

RECOMMENDATION NO. 14

COMPILATION OF STATISTICS ON ADMINISTRATIVE PROCEEDINGS BY FEDERAL DEPARTMENTS AND AGENCIES

Government agencies which conduct formal or informal rule-making proceedings or cases of adjudication which directly fix the rights and obligations of private persons (hereafter referred to as "proceedings")¹ owe a special duty to the individuals affected and to the general public to manage their caseloads as efficiently as possible, to eliminate inordinate delays in the conduct of proceedings, and to work continuously toward improving the fairness, effectiveness, and economy of their procedures. The present volume of Federal administrative proceedings is so great that much of the basic information needed in these efforts can be developed in intelligible and useful form only through statistical study. The compilation and publication of comprehensive statistics on Federal agency proceedings, at regular intervals would:

- Provide each agency with information concerning its business which would enable it to manage its caseload more effectively,
- Augment generally the information concerning its activities which each agency must furnish to the President, the Congress, and the public,
- Afford affected parties and their counsel a better understanding of the administrative processes which determine their rights and obligations, and
- Provide a basis for specific study of particular agency procedures by the agency itself, by committees of Congress, the Administrative Conference of the United States, the organized bar, research scholars, and other individuals and organizations, public and private, interested in improving the Federal administrative process.

RECOMMENDATION

1. To the extent deemed useful to advance the purposes of this recommendation, each Federal administrative agency which con-

¹The agency compilations proposed by this recommendation should not be limited to formal proceedings, or limited to "proceedings" as that term has been employed in gathering statistics for past conferences or Congressional groups. Rather, agency figures should report all matters directly fixing the rights, privileges, and obligations of private interests including the routine handling of applications and claims.

ducts proceedings (as defined above) affecting private persons' rights, privileges or obligations, should prepare annual statistical data pertaining to those proceedings, to be compiled in such manner and presented in such publications as the agency considers appropriate.

2. These statistical compilations should list the kinds of proceedings pending during the year, with a concise yet meaningful description of the nature and purpose of each kind of proceeding and citations for the statutory authority under which the proceedings are conducted, and the sections of the Code of Federal Regulations which set forth the rules of practice governing each kind of proceeding.

3. For the purpose of agency efforts that may be made in cooperation with the Chairman of the Administrative Conference of the United States, to lessen delays in administrative proceedings, the statistical compilation should show the number of days which elapsed during each significant step of the proceedings which were concluded during the year.

4. In designing each agency's compilation, the following information, together with the time-study data referred to in 3 above, should be considered minimal:

(a) The number of proceedings of each kind pending at the beginning of the year;

(b) The number of new proceedings filed or otherwise commenced during the year;

(c) The number of proceedings concluded during the year and the manner of their disposition (i.e., by settlement, dismissal on procedural grounds, decision on the merits without hearing, final decision by agency after hearing, and an examiner's initial decision, etc.);

(d) The number of proceedings remaining at the end of the year; and

(e) The number of proceedings concluded during the year which were appealed to the courts.

5. Each agency should periodically analyse all of the information thus compiled and should develop improved techniques fitted to its particular needs to reduce delays and expense and otherwise to improve its administrative processes. A copy of this analysis should be submitted to the Administrative Conference of the United States.

6. In presenting its statistical compilation, each agency should summarize this analysis and describe the specific steps it has taken toward the ends referred to in 5 above.

7. Each agency, in its subsequent compilations, should follow a pattern that makes possible a comparison of data with corresponding data for earlier periods, thus reflecting changes in backlogs, volumes, and elapsed times and providing a measure of the agency's experience following the specific actions referred to in 6 above.

REPORT OF THE COMMITTEE ON LICENSES AND
AUTHORIZATIONS IN SUPPORT OF RECOMMENDATION
NO. 14

*Prepared by
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Statistics assembled by the Office of the Chairman of the Administrative Conference report that 527,436 formal administrative proceedings were pending before 34 departments and independent agencies of the Federal Government during the six-year period from July 1, 1960 to July 1, 1966. All of these cases were of kinds which normally involve oral hearings and decision on the basis of the hearing record.¹

In numbers, these formal proceedings represent only a small part of the Federal administrative process. Presumably the volume of proceedings which are not decided on the basis of a hearing record far exceeds the number of formal cases. For example, the above total does not include approximately 75,000 U.S. Board of Parole cases during this period in which oral hearings were held, but the hearing provided only a part of the basis for decision. Similarly the total figure does not include the substantial number of cases which ordinarily are determined on written submissions without oral hearings, such as the approximately 1,800 proceedings conducted each year by the Trademark Trial and Appeal Board.

For purposes of the Administrative Conference statistics, the term "proceeding" was limited to disputed matters. The great bulk of the administrative process consists of the routine handling of large numbers of applications, claims, complaints, etc. which only rarely become the subject of "proceedings" in the sense that the agency's process for their disposition involves the receipt of opposing evidence and argument on disputed issues of law or fact. The Conference statistics therefore exclude, for example, the Federal Communications Commission's normal proc-

¹ The Administrative Conference compilation notes the omission of a few cases of kinds for which figures are not available or which are instituted so infrequently that they are of no interest to the work of the Conference. Of the total number of proceedings, 28,897 still were pending at the end of the six-year period. A list of the reporting departments and independent agencies is attached as Appendix A.

essing of radio station applications in the non-broadcast and non-common carrier field, such as applications for public safety, industrial, amateur, land transportation, aviation, and marine radio services (514,039 applications processed in 1967 and 523,550 in 1968).²

The formal proceedings which are included in the figures assembled by the Administrative Conference are of great variety, ranging from social security hearings of consequence to a single pensioner to complicated rate cases of substantial impact upon entire industries and broad segments of the consuming public. Because of this variety, the 527,436 figures itself is of no significance. However it does serve to illustrate that the Federal administrative process is a governmental activity of considerable proportions.

The Administrative Conference Committee on Licenses and Authorizations respectfully submits that, because of the magnitude of the Federal administrative process, much of the information which is indispensable to an adequate understanding of that process can be developed and presented intelligibly and usefully only through statistical study. To manage its business effectively, an agency must have the means of understanding its operations. If changes in agency organization and procedure are to be made with confidence that they will produce greater fairness and effectiveness in future operations, they must be developed with a full understanding of past and present agency experience. In many areas of Federal agency activity only statistical study can assure such understanding. Without reliable data, efforts toward procedural reform in such areas may be only uncertain probes into a bottomless morass of imperfectly understood or misunderstood experience.

In particular, the problem of inordinate delays in the administrative process demands statistical study. Through the years of developing concern over the shortcomings of the administrative process as an important element of our system of government, critical attention has focused constantly upon this problem. One of the reasons for the extensive reliance of our system upon administrative agency processes has been the assumption that a specialized and highly expert administrative tribunal can appropriately dispose of a large volume of particular kinds of cases much more swiftly and economically than the courts. Although many agencies have labored commendably over the years

² FCC Annual Reports for 1967 and 1968.

to realize this objective, the problem of delay apparently remains today as one of major proportions.

A random sample of 5,000 cases reported in the Administrative Conference compilation as having traversed the full route through hearing, preliminary decision, exceptions, and agency final decision indicates that the total elapsed time from the date the matter was committed to the formal hearing process to the date of the final decision was in excess of 1,000 days in 730 cases, more than 5 years in 135 cases, and over 10 years in 38 cases. One proceeding lasted almost 20 years.

The average elapsed time for the 5,000 proceedings was 465 days, or 1 year and 100 days. These "total" times do not include whatever period the application, complaint, or claim, was under preliminary investigation, was on the agency's "processing line," was the subject of negotiations looking toward settlement, or simply was waiting in line, prior to its being committed to formal hearing procedures by designation for hearing or otherwise.

Obviously an administrative remedy which takes more time than the private party involved has to spend is no remedy at all. Because governmental activity now plays such a prominent role in business affairs, inordinate delays in public administration can constitute a serious encumbrance upon private business activity and private initiative and may, in its cumulative effect, slow the nation's economic development. For the individual to whom a particular agency action may be the difference between self-employment and a dead-end job, professional medical care or self-treatment, an education or an unskilled job, hospitalization or permanent disability, or self-sufficiency as a pensioner or dependence upon relatives, delays may work insufferable hardships.

According to the statistics of the Office of the Chairman of the Administrative Conference, the total volume of formal proceedings increased steadily over the six-year period of that compilation. Agency annual reports indicate that informal procedures increased at an even greater rate. Today there would appear to be no reason to expect that such growth will not continue.

The Committee is of the view that time has run out for casual efforts to combat inordinate delays in agency proceedings. The Committee believes that an intensive and concerted attack upon this persistent problem is long overdue.

Further, the Committee is convinced that the necessary first step, if the effort is to be effective in substantially reducing delays, is the compilation of comprehensive information on each

agency's backlog of cases, its current volume of new proceedings instituted, the method of their handling and the manner of their disposition, and the significant details as to the time involved in their handling.

In concluding that there is a substantial need for statistical study of administrative proceedings, the Committee is not unaware of the limitations of statistical study, particularly where, as in the case of administrative proceedings, no two of the things being counted are exactly the same. As Kent Professor at Columbia in 1922, Harlan Fiske Stone, in a speech relating to judicial statistics, appropriately noted:

"The statistical method of dealing with social problems often cannot be relied upon as a mathematical demonstration leading to specific conclusions, but it may be used to indicate tendencies, to mark out the boundaries of a problem, and to point the directions to be given to a particular investigation of a nonstatistical character."

The Committee fully appreciates the fact that statistics are seldom an end in themselves. However, carefully tailored to the purposes they are intended to serve, they can be an indispensable tool for effective management of agency caseloads and an invaluable device in the location of procedural problems and their causes.

In part because of the limitations of statistical study, but perhaps more because of the dissimilarity of statistical techniques to the traditional methods of legal research, statistics have not enjoyed extensive use by study groups in the area of administrative reform. In 1939 the Attorney General's Committee on Administrative Procedure collected some data on the volumes of administrative proceedings and the time periods involved in their disposition. The statistical undertakings of the Hoover Commissions were somewhat more ambitious. The first continuing compilation was initiated by the Office of Administrative Procedure in the Department of Justice in 1957. That series at the outset was limited to formal proceedings conducted by examiners appointed pursuant to section 11 of the Administrative Procedure Act and was patterned in some respect after the statistics of the Administrative Office of the United States Courts.

The temporary Administrative Conference of 1961 and 1962 compiled data for those two years, expanding somewhat the Office of Administrative Procedure series and utilizing computer processing. When that effort ended, the Senate Judiciary Subcommittee on Administrative Practice and Procedure, in cooperation with the Office of Administrative Procedure, continued the

series for one more year, 1963, and later collected and held for processing the raw data for the years 1964-1966, in anticipation of the establishment of the statutory Administrative Conference. The Office of the Chairman has had these figures computer-processed and, combining them with the 1961-1963 figures, now has completed a six-year compilation. Although budget limitations have precluded printing this compilation, it is undergoing careful study by the Conference staff and is available for the use of the committees of the Conference and others who may find it helpful.

Past efforts to provide comprehensive statistical data have been invaluable to the work of the Office of Administrative Procedure and to the 1961-62 Administrative Conference in providing needed information of which no other research technique is capable. However, for two principal reasons, the products of these efforts have never realized their full potential. First, the considerable variety of agency functions and the resultant variety of procedures among the agencies severely limits the utility of any design or format for a statistical compilation which seeks to measure the same factors in all proceedings across-the-board. For example, the Committee discussed one kind of procedure in one of the major regulatory agencies in which the really costly delays occur before the matter becomes a "proceeding," as that term was used in compiling the Administrative Conference figures. This procedure was contrasted with others in other major regulatory agencies in which an applicant often files for operating authority with no intention of prosecuting his application, but rather only to assure his place as a party in a comparative proceeding in the event competitors seriously prosecute applications for the same authority. There simply is no way of providing comparable time-study data on these two kinds of proceedings by any single, across-the-board compilation design. There are many other examples of this kind of problem.

The Committee concludes therefore that, in order to go beyond the utility of the present Administrative Conference statistical compilation, the statistical studies for each agency must be tailored carefully to fit the particular procedures of the individual agency, rather than conformed to any across-the-board pattern.

The second principal limitation upon the utility of past statistical efforts results from the fact that the design of the compilation in each case has followed, rather than preceded, the experience which the compilation reported. A thoughtful decision by each agency before the year for which figures are to be

compiled begins, so that arrangements can be made in advance for the recording of the desired information, obviously will provide much more useful data than can be recovered after the year has ended.

The Committee therefore recommends that each agency determine precisely what information it needs to deal effectively with problems of inordinate delays and expense, etc. in its own administrative processes, and make whatever recording or reporting arrangements are necessary before the beginning of the next fiscal year, so that comprehensive information concerning that year's experience may be assured.

The Committee believes that every agency should compile and make available basic data reflecting the nature and proportions of the agency's caseload generally. The various factors measured by the Administrative Conference statistics may provide a pattern for the agencies in designing these basic statistics. The Administrative Conference compilation consists of three parts, the first of which provides a general "catalog" of formal proceedings. It is the Committee's idea that the agency compilations proposed by this recommendation should not be limited to formal proceedings, or indeed to proceedings, as that term was employed in assembling the Conference data. Rather, agency figures should report all matters directly fixing the rights, privileges, and obligations of private interests, including the routine handling of applications and claims such as those of the Federal Communications Commission.

Part I of the Administrative Conference compilation, the listing of formal proceedings, describes briefly the nature and purpose of each different kind of proceeding conducted by each department or independent agency, usually indicating how and by whom the proceeding is instituted and what kind of relief or sanction is contemplated, with citations for the agency's authority and its rules of practice governing the particular kind of proceeding. Part I also provides a general classification of proceedings into a dozen broad categories and indicates as to each kind of proceeding whether it is subject to the requirements of sections 556 and 557 of title 5 of the United States Code, formerly sections 7 and 8 of the Administrative Procedure Act.

Part II reports, for each kind of proceeding, the case input and output during the year and indicates generally the manner in which cases were disposed of. Specifically, it consists of a 13-column schedule under the following column headings:

1. Cases pending at the beginning of the fiscal year

2. Number of new cases commenced during the year
3. Number of cases reopened during the year
4. Total input of cases for the year
5. Number of cases closed during the year by agency decision on the merits after hearing and preliminary decision
6. Cases closed by agency decision on the merits after hearing without a preliminary decision
7. Cases closed after hearing by preliminary decision which became final without review by the agency
8. Cases closed by decision on the merits without an oral hearing
9. Cases closed by withdrawal, consent, settlement or other agreement
10. Cases dismissed without the consent of the parties, on procedural grounds
11. Other final disposition (describe in footnote)
12. Total output of cases for the entire year
13. Balance remaining at the end of the fiscal year

Obviously the various columns indicating the manner in which cases were concluded can be made much more meaningful in an individual agency's compilation by dividing the total output into categories which reflect the particular agency's experience instead of the experience of all agencies generally. This limitation of the Administrative Conference statistics is well illustrated by the inadequacy of the above-described column headings in relation to the many kinds of cases, for example, in which no preliminary decision is issued.

Part III of the Administrative Conference statistics provides basic time-study data on random samples of the cases which involved oral hearings (the proceedings reported in columns 5, 6, and 7 of Part II) and, for the years 1964-66, on random samples of the cases reported in column 8.

In addition to basic backlog, volume, and time-study data of this general nature, each agency should include in its own compilation whatever data it feels may be useful for purposes of special statistical studies. For example, if an agency feels that the answer to its particular caseload problem may be greater use of settlement and compromise techniques, it should assemble and report whatever data may serve that purpose. It should study and decide in advance exactly what statistical information might be useful in developing procedures for settlement, then collect and report such information. For example, how many cases are settled, at what stage of the proceeding, and subject to what

conditions? What is the incidence of those factors which the agency is able to identify as factors which limit the opportunity for settlement or otherwise militate against settlement, etc.

Examination of recent annual reports of a number of departments and agencies indicates a considerable amount of volume data, both on proceedings and on the routine processing of undisputed matters, is made available in such reports. Occasionally there is also information into the nature of these special-purpose statistical studies such as the example above. However, there is virtually no information which would assist in meeting the problem of inordinate delays. Much more comprehensive statistics are needed to fulfill the objectives stated at the bottom of the first page of the recommendation.

To repeat the same statistical information at regular intervals accomplishes much more than simply multiplying such information. The continuing accretion of data, in effect, adds a third dimension to the demonstration. It enables comparisons over a period of time which indicate the direction in which the reported experience is moving as well as the effect of procedural or other changes. An essential part of the Committee's recommendation, therefore, is that each agency should collect and publish its statistics as a continuing series. Obviously the publication should be annual. In the opinion of the Committee, the department and agency annual reports provide an ideal opportunity for such annual publication.

The principal thrust of the recommendation of the Committee on Licenses and Authorizations is that statistical analysis of an agency's administrative procedures should, in the first instance, be a regular and important activity of the agency itself. The responsibility for fair, expeditious, and effective procedures is, in the first instance, in the agency. The immediacy of the agency's experience with its procedures affords it a special competence which makes its own analysis far more useful than study by outside experts.

The role of the Administrative Conference under its statutory responsibility for the collection of statistics and information concerning agency procedures should be as a central exchange or "clearing-house" for specific ideas for improvements in procedures developed from the individual agencies' analyses and as a forum for both comprehensive and particularized study of the experience of the several departments and agencies. But the collection and publication of fundamental statistical information,

carefully fashioned to the particular agency function, should be the duty of the individual agency in the first instance.

The Committee is convinced that detailed study by each agency of its own experience can provide insights into procedural problems which no amount of examination by an extrinsic body, however expert, can provide. By the same token, the universal experience represented by the Conference membership can provide a comprehensive understanding of administrative procedures beyond the competence of any individual agency. The many serious problems of the Federal administrative process demand the best efforts of the agencies and of the Conference.

In the past, statistical study has been laborious. Today, every agency has its own computer facilities or, at nominal expense, can arrange for the use of the facilities of some other agency. The Committee is confident that, with such capability, continuing statistical study of administrative procedures by the agencies themselves, with the help of the Administrative Conference, will eliminate the general uncertainty which attends so many of our present procedural problems and will contribute substantially in ultimately eliminating excessive delays and improving the fairness and effectiveness of agency procedures.

APPENDIX A

DEPARTMENTS AND AGENCIES WHOSE PROCEEDINGS ARE INCLUDED IN THE 1960-1966 STATISTICAL COMPILATION OF THE OFFICE OF THE CHAIRMAN OF THE ADMINISTRATIVE CONFERENCE

1. Department of Agriculture
2. Atomic Energy Commission
3. Civil Aeronautics Board
4. Civil Service Commission
5. Department of Commerce
6. Department of Defense
7. Federal Aviation Agency
8. Federal Coal Mine Safety Board of Review
9. Federal Communications Commission
10. Federal Deposit Insurance Corporation
11. Federal Home Loan Bank Board
12. Federal Maritime Commission
13. Federal Power Commission
14. Federal Reserve System Board of Governors
15. Federal Trade Commission
16. General Services Administration
17. Department of Health, Education and Welfare
18. Department of the Interior
19. Interstate Commerce Commission

20. Department of Justice
21. Department of Labor
22. National Aeronautics and Space Administration
23. National Labor Relations Board
24. National Mediation Board
25. National Science Foundation
26. Post Office Department
27. Railroad Retirement Board
28. Securities and Exchange Commission
29. Small Business Administration
30. Department of State
31. Subversive Activities Control Board
32. Tennessee Valley Authority
33. Department of the Treasury
34. Veterans' Administration