

**REPORT OF THE
VIRGINIA BAR ASSOCIATION COMMITTEE TO STUDY THE**

**ESTABLISHMENT OF AN
ADMINISTRATIVE CONFERENCE
OF VIRGINIA**

**TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA**



SENATE DOCUMENT NO. 3

**COMMONWEALTH OF VIRGINIA
RICHMOND
1995**

I. INTRODUCTION

There are a number of organizations and individuals in Virginia currently involved in reviewing, formally or informally, various aspects of the policies and procedures governing our state administrative process. These include: the various General Assembly committees, and in particular the General Laws Committees of both the House of Delegates and the State Senate, the Virginia Code Commission, the Registrar of Regulations, the Joint Legislative Audit and Review Commission, the Division of Legislative Services, the Governor and his various Cabinet Secretaries, the Attorney General and his internal Administrative Process Act Committee, the Department of Planning and Budget and other state agencies, the Administrative Law Sections of the Virginia State Bar and the Virginia Bar Association, segments of the Women Attorneys Association and the Old Dominion Bar Association, administrative law committees of some local bar associations, members of the various regulated communities, consumer and other public interest groups and individual citizens. See Appendix E at 12, and Appendix F at 1-8.

No mechanism currently is in place, however, to bring together these various organizations and individuals to consider issues affecting Virginia's administrative process, and there is no single entity which has as its primary responsibility overseeing and monitoring the effectiveness and fairness of that process on a regular and ongoing basis and reporting problems and suggestions for improvements to the Governor and the General Assembly.

II. FORMATION AND COMPOSITION OF STUDY COMMITTEE

A. General Assembly:

Pursuant to Senate Joint Resolution No. 236 (Appendix A), the 1993 General Assembly requested the Virginia Bar Association to study the need for the establishment of an Administrative Conference of Virginia to perform the above functions and assist in determining whether "state administrative procedures ensure maximum efficiency and fairness in the performance of . . . governmental" "regulatory functions and related responsibilities for the determination of private rights and obligations."

B. Virginia Bar Association:

At the request of Whittington W. Clement, President of the Virginia Bar Association, President-elect M. Langhorne Keith formed a 20-person committee to undertake the study. That committee was composed of five members of the General Assembly, representatives from the Virginia Bar Association, the Virginia State Bar, the Women Attorneys Association, the Office of the Attorney General, the Joint Legislative Audit and Review Commission and the Division of Legislative Services, a member of the Virginia Court of Appeals, a member of the State

Corporation Commission, an administrative hearing officer and two law professors. See Appendix B. The study committee received staff assistance from lawyers and summer interns at Hazel & Thomas and Hunton & Williams, and from the staff of the Joint Legislative Audit and Review Commission, the Division of Legislative Services and the Office of the Attorney General.

III. STUDY COMMITTEE DELIBERATIONS

A. General:

The study committee met on three occasions -- June 1, September 10 and November 12, 1993 -- and reviewed research on the work of the Administrative Conference of the United States and on the administrative process in Virginia, reviewed a 1991-92 study of the Virginia Administrative Process Act by the Joint Legislative Audit and Review Commission, surveyed selected state agencies for their thoughts and suggestions on the need for, and the potential organizational structure and functions of, an Administrative Conference of Virginia, and surveyed other states to determine how those states monitored the effectiveness and fairness of their state administrative processes.

B. Administrative Conference of the United States:

The Administrative Conference of the United States ("ACUS") was created as an independent federal agency in the mid-1960s "to identify problems and places where there is room for improvement in [federal] agency processes, and also in judicial review of [federal] agency actions -- and then to study and deliberate those issues and generate recommendations for improvement." Appendix C at 3. See also Marshall J. Breger, "The Administrative Conference of the United States: A Quarter Century Perspective," 53 U. Pitt. L. Rev. 813 (Summer 1992) for an excellent overview of the work of the ACUS. Professor Robert A. Anthony of the George Mason University School of Law, a former Chairman of the ACUS, and Professor Richard A. Merrill of the University of Virginia School of Law, a former member of the ACUS, were members of the study committee. See Appendix C for a presentation to the study committee by Professor Anthony on the organization and work of the ACUS.

The ACUS consists of 100 part-time, unpaid members and a Chairman who is a full-time federal official appointed by the President. The President also appoints 10 of the members as the Council of the ACUS, which is in effect a board of directors for the Conference. The majority of members of the ACUS are government officials; the remainder are private individuals, mainly practicing lawyers and academic lawyers. The ACUS operates in a "conference" format, meeting twice each year in an "Assembly" to consider recommendations and proposals. Most of the work of the ACUS is done through its committees, with the help

of outside consultants (mostly academics). Committee recommendations and proposals generally are reviewed and acted upon by the Council before they are presented to the full ACUS membership at one of the biannual conferences.

The size, structure and operational format of the ACUS are both its strength and its weakness. They ensure that the review process by the ACUS will be deliberative and thoughtful and that any recommendations or proposals will have been reviewed by a representative cross-section of the agencies, entities and individuals likely to be affected by those recommendations and proposals. On the other hand, any process involving such a large number of participants can become unwieldy, time-consuming and arguably overly deliberative.

In general, the work of the ACUS has been highly regarded, and it certainly is fair to say that the ACUS has had a significant impact on the federal administrative process -- and indirectly on state administrative processes -- over the quarter century of its existence. See Appendices C and D; see also Preger, supra. Recently, however, the ACUS has been the subject of considerable controversy and the continuation of its funding has been threatened. Some would say this controversy has arisen because of the ACUS's review of the monitoring of federal administrative law judges, the recommendations from that review having upset some of those judges; others would say that the ACUS simply has outlived its usefulness and that the controversy has arisen because of a failure on the part of ACUS and others to recognize that fact. See Appendix D at 4-6.

After much discussion, there was a consensus among study committee members that the ACUS was not a model that was appropriate for an "administrative conference" in Virginia, mainly because of the size and potentially unwieldy nature of the "conference" format of the ACUS and because of a belief among study committee members that the goals of the ACUS could be achieved in Virginia by a much smaller group.

C. 1991-92 Study of the Virginia Administrative Process Act:

During 1991 and 1992, the Joint Legislative Audit and Review Commission ("JLARC") conducted a study of Virginia's Administrative Process Act. JLARC, Review of Virginia's Administrative Process Act, Va. Gen. Assembly, H. Doc. 51 (1993). Appendix E contains a summary of that JLARC study. The key findings of the study were that:

- There were VAPA [Virginia Administrative Process Act] compliance problems which until recently included the lack of an executive order for regulatory review

- VAPA's effectiveness has been limited for other reasons as well:
 - it frequently does not apply
 - its requirements are limited
 - more could be done by agencies to facilitate meaningful public participation
- There were accountability concerns:
 - public commentators lacked confidence that agencies consider comments
 - elected officials have lacked a formal mechanism to halt a regulation except by statute
 - there is a lack of adequate mechanisms to ensure agency compliance
 - agencies have substantial power in case decisions that can be abused
 - judicial review tends to be deferential to agencies

Appendix E at 6. With regard to the need for ongoing oversight and accountability of our state administrative process, the 1991 JLARC study noted that while there were a number of entities that have varying levels of responsibility for promoting compliance with the Administrative Process Act,

- Yet for a variety of reasons (lack of awareness of rules, the desire to act quickly, lack of resources or unwillingness to do the work required, disinterest in public participation), agencies continued to ignore or implement poorly some provisions of the [Administrative Process] Act.
- Also for a variety of reasons (lack of time, resources, or attention due to competing priorities), entities that help promote compliance are still not able to secure compliance in many cases.

Id. at 12.

The JLARC staff member who assisted the study committee concluded in his presentation to the study committee that an "administrative conference" could perform a number of activities to promote compliance with, and accountability under, the Administrative Process Act, including periodic surveys of state agencies, local governments, the regulated communities, administrative law attorneys and others to determine problem areas and potential solutions, assessments of agency case decision practices, the collection and analysis of information to determine if

regulatory time frames are being met, and working with the Code Commission and the Registrar of Regulations on various administrative law matters. See id. at 13.

D. Survey of Selected State Agencies:

During the Summer of 1993, the study committee conducted a survey of 22 selected state agencies to determine their initial reaction to, and obtain their input on, the establishment of an "administrative conference" in Virginia. Nineteen agencies, representing a broad spectrum of size and complexity, responded to the survey. See Appendix F at 9-17. Although 72% (13) of those responding indicated that an administrative conference could perform a beneficial role, 79% (15) thought there were areas in which the establishment of an administrative conference could be detrimental. Balancing the potential benefits and concerns, 50% (9) favored the establishment of an administrative conference, 17% (3) were opposed to an administrative conference and 33% (6) were undecided.

Respondents were given an opportunity to provide comments on the perceived advantages and disadvantages of an administrative conference. Their comments reflected many of the comments and suggestions later offered by study committee members during the study committee's deliberations. Among its potential advantages, for example, some respondents noted that an administrative conference could provide a forum for greater input from both the public and state agencies on public policy questions concerning the state administrative process, could serve as a vehicle to educate the public and state agencies on that process and its problems and could provide the basis for a partnership, and a better line of communication, between the private and public sectors to resolve those problems. Still other respondents noted that an administrative conference could serve as a regular focal point for communication with other states about what they are doing to monitor their administrative processes. Other respondents noted that a broadly-constituted group could provide an outside, constructively critical, systematic review of the state administrative process that could improve the quality and responsiveness of that process. Several respondents noted the possibility that an administrative conference could lead to a more "standardized" administrative process for all state agencies. Some of these respondents thought standardization would lead to greater consistency in dealing with the various regulated communities and, therefore, was a good idea; others thought that standardization would ignore the specific needs of particular state agencies and, therefore, was a bad idea. One respondent noted that an administrative conference could help provide training and technical assistance to state agencies and the regulated communities on how to use the current administrative process more efficiently, how to write simple, clear regulations, etc. Finally, several respondents noted that an administrative conference could help balance various competing interests in the process -- e.g., the need for public participation and input versus the need for an efficient and reasonably expeditious administrative process.

On the negative side, the major concerns were that an administrative conference could become "just another layer of bureaucracy," thereby making the administrative process more cumbersome and time-consuming rather than streamlining it, that an administrative conference

might focus on issues involving the operations of specific agencies, rather than "big picture" public policy issues affecting the administrative process in general, thereby adversely affecting the needs of individual state agencies, and that it could be dominated by "special interests" representing the regulated communities. One respondent expressed a concern that an administrative conference could become dominated by attorneys and that the focus of the conference would then be on complicated legal issues rather than on more mundane, practical issues of relevance to the regulated communities and state agencies. Finally, one respondent expressed concern that an administrative conference would not have any real authority to effect change.

E. Survey of Other States:

During the Summer of 1993, the study committee researched what has been done about administrative law reform in the 49 other states, including a written questionnaire that was mailed to 35 chairpersons of administrative law sections of state or local bars, a computer search, and telephone calls to practitioners, law professors, state bars, legislative libraries and administrative law judges in other states. See Appendix G. The two issues researched were whether other states have administrative conferences or committees that make recommendations for improving state administrative law, and, if not, why not? The survey revealed that no state has an "administrative conference" established by statute but that virtually all states have some mechanism in place to review their state administrative process, such as a periodic "conference" of the regulated communities, state agencies, practitioners, and other interested persons, legislative studies on particular issues or agencies, studies by administrative law judges, ongoing law review commissions, bar association committees, judicial councils, and law school institutes. Two states, Ohio and New York, apparently are considering the establishment of an administrative conference similar to the one being considered by this study committee, and a bill establishing an administrative conference in Illinois apparently was introduced but subsequently was defeated.

It is not clear why these other states have not established, or have rejected the idea of, an "administrative conference" to help monitor and oversee their state administrative process. The most likely reason, however, is a belief that there is no need for an administrative conference, either because there are other state agencies or private groups already overseeing or monitoring the state's administrative process, or the administrative process in that state has not yet matured to the point where an administrative conference is necessary.

Finally, as part of the written questionnaire to chairpersons of administrative law committees of other state bar associations, the study committee asked whether they thought there was a need in their states for a state agency to recommend improvements in state administrative law. Of the 17 state bar associations responding, 13 replied yes, 2 replied categorically that there was no need for such an entity, and 2 thought that their state bar association, judicial council or legislature currently was meeting the need. See Appendix G at 10-11.

IV. RECOMMENDATION

After considerable discussion about the need for, and potential functions and organizational structure of, an administrative conference of Virginia, the study committee voted unanimously to recommend that the Virginia Code Commission exercise its authority (or if it did not clearly have the authority, that it be granted the authority) to appoint a standing "Administrative Law Advisory Committee" to assist in the research and review of administrative law reform and law development issues in order to assist the Code Commission in fulfilling its statutory duty to "continually monitor the operation" of Virginia's administrative process. See Va. Code § 9-77.12.

The study committee's recommendation was endorsed unanimously by the Executive Committee of the Virginia Bar Association at its meeting on January 15, 1994.

V. PROPOSED CODE COMMISSION **"ADMINISTRATIVE LAW ADVISORY COMMITTEE"**

A. Need for an Administrative Conference:

There was considerable debate among study committee members about the need for an "administrative conference" in Virginia and the functions it would perform. A significant number of members felt that there was a real need for such an entity, and that it should be established by the General Assembly as an agency independent of the control and direction of both the executive and legislative branches, with discretion to monitor Virginia's administrative process, subject to general statutory guidance from the General Assembly, and to determine which issues and problems to research and review.

Another significant number of members felt that there was no need for an "administrative conference" in Virginia at this time, especially in the form of an independent agency. This group felt entities such as the General Assembly standing committees, study committees appointed pursuant to General Assembly Joint Resolutions to review particular issues, and the Joint Legislative Audit and Review Commission provided sufficient governmental monitoring and oversight of Virginia's administrative process and that "independent" monitoring and oversight of that process already existed through the administrative law committees of the Virginia Bar Association, the Virginia State Bar and other bar associations, various regulated community associations, and consumer and other public interest groups.

There was agreement among the members, however, that (1) there is no mechanism currently in place to bring together the various agencies, organizations and individuals who are interested in and affected by the state administrative process to consider issues involving that

process, and that (2) there is no single entity which has as its primary responsibility overseeing and monitoring the effectiveness and fairness of the state administrative process on an ongoing basis and reporting problems and suggestions for improvements to the Governor and the General Assembly. There also ultimately was a consensus that state agencies, the regulated communities, consumer and other public interest groups and the public at large would benefit from such a mechanism and entity. Thus, after much discussion, the study committee decided, unanimously, that there was a need to have some type of "administrative conference" in Virginia that would have as its primary responsibility the ongoing review of Virginia's administrative process and that could provide the mechanism for bringing together the interested and affected agencies, organizations and individuals to consider issues and problems affecting the state administrative process.

The issue then became what type of "administrative conference" should be recommended for Virginia. See Appendix H for an overview of the various organizational structures for an administrative conference considered by the study committee. For the reasons outlined in Part IIIB above, there was widespread agreement on the study committee that the Administrative Conference of the United States was not the model to adopt.

B. Standing Committee of the Code Commission:

The Code Commission has had long-standing and continuing involvement in various administrative law issues. The Code Commission was the entity that recommended the enactment of an Administrative Process Act for Virginia, is responsible for publication of the Virginia Register of Regulations, and will be responsible for publishing the new Virginia Administrative Code, which will be similar to the Code of Federal Regulations.

In addition, pursuant to § 9-77.12 of the Code of Virginia, the Code Commission is directed to

continually monitor the operation of the Administrative Process Act . . . and the Virginia Register Act . . . to ensure that those laws provide the most practical means to administrative agencies of the Commonwealth for the promulgation, amendment and repeal of administrative law within the powers granted to such agencies by the General Assembly and to recommend from time to time such changes as it deems appropriate.

The Code Commission currently does not have the time or staff to monitor and oversee the state administrative process on a regular, ongoing basis. Nor does it currently have a permanent advisory group of businesses and citizens who are affected by the process, state agency representatives, and attorneys who practice administrative law to assist in its monitoring and oversight function. In the past, however, the Code Commission has appointed such advisory committees to provide assistance in its review and recodification of particular titles of the Code of Virginia, most recently, for example, in its recodification of Title 4 of the Code. The study

committee therefore decided to recommend that the "administrative conference" be established in the form of a standing committee of the Code Commission to provide the Commission with ongoing assistance in its monitoring and oversight of Virginia's administrative process.

As a standing committee of the Code Commission, the Administrative Law Advisory Committee would report directly to the Code Commission and be subject to the control and direction of the Code Commission. The Code Commission, therefore, should be the group that ultimately determines the specific functions and duties of the Advisory Committee, and its composition. The study committee, however, offers the following suggestions to assist the Code Commission in establishing the Advisory Committee.

C. Duties and Functions:

1. Annual Workplan:

The Advisory Committee should be required to submit to the Code Commission for approval an annual workplan, to include the research project(s) and review efforts it will undertake over the next calendar year.

2. Three Primary Functions:

The Advisory Committee should be given the authority to perform three primary functions:

- **Undertake Research Projects:**
 - The Advisory Committee should be responsible for undertaking the research and making recommendations on various administrative process projects delegated to it by, or approved by, the Code Commission or specifically delegated to it by a Resolution of the General Assembly.
 - This research should be completed either by the Advisory Committee itself or by consultants, including academics, who contract with the Advisory Committee.
 - All findings and recommendations of the Advisory Committee should, of course, be based on empirical data and empirical assessments of agency performance -- and Virginia-specific data and assessments wherever possible -- to ensure that the work of the Advisory Committee is based upon the most accurate information available and not upon anecdotes and intuition. It is likely, therefore, that much of the research will be undertaken by consultants, including academics, working in conjunction with a subgroup or subcommittee of the Advisory Committee.

- Assist the Code Commission in Reviewing the Effectiveness, Efficiency and Fairness of the Administrative Process:
 - The Advisory Committee should be responsible for assisting the Code Commission in reviewing the effectiveness, efficiency and fairness of our state administrative process and reporting its findings annually to the Code Commission. This annual report should be made available to the public, the Governor and the General Assembly.
 - The major purpose of this review function would be to ensure that the General Assembly's intent, as reflected in the Virginia Administrative Process Act, is being implemented fully and appropriately by the various state agencies.
 - As part of this review function, the Advisory Committee should be authorized to receive comments and suggestions from any source and should report any such comments and suggestions to the Code Commission annually or as otherwise appropriate.
 - The Advisory Committee also should be authorized and encouraged to hold at least one public hearing each year and a Biennial (perhaps later an Annual) Conference on Virginia's Administrative Process, and should be authorized to conduct periodic surveys of state administrative agencies, the regulated communities and other interested organizations and individuals to determine the "state of the administrative process" in Virginia.
- Co-Sponsor a Biennial Conference on Administrative Law:
 - In order to provide a focal point and forum for discussion of Virginia's administrative process by the various organizations and individuals interested in and affected by that process, the Advisory Committee should be authorized to co-sponsor with the Code Commission a Biennial (perhaps later an Annual) Conference on Virginia's Administrative Process.
 - Conference topics could include issues that have been delegated to the Advisory Committee, or concerns and suggestions the Advisory Committee has received from the public, or other topics suggested by interested organizations and individuals.

D. Organization and Composition:

1. **Legislative Branch Entity** -- As a standing committee of the Code Commission, the proposed Administrative Law Advisory Committee would be a legislative branch entity.
2. **Appointment and Terms** -- The members and chair of the Advisory Committee should be appointed by the Code Commission for two-year terms.
3. **Members** -- The Advisory Committee should have representatives from:
 - state agencies, including the Attorney General's Office and independent state agencies such as the State Corporation Commission;
 - the Office of the Executive Secretary of the Supreme Court of Virginia;
 - the regulated communities;
 - public interest groups;
 - local governments;
 - the bar; and
 - the academic community.
4. **Size** -- No particular number of members is recommended, but the size of the Advisory Committee should be sufficient to permit representation from the various groups of citizens listed above and to permit the Advisory Committee to appoint subcommittees to work on various research projects and supervise the consultants who are conducting research for the Advisory Committee.

E. Staff Assistance:

In order to perform its functions properly, the Advisory Committee will need staff support. Many of the functions of the Advisory Committee will be performed by the members themselves and by outside consultants, but staff support will be required as well. That staff support should be provided by the Division of Legislative Services, which is the agency that already provides support to the Code Commission. Any need for additional staff support can be monitored and controlled by the Code Commission through its approval of the Advisory Committee's annual workplan and through the number of projects the Code Commission delegates to or approves for the Advisory Committee.

F. Budget:

A modest increase in the annual budget of the Division of Legislative Services probably will be required to staff the Advisory Committee adequately. That increase is estimated to be:

\$40,000	--	staff position (including benefits)
20,000	--	research consultants
5,000	--	travel for Advisory Committee members
5,000	--	Biennial Conference
<u>5,000</u>	--	telephone, supplies, etc.
\$75,000	--	TOTAL

Respectfully submitted,

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Brian L. Buniva
Robert L. Calhoun
James N. Christman
Jean W. Cunningham
James C. Dimitri
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Philip A. Leone
Richard A. Merrill
E. M. Miller, Jr.
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Theodore V. Morrison, Jr.
Michael J. Quinan
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APPENDIX A

Senate Joint Resolution No. 236

1993 SESSION
ENGROSSED

SENATE JOINT RESOLUTION NO. 236

Senate Amendments in [] - February 2, 1993

Requesting the Virginia Bar Association to study the establishment of an Administrative Conference of Virginia.

Patrons—Calhoun, Benedetti, Gartlan, Holland, E.M., Howell, Russell and Woods; Delegates: Callahan, Murphy and Quillen

Referred to the Committee on Rules

WHEREAS, the performance of regulatory functions and related responsibilities for the determination of private rights and obligations by the executive departments and administrative agencies of the Commonwealth substantially affects large numbers of private individuals, local governments and many areas of economic and business activity; and

WHEREAS, it is essential to the protection of private and public interests and to the future growth and development of the Commonwealth that state administrative procedures ensure maximum efficiency and fairness in the performance of these governmental functions; and

WHEREAS, the increasing use of the administrative process over the past decade has been attended by concern over the efficiency and adequacy of department and agency procedures; and

[WHEREAS, the Joint Legislative Audit and Review Commission conducted a study of the Administrative Process Act, and found that there has been some confusion and problems in agency compliance with the Act's requirements; and

WHEREAS, the Joint Legislative Audit and Review Commission study indicated that there is a need for periodic review of the Act's provisions and for stronger oversight of agency compliance with the Act; and]

WHEREAS, the experience acquired by the Administrative Conference of the United States and similar efforts in several states demonstrates that substantial progress improving department and agency procedures can result from a cooperative effort by departments and agencies working with the private sector; now, therefore, be it

RESOLVED by the Senate, the House of Delegates concurring, That the Virginia Bar Association be requested to study the establishment of an Administrative Conference of Virginia. The study shall include an examination of all relevant issues, including the need for such a conference, the scope of its jurisdiction and membership and its relationship to the executive and judicial departments of the state government. In making this study, the Virginia Bar Association shall examine the experience and work of the Administrative Conference of the United States and entities performing similar functions in other states and shall consult with knowledgeable and interested persons in the academic and business community, environmental and consumer organizations and other interested persons. The Virginia Bar Association shall complete its work in time to submit its findings and recommendations to the Governor and the 1994 Session of the General Assembly as provided for in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents; and, be it

RESOLVED FURTHER, That the Clerk of the Senate prepare a copy of this resolution for transmittal to the President of the Virginia Bar Association, so that the Association may be apprised of the request of the General Assembly in this matter.

APPENDIX B

List of Committee Members

THE VIRGINIA BAR ASSOCIATION

VIRGINIA ADMINISTRATIVE CONFERENCE STUDY COMMITTEE

The Honorable James F. Almand
Member, House of Delegates
Arlington, VA

The Honorable Joseph V. Gartlan, Jr.
Member, Senate of Virginia
Mason Neck, VA

Professor Robert A. Anthony
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The Honorable Robert L. Calhoun
Member, Senate of Virginia
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(Chair)
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APPENDIX C

Presentation on the Administrative Conference of the United States

Professor Robert A. Anthony

June 1, 1993

For the Virginia Bar Association Committee to Study the
Establishment of an Administrative Conference in Virginia 6-1-93

The Administrative Conference of the United States
presented by Robert A. Anthony

Senator Calhoun's memo has given you an excellent summary description of the ACUS -- it catches the essence very nicely. And the materials from ACUS that Lane Kneedler has distributed to you are well chosen to flesh that out and give you some valuable detail -- more detail, actually, than I'll be able to present to you today. So I recommend that if you have time you take a look at these documents -- they're very informative.

As you know, major complaints about the high-handedness and inefficiency of agencies -- and sometimes, also about unfairness -- date back at least to the New Deal.

Efforts to get a handle on those problems and at least try to subdue them have included the Attorney General's Committee on Administrative Procedure of the late 1930's, whose work led to the federal APA of 1946, the Hoover Commission on Government Organization of the early 1950's, and two temporary conferences on administrative organization and procedure convened by President Eisenhower and by President Kennedy. My sense is that these groups were trying to play catch up -- maybe in some ways we still are --

but legislative and regulatory developments on the federal level ~~have~~ kept outrunning the ability of the reformers to rein them in. In any event, the perception kept growing that some effort should be made to confront this gargantuan sprawl of diverse agencies, with their erratic procedures, confusing organization and, sometimes, secret and arbitrary law.

The temporary Eisenhower and Kennedy conferences were just that -- ad hoc conferences of agency officials, private practitioners and academics -- modeled in part on the Judicial Conference of the United States. The second one was in fact called the Administrative Conference of the United States. Both Conferences made a number of general and specific recommendations, and each of them included a recommendation that the conference structure be made permanent. That was accomplished by the Administrative Conference Act of 1964. I understand that President Johnson was trying to get a combination of Jesus Christ and Superman to be the first chairman, and needless to say his search took a long time. It was 1968 before he appointed the first chairman, Jerre Williams of the University of Texas Law School, who is now a judge of the 5th Circuit. The Conference has been going strong ever since.

Now I'd like to tell you a little about how the Conference works. I don't do this in any spirit of suggesting that the format of the AC of the US is necessarily the most appropriate one for Virginia. I can't claim much specific knowledge of the administrative process in Virginia, but I do know that Virginia has a pretty well run

state government, and it is my impression that Virginia doesn't have problems on anything like the same scale as the Federal bureaucracy, and accordingly the mechanism to attack those problems probably doesn't need to be set up on the same scale as the AC of the US. Nevertheless, in my opinion the AC idea has proven to be a successful one, and I believe it is very much worth our while to consider whether the basic idea can be adapted to help improve the administrative process in Virginia.

The core of what the ACUS does is to identify problems and places where there is room for improvement in agency processes, and also in judicial review of agency actions -- and then to study and deliberate those issues and generate recommendations for improvement.

The way it does this is through the conference format. Suggestions for Conference study come from a variety of sources, and are evaluated by the Chairman and his staff. The Chairman is a full-time federal official, appointed by the President for a term of 5 years after confirmation by the Senate, and he has a staff of about 20 lawyers and support people. Besides the Chairman, there are 100 other members of the Conference, all part-time and unpaid. Ten are appointed by the President, and form a Council, which is a lot like a Board of Directors. The remainder are divided between government officials and so-called public members, who are from private life, typically lawyers in private practice, lawyers representing interest groups, and academic lawyers. These folks

serve pro bono. The government members must be the heads of agencies or the persons they designate. Typically, representatives of the Cabinet-level departments are general counsels or deputy general counsels, while representatives of the independent boards and commissions tend to include commissioners as well as general counsels. All of these members, other than those on the Council, are grouped in committees, which consider matters in their particular subject areas. The current committees of the Conference are Adjudication, Administration, Governmental Processes, Judicial Review, Regulation and Rulemaking. There is some information about them in the materials Lane has circulated to you.

The Chairman decides which topics to study, and assigns each project to one of the Committees. Usually the Chairman's office contracts with an established specialist in the field to prepare a report and to work with the committee to develop recommendations. Although these consulting contracts are by no means lucrative, the Conference has nevertheless been consistently successful in attracting distinguished scholars for this work. An excellent example is Dick Merrill, who has been a consultant to the Conference on more than one occasion, and indeed has been a member of the Conference as well. The high calibre of the consultants, equally with the high caliber and expertise of the members, has been a key ingredient in the Conference's success.

Here's how a project typically develops: The consultant meets with the Chairman, with the Research Director and other staff, and with

the relevant committee to get a good fix on the job to be done. Then the consultant drafts a report, based on his analysis not only of the law and agency practice but usually also a considerable amount of empirical research in the form of interviewing agency people and affected private parties and observing the process at work. The Committee reviews the draft report and meets with the consultant to suggest adjustments or further avenues of inquiry, and, as soon as it is practicable, to draft recommendations. Proposed recommendations are circulated in draft form to the affected agencies -- which sometimes will be all the agencies, as in the case of a generic proposal concerning rulemaking procedures or judicial review. The resulting agency comment, which often is quite voluminous, is considered at the next meeting by the committee and consultant. Frequently representatives of the agencies come to the Committee meetings to offer information and argument, as do representatives of trade associations and advocacy groups and other interested private persons. Usually all these folks get at least some chance to join in the discussion, along with members of the committee, Conference staff lawyers and the consultant. Speaking as someone who has been a Chairman, a Committee member and a consultant, I've seen a lot of these discussions, and they run the gamut from the trivial or pedestrian to those that truly penetrate the subject and generate valuable new ideas and practical solutions. Usually, I'd say, the Committee process works pretty well. The main problem over the years has been getting committee members to come to the meetings. One of my successors as Chairman attacked this problem by reducing the number

of committees so there'd be more members on each committee, and also by appointing a variety of senior fellows, liaison representatives and special counsels to take part in Conference deliberations without officially being members, with the result that committee and full conference meetings are correspondingly enriched.

At the end of this process -- which may take 6 months or a year or even more -- the Committee prepares final recommendations for consideration by the full membership of the Administrative Conference, which meets in plenary session twice a year, in June and December. Before the recommendations go to the Plenary Session, they are reviewed by the presidentially-appointed Council, which meets two or three times each spring and each fall, in preparation for the June and December plenary sessions. The Council gives the proposals a pretty thorough going over, although formally the Council may only comment on the proposals and may not prevent any proposal from going to the floor of the Plenary Session. In practice, a Committee usually will modify its proposal as a result of Council suggestions, though it doesn't have to. Once in a while the Committee will decide on the basis of Council reaction to pull its proposal back and rework it for submission at a later plenary session.

After the Council has reviewed all the proposals that are ready for a given plenary session, the staff sends the proposed recommendations to all Conference members, along with the

underlying reports and any statements of the Council's views, for the members to review and then act on at the Plenary Session.

I have just received the agenda and documents for the Conference's 48th Plenary Session, to be held next week. The program is scheduled to run from 1 to 5 Thursday afternoon and 9 to noon on Friday. [By the way, as always, there will be a cocktail and buffet reception on the Thursday evening -- a very cheerful and productive way to continue the deliberations of the day.] Here are the topics of the proposed recommendations, which represent a fairly typical spread of general and specific focus:

- * Use of APA Formal Procedures in Civil Money Penalty Proceedings

- * Administrative and Judicial Review of Prompt Corrective Action Decisions by Federal Banking Regulators

- * Improving the Environment for Agency Rulemaking

- * Peer Review in the Award of Discretionary Grants

- * Right to Consult with Counsel in Agency Investigations

In format, the plenary is somewhat like a legislative proceeding. The Conference Chairman presides. The hall seats about 180 people, in a semicircular arrangement. Copies of the proposed recommendations are placed on every seat. For each proposal, the committee chair and the consultant make a presentation of about 10 minutes. Then the matter is opened for discussion. This is not a rubber stamp process by any means. The members have thought about the proposals, and they can have quite a bit to say -- often points

about drafting or coverage, or suggestions by way of amplification or embellishment, but sometimes in opposition to some part of the Committee's proposal. These are real debates, sometimes very vigorous, and they are an essential part of the process of refining the recommendations and assuring that they're acceptable to most of the agencies and other interests represented on the floor. Robert's Rules of Order apply, and there is a standing resolution limiting how long individuals may speak, how debate on an item may be extended beyond the agenda time limit, and so forth. When an amendment or substitute is offered, the Committee may accept it. But if the Committee opposes it, the matter goes to a vote. I would guess that well over half of the proposals get amended on the floor in one way or another. Then the whole recommendation is voted on for adoption. It is relatively rare for a proposal to be rejected altogether, though I've seen Committees, in the face of adverse comment, withdraw their proposals for further consideration, and a few times I've seen the matter tabled or referred back to the Committee by vote of the full membership.

Proposals that are adopted become official recommendations of the Administrative Conference of the United States. The Chairman sends them with a pointed covering letter to all affected agencies and entities, and they are published in the Code of Federal Regulations. Recommendations may by statute be addressed to administrative agencies, to the President, to the Congress, and to the courts through the Judicial Conference of the United States. They do not have the force of law, and no specific sanction befalls

an agency that disregards one. But they are highly persuasive, and by and large they are well observed by the agencies. Often Congress incorporates them into statute law.

The Conference, especially through the Office of the Chairman, has responsibilities that go beyond the process of studying problems and generating formal recommendations. The recommendations form the foundation upon which many of those additional duties are based. Staff attorneys, and sometimes the Chairman himself, work actively with the agencies to get them to implement Conference recommendations. The Chairman and his staff are often called upon to furnish informal advice and consultation about administrative process to agencies, to the Executive Office of the President (especially OMB), and the Congress; the recommendations that the Conference has adopted over the years are the principal basis for this advice. The Conference staff is regularly called upon to advise agencies on implementing the procedural aspects of new legislation. Staff members are often called upon by both the Executive and the Congress to help draft legislation. The Chairman and Conference members frequently testify on the Hill on matters entailing administrative procedure and regulatory practice.

All of this activity reflects an asset of the Conference that is particularly pertinent to our discussion today -- namely, the fund of expertise built up in the membership and staff, who have a pretty good institutional memory and can use it to be very helpful in assuring good procedure.

In these ways, the Conference works informally to coordinate agency procedural operations and to help the agencies achieve consistency and good practice. Sometimes Congress imposes a specific responsibility on the Conference: in my day, for example, there were mandates to study taxpayer-related procedures of the IRS, to study the then-new rulemaking procedures of the FTC, and to advise the agencies on implementing the Government in the Sunshine Act. More recent examples include preparing model regulations for implementing the Equal Access to Justice Act, the Alternative Dispute Resolution Act and the Negotiated Rulemaking Act.

The Conference regularly proliferates its administrative expertise through colloquiums and training programs -- such as the annual seminars for Congressional staff and the quarterly seminars for agency general counsels. Once, when I was Chairman, we had a 3-day orientation program for the new chairs and commissioners of the independent regulatory agencies appointed by a new Administration. The Conference further spreads the word through publications -- such as its much-used sourcebook on administrative law, its manual for ALJs, its guidebooks for implementing the ADR and Reg Neg Acts, and several others.

In these ways, the central idea of a conference -- of interested experts conferring -- is complemented by an institutional continuity, an organism for thinking about all this stuff, that takes what the members as a conference have done and consolidates it, and tries to and assure that it is available to those who can

profit from it. The Conference is thus a resource for all of the Federal government and those who deal with it. I believe the people of the country are at least a little bit better off as a result.

APPENDIX D

Administrative Review at the Federal Level

Roger G. Bowers

August 27, 1993

MEMORANDUM

TO: VBA Committee to Study the Establishment of an
Administrative Conference in Virginia

FROM: Roger G. Bowers, Staff

DATE: August 27, 1993

RE: Administrative Review at the Federal Level

This report seeks to identify the entities involved in federal administrative process review, and to discuss their interaction in order to better understand the role of the Administrative Conference of the United States ("ACUS"). The report then looks closely at the role of ACUS, as it is the only agency charged specifically with review of administrative process. The model ACUS provides for an administrative conference which will be critiqued in light of recent public debate concerning funding for ACUS. Reference will be made in footnotes to the materials provided in the Committee's notebook and subsequent informational package.¹

Federal Administrative Review

The standard avenues for the review of administrative process on the federal level occurs through: 1) in-house review, by the agencies themselves; 2) when a case or controversy arises, by the appropriate courts; 3) when reauthorization arises or revision is warranted, by the legislature; or, 4) when agency-wide review is requested, by ACUS. The first and second categories, specific agency in-house review and judicial review of administrative procedure, are not discussed herein. The third category is accomplished by the General Accounting Office ("GAO"). As the investigative arm of Congress, the GAO has an extensive role in the review of legislation before Congress, but has a very little ongoing role in administrative review.² After legislation is passed, the Office of Management and Budget ("OMB") has an extensive role in the review of the promulgation

¹ Further information is available from ACUS, and in an article entitled "Administrative Conference of the United States: A Bibliography 1968-1991", included at Tab #12 of the Notebook provided to Committee members, dated June 1, 1993.

² The United States Government Manual, Legislative Branch, General Accounting Office.

of proposed and final agency regulations. OMB is charged with evaluating, formulating, and coordinating management procedures and program objectives within and among federal departments and agencies.³ Under executive order of the President, the OMB reviews all regulatory activity, and recommends presidential review of political and policy level changes. It is ACUS that has been given as its primary mission the mandate to review and recommend changes to existing administrative process problems.⁴ This report will investigate the fourth category at length below.

Administrative Conference of the United States

During its twenty five years, ACUS has reviewed numerous types of administrative process issues, as best demonstrated by the diverse topics covered by its recommendations.⁵ As discussed at length in materials provided⁶ and Professor Anthony's presentation to the Committee⁷, the Administrative Conference was originally conceived to "coordinate policies in transportation, communication and energy in order to step up the pace of economic growth, and develop and implement effective national policies."⁸ Several temporary administrative review conferences preceded ACUS, each calling for a permanent body to be enacted by

³ The United States Government Manual, Executive Office of the President, Office of Management and Budget.

⁴ 5 U.S.C.A. § 591, included at Tab #12 of the Notebook provided to Committee members, dated June 1, 1993.

⁵ 1 CFR Part 305, "Recommendations of the Administrative Conference of the United States", included at Tab #14 of the Notebook provided to Committee members, dated June 1, 1993.

⁶ ACUS General Information Flyer, included at Tab #6 of the Notebook provided to Committee members, dated June 1, 1993; Marshall J. Breger, "The Administrative Conference of the United States: A Quarter Century Perspective", 53 UNIVERSITY OF PITTSBURGH LAW REVIEW 813 (1992), included in package sent to Committee members with memorandum entitled Additional Materials from June 1 Organizational Meeting, dated June 23, 1993.

⁷ Presentation by Robert A. Anthony, included in package sent to Committee members with memorandum entitled Additional Materials from June 1 Organizational Meeting, dated June 23, 1993.

⁸ Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 86th Cong., 2d Sess., Report on Regulatory Agencies to the President-Elect (Comm. Print 1960).

statute.⁹ ACUS was envisioned as "a mechanism for self-policing on the part of the administrative agencies, with enough outside initiative and influence to assure objectivity."¹⁰

ACUS was enacted as a cost cutting measure. "The basic objective of the Administrative Conference will be to cut down on the time and cost of administrative procedures and at the same time, to preserve the necessary elements of due process of law."¹¹ When then President Kennedy proposed an administrative conference, public response was positive. The *Wall Street Journal* declared that "[t]he headless 'fourth branch of Government' may soon grow a head."¹² Interestingly, ACUS was given no power to mandate agency action, instead the implementation role was limited to a purely advisory status.¹³ According to sources in the Kennedy administration, the authorizing legislation was purposefully silent on ACUS's ability to require agency implementation of its recommendations. This development was in response to criticism that the ACUS Chairman could become a "czar" or "super administrator."¹⁴ In practice, this problem has not been experienced, and ACUS has been very successful. In his article Mr. Breger discusses the impact of ACUS by providing ten pages of examples of administrative law improvements, stating that ACUS has had "significant effect on the workings of the federal government."¹⁵

As presently operating, ACUS holds a dual role, primarily that of a forum for debating administrative process¹⁶, but also through its staff, a secondary role assisting agencies in implementing recommendations and reviewing administrative

⁹ Breger, at p. 818.

¹⁰ *Id.*

¹¹ Senate Committee on the Judiciary, 88th Cong., 1st Sess., Providing for Continuous Improvement of the Administrative Procedure of Federal Agencies by Creating an Administrative Conference of the United States (Report No. 621).

¹² Breger, at 818.

¹³ *Id.* at 829.

¹⁴ *Id.* at 830.

¹⁵ *Id.* at 831.

¹⁶ Summarized in ACUS 1992 Annual Report, pp. 5-18, included at Tab #7 of the Notebook provided to Committee members, dated June 1, 1993.

process.¹⁷ ACUS has reporting functions under the Equal Access to Justice Act,¹⁸ The Negotiated Rulemaking Act,¹⁹ and concerning use of alternative dispute resolution in federal agencies.²⁰ Functionally, ACUS has a full time staff of 22 persons, an uncompensated Assembly consisting of 101 persons with a majority filled by agency heads or their appointees, and contracts with independent research consultants. In the 1992-93 fiscal year ACUS had Congressional funding of 2.3 million dollars, and \$133,000 of funding sources from other federal agencies.²¹

The Administrative Conference's Future

In the proposed 1993-94 federal budget process, ACUS requested an appropriation of \$2.3 million, similar to the previous year. However, funding for ACUS was cut to zero in the House, and by 22%, to \$1.8 million in the Senate. The final appropriation is as yet undetermined, but will be settled by the House-Senate Conference Committee shortly after Congress returns in September.²² Influential and bipartisan support for ACUS has been sounded in both halls of Congress, as well as strong White House backing. However, ACUS has no natural constituency, and a public prediction of the final funding amount is uncertain.²³

It has been widely reported that the demise of ACUS funding in the House is attributed to aggressive action by representatives of national organizations of federal administrative law judges, angered by an ACUS recommendation concerning administrative law judges.²⁴ ACUS officials have characterized this action as a "vendetta by a coterie of

¹⁷ Summarized in ACUS 1992 Annual Report, pp. 19-28, included at Tab #7 of the Notebook provided to Committee members, dated June 1, 1993.

¹⁸ 5 U.S.C. § 504(e) (1988).

¹⁹ 5 U.S.C. § 589(d)(3) (1990).

²⁰ Breger, at 828.

²¹ Summarized in ACUS 1992 Annual Report, p. 29, Appendices C and D, included at Tab #7 of the Notebook provided to Committee members, dated June 1, 1993.

²² 60 FCR 6 d13, August 9, 1993.

²³ 60 FCR 7 d8, August 16, 1993.

²⁴ Michael S. Arnold, staffwriter, "Agency's Controversial Report May Have Doomed It", The Washington Post, Federal Page, p. 21, Final Edition, July 1, 1993.

administrative law judges jealously guarding their professional status."²⁵ Various administrative law judges responded that while "public debate among experts regarding issues of administrative law could be fruitful," the ACUS report was done by "a hand-picked quartet of academics with little direct experience in administrative litigation, relying on ancient data, [who] produced a lengthy report proposing fundamental changes" without in-depth review.²⁶

Comments on the ACUS Model of an Administrative Conference

Obviously political rhetoric has clouded the issue concerning the specific ACUS recommendation regarding administrative law judges, however several results of the debate are of interest. First, the administrative law judges have argued that the conference is controlled by agency administrators to the detriment of those who must maintain independence from direct agency management (in other words, administrative law judges).²⁷ Considering the statutorily mandated majority of the ACUS Assembly, this may be a legitimate criticism. It has been suggested that ACUS has an institutional bias on matters in which the executive branch agencies have a special interest.²⁸ In developing an administrative conference model, care should be given as to whether agency personnel should hold a majority of the votes, as they do in ACUS.

Second, the House Appropriations Committee was able to partially justify its scorn for recent ACUS work by revealing that the ACUS Assembly has failed to convene even a quorum for several of its recent bi-annual gatherings. This lack of participation by ACUS Assembly members draws into question ACUS' success in using volunteer participation. The administrative conference model depends upon the broad spectrum of views that a diverse assembly can bring to administrative process problems in order to develop universal solutions. If over half of the members of the body are absent, wide-reaching and disparate debate will always be lacking. Because of the voluntary membership, the model can fail to provide recommendations based upon universal input and experience.

²⁵ Id.

²⁶ "Conference That Deserves the Ax", The Washington Post, Letter to the Editor, p. 26, Final Edition, August 12, 1993.

²⁷ Id.

²⁸ "Administrative Conference: Invitation to Cronyism", The Washington Post, Letter to the Editor, p. 16, Final Edition, August 3, 1993.

Looking at larger implications of the current ACUS budget struggle, the fact that ACUS is threatened so easily, and so completely, is also a consequence of its independence and lack of authority. ACUS's presence as a single line item of the federal budget, and its lack of mandated duties, has made it very easy to cut. Its independent-observer status means that it has much less direct responsibility on a day-to-day basis. With the exception of ACUS's role in Vice President Gore's National Performance Review, there are few direct responsibilities demanding that ACUS remain.

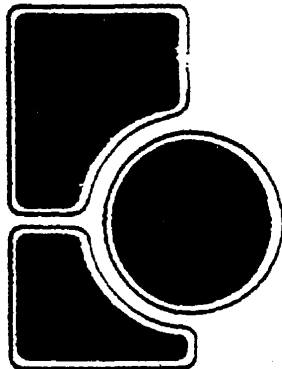
Thus, the current federal debate has centered upon whether ACUS's mission is complete. The opposition to ACUS states that the agency's work is finished; the supporters state that administrative process will always need independent study in order to continually improve. The resolution of this question may help shape the Committee's position concerning a Virginia Administrative Conference. For our purposes, this debate is very timely. Although it operates on a much larger scale, the ACUS model of an administrative conference is the sole operating model. Even its critics recognize that the substantive mission of ACUS, to foster public debate among experts regarding issues of administrative law, is needed. It is possible that the information provided by this recent public debate concerning potential ACUS procedural flaws could be used to develop a more successful model for an administrative conference.

APPENDIX E

Summary of Joint Legislative Audit and Review Commission's Study of the Virginia Administrative Process Act

Robert B. Rotz

June 1, 1993



**Joint Legislative Audit
and Review Commission**

**JLARC Review of Virginia's
Administrative Process Act:
The Need for Oversight
and Accountability**

**Presentation to the
Virginia Bar Association's Committee
to Study the Establishment of
an Administrative Conference**

Robert B. Rotz, Division Chief

June 1, 1993

Study Mandate

- **HJR 397 (1991 Session) requested JLARC study of whether amendments are necessary to VAPA, the Act which governs rulemaking and case decision proceedings of State agencies in Virginia**
- **JLARC is an oversight agency for the Virginia General Assembly:**
 - **Commission composed of 14 General Assembly members**
 - **full-time research staff**
- **Mandate for VAPA study raised issues of:**
 - **efficiency**
 - **effectiveness**
 - **meaningfulness of public participation**
- **Final report briefed in October 1992**
- **Study resulted in two bills, an omnibus bill and an executive/legislative suspension bill (both passed during the 1993 Session)**



Research Process

- **JLARC study team formed to conduct research**
- **Research activities included:**
 - **Structured interviews with Registrar of Regulations, staff of the Attorney General's Office, staff of State agencies, and others**
 - **Document reviews, including the Model State APA and State Administrative Rulemaking (Bonfield)**
 - **Mail surveys to all 136 local governments, to 426 Virginia business, professional, trade, and civic associations, and to members of the Virginia State Bar or VBA administrative law sections**
 - **Analysis of rulemaking timeframes**
 - **A comparison of agency public participation guidelines (PPGs)**
 - **A data analysis of public participation and changes to proposed regulations**
 - **An analysis of agency statements on the basis, purpose, substance, issues, and impact of their regulations**



Subcommittee Process

- **A subcommittee of JLARC was formed to receive public input and consider the policy implications of JLARC staff work during the course of the review**
- **The subcommittee held a public hearing and conducted several meetings to consider research findings and obtain public input**
- **The subcommittee developed the omnibus bill to address most issues, and a separate bill to provide an executive/legislative suspension of regulations**



Local Government and Association Survey Findings

- **Local governments and associations believe that agency information on the costs and benefits of their regulations is inadequate**
- **Local government and association confidence levels that agencies consider public input could be higher**



Administrative Law Attorney Survey Findings

- **In general, the attorneys had more positive than negative opinions about their overall experience with case decision processes**
- **However, many had particular instances or issues of concern, many of which centered around possible bias in decisions and the timeliness of decisions**



Key Overall Study Findings

- **There were VAPA compliance problems which until recently included the lack of an executive order for regulatory review**
- **VAPA's effectiveness has been limited for other reasons as well:**
 - **it frequently does not apply**
 - **its requirements are limited**
 - **more could be done by agencies to facilitate meaningful public participation**
- **There were accountability concerns:**
 - **public commenters lack confidence that agencies consider comments**
 - **elected officials have lacked a formal mechanism to halt a regulation except by statute**
 - **there is a lack of adequate mechanisms to ensure agency compliance**
 - **agencies have substantial power in case decisions that can be abused**
 - **judicial review tends to be deferential to agencies**



Summary of Key Compliance Problems

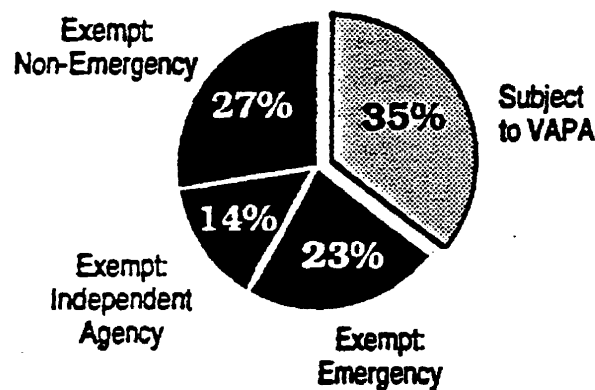
- **Executive order not published for first three years of the administration**
- **Timeframe and publication requirements are not always met**
- **Agencies are not providing estimates of regulatory impact as required by VAPA**
- **Agencies do a poor job of implementing the requirement to describe the "basis, purpose, substance, issues" of their regulations**



Effectiveness Issues: VAPA Frequently Does Not Apply

- **VAPA applied to a minority of promulgated regulations in 1990-91**

Proportion of Regulations Subject to and Exempt from VAPA During 1990-91 Regulatory Year



- **Areas of concern with regard to VAPA exemptions include total agency exemptions and the high use of emergency regulations**



Effectiveness Issues: VAPA Requirements Are Limited

- **Key procedural requirements of VAPA are fairly limited in scope and appear reasonable**
- **There are areas in which VAPA and agency PPGs may not have required enough in the past to adequately promote public participation or achieve other goals**
- **The JLARC study report and the omnibus APA bill addressed a number of these areas:**
 - **petitioning for rulemaking**
 - **tightened standards for NOIRA comment period**
 - **petitioning to compel public hearing**
 - **opportunity for additional comment if changes with substantial comments are made**
 - **consistent opportunity for informal fact finding**
 - **opportunity for participants in prior case decision proceedings to respond to subsequent summaries prepared for boards or commissions**



Accountability Issues: Public Confidence

Virginia Association and Local Government Confidence Levels Concerning the Consideration of Public Comment by Agencies

Statement: *"When we provide oral or written comments, I have confidence that the State regulatory agency will give the comments careful consideration."*

<u>Response</u>	<u>Associations (Percent)</u>	<u>Local Governments (Percent)</u>
Strongly Agree	4	0
Agree	50	33
Disagree	28	53
Strongly Disagree	18	14

Virginia Association and Local Government Confidence Levels Concerning the Impact of Public Comment on Proposed Regulations

Statement: *"I have confidence that State regulatory agencies will change the content of their proposed regulations if the public comment period produces sound reasons for change."*

<u>Response</u>	<u>Associations (Percent)</u>	<u>Local Governments (Percent)</u>
Strongly Agree	3	1
Agree	52	27
Disagree	33	61
Strongly Disagree	12	11



Accountability Issues: Role of Elected Officials

VAPA did not provide a mechanism for elected officials to suspend a regulation

The *Chadha* decision of the U.S. Supreme Court has been influential, but does not directly address and settle the constitutionality of the legislative veto at the State level

Further, *Chadha* addresses a pure legislative veto, not a joint executive/legislative suspension

Seventeen states were found to provide for a suspension of regulations until the legislature can meet to consider a statute

The JLARC APA subcommittee supported a joint executive/legislative suspension bill that was passed during the 1993 Session



The Need for Ongoing Oversight and Accountability

- **The following entities have varying levels of responsibility for promoting compliance with VAPA requirements:**
 - **Agency directors, regulatory coordinators**
 - **The Office of the Attorney General and the Department of Planning and Budget**
 - **Cabinet secretaries**
 - **The Governor**
 - **The Registrar of Regulations and the Code Commission**
 - **The judicial branch, which can review the "observance of required procedure where any failure therein is not mere harmless error" (§9-6.14:17)**
- **Yet for a variety of reasons (lack of awareness of rules, the desire to act quickly, lack of resources or unwillingness to do the work required, disinterest in public participation), agencies continue to ignore or implement poorly some provisions of the Act**
- **Also for a variety of reasons (lack of time, resources, or attention due to competing priorities), entities that help promote compliance are still not able to secure compliance in many cases**



Potential Activities to Promote Compliance and Accountability

- **JLARC is required to "conduct a review periodically of exemptions and exclusions" to the APA, "to assess whether there are any exemptions or exclusions which should be discontinued or modified"**
- **Other activities which would be useful that an administrative conference might perform include:**
 - **periodic surveys of local governments, associations, or others who comment on agency rulemaking, to find out areas of greatest concern regarding agency implementation of requirements**
 - **collection and analysis of information from the Register of Regulations, to see if rulemaking timeframe requirements are being met**
 - **assessment of agency compliance in providing adequate information on the purpose, substance, issues, and impact of their regulations**
 - **periodic surveys of administrative law attorneys who practice before agencies, to get feedback on case decision process concerns**
 - **more detailed assessments of agency case decision practices**
 - **consultation with agencies on compliance concerns and suggestions for improvement**
 - **consultation with Code Commission and Registrar of Regulations on suggestions for the Virginia Register or the newly established Code of Regulations**



Example of Current Issue: Filing Requirements

- **Since 1973, the Virginia Register Act has required agencies to "file with the Registrar the full text of all its currently operative regulations...where agencies adopt textual matter by reference to publications other than the Federal Register or Code of Federal Regulations, the agency shall (i) file with the Registrar copies of such referred publications."**
- **To make regulatory law accessible to the public in the form of a regulatory code, SB 639 from the 1993 Session requires agencies "to file all regulations and other statements having the force of law" with the Registrar**
- **Some state agencies indicate that the Registrar's office will be overwhelmed with material**
- **There is confusion as to what must now be filed pursuant to SB 639 and what does not have to be filed**
- **A whole set of issues have been raised by an agency around the necessity to file matters adopted by reference with the Registrar, as apparently this 20-year filing requirement was more honored in the breach than in the observance by some agencies**
- **In this situation, it would be useful to have access to a resource that could help assess options for the implementation of the requirements, such as an Administrative Conference**



APPENDIX F

Survey of State Agencies

Study Committee Staff

August 31, 1993

STAFF REPORT ON CURRENT ACTORS IN THE STATE'S ADMINISTRATIVE PROCESSES

This staff report consists of two components. The first component, from pages 2 to 8, is an outline of the various advisory or review roles performed by current actors regarding certain administrative process matters. The actors discussed include: the Governor/Governor's Office/Cabinet Secretaries; the Department of Planning and Budget; agency regulatory coordinators; the Attorney General's Office; the Virginia Code Commission; the Registrar of Regulations; the Division of Legislative Services; General Assembly committees; the Joint Legislative Audit and Review Commission; and the administrative law committees of the Virginia State Bar and Virginia Bar Association.

The second component, from pages 9 to 17, consists of the results from a survey of selected State agencies. The purpose of the survey was to obtain the views of State agencies on the idea of establishing an administrative conference in Virginia. Nineteen of the twenty-two agencies surveyed responded to the survey. Their responses indicate the potential benefits and concerns that they see relating to the establishment of such a conference.

Part One: Advisory or Review Roles Performed by Current Actors Regarding
Certain Administrative Process Matters

A. The Governor / Governor's Office / Cabinet Secretaries

- The *Code of Virginia* requires that the Governor:
 - adopt and publish procedures by executive order for the review of all proposed regulations;
 - examine proposed regulations to determine if they are necessary to protect the public health, safety and welfare;
 - examine the proposed regulation to see if it is clearly written and is understandable;
 - transmit comments on the proposed regulation to the Registrar and the agency prior to completion of the public comment period; and
 - mandate through executive order a procedure for the periodic review of existing regulations.
- Also, the *Code of Virginia* provides that the Governor may:
 - file a formal objection to a regulation, necessitating an agency response;
 - require an agency to provide an additional thirty days for public comment if one or more changes with a substantial impact are made to a proposed regulation;
 - suspend a regulation until the end of the next legislative session, through joint action with majority of each of the legislative standing committees; and
 - approve emergency regulations that are necessitated by an emergency situation.
- The Governor's policy office is responsible for carrying out the review of proposed regulations:
 - policy office has three full-time staff
 - regulation review is one of many duties
 - sometimes materials are submitted late for the Governor's review

- The Cabinet secretaries also have a role in the regulatory review process:
 - executive order requires that agency heads meet with the appropriate Secretary on all proposed regulations before they are submitted, and ensure that they are reasonable and necessary;
 - the Secretary is to issue a "Statement of Assurance" to the Governor's Office that the regulation is "reasonable, necessary, and in his discretion, absolutely essential to achieve the required objective."

B. The Department of Planning and Budget

- The Department of Planning and Budget (DPB) is an executive agency responsible for:
 - developing and administering the executive budget;
 - providing planning, budgeting, research and staff support to the Governor and the Secretaries;
 - analyzing federal actions and programs; and
 - conducting policy analyses, special studies and evaluations.
- In its role of providing staff support, DPB works closely with the Secretaries and the Governor in reviewing regulations proposed by state agencies.
- DPB's role in the executive review of regulations is set forth in Executive Order Number Twenty-Three (90)(Revised), and includes:
 - a review of the proposed regulation and the regulatory package during the Notice of Comment Period, focusing on the substantive fiscal, policy, or program implications of the regulation;
 - the preparation of comments for the Secretary and the Governor's Office based on this review of the proposed regulation; and
 - a review and preparation of comments for the Secretary and the Governor's Office on the final regulation and regulatory package, including a review of public, executive, and Attorney General's Office comment, and a comparison of the final regulation with the proposed regulation.

C. Agency Regulatory Coordinators

- While agency directors are ultimately accountable for ensuring that mandated requirements are met, the Governor's executive order requires that each agency appoint a regulatory coordinator to oversee regulation development.
- Regulatory coordinators:
 - are to be knowledgeable of the requirements of the APA and the Register Act; the Governor's objectives for regulatory preparation and review; the agency's public participation guidelines (PPGs); and the content of the Code Commission's regulations and the *Register Manual*
 - conduct quality-control reviews of proposed regulations and regulatory review packages
 - serve as the agency liaison with the Registrar of Regulations
 - verify that regulation documents submitted for filing and publication in the *Register* are processed properly and are correct in format and content
 - proofread documents published in the *Register* to ensure correct publication, and file errata sheets when necessary

D. The Attorney General's Office

Regulations

- The only duty of the Attorney General's Office specified in the APA is to review - following procedures established by the Governor - proposed regulations to ensure statutory authority. §9-6.14:9.1(A) of the *Code*. See also EO 23 (90), Part I (B)(1)(c).
- The Governor has required agencies to obtain another such review as to final regulations if any changes are made from the proposed regulations. See EO 23 (90), Part I (D)(1).
- In practice, the Governor has required agencies to obtain such a review prior to his approval of emergency regulations as well.
- The major role of the Attorney General's Office in this area consists of counseling agencies before, during and after the regulatory process regarding all aspects of proposed and final regulations. This includes, depending on the needs and wishes of the agencies, assistance in drafting, reviewing and revising regulations at all stages of the regulatory process.

- The Attorney General's Office defends litigation challenging any aspect of the validity or application of a regulation adopted and enforced by an agency.

Case Decisions

- The Attorney General's Office provides counsel to agencies which are making case decisions.
- The Attorney General's Office presents the agency's case to hearing officers and/or agency decision-makers in some, but not all, proceedings held under §9-6.14:11 and formal hearings held under §9-6.14:12.
- The Attorney General's Office defends litigation challenging agency case decisions.

General

- The Attorney General's Office maintains an internal Committee which coordinates advice and litigation activities and reviews and comments on proposed legislation relating to the APA and administrative issues generally.
- The Attorney General's Office provides training to agency personnel in various phases of administrative practice and procedures.

E. The Virginia Code Commission

- The Virginia Code Commission is a legislative agency composed of ten members (the Attorney General and the Director of the Division of Legislative Services serve as members ex officio):
 - two members of the Senate of Virginia;
 - two members of the House of Delegates;
 - two circuit court judges (retired or inactive);
 - one former member of the Senate of Virginia;
 - one former member of the House of Delegates;
 - the Attorney General or his designee;
 - the Director of the Division of Legislative Services.

- The Commission's statutory duties include:
 - compiling and maintaining the Administrative Law Appendix, the Virginia Administrative Code and the Virginia Register;
 - publishing and maintaining the *Code of Virginia* and the Administrative Code; and
 - monitoring the operation of the Administrative Process Act and the Virginia Register to ensure that those laws provide the most practical means to administrative agencies for the promulgation, amendment and repeal of administrative law within the confines of those agency's powers conferred by the General Assembly.

F. The Registrar of Regulations

- Appointed by the Virginia Code Commission to satisfy the need for public availability of information
- Responsible for publishing the Virginia Register of Regulations and issues Form, Style and Procedure Manual to assist administrative agencies in their rulemaking operation
- Responsible for distributing the Virginia Register to each public library system in Virginia, the Governor, the Lieutenant Governor, and, upon request, to the Code Commission, the Attorney General, and General Assembly members

G. The Division of Legislative Services (DLS)

- Primary responsibilities include:
 - legislative, legal and general research services to the General Assembly and the Virginia Code Commission;
 - legal and research support and policy analysis to standing committees and interim study committee and commissions;
 - bill drafting;
 - depository for state agency regulations;
 - publication of the Virginia Register; and
 - various legislative publications.
- APA-related responsibilities include a review of the summary of regulatory action prepared by administrative agencies, to determine if it accurately represents the substance of the regulation

H. General Assembly Committees

- Applicable standing committees of either house of the General Assembly may file an objection to a proposed or final regulation prior to its becoming effective:
 - within 21 days after receiving objection, agency must file response with Registrar, the objecting committee, and the Governor
 - unless withdrawn by agency, regulation becomes effective on a date specified by the agency but after the 21-day extension period is complete
- Changes to the APA in 1993 also empower both of the applicable standing committees, acting jointly with the Governor, to suspend a regulation's effective date until the end of the next legislative session:
 - suspension statement signed by Governor and majority of members of each of the standing committees
 - purpose is to allow for consideration as to whether statutory action is needed at next session

I. The Joint Legislative Audit and Review Commission (JLARC)

- JLARC is an oversight agency for the Virginia General Assembly
 - Commission composed of 14 General Assembly members
 - full-time research staff
- JLARC staff perform research on a variety of topics as determined and directed by the General Assembly. Examples of studies include:
 - organization and management reviews of agencies;
 - evaluations of programs;
 - studies of State funding formulas; and
 - studies of intergovernmental mandates and relations.
- Occasionally JLARC is designated to perform a study that specifically relates to the administrative process or regulatory matters. For example:
 - a 1982 report addressed the occupational and professional regulatory system in Virginia

- a 1993 report addressed the Administrative Process Act
- Recent changes to the APA require that JLARC conduct a review periodically of the exemptions and exclusions in §9-6.14:4.1 of the APA, "to address whether there are any exemptions or exclusions which should be discontinued or modified."
- In the future, the extent to which JLARC conducts other types of reviews of administrative process or regulatory issues is dependent upon the needs and the direction of the General Assembly.

J. Administrative Law Committees of the Virginia State Bar and Virginia Bar Association

- Both the Virginia State Bar and the Virginia Bar Association have administrative law sections.
- As of the Spring of 1992, the Virginia State Bar's administrative law section had 254 members; the Virginia Bar Association's section had 39 members.
- Some members of the administrative law sections predominately practice before agencies whose procedures are covered by the Virginia APA. Other members predominantly practice before the State Corporation Commission or at the federal level.
- The Virginia State Bar, the Virginia Bar Association, and their administrative law sections are asked from time to time to study, or provide their views and recommendations on, administrative law matters.
- The administrative law sections also work at their own initiative on some administrative law issues. For example, representatives of the sections have worked on issues such as the need for an administrative code, or the need for a centralized administrative law judge system for case decisions.
- Limitations of the sections to performing the role that an administrative conference might perform include that there are no specifically devoted staff resources, the sections are dependent upon volunteer energy and meet on a limited basis, and the sectional viewpoints are reflective of only the legal community's perspective.

Part Two: Survey of State Agencies on Establishing an Administrative Conference

Twenty-two State agencies were surveyed to obtain their initial reaction to, and input on, the idea of establishing an administrative conference in Virginia. Nineteen responses were received, for a response rate of 86 percent. The agencies which responded included: Agriculture, Alcoholic Beverage Control, Council on Child Day Care, Criminal Justice Services, Environmental Quality, Health Professions, Health Services Cost Review Council, Housing and Community Development, Labor and Industry, State Library, Medical Assistance Services, Motor Vehicles, Planning and Budget, Professional and Occupational Regulation, Racing Commission, State Police, Social Services, Taxation, and Transportation.

Summary of Results

The agencies were asked four questions on the survey. Three of the questions required the respondent to checkmark a box indicating the respondent's point of view.

Respondents were asked if they think that an administrative conference could perform a beneficial role, if established in Virginia.

The results were:	13	Yes	(72%)
	3	No	(17%)
	2	Undecided	(11%)

(N=18)

The respondents were asked if there were areas in which they thought that the establishment of an administrative conference could be detrimental.

The results were:	15	Yes	(79%)
	4	No	(21%)

(N=19)

The respondents were also asked if, overall, they favored the establishment of an administrative conference, balancing the potential benefits and concerns.

The results were:	9	Yes	(50%)
	3	No	(17%)
	6	Undecided	(33%)

(N=18)

Comments from Survey Respondents

The following material is a compilation of actual comments made by the survey respondents in addressing the survey questions.

Beneficial role of a Virginia Administrative Conference?

The conference could serve as a liaison between private business, concerned citizens, and state agencies.

I am not completely clear on the scope of the review of an Administrative Conference. However, it would appear to be helpful to have an outside, constructively critical review of this system, given the fact there is continuing concern about public accountability in the promulgation of regulations.

As has been apparent during the last General Assembly Session, there have been many bills submitted by members regarding the APA that either conflict or have not been given a thorough review for practical consequences before passage. The creation of an administrative conference would allow any entity to study current APA practices and related issues in a more productive and informed environment. A central body would greatly assist in providing a consistent flow of information to impacted agencies encouraging better compliance.

Conference could provide a forum for public participants involved in the process to identify perceived difficulties in obtaining redress. The conference could also allow regulatory agencies an opportunity to express their concerns with requirements and provide suggestions for improvement of promulgation and amendment of regulations. Such a conference could provide a liaison / education role to both those regulated and those administering and promulgating regulations.

Currently there is no open forum that effectively permits an exchange of information.

This would be an opportunity to bring together all the players, with their different viewpoints to discuss relevant issues and hopefully reach consensus on how to deal with those issues. It would hopefully create an ongoing forum different from a JLARC study that there would be an openness for new ideas and we would not be protecting our individual turfs.

This is an executive function and should not be delegated to an outside entity for oversight. These responsibilities reside with the Governor and his cabinet. Oversight and management of compliance with administrative processes and the

assessment of their appropriateness should be the primary duty of the Secretary of Administration.

Many of the citizens who must comply with the regulations we establish don't understand and never have the opportunity to influence the processes we use. The APA is too important to the quality of our government not to have a broadly representative group of citizens, lawmakers, and agencies influencing it in an environment which isn't as hectic as a General Assembly session.

We understand the need for efficiencies, compliance, and oversight, but would prefer to get the private sector more involved in the structure and process that already exists. If the APA and the Office of the Registrar of Regulations needs improvement, concentrate on them.

As pointed out by Senate Joint Resolution 236, administrative policy making and administrative decision making affects large numbers of individuals in the Commonwealth. Many are never represented by legal counsel in their dealings with state agencies. Administrative processes should be both fair and thorough to all. On the other side, however, state agencies have a need for the processes to be efficient and reasonably expeditious. An administrative conference would be an honest forum where these sometimes competing interests could be weighed.

The administrative process is an important link and partnership between state agencies and commissions with citizens and regulated entities. An administrative conference would provide an opportunity for these groups to have a direct influence on the administrative process. As a result, we would have a process that better serves all involved. Communication to the legislative branch of needed changes to the Administrative Process Act and related Titles would also be enhanced.

Although the suggested mission is laudable, an administrative conference appears to be unnecessary and would likely duplicate other recent efforts that are designed to improve Virginia's regulatory processes.

Specifically, the recent JLARC study identified problems in the regulatory process and made recommendations that resulted in significant changes to the APA. Those changes have strengthened the public participation requirements and increased executive and legislative oversight. JLARC may, from time to time, wish to review Virginia's regulatory process to determine if its recommendations are being carried out by state agencies, and if additional modifications should be made.

Also, the recent Executive Order expands the Secretary's oversight, by requiring that the Secretary affirm that proposed regulations are absolutely necessary to protect the public's health, safety and welfare.

If the administrative conference assumes a role similar to that at the federal level, it may be helpful in improving/simplifying administrative procedures for agencies promulgating administrative rules/regulations.

There is always benefit in looking at how well we are doing business - the question is - what happens to the outcomes of that review? My answer is thus: it depends!

The goal of the federal Administrative Conference, to provide a forum for the discussion and study of administrative procedures, is laudable. However, the Department has insufficient knowledge of the federal Administrative Conference to gauge its effectiveness and determine whether this is a concept that can be successfully replicated at the state level.

Additionally, the Department is not clear as to the direction a Virginia Administrative Conference would take. If the Administrative Conference is limited to the regulatory area then any input from the public in the regulation promulgation area would be helpful. If the Administrative Conference is intended to affect the internal administrative operations of the Department and/or affect the environment in which it operates, the Department has numerous concerns.

The Administrative Conference could provide a continuous, systematic review of the Administrative process throughout the Commonwealth. This group could also provide sound recommendations to the General Assembly for improving the Administrative Process Act and the Virginia Register Act (APA/VRA).

In addition, the group could develop a standardized process for rulemaking applicable to all State agencies. Continuous interaction of State agencies, in conjunction with an Administrative Conference, could naturally lead to a more uniform approach to rulemaking by the various State agencies. A standardized approach to rulemaking would, in turn, aid both the general public and the regulated communities by permitting interested parties to spend less time learning the different processes to rulemaking taken by individual agencies. Instead, they could focus more time on the development of substantive comments concerning proposed rules.

The Administrative Conference could also perform routine studies similar to the "Review of Virginia's Administrative Process Act" recently conducted by the Joint Legislative Audit and Review Commission (JLARC). As a result, improvements in the quality and responsiveness of the administrative process could occur on a continuous basis. Beneficial studies of this type could independently corroborate the findings of earlier studies, or substitute for future JLARC analyses.

The conference could maintain lines of communication with and follow development of other states' Administrative Conferences to aid in the early recognition and identification of novel ideas for improving the administrative

process. This coordination role would be useful in standardizing the administrative process on a multi-state basis.

Such a conference would allow regulatory agencies to have direct input into the formulation of administrative processes as well as affording the opportunity to learn the concerns of the regulated public.

The conference could assure a smooth transition of changes in the APA by addressing problems and recommending well thought-out solutions within the context of the mission statement and the federal conference before legislative remedies are sought.

Concerns about establishing a Virginia Administrative Conference?

The regulatory authority and needs of individual State agencies could be adversely affected.

If the Conference simply increased the flow of paperwork from state agencies, without addressing substantive issues, it would result in a waste of time and money.

Such a conference could lead to pressure to tighten technical requirements of the regulatory process to a degree that would make the administrative law forum as complex as criminal/civil law procedures. The current process of promulgating or amending regulations takes anywhere from nine to fifteen months done correctly. Concern of non-compliance by a few agencies could lead to a tightening of requirements which could impair timely reaction to necessary amendments.

That such a forum would be dominated by special interests representing regulated entities.

My only concern would be that there would be one position or viewpoint that would dominate this process.

Establishing the "Conference" as a "Commission" will dilute any potential for meaningful action and substantial results. "Commissions" by their statutory restrictions are only sounding boards, established to provide information to the Governor. A more direct and continuous source of information would be through the Secretary of Administration whose ongoing evaluation of administrative processes and issues would have immediacy and relevance for policy assessments and decision making.

The only concern I have is that attorneys will dominate the conference and that the more mundane, practical issues that citizens and agency personnel have

would get lost. This concern can be eliminated by assuring broad membership to include a number of members who are not lawyers.

Pragmatically no [concerns], but any effort at this time to enlarge government under the guise of "private involvement" and "oversight" would concern us. Are there not other ways of addressing the problem? What about doing agency "performance audits"?

Such a conference will, in my opinion, tend to gravitate to uniformity of process and procedures. There are legitimate reasons for differing processes and procedures within certain agencies, public assistance benefits being one area that has traditionally been accorded different treatment. Recognition of such differences may well get swept away in a rising tide of uniformity.

If the establishment of this administrative conference simply became another layer of bureaucracy, its establishment will only add to the cumbersomeness of the current process.

The conference could result in the process being more cumbersome than it is already. I am always concerned about creating yet another government agency.

The Department is concerned about the extent of any Virginia Administrative Conference's involvement in the administrative process beyond the regulatory process.

Administration procedures for the Department are generally established by statute. Regulations are adopted by the Department to explain the laws adopted by the General Assembly. The Department's regulations are not adopted in an effort to administratively promulgate laws. In other words, the Department's regulations are interpretive rather than legislative (a distinction recognized in the Federal Administrative Process Act and not the Virginia Administrative Process Act). This results in a somewhat unique situation where the Department's constituents desire more regulations rather than less.

The Department is also concerned about any efforts to increase the details of regulation promulgation cost estimates. The Department would object to any cost estimating requirement that would consider the tax liability to be a "cost" affected by its regulations.

The Department questions whether the Administrative Conference would affect its internal administrative appeals process. Although the appeals process is governed by statute, the Department is hesitant to support any thing which could result in confusion or unnecessary delay in our appeals process. One area of specific concern is the inclusion of the Department's public documents (primarily rulings in individual cases) in the Virginia Register.

Finally, the Department is concerned about the length and complexity of the process and the possible duplication of steps which could result from the institution of an Administrative Conference. Although the Conference is

suggested as a means of streamlining the process, its effect could be to expand the process beyond that which would be desirable.

An obvious concern with the conference is its eventual role in the overall process: is it to be an advisory body, or a supervisory one? It is essential that the conference not become another bureaucratic layer. The administrative process in Virginia already has the Virginia Code Commission and the Registrar of Regulations to oversee promulgation of regulations.

Recent efforts by the General Assembly (through JLARC) to strengthen adherence to the regulatory requirements should be given an opportunity to work before imposing any further formal oversight on the process. The Administrative Conference should concern itself with improving the administrative process, and resist the temptation to become another "approval layer" in the process itself. This situation could lead to even longer timeframes for rulemaking.

Another possible detrimental effect relates to the composition of the conference. The Administrative Conference should be organized to ensure that no one special interest has a dominant role. The group should provide a forum to obtain input from a representative cross-section of the general public, the regulated communities and the State agencies.

While recognizing that such a conference could be advantageous, it may have the disadvantage in that the conference has no real authority to bring about change. Further, one wonders whether it would ultimately lead to a clarification and simplification of administrative processes.

[Concerns include] Extent of defined oversight role. Timeliness of activities/studies of the conference. Membership - who will be participating.

Additional Comments

As with any board or governing body, there is a tendency to make change and then spend time and money defending your product. It is our hope that the administrative conference would continue to review its own work and make improvements thus enhancing the Commonwealth's regulatory environment.

Regulatory bodies serve unique audiences and industries which represent many different needs and perspectives. The establishment of such a conference should be reflective of both agency representation and public representation. Any conference established should concentrate on addressing issues which ensure adequate public input while streamlining the regulatory process and build a working partnership between professional regulatory groups and the constituents served.

I think that the establishment of this type of conference would help to steadily improve the administrative process and procedures here in Virginia.

The Secretary of Administration should initiate an ongoing evaluation of compliance and appropriateness of administrative processes that would identify problem areas where compliance is lacking or even circumvented. Based on such findings, an assessment of the cause of problems would focus on the appropriateness of the procedure and recommend solutions.

The Administrative Conference could be particularly helpful in educating people on the importance of the APA and the ways in which they can influence rulemaking.

We are a relatively small agency with little APA regulatory activity. Accordingly, we are not aware of all of the "big picture" issues.

In recent years, the General Assembly has attempted to modify the APA and related Titles in an effort to make the administrative process more open and accessible to the public. In order to better carry out this intent, a vehicle which facilitates direct input to the process from both the regulated and regulating entities would be beneficial. An administrative conference could provide this vehicle.

In addition, state agencies and commissions would benefit from the establishment of a group that facilitates communication and exchange of ideas related to the administrative process. This would result in more consistent processes between regulating entities which in turn will make things easier for regulated entities.

An administrative conference, if held, might be most effective if it provides training and technical assistance to state agencies and other interested parties, including regulated entities. Some of the problems JLARC identified could be ameliorated by training that would help state agencies gain a better understanding of the process and improve the quality of their regulations. For example, there might be training on how to use ad hoc committees effectively, or how to write simple, clear regulations.

I do not have enough info to make an informed decision.

Since the Department is unclear as to the goals and authority of the Administrative Conference and its effect upon the administrative process, the Department cannot adequately address the benefit of the creation of a Virginia Administrative Conference. The development of the Virginia Code of Regulations by the Virginia Code Commission may be an effective tool, in the long term, in studying the issues attempted to be addressed by the Virginia Administrative Conference.

The conference should strive to maintain a proper balance between opposing goals. For example, increasing efficiency and cost-effectiveness of the process may be detrimental to making it more responsive to the needs of the participants. Striking a balance between improving the quality of the administrative process and holding the line on (or preferably reducing) the time and costs associated with the state agencies' rulemaking efforts is not an easy task.

More information is necessary before a conclusion can be reached.

The Administrative Conference of the United States is a large organization, consisting of more than one hundred members. In fiscal year 1991, it had an annual appropriation of more than two million dollars.

A self-professed scholarly institution, 'The Conference conducts most of its research by using the services of outside academic or professional consultants...

At the end of 1991 approximately 25 research projects were underway' (1991 Annual Report, Administrative Conference of the United States, p. 29.) Five of these projects were supported by funds transferred to the Administrative Conference by agencies requesting studies.

The Administrative Conference of the United States was created in 1964 'to study the efficiency and fairness of the administrative processes in the federal government, and to recommend improvements to the President, Congress, and federal agencies' (Votava, Cari L., Administrative Conference of the United States: A Bibliography, 1968-1991). That agency, therefore, having been in existence for nearly 30 years, would seem to be a permanent fixture in the federal government. Federal regulations that place requirements on states are presumably subject to review by the Administrative Conference of the United States. Yet those federal requirements continue, with whatever burdens they impose, the Administrative Conference of the United States notwithstanding. [In Virginia,] if a regulation is considered particularly nettlesome, the revised Administrative Process Act provides a means of dealing with it directly - through action by the Legislature or Governor, or both.

The Administrative Conference of the United States has also been responsible for a number of writings -- many quite specific, and of little general use. An Administrative Conference of Virginia patterned after the Administrative Conference of the United States would be a resource for agencies though, if like its federal counterpart, it would serve few agencies most of the time, given the often highly specific nature of its output.

If the Commonwealth really wants an organization like the Administrative Conference of the United States, it may be preferable to try to borrow the services of the Administrative Conference of the United States, at least on a temporary basis. The Administrative Conference of the United States makes its services available to foreign countries (1991 Annual Report, p.1), and it would seem reasonable to suppose that they would therefore make their services available to the Commonwealth.

APPENDIX G

Administrative Conferences in States Other Than Virginia

James N. Christman

August 18, 1993

MEMORANDUM

TO: H. Lane Kneedler, Esq.

DATE: August 18, 1993

FROM: James N. Christman

FILE: 99997.013093

Administrative Conferences in States Other Than Virginia

As part of the study of the Virginia Bar Association Committee to Study the Establishment of an Administrative Conference in Virginia, I researched what has been done about administrative law reform in the 49 states *other than* Virginia.^{1/} I undertook to answer two questions:

1. Do other states have administrative conferences or committees that make recommendations for improving state administrative law?
2. If not, why not?

The inquiry was intended to answer the question "if having a state administrative conference is a good idea, why don't other states have them?"

No state in the Union has an administrative conference established by statute. However, the nonexistence of state administrative conferences does not mean they are unnecessary. Many states are in fact engaged in the process of studying and reforming their administrative law. For example:

1. The Florida State Bar holds an administrative conference about every 1½ years.

^{1/} The inquiry included a written questionnaire mailed to some 35 chairpersons of administrative law sections of state or local bars, a LEXIS and WESTLAW search, and phone calls to practitioners, law professors, state bars, legislative libraries, and administrative law judges around the country.

Both LEXIS and WESTLAW donated research time to this project. I am grateful to Christie Riddle of LEXIS and Mary Stuart Crowley of WESTLAW for their help. Thanks are due also to Robin Roy of the American Bar Association, who provided a list of administrative law specialists in most of the states.

2. California has an office of administrative hearing judges who, besides holding hearings, are required to study and recommend improvements to state administrative law.
3. In many states the Administrative Law Section of the State Bar makes recommendations.
4. Several states (California, Minnesota) have a Code Revision Commission or Law Revision Commission that recommends changes to all state laws, including administrative law.
5. Several states have had one-time-only study commissions to draft or revise their administrative procedure acts.

One reason why administrative conferences have not been created may be simply that interest in state administrative law has not matured. It is still early; interest in improving administrative law at the state level is just beginning to burgeon. Professors and state bar organizations (in New York and Ohio, at least) are beginning to call for the creation of state administrative conferences.

It appears that a systematic means for reforming state administrative law is a good thing. But what form that means should take is something about which reasonable people can differ. For example, there is an issue whether reform of administrative law should be separate or rather just a part of law reform generally. And cost, as always, is a factor; it is easy to recommend a study of administrative law if it doesn't cost much, less easy as the projected cost increases.

State Agencies that Study Administrative Law

Florida. The Administrative Law Section of the Florida State Bar (an integrated state bar to which all licensed attorneys belong) holds administrative conferences about every 1½ years. Described by the current chairman as a "think tank," these conferences last two days and have presentations on administrative law and panel discussions; they are a combination CLE seminar and a mechanism for recommending improvements to administrative law. Frequently the conferences result in such recommendations.

Florida also has model rules of administrative procedure, written by an Administration Commission (a Cabinet agency). These are applicable to Florida agencies presumptively; an agency must act affirmatively to avoid using the model rules.

Also, in Florida the Division of Administrative Hearings (a central panel of hearing officers) must issue a written report each year to the Administrative Procedures Committee of the legislature and the Administration Commission. This report is to include

Recommendations for change or improvement in the Administrative Procedure Act or any agency's practice or policy with respect thereto.

Fla. Stat. § 120.70 (WESTLAW 1992). The Division also reviews the validity of proposed and existing rules. Fla. Stat. § 120.54(4), .56 (1989).

California. In California the Office of Administrative Hearings is charged by statute with recommending reforms to administrative law and procedure:

The office is authorized and directed to study the subject of administrative law and procedure in all its aspects; to submit its suggestions to the various agencies in the interests of fairness, uniformity and the expedition of business; and to report its recommendations to the Governor and Legislature at the commencement of each general session. All departments, agencies, officers and employees of the State shall give the office ready access to their records and full information and reasonable assistance in any matter of research requiring recourse to them or to data within their knowledge or control.

Cal. Gov. Code § 11370.5. This office contains the administrative law judges who conduct hearings held by state agencies. Cal. Gov. Code § 11502.

Also, California has a California Law Revision Commission with responsibility for the continuing substantive review of California statutory and decisional law. Cal. Gov. Code §§ 8280-98. The Commission studies California law to discover defects and anachronisms and recommends legislation to make needed reforms. California Law Revision Commission, *Annual Report for 1991* at 9. The Law Revision Commission does not limit itself to *administrative* law, but during 1992 it gave priority to that topic, taking as its objective the writing of a new Administrative Procedure Act. *Id.* 11.

Alabama. Alabama has an Alabama Law Institute, a state agency located at the University of Alabama Law School. Described as a "blue ribbon" board, the Institute is active in a variety of law reform matters. It has an Administrative Procedure Committee that formulated proposed amendments to the state's Administrative Procedure Act, and these were enacted into law in 1993.

The Administrative Law Section of the Alabama State Bar has also been active in proposing reforms to administrative law.

Also, as part of the budget management process, each Alabama agency must submit a "performance report" to the department of finance each year. The report includes, among other things,

The administrative improvements made in the preceding year, potential improvements in future years and suggested changes in legislation or administrative procedures to make further improvements.

Code of Ala. § 41-19-11(a)(4) (1991 Repl. Vol.)

Alaska. Alaska has three different bodies that are responsible for recommending improvements to state administrative law. They are the Department of Law (Alaska Stat. 44.62.125), the Legislative Committee (Alaska Stat. 44.66.050), and the Code Revision Commission (Alaska Stat. 24.20.075). The Code Revision Commission is a "permanent commission of the legislature" consisting of two legislators, three public members, one executive branch lawyer appointed by the governor, a designee of the supreme court, and a designee of the Bar Association. Alaska Stat. § 24.20.075. It concerns itself with reform of state law generally, including administrative law.

The Department of Administration is an executive branch agency that has the duty of making "surveys and studies to improve administrative procedures, methods, and organization." Alaska Stat. § 44.21.020 (1992).

In the Department of Law, a lawyer called the "regulations attorney" is responsible for all functions relating to the handling of administrative regulations. Alaska Stat. § 44.62.125. The Department must "continually review the regulations, make recommendations to the respective agencies concerning deficiencies, conflicts and obsolete provisions in and the need for reorganization or revision of the regulations." *Id.*

Proposed rules are reviewed by the "regulations attorney" in the Department of Law. Existing rules are reviewed by the Department of Law and the Legislative Committee and on occasion by the Code Commission.

Connecticut. Connecticut has no administrative conference. The last general revision to the State's Administrative Procedure Act was in 1988, after the Executive Committee of the State Bar Association's Administrative Law Section set up a task force to review the act. When the Bar Association process was completed, a state agency called the Law Revision Committee, under the auspices of the Connecticut General Assembly, undertook a review of the act by creating a committee representing interested parties. The result of this effort was a set of

suggested amendments that were presented to the General Assembly. These suggested amendments, with only minor changes, were ultimately enacted into law.

Georgia. Georgia has no administrative conference. A Bar Committee has been appointed to address law reform.

Illinois. Illinois has no administrative conference. The state has considered having such an agency, and legislation to that effect was introduced. Reportedly the legislation was rejected because of cost.

Iowa. The Iowa Attorney General, as part of his function as attorney adviser for all but two state agencies, recommends improvements to administrative law. Iowa Code § 13.2

Also, the Governor of Iowa has established a Task Force on Uniform Administrative Rules to draft model administrative procedural rules.

Kansas. The Kansas Judicial Council is responsible for reform of state law generally. The Kansas Administrative Procedures Act resulted from Judicial Council and legislative study committees over many years.

Maine. Maine has no administrative conference.

Maryland. By Executive Order 01.01.1991.25 the Governor of Maryland created a Governor's Commission to revise the state Administrative Procedure Act. Commission work was completed in December 1992, and the legislature in 1993 adopted changes recommended by the Governor's Commission. See P. Tiburzi *et al.*, *Report of the Commission to Revise the Administrative Procedure Act* (Sept. 1, 1992).

Michigan. The State Bar of Michigan's Administrative Law Section makes recommendations for reform of administrative law. So does the Michigan Law Revision Commission (P. O. Box 30036, Lansing, MI 48909-7536).

Montana. In Montana, an administrative code committee, which reports to the legislature, has a broad mandate to police agency rulemakings. For example, it may demand an economic impact statement from an agency, and it must be informed by the agencies of any judicial proceeding in which the administrative procedure act is in issue. Mont. Code Ann. § 2-4-410. This committee is required each year to submit a report to the legislature and may recommend amendments to the Montana Administrative Procedure Act or the repeal, amendment, or adoption of a rule. Mont. Code Ann. § 2-4-411, § 2-4-412, 5-11-210 (1992). The same committee reviews all proposed rules for compliance with the administrative procedure act. Mont. Code Ann. 2-4-402(1).

The Attorney General of Montana is required to prepare model rules of practice for agencies. Mont. Code Ann. § 2-4-202.

Each Montana state agency is required to review its rules at least biennially to determine if any new rule should be adopted or any existing one changed or repealed. Mont. Code Ann. § 2-4-314.

Minnesota. In Minnesota the function of an administrative conference has recently been performed by a Commission on Reform and Efficiency (CORE). This is a group of 22 citizens appointed by the governor and legislature in 1992 to study ways to improve state government generally. Last year CORE chose administrative rulemaking as one of its subjects for study. Its report was issued in March 1993. Commission on Reform and Efficiency, *Reforming Minnesota's Administrative Rulemaking System; Summary Report* (St. Paul: CORE March 1993).

Mississippi. Mississippi apparently has no systematic mechanism for studying administrative law reform.

Missouri. The Missouri Bar Association, an integrated bar, has an Administrative Law Committee, which studies administrative law and recommends changes. A subcommittee of this Committee works to propose changes in legislation for administrative agencies.

New York. In February 1993 Professor Michael J. Hutter of the Albany Law School, funded by the Business Council of New York State (an industry trade group), published a study of rulemaking in New York. He recommended that a study be made of New York State's Administrative Procedure Act (SAPA). M. Hutter, *Administrative Rule Making: Revisiting the NYS State Administrative Procedure Act, Article 2* (Government Law Center of Albany Law School, February 1993).

Among other things, Professor Hutter recommended that any review and reform of SAPA's rulemaking procedure should consider the establishment (and the legality) of an administrative conference that would be empowered to review, and perhaps reject (with appropriate safeguards), future amendments to SAPA and/or act on a continuing basis as an evaluator of SAPA. Report at 39. He opined that such a conference, *modeled after the Administrative Conference of the United States*, would ensure that amendments to SAPA were not inconsistent with any of the underlying goals of a recodification and/or revisions of SAPA and would obviate the need for special studies in the future. *Id.*

North Carolina. There is no analog to the Administrative Conference of the United States in North Carolina. The closest are the following: legislative judiciary committees, an environmental permit reform working group, the North Carolina Institute of Government (which, however, focuses primarily on local government issues), and the North Carolina Bar Association APA Section. There is a legislatively created Rules Review Commission, but it is charged with

reviewing each promulgated rule to ensure consistency with the enabling statute and with making a few other judgments; it is a working group and has no academic bent or function.

The Office of Administrative Hearings (OAH) is charged with hearing administrative appeals and publishing the North Carolina regulatory register and code, but it has no power, obligation, or budget to perform studies of the APA. Its Chief Administrative Law Judge often comments on proposed rules.

Ohio. Ohio statute R.C. 105.51 establishes a Judicial Council that is required to study state agencies. It has 16 members, including the chief justice, the attorney general, the chairpersons of the house and senate judiciary committees, and the president of the state bar association. The Council has not been funded for years and is apparently inactive. The council is supposed to report biennially to the general assembly concerning the work of the state administrative agencies and the judicial system and its "recommendations for modification of existing conditions." Ohio R.C. § 105.53. It may submit suggestions for the consideration of the heads of the agencies with respect to rules, practice, and procedure. *Id.* It may request from the secretary of state statistical information relating to the courts and administrative agencies. Ohio R.C. § 111.11.

The Administrative Law Committee of the Ohio State Bar Association will soon recommend a bill to establish a state administrative conference.

Pennsylvania. There is no government agency for recommending changes to administrative law in Pennsylvania. The Administrative Law Section of the Pennsylvania Bar Association makes recommendations to the Board of Governors of the Bar Association, which, if adopted by the Board, are passed on to the state legislature. The Administrative Law Section is presently studying whether the state's administrative procedures vary too much from agency to agency.

West Virginia. West Virginia has no administrative conference. Proposed rules are reviewed by a joint committee of the legislature, and all legislative regulations are then passed by the legislature as statutes. The aggregation of all rules into one bill was recently struck down by the West Virginia Supreme Court of Appeals as violative of the State constitutional ban on a bill having more than one subject matter.

Wisconsin. Wisconsin has no administrative conference. A legislative committee of the state legislature is responsible for reforming administrative law. Apparently a committee of the state legislature reviews all administrative code changes made by state agencies.

Wyoming. The Administrative Law Section of the Wyoming State Bar studies administrative law and makes recommendations for improvements through the auspices of the State Bar.

Interstate Compacts

Several interstate compacts, adopted into state law by several states, call for multistate boards to recommend changes to administrative procedures. These are, however, a special case; presumably they were prompted by a need to achieve uniformity in areas where several states have to work together.

For example, the Southern Interstate Nuclear Compact,²⁷ the Western Interstate Nuclear Compact,²⁸ and the Midwestern²⁹ Interstate Nuclear Compact, all in identical language, call for a multistate board (the Southern Interstate Nuclear Board, for instance) to "[s]tudy . . . administrative practices in or related to nuclear fields" and "[r]ecommend such changes in, or . . . the amendments or additions to the . . . administrative procedures and practices . . . of the party states in any of the fields of its interest and competence"

The Southern States *Energy* (as distinguished from nuclear) Compact uses the same language, except that study and recommendations are to be about administrative procedures and practices in or related to "energy and environmental fields."³⁰

²⁷ Southern Interstate Nuclear Compact: Code of Alabama § 9-18-1 (1992); Fla. Stat. § 377.711 (1992); KRS Ann. (Kentucky) § 152.210 (Michie 1992); § 18.060 R.S. Mo. (1991) (Missouri); S.C. Code Ann. § 13-7-420 (1991); Tenn. Code Ann. § 68-202-601 (1992).

²⁸ Western Interstate Nuclear Compact: Alaska Stat. § 41.98.110 (1992); A.R.S. (Arizona) § 30-701 (1992); Cal. Gov. Code § 67401 (1993); C.R.S. (Colorado) 24-60-1401 (1992); Idaho Code § 39-3020 (1993); Mont. Code Ann. § 90-5-201 (1992); Nev. Rev. Stat. Ann. § 459.001 (1991); N.M. Stat. Ann. § 11-9-1 (1992); Utah Code Ann. § 63-41-3 (1993); RCW (Washington State) 43.21F.400 (1991); Wyo. Stat. § 9-6-101 (1992).

²⁹ Midwest Interstate Nuclear Compact: Iowa Code § 15D.1 (1992).

³⁰ Southern States Energy Compact: Code of Ala. § 9-18A-1 (1992); Ark. Stat. Ann. § 15-10-401 (1992); O.C.G.A. (Georgia) § 12-10-1 (1992); KRS Ann. (Kentucky) § 152.210 (Michie 1992); La. R.S. 51:1005 (1992); Md. Ann. Code Art. 41, § 16-106 (1992); Miss. Code Ann. § 57-25-1 (1991); N.C. Gen. Stat. § 104D-1 (1992); 74 Okl. St. § 1051 (1992), 1 L.P.R.A. § 201 (Puerto Rico) (1989); Tex. Gov't Code § 761.001 (1993); Va. Code Ann. § 2.1-336 (1993); W.Va. Code § 29-1E-2 (1992).

Other multistate agreements covering highways⁶ and industrialized/modular buildings⁷ also have provisions for securing uniformity of administrative procedures.

Legislative or Executive Oversight

Most of the provisions of state law summarized above are to be distinguished from legislative oversight of individual agency rules. According to the Minnesota study⁸ mentioned above, 41 states have some legislative committee system for reviewing rules. Commission on Reform and Efficiency, *Reforming Minnesota's Administrative Rulemaking System* (St. Paul: CORE March 1993), Appendix H at 85. The nine states *without* formal systems for legislative review are Arizona, California, Delaware, Hawaii, Mississippi, Nebraska, New Jersey, New Mexico, and Rhode Island.

In a number of states, too, the Governor's office or some other Executive Branch agency reviews agency rules. For example, in New York State each agency must submit a notice of proposed rule (including detailed information and a regulatory impact statement and regulatory flexibility analysis statement) to the office of Business Permits and Regulatory Assistance (OBPRA). OBPRA is empowered to review the notice for compliance with six specified criteria and, if compliance is found lacking, to institute a further lengthy review process, which will delay the effective dates of the rule but cannot prevent its ultimate adoption. SAPA § 202.C. Once the rule is adopted by the agency, the agency must submit to OBPRA a notice of adoption, which must contain certain detailed information. *Id.* Subd. 5.

⁶ Multistate Highway Transportation Agreement: Ariz. Rev. Stat. § 28-2301(d) (1992); Cal. Veh. Code § 35901 (1993); Colo. Rev. Stat. 24-60-2502; Mont. Code Ann. § 61-10-1101 (1992); Nev. Rev. Stat. Ann. § 481A.010 (1991); Or. R. S. § 802.560(d) (1991); Utah Code Ann. § 41-23-2(d) (1993); R.C.W. (Washington) 47.74.010 (1991).

⁷ Interstate Compact on Industrialized/Modular Buildings: Minn. Stat. § 16B.75(5) (1992); N.J. Stat § 32:33-2, 32:33-7, 32:33-8 (1992); R.I. Gen. Laws § 27.4-1 (1992).

⁸ The Minnesota study in turn got its information on this point from *Legislative Review of Administrative Rules and Regulations* (1990) by the National Conference of State Legislatures.

The Model State Administrative Procedure Act (1981)²⁹ provides that

- (1) Each agency must periodically (the Model Act suggests annually) review its own rules, though more for substantive effectiveness, apparently, than for procedural correctness (MSAPA § 3-201);
- (2) The governor may rescind or suspend agency rules or terminate a rulemaking (§ 3-202);
- (3) The office of the governor will have an administrative rules counsel to advise the governor in exercising the above authority (§ 3-202);
- (4) An Administrative Rules Review Committee of the legislature, consisting entirely of state legislators, is selectively to review agency rules. This review covers substantive rules as well as procedural ones (§ 3-204).

Opinions of Practitioners in Other States

As part of my mail survey, I asked the chairpersons of administrative law committees of state bars across the country whether they thought there was a need in their states for a state agency to recommend improvements in state law. My sample is probably biased; people who head administrative law committees are likely to favor having expert bodies to study administrative law. Still, as experts in administrative law and practitioners who practice before administrative agencies, these people's opinions are worth considering.

Only two respondents (from Connecticut and Wyoming) said categorically that there is no need for an agency to recommend improvements. Here are the answers:

²⁹ 1981 Model State Administrative Procedure Act, 15 ULA 1 (1990).

Is there a need in your state for an agency to recommend improvements in administrative law?

Yes

No

Alabama
Alaska
Illinois
Iowa
Maine
Maryland^{12/}
Michigan
Minnesota
Mississippi
Pennsylvania
Ohio
West Virginia
Wisconsin

Connecticut
Kansas^{10/}
Missouri^{11/}
Wyoming

Summary

No state has an "administrative conference" established by statute, though the Florida state bar holds one regularly. Several states have committees that study and recommend changes to state law, including administrative law. And in several states the administrative law section of the state bar makes such recommendations.


James N. Christman

^{10/} The Kansas respondent thinks the need is met by the Kansas Bar Association Committees, Judicial Council, legislature, etc.

^{11/} The Missouri respondent thinks the Administrative Law Committee of the Missouri Bar is meeting the need.

^{12/} Two respondents for Maryland both said yes.

APPENDIX H

Organizational Structure Options for Virginia Administrative Conference

Philip F. Abraham

September 2, 1993

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M E M O R A N D U M

TO: H. Lane Kneedler

FROM: Philip F. Abraham *PfA*

DATE: September 2, 1993

RE: Organizational Structure Options For Virginia Administrative Conference

My research, which is preliminary in nature, has focused upon the organizational structure options that exist for creation of a "Virginia Administrative Conference" should the Virginia Bar Association Committee conclude Virginia could benefit from creation of such an entity. During the course of my research on this matter certain potential areas of consensus have emerged which may be helpful to consider when reviewing the various options that exist for a conference organizational structure. This memorandum first reviews the potential areas of consensus and then discusses structure options.

I. Potential Areas of Consensus

1. As Bob Rotz' initial briefing paper distributed in June illustrates, there are a wide variety of entities in Virginia that currently play a substantive or advisory role in the review and development of administrative law issues facing Virginia. These include legislative entities (e.g. the Code Commission and the Joint Legislative Audit and Review Commission), executive branch agencies (e.g. the Governor's Office, Department of Planning and Budget, and the APA Committee in the Attorney General's Office), bar organizations, members of academia and the Virginia Hearing Officers Association.

While these entities have varying degrees of interest in administrative law matters, few have Virginia administrative law as a major focus of their responsibility. In addition, there are few, if any, opportunities or mechanisms available to these entities to coordinate their activities or to come together in a common forum to share their various perspectives and to give thorough consideration to the often complex procedural issues that arise in the field of administrative law in Virginia.

2. Given potential area of consensus #1 above, the central question facing the VBA Committee in considering whether a "Virginia Administrative Conference" is needed is: Would the performance of Virginia government be improved and the fairness, effectiveness, and efficiency of the Virginia administrative process be enhanced through the creation of a public body to serve as a forum for the study, debate and coordination of important procedural issues of Virginia administrative law by the numerous public and private entities interested in such topics? Many agree that, should a Virginia Administrative Conference be adopted, a useful purpose could be served by creating an entity which is broadly constituted to represent the various public and private entities that are currently considering administrative law matters in Virginia. Many also agree that such an entity could serve a useful purpose by providing an opportunity for these groups to coordinate their activities on administrative law matters and by providing a forum for consideration of current topics in Virginia administrative law.

3. If the VBA Committee agrees that the Commonwealth could benefit from the creation of such an entity, the following potential areas of consensus have emerged regarding key organizational elements of a Virginia Administrative Conference:

(a) The Administrative Conference of the United States (ACUS) probably is not an appropriate model for the Commonwealth. While there may be some elements of the ACUS which could be useful to a Virginia Administrative Conference, the ACUS is too large, expensive, and independent to serve as a model for Virginia. The ability of the ACUS to cross the line between considering "procedural" and "policy" issues also raises concern.

(b) A Virginia Administrative Conference would not have to adopt a "conference" format to serve a useful purpose. Creation of some form of advisory entity could produce positive results. Such an entity could be a free-standing public board or commission or it could be made part of an existing state agency or commission (e.g. the Code Commission, JLARC or the Department of Planning and Budget). A central element of such an entity would be that it be diversely constituted to include representation from the various public and private entities with interest in Virginia administrative law matters. The inclusion of the recipients of government services as well as the regulated community may also be warranted. Such an entity could also sponsor periodic conferences on current topics in Virginia administrative law.

(c) No entity which is given responsibility for considering topics of the complexity of those arising today in Virginia administrative law could perform an effective role without

some type of staff resources. This does not mean, however, that full-time staff would need to be hired by such an entity. Rather, existing state employees could be assigned responsibility for staffing the Commission as part of their existing job responsibilities as long as such employees were not assigned to an agency with a vested interest in the outcome of deliberations on matters of Virginia administrative law. In addition to such "in-house" staff, the conference could benefit from the ability to draw on outside experts in administrative law to enable the conference to conduct objective, systematic and thorough analytical research on procedural matters of Virginia administrative law. Regardless of whether outside experts are utilized by a Virginia Administrative Conference, such an entity may require a small appropriation to be effective. The use of outside experts would be limited by the amount of funds made available for such a purpose.

(d) It may be warranted to establish certain limitations on the type of issues which could be studied by a Virginia Administrative Conference (e.g. "procedural" issues rather than "policy" issues) and on the manner in which the conference would initiate the study or debate of issues. Such limitations could be included in any statutory provision creating the conference and might include a requirement that studies could only be undertaken upon the request or resolution of specific entities (e.g. by General Assembly resolution, request of a standing committee of the legislature, request of the Governor, request of the Chief Justice of the Virginia Supreme Court or the Virginia Court of Appeals, or request of the Judges of the State Corporation Commission). A mechanism should also be developed to prioritize and schedule the handling of such requests and possibly for the winnowing down of the topics that might be considered by the conference to ensure its workload does not exceed its resources.

II. Organizational Structure Options

In theory, a wide range of organizational structure options exist which could serve as a model for the structure of a Virginia Administrative Conference. These options range from the creation of a new state agency with significant staff and budgetary resources to focusing responsibility for such an entity within an existing state agency with no new staff or funding provided. I have reviewed existing state agencies, boards and commissions and have identified a number of entities which illustrate the wide range of organizational structure options that exist for a Virginia

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Administrative Conference should the VBA Committee determine such a conference is needed. These options include:

1. Creating a new state agency. This is the most expensive approach. For example, JLARC, with a staff of approximately 30 employees, has a budget of more than \$2 million annually;

2. Establishing a modestly funded commission like the Virginia Crime Commission which has two full-time employees and a budget of \$150,000 per year;

3. Forming a new advisory commission such as the State Water Commission which has no full-time employees, utilizes existing staff of Legislative Services and has an annual appropriation ranging from \$13,000 and \$18,000;

4. Creating an advisory commission like the Special Advisory Commission on Mandated Health Insurance Benefits which has no full-time staff, utilizes existing agency staff, and has no direct appropriation in the state budget;

5. Forming an advisory board to an existing state agency or commission, such as the role played by the Virginia Personnel Advisory Board, which has no appropriation and utilizes existing staff of the agency to which it is linked.

6. Assigning responsibility to an existing agency or commission to perform the functions of an administrative conference, including sponsoring periodic conferences on current topics in Virginia administrative law.

My preliminary conclusion is that options #3, 4, 5 or 6, or some variation thereof, are the most appropriate and practical alternatives to consider further should the VBA Committee find that a Virginia Administrative Conference is needed. Both the State Water Commission and the Special Commission on Mandated Health Insurance Benefits bring together a diverse group of experts in their fields and serve as an effective sounding board and filtering device for controversial and complex topics before they are considered or finally acted upon by the Virginia General Assembly.

I hope this information is helpful and look forward to developing it further with guidance from the VBA Committee.

