think there should be alternates, when you say no problems?

Mr. STAATS. With respect to the heads of the agencies and the chairman of the regulatory agencies, we feel there should be alternate members or delegations of responsibility to persons who can attend.

Mr. KENNEDY. Should that extend—

Mr. STAATS. I think Judge Prettyman's concern about this is a matter of continuity and the ability of the agency head to participate on a regular basis.

We think this can be adequately handled by a way which has been used many, many times, which is to designate an alternate or to delegate that function to a subordinate, say, the No. 2 man in the agency, or one of his principal staff people. This is the way it is normally done, and we think that the objective can be accomplished in that manner. But we do think, when we are talking about a law which places responsibility on agencies with respect to improvement of their internal procedures and processes, on a matter as important as this one, that we ought not to place that responsibility on anybody other than the agency heads.

Mr. KENNEDY. Would you extend the concept of alternates to other members of the Conference, as well, if they could not attend because of pressure of other business?

Mr. STAATS. I see no reason why that should be done in those cases. And, in fact, I would hope that the agency heads and the chairmen of the regulatory bodies would and could attend, and I think in most cases they would.

Mr. KENNEDY. Let us assume that you have a nongovernment member of the Conference; he is tied up in an antitrust case and cannot come for some months. Would you permit him to designate an alternate or would that be undesirable?

Mr. STAATS. Your principle there is a different one. Your principle there is that you selected that individual because of his background and competence and his personal ability to make a contribution.

The principle that I am talking about with respect to an agency is a question of responsibility, who is responsible.

Mr. KENNEDY. Now, were you going to comment as well on Judge Prettyman's suggestion on the limitations of the jurisdictional competence or do you think you have already adequately covered that?

Mr. STAATS. I believe this is a point that Miss Guffey elaborated on a minute ago. I think we have stated a principle here. I believe he has said about the same thing I have said—that it should be as broad as the coverage of the Administrative Procedure Act—and I believe that that is what this bill does.

Mr. KENNEDY. Well, since he did say that, is there a disagreement as to how broad the Administrative Act is? Judge Prettyman says that the bill is deficient because it is not as broad as the act. You say that it is as broad as the act?

Mr. STAATS. Well, he speaks of this—

Mr. KENNEDY. May we have your advice as to just which set of words we should pay the most heed to?

Miss GUFFEY. Mr. Chairman, there have been certain suggestions that the definitions in the Administrative Procedure Act, section 2, be used to set the scope of the Conference. Now, those definitions do not, themselves, set the scope of the Administrative Procedure Act. The scope of the act is set, not by the definitions, but by the subsequent sections of the act. S. 1664 is consistent with details of the coverage of the sections which deal with rulemaking and adjudication in the APA, except that in one instance the scope of S. 1664 is broader than the scope of the Administrative Procedure Act in that it would let the Conference consider instances in which an administrative agency may impose a penalty on a private party without meeting the formal requirements of sections 7 and 8 of the APA.

Mr. KENNEDY. Mr. Chairman, on this point, this goes back to something Miss Guffey said earlier: that these exceptions which are placed in the APA and the substantive sections dealing with specific types of proceeding, are partially because Congress in some of the instances has some doubt about agency procedures.

I think particularly of that *de novo* exception that Miss Guffey has mentioned.

But since this Conference is to study and make recommendations to improve agency procedures—perhaps they could improve them so much that the Congress would no longer have to place this *de novo* exception in the Administrative Procedure Act, and, yet, if we follow the reasoning of the draft of the bill prepared by the Bureau of the Budget, we would be preventing the Conference from looking into a means of improving agency procedure in that area.

Miss GUFFEY. Mr. Chairman, I would like to comment on the possibility that Congress might want to drop the exception relating to trials *de novo*.

If the proposal contemplates that the agencies would, themselves, give the trial in those cases, you would be transferring, I believe, from the courts to the agencies functions which the courts have been perfectly able to handle and which Congress has never seen any reason to bring within the scope of what we call the administrative process—and that, itself, is a technical term.

Mr. KENNEDY. Mr. Staats—

Mr. FENSTERWALD. I wonder if I could interrupt. I am not quite sure I understand.

All this power this Conference has is to study and recommend.

Miss GUFFEY. Right.

Mr. FENSTERWALD. I do not understand why you want to limit the powers of study and recommendation to certain fields, excluding, for example, the question of trials *de novo*. We are not considering what power the agencies have. We are only discussing the power of the Conference to study and make recommendations in this field, and I do not see the danger there.

Miss GUFFEY. Well, the principle involved here relates to what is the administrative process, and why did Congress find it necessary to pass the Administrative Procedure Act in the first place? We had gotten into certain situations where agencies could make decisions, and where the courts in reviewing the decisions could not review the facts from the beginning, and in which it was possible to say that the Government was not protecting due process.

Now, unless that situation exists where the courts are precluded from giving a comprehensive review, then the administrative agency is able to proceed in an expeditious, executive manner, subject always to the knowledge that if it is capricious or if it is not getting all the facts, it is subject to court review.

Mr. FENSTERWALD. Well, I still do not see what harm could derive from letting the Administrative Conference have the authority to study this whole problem and make recommendations, provided that the problem exists and some recommendations might be helpful.

Miss GUFFEY. It is fundamentally outside of the objective of the Conference as it is viewed. The primary intent of the Conference is to improve the operation of the regulatory agencies and the regulatory programs which regulate private interests.

Mr. STAATS. I think you are quite correct in saying it is advisory, but even in that framework we feel that the acceptance of this program, as far as the agencies are concerned, is going to be much improved if we can limit it to the central thesis that we are trying to deal with here, which is administrative procedure.

I think that this is what was behind the exclusions: We included them for the obvious reasons which are back of the exclusions in the Administrative Procedure Act respecting the areas of military policy, foreign policy, regulations respecting internal management, budgets, personnel, and all of this. Even though your principle of it being advisory would still apply, we would not think it would be too profitable or appropriate or even essential that they get into areas of this kind. If we are going to develop something which the agencies are going to have a fear about, then I think we have largely defeated the basic principle here, which is cooperation and acceptance of the idea that this is a useful framework in which to discuss these issues.

Mr. FENSTERWALD. Well, I am still somewhat confused on this. The last Administrative Conference had a very productive committee on judicial review which was headed by one of our witnesses this morning, Mr. Ashley Sellers, and they produced some very valuable committee reports and recommendations.

Whether these are put into effect or not will depend upon a number of things, but I do not know why it is not productive to have as broad a jurisdiction as you can for this Conference because its powers are so limited, and I can see where you think it might be better to have them concentrate in certain fields, and this may very well be true, but I wondered if by legislation we should narrow this thing down and exclude broad areas.

Miss GUFFEY. It would not be created to improve the operation of the courts. It would be created primarily to deal with procedures of executive agencies, and that should be its emphasis.

Mr. KENNEDY. Mr. Fensterwald, could I interject there a couple of specific examples that I wonder—

Mr. FENSTERWALD. Certainly.

Mr. KENNEDY (continuing). If this Conference could look into, because I noticed in Mr. Staats' statement he emphasized that it should deal only with formal agency proceedings.

He said the effects will be to enable the Conference to concentrate very largely on the procedures used in formal proceedings.

Now, would that include proceedings, say, of the Veterans' Administration? Or should we make no efforts in this Conference to improve the procedures of the Veterans' Administration or the Social Security Administration or, say, the granting of grazing permits by some of the departments?

Do you wish to exclude that type of administrative activity from the work of the Conference merely because it might not be a formal proceeding?

Miss GUFFEY. You have used the term "administrative process" applied to two fundamentally different kinds of things and which are ordinarily distinguished, on one hand, as matters which affect the benefits, rights, and privileges of private parties, and, on the other hand, as a proprietary function of the Government.

Mr. KENNEDY. Well, we are dealing with the public here. We want to know which proceedings affecting the public, regardless of whether they are so-called proprietary functions or licensing functions or anything else, that you want the Conference to have the authority to deal with.

Miss GUFFEY. The membership of the Conference here would be made up of lawyers. This is a particular subject matter in which they are selected to advise because of their legal competence. There is no particular reason of which we are aware to select a particular body of citizens to advise on some of those other matters or that the members of this Conference would be the same group——

Mr. KENNEDY. But the emphasis——

Miss GUFFEY (continuing). That you would put into a group which would advise on those other matters.

Mr. KENNEDY. But the emphasis here has been, according to the bill that the Bureau of the Budget prepared, to have a large number of agency people, as a matter of fact, people from every agency, who might have some sort of administrative proceeding function.

Now, certainly that would include representatives from agencies who have the job of grazing permits. It would include the Secretary of Health, Education, and Welfare, who has the social security problem.

You want all these people to be on the Conference, I understand, heads of those agencies on the Conference, and, yet, you want to restrict the scope of the Conference's activities to exclude the very functions which their departments have.

Now, it seems to me, it is unnecessary to have them if we are not going to go into the workings of their department, so far as they are concerned with the public.

Mr. STAATS. How broad would you make this? If you are going to broaden this to the point where you are including all the operations of Federal Government, then I think we are talking about something that frankly we are not interested in.

Mr. KENNEDY. Well, what was the scope of the last Conference? It did go into the area of the Board of Contract Appeals of the armed services and, as I recall, made a recommendation which was adopted by the Department of Defense.

That would not be permissible, I assume, under this.

Mr. STAATS. We are talking about formal proceedings here, I think, Mr. Kennedy.

Mr. KENNEDY. But it is a proprietary function—the granting of contracts—that was a part of the work of the last Conference.

And, then, you would, as I understand it, exclude it from the work of this Conference; yet, the Department thought it was so good, it adopted it.

Mr. STAATS. That is correct.

Mr. KENNEDY. It seems to me, if we are going to make any headway here, this problem of the jurisdiction is quite important.

Mr. STAATS. I think we learned a great deal from the temporary Conference, the facts that were dealt with in that Conference. It does not necessarily imply it should apply to the future.

Mr. KENNEDY. Let me turn to another point which has been raised in arguments pro and con as to whether we should have a section in the bill dealing with conflict of interest in order to protect those people who participate in the work of Conference from the conflict-of-interest statutes.

Now, your draft does not have that. It has been suggested that it be included. One of the representatives for the Departments is opposed. What is your feeling?

Mr. STAATS. Your question has to do with the conflict-of-interest provisions that apply with respect to the non-Government participants in the Conference. We do not believe that it is essential to have that. We believe that the recent changes in the conflict-of-interest legislation adequately cover this with respect to part-time persons filling positions of consultants or temporary employment.

I believe the Department of Justice presented here yesterday a statement on this point, because we knew this question would arise.

I think it is a very good question. I do not know that we would have a strong objection to it going in. We simply felt it was not essential to have it in the light of the recent legislation.

Mr. KENNEDY. And you think the activity of the Conference, as far as conflict of interest goes, would not apply to members of the Conference as well as consultants that you mentioned?

Mr. STAATS. We believe they are adequately covered under the regulations which have been issued under that new legislation.

Mr. KENNEDY. In other words, no one can get in trouble later on for violating the words of Congress?

Mr. STAATS. I do not think so.

Mr. SEIDMAN. Mr. Kennedy, I would like to point out that—

Senator LONG. Just a minute. I am sorry to break in at this time, but it will be necessary that this subcommittee be in recess for 5 or 10 minutes so that another subcommittee can hear a judgeship nomination.

(Whereupon, a brief recess was taken.)

Senator LONG. The subcommittee will be in order.

Mr. Staats, will you and Miss Guffey and Mr. Seidman please come back to the witness table. I apologize again for breaking in like this.

Mr. STAATS. It is quite all right, Mr. Chairman.

Senator LONG. Mr. Kennedy?

Mr. KENNEDY. Mr. Chairman, during the recess I took the opportunity to talk further with Mr. Seidman from the Bureau of the Budget about the problem of a possible provision with respect to conflict of interest, and I gather that Mr. Seidman has with him a copy of the law and he will explain it.

Our concern centers on at least two of the types of people who will be connected with the Conference. The first are those who are employed as consultants on a part-time basis or, perhaps, on a full-time basis, but for a limited period of time; the second category would be either the members of the Conference or the members of the Council who serve for terms of 2 or 3 years, as I recall, so that, in the language of the act, those people who serve for less than 100-some-odd days are defined as special employees. But we would like to know what the intent of the Bureau of the Budget is as to, first, consultants, and, second, members of the Assembly and members of the Council.

Mr. SEIDMAN. It was our view, in considering this problem, that both the consultants to the Conference who would serve for less than 165 days, as determined by the agencies, and the outside members would be special employees within the definitions of the new conflict-of-interest laws, which, as you know, repealed all the exemptions which formerly existed in law from the conflict-of-interest statutes.

Mr. KENNEDY. And as special employees, members of the Conference or the Council, then, for a term of years, could participate and could collect their travel expenses or whatever they are authorized to collect without running afoul of the existing law?

Mr. SEIDMAN. He would be subject to those limitations and prohibitions applicable to a special Government employee.

Mr. KENNEDY. Could you give us the statutory citation for the record?

Mr. SEIDMAN. Public Law 87-849, and I might call to the attention of the committee a committee print of this committee which contains not only the statute, but any explanatory memorandum of the Department of Justice interpreting the statute.

Mr. KENNEDY. And it is to that, that you refer in making your statement?

Mr. SEIDMAN. That is correct.

Mr. KENNEDY. Thank you, Mr. Seidman.

Mr. Staats, I would like to turn to one other area here about which we have had a number of suggestions in the course of the hearings, and that is the duties and responsibilities of the Chairman of the Conference.

How do you interpret the Bureau of the Budget draft with respect to several areas: first of all, whether under S. 1664, when you prepared it, the Chairman of the Conference is authorized to make studies on his own initiative, assuming there has been no action by either the Council or the full Assembly with respect to whether or not a study should be undertaken?

Mr. STAATS. We have tried, Mr. Chairman, to spell out the role of the Chairman as precisely as we could. In general, we would envision his role to be one of leadership in the work of the Conference. He would be full time. He would be a presidential appointee for a period of 5 years.

We think that the crux of the question as to whether the Conference is successful or not is going to depend, in large measure, on the leadership and strength of the Chairman.

I do not know that I can add a good deal to what has been spelled out in S. 1664. We have included his role as a member of the Council in 6(b), and also in 6(c) the authorities that he would have as Chairman of the Conference.

Mr. KENNEDY. Well, specifically, would the Chairman have the power on his own initiative to either initiate himself, or on suggestion of anyone else to undertake, an investigation of some procedure of one or more agencies?

Mr. STAATS. No.

I believe section 6(c) covers this point. He would recommend to the Council appropriate subjects for action by the Conference. Like all members of the Conference, he would be free to state his dissents or his views. He could, presumably, as a presidential appointee and subordinate of the President, be called upon for personal advice.

I think that is an obvious point.

But I would not find any language here which would authorize him to do what you are suggesting.

Mr. KENNEDY. That is the specific question I would like to have had you answer.

Now, turning to the question of speaking his own mind, you said that he would have the same right as any member of the Conference to speak.

Would that include speaking to the agencies with respect to suggestions, assuming that they did not request the advice?

Mr. STAATS. I believe that there is provision here for dissents. There is a proviso in section 6(a) that—

Any member or members who disagree with a recommendation adopted by the Assembly shall be accorded the privilege of entering dissenting opinions and alternative proposals in the record of Conference proceedings and the opinions and proposals so entered shall accompany the Conference recommendations in any publication or distribution thereof.

Mr. KENNEDY. Apart from that, though, would the Chairman be authorized under the draft of this bill prepared by you—would he be given the authorization to investigate a matter by the Conference, to submit his own conclusions independently of any report, independently of whether they are dissents from any Conference action, submit his own views to either the agencies concerned, the President, or the Conference on his own initiative?

Mr. STAATS. No. I think the answer is no.

Mr. KENNEDY. Then, in sum, I gather that the power of the Chairman under this bill will be, first of all, housekeeping. He can appoint employees. He can rent office space. And, secondly, he can recommend matters to the Council for their consideration and action. And, thirdly, he can organize and direct the studies ordered by the Assembly or the Council.

That is about the extent of the functions, is that correct?

Mr. STAATS. Well, I do not know—I think this is all spelled out pretty clearly. I do not know what the thought is back of your question as it relates to the language here. But section 6(c) says that he will be the chief executive of the Conference in that capacity.

Mr. KENNEDY. What does that mean, “chief executive of the Conference”?

Mr. STAATS. He is the head of it.

Mr. KENNEDY. And what can he do as chief executive, the same thing a chief executive of a corporation can do?

Mr. STAATS. This is spelled out in 6(c) in some detail. I would be happy to read it:

In that capacity he will have power to—

Mr. KENNEDY. Instead of reading it, Mr. Staats, let us just take some examples. We have already covered the point that he cannot initiate a study on his own.

Mr. STAATS. Section 6(c) (1) says he can—

make preliminary inquiries into matters he deems important for Conference consideration, including matters proposed by persons inside or outside of the Federal Government.

Now, this is a normal role for any chairman of any conference.

Mr. KENNEDY. Now, what is a preliminary inquiry?

Mr. STAATS. “Preliminary”?

Mr. KENNEDY. What would you consider that?

Mr. STAATS. I would think it would be whatever in his judgment represents an adequate basis on which to make a recommendation for subjects that the Conference might concern itself with.

Mr. KENNEDY. In other words, this is an inquiry to get enough information to put the matter before a conference so that the Conference could decide whether it wants to actually conduct a full scale—

Mr. STAATS. Yes.

I think we are clear on the point, and we have no difference with you on this particular point, that the studies would be Conference studies.

Mr. KENNEDY. It is not a question of the difference. I just want to make sure I know what a preliminary inquiry is.

Mr. STAATS. Well, that is like “How long is a piece of string?” and that is about the only answer I can give you.

Mr. KENNEDY. How long is a piece of string?

Mr. STAATS. As long as necessary to do the job.

Mr. KENNEDY. What is?

Mr. STAATS. Whatever is necessary to do the job.

Mr. KENNEDY. I think that answers it.

He can make as a preliminary inquiry anything necessary to do the job, is that correct?

Mr. STAATS. That is right.

Mr. KENNEDY. Thank you.

Under his power he can request an agency head to provide information.

Does he have any power to put teeth into his request? I point out, since you will read it if I do not, line 6 on page 9 of the bill says: “which information shall be supplied to the extent permitted by law or agency regulations”.

Mr. STAATS. Yes.

Mr. KENNEDY. I assume that means that an agency could make a regulation that it would submit no information to the Conference, is that correct?

Mr. STAATS. If it is prohibited from supplying that information otherwise. Now, there are some agencies which would like to go further in making this more restrictive even than this.

Mr. KENNEDY. Is there anything to restrict the agency's power to make a regulation on what information they will supply to the Conference?

Mr. STAATS. I do not think that it would be reasonable to assume that any President would be, as a matter of policy, willing to have such a regulation made if it were for the purpose of preventing the Conference from having legitimate information. I think this is something you have to leave—

Mr. KENNEDY. How about the independent agencies, Mr. Staats, which are not under the President's direction?

Mr. STAATS. I think you have to leave this to the good judgment of the individuals, and this is, again, one of the reasons that I emphasized so strongly in my earlier remarks the importance of having a cooperative attitude here, making the agencies feel that this is something that is going to help them do their job better. If they get the information—

Mr. KENNEDY. They get such information as they want to?

Mr. STAATS. If the superagency concept is the concept here, then I think you will find widespread resistance to this proposal, and I think that they would be perfectly accurate in having that concern.

Mr. FENSTERWALD. Would there be any objection to cutting down this limitation to apply to statutes only and not to regulations? In other words, they will have to give the Chairman information except as prohibited by statute?

Mr. STAATS. The reason for including "agency regulations" at this point has to do with the confidentiality provisions which have been applied in many areas, and I think that whatever regulations are in existence today with respect to confidentiality probably would have to apply here.

If there is other language which could accomplish this objective, this is certainly a point that we would not want to be too insistent upon, but I think the basic thought here is to protect the confidentiality regulations that are now in effect.

Mr. KENNEDY. You may not believe it, but I could even be on your side, but I just want to understand for the record the fact that you do not mean by this "or agency regulations" that agencies should go out and promulgate regulations to keep things secret from the Conference.

Mr. STAATS. That is right.

Mr. KENNEDY. And the only reason you have this in here is to protect those things which have in the past been considered matters of confidentiality?

Mr. STAATS. I think it is a perfectly fair point to have it on the record that this is the intent.

Mr. KENNEDY. So, then, we come back to the question I asked you before, and you were about to read subsection (c) of section 6 to me.

The basic powers of the Chairman of this Conference, as provided in this bill that you drafted, would be, first of all, housekeeping. He is responsible as an executive for the administration of the Conference?

Mr. STAATS. That is correct.

Mr. KENNEDY. And, secondly, he has the power, and, I assume, the duty, to make these preliminary inquiries, which are as long as a piece of string, into things which might be of interest to the Conference to go into further?

Mr. STAATS. That is correct.

And I think—

Mr. KENNEDY. And, he has the power to request from the agencies information not only with respect to those preliminary inquiries, but with respect to any major injuries that the Conference, itself, might decide to make?

Mr. STAATS. Yes. I think that is accurate.

Mr. KENNEDY. He has the power and the duty to prepare, on behalf of the Conference, and submit to the President and Congress an annual report.

Mr. STAATS. That is right.

Mr. KENNEDY. Now, would the next clause there, "and such interim reports as he deems desirable"—what does that mean?

Mr. STAATS. This would be reports on the status of the work of the Conference, on the status of any particular studies that were under-way.

Mr. KENNEDY. Are those reports approved by the Conference or are those reports which he might submit apart from those approved by the Conference?

Mr. STAATS. I think if these were purely of a status character, I would doubt that they would be a matter of concern to the rest of the Conference. It seems to me this is something that the Council itself could work out quite appropriately.

Mr. KENNEDY. Could he submit to the Congress and the President reports on the result of his preliminary inquiry?

Mr. STAATS. Well, I think you have to—I don't know that you could answer this one a priori. It seems to me if you are talking about studies that have been undertaken, that is one thing, but my assumption would be that the Chairman, working cooperatively and effectively with the Conference, would not indicate matters that he has in mind recommending to the Conference that he undertake. I would not regard that as anything that is of Conference character until the Conference had agreed.

Mr. KENNEDY. I have only one other question, Mr. Chairman. Senator Dirksen has received some comments along the line that the membership of this Conference would constitute what somebody described in one of them as "a stacked deck," being predominantly agency.

Now, you have discussed that point. You think the Conference just won't get anywhere unless what it wants to do is acceptable to the agencies?

Mr. STAATS. Let me put it this way, and this is a very key point in the whole subject here. We are convinced, Mr. Chairman, that this Conference will not be effective unless it is regarded as official Government responsibility. We could have proposed the same pattern

as the Judicial Conference of the United States. In fact, this was one of the proposals that received serious consideration. We came to the conclusion that the pattern the Judicial Conference was not the best one here because of the importance of having the viewpoint of the practitioners outside of Government, of students in this field, and of other interested parties who could make a contribution, and we felt it more effective to have them a part of the organization rather than purely in an advisory role to the Conference.

Mr. KENNEDY. Did you consider the other alternative of having an all-non-Government with Government advisers?

Mr. STAATS. Yes, we did, but that would not require legislation. That is possible at the present time without legislation. And again it is a question of what is the proper relationship here of people outside of Government working with the Government in this very important area.

Mr. KENNEDY. I gather you expect, then, under this formula that you have devised, where the Conference does make a recommendation, because of the nature of the people who compose it and the studies which can be given to it, those recommendations will be carried out by the agencies.

Mr. STAATS. Yes. This is a very good point that you are making. Illustrative of the validity of it is the outcome of the last conference. A large number of recommendations have been carried out. In practically all cases where the agencies now have had some responsibilities for carrying out the recommendations, they are moving ahead with them, you see. And some result is being achieved.

In the first place, if the agencies had not felt that they were full participants in that process and were receiving some value out of it, they wouldn't have put the effort into it. In the second place, they wouldn't have done much about it after the results had been made available.

So I think if we are looking for results here, we have got to put the emphasis on the side that this is a Government program and Government responsibility, and it has got to be preponderantly a Government effort.

We want the views of the outside people. We think they have an extremely valuable input into the picture. But the responsibility has got to be clearly fixed. Everyone has to understand that the responsibility is properly placed on the Government side.

Mr. KENNEDY. Mr. Staats, in accepting all of that, then why not put some teeth into the action of the Conference and give the power to do more than recommend. As long as what it is going to do has been so carefully worked out both in the composition of its membership and in the way in which it is going to operate, and you stress the point that you would like it that way, you want it that way, because the result is going to be something which the agencies can accept.

Mr. STAATS. No, it is not—

Mr. KENNEDY. Why not give the Conference the power to do more than recommend?

Mr. STAATS. Well, if you are suggesting the possibility of giving it directive powers, I would be extremely opposed to that. I do not think that is the proper function of a group of this kind. I think

the Congress is free to enact legislation at any time it wishes to change an agency's program or its procedures, and that would be the appropriate way to do it. But the value here——

Mr. KENNEDY. Do you think that Congress should deal with agency procedures as well as substance?

Mr. STAATS. Certainly. Certainly. The value——

Senator LONG. If the chairman may interpose, we don't want this to take away the power and duty of this subcommittee. The subcommittee might decide to take a look inside these agencies and see what goes on.

Mr. STAATS. We are delighted at this evidence of interest on the part of the committee, as shown by the fact that you are holding hearings on this bill today, Mr. Chairman. But I would like to emphasize that Mr. Kennedy has put his finger on what I think is a very key point—that the value here is the value that comes from collaborative efforts on the part of the agencies in dealing with their common problems, that they must feel a responsibility for this in order to put their best efforts or best manpower on it and work collaboratively with the other agencies and with the outside people who would make up the Conference.

If they feel that the Conference is an authority that is going to force them to make changes, I don't think you would get a very good result and we would be opposed to that very strongly.

Mr. KENNEDY. Then, even though the membership has been arranged so as to lead to a result, recommendations acceptable to the agencies because of the cooperative effort between the agency people and some other outsiders, you still don't want to make any sort of requirement that the agencies adopt the recommendations, nor do you, I suppose, even want them to report why they haven't adopted them, do you?

Mr. STAATS. Well, you see, this will make available in a very open public way the fact that agencies have or have not adopted these proposed procedures.

Mr. KENNEDY. Should the agencies report to the Congress or the Bureau of the Budget that they have not adopted them?

Mr. STAATS. I think this would be perfectly appropriate and I would assume this would be part of the annual report which is——

Mr. KENNEDY. I mean the agencies themselves. Let's assume there is a report with respect to, one of the regulatory agencies. The agency doesn't adopt the recommendation. Should the agency answer to the Conference, the Bureau of the Budget, or Congress as to why it hasn't adopted the recommendation?

Mr. STAATS. Well, I think all of these may be involved. If it is a matter which would have a significant effect on manpower or budget requirements, obviously we are going to be interested and the Appropriations Committees will be interested. If it is a matter that involves considerations of that character, and above that, then this committee and other committees of the Congress may well have an interest.

But through the annual report and through the workings of the Conference I think that we will be a step ahead in that respect as against where we are at the present time.

Mr. KENNEDY. I share your concern that we get our money's worth from this Conference, and I would like to see the results it arrives at actually put into action or the reason why they are not carried out.

I assume you do, too, or you wouldn't be recommending spending a million and a half dollars or more in these times for this type of activity. Isn't that correct?

Mr. STAATS. That is correct. I think this follows.

Mr. KENNEDY. Thank you.

Senator LONG. Mr. Fensterwald?

Mr. FENSTERWALD. I have no further questions, Mr. Chairman.

Senator LONG. Mr. Staats, Miss Guffey, and Mr. Seidman, we are grateful to you. You have been helpful to us, and this has certainly been worthwhile this morning.

Mr. STAATS. We have enjoyed, Mr. Chairman, the opportunity to meet with you and to have this full exchange of thoughts on this matter.

We feel that there is for the first time a reasonable consensus on a matter that has been under serious consideration now to my personal knowledge for 20 years, and our hope is that we have enough of a consensus to enable us to move forward now on this legislation.

Thank you.

Senator LONG. Thank you, Mr. Staats.

The next witnesses are Mr. Harold Russell, chairman of the American Bar Association, Special Committee on Legal Services and Procedure, Mr. Ashley Sellers, vice chairman, American Bar Association Special Committee on Legal Services and Procedure, and Mr. Bernard A. Foster, American Bar Association delegate, section on minerals and natural resources law.

All three have prepared statements. I understand that the three of them are going to testify and then there will be questions. We will discuss the statements at that time.

Will all three of you gentlemen come around to the table?

STATEMENTS OF HAROLD RUSSELL, CHAIRMAN OF THE AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE ON LEGAL SERVICES AND PROCEDURE; ASHLEY SELLERS, VICE CHAIRMAN, AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE ON LEGAL SERVICES AND PROCEDURE; AND BERNARD A. FOSTER, JR., AMERICAN BAR ASSOCIATION DELEGATE, SECTION ON MINERALS AND NATURAL RESOURCES LAW

Senator LONG. We have biographical sketches of each of you. All of you are very distinguished lawyers and members of the bar association and have done a great deal of work in this field.

We appreciate your being here this morning. The biographical sketches will be placed in the record at this time.

(The biographical sketches referred to follow:)

BIOGRAPHICAL SKETCH OF HAROLD L. RUSSELL

Harold L. Russell, born Abingdon, Va., July 1, 1916; admitted to bar, 1941, New York; 1942, Georgia. Preparatory education, Hendrix College (A.B., 1937); legal education, Columbia University (LL.B., 1940). Fraternity: Phi Delta Phi. Member: Atlanta, Ga., Federal and American Bar Associations; Lawyers Club of Atlanta; the Association of the Bar of the City of New York.

Member, Administrative Law Section American Bar Association, 1948 to date. Member of Council Administrative Law Section American Bar Association, 1954-61. Chairman, Administrative Law Section American Bar Association, 1956-57. Chairman, Special Committee on Legal Services and Procedure, American Bar Association, 1961 to date. Member, for several years, Administrative Law Committee, Georgia Bar Association. Vice chairman, Lieutenant Governor's Special Committee for Study of Georgia Uniform Administrative Procedure Act, 1963-64. Member, Board of Visitors, Columbia University Law School, 1959 to date.

BIOGRAPHICAL SKETCH OF ASHLEY SELLERS

Mark Ashley Sellers, lawyer, born Grand Bay, Ala., March 24, 1902; A.B., Princeton, 1924; LL.B. University of Texas, 1928; S.J.D., Harvard, 1933. Admitted to Texas Bar, 1928; Georgia, 1931; District of Columbia, 1947. Practice of law, Abilene, Tex., 1928-30; county attorney, Andrews, 1930; Longview, 1931; assistant professor of law, Emory University, 1931-33; special assistant to U.S. Attorney General, 1933-35, 1945 (specially designated to represent the Attorney General of the United States before the Congress respecting the enactment of the Administrative Procedure Act); professor of law, University of Georgia, 1935-38; Associate Solicitor U.S. Department of Agriculture, 1938-43; Assistant, War Food Administration, 1943-45; private practice, Washington, D.C., since 1946; currently executive partner, Cummings & Sellers; members, Administrative Conference of United States (chairman, Committee on Judicial Review), 1961-63; fellow and member board of directors, American Bar Foundation; member American (house of delegates, 1952-53, chairman special committee on legislative services and procedures 1955-58), Georgia, Federal (chairman, committee administrative law, 1944), Texas, District of Columbia Bar Associations, Interstate Commerce Practitioners Association, American Law Institute, American Judicature Society, Phi Delta Phi, Democrat, Methodist. Clubs: Cosmos, Princeton, Harvard, National Lawyers, National Democratic, Congressional Country (Washington), Terrace (Princeton, N.J., contributor of professional journals. Home: 5145 Tilden Street, Washington, D.C.; office, 1625 K Street NW., Washington 6, D.C.

BIOGRAPHICAL SKETCH OF BERNARD A. FOSTER, JR.

Bernard A. Foster, Jr., born Spartanburg, S.C., 1909: admitted to bar, 1936, South Carolina; 1937, District of Columbia; 1954, Maryland. Preparatory education, Wofford College (A.B. with distinction, 1931); legal education, George Washington University Law School (J.D. 1937). Fraternity: Phi Delta Phi. Editor, George Washington University Law Review, 1936-37. Author, with collaborators, "Water-Resources Law," 1950. Senior attorney, Federal Trade Commission, 1941-42; Special counsel, Federal Power Commission, 1946-50. General Counsel, the President's Water-Resources Policy Commission, 1950-51. Assistant General Counsel and Chief, Natural Gas Division, Federal Power Commission, 1951-53. Trustee, Rocky Mountain Mineral Law Foundation. Member: Bar Association of the District of Columbia; American Bar Association (chairman, natural gas committee, section of mineral law, 1954-55; member of council, section of mineral law, 1955-59; second vice chairman, 1959-60; first vice chairman, 1960-61; chairman, 1961-62; member, house of delegates, 1962-63); Federal Bar Association; American Judicature Society; Federal Power Bar Association (member, executive committee, 1955-58). U.S. Army, 1942-46, lieutenant colonel; Chairman, Joint Army-Navy-Air Force Industrial Employment Review Board, 1945-46.

Mr. RUSSELL. Mr. Chairman, before Mr. Staats leaves I would like to take the opportunity to express on our behalf great appreciation for the work that has been done in this area by Mr. Staats and his associates, the opportunities for exchange of views which they afforded to us, and we are very pleased that the project has moved forward as it has with their help.

We have tried to organize our presentations so that we don't repeat and so we can be most helpful to you hopefully, and Mr. Sellers will go first and I will go second, and then Mr. Foster, and I would like to suggest, Mr. Chairman, if you have questions, you and Mr. Fensterwald and Mr. Kennedy, that they be held until we complete the presentations.

Senator LONG. It is our intention to do that. We are happy to have all three of you here this morning.

Mr. Sellers, you may proceed.

Mr. SELLERS. Thank you, Mr. Chairman, and members of the subcommittee.

My name is Ashley Sellers. I am vice chairman of the Special Committee on Legal Services and Procedure of the American Bar Association and presently serve as an assembly delegate to the house of delegates.

I am a former chairman of the section of administrative law of the American Bar Association and appear here today on behalf of the association to support the establishment, by appropriate legislation, of an Administrative Conference of the United States.

The concept of such a permanent Administrative Conference of the United States has long been advocated by every group which has considered the matter.

The time is ripe for the establishment of such a Conference because there is a crucial need for it. Furthermore, I think this subcommittee will agree, when it reviews the history of past events, that the establishment by legislation of a permanent Administrative Conference has been carefully considered, and that the various alternatives concerning the manner of the establishment and operation of such a Conference are being thoroughly explored.

It is not a situation in which the subcommittee is confronted with a completely new idea, in which case it would be both necessary and desirable for the subcommittee to take evidence with a view to deciding whether the idea has merit. As I view the matter, there can be no serious opposition to the idea, itself. I think that the primary task of this subcommittee is to determine the details of the legislation for the establishment of such a Conference.

Personally, as a longtime member of the American Bar Association, I have served with those sections and committees of the association which have advocated the establishment of an Administrative Conference of the United States. Therefore, to make the record clear, I favor the establishment of such a Conference along the lines espoused by the American Bar Association.

One of the key provisions of the American Bar Association's approach to this matter is that the Chairman of the Conference should be given strong powers by the Congress in the enabling legislation, including powers to act individually and on his own initiative in dealing with the host of problems confronting our administrative agencies—and by administrative agencies I include all executive departments exercising regulatory functions, as well as the so-called independent Federal agencies.

In this connection, I would like to impress upon the subcommittee my conviction that, in dealing with matters of administrative law and procedure, both the Congress and other groups unfortunately

frequently overlook the fact that our great executive departments, in many cases, exercise administrative regulatory powers just as important to those concerned as do the independent agencies.

For that reason, I am pleased to point out that the ABA proposal for legislation for the establishment of a Conference, as well as the other legislative proposals which have come to my attention, is, by its terms, applicable to executive departments as well as to independent agencies.

By this, I mean that the Administrative Conference of the United States, if established on a permanent basis by legislation, as proposed, would be able to deal with those problems of administrative law and procedure concerning the executive departments, as well as the so-called independent regulatory agencies.

In addition to the creation of a strong Chairman, with independent powers, another key provision of the legislation for the establishment of a Conference, advocated by the American Bar Association, makes it clear that the Conference to be established is not based upon the concept that it shall be dominated by the executive departments and agencies, themselves.

I am aware that there are those who honestly feel that the primary value to be achieved by an Administrative Conference of the United States is simply to create a mechanism by which the Federal executive departments and agencies, themselves, may meet and engage in some process of self-improvement. Of course, self-improvement is important, but I submit that it is not enough.

For that matter, may I break in on my prepared statement to say that I am not sure that it really is necessary to have special legislation creating an Administrative Conference if all that is going to be done—if its sole purpose is to enable the agencies themselves to meet and to have self-improvement programs. I think they have that power already. And in fact, it is a rather—it is somewhat of a commentary that over the many years that have gone by, in which time after time these problems of delay and problems of unnecessary variation in procedures have been brought to their attention, that there has not been more of interagency committees and coordination and liaison for this purpose.

In my opinion, the Conference should, as contemplated by the American Bar Association's proposals, be based upon a somewhat broader foundation. It should be regarded as a meeting place for departments and agencies and nongovernmental representatives from the practicing bar and from the scholastic world to meet and exchange ideas. Neither governmental nor nongovernmental groups have a monopoly on ideas.

If a permanent Administrative Conference of the United States is to be established by legislation, as I think it should be, then it should provide a forum in which all persons concerned with the improvement of administrative law and procedure may participate. Therefore, I am pleased with this part of the legislative program of the American Bar Association, and I hope that this subcommittee will agree with this philosophic approach.

A third key provision of the legislative program for a Conference advocated by the American Bar Association is based upon the concept that the subject matter with which such a Conference may deal should

not be narrowly circumscribed. In essence, the Conference should be permitted to deal with all of those matters which may involve administrative law and procedure and with which the executive departments and agencies, themselves, are concerned.

In this connection, neither the Conference on Administrative Procedure, which filed its report in 1955, nor the Conference just concluded, which filed its report last December, was narrowly restricted as to the subject matter with which it could deal.

I think that the experience of these two Conferences, and the recommendations which they made, reveals dramatically the desirability of allowing a Conference on Administrative Procedure to deal with all of the problems included in the complete spectrum of administrative law.

I earnestly hope that this subcommittee will, in reporting proposed legislation upon this subject, take pains not to delimit the Administrative Conference, but to permit it to inquire into the entire field of Federal administrative practice and procedure.

Specifically, I would like to cite one example of what I mean. This illustration has already been adverted to earlier this morning.

There is a tendency in some quarters and at times to limit, in one's thinking, administrative procedure only to that subject to and not therein excepted from the full coverage of the Administrative Procedure Act of 1946.

But, there are crucial problems of administrative law and procedure which are not, in all respects, encompassed by that great legislation. A specific example is that involved in handling claims arising out of Government contracts containing disputes clauses, making the decisions of heads of agencies final as to matters of fact, with the right to resort to the U.S. Court of Claims only where question of law are involved or in other circumstances permitted by the so-called Wunderlich Act (68 Stat. 81, 41 U.S.C. secs. 321-22, 1958).

It would be a mistake, in my opinion, for the Congress to enact legislation for the establishment of an Administrative Conference and, at the same time, to preclude the Conference from considering problems arising in these contract claims cases. It is becoming increasingly evident, as the area of Government contract activity expands due to new defense needs and to the vast governmental programs dealing with outer space which are just beginning, that Government contracts of the type I am considering are becoming of ever greater importance in our total economy. It is safe to assume that, as this tendency increases, administrative procedure dealing with the administration of these contracts and the handling of claims under the so-called disputes clauses, will become of greater and greater concern, both to the Government and to the public.

Therefore, it is in my opinion, almost unthinkable that any Administrative Conference created by the Congress would be precluded from dealing with these problems.

May I add to my prepared statement at this point another illustration of the extent to which the Conference, the jurisdiction of which is provided in the bill pending before you, would be in my judgment too narrowly circumscribed.

For example, in the last Conference there was, as has been adverted to this morning, a Committee on Judicial Review of which I happened to have had the honor to be the chairman. Now, the jurisdiction of

that committee was as broad as is the entire subject of judicial review of administrative action, whether pertaining to court review of administrative action arrived at through the formal procedures of the Administrative Procedure Act or otherwise.

For example, the *de novo* proceedings that were adverted to this morning and which are specifically exempted from the coverage of the bill now pending before you were a subject of investigation by the previous Conference.

An illustration of the significance of the subject of judicial review and of the need for this study and investigation, is graphically set forth in a current article by Judge Henry J. Friendly entitled "The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't," which appears in the *Columbia Law Review*, volume 63, beginning at page 787, and the excerpt which I will now read is on page 796.

Speaking of judicial review and the varying procedures, he says:

Some orders are reviewable by a single district judge with appeal to a court of appeals, some by a "statutory" district court of three judges—one of whom must be a circuit judge—with direct appeal to the Supreme Court, some by a court of appeals of appropriate venue, some only in the Court of Appeals for the District of Columbia; in other cases, no method of review is provided. The periods in which review may be sought are even more variegated, 15, 20, 30, 60, and 90 days, 3 months, 6 months, and no limits at all. Sometimes the period starts with the entry of the order, sometimes with its mailing, sometimes with the giving of public notice. In some cases, rehearing must first be sought, in others not. Some orders are immediately effective unless stayed, others have no effect until enforced, still others will be effective save for a petition to review which works an automatic stay. These differences create pitfalls for the unwary practitioner and undue interpretive burdens for the courts. Whatever the historical reasons for this efflorescence of variety, its continuation is unworthy of an ordered legal system. No vital interests are at stake here; these weeds have grown simply for lack of a gardener.

The Administrative Conference through the Judicial Review Committee, in studying the question of judicial review despite the fact that it was limited only to some 15 months of tenure, supervised and brought about the setting forth of all of the statutory provisions, Federal statutory provisions, for judicial review of Federal administrative action, in a monograph prepared by the committee and submitted to the Administrative Conference. That basic source material for subsequent research in this field is of an extremely valuable nature.

Nowhere else is there set forth a complete compendium of the statutory provisions relating to judicial review of administrative action.

If this bill now pending before you were to be enacted in its present form, such a study by a permanent conference could only be piecemeal. It would be incomplete. Many of the statutory provisions for judicial review of administrative action pertain to the review of matters that would not be covered by the jurisdiction as defined in the present bill, and therefore there could be no jurisdiction in the Administrative Conference to make a complete, exhaustive study of the whole field of judicial review of administrative action.

I think this illustration serves two purposes. One, to show the desirability of an Administrative Conference in the first place, and second, the desirability of having it have very broad range in which it may work.

Returning to the text, these, therefore, are the key provisions of the legislative proposal of the American Bar Association and which it feels are necessary if the Congress is to establish a conference which will make a contribution to the field of administrative law of significant value:

- (1) A strong Chairman with independent powers;
- (2) A Conference composed of representatives of governmental and nongovernmental personnel without a prerequisite predominance of any one group; and
- (3) Authority to deal with the whole range of administrative procedural problems.

Now with the subcommittee's approval, I would like to direct attention to why I think a Conference should be established by legislation, along the lines which I have indicated. But, in spite of the general recognition that the rise of administrative law has probably been the most legally significant trend in this century, and that this body of law affects so many values, the surprising—and I am almost tempted to use the word “shocking”—fact is that, for the most part, the Congress of the United States, which is the creator of administrative law, has been able to give so little attention to its form and the direction of its growth.

Apart from the Federal Register Act of 1937 and the Administrative Procedure Act of 1946, the Congress has thus far dealt with administrative law and procedure largely on an ad hoc basis. Separate legislation dealing with the various agencies and executive departments has been the keynote. Actually, for example, there is no real reason why some regulatory functions have been entrusted to Federal executive departments while others of a precisely similar nature have been entrusted to so-called independent regulatory agencies.

While bearing certain similar characteristics, the very procedures prescribed by the Congress under the different regulatory statutes have not been consistently uniform even where uniformity would be desirable, both from the standpoint of the government and of the public.

Insofar as the Congress is concerned, this situation of lack of uniformity has undoubtedly been occasioned by the fact that the Congress created each administrative function at a different time. Different draftsmen were responsible for the different great regulatory statutes. Individual idiosyncrasies and preferences unavoidably crept into the drafting processes. There has been no common reference point—no guidelines as to what is desirable both from a governmental and a public standpoint.

Indeed, I daresay that, more often than not, when enacting the great regulatory statutes, the individual Members of the Congress naturally have been more concerned with substance than with procedure, which they probably regarded and well might have regarded as an incidental detail.

The result is that, because of the manner in which the Congress has enacted the various laws, a hodge-podge of procedures is provided. Sometimes the Congress has even imposed the strictest sort of quasi-judicial proceedings with respect to essentially rulemaking functions, thereby hamstringing both the Government and the public and giving

a basis for the charge, sometimes made indiscriminately, that the administrative process has been "overjudicialized." At other times, the Congress has moved in the opposite direction and has not provided sufficient procedural safeguards in situations where it should have done so—and by sufficient safeguards. I am not necessarily confining my remarks to whether or not the procedure has been "constitutional." I think it is equally important for the Congress to provide, where desirable, procedures which create a favorable public image.

Turning away from the Congress for a moment, I call attention to the fact that, in many reports which I have seen from public and quasi-public groups engaged in studying administrative law and procedure, a virtue is made of diversity. It is sometimes stated—all too categorically—that it is desirable to deal with each administrative law problem on an ad hoc basis and to provide for special procedures for the different administrative functions.

I have dwelt at some length upon the manner in which the Congress has approached the establishment of laws dealing with administrative agencies simply to illustrate the fact that there exists a gap in that there is no central governmental group concerned continuously with the detailed improvement of administrative procedure. An Administrative Conference of the United States, established along the lines proposed by the American Bar Association, would fill this gap.

For the first time, there would be a permanent body devoting itself day in and day out to critically examining the problems of administrative law and procedure and making an effort to bring about improvements.

The ideal way to do this, as is the position of the American Bar Association over a period of years, would be for the Congress to establish an independent Office of Administrative Practice and Procedure.

Such an idea was first advanced as far back as 1941 in the final report of the Attorney General's Committee on Administrative Procedure. Since that time, it has been advocated by others, including the American Bar Association. In 1956, it was my privilege to be the first chairman of the Special Committee on Legal Services and Procedure of the American Bar Association, which made a recommendation for the establishment of such an office of administrative practice and procedure and this recommendation was adopted by the house of delegates of the American Bar Association on February 20, 1956.

As recently as February 5 of this year, the house of delegates, in the same resolution in which it endorsed the establishment of an Administrative Conference of the United States, by legislation, reaffirmed its position as to the need for the establishment of an independent Office of Administrative Practice with a strong Director, "whether that Office be a separate agency or combined with the Office of Director of the Administrative Conference," which it also espoused.

I may add that, as far back as 1959, the American Bar Association adopted a resolution calling for the establishment of a permanent Administrative Conference by legislation along the lines which I have outlined above.

Therefore, the position of the American Bar Association is that the Congress, by enacting legislation for a conference, with a strong

Director or Chairman, can and should accomplish both of the goals of the American Bar Association in one bill. The legislative program of the American Bar Association for the establishment of a Conference has been developed under the concept that this legislative proposal combines the features of an independent office and of a conference.

The Congress, by enacting this legislation, would not only fill the gap mentioned above, but it would provide a mechanism for the continuous improvement of administrative law and procedure.

I cannot overemphasize the necessity for continuity in the review of procedure—a day in and day out preoccupation with the subject by a professional group such as would be the case of the Chairman of the Administrative Conference under the legislation advocated by the American Bar Association. Only by such continuous preoccupation can any real improvement be reasonably anticipated.

I acknowledge that, in the past, committees of the Congress have rendered a signal service in turning the spotlight on particular problems. Frequently, such focusing of attention by the Congress on particular problems has resulted in ameliorating legislation or revisions of procedures by the agencies themselves.

Here, again, however, one notices the same defect which I described above; namely, such legislation has, for the most part, dealt with ad hoc situations and has not dealt with the problem across the board, so to speak. The result has been to intensify the patchwork nature which characterizes our present administrative law structure.

The experience of the past two Conferences on Administrative Procedure furnishes conclusive evidence, to my mind, that in order to secure the maximum advantages of this mechanism, the Conference should be established on a permanent legislative basis.

The Conference which filed its report in 1955 expired. That Conference made 22 general recommendations for improvements of the administrative process. As of 1958, only 21 of the 53 agencies affected by the recommendations of that Conference had actually put into effect 1 or more of these 22 general regulations. In 3 years after that Conference expired, 32 of the 53 agencies had not seen fit to adopt even 1 of the recommendations.

Unless a permanent Administrative Conference is established, there is no reason to believe that the record of the recent Conference will be any better in this respect. The recent Conference made 30 recommendations. There is no organized activity designed to prod the present governmental agencies into adopting these 30 recommendations.

If the Conference of the type advocated by the American Bar Association is established, its Chairman will have this aspect of his work cut out for him. By continuously urging the agencies to adopt the recommendations and by reporting to the Congress those who do not, a dramatic exception may be made to the somewhat gloomy record of the 1955 Conference in this respect.

What I have just said illustrates what may almost be taken as a maxim, namely, that, unless some sort of spur is applied, Federal executive departments and agencies will not, voluntarily, change their procedures, however desirable, if it involves too much of a departure from the status quo.

In making this comment, I am not doing so in a critical sense because it probably reflects one inherent facet of human nature. Rather, I am stating a fact which must be accepted as a truism unless one is to engage in a process of self-delusion.

But the desirability of a permanent Conference, established by legislation, is not to be predicated solely upon the fact that such a Conference will undoubtedly be more successful in getting the agencies to effectuate recommendations made by the Conference than has been the case in the past. By far, the greater desirability for a permanent Conference stems from the factor to which I have previously referred, namely, the Chairman and his staff will give constant and professional attention to the problems of administrative law and procedure.

There really can be no substitute for this. It is one of the most pressing needs in the field of administrative law and procedure. There is no one to whom a person may go and complain of an injustice; there is no one to whom a person may go and suggest ideas for improvement; there is no one, if the subcommittee pleases, who drives to work every morning in the city of Washington with the thought in mind that "it is my duty, throughout the day, to give my attention to the problems of administrative law and procedure, to look at the process as a whole, to hear complaints, and to initiate projects which I feel will be helpful to the Government and to the public."

I think I should say a word about the concept of the Chairman of the Conference as envisaged by the American Bar Association. He is to be the Chief Executive Officer of the Conference and will preside over the sessions of its Council and its Assembly. He is to serve for a 5-year term under Presidential appointment and Senate confirmation, and his compensation is to be equivalent to that of an Under Secretary of an executive department.

An official so appointed and so compensated will take his place in the hierarchy of our Government at a level which will enable him to perform his task effectively. To such position men of stature and learning will be attracted, and I may add that it is the concept of the American Bar Association that a man of high professional skill in the field of administrative law and procedure will be appointed to the position.

To those of us who have labored for so long in the field of administrative law, the concept of an Administrative Conference of the United States, headed by such a Chairman, is an exciting one. Certainly, we are not naive enough to think that such legislation, alone, will solve the problems. We do believe, however, that if the Congress will enact the legislation it will, for the first time, establish a basic instrument for solving the problems of administrative law and procedure.

There are one or two peripheral matters to which I would like to call the attention of the subcommittee. One of these relates to the need to include, in the proposed legislation, specific provisions so as to make it clear that service by nongovernmental personnel with the Conference will not be deemed to bring such individuals within the scope of certain statutes which otherwise might serve as a practical bar to the ability of the Government to secure highly qualified individuals as members of the Conference. The American Bar Association bill for the establishment of an Administrative Conference contains such lan-

guage, and may I add that there does seem to be some doubt that the suggestion that the recent legislation to which the Bureau of the Budget called your attention would answer this purpose. At any rate, we think it is sufficiently important that there should be in this bill specific language to make it crystal clear that a person outside of the Government may serve on this Conference without running afoul of the conflict of interest statutes which, of course, are only technical situations.

Obviously if it is a matter of true conflict of interest, he is governed by the canons of ethics. No lawyer such as we are talking about here, the type of people who might be called upon to serve on this Conference, would think of accepting a position and serving on this Conference if in fact there was a conflict of interest.

At any rate, we see no reason why the bill shouldn't make it perfectly plain that there need be no difficulty here.

Also, I strongly urge that any legislation upon this subject include a provision, as advocated by the American Bar Association, that each member of the Assembly shall participate in his individual capacity and not as a representative of any governmental or nongovernmental organization.

This is very important. The whole concept of the Conference, as espoused by the American Bar Association, is to provide a forum in which persons learned in this field may gather and deal with the problems in this field. Unless the persons who actually serve as members of the Assembly feel that they have the opportunity to speak according to their individual convictions, maximum utility from the Conference cannot be expected.

I will paraphrase the remainder of my prepared statement simply by stating that Mr. Bernard Foster, one of our three witnesses for the American Bar Association, will in his testimony specifically submit to the subcommittee the suggestions of the bar association in draft form for inclusion in this record.

I respectfully suggest in conclusion that there is no better way for Congress to exercise the responsibilities to which the President referred and which created the previous Administrative Conference and to give evidence of its continuing concern than to establish on a permanent basis an Administrative Conference of the United States.

Thank you.

Senator LONG. Thank you, Mr. Sellers. We appreciate your being here and presenting your very helpful statement to us.

Is Mr. Foster next?

Mr. RUSSELL. I am Mr. Russell. I was going to be next, Mr. Chairman; I saw you looking apprehensively at the clock. What are your time requirements, and maybe I can make some adjustments.

Senator LONG. If we can simply curtail some of the statements—we have one other witness after you, Mr. Lane. The committee would like to complete the hearings this morning if possible. We could come back this afternoon, if necessary, to hear you all, but if the presentations can be made, we hope to be able to stay and complete them this morning.

Mr. RUSSELL. Fine.

Mr. Chairman, it is a pleasure and an honor to be with you today taking part in what I believe will become known as a major accomplishment in the field of administrative law.

Also at the outset of my remarks, Mr. Chairman, I want to commend you and the subcommittee for its start on a broad and substantial program of accomplishment in the assigned field of this subcommittee.

Since its organization this subcommittee has moved forward with commendable vigor and imagination laying the groundwork for consideration of many problems in the area of administrative law about which heretofore much has been said and little has been done.

I would also at the outset, Mr. Chairman, like to congratulate the subcommittee upon the competence and spirit of its professional staff. You are exceedingly fortunate, I think, to have two such able and knowledgeable legal aids as Mr. Fensterwald and Mr. Kennedy.

Senator LONG. Mr. Russell, the Chair can certainly agree with you 100 percent in that statement.

MR. RUSSELL. It has occurred to me, Mr. Chairman, that I could be most helpful to the deliberations of the committee by emphasizing the areas of widespread agreement within the framework of the general proposition that the public interest will be promoted by the establishment of an Administrative Conference.

Now, we will have some suggestions to be presented by Mr. Foster as to how Senate bill 1664 may be modified better to achieve the objectives upon which all I believe are agreed. But I believe it would help your analysis of the situation if I could outline first what I believe to be areas of agreement.

First, there is universal agreement that there is need for action in the field of administrative procedure. For years, no one has denied the proposition that "something must be done" to make administrative proceedings less burdensome and costly, to enable Government agencies to accomplish their work with greater facility and, at the same time, to preserve the fundamental rights of every American citizen to due process and fairplay.

Secondly, I now find almost universal agreement that an Administrative Conference, established on a permanent basis by legislation, is needed because it will produce good results in the area of improvement of administrative law. There is also here a strong feeling, shared by the many persons with whom I have discussed this subject, that an Administrative Conference can improve the relationships between the administrative agencies on the one hand and the public which they serve on the other hand.

By enabling the agencies in cooperation with representatives of the public to undertake mutually helpful critical self-examination of their practices and procedures and by providing a vehicle for the formulation of solutions, the benefits of expedition in action, reduction of expense in processing matters, and the preservation and enhancement of fairplay and due process can be achieved.

Also, by providing a "wailing wall" or "escape valve," if you want to term it that way, for the receipt and consideration of public complaints with respect to the handling of matters by agencies, the governmental process itself can be benefited by the certain creation of a better "public image" for the agencies.

In the past, Mr. Chairman, no one has sought to circumscribe narrowly the work of an Administrative Conference. It was thought in the establishment of two previous conferences by Presidents Eisenhower and Kennedy that the Conference would concern itself with

agency proceedings and actions generally as defined by section 2(g) of the Administrative Procedure Act.

It should be noted that some matters which are defined in that section as agency proceedings or actions are in later sections of the APA excluded from certain requirements of that act. However, fundamentally the previous Conferences have held broad authority and the scope of their activities has been left to the sound judgment of the chairman, council members, and membership of the Conferences.

While the proposal before you now, S. 1664, would unduly and narrowly limit the inquiries of a Conference, I believe that that proposal, in that respect, is basically inconsistent with the consensus as to the scope and fundamental purpose of an Administrative Conference.

If the Conference is to be effective in assisting the agencies to solve their own problems and in assisting the agencies better to serve the public, and if it is to be the "escape valve" which we all hope that it will be, it cannot be confined merely to those matters which are subject now to the formal proceedings requirements of the Administrative Procedure Act.

In my view, the proposal before you for a narrowly-confined activity of the Conference is not a conscious repudiation of the prevailing consensus that the scope of the work of the Conference should at least be as broad as agency proceedings and actions as defined in section 1001(g) of the Administrative Procedure Act.

I believe the proposal to restrict the work of the conference to areas of formal proceedings as defined under the Administrative Procedure Act is, basically, an inadvertent circumscription of the activities of the Conference which would derogate from the accomplishment of the things which we all expect of it.

Thirdly, I am now pleased to find an important area of agreement in the position of the chairman in relation to the activities of the Conference. I believe it is now generally recognized that the chairman's office must be one of stature, commanding the respect of the public and of the agencies alike.

I believe also it is now almost universally recognized that he must have the power to speak out, individually and independently, when he believes the public interest so requires. And in that regard I view the draft which you have before you, and particularly the sections which Mr. Kennedy discussed with Mr. Staats this morning, as providing the power or the authority in the Chairman to speak out independently when he feels that it is in the public interest to do so.

Certainly the section 6(c), at the very end where he says—where it is stated that "the Chairman may make interim reports as he"—that is, he, the Chairman—"deems desirable," that language would in my view give him the ability, the right, the power to speak out individually and independently.

As a matter of fact, Mr. Chairman, that language resulted—that language in the Budget draft resulted from suggestions which were made in the course of our conferences with the Budget.

Now, I believe it is also clear that the Chairman must have the power to require information of the agencies if the work of the Conference is to be furthered, and not only must he have the power to require information to determine whether there are areas of agency procedure which warrant further investigation and consideration by

the Conference as a whole, but it is also vitally necessary that he be able to require information of the agencies to determine to what extent, if at all, the agencies implement the recommendations of the Conference. There is, I believe, universal consensus now that one of the principal needs for a strong chairman is to insure that there is some kind of constant goad to the implementation of recommendations of the Conference.

Fourthly, although there are surface differences, there is a most substantial consensus of agreement on the vital subject of the composition of the membership of the Conference. No one disputes the fact that personnel from the agencies must be members of the Conference.

That is true, not only because one of the objectives of the Conference is to enable the agencies to undertake critical self-examination but also because many of the problems faced by agencies are common to many agencies.

The Conference can be of vital importance in affording the agencies a means for exchange of information as to methods, procedures, and operating practices without which the agencies can never know of, or hope to reach, the level of the highest denominator of activity by any agency. Also, agency representation in fair proportion will promote in the agencies a sense of confidence in, and acceptance of, the recommendations of the Conference.

Moreover, within the past few years, there has been a recognition by all who have been articulate in this field that the Conference, if it is to be successful, must have a fair membership from the practicing bar, as well as from the agencies themselves, and also must have members from the experts in the teaching profession in law schools and in universities and others, whether from within the Government or from without Government, must have these outside people, that is, outside the agencies, whose special competence, interest and ability in this field will make them invaluable participants in the Conference. There is also, I believe, without any question a consensus that the outside-of-Government representation should be in such proportion as fairly to reflect the views and interest of the citizens of the United States whose daily lives are directly and vitally affected by administrative action.

The outside-of-Government representation is, according to the consensus, intended to accomplish several things. first, no one denies that such representation will produce a greater activity by the Conference. The outside-of-Government representation will be a deterrent to lethargy.

It will prevent the agencies from converting the Conference into a mutual admiration society for the perpetuation of the status quo. The outside-of-Government people will also be expected to contribute sound ideas for the solution of problems in the field of agency procedures, which solutions will reflect the viewpoint of the public interest.

Although the agencies themselves are, necessarily, and often claim to be the sole, custodians of the public interest, the agencies have also the responsibility for the accomplishment of their own work with expedition, economy, and efficiency. Their duty to the public and their duty to their own operations is not the same duty.

No one expects the agencies to see the viewpoint of the affected citizen to the same extent as nonagency members of the Conference.

Finally, there has developed in the past few years a universal recognition that outside-of-Government representation on the Conference is necessary to give it a more acceptable public "front," to use a common word. There would be inherent public suspicion of any conference organization composed entirely of Government personnel. It would be looked upon as a subterfuge organized entirely to subvert really constructive accomplishment. For these reasons, those who formerly opposed any public representation are now unanimously committed, as in the bill before you, to outside-of-Government membership.

In summary, then, on this point, there is a consensus among all concerned that the agency personnel must be members of the Conference in fair proportion so that neither the agencies nor the public members are subjected to an unfair representation.

Finally, I find that there is agreement among all interested in this subject that the creation of an Administrative Conference is a positive step which can be taken now to achieve substantial progress in the field of administrative law. It is the least controversial of all pending proposals for reform in the field of administrative practice and procedure.

I believe it would be helpful, Mr. Chairman, if I could briefly review the history of this matter within the American Bar Association to give you an idea of the public reaction and public opinion on this subject.

For many years the matter of administrative conference has been discussed with the American Bar Association. In July 1959, the house of delegates endorsed the idea of a permanent Conference by legislation and it directed one committee and one section jointly to formulate appropriate legislation. For more than three and a half years there was a split of opinion in the association as to how the legislation should be formulated. It wasn't until February 1963 that we arrived at a proposal which will be presented to you by Mr. Foster. It was finally after all that time blessed with the most substantial unanimity received by any major proposal in the field of administrative law we have had in several years within the American Bar Association. And as you pointed out in your opening remarks on Tuesday, Mr. Chairman, three sections and a special committee of the association were given the responsibility of seeking the enactment of the February 5, 1963, bill approved by the house of delegates or legislation equivalent in purpose and effect.

Now, we were able, Mr. Chairman, to get that unanimity of opinion because the bill did three things.

First, it provided for a Chairman with independent investigatory and reporting powers not only to initiate projects which would be considered by the Conference and to determine when particular matters would be of sufficient value for consideration by the Conference, but also to follow up on recommendations of the Conference and seek their implementation by the agencies.

Secondly, we provided for a Conference which would not be "loaded" with agency personnel, with Government personnel, or with public representatives, which would not be the "stacked deck" that Mr. Kennedy said someone had mentioned in a communication which Senator Dirksen had received.

Our particular formula said that not more than 50 percent of the membership of the Conference should be agency personnel and not more than 50 percent should be members of the practicing bar.

Incidentally, Mr. Chairman, although we haven't been able to be with you in that last 2 days, we have secured the transcript and read it each night and we have read all the prior testimony. I have noticed that some people say that we are advocating 50 percent practicing bar and 50 percent from the agency, but we are not by any means doing that. We have put it negatively and said not more than 50 percent should be from the agencies and not more than 50 percent should be from the practicing bar.

What we are trying to do is avoid "stacking" this Conference in either direction.

Now, I would like to point out that our formula would allow a Conference almost precisely similar to the 1961-62 Conference which you have heard praised in great measure. In that Conference there were 94 members. I notice Judge Prettyman testified there were 88 but in his count I believe he left out the Senate and House of Representatives members and alternates, so that you had actually 6 more than he said.

Now, they included agency personnel and the Members of Congress and judges and other persons employed by the Government, and finally members of the practicing bar and scholars.

Now, actually 47, or 50 percent, of that Conference were agency personnel and the others came from the other groups which I have mentioned.

Now, I heard no complaint about the composition of the previous Conference and our formula allows a Conference which is precisely like the one before, and it avoids the "stacked deck" idea. We also provided that the Council should include five members of the practicing bar to assure fair public representation. That is less than a majority, of course. At the last Conference, in fact, the Government personnel on the Conference were in the minority.

Finally, in securing unanimity of action in ABA on this, we had no problem about the scope or coverage or work of the Conference because it never came up as an issue. It was always considered that it would be coextensive with the basic coverage of the Administrative Procedure Act.

Now, from my experience I believe if this committee reports a bill which will incorporate those three fundamentals; that is, a Chairman with independent powers, a Conference membership with—and I want to say this very carefully—a Conference membership with fair representation from all interested and affected quarters, and a scope of work coextensive with the basic scope of the Administrative Procedure Act, the bill will find enthusiastic general support.

In conclusion, I think that you will also want to realize that the Administrative Conference will not be simply a study group dealing in matters of academic interest. The Conference can produce substantial savings to the taxpayer by promoting efficiency in administrative procedures.

Mr. Kennedy was indicating some interest in the cost of the Conference this morning. I think that the opportunities for saving in Government procedures, administrative procedures, through the work

of a Conference are many, many, many scores of times over any possible cost of the Conference; in comparison the cost of the Conference would be minute.

The Conference can also promote substantial savings for the persons affected by agency action by eliminating undue delay, complexity, and expense in administrative procedure. In short, this is a matter which is not of intangible value but there can and will be very, very real savings in my view from the establishment of the Conference, savings not only to the Government but to the people who are affected by administrative action.

Now, all of these good things are threatened in my view by some of the defects in Senate 1664 which cut across these basic fundamentals upon which there is agreement, and Mr. Foster will go on to those.

In the meantime, I join Mr. Sellers in urging that this subcommittee report out legislation which will incorporate and which will not detract from the basic principles upon which there is widespread agreement.

Thank you.

Senator LONG. Thank you, Mr. Russell. We appreciate your statement. We appreciate your condensing it as much as you could.

The Chair now recognizes Mr. Bernard A. Foster, Jr.

Mr. FOSTER. Thank you, Mr. Chairman. Let me express at the outset my appreciation of the honor extended to me by the invitation of this subcommittee to testify with respect to S. 1664, a bill to create an Administrative Conference.

It is my privilege to appear before you as a spokesman for the American Bar Association, where I am a member of the house of delegates and immediate past chairman of the section of mineral and natural resources law. I am engaged in the private practice of law in Washington, D.C. It is perhaps relevant to note that a very substantial part of my time has been devoted to the field of administrative law, not only during many years in private practice, but also in Federal positions, including service as Assistant General Counsel in charge of natural gas matters for the Federal Power Commission and as General Counsel for the President's Water Resources Policy Commission. Problems in administrative law receive attention from the Rocky Mountain Mineral Law Foundation, of which I have the honor to serve as a trustee. In addition, some of my service in the Army during World War II provided experience in the field of administrative law, for I served as executive officer and later as chairman of the Joint Army-Navy-Air Force Industrial Review Board.

The prompt action of the subcommittee in launching hearings is a healthy recognition of the need for such an organization. I share the hope of many that the proposal which you are now considering will be the genesis of a truly effective instrumentality in the field of administrative law.

During the current period of our national history, it is an understatement to say that the entire administrative process is on public trial. The preservation of fairplay and due process and improvement in the administrative process are needs crying for prompt fulfillment.

A giant stride toward this end, we believe, would be the creation of the Administrative Conference, an agency conceived in the belief that education and persuasion are more effective avenues for improvement and reform than any combination of mandates or edicts.

Mr. Ashley Sellers has presented to you a review of the long history of effects directed toward creation of a permanent Administrative Conference, and I shall not repeat that history here. Much of it has been intertwined as Mr. Russell has indicated with the history of the activity of the American Bar Association in this field.

To those of us who have watched that part of history, February 5, 1963, was a day of real achievement when the house of delegates of the American Bar Association almost unanimously adopted a resolution endorsing the establishment of an Administrative Conference of the United States and recommending specific legislation or its equivalent in purpose and effect. An index of the extent of this achievement lies in a mere reference to the earlier widely ranging views within and among various units of the American Bar Association.

A copy of the resolution of the house of delegates and the proposed draft of legislation were formally transmitted, on February 22, 1963, to the chairman of the Senate Judiciary Committee, to the President of the Senate, and to the Speaker of the House of Representatives.

The resolution of the house of delegates imposed responsibilities for urging enactment of the proposed legislation upon the American Bar Association's special committee on legal services and procedure, section of administrative law, section of mineral and natural resources law, and section of public utility law.

Thereafter, representatives of these groups were privileged to meet with the Honorable E. Barrett Prettyman, the distinguished jurist who rendered untiring service as Chairman of the President's 1953-54 Conference on Administrative Procedure and also as Chairman of the Administrative Conference of the United States, established by President Kennedy, which submitted its final report on December 15, 1962. We had other meetings attended by representatives of the Council of the 1961-62 Administrative Conference. We were also honored to meet with representatives of the Bureau of the Budget.

Discussions during these meetings were productive. In the first place, with the submittal of its final report in December 1962, the Administrative Conference outlined the framework of legislation which would create a permanent Administrative Conference.

Also, drafting work was underway at the Bureau of the Budget. A number of suggestions which we advanced met with acceptance. Likewise, in a continuing effort to evolve a draft upon which we all could agree, we made a number of changes in our proposed draft, consistent with the mandate from the house of delegates to urge enactment of the draft of legislation which it had endorsed, or legislation equivalent in purpose and effect.

Incorporating a number of changes urged by others, the last such revision in our draft of proposed legislation was completed on May 1, 1963. I shall later refer to that draft, and I ask leave of the chairman at this point to have it printed as an appendix to my remarks.

(The draft referred to follows:)

A BILL To provide for continuous improvement of the administrative procedure of Federal agencies by creating an Administrative Conference of the United States, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Administrative Conference Act of 1963."

FINDINGS AND DECLARATION OF POLICY

SEC. 2. The Congress finds and declares that—

(a) administration of regulatory and other statutes enacted by Congress in the public interest substantially affects large numbers of private individuals and many areas of business and economic activity;

(b) the protection of public and private interests requires continuous attention to the administrative procedure of Federal agencies to ensure maximum efficiency and fairness in achieving statutory objectives;

(c) responsibility for assuring fair and efficient administrative procedure is inherent in the general responsibilities of officials appointed to administer Federal statutes;

(d) experience has demonstrated that cooperative effort among Federal officials, private citizens and others whose interest, competence, and objectivity enable them to make a valuable contribution, can find solutions to complex problems and achieve substantial progress in improving the effectiveness of administrative procedures; and

(e) it is the purpose of this Act to provide suitable arrangements through which Federal officials and other persons as herein provided may cooperatively study mutual problems, exchange information, and develop recommendations for action by proper authorities to the end that private rights may be fully protected and regulatory activities and other Federal responsibilities may be carried out expeditiously in the public interest.

SEC. 3. As used in this Act—

(a) "administrative program" means any agency proceeding or action as defined by section 1001(g) of Chapter XIX of Title 5 of the United States Code.

(b) "agency" means any Federal agency, including a constituent agency of an executive department, which carries out an administrative program.

(c) "administrative procedure" means procedure used in carrying out an administrative program, and shall be broadly construed to include any aspect of agency organization, procedure, and management which may affect the equitable consideration of public and private interests, the fairness of agency decisions, the speed of agency action, and the relationship of operating methods to later judicial review, but shall not be construed to include the scope of substantive agency responsibility as established by law or matters of substantive policy committed by law to agency discretion.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

SEC. 4. (a) There is hereby established the **Administrative Conference of the United States** (hereinafter referred to as the "Conference").

(b) The Conference shall be composed of a Chairman, a Council and an Assembly, constituted in the manner hereinafter provided. The Conference shall maintain an office at the seat of government.

SEC. 5. The Chairman shall be appointed by the President with the advice and consent of the Senate to serve for a term of 5 years and thereafter until his successor shall be appointed and has qualified. The Chairman shall receive compensation at the highest rate established by law for an under secretary of an executive department of the Federal Government.

SEC. 6. The Council shall consist of the Chairman of the Conference (who shall be the Chairman of the Council) and ten other members appointed by the President. The membership of the Council shall reflect diverse experience in the field of administrative procedure and shall include at least five members of the bar in private practice. Not more than six members of the Council shall be members of the same political party. The members of the Council (other than the Chairman) shall be appointed for terms of three calendar years except that the members initially appointed shall serve for one, two, or three years as designated by the President. Each of their successors shall be appointed for a term of three years from the date of the expiration of the term for which his predecessor was appointed, except that any person appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the unexpired term of such predecessor. Each member of the Council shall serve until his successor is appointed and

qualified. Any vacancy on the Council shall be filled by the President by appointment from among persons eligible for original appointment to the vacant position.

SEC. 7. (a) The Assembly shall consist of the members of the Council and persons from the agencies and members of the practicing bar, scholars in the field of administrative law and government, and others specially informed by knowledge and experience with respect to Federal administrative practice and procedure. The composition of the Assembly and its total number shall be determined from time to time by the Council: *Provided*, That members from outside the Federal Government shall be appointed in such numbers as will assure adequate representation of the public and reflection of diverse experience, but in no event shall more than 50 per centum of the membership be members of the bar in private practice nor shall more than 50 per centum of the membership be persons from the agencies. The Council shall designate the agencies from which members shall be named and the number of such members from each, having due regard for the extent of the administrative programs of the respective agencies. The head of the agency or, of the agency is a board or commission, its chairman with the approval of the board or commission, shall name a member or members from such agency. Other members (except as provided in paragraph (c) hereof) shall be named by the Council. Each member of the Assembly shall participate in his individual capacity and not as a representative of any governmental or nongovernmental organization. All members of the Assembly except the members of the Council shall be appointed for terms of two calendar years, except that the terms of initial members of the Assembly shall end December 31, 196—.

(b) A member of the Assembly designated from an agency shall become ineligible to continue as a member of the Assembly under that designation if he leaves the service of that agency. A member not from an agency shall become ineligible to continue as a member of the Assembly in that capacity if he enters the regular service of the Federal Government. If a member resigns, becomes ineligible, or is otherwise unable to continue as a member of the Assembly, the appointing authority that named him shall designate a successor for the remainder of his term.

(c) There shall be appointed from each Congress as members of the Assembly (1) by the President of the Senate, three members of the Senate and as alternates, three members of the staffs of committees of the Senate, and (2) by the Speaker of the House of Representatives, three members of the House of Representatives and as alternates three members of the staffs of committees of the House of Representatives. The Chief Justice of the United States shall be invited by the Council to appoint from the Judicial Conference of the United States shall be invited by the Council to appoint from the Judicial Conference of the United States three members of the Assembly and three alternate members.

DUTIES AND POWERS OF THE CONFERENCE

SEC. 8. To carry out the purposes of this Act the Conference shall—

(a) Study the efficiency, adequacy, and fairness of the administrative procedure used by Federal agencies to carry out administrative programs in the public interest and to determine the rights, privileges and obligations of private persons;

(b) Make recommendations to the agencies, collectively or individually, and to the President, the Congress, or the Judicial Conference of the United States, as it deems appropriate, including recommendations for preventing undue delay and expense and unduly long records and for establishing insofar as practicable uniform procedures and rules of practice;

(c) Arrange for interchange among the agencies of information which may be useful in improving administrative procedure;

(d) Collect information from the agencies and publish such reports as it deems useful for evaluation and improvement of administrative procedure;

(e) Foster cooperative efforts among the agencies and members of the bar to bring about improvements in administrative procedure.

OPERATION OF THE CONFERENCE

SEC. 9. The Chairman shall be the chief executive and administrative officer of the Conference and devote his full time and energies to the duties of his office. He shall—

(a) Encourage and stimulate agency action to effectuate the purposes and functions of the Conference and to implement its recommendations;

(b) Be the spokesman for and representative of the Conference in relations with the several branches and agencies of the Federal Government and with persons and organizations outside the Federal Government;

(c) Make inquiries into matters for Conference consideration, including matters proposed by persons inside or outside the Federal Government and recommend appropriate subjects for action by the Conference;

(d) Obtain from the agencies information needed by the Conference or the Chairman in effectuating the purposes and functions of the Conference, which information shall be supplied by the agencies upon his request;

(e) Upon request of any agency, furnish assistance and advice on matters of administrative procedure;

(f) Prepare for the approval of the Council estimates of the budgetary requirements of the Conference;

(g) Appoint employees, subject to the civil service and classification laws, define their duties and responsibilities, and direct and supervise their activities;

(h) Rent office space at the seat of government;

(i) Provide necessary services for the Assembly, the Council and committees of the Conference;

(j) Organize and direct studies for Conference purposes, utilizing from time to time, as appropriate, experts and consultants, who may be employed as authorized by section 15 of the Administrative Expenses Act of 1946, as amended (5 U.S.C. 55a), but at rates for individuals not to exceed \$100 per diem; and

(k) Exercise such additional authority as may be delegated to him by the Council or the Assembly.

SEC. 10. The Council shall—

(a) determine the time and agenda of sessions of the Assembly;

(b) propose bylaws and regulations, including rules of procedure and committee organization, for adoption by the Assembly;

(c) appoint members of committees authorized by the bylaws and regulations of the Assembly;

(d) make recommendations to the Assembly or its committees on any subject germane to the purposes of the Conference;

(e) receive and consider reports and recommendations of committees of the Assembly and transmit them to the Assembly with the views and recommendations of the Council;

(f) designate a member of the Council as Vice Chairman to act in the absence or incapacity of the Chairman;

(g) designate such additional officers of the Conference as it may deem desirable;

(h) approve or revise the Chairman's budgetary proposals; and

(i) exercise such other powers as may be delegated to it by the Assembly.

SEC. 11. (a) The Assembly shall have ultimate authority over the activities of the Conference, but this shall not be construed to limit the independent powers granted the Chairman under this Act. It shall—

(1) adopt such recommendations as it deems appropriate for improving administrative procedure; and

(2) adopt bylaws and regulations not inconsistent with this Act for carrying out the functions of the Conference, including the creation of such committees as it deems necessary for the conduct of studies and the development of recommendations for consideration by the Conference.

The Conference shall not entertain requests to study bills pending in Congress but this shall not be deemed to limit the subject matter of any study or report of the Conference.

(b) The members of the Assembly shall meet in plenary session at the seat of government at least once each year and at such other times as may be determined by the Council. At meetings of the Assembly, the Chairman shall preside but shall have no vote unless the Assembly shall be equally divided. At each plenary session the Chairman shall make a full report concerning the affairs of the Conference since the last preceding plenary session.

(c) The Chairman shall transmit an annual report of the Conference to the President and the Congress and may submit supplemental and interim reports to the President, the Congress, the Judicial Conference, or any agency.

(d) Any member of the Conference may express to the Congress, the President or others his views concerning matters within the cognizance of the Conference.

GENERAL

Sec. 12. Membership in or service to the Conference by persons outside the Federal Government, whether compensated or not, shall not be considered as service or employment bringing such individuals within the provisions of sections 203, 205, 207, 208 or 209 of Chapter II of Title 18 of the United States Code.

Sec. 13. (a) All members of the Conference other than the Chairman shall serve without compensation but shall be reimbursed for actual expenses incurred in connection with the functions of the Conference;

(b) The Chairman may make such expenditures (including expenditures for rent and personal services, office employees, travel, law books, periodicals, books of reference, printing and binding, and studies or investigations) as may be necessary for the execution of his functions and the functions of the Council and the Conference, out of appropriations made from time to time by Congress. Expenditures of the Chairman, the Council, and the Conference shall be allowed and paid only on presentation of itemized vouchers therefor approved by the Chairman or such other person or persons as may be designated for that purpose by the Chairman with the approval of the Council;

(c) There are hereby authorized to be appropriated such sums as may be necessary to accomplish the purposes of this Act.

Mr. FOSTER. Let me digress here to express our sincere appreciation to Judge Prettyman, the members of his Council, and the representatives of the Bureau of the Budget, all of whom graciously cooperated toward the common goal, the establishment of a permanent Administrative Conference of the United States.

In driving toward this common goal, there are many wide areas of agreement among those who have shared in efforts to establish an Administrative Conference on a permanent basis. Mr. Harold Russell has delineated those areas. He has also suggested that, in our opinion, S. 1664 should be amended in several particulars if it is effectively to reflect those wide areas of agreement. The purpose of S. 1664 has our staunch support.

With equal enthusiasm, the strength of the organized bar of the United States will be aligned in support of S. 1664, if it is so amended as to constitute it a proposal which is equivalent in purpose and effect to the May 1, 1963, American Bar Association draft to which I referred earlier.

Indeed, the simplest means to place the totality of our recommendations before you is to invite your consideration of our May 1, 1963, draft. I recognize that you will doubtless wish to focus attention upon those parts which deviate from the proposal now pending before you in S. 1664.

To aid in this purpose, I shall specify those aspects of S. 1664 which we believe would profit from amendment, and I shall attempt to explain why we invite your consideration of these suggestions.

Some of the matters on which we suggest changes are lesser in importance; indeed, some may relate to defects in the bill which crept in through inadvertence. Other suggestions, particularly those which I shall mention first, we view as well-nigh indispensable. While we cannot support S. 1664 as now written, we would urge its enactment with revisions in the following respects.

(1) In our view, the provision dealing with the scope of the functions of the Administrative Conference must be clarified and broadened. The definition of "administrative program" has been so narrowly defined as to lead to the possible exclusion of many matters which clearly should be within the cognizance of the Conference.

We agree with Professor Gellhorn's observation that, as now drafted section 3(a) might be deemed to exclude such matters as "Government procurement procedures, selection and tenure of hearing officers, recruitment and training of Government attorneys, social security administration, land patents, grazing permits, steamship, locomotive, and aircraft inspection, proceedings involving determination of appropriate units for collective bargaining, and passport issuance, among other administrative activities important to persons outside the Government."

Remembering that section 3(c) so defines "administrative procedure" as to exclude "the scope of agency responsibility as established by law or matters of substantive policy committed by law to agency discretion," an unobjectional definition of "administrative program" can be devised by inclusion of any agency proceeding or action as defined by section 1001(g) of chapter XIX of title 5 of the United States Code.

This would bring clearly within the cognizance of the Administrative Conference many activities having direct and indirect impact on members of the public, which may now be foreclosed to assistance from the Administrative Conference by the language of section 3(a) as now drawn. We can perceive of no justification for the constrictive effect of that part of the bill if, as may be the case, its purpose is exclusionary.

As an alternative to the foregoing suggestions respecting section 3 those advocated by Professor Gellhorn would be acceptable to us.

I listened rather intently, Mr. Chairman, to the testimony of Mr. Staats this morning on this point, and particularly to his answers during colloquies to try to learn, if I could, why section 3 was drawn in the manner in which it now appears and why it was determined to be desirable to give the bill the constrictive effect which I have described.

I could not find in the affirmative written statement any explanation beyond this one sentence, and I quote:

The effect will be to enable the Conference to concentrate very largely on the procedure used in formal proceedings.

And I believe he answered in one colloquy that it would aid in focusing attention on formal proceedings.

Now, these things are so, Mr. Chairman, but I would submit that there is no logical relationship whatsoever between a determination of what things should come within, or without sections 4 and 5 of the Administrative Procedure Act, on the one hand, and section 3 determining the scope of the bill establishing the Administrative Conference, on the other.

The point developed this morning, it seems to me, would simply say that section 3 is designed to enable the Conference to give its primary attention to areas involving formal proceedings. Certainly that would not be barred by bringing within the purview of the bill, as now drawn with the modifications we suggest, other aspects of administrative procedure which are not subject to sections 4 and 5 and which we believe should have assistance from the Administrative Conference and benefit from its study and recommendations.

(2) Another area which we deem to require amendment involves several aspects of the organization of the Conference as one composed "preponderantly" of Federal officials and personnel.

This is required by section 4(b) as now drawn, and it is apparently interrelated with certain other provisions in the bill. Thus, section 6(b) provides that the Conference shall include a Council composed "preponderantly of Federal officials and personnel."

Also, section 2(f) states that the purpose of the act is to provide arrangements through which "Federal agencies, assisted by outside experts, may cooperatively study mutual problems * * *."

In the first place, we believe that provisions of this sort will have the calculable effect of destroying public confidence in the work of the Administrative Conference. Such provisions are sure to stimulate charges that the Federal agencies involved are thereby insulated from public criticism, even though genuine and constructive, if the agencies themselves should view such criticism as unwelcome.

In the final analysis, the agencies exist and operate only for the public, not for the benefit of agencies or of agency personnel. As has been said before, they are the servants, not the masters of the public. And surely no one would object to a fair representation of the public in the composition and functions of the Administrative Conference.

Indeed, a plausible argument could be advanced for subordinating participation of agency personnel to preponderant representation of the public. But neither this extreme, in our view, nor the opposite extreme in the language of the bill as now drawn provides the right solution.

Instead, we think the bill should be amended to provide for a fair and representative participation by persons from the agencies and members of the practicing bar, scholars in the field of administrative law and government, and others specially informed by knowledge and experience with respect to Federal administrative practice and procedure.

Members from outside the Federal Government should be appointed in such numbers as will insure adequate representation of the public and reflection of diverse experience. Rather than to provide for a preponderance in either direction, we propose an arrangement under which not more than 50 percent of the membership will be members of the bar in private practice, and not more than 50 percent will be persons from the agencies. In this connection, it should not be overlooked that many of the members appointed from outside the Federal Government will certainly be persons with prior experience in the agencies.

We hold similar views as to the proper composition of membership of the Council. Here again, there should be a reflection of diverse experience in the field of administrative procedure. In no event should there be a preponderance of agency representation.

A related feature which we believe should be amended is the provision in section 4(b) specifying that certain Federal officials shall attain membership in the Conference by reason of the offices which they hold, either automatically or upon designation by the President, or when authorized by the Council. While we recognize that it will not be possible for members of the Conference who are Federal officials or personnel to divorce themselves entirely from their own experience, they should exercise their own independent judgment as individuals, not serve as mere representatives of agencies in carrying out

their duties as members of the Conference. The bill should include a specific provision to this effect.

Ideally, each member of the Conference should draw upon the entirety of his experience and expertise, wholly without regard to whether he happens to be a Federal employee or not. His goal should be improvement in administrative procedure to serve the public good. This should never be subverted by an impulse to insulate any agency from constructive criticism, either through such member's individual actions or in concert with others. The bill should contain no language which could be seized upon by its opponents as grounds for charging that the Conference is so composed as to prevent any criticism unwanted by the agencies.

In this connection I believe it is very significant, Mr. Chairman, that Mr. Staats felt impelled this morning to defend S. 1664 against charges which are already in the press asserting that it would create a super-agency. Likewise, Mr. Kennedy referred to the fact that he has received, or Senator Dirksen has received letters characterizing this as a "stacked deck." Both of such types of charges are the outgrowth, we submit, of the features of the bill to which I have just invited attention. And this aspect of the bill can easily be cured and a restoration of public confidence in the bill can be effected, we believe, by the suggestions that I have advanced.

In this connection, I think it should not be overlooked that the fact that the administrative process is on trial today, the horrendous condition which exists in the operations of many agencies, is, in large measure, though not entirely, the fault of the agencies themselves.

Since that is so, it seems somewhat illogical to suggest a "preponderantly" self-improvement program as the best means of solving the problem.

In this connection, also, I think it should be noted that reference was made by Mr. Staats to the composition of the Judicial Conference. It is true enough as he pointed out that the Judicial Conference itself is composed entirely of judges, and so I might add were the conferences of some of the Judicial Circuits.

However, I think it is significant to point out right here that in a recent amendment of the rules of District of Columbia circuit, the composition of the Judicial Conference of that circuit was so altered as to create a situation under which there would not be a preponderance of judges, and we believe that this is the outgrowth of the experience within that conference and may well forecast a trend revision in the organization of the Judicial Conference itself.

Nor should it be overlooked that the appointive power vested in the President necessarily carries with it a sure means to control the flavor of the composition of the Administrative Conference. It is thus a surplusage, which should be eliminated, to superimpose a requirement that the Conference be "preponderantly" agency dominated. To require by law such a preponderance is to invite and give support to charges—already in evidence today—that the Conference will be a "stacked deck" and that it will be in effect a "super agency."

Now, Mr. Chairman, in view of the shortness of time, and your prior indication of the wish to conclude this morning, and it is a transgression upon your courtesy to proceed further with my prepared statement, I would therefore suggest, if it would be in order, that the bal-

ance of my statement be read into the transcript and I would make only one comment in addition to it if that would be satisfactory with you, sir.

Senator LONG. Yes, Mr. Foster. Without objection your prepared statement will be shown in the record as if read, presented by you.

(The remainder of the prepared text of Mr. Foster is as follows:)

Mr. FOSTER. (3) In order to insure that the Chairman can function properly as the Chief Executive of the Conference, certain changes in section 6(c) are essential. At present, it provides that the Chairman shall have the power to:

"(3) Request agency heads to provide information needed by the Conference, which information shall be supplied to the extent permitted by law or agency regulations."

Earlier drafts did not include the words "or agency regulations," and it would appear that they are intended to be broader than the "law."

The effect of adding these words is to provide that the agency shall comply with the request of the Chairman of the Administrative Conference if the agency elects to do so. Whether this result was intended or not, it is the necessary effect of the provision as now drawn.

There is an inherent anomaly in a provision which authorizes the issuance of a mandatory request and simultaneously allows the recipient to negate the mandate. It is, of course, necessary and desirable to provide that the agency shall comply with requests by the Chairman of the Conference for information only "to the extent permitted by law."

It is correspondingly imperative that the words "or agency regulations" be deleted.

The bill also authorizes the Chairman to:

(10) Organize and direct studies ordered by the Assembly or the Council, utilizing from time to time, as appropriate, experts and consultants * * *.

If the Chairman is to function effectively as a Chief Executive, as the bill proposes, he should certainly be authorized to initiate studies for Conference purposes without having to await an order by the Assembly or the Council. The necessity for timely initiation of studies appropriate for Conference purposes should not have to await the next meeting of the Assembly or the Council. Without derogating from the right of the Assembly or the Council to order that studies be undertaken, this apparent impediment to the effectiveness of the Chairman must be removed.

(4) A similar undue limitation appears in the last sentence of the section which provides that the Chairman shall, on behalf of the Conference, transmit to the President, and to the Congress, an annual report and such interim reports as he deems desirable.

Additional provision should be made expressly to authorize the Chairman, between or pending sessions of the Conference, to make supplemental and interim reports to the President, the Congress, the Judicial Conference, or any agency. Perhaps such a power is implicit in the very nature of his position, but there should be no doubt of his authority on this point.

Moreover, we deem it essential that doubt be removed in a related area by including in the bill the following provision which now appears in section 11(d) of our May 1, 1963, draft:

(d) Any member of the Conference may express to the Congress, the President or others his views concerning matters within the cognizance of the Conference.

(5) Section 5(d) now provides that the Conference is authorized to—

Collect from administrative agencies and publish such reports of operating statistics as it deems useful for evaluating and improving administrative procedure.

We believe that the narrow constriction to "reports of operating statistics" may result from inadvertence. In any event, there can be no serious question that the language should be amended to give the Conference much broader authority to collect information and publish reports. A ready cure would lie in inserting the word "information" after the word "collect" and in deleting the words "of operating statistics."

(6) Section 4(b) does not include a provision for Conference Members from the Senate and the House of Representatives, or from the Judicial Conference. Such a provision, which we deem salutary and desirable, appears in section 7(c) of our May 1, 1963, draft.

We are all aware of the arguments which can be marshaled for and against such a provision, and they need not be detailed here. For our part, we believe that substantial benefits would accrue to the Conference through contributions from members from the Judiciary, the Senate, and the House.

(7) Section 2(c) provides that:

The diversity of Federal activities frequently precludes the establishment by statute of administrative procedure which would be generally suitable for use by all agencies.

If the bill is to include a section on findings and declaration of policy—and we do not view such a section as indispensable—we deem it most unfortunate to include such a negative finding as that quoted above.

Passing for a moment the question whether the finding is supportably sound, its very inclusion is an argument against one of the purposes underlying the creation of an Administrative Conference; namely, the encouragement of uniformity in administrative procedure so far as this is susceptible of practicable accomplishment. I note that the distinguished Chairman pointed out in his opening remarks last Wednesday, June 12, 1963, that one of the purposes of the Conference will be to obtain "greater uniformity of procedure."

As drafted, section 2(c) should be eliminated or amended to replace the negative with a positive.

(8) Section 4(d) provides that members of the Conference, other than the Chairman, shall receive no compensation for service. In order to avoid creating problems under the conflict-of-interests statute, language should be added to this section to make it clear that service in the Conference shall not be considered as service or employment within the meaning of section 203, 205, 207, 208, or 209 of chapter 2 of title 18 of the United States Code.

(9) As now drafted, S. 1664 contains no provision respecting the time of meetings of the Conference. We believe a safeguard provision should be included that the Conference meet at least once a year.

In closing, I join Mr. Sellers and Mr. Russell in urging enactment of S. 1664 if it be amended as we recommend.

I wish to thank the subcommittee for its patience, and to express again my appreciation of your invitation to appear before you.

In conjunction, Mr. Chairman, with point No. 8 which appears on page 10 of my prepared statement, I would at this juncture like to add that I am seriously disturbed over the testimony which I read in yesterday's transcript of Mr. Maxson and testimony which I heard this morning partly from Mr. Staats and I believe partly from Mr. Seidman, having to do with the possibility that participation by the private practitioner in the operations of this Conference might subject him to liability under the conflict-of-interest statutes. If that part of the bill is left as it now stands, and there is no provision such as is suggested in section 8, I think you will have a further deterrent against a voluntary contribution by members of the practicing bar from their expertise to the function of this Conference.

It will be one step further toward freezing out participation of the members of the practicing bar which, in conjunction with the other aspects of the bill as now drawn, have led already to the characterizations in the press as a "superagency."

Thank you, Mr. Chairman.

Senator LONG. Thank you, Mr. Foster. We certainly appreciate the time and effort we know that has gone into the preparation and study of this matter. We are grateful to you gentlemen as representatives of the American Bar Association appearing here and making your contribution to the committee.

Mr. Fensterwald, do you have any questions?

Mr. FENSTERWALD. I have two questions, Mr. Chairman.

Before I ask them I would like to thank all three of these gentlemen and the American Bar Association for the time that they have devoted to this subject. They have been extremely helpful to the subcommittee in its consideration of this matter. I want it in the record that we are deeply grateful.

Mr. Sellers, one question that arose in my mind during the testimony was this question of the scope of the Conference. I followed the work of your Committee on Judicial Review with great interest. Is it your feelings that if we set up an Administrative Conference as outlined in S. 1664 and you again were made the Chairman of such a committee of the Conference that you would be hobbled by the limitations which would be enacted in the bill itself?

Mr. SELLERS. Oh, very very definitely. Aside from the fact that the Conference could not study with the hope of perhaps improving or changing the method of judicial review of functions, administrative functions, the Conference probably would be precluded from inquiring into the subject of judicial review in any degree, by virtue of the definitions in S. 1664. One of the great things that needs to be done and which a permanent conference with a Committee of Judicial Review would need most urgently to take up would be whether there should be judicial review of functions that are not now subject to judicial review or conceivably, conversely whether there aren't some functions

that are now sent to the courts that need not go there such as the de novo matters that we were speaking about. But the Conference clearly would be precluded from going into those matters insofar as they related to functions like Government contracts, like social security, and the management and proprietary functions of the Government, and possibly would be denied the privilege of inquiring into the subject of judicial review.

Now, it is all very well to draw a line between regulatory activities and nonregulatory activities and say that regulatory activities are the matters which should be the concern of this Conference.

I say it is all very well. There is sort of a logic to it on the basis that private parties have no rights in connection with these proprietary functions except to the extent that the Congress has given them the right, whereas you do have some rights of a constitutional origin with respect to the regulatory functions.

But that should be not the end of our concern with this question of administrative procedure.

It is just as important to a man in the West who has been grazing his livestock on Government reservations for a generation or so to have a fair procedure to determine whether he should be summarily deprived of that right, I will call it, or that privilege, whatever you may call it, as it is for him to have a right to due process in the conduct of the regulatory functions of the Government. The distinction is really not of any practical significance.

Mr. FENSTERWALD. Could you tell me whether you think your committee would be the only one that would be hobbled or whether other committees, as organized in the previous Conference, would be hobbled by this narrow jurisdiction?

Mr. SELLERS. Well, I can only say as to that, Mr. Fensterwald, that if you look at this last Conference in terms of the recommendations, there were a number of recommendations to which that Conference addressed itself which have been referred to here in previous testimony which would not be within the purview of this proposed Conference under S. 1664, and to that extent, therefore, I would say it would be obvious that the Conference would be hobbled.

There was a group of people presumably of the same stature and the same type of constituency in the previous Conference as you would anticipate would be in the new Conference. That body thought these matters were of great significance, else they would not have considered them, and to the extent that they would be precluded from doing that in a future Conference, I think definitely it would be hampering.

Mr. FENSTERWALD. I had one other question. This is for Mr. Russell.

Mr. Russell, did you find in the voting, either in the committees or in the Assembly, that there was generally a split along agency-non-agency lines?

Mr. RUSSELL. Mr. Fensterwald, I was not a member of the Conference then. I think you had better address that to Mr. Sellers. Mr. Sellers had better try to answer that.

Mr. FENSTERWALD. Mr. Sellers, would you like to reply to that?

Mr. SELLERS. I don't think I can say—first, it is a matter of impression because I didn't count the votes and obviously you couldn't anyway. There was no record kept of individual votes.

I think there was quite definitely at times a fairly typical vote on the controversial issues in which agency people were predominantly on one side and the private practitioners at least were predominantly on the other side. But there were always private practitioners voting on the agency side and occasionally you would find an agency man voting on the private practitioners' side.

Time and time again the vote would be 30 or thereabouts to about 18 or 19. Of course, the Conference was larger than that but usually there were about 50 to 60 people who were in regular attendance and where there was what you might call the controversial issues, it was usually about 3 to 2.

Mr. FENSTERWALD. Thank you. Those are the questions I had, Mr. Chairman.

Senator LONG. Thank you.

Mr. Kennedy?

Mr. KENNEDY. I have no questions, Mr. Chairman, but I would like to join Mr. Fensterwald in commending the people that have come today who are from outside the Government as well as the other witnesses for all the time that they have put in on this, both at these hearings and in working on drafts.

Senator LONG. Thank you. Thank you gentlemen again for condensing your statements. We appreciate it.

Mr. RUSSELL. We appreciate being with you, sir.

Senator LONG. Mr. John D. Lane, our next witness. He was a member of the Council of Administrative Conference in 1961.

STATEMENT OF JOHN D. LANE, ATTORNEY, WASHINGTON, D.C.

Senator LONG. The biographical sketch of Mr. Lane will be placed in the record at this time.

(The biographical sketch referred to follows:)

Lane, John D. Born Norwalk, Conn., November 23, 1921. Admitted to the District of Columbia bar, 1948; 1950, Connecticut. Preparatory education: Georgetown University (B.S. 1943); legal education: Georgetown University (LL.B. 1948). Fraternity: Delta Theta Phi. Member: Bar Association of the District of Columbia; American Bar Association; State Bar Association of Connecticut. Partner in law firm of Hedrick and Lane, Washington, D.C. Counsel to the law firm of Lane and Carroll, Norwalk, Conn. Formerly special attorney, Office of Chief Counsel, Bureau of Internal Revenue (1948) and administrative assistant to U.S. Senator Brien McMahon (Democrat of Connecticut) (1949-52). Appointed to Council of Administrative Conference in 1961.

Mr. LANE. Thank you.

Mr. Chairman and members of the subcommittee, my name is John D. Lane.

I wish to thank you for the invitation to express my views on the proposed legislation to create a permanent Administrative Conference. A great deal has been said here in the last 3 days in support of the proposal. You have heard from distinguished members of the bench and bar who have a wealth of experience with the administrative process, and I am pleased to associate myself with their conclusions.

I believe it absolutely necessary to the continued functioning and future well-being of the independent and departmental agencies that a permanent Administrative Conference be established.

As a member of the Council of the Conference during the past 2 years, I viewed the work of the Conference essentially as an experi-

ment. Our overriding purpose was to determine once and for all whether the concept of an agency conference was valid—whether a group so constituted could effectively challenge and deal with problems which, in the words of Dean Landis' report of December 1960, "threaten to thwart hopes so bravely held" for the success of the administrative agencies. The experimental stage is now complete, and I believe the Administrative Conference has proved that it is both valid in concept and effective in practice.

In urging the enactment of this legislation, one is inclined to underscore the changes and improvements expected once the Conference has been permanently established to oversee the implementation of its recommendations.

I have every faith in these anticipated benefits, and am certain that the administrative process will be markedly improved in future years. However, I submit that Congress need not base its judgment solely on expectations.

The recent Conference has already had a demonstrably worthwhile effect on the practices and procedures of many agencies. While by no means a complete list, I have noted some of the actions which have already been taken by various Federal agencies in spontaneous response to recommendations of the Conference:

1. Recommendations 3 and 4 advocated a change in the method of judicial review of orders of the Interstate Commerce Commission. It is my understanding that the Commission favors the recommendations and is preparing draft legislation for submission to Congress which would, if enacted, change a procedure in effect since 1903.

2. Recommendation No. 6, that the Armed Services Board of Contract Appeals be constituted as a unitary board in the Defense Establishment, has been adopted.

3. Recommendation No. 7, that departments and agencies having internal appellate entities publish the procedural rules and final decisions of those entities, has been adopted by the Atomic Energy Commission, Federal Aviation Agency, National Aeronautics and Space Administration, Veterans' Administration and the Departments of Agriculture, Interior, and Treasury.

4. Recommendation No. 15 deals with the requirement placed upon those agencies subject to the Administrative Procedure Act to accord persons compelled to appear before them the right to be "accompanied, represented, and advised by counsel."

The recommendation suggested a reexamination by the agencies to insure conformity with certain specified minimum standards. I have been advised that this recommendation has been adopted by the Civil Service Commission, Federal Power Commission, Small Business Administration, the Federal Reserve System, Post Office Department, and Department of Health, Education, and Welfare.

In addition, four other agencies are reportedly in the process of adopting this recommendation.

5. Recommendation No. 16, dealing with the sensitive matter of ex parte communications, is undoubtedly the most extensive of these suggestions upon which agency action has been taken. This recommendation sets forth a number of basic principles for use by individual agencies in the promulgation of their separate codes of behavior. The

recommendation has been adopted by the AEC, FPC, FTC, SEC, and the Federal Home Loan Bank Board.

In addition, three agencies are in the process of adopting the recommendation and several more have the matter under active study.

I cite these examples of agency action on the recommendations of the Conference to emphasize what can be accomplished. While this record has been most gratifying to all connected with the Conference, it is merely a beginning and much more can be done.

The fact to bear in mind at this juncture is that the agency actions referred to have been taken after recommendation by a temporary Conference, existing only by virtue of Executive order, having no approval from Congress other than a fiscal appropriation, and laboring under the handicap inherent in any body of an essentially temporary and experimental nature.

Once formally established with the imprimatur of Congress, the prestige and resultant effectiveness of the Conference will be manifestly greater.

With regard to the proposed legislation pending before this subcommittee, I wish to make several specific suggestions. Firstly, I join with Professor Nathanson and representatives of the American Bar Association who have recommended the deletion from S. 1664 of paragraphs (1) and (2) of subsection 3(a).

These paragraphs, in my opinion, restrict unreasonably the breadth of the Conference's sphere of activity without reason or corresponding benefit. Certainly the Conference should be free to examine the entire administrative process as it affects the public.

Secondly, section 4 of the proposed legislation should make it clear that those members of the Administrative Conference drawn from Government should serve as individuals charged only with a personal responsibility and not as official spokesmen for the agencies by which they are employed.

This concept was expressed in the final report of the Conference, and should I believe be included in this legislation. To do otherwise might cause or permit official and inflexible positions inconsistent with the basic objectives of the Conference.

Thirdly, the President should not be restricted in his appointments to the Council by the provision in line 20 of page 7 which states that the Council shall be composed "preponderantly of Federal officials and personnel."

While I have no quarrel with the spirit of these words, I believe they should be deleted so as to give the President complete freedom and the widest possible choice in his appointments to the Council.

Finally, I wish to lend my support to the suggestions of prior witnesses regarding the exclusion of nongovernment members of the Conference from the conflict-of-interest laws; the deletion from subsection 4(b) of the bill of the requirement that agency "chairmen" and department "heads" be included in the Conference; and the deletion from subsection 4(c) of the provision permitting alternate membership. The reasons for each of these latter suggestions have been fully discussed by prior witnesses and need no further amplification.

I would also suggest, Mr. Chairman, that the provision which requires an annual report to the President and Congress be expanded somewhat to make it clear that the Chairman of the Conference be

required not only to make a report of the activities of this proposed Conference but also show what the agencies have done about implementing the recommendations of the Conference.

I visualize that if this is not done, the Congress may just get a report which says how much money this Conference has spent and the recommendations it has made, but I think more important than that and of greater interest to Congress would be what the agencies of the U.S. Government have done about the work of the Conference and how many of the recommendations have been implemented.

I think this would go a long way toward furthering the work of the Conference and making it more effective.

Mr. Chairman, I would like to take this opportunity to commend you for your interest in doing something about the growing problems surrounding the administrative agencies. The business of trying to strengthen and reform the administrative process is frequently laborious and usually undramatic. Nevertheless, a solution to these problems is vital to the public interest and to the economic health of the Nation. I thank you for your interest in and support of this cause.

Senator LONG. Mr. Lane, thank you, and we thank you for the manner in which your report was submitted to us.

Any questions, Mr. Fensterwald?

Mr. FENSTERWALD. I have no questions, Mr. Chairman.

Senator LONG. Mr. Kennedy?

Mr. KENNEDY. I have no questions, Mr. Chairman. It is a pleasure to see Mr. Lane here.

Mr. LANE. Thank you.

Senator LONG. Thank you.

This will conclude the hearing on Senate bill 1664. The record will be kept open until next Wednesday for any statements that we receive; they will be included in the record.

Thank you again for being here, gentlemen. Thank you all very much. The committee will be adjourned.

(Whereupon, at 1:22 p.m., the committee was adjourned.)

(The following statement from Prof. Earl Latham was received subsequent to the close of the hearings:)

STATEMENT OF EARL LATHAM

To identify myself, I should like to say that I am the Joseph B. Eastman professor of political science at Amherst College, and chairman of the department of political science. I was a member of the Executive Council of the Administrative Conference of the United States which was established by Executive Order 10934, April 13, 1961, and fully support the final recommendation of that temporary body for the creation by statute of a permanent Administrative Conference of the United States. Although there are doubtless many matters of word and phrase that merit comment in the consideration of S. 1664 and the proposals of the Special Committee on Legal Services and Procedure of the American Bar Association, I shall confine the following remarks to what I think are five principles that should govern the design of a permanent Administrative Conference.

The first is the principle of agency responsibility for the adoption of fair and efficient administrative procedures. This is so platitudinous as to be almost unworthy of remark, and it would go without saying, were it not for the fact that the corollaries of the principle are sometimes lost to view. One of these corollaries is that authority sufficient to the responsibility must also be vested in the agencies. Divided authority to achieve fair and efficient administrative procedures can tend to thwart the goal by enfeebling the means.

If the principle of agency responsibility is to be applied, it follows that authority to develop improved procedures should not be lodged in some single functionary outside the agencies, with powers of command. Although there may be no current proposal to establish an officer in the Federal service like the ombudsman in Scandinavian countries, the thought has been discussed in professional literature, and the idea has seemed plausible to some. However workable such an institution may be abroad, it does not fit into the context of American political experience, and I do not think that it would fulfill the hope it stirs in its supporters. The agencies need such a monitor much less than they need encouragement and the means to improve their own practices.

The concept of the Administrative Conference serves the principle of agency responsibility especially well. Such a Conference should be primarily an agency affair, a center at which agency officials can communicate with each other about common administrative problems, a clearinghouse, a forum for the exchange of information and ideas, an institution to facilitate self-improvement. The Administrative Conference established under Executive Order 10934 satisfied all of these expectations, and the spirit of cooperative enterprise among the agencies was remarked upon by many who observed the Conference in action.

The second principle, closely linked with the first, is the cooperative self-improvement by the agencies should not be equally shared with spokesmen for private groups. Although lawyers in private practice have an understandably keen interest in the fair and efficient conduct of agency proceedings, I think that their proper functions in this domain are assistance, expert advice, careful and responsible criticism, and availability when needed for these contributions of service. Performance of these functions with willing objectivity can aid the growth of sound administrative practice in many useful ways. If they are to be regarded as equal partners with agency heads in the execution of officials' responsibility to improve procedure, their partnership tends to confuse the helpful distinction between the public and the private interest, and to make uncertain the respective roles of Government and guild.

The meaning of this principle for an Administrative Conference has two dimensions. First, there does not seem to me to be much warrant for the assignment of 5 places in an Executive Council of 10 to "members of the bar in private practice," as is proposed in the suggestions of the Special Committee on Legal Services and Procedure of the American Bar Association. According to that proposal, private lawyers might comprise a majority of the Executive Council, or even hold all 10 seats, since the language of the reservation for private practitioners is that the number shall be "at least five." Since the special committee also provides that the Executive Council determine the time and agenda of the assembly of the proposed Administrative Conference, and that it propose bylaws and recommendations, appoint members of committees authorized by the bylaws and regulations of the assembly, make recommendations to the Assembly or to any of the committees appointed by the Council on any subject germane to the purposes of the Conference, and approve or revise the budgetary proposals of the Chairman of the Conference, it is clearly possible that purely private persons, in control of public funds, might be endowed with public authority to deal with official agencies.

Second, there does not seem to be much warrant either for the assignment of a possible 50 percent of the seats in the Assembly to "members of the bar in private practice," or to limit the representation of the agencies in the Assembly to 50 percent. Under this proposal, it would be theoretically possible to give lawyers in private practice 50 percent of the seats in the Assembly, to restrict agencies to 25 percent, say, and to award the other 25 percent to "scholars in the field of administrative law and government, and others specially informed by knowledge and experience with respect to Federal administrative practice and procedure." With a possible majority in the Council and a working plurality in the Assembly, lawyers in private practice would dominate a statutory institution whose chief justification should be that it helps Federal agencies to help themselves.

The third principle that should govern the design of an Administrative Conference, as I see it, is the existence of conditions that favor steady leadership by a Chairman who is vigorous and imaginative, dedicated and knowing, firm in purpose yet moderate and patient in temper. The Administrative Conference of 1961-62 was extremely fortunate to have the wise and skilled leadership of Judge E. Barrett Prettyman, and the Chairman of any successor Conference will make high marks if he can equal the standards for the position set by the per-

formance of Judge Prettyman. Few will think, I suppose, that any statutory language will guarantee the personal qualities of a Chairman of the Conference but it can provide authorities that will permit the right kind of Chairman to function most effectively.

The Chairman of the Conference should have, I think, at least the following powers. First, he should have the authority to make preliminary inquiries into matters he deems important for consideration by the Conference and should be able to do so on his own initiative, or upon the suggestion of other persons, both inside and outside the Federal Government. Second, he should be regarded as the official spokesman for the Conference in all dealings with the officials of Federal agencies, with whom he will be in continuous touch on matters concerning the improvement of administrative procedures. Third, he should be the presiding officer at all meetings of the Council and the Assembly, recognized both as hand and head, the chief executor and the chief executive.

The Chairman should have both the status and the stature required to deal effectively with Federal officials of whatever rank, not in peremptory ways, of course, since he will have neither powers of command nor sanctions other than those of knowledge, reason, and good will. But he will be the central person in the Conference with continuity to guide its affairs that neither the Council nor the Assembly will have since these organizations will, at best, be able to meet only from time to time. It is the Chairman who must provide the necessary followup to Conference recommendations for the improvement of agency procedures but he will be able to do so only if he has the dignity of position and the full authority which successful performance of his office will require.

The fourth principle of design for the Administrative Conference is that its competence should be coextensive with the problems it needs to deal with. S. 1664, I think, unnecessarily limits the jurisdiction of the proposed Conference in section 3 which confines the definition of "administrative program" to "rule-making" and "adjudication." I think that the jurisdiction of the Conference should, at the least, include licensing also.

The fifth principle is that recognition should be accorded to other professional skills besides those of lawyers and law professors in the work of the Conference. Problems of administrative procedure can often be illuminated by the insights of engineers, accountants, political scientists, and economists. Moreover, it is possible that they can contribute perspective that purely legal approaches (however essential in the conduct of public proceedings) may sometimes miss. Such professional skills may be made available by hire to the committees of the Conference, to be sure, but they may also be useful in the deliberations of the Council and in the plenary sessions of the Conference, and it would be valuable to provide them limited but direct representation.

In conclusion, it may be said that the concept of the Administrative Conference is one of the most promising ideas in public administration in three decades. The improvement of administrative procedures through cooperative self-help by agencies of the Federal Government can be achieved through an administrative conference. But that administrative conference will serve best which provides principal representation to the Federal agencies, under a strong and capable Chairman, and with a jurisdiction commensurate with the problems that need attention.

U.S. DEPARTMENT OF COMMERCE,
MARITIME ADMINISTRATION,
Washington, D.C., July 2, 1963.

HON. EDWARD V. LONG,
Chairman, Senate Judiciary Subcommittee on Administrative Practice and Procedure, Washington, D.C.

DEAR SENATOR LONG: Allow me to congratulate you upon your designation as chairman of the Senate Subcommittee on Administrative Practice and Procedure. This subcommittee has a most important function in overseeing the operations of the several regulatory and promotional agencies which employ formal administrative procedures and I am happy that the chairmanship is in your good hands.

As you are undoubtedly aware, statutory hearings are conducted before this agency in three specific areas: (1) applications by steamship companies for operating-differential subsidy to permit competition with foreign carriers on a vessel operating cost parity pursuant to section 605(c) of the Merchant

Marine Act of 1936, as amended, (2) applications by subsidized carriers to enter the protected domestic, coastwise, or intercoastal trades pursuant to section 805(a) of the act, and (3) applications by lumber shippers desiring to use foreign-flag vessels between ports in the United States and Puerto Rico pursuant to Public Law 87-877. Occasionally nonstatutory hearings are being held pursuant to discretionary authority. These concern applications for so-called title XI shipbuilding mortgage insurance and appeals from decisions of the Maritime Administration contracting officer in disputes arising under shipbuilding contracts.

We have a staff of two hearing examiners and six attorneys who, as required, act as public counsel in the processing of formal proceedings. The chief hearing examiner, Mr. Paul N. Pfeiffer who is also the current president of the Federal Trial Examiners Conference, and the assistant general counsel, Division of Operating Subsidy Contracts, Mr. Louis Zimmet, would be happy to discuss any problems on administrative procedure with your Mr. Fensterwald at his convenience.

The Maritime Administration has been greatly impressed by the work of the Administrative Conference in producing numerous carefully considered and well-documented reports on the subjects of licensing, rulemaking, contract appeals, functions of hearing examiners and public or staff counsel. It would appear that the reestablishment of the Administrative Conference on a permanent basis would be a desirable step in developing further improvements in the technique of administrative adjudication. The cross-fertilization of ideas stemming from an expert body composed of Government lawyers and hearing examiners, private practitioners, and law professors should serve as a catalytic agent toward the attainment of this important goal.

With renewed congratulations and best wishes for the success of your subcommittee.

Sincerely yours,

(Signed) DONALD W. ALEXANDER,
Maritime Administrator.

LAW OFFICES OF HEDRICK & LANE,
Washington, D.C., June 17, 1963.

BERNARD FENSTERWALD, Jr., Esq.,
Chief Counsel, Senate Subcommittee on Administrative Practice,
Room 3214, New Senate Office Building,
Washington, D.C.

DEAR BUD: After Friday's hearing, we discussed the possibility of an exemption from the conflict-of-interest laws for non-Government personnel that will be appointed to the Conference. You called my attention to the testimony given by Webb Maxson in which he states that under Public Law 87-849, a new category of Government employees was created. They are termed "special Government employees." These "special Government employees" are relieved from certain prohibitions and penalties of the conflict-of-interest laws. Maxson goes on to state, "It is clear that both the Conference member and the per diem staff assistant would come within the definition of 'special Government employee'." As I read section 202 of title 18 of the United States Code, I do not agree that this is clear. You have to bear in mind that Council members will be appointed for 3-year terms, and the statute defines a "special Government employee" as one "who is retained, designated, *appointed*, or employed to perform, with or without compensation, *for not to exceed one hundred and thirty days* during any period of three hundred and sixty-five consecutive days * * *." [Emphasis supplied.]

I believe that Maxson takes the position that since the Council will only meet on a relatively few days in any year, the Council member will be entitled to draw per diem for only those days and therefore will work less than 135 days during the year and he thereby becomes a "special Government employee." It is my contention that the Council member is appointed for the entire 365 days in the year and the force and effect of the statute does not turn on the days worked or whether or not he has earned compensation. This precise reading of the statute, therefore, would mean that the individual appointed to the Council would not be a "special Government employee" and, therefore, would not be entitled to the immunity so provided.

Therefore, I feel that it would be perfectly appropriate for the committee to place a provision in the act which would make it clear that persons from outside the Government who are designated or appointed to serve on the Conference shall be deemed to be "special Government employees" as that term is defined in 18 U.S.C. 202.

With kindest regards.

Sincerely,

JOHN D. LANE.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D.C., June 29, 1963.

Hon. EDWARD V. LONG,
U.S. Senate,
Washington, D.C.

DEAR SENATOR LONG: This is in response to your letter of June 18, 1963, with regard to the impact of the conflict-of-interest laws on nonagency members and staff of the Administrative Conference of the United States which would be established by S. 1664.

The term "special Government employee" to which you referred in your letter is defined in 18 U.S.C. 202(a) to include individuals who are appointed or employed to perform duties for not to exceed an aggregate of 130 days in any period of 365 consecutive days. Special Government employees are, as you know, subject to fewer restrictions under 18 U.S.C. 203, 205, and 209 than regular employees.

It should be noted that the 130-day standard of 18 U.S.C. 202(a) is a standard of estimated future service. In other words, the classification of an appointee or employee either as a regular or a special Government employee is based not on the amount of his past service but on the amount of his prospective service.

The President's memorandum of May 2, 1963, to the heads of executive departments and agencies, entitled "Preventing Conflicts of Interest on the Part of Special Government Employees" (28 F.R. 4539), sets forth rules to govern the appointment and classification of officers and employees in the light of 18 U.S.C. 202(a). In general these rules require an estimate of service and classification at the time of an individual's first appointment or employment and another estimate and classification at each interval of 365 days thereafter. Each classification remains in effect for the following 365-day interval regardless of the amount of actual service performed during that interval.

Section 4(b)(1) of S. 1664 provides that the chairman of the proposed Administrative Conference of the United States would be a full-time official, and no doubt some of the employees he would appoint under the authority of clause (7) of section 6(c) would also serve full time. The Chairman and these individuals would of course be regular employees for purposes of the conflict of interest laws. There is no question that this is a proper result.

It is plain that the nonagency members of the Conference and its Council will be special Government employees since their duties will require far less than 130 days of service in any year. Thus the status of such nonagency personnel will entail only limited conflict-of-interest restrictions and will not be an obstacle to the recruitment of able Conference and Council members.

Although the experts or consultants who may be employed under the authority of clause (10) of section 6(c) of the bill, and part-time staff members who may be employed under the authority of clause (7), no doubt will generally fall into the category of special Government employees, it is possible that in some cases they will be categorized as regular employees. I see no reason to provide that in these cases they should be shielded from the full force of the conflict-of-interest laws and thus preferred over persons in similar circumstances in other Government agencies. One of the main purposes of Public Law 87-849, which enacted those laws, was to repeal, and eliminate the need for, the patchwork of ad hoc statutory exemptions which Congress had enacted through the years in order to mitigate the severe impact of the prior laws on the intermittent consultants and advisers of various agencies (see sec. 2 of Public Law 87-849, 76 Stat. 1126; H. Rept. 748, 87th Cong., 1st sess., pp. 5 and 26; hearings of June 21, 1962 before the Senate Judiciary

Committee, 87th Cong., 2d sess., on "Conflict of Interest," p. 18). Congress substituted reasonable general legislation for that patchwork and, more particularly, provided a liberal standard in 18 U.S.C. 202(a) for determining the persons entitled to special treatment. It seems unlikely therefore that present law will hamper the Conference in obtaining the services of experts, as needed.

In sum, this Department is of the view that S. 1664 should not be amended to afford an exemption from the conflict-of-interest laws for any of the persons who would serve the proposed Administrative Conference, whether as members or otherwise.

I trust you will find this discussion helpful. I should be pleased to hear from you again if you have any further inquiry.

Sincerely,

NICHOLAS DEB. KATZENBACH,
Deputy Attorney General.

JUNE 18, 1963.

HON. ROBERT F. KENNEDY,
*The Attorney General of the United States,
Department of Justice,
Washington, D.C.*

MY DEAR MR. ATTORNEY GENERAL: During the hearings on S. 1664, apprehension was expressed by a number of members of the bar that nonagency members and staff of the proposed Administrative Conference would be subjected to the provisions of the conflict-of-interest law applicable to "regular Government employees." This apprehension arose out of the difficulty of fitting such personnel within the technical requirements of the definition of "special governmental employees."

If nonagency members and staff are to be subject to all of the proscriptions of regular Government employees, there is every likelihood that this will inhibit many valuable persons from accepting appointments. Therefore, it would be helpful to have your advice as to the question whether such personnel would be within the definition of "special governmental employees." If your reply is in the negative, would it not be helpful to place an exemption from the conflict-of-interest laws in S. 1664, as suggested by the American Bar Association and others.

As we expect to write the report on this bill in the very near future, it would be helpful to have your advice as quickly as possible.

With gratitude and kind regards.

Sincerely,

EDWARD V. LONG, *Chairman.*

NEW YORK STOCK EXCHANGE,
New York, N.Y., June 28, 1963.

HON. EDWARD V. LONG,
*U.S. Senate,
Washington, D.C.*

DEAR SENATOR LONG: We have followed with interest the press reports of your hearings on S. 1664—creating an Administrative Conference of the United States—to determine whether business interests would be represented on the Conference.

As you know, the Securities and Exchange Commission under the Securities Exchange Act of 1934, oversees much of the securities industry, including the operations of our exchange. We have daily contact with the Commission and an active liaison program covering all phases of the interrelationship between the Commission and the exchange. Other industries undoubtedly have equal contact with the various regulatory agencies of the executive branch of the Government.

It is our hope that consideration will be given to appropriate representation on the Conference by businesses such as the securities industry which through years of experience have acquired unusual knowledge of the workings of individual agencies.

If it is still possible, we would greatly appreciate having this letter inserted in the record of the hearings on S. 1664.

Sincerely yours,

G. KEITH FUNSTON.

EXECUTIVE OFFICE OF THE PRESIDENT,
BUREAU OF THE BUDGET,
Washington, D.C., July 2, 1963.

Hon. EDWARD V. LONG,
*Chairman, Subcommittee on Administrative Practice and Procedure, Committee
on the Judiciary, U.S. Senate, Washington, D.C.*

DEAR SENATOR LONG: At the recent hearings on S. 1664 great interest was shown in the coverage of that bill as related to the coverage of the Administrative Procedure Act.

In general, our approach in drafting S. 1664 was to keep its coverage consistent with those sections of the Administrative Procedure Act which deal with administrative operations, as opposed to those which deal with public information and judicial review. Where there are differences in coverage, S. 1664 is broader. However, since the coverage of each section of the Administrative Procedure Act is determined almost exclusively by its own internal provisions, this is an exceedingly complicated subject.

Accordingly, I have requested the staff to prepare a comprehensive analysis of the coverage of S. 1664 as related to the coverage of the several sections of the Administrative Procedure Act. I also requested them to provide specific examples of matters excluded from the coverage of S. 1664 and sections 4 and 5 of the APA and an explanation of the philosophy back of the exclusions.

A copy of the staff paper is enclosed. I hope this information will be useful to you and to the other members of your committee in your further consideration of S. 1664.

Sincerely,

ELMER B. STAATS, *Acting Director.*

JUNE 27, 1963.

COMPARISON OF S. 1664 AND THE ADMINISTRATIVE PROCEDURE ACT WITH RESPECT TO COVERAGE

1. Basis for determining coverage

a. S. 1664.—The coverage of S. 1664 is determined by the definitions included in section 3 of the bill, as follows:

"DEFINITIONS

"SEC. 3. As used in this Act—

"(a) 'Administrative program' includes any Federal function which involves protection of the public interest and the determination of rights, privileges, and obligations of private persons through 'rule making' or 'adjudication' as those terms are defined in section 2 of the Administrative Procedure Act (5 U.S.C. 1001), except that it shall not include—

"(1) Any function or matter specified in section 4(1) or (2) of the Act except to the extent that such function or matter consists of proceedings and decision-making required to be conducted in conformity with sections 7 and 8 of the Act or the imposition of penalties on private persons through agency action not subject to sections 7 and 8; or

"(2) Any matter specified in section 5(1), (3), (5), and (6) of the Act.

"(b) 'Administrative agency' includes all executive departments and any other Federal agency, including a constituent agency of an executive department, which carries out an administrative program.

"(c) 'Administrative procedure' means procedure used in carrying out an administrative program and shall be broadly construed to include any aspect of agency organization, procedure, or management which may affect the equitable consideration of public and private interests, the fairness of agency decisions, the speed of agency action, and the relationship of operating methods to later judicial review, but shall not be construed to include the scope of agency responsibility as established by law or matters of substantive policy committed by law to agency discretion."

b. *Administrative Procedure Act.*—Respecting S. 7, which became the Administrative Procedure Act (APA), the Senate report said:

"The definitions in section 2 are important, *but they do not indicate the scope of the bill* since the subsequent provisions make many functional distinctions and exceptions." [Emphasis added.]

The coverage of each section of the act is determined by provisions of the section itself. The coverage provisions of each section differ because the policy considerations differ in relation to the subject matter covered. Therefore the coverage of the act must be determined by examining the provisions of each section; this is done in the following comparisons.

2. *Comparison of S. 1664 with sections 4, 5, 6, and 7 of the APA*

The definitions which determine the substantive coverage of S. 1664 are section 3(a), "Administrative program" and 3(c), "Administrative procedure." The effect of each of these is discussed below.

a. *Section 3(a), "Administrative program."*—As used in S. 1664, "Administrative program" is defined largely by reference to the Administrative Procedure Act itself.

Subject to exclusions later noted, "administrative program" is defined to include any Federal function which involves determination of rights, privileges, and obligations of private persons through "rule making" and "adjudication," as defined in section 2 of the act. These references to the APA make clear that the terms are used with identical meanings in S. 1664 and the APA, and also that both the bill and the act start from an inclusive coverage of agencies having rulemaking and adjudicatory functions, even though the terms, standing alone, do not determine the coverage in either case because of subsequent provisions.

Likewise the exclusions from S. 1664 are generally spelled out by reference to exclusions from the relevant sections of the APA, as follows:

(1) *Item 3(a)(1).*—Any "function" or "matter" excluded by items (1) and (2) of section 4 of the APA. "rulemaking," is, by item 3(a)(1), excluded entirely from S. 1664 unless it involves some proceeding or decision making subject to the procedural requirements of sections 7 and 8 of the act or it involves the imposition of penalties on private persons through agency action, not subject to sections 7 and 8. Any matter subject to sections 7 and 8 and the imposition of any penalty on private persons through agency action alone is within the purview of the Conference. Therefore, through the provisions of 3(a)(1) of S. 1664, the coverage of the bill with respect to "function" or "matter," as those terms are used in section 4 of the APA, is kept consistent with the coverage of section 4 (rulemaking), section 5 (adjudication), section 7 (hearings), and section 8 (decisions) of the APA. (This is done in a single item for simplicity in drafting and interpretation of the bill.)

(2) *Item 3(a)(2).*—Any matter excluded from the coverage of the APA by section 5 (1), (3), (5), and (6) is excluded from the coverage of S. 1664 by item 3(a)(2). This makes section 5 of the act and the bill consistent in coverage in these respects, since any personnel matter, excluded by 5(2) of the act, and military, naval, or foreign affairs functions, excluded by 5(4) of the act, are likewise excluded from S. 1664 by the provisions of 3(a)(1), discussed above.

It should be noted, however, that the effective coverage of section 3(a) of S. 1664 is broader than the effective coverage of sections 4 and 5 of the APA in a number of respects:

(1) Under the provisions of section 4(a) of the act certain prescribed procedures apply to rulemaking only when a substantive statute requires a hearing, and section 4(b) of the act invokes the procedural requirements of sections 7 and 8 only where agency rules are required by a substantive statute to be made on the record after opportunity for an agency hearing. Under the provisions of section 5 of the act the procedures prescribed by that section apply only when a substantive statute requires that an agency determination be based on the record after opportunity for an agency hearing. The coverage of S. 1664 is not thus limited by reference to the hearing provisions of other statutes.

(2) S. 1664 also covers any proceedings and adjudicatory determinations subject to the procedural requirements of sections 7 and 8 of the act through court decisions in specific cases, as well as those covered by sections 4 and 5 of the APA.

In addition, S. 1664 covers any instance of adjudication in which an agency may impose penalties on private persons through agency action not subject to sections 7 and 8 of the APA. In this respect the coverage of S. 1664 is broader than any of the APA sections here being compared.

b. *Section 3(c), "Administrative procedure".*—The definition of "administrative procedure" determines the scope of S. 1664 with respect to agency functions falling within the scope of "administrative program," as defined in section 3(a).

It should be emphasized that the scope of S. 1664 is not limited to "rule-making" and "adjudicatory" functions, but to "administrative programs" which involve rulemaking and adjudication. With respect to such programs "administrative procedure," as defined in section 3(c), includes any matter of agency organization, procedure, or management which may affect the equitable consideration of public and private interests, the fairness of agency decisions, the speed of agency action, and the relationship of operating methods to later judicial review; the definition excludes the scope of agency responsibility as established by law or matters of substantive policy committed by law to agency discretion.

Under this provision of S. 1664 the Conference would be free, for example, to consider any matter relating to the selection, tenure, or role of hearing examiners, because these are management matters falling within the scope of the definition of "administrative procedure," even though section 3(a)(1) excludes any matter relating to agency management or personnel in general.

3. *Comparison of S. 1664 with other sections of the APA*

Section 3 of the APA, entitled "Public Information," requires every "agency," as defined in section 2 of the act, to (1) publish certain rules and policy statements and descriptions of its organization and procedures in the Federal Register; (2) publish or make available for inspection all rules and all final opinions or orders in the adjudication of cases; and (3) save as otherwise required by statute or as information is held confidential for good cause, make matters of official record available to appropriate persons. The only specific exceptions to section 3 are (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency.

To the extent, however, that section 3 covers agencies which do not have substantive rulemaking or adjudicatory functions, such as the Federal Mediation and Conciliation Service, the Commission of Fine Arts, and the Smithsonian Institution, it is not relevant to the purposes of an Administrative Conference as created by Executive Order 10934 of 1961, or to "administrative agencies" or to the "administrative process," as those technical terms are generally construed.

Section 6 of the APA, entitled "Ancillary Matters," deals with the right to counsel in agency proceedings, investigations, subpoenas, and denials. Section 9, entitled "Sanctions and Powers," deals with the exercise of agency power or authority. The subject matter of both sections relates primarily to "administrative programs," as defined in S. 1664, and is therefore within the coverage of that bill.

Section 10(c) of the APA, "Judicial Review," provides that "Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review" unless (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion. This probably is no broader in coverage than sections 4 and 5. In any event, section 10 has nothing to do with the administrative procedure used by Federal agencies except for item 10(d), which authorizes an agency to postpone the effective date of any action taken by it, pending judicial review. That aspect of agency procedure would be within the coverage of S. 1664, as defined in section 3.

Section 11 of the APA deals with "Hearing Examiners." As indicated above, this subject is entirely within the coverage of S. 1664 through the definition of "administrative procedure" in section 3(c).

Section 12 deals with "Construction and Effect" of the APA, and therefore is not relevant to the purpose of this paper.

4. *Philosophy back of the exclusions from sections 4 and 5 of the APA and S. 1664*

The philosophy back of the exclusions from sections 4 and 5 of the APA, as well as those in S. 1664, has been expressed by various authorities on the "administrative process."

The Final Report of the Attorney General's Committee on Administrative Procedure states that:

"The committee has regarded as the distinguishing feature of an 'administrative' agency the power to determine, either by rule or by decision, private rights and obligations."

The president of the American Bar Association, in an article discussing the pending bill which became the APA, stated:

"It had come to be widely held that such legislation * * * should apply to kinds of operations rather than to forms of agencies. Accordingly, the proposed statute deals primarily with the *legislative and judicial functions of administrative agencies*." [Emphasis added.]

The comments of Senator McCarran, chairman of the Senate Judiciary Committee, during consideration of S. 7, also illuminate the philosophy reflected in the APA:

"We have set up a fourth order in the tripartite plan of Government which was initiated by the founding fathers * * * They set up the executive, the legislative, and the judicial branches; but since that time we have set up a fourth dimension, if I may so term it, which is now popularly known as administrative in nature. So we have the legislative, the executive, the judicial, and the administrative.

* * * * *

"The rules and regulations [of the administrative agencies] are the very things that impinge upon, curb, or permit the citizen who is touched by the law * * *

* * * * *

"S. 7, the purpose of which is to improve the administration of justice by prescribing fair administrative procedure, is a bill of rights for the hundreds of thousands of Americans whose affairs are controlled or regulated in one way or another by agencies of the Federal Government. It is designed to provide guaranties of due process in administrative procedure."

The report also quotes from Dean Landis' book, "The Administrative Process":

"* * * agencies were created whose functions embraced the three aspects of government * * * These agencies, tribunals, and rulemaking boards were for the sake of convenience distinguished from the existing governmental bureaucracy by terming them 'administrative.' The law the courts permitted them to make was named 'administrative law,' so that now the process in all its component parts can be appropriately termed the 'administrative process.'"

In debates on S. 7 in the House of Representatives Congressman Walter said:

"We are not here concerned so much with mere custodial or managerial tasks of management. But we are concerned with administrative powers which are compulsory in their nature. We are mainly concerned with administrative processes, in other words, which are regulatory in their effect."

Therefore, it is clear that the exclusions are intended primarily to mark the distinction between those matters which are purely "executive" and those which are "administrative," to use Senator McCarran's terms.

Respecting the specific exclusions from section 4 of S. 7, Congressman Walter also said:

"The exemption of military and naval functions needs no explanation here. The exempted foreign affairs functions are those diplomatic functions of high importance which do not lend themselves to public procedures and with which the public is ordinarily not directly concerned. The exemption of proprietary matters is included because in those cases the Government is in the position of an individual citizen and is concerned with its own property, funds, or contracts."

5. Examples of matters excluded from the APA and S. 1664

a. *Exclusion resulting from the definition of agency.*—Section 2(a) of the APA defines "agency," as used in the act, to exclude Congress, the courts, or the governments of the possessions, territories, or the District of Columbia. The term "courts" includes the Tax Court, the Court of Customs and Patent Appeals, the Court of Claims, and similar courts. The act also excludes (except from sec. 3, "Public Information") agencies composed of representatives of the parties or of representatives of organizations of the parties, such as the

National Railroad Adjustment Board and the Railroad Retirement Board; courts martial and military commissions; and military or naval authority exercised in the field in time of war or in occupied territory.

These exclusions carry over to S. 1664 through the definitions of "rule-making" and "adjudication," as used in section 3(a).

b. *Exclusions based on section 4 of the APA (rulemaking).*—Exclusions from section 4 of the APA (rulemaking) and from all of S. 1664 except as specified in 3(a) are (1) any military, naval, or foreign affairs function, or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(1) Military matters: Legislative history makes clear that the words "military or naval affairs" are not to be equated with the War Department or the Navy Department. Hence the civil functions of the Corps of Engineers, which include regulatory functions related to navigable waters, for example, would not be excluded as a military matter.

(2) Foreign affairs: "Foreign affairs" means those "affairs" which so affect relations with foreign governments that, for example, public rulemaking would clearly provoke definitely undesirable consequences." The Attorney General's Manual indicates the exemption is "applicable to most functions of the State Department and foreign affairs functions of other agencies." Exceptions would be matters not importantly affecting relations with other countries; this would seem to include most matters relating to passports or citizenship, for example, now handled by review boards created without express statutory authorization.

(3) Agency management or personnel: If a matter is solely the concern of the agency proper or is concerned with the internal management of the executive branch of the Federal Government, and therefore does not affect members of the public to any extent, it is excluded. For example:

(a) The Attorney General's Manual says "Most functions of the Bureau of the Budget." We can think of no exceptions.

(b) Interdepartmental committees established by the President for handling internal management problems.

(c) An agency's internal personnel and budget procedures, such as rules for vacation, leaves of absence, travel, etc.

(d) Functions of the Civil Service Commission (except for sec. 3, "Public Information") and of other agencies with respect to the administration of special personnel systems.

(4) Public property: Examples of matters excluded are:

(a) The sale or lease of public lands or of mineral, timber, or grazing rights;

(b) Management of ships by the Maritime Commission;

(c) Management of TVA properties;

(d) Management of the national forests;

(e) Actions affecting Indian lands;

(f) Public buildings management.

(5) Loans: Examples of matters excluded are:

(a) Loans by any Federal agency, such as Small Business Administration, Housing and Home Finance Agency, Commodity Credit Corporation, and the Farm Credit Administration.

(b) Loan guarantees, such as those of the Federal Housing Authority and the Veterans' Administration.

(6) Grants: Examples are:

(a) Subsidy programs, such as those in the aviation, maritime, and commercial fishing industries.

(b) All grant-in-aid programs, regardless of recipient.

(7) Benefits:

(a) Veterans' benefits.

(b) Federal employees' benefits of all kinds.

(c) OASI benefits up to the point where need for a formal hearing arises; hearings are subject to sections 7 and 8 through the procedural requirements of the Social Security Act.

(8) Contracts: Entirely excluded, except for debarment under the Walsh-Healey and Bacon-Davis Acts, where formal hearings are required.

c. *Exclusions based on section 5 of the APA (adjudication).*—

(1) Matters subject to a subsequent trial de novo in any court:

(a) Applies chiefly to matters subject to trial de novo in the U.S. Court of Claims, the U.S. Customs Court, the U.S. Court of Customs and Patent

Appeals, and the U.S. Court of Military Appeals, all in the judicial branch; and the Tax Court of the United States in the executive branch.

(b) Also includes certain reparations orders of the ICC and the Secretary of Agriculture.

(2) Proceedings in which decisions rest solely on inspections tests, or elections: The Senate report states these are excluded "because those methods of determination do not lend themselves to the hearing process." The Attorney General's Manual construes "solely" to mean "mainly." Examples include:

- (a) Denial or revocation of seaworthiness by the Coast Guard;
- (b) Locomotive inspections by ICC;
- (c) Grain, meat, and poultry inspections by Agriculture;
- (d) Food inspections by FDA;
- (e) See also item d below.

(3) Cases in which an agency is acting as an agency for a court: Exempted because the entire process is subject to review by the court.

FTC may serve as master in chancery to a court in an antitrust suit brought by the Attorney General.

(4) Certification of employee representatives: Rests primarily on elections. Both the NLRB and the Federal Mediation Board perform this function.

COPENHAGEN, DENMARK, July 2, 1963.

MR. HAROLD SEIDMAN,
Bureau of the Budget,
Washington, D.C.

DEAR MR. SEIDMAN: Your letter of June 25 reached me only today, having been forwarded from New York.

I have read with appreciation and interest your precisely formulated draft of a statement to Senator Long concerning the coverage of S. 1664.

Since I have the utmost confidence in you, as well as the liveliest respect for your ability, I find disagreement with you to be both difficult and distasteful. In all candor, however, I must express my strong opinion that the present approach to the reach of S. 1664 rests upon an unsure foundation.

Your analysis of the Administrative Procedure Act and your comparison of its coverage with that of S. 1664 are absolutely sound. In my view, however, it is a mistake to link the two together. The limitations embodied in the Administrative Procedure Act are desirable; in fact, if I had my choice, I would broaden them. Beyond any question, Congress was right in not fastening the requirements of the Administrative Procedure Act on the Railroad Retirement Board, the Veterans' Administration, the General Services Administration, and the other bodies that perform acts of the various types exempted from the act. It would have been outrageous to prescribe that the millions of benefactory decisions of the Veterans' Administration, for example, would have to be preceded by the same procedural formalities as might be required of the National Labor Relations Board or the Federal Trade Commission.

But that is not to say that the procedures untouched by the Administrative Procedure Act are procedures unworthy of study. Clearly, on the contrary, they do deserve consideration.

Simply as a matter of historical reference, I note that the Attorney General's Committee on Administrative Procedure did in fact prepare and publish monographs dealing with the Veterans' Administration, the Railroad Retirement Board, the Federal Employees' Liability Commission, and the Department of the Interior in its handling of such matters as are involved in the Taylor Grazing Act, the issuance of patents to public lands, and the disposal of mineral rights. While none of the matters dealt with in those monographs should be dealt with in an across-the-board manner, all of them were the subject of particularized recommendations in the committee's final report.

The Administrative Conference that concluded last December also made a few recommendations that would be outside the ambit of S. 1664. Thus, for example, it suggested to the General Services Administration that it publish or otherwise make available the decisions of its Board of Contract Appeals. No possible harm can flow, in my judgment, from the expression of ideas concerning administrative problems in addition to those dealt with by the portions of the Administrative Procedure Act you have used as the foundation stones of S. 1664.

Indeed, I believe that the administration would gain much from having available and in operation a continuing study group that would presumably be broadly concerned with methodological matters, whether in a claims-determining agency affecting millions of citizens or in a contracts-judging body affecting a significant portion of the economy. Bear in mind that the Administrative Conference has no power to compel, but only the capacity to advise. Bear in mind that it will have no inducement to roam at large in a recklessly improvident way, but will in the very nature of things interpret "administrative procedure" as lawyers typically do, and not as management experts do. Bear in mind that if, contrary to all reasonable expectation, some future Administrative Conference were to divert its energies into too distant realms, a quiet word from the White House to the Chairman would probably be heard and understood, as would a nudge by an appropriations subcommittee. In short, the dangers that the Administrative Conference will stray into undesired territory are few. The trouble with S. 1664 is that it would prevent attention to procedures as to which the Administrative Conference's judgment might be highly desirable.

Let me conclude this too long letter with one more remark. If the only way to have an Administrative Conference would be to accept the limitations of S. 1664, I would favor their acceptance in accord with the doctrine of the half loaf. But, truly, I see no solid justification for the limitation. I most earnestly request your reexamination of the theory that now underlies them.

I shall send a copy of this letter to Judge Prettyman for his information. You remarked in your letter that he, too, had planned to write me about S. 1664. His letter has not yet caught up with me.

Cordial personal regards.

Sincerely yours,

WALTER GELLHORN.

(The above letter was transcribed July 6.)



