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REAUTHORIZATION OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

HEARING

BEFORE THE

SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

MAY 20 AND JUNE 24, 2004

Serial No. 109

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://www.house.gov/judiciary

U.S. GOVERNMENT PRINTING OFFICE

93–774 PDF WASHINGTON : 2004

For sale by the Superintendent of Documents, U.S. Government Printing Office
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REAUTHORIZATION OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

THURSDAY, MAY 20, 2004

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCIAL
AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:06 p.m., in Room 2141, Rayburn House Office Building, Hon. Chris Cannon (Chair of the Subcommittee) presiding.

Mr. CANNON. The Subcommittee will please come to order. I expect we will have several other Members who told us they would like to join us will join us soon.

It is indeed an honor and a pleasure to welcome to our Subcommittee today two of our Nation's most esteemed jurists. I am informed that it's fairly rare to have a Justice from the Supreme Court, let alone two Justices, testify before Congress, particularly with respect to matters not pertinent to the judiciary's funding or operations. According to the Congressional Research Service, the last time a Supreme Court Justice testified before the House Judiciary Committee was in May 1971, when Associate Justice Potter Stewart discussed legislation concerning the Federal Judicial Center and the Administrative Office of the United States. The presence of Justices Breyer and Scalia, I believe, underscores the significance of today's hearing, which focuses on the value of reauthorizing the Administrative Conference of the United States.

For those of you who are not familiar with the work and accomplishments of the Conference, let me briefly explain.

Over the course of its 28-year existence, the Conference issued more than 200 recommendations, some of which were Government-wide and others were agency-specific. It issued a series of recommendations eliminating a variety of technical impediments to judicial review of agency actions and encouraging less costly consensual alternatives to litigation.

The fruits of these efforts included enactment of the Administrative Dispute Resolution Act of 1990, which established a framework for the use of ADR. In addition to this legislation, ACUS served as the key implementing agency for the Negotiated Rulemaking Act, the Equal Access to Justice Act, the Congressional Accountability Act, and the Magnusson-Moss Warranty Federal Trade Commission Improvement Act.

The Conference also made recommendations regarding implementation of the Congressional Accountability Act and played a

key role in the Clinton administration's National Performance Review with respect to improving the regulatory systems. Further, ACUS served as a resource for Members of Congress, congressional Committees, the Internal Revenue Service, Department of Transportation, and the Federal Trade Commission.

With respect to specific agencies, the Conference, for example, during the 1970's undertook an exhaustive study of the procedures of a single agency, the Internal Revenue Service, which resulted in 72 proposals concerning the confidentiality of taxpayer information, IRS settlement procedures, and the handling of citizen complaints, among other matters. The IRS ultimately adopted 58 of these recommendations.

Some may ask: Why should we reconsider—or consider reauthorizing the agency at this time or the Conference at this time? We've gotten along without the Conference over the last 8 years—I might say, not very well. How can we justify re-establishing the agency at the attendant expenditures, especially in a fiscal belt-tightening environment? The answer, at least to me, is obvious. Just this week, Congress passed the Paperwork and Regulatory Improvements Act by an overwhelming bipartisan vote of 373–54. This legislation is intended to assist Congress in its review of final agency rules under the Congressional Review Act and to improve the quality and quantity of information provided in the annual regulatory accounting statement prepared by the Office of Management and Budget.

While a good bill, problems with the current administrative law environment are much greater than either the Congress or OMB by itself, or even jointly, can address. According to the Congressional Research Service, there are growing patterns of evasion among agencies with respect to notice and comment requirements. An increasing number of regulations are being successfully challenged in courts. An informal study by CRS indicates that 51 percent of these rules were struck down by the courts. Needless litigation hurts everyone. It slows the rulemaking process, encourages agencies to try to circumvent public comment requirements, and costs taxpayers millions of dollars, a lot more than the budget that we're proposing here.

Another serious area of concern is the need to have a coherent approach among the agencies with respect to emerging issues and technologies. These areas include issues dealing with privacy, national security, public participation in the Internet, and the Freedom of Information Act. There are also concerns about the need to have peer review and to have regulations based on sound science.

Our Nation's people and business communities depend upon Federal agencies to promote scientific research and to develop science-based policies that protect the Nation's health and welfare. Integral to the Federal regulatory process is the need to assess the safety, public health, and environmental impact of proposed regulations. Regulations lacking sound scientific support can present serious safety and health consequences, as well as cause private industry to incur unnecessary and burdensome expenses to comply with such regulations. Restoring the Conference in some form, from my perspective, would provide a cost-effective, highly valuable solution to these problems. It is my hope that today's hearing will be the

first step toward establishing a strong evidentiary base to support the reauthorization of the Conference.

[The prepared statement of Mr. Cannon follows:]

PREPARED STATEMENT OF THE HONORABLE CHRIS CANNON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH, AND CHAIRMAN, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

The Subcommittee will please come to order.

It is indeed an honor as well as a pleasure to welcome to our Subcommittee two of our nation's most esteemed jurists. I am informed that it is a fairly rare event to have a Justice of the Supreme Court—let alone two Justices—testify before Congress, particularly with respect to matters not directly pertinent to the Judiciary's funding or operations. According to the Congressional Research Service, the last time that a Supreme Court Justice testified before the House Judiciary Committee was in May of 1971, when Associate Justice Potter Stewart discussed legislation concerning the Federal Judicial Center and the Administrative Office of the United States.

The presence of Justices Breyer and Scalia—I believe—underscores the significance of today's hearing, which focuses on the value of reauthorizing the Administrative Conference of the United States. For those of you who are not familiar with the work and accomplishments of the Conference, let me briefly explain.

Over the course of its 28-year existence, the Conference issued more than 200 recommendations—some of which were government-wide and others that were agency-specific. It issued a series of recommendations eliminating a variety of technical impediments to the judicial review of agency action and encouraging less costly consensual alternatives to litigation. The fruits of these efforts include the enactment of the Administrative Dispute Resolution Act in 1990, which established a framework for the use of ADR.

In addition to this legislation, ACUS served as the key implementing agency for the Negotiated Rulemaking Act, the Equal Access to Justice Act, the Congressional Accountability Act, and the Magnusson-Moss Warranty-Federal Trade Commission Improvement Act. The Conference also made recommendations regarding implementation of the Congressional Accountability Act and played a key role in the Clinton Administration's National Performance Review with respect to improving regulatory systems. Further, ACUS served as a resource for Members of Congress, Congressional Committees, the Internal Revenue Service, Department of Transportation, and the Federal Trade Commission.

With respect to specific agencies, the Conference, for example, during the 1970s undertook an exhaustive study of the procedures of a single agency—the Internal Revenue Service—which resulted in 72 proposals concerning the confidentiality of taxpayer information, IRS settlement procedures, and the handling of citizen complaints, among other matters. The IRS ultimately adopted 58 of these recommendations.

Some may ask, "Why should we consider reauthorizing the Conference at this time?" We've gotten along without the Conference over the last eight years. How can we justify re-establishing an agency with the attendant expenditures especially in this belt-tightening environment?"

The answer—at least to me—is obvious. Just this week, Congress passed the Paperwork and Regulatory Improvements Act by an overwhelming bipartisan vote of 373 to 54. This legislation is intended to assist Congress in its review of final agency rules under the Congressional Review Act and to improve the quality and quantity of information provided in the annual regulatory accounting statement prepared by the Office of Management and Budget. While a good bill, problems with the current administrative law environment are much greater than either the Congress or OMB can singularly or even jointly address.

According to the Congressional Research Service, there are growing patterns of evasion among agencies with respect to notice and comment requirements. An increasing number of regulations are being successfully challenged in the courts. An informal study by CRS indicates that 51% of these rules were struck down by the courts. Needless litigation hurts everyone—it slows the rulemaking process, encourages agencies to try to circumvent public comment requirements, and costs taxpayers millions of dollars.

Another serious area of concern is the need to have a coherent approach among the agencies with respect to emerging issues and technologies. These areas include issues dealing with privacy, national security, public participation and the Internet, and the Freedom of Information Act. There are also concerns about the need to have

peer review and to have regulations based on sound science. Our nation's people and business communities depend upon federal agencies to promote scientific research and to develop science-based policies that protect the nation's health and welfare. Integral to the federal regulatory process is the need to assess the safety, public health, and environmental impact of proposed regulations. Regulations lacking sound scientific support can present serious safety and health consequences as well as cause private industry to incur unnecessary and burdensome expenses to comply with such regulations.

Restoring the Conference in some form—from my perspective—would provide a cost-effective, yet highly valuable solution to these problems. It is my hope that today's hearing will the first step toward establishing a strong evidentiary basis of support for reauthorizing the Conference.

Mr. CANNON. I will now turn to my colleague, Mr. Watt, the distinguished Ranking Member of the Subcommittee, and ask him if he has opening remarks.

Mr. WATT. Thank you, Mr. Chairman, and I will take a brief moment here just to thank the Chairman for convening today's hearing and to welcome our distinguished guests, Justices Breyer and Scalia.

As I indicated to the two Justices, this must be my Supreme Court day because we—a judicial caucus has now been started in the House, and its first visitor just before this meeting was convened was Justice Rehnquist, Chief Justice Rehnquist. So I think I've had more exposure, direct, personal exposure to Justices of the Supreme Court in one day than I have in my entire life, although I guess most people know I've had quite a bit of exposure, not personal but in other respects, with the Justices. So I'm delighted to be here and honored that you would share your insights on the topic of this hearing.

The purpose of the hearing is to determine whether the state of administrative law and procedure warrant the reauthorization of the Administrative Conference of the United States. And as we know, the Administrative Conference was initially established in 1964 as a permanent body to serve as the Federal Government's in-house adviser on and coordinator of administrative procedural reform. It enjoyed bipartisan support for over 25 years and advised all three branches of Government before being terminated in 1996.

Through the years, the Conference was a valuable resource providing information on the efficiency, adequacy, and fairness of the administrative procedures used by administrative agencies in carrying out their programs. This was a continuing responsibility and a continuing need, a need that, certainly in my opinion, has not ceased. So the topic before us today is one that has truly been nonpartisan, bipartisan, and I think we are blessed to have these two distinguished witnesses who—both of whom have personal experience with the Conference and its workings. And I understand also that the Chairman is expecting to have additional hearings to further information the Subcommittee and the Judiciary Committee about the need for the Administrative Conference, and I look forward to those hearings.

Again, I welcome Justice Scalia and Justice Breyer, and I bring you the regards of your Chief Justice from the prior meeting. Thank you for being here.

I yield back.

Mr. CANNON. The gentleman's time has expired.

We would like to thank the Members who have joined us here: Mr. Coble from North Carolina; Mr. Chabot from Ohio; Mr. Watt, of course, from North Carolina, the Ranking Member; Mr. Delahunt from Massachusetts; Mr. Conyers from Michigan; and Mr. Scott from Virginia. We appreciate your attendance.

We received a letter from the American Bar Association expressing its support for the reauthorization of the Administrative Conference, and without objection, we will submit that for inclusion in the record. So ordered.

[The information referred to follows:]

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May 20, 2004

The Honorable Chris Cannon
Chairman
Subcommittee on Commercial and Administrative Law
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Re: Subcommittee Hearing on the Reauthorization of the Administrative Conference of the United States, Scheduled for May 20, 2004

Dear Mr. Chairman:

On behalf of the American Bar Association ("ABA") and its more than 400,000 members nationwide, I write to express our support for the reauthorization and refunding of the Administrative Conference of the United States, the subject of today's Subcommittee hearing. As Chair of the ABA Section of Administrative Law and Regulatory Practice, I have been authorized to express the ABA's views on this important matter. We ask that this letter be included in the official record of today's hearing.

As you know, the Administrative Conference was established in 1964 as a permanent body to serve as the federal government's in-house advisor on, and coordinator of, administrative procedural reform. It enjoyed bipartisan support for over 25 years and advised all three branches of government before being terminated in 1996.

Through the years, the Conference was a valuable resource providing information on the efficiency, adequacy and fairness of the administrative procedures used by administrative agencies in carrying out their programs. This was a continuing responsibility and a continuing need, a need that has not ceased to exist.

The Conference's work in some cases resulted in bipartisan legislation to improve the administrative process. For example, both the Negotiated Rulemaking Act of 1990 and the Administrative Dispute Resolution Act were the product of the Conference's work, both in terms of the studies and reports that underlay the justification for these two laws and also in terms of the interested persons and agencies brought together to support the law.

In other cases, the Conference's work made legislation unnecessary. For example, early studies indicated that the exemption from notice and comment in the original Administrative Procedure Act for rulemakings involving public property, grants, contracts, loans, and benefits was no longer necessary or desirable. As a result of the Conference's work, virtually every agency voluntarily subjected itself to notice-and-comment rulemaking when dealing with these subjects, improving the transparency and acceptability of government rules without the need for legislative amendment.

The hallmark of the Conference's work was its ability to provide expert and non-partisan advice to the three branches of government. Drawing on the large number of volunteer public members of the Conference, as well as representatives from a wide spectrum of agencies, the Conference fostered a conversation among all interested persons and agencies. Utilizing academics for empirical research, which was reviewed first by subject matter committees staffed by members of the Conference and then by the full Conference, the Conference was able to provide a factual predicate for improvements in the administrative process that were not identified as ideologically or partisan-based proposals.

I stress the fact that over a quarter century the Administrative Conference of the United States maintained a reputation for non-partisan, expert evaluation of administrative processes and recommendations for improvements to those processes. It had no power but the power to persuade, and no political constituency other than those interested in improving administrative government. The lack of a particular constituency was its undoing when a political need for visible symbols of budget cutting and a special interest attack on the Conference combined in a perfect storm of politics. The error of that penny-wise, pound foolish decision to sacrifice the Conference stands out today, when a divisive and corrosive partisanship on issues of national concern cry out for the kind of independent, respected expert view that the Conference exemplified.

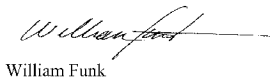
Not only was the Conference a source of expert and nonpartisan advice, the Conference played an important facilitative role for agencies in implementing changes or carrying out recommendations. Thus, a number of statutes, including the Government in the Sunshine Act and the Equal Access to Justice Act, specified that the Conference work with agencies in adopting the agencies' initial regulations. More recently, the Conference worked tirelessly to help agencies understand and utilize the Negotiated Rulemaking Act and the Administrative Dispute Resolution Act. Today, adapting administrative processes to make best use of the internet is a hot topic, but one for which there is no central organization to study different techniques, assess them, and then facilitate the implementation of those that are best.

It is a testament to the Conference's unique position that today persons of such differing judicial philosophies as Justices Scalia and Breyer can rally behind the re-creation of the Conference. Nor is it hard to find many others from across the political spectrum who will similarly commend the re-creation of the Conference to your subcommittee. Past chairs of the Conference, such as Professors Marshall Breger and Robert Anthony and Judge Loren Smith from one side of the aisle, can join hands with lawyer Sally Katzen and administrative judge Thomasina Rogers on the other side.

The Conference proved itself effective at promoting efficiency in government for over 25 years. The American Bar Association has long supported the Conference and the role it played in advancing administrative procedural reform. We urge you to support legislation that would reauthorize the Conference and provide it with funds that are sufficient to permit it to continue its important mission.

Thank you for considering the views of the ABA on this important issue. If you would like to discuss the ABA's views in greater detail, please feel free to contact me at 503/768-6606 or the ABA's legislative counsel for administrative law issues, Larson Frisby, at 202/662-1098.

Sincerely,



William Funk

cc: All members of the Subcommittee on Commercial and Administrative Law

Mr. CANNON. Without objection, all Members may place their statements in the record at this point. Is there any objection? Hearing none, so ordered.

Mr. Coble has asked for a quick 1-minute opening statement. We're pleased to yield to the gentleman.

Mr. COBLE. Mr. Chairman, I will not exceed 1 minute. I just want to reiterate what Mr. Watt said. I was with Mr. Watt, Mr. Scott, and other colleagues with the Chief Justice at a meeting today. We very much enjoyed having him here, and we very much appreciate you two Justices being with us.

And, Mr. Chairman, I regret it but I've got another meeting going on now, so I may have to bolt before you conclude. But I thank you for having called this hearing.

Mr. CANNON. I thank the gentleman, and we appreciate that many things are going on.

Mr. Conyers, did you——

Mr. CONYERS. Mr. Chairman, could I be permitted a brief welcome to——

Mr. CANNON. Absolutely, Mr. Conyers. The Ranking Member of the full Committee, Mr. John Conyers from Michigan.

Mr. CONYERS.—the two distinguished Justices. I'm so glad that you're here. And I just wanted Justice Scalia to know that you look much more friendly in our setting than you do in your own. [Laughter.]

Justice SCALIA. It's the black robe.

Mr. CONYERS. That might have something to do with it as well.

I have also about several hundred questions which, regrettably, are not appropriate to this hearing. But you might want to extend to the Ranking senior Member of Judiciary an invitation to lunch or something else to examine my viewpoint and I yours. And we might reach a greater degree of comity than exists at the present moment.

Thank you very much.

Mr. CANNON. Thank you, Mr. Conyers.

Mr. WATT. Could I ask the gentleman to yield just for a second?

Mr. CONYERS. Of course.

Mr. WATT. Just long enough to invite him to become a member of the newly established Judiciary Caucus, which had its first meeting today and met with Justice Rehnquist. So we're trying to encourage comity and exchange across judiciary and——

Mr. CONYERS. Excellent idea.

Mr. CANNON. Is this a bipartisan caucus?

Mr. WATT. Yes, it is. It's chaired, actually, by Representative Schiff and Representative Biggert, Republican and Democrat.

Mr. CANNON. This is a caucus that goes beyond the Judiciary Committee itself?

Mr. WATT. Yes.

Mr. CANNON. Okay. Thank you.

Without objection, the Chair will be authorized to declare recesses of the Subcommittee at any point. Hearing none, so ordered.

I ask unanimous consent that Members have 5 legislative days to submit written statements for inclusion in today's hearing record. So ordered.

I also want to remind my colleagues of the obvious: Our witnesses are guided by Canon 3 of the Code of Conduct for United States Judges, which advises the judiciary to avoid making public comments with respect to the merits of pending or impending actions. We should endeavor to respect those constraints and limit our questions to the matter of our hearing. Adherence to this admonition will promote a greater dialogue, I think, at this point in the hearing and encourage the judiciary to participate in future hearings.

Although I'm now pleased to introduce our witnesses for today, I'm sure that our colleagues are very well acquainted with their extensive accomplishments.

Justice Antonin Scalia was nominated by President Ronald Reagan to the United States Court of Appeals for the District of Columbia Circuit and assumed the bench in 1982. Thereafter, he was nominated by President Reagan as Associate Justice of the United States Supreme Court and took the oath of office on September 26, 1986.

Prior to his service in the judicial branch, Justice Scalia was general counsel for the Office of Telecommunications Policy in the Executive Office of the President from 1971 to 1972 and Assistant Attorney General in the Office of Legal Counsel at the Justice Department from 1974 to 1977. Between those two assignments, and of particular relevance to today's hearing, Justice Scalia served as chairman of the Administrative Conference from 1972 to 1974. In addition, he chaired the American Bar Association Section of Administrative Law from 1982 to 1983.

Our next witness is Justice Stephen Breyer. Justice Breyer began his illustrious legal career as a law clerk to Justice Arthur Goldberg during the Supreme Court's 1964 term. He then served as special assistant to the head of the Justice Department's Antitrust Division from 1965 to 1967. In 1973, Justice Breyer, having by this time worked for the judicial and executive branches of the Federal Government, now applied his talents to the legislative branch, where he worked as assistant Watergate special counsel in 1973, special counsel to the Senate Judiciary Committee in 1975, and as the Committee's chief counsel from 1979 to 1980. Thereafter, he was appointed Judge to the United States Court of Appeals for the First Circuit. President Clinton nominated him to the Supreme Court, and he took office in August 1994. Justice Breyer has authored numerous books and articles in the field of administrative law and regulation.

I extend to each of you our warm regards and appreciation for your willingness to participate in today's hearing. In light of the fact that your written statements will be included in the hearing record, I request that you limit your oral remarks to 5 minutes, but we are not going to be very hard on that time frame. We are mostly interested in your comments and ideas. Accordingly, please feel free to summarize and highlight the salient points of testimony.

You'll note that we have a lighting system. It starts with green, goes to yellow, it stays yellow for a minute, and then we'll sort of ignore it if it turns red.

On the other hand, because we have a number of Members, we'll try and keep the questioning to about 5 minutes using the same

system, and I'll tend to tap the gavel when the 5 minutes runs, just so people are aware. I don't think that we'll have a problem with people going over time today.

Justice Scalia, would you now proceed with your testimony?

STATEMENT OF THE HONORABLE ANTONIN SCALIA, ASSOCIATE JUSTICE, SUPREME COURT OF THE UNITED STATES

Justice SCALIA. I would be happy to. Mr. Chairman, Members of the Subcommittee, Congressman Conyers, I'm happy to be here today to provide information about the Administrative Conference. I obviously think it was a worthwhile organization and I guess demonstrated that belief by devoting 2 years of my life to it.

I've described the organization of the Conference and some of its accomplishments, particularly during my tenure as Chairman, in my written testimony, and I will not go over that.

I was Chairman from September 1972 until August 1974. Like the first two Chairmen, who were Professor Jerre Williams of the University of Texas Law School and Professor Roger Crampton of the University of Michigan Law School, and like my successor, Professor Robert Anthony of Cornell Law School, I was an academic and at that time on leave from the University of Virginia Law School. And, frankly, it was very much an academic job. I viewed it somewhat as returning from an online executive branch job, which I had had before then—I was general counsel of an agency—to a job that mainly dealt with examining procedures within the executive branch, trying to line up consultants (generally academic consultants) who would be competent to assist our committees in studying those procedures, and then assisting the full Assembly in preparing recommendations.

I found the Conference to be a unique combination of talents from the academic world, from within the executive branch—because many of the members of the Conference were representatives of the agencies, usually general counsels—and, thirdly, from the private bar, especially lawyers particularly familiar with administrative law. I did not know another organization that so effectively combined the best talent from each of those areas.

I think the Conference's ability to be effective hinged in part on the fact that we were a Government agency, and when we went to do a study at an agency, we were not stonewalled. Very often, a member of that agency was on our Assembly, and so the agency would cooperate in the study that we did. I think it's much harder to do that kind of a study from the outside. The agencies tended to look upon us as essentially other people from the executive branch trying to make things better.

I think we were successful in improving many procedures throughout the Government. Very little of it made headlines. Most of the changes had to be made agency by agency. Nobody who was not involved in the particular work of that particular subsection of that particular agency would even know that any changes had been made. But, all in all, I think the Conference was successful in improving the efficiency and the economy of the executive branch in many areas.

Mr. Chairman, at the Court we really don't let counsel blather on without being interrupted by questions for very long, so I feel

constrained to set the example myself. I will just refer you to my written testimony for the rest. I'm mainly here to answer your questions.

[The prepared statement of Justice Scalia follows:]

PREPARED STATEMENT OF THE HONORABLE ANTONIN SCALIA

Mr. Chairman and Members of the Subcommittee:

I am happy to accept your invitation to provide information concerning the Administrative Conference of the United States. I was the third Chairman of the Conference, and served in that capacity from September 1972 to August 1974. Like the first two Chairmen (Professor Jerre Williams of the University of Texas Law School, and Professor Roger Crampton of the University of Michigan Law School), and like my successor (Professor Robert Anthony of Cornell Law School), I was an academic—at that time on leave from the University of Virginia Law School. The Conference was then, and I believe continued to be, a unique combination of scholarship and practical know-how, of private-sector insights and career-government expertise. My testimony will generally pertain to the time period in which I served as Chairman, since I did not follow the Conference's activities closely after moving on.

At the outset, let me describe why the Conference was instituted and how it was organized. The Administrative Conference of the United States was established as a permanent independent federal agency by the Administrative Conference Act, signed by President Lyndon Johnson in 1964; and it was activated by the appointment of its first Chairman in January 1968. Its purpose was to identify the causes of inefficiency, delay, and unfairness in administrative proceedings affecting public rights, and to recommend improvements to the President, the agencies, the Congress, and the Courts.

The Conference was composed of three parts: a Chairman, a Council, and an Assembly. The Chairman was appointed by the President, with the advice and consent of the Senate, for a term of five years. He was the Chief Executive of the Conference. He presided at plenary sessions of the Assembly and at Council meetings, and was the official spokesman for the Conference in relations with the President, the Congress, the Judiciary, the agencies, and the public. His most important responsibility, however, was to identify subjects appropriate for study by the Conference, and—if the relevant Committee of the Assembly was willing to pursue a particular subject—to line up an academic consultant qualified to assist in the research. It was also the Chairman's responsibility to seek implementation of Conference recommendations—a task that required some diplomacy and charm, since needless to say the Conference had no enforcement powers over the agencies, much less over the President and Congress if the recommendations were directed to those quarters. The Chairman was served by a small permanent staff whose principal duties were to furnish administrative and research support to the Assembly of the Conference and its Committees, to follow and assist in the work of consultants, and to help the Chairman in securing implementation of recommendations.

The Council of the Conference consisted of the Chairman and 10 other members who were appointed by the President for three-year terms, of whom not more than one-half could be drawn from Federal agencies. Its functions were similar to those of a corporate board of directors. It had the authority to call plenary sessions of the Conference and to fix their agenda, to recommend subjects for study, to receive and consider reports and recommendations before the Assembly considered them, and to exercise general budgetary and policy supervision.

The Assembly of the Conference was composed of the entire membership, which by statute could not be less than 75 members nor more than 91. The Chairman and the other members of the Council accounted for 11 of this number; the remaining members fell into the following groups: First, the Act conferred membership upon the Chairman of each independent regulatory board or commission, or an individual designated by the board or commission. Second, the Act granted membership to the head of each Executive Department or other administrative agency (or his designee) named by the President. The final group consisted of the public members, appointed by the Chairman with the approval of the Council for two-year terms. These members, who had to comprise not less than one-third nor more than two-fifths of the total membership, were selected in such a manner as to provide broad representation of the views of private citizens of diverse experience. They were chosen from among members of the practicing bar, prominent scholars in the field of administrative law, and others specially qualified by knowledge and experience to deal with matters of federal administrative procedure.

The Assembly, which had ultimate authority over all activities of the Conference, operated much like a legislative body. It adopted By-laws establishing nine standing committees: (1) Agency Organization and Personnel, (2) Claims Adjudications, (3) Compliance and Enforcement Proceedings, (4) Grant and Benefit Programs, (5) Informal Action, (6) Judicial Review, (7) Licenses and Authorizations, (8) Ratemaking and Economic Regulation, and (9) Rulemaking and Public Information. These committees were the real work-horses of the Conference. They met periodically to direct and supervise research by academic consultants and by the Conference's professional staff. On the basis of that research they framed proposals for consideration by the Assembly at its annual meeting. When a study or tentative recommendation had been prepared, it was circulated to the affected agencies for comment and reexamined by the committee in light of the replies. After final committee approval, a proposed recommendation would be transmitted to the Council and then to the Assembly for final action in plenary session. The Assembly could adopt the recommendation in the form proposed, amend it, refer it back to the committee, or reject it entirely.

The purpose of the Conference was to apply the talents of its diverse group of agency officials, practitioners, and academic members to improving the efficiency and fairness of the thousands of varieties of federal agency procedures. In my judgment, it was an effective mechanism for achieving that goal—usually through voluntary acceptance of its recommendations by the affected agencies. Inefficiency and unfairness in agency procedures often exist simply by reason of bureaucratic inertia, and a well reasoned study and recommendation, prepared with the cooperation of the affected agency, can often produce desirable change. A few of the Conference's projects have had major, government-wide impact—for example, its recommendation leading to Congress's adoption of Public Law 94–574, which abolished the doctrine of sovereign immunity in suits seeking judicial review of agency action. For the most part, however, each of the Conference's projects was narrowly focused upon a particular agency problem, and was unlikely to attract attention beyond the affected community. This should be regarded, not as a sign of ineffectiveness, but as evidence of solid hard work. Administrative procedure is not a one-size-fits-all operation; most procedural regimes are unique, and have to be fixed one-by-one.

The Administrative Conference made several important strides in the area of implementation and saw some of its earlier recommendations bear fruit. Some examples that come to mind are the Justice Department's almost verbatim adoption of the Conference's guidelines for implementation of the Freedom of Information Act; the Civil Service Commission's publication of proposals substantially applying the Conference's recommendation concerning adverse actions against Federal employees; the Board of Parole's indication of its readiness to adopt the Conference proposals concerning parole procedures; and the Department of Labor's adoption of a field memorandum that substantially implemented the Conference's proposals regarding labor certification of immigrant aliens. Agencies that engaged in publicity as a regulatory tool adopted procedures conforming to the Conference's recommendations for protecting against unfair publicity that could harm a private party. The Conference's recommendations regarding procedures for resolution of environmental issues in licensing proceedings were embodied in regulations adopted by five of the six affected agencies.

Some of the Conference's work also bore fruit at the legislative level. The Parole Commission and Reorganization Act of 1976, P.L. 94–233, implemented Recommendation 72–3's call for a right to counsel in parole proceedings, and other procedural guarantees recommended by the Conference. The 1974 Freedom of Information Act Amendments, Pub. L. No. 93–502, adopted many of the Conference's recommended improvements to FOIA. The Conference's encouragement of granting agencies authority to impose civil money penalties has had a major, and I think beneficial, impact. Many separate statutes implemented the Conference's recommendation regarding the appropriate standard of pre-enforcement judicial review of rules of general applicability. (That recommendation was also cited by court opinions that looked to it for guidance. See *Ass'n of Data Processing Service Organizations, Inc.* v. *Board of Governors of Federal Reserve System,* 745 F. 2d 677, 684 (CADC 1984); *Home Box Office, Inc.* v. *F. C. C.,* 567 F. 2d 9, 57 n.130 (CADC 1977).) Some recommendations were effectively implemented through a combination of congressional and agency action. For example, the Department of Treasury agreed to carry out most of the provisions of Recommendation 73–4, which called for increased access to customs representatives, greater disclosure, and written findings; and 1974 legislation implemented the suggested improvements in coordination between Customs and other relevant agencies. Of course some recommendations were framed not in terms of what to do, but rather in terms of what to avoid—for example, the rec-

ommendation cautioning against Congress's imposition of complex rulemaking procedures, which has been followed with few exceptions.

The Conference made itself useful in ways beyond specific proposals for legislation, or executive or judicial action. As Chairman, I gave testimony before Congress on legislation pertaining to the Freedom of Information Act, the procedures of the U. S. Board of Parole, the establishment of a Consumer Protection Agency, possible amendments to the Federal Food, Drug, and Cosmetics Act and the Fair Packaging and Labeling Act, and the opening of the administrative process to the public. The Conference responded to numerous informal requests for advice from congressional committees and committee staffs on a wide variety of procedural matters.

Agencies also sought the Conference's informal advice and assistance, particularly in connection with their initiation of new programs or procedures. I regarded this sort of pre-implementation advice as a particularly beneficial activity, since it is obviously preferable to get things started on the right foot than to criticize the deficiencies of a program already in operation. During my first year alone, the staff and consultant resources of the Conference were called upon for advice with respect to several programs under development—for example, the Department of Transportation's program to facilitate public participation in their rulemaking process, and the Justice Department's congressionally mandated study into the feasibility of a special court for environmental matters. Especially noteworthy was the study which the Chairman's Office prepared, at the request of the Office of Management and Budget, covering the procedural provisions of what was then the most significant piece of regulatory legislation that had been adopted in years, the Consumer Product Safety Act. This study was completed before the members of the new Consumer Product Safety Commission had yet been named, and was therefore a prime example of applying the Conference's expertise at the point where it is most useful—before procedures have been adopted and institutional commitments made. The Conference also conducted seminars for agency attorneys, emphasizing those aspects of administrative procedure that had special relevance to the attorneys' agency, but also refreshing the attorneys' recollection of basic administrative law principles to which they had had no systematic exposure since law school.

The Conference also conducted studies that, while not producing recommendations in and of themselves, were useful in enabling particular administrative functions to be understood and evaluated. An example of this is the study completed during the first year of my chairmanship by the Committee on Informal Action, systematically examining, for the first time, the agencies' practices in providing advice to the public. Or the study by the Chairman's Office concerning the various means by which agencies handle citizen complaints.

One way of judging the worth of the Conference without becoming expert in the complex and unexciting details of administrative procedures with which it deals, is to examine the roster of men and women who have thought it worthwhile to devote their time and talent to the enterprise. Over the years, the academics who have served as consultants to or members of the Conference have been a virtual Who's Who of leading scholars in the field of administrative law; and the practitioners who have served as members have been, by and large, prominent and widely respected lawyers in the various areas of administrative practice.

I would not presume to provide the Subcommittee advice on the ultimate question of whether, in a time of budget constraints, the benefits provided by the Administrative Conference are within our Nation's means. But I can say that in my view those benefits are substantial. The Conference was a proved and effective means of opening up the process of government to needed improvement.

Mr. CANNON. Thank you, Mr. Justice. That was very enlightening, raised points I hadn't considered in the past. We have strict rules here because there's a tendency that we blather on, and so we will adhere at least on our behalf. Thank you very much.

Mr. Justice Breyer, would you mind presenting your testimony now?

STATEMENT OF THE HONORABLE STEPHEN G. BREYER, ASSOCIATE JUSTICE, SUPREME COURT OF THE UNITED STATES

Justice BREYER. In the Court, when the red light goes on, people stop. [Laughter.]

Mr. CANNON. We'd like to inject some of that DNA around here, but we've long since given up.

Justice BREYER. Mr. Chairman and Members of the Committee, I'm very pleased to be here with my colleague Justice Scalia. I think we're completely in agreement. I think it's a very good thing that you're looking into the question of reauthorization. The reason I think it is good is I think Americans have problems that call for some Government solutions. They might need Social Security. They might need a permit in the environmental area. They might need—they might be veterans. There are just millions and millions of interactions between ordinary citizens and Government.

If you tell the citizens that they just have only to do what the Government says or go to court, their life becomes impossible because courts are too expensive and they take too long. So we have administrative processes which are supposed to be simple and they're supposed to be less expensive. That's where the Administrative Conference comes in, because it's hard to create those processes—very hard. And it's done at a level that's highly technical. You could say, "What person actually cares about separation of functions rules for rulemaking?" All you have to do is mention that phrase, and they're already asleep. But, in fact, whether you have one set of rules or another set of rules matters. And if you were to say, "What's the right set of rules?" I couldn't tell you in theory. In theory, there is no right set. You have to have people who know about it. And I have been an academic for many years, and I will absolutely swear that they don't know.

We are very good in the academy at getting theories, but we're not necessarily so good in finding out how they operate in practice. This is where the Administrative Conference came in.

My first book I ever wrote, a book that I think was extremely popular—I think it sold 23 copies. But it was aimed at certain questions: How do people actually set rates at the Federal Power Commission? Do you remember the Federal Power Commission? Well, that was back in the 1960's, and that was FERC before FERC was born.

So Paul McAvoy and I actually went to the Federal Power Commission. It was impossible in Washington to find anyone who knew where it was. We found it. We found the administrators who actually set the rates. It was a woman named Georgia Ledaukis. I remember her. I said, "How do you set a rate?" And she explained it. No one had ever asked her that question. But it was that system that only she, I think, at the Federal Power Commission knew about. and that was really the system that they, in fact, used.

So, I think that was a good idea. And what the Administrative Conference did was formalize that kind of thing. There were four kinds of members: there were actual commissioners. I can remember when—it was Dean Burch—do you remember Dean Burch who was Chairman of the Federal Communications Commission? And he would tell us about the problem of ex parte communications in practice. Would you like to know what he said? It's sort of interesting. He said—I can remember this talk. He said, "You know, I was from Arizona. I was appointed Chairman of the Federal Communications Commission. My neighbors congratulated me. And then I came to Washington. I thought I was a pretty important person. But I discovered nobody was the slightest bit interested. Oh, no," he said, "there was one group of people, one group of very po-

lite, very charming, really hospitable people who seemed to be interested in everything I said. They were lawyers, and they worked for the communications company." He said, "No, that was in really practical form the problem of ex parte communications."

Well, I'm just giving you examples. But I'm saying when you put the academics together with the agency staffs, the agency commissioners, the heads of the agency, and then some lawyers who are actually practical people outside the agency who know what it is to deal with them every day. And they discuss things at a technical level, sometimes things can change—a little bit for the better.

What kinds of rules should we have for a proceeding of informal rulemaking? How formal should informal rulemaking be? Should it be very formal, like formal rulemaking? Hardly formal? Somewhere in the middle? The same for every agency? Have exceptions, as we do sometimes for some of these procedures?

The Conference would try to address that kind of question. Someone would write a report. The report would be criticized. It would be discussed. Something would emerge, and then recommendations would flow, either to the agencies themselves or to Congress. When they passed Congress—and sometimes they did—it was not because people thought there was a lot of political force behind it one way or the other. It was because they thought it was simply good Government. That's what the commission—that's what the Conference did. It is a matter of good Government. Its recommendations were not perfect, but I think they helped. And it's a great forum for bringing people together and discussing what will really happen, not what the politics or the general policy is about procedure and at a technical level.

So I'm very glad you've looked into this. I'm glad you're doing it. I very much hope you reauthorize the Administrative Conference.

[The prepared statement of Justice Breyer follows:]

PREPARED STATEMENT OF THE HONORABLE STEPHEN BREYER

Mr. Chairman and Members of the Subcommittee. Thank you for the invitation to comment upon the Administrative Conference of the United States. I participated in its activities from 1981 to 1994 as a "liaison" to the Administrative Conference from the Judicial Conference. I believe that the Conference was a unique organization, carrying out work that is important and beneficial to the average American, at low cost.

During that time, the Administrative Conference primarily examined government agency procedures and practices, searching for ways to help agencies function more fairly and more efficiently. It normally focused upon achieving "semi-technical" reform, that is to say, changes in practices that are general (involving more than a handful of cases and, often, more than one agency) but which are not so controversial or politically significant as likely to provoke a general debate, say, in Congress. Thus, it would study, and adopt recommendations concerning better rule-making procedures, or ways to avoid legal technicalities, controversies, and delays through agency use of negotiation, or ways of making judicial review of agency action less technical and easier for ordinary citizens to obtain. While these subjects themselves, and the recommendations about them, often sound technical, in practice they can make it easier for citizens to understand what government agencies are doing to prevent arbitrary government actions that could cause harm.

The Administrative Conference was unique in that it developed its recommendations by bringing together at least four important groups of people: top-level agency administrators; professional agency staff; private (including "public interest") practitioners; and academicians. The Conference would typically commission a study by an academician say, a law professor, who often has the time to conduct the study thoughtfully, but may lack first-hand practical experience. The professor would spend time with agency staff, which often has otherwise unavailable facts and expe-

rience, but may lack the time for general reflections and comparisons with other agencies. The professor's draft would be reviewed and discussed by private practitioners, who bring to it a critically important practical perspective, and by top-level administrators such as agency heads, who can make inter-agency comparisons and may add special public perspectives. The upshot was likely to be a work-product that draws upon many different points of view, that is practically helpful and that commands general acceptance.

In seeking to answer the question, "Who will control the regulators?" most governments have found it necessary to develop institutions that continuously review, and recommend changes in, technical agency practices. In some countries, ombudsmen, in dealing with citizen complaints, will also recommend changes in practices and procedures. Sometimes, as in France and Canada, expert tribunals will review decisions of other agencies and help them improve their procedures. Sometimes, as in Australia and the United Kingdom, special councils will advise ministries about needed procedural reforms. Our own Nation developed this rather special approach (drawing together scholars, practitioners, and agency officials) to bringing about reform of a sort that is more general than the investigation of individual complaints yet less dramatic than that normally needed to invoke Congressional processes. Given the Conference's rather low cost (a small central staff, commissioning academic papers, endless amounts of volunteered private time, and two general meetings a year), it is indeed a pity that by abolishing this Conference, we have weakened our federal government's ability to respond effectively, in this general way, to the problems of its citizens.

I have not found other institutions readily available to perform this same task. Individual agencies, while trying to reform themselves, sometimes lack the ability to make cross-agency comparisons. The American Bar Association's Administrative Law Section, while a fine institution, cannot call upon the time and resources of agency staff members and agency heads as readily as could the Administrative Conference. Congressional staffs cannot as easily conduct the technical research necessary to develop many of the Conference's more technical proposals. The Office of Management and Budget does not normally concern itself with general procedural proposals.

All of this is to explain why I believe the Administrative Conference performed a necessary function, which, in light of the cost, should have been maintained. I recognize that the Conference was not the most well known of government agencies; indeed, it was widely known only within a fairly small (administrative practice oriented) community. But, that, in my view, simply reflects the fact that it did its job, developing consensus about change in fairly technical areas. That is a job that the public, whether or not it knows the name "Administrative Conference," needs to have done. And, for the reasons I have given, I believe that the Administrative Conference was well suited to do it.

I hope these views will help you in your evaluation of the need to re-establish the Conference. I highly recommend that Congress do so.

Mr. CANNON. Thank you very much, Mr. Justice Breyer.

Mr. Coble, would you like 5 minutes?

Mr. COBLE. Thank you, Mr. Chairman. And, again, I apologize for my imminent departure, but it's good to have both of you with us.

Justice Scalia, should ACUS in your opinion be established as a part of another agency such as Department of Justice or GSA, for example, A? And should it be privatized, B?

Justice SCALIA. A is easy. I don't think it would be effective if it were a part of any other agency. It was set up originally as an independent agency, and I think it has to be that in order to have the confidence of the other agencies with which it's dealing. As you know, there are some interagency jealousies and reservations which I think would make its studies more difficult if it were a subunit of some other department. Besides which, I think being accountable to a Secretary of some Department or to the Attorney General would eliminate its independence, which is its whole value. It's not supposed to reflect the view of the current Administration or of the current Justice Department. It's supposed to rep-

resent the intelligent, informed view of those who are expert within the academic community, the practicing bar, and the Government. So if you want to have that, I think you have to make it an independent agency. I think it would hurt it to put it under something else.

Now, the second question, should it be privatized? I'm not sure what you mean by that. I think it has to be within the Government because, as I indicated in my initial comments, you have an entree to the agencies. No agency likes to be studied. Anybody who says, you know, "We welcome a study," they're kidding you. Everybody would like people to go away and leave me alone.

But if you have an agency that has the respect of other agencies and in which a representative from that agency itself is on the Conference, which was usually the case, your chances of being able to do a thorough study with the cooperation of the agency are vastly increased. That could not be done by a private operation.

Mr. COBLE. Thank you, sir.

Justice Breyer, in this town much is made over, oh, it must bipartisan. Well, I'm an advocate of bipartisanship as well, but by the very nature of this city, it's the capital city of a Republic of 50 States, and some issues by their very nature and make-up are going to be partisan. Justice Scalia I think answered this, but let me put it to you, if I may.

How important is it to preserve the bipartisan, nonpolitical nature of ACUS?

Justice BREYER. It's fairly important. I can't recall in the time I was there—I don't want to say none, but I can't recall any significant number of issues coming up where partisanship made much of a difference. You know, there could have been some, but it's at a level where what is the partisan view of separation of functions in rulemaking? You know, for most—that's not true 100 percent, but most of it, it doesn't take place in the discussion at a partisan level.

Mr. COBLE. Thank you, sir.

Mr. Chairman, I want you to take judicial notice that I beat the red light, and I yield back my time. And thank you, again, gentlemen, for being with us.

Mr. CANNON. I thank the gentleman.

Mr. Watt, would you like 5 minutes?

Mr. WATT. Thank you, Mr. Chairman.

Justices, reading from the briefing memo that the Committee Members got, just to establish a foundation for a question that I want to follow up with, the Administrative Conference was established as a permanent, independent agency in 1964 and became operational 3 years later. The Conference was created to develop recommendations for improving procedures by which Federal agencies administer regulatory, benefit, and other Government programs. It served as a private-public think tank that conducted basic research on how to improve the regulatory and legal process. After failing to be appropriated funds for fiscal year 1996, ACUS ceased operations as of October 31, 1995, and the statutory provisions establishing ACUS have not been repealed.

Justice Breyer gave us a great snapshot of some of the things that the Conference did to formalize and clarify procedures that

were absolutely necessary. I sense that we are probably continuing to benefit from the work that the Conference did over the years of its existence in establishing knowable and uniform procedures.

I'm wondering if either of you may have examples of some of the problems that have been created since 1995 when the Conference went out of existence that might have been avoided had the Conference been in place.

Justice BREYER. We won't know. I remember one of the things they were working on earlier when I was—it was before I was appointed to the Supreme Court. I was on the court of appeals. A question that's always been a tough one, but very interesting, is the problem of negotiated rulemaking. Rules take us sometimes a very long time to write, and the problem they deal with almost goes away by the time they get them written and through the courts. And there was an idea that we could produce a negotiated process, and that's not an easy thing to do because sometimes there are people left out of the table.

They've done studies on that, and maybe that's made a lot of progress without them. Maybe it hasn't. I haven't heard too much about it.

Mr. WATT. That was still a work in progress at the end of the——

Justice BREYER. I think a continuous set of works in progress. But the short answer is I don't know.

Justice SCALIA. That's my answer, too, Congressman. And it's not easy to know. The biggest part of my job when I was Chairman was precisely identifying problems to study. Most of them are under the surface. They don't leap out at you. If they leapt out at you, there would be legislation covering the problem. That's usually not the case. It takes some work to discover what the real problems are and to discover how to solve them.

Anyway, you know, I have been out of that business for a while now. I'm now in the business of creating problems rather than solving them. [Laughter.]

Justice BREYER. That's what I was thinking. I was thinking that since we've both been on the Court, my guess is that we could get a pretty good agenda for them.

Mr. WATT. I would sense that maybe the people who would be most knowledgeable about the problems that may be surfacing as a result of not having the Conference in place would be ordinary citizens who are trying to work their way through a process that there's really—or improve a process that there's really no formalized procedure in place at present to improve. So I——

Justice SCALIA. Either citizens, Congressman, or the specialized bar that services that particular segment of the community—maybe the immigration bar or the bar that handles Veterans Administration appeals, things of that sort. That's where you usually get the signals from.

Mr. WATT. Now, the ABA's letter has certainly been vigorously in favor of doing this. It may be that some of their committees have stepped into that void and they'd like to get back out of it and formalize it in a different sense, or be participants in it but not necessarily the only voice that's being heard in that——

Justice BREYER. That's exactly right, because the Administrative Law Section of the American Bar Association has always been active in this area, and both, they co-existed. But what the Conference could do that the Ad. Law Section couldn't do is just what Justice Scalia is talking about: they could get the access to the information inside the Government and the off-the-record reactions of people in charge of those agencies. So it produced a conversation that you can't have as easily just through the ABA.

Justice SCALIA. I was Chairman of the Ad. Law Section for a year, and there's a big difference between showing up at an agency and saying, "I'm from the American Bar Association, I want to know this, that, and the other," and coming there from the Administrative Conference which has a statute that says agencies shall cooperate and provide information. It makes all the difference in the world.

Mr. WATT. Thank you, Mr. Chairman. I've always wanted to question Supreme Court Justices and be on the other side of the fence.

Mr. CANNON. This is actually pretty cool, isn't it?

Mr. WATT. Yes, this is nice. [Laughter.]

I will yield back. I'll resist the temptation to go well beyond the 5 minutes. I thank both witnesses and thank you for being here, and I yield back.

Mr. CANNON. The gentleman yields back.

The gentleman from Florida, Mr. Feeney, is recognized for 5 minutes.

Mr. FEENEY. Thank you, Mr. Chairman. I apologize for being a little bit late, but I want to also thank Justice Breyer and Justice Scalia for all that you do to help our country in administering the third branch of Government under article III. I want to tell you that I think everybody on this Committee, regardless of their partisan nature, wants to work with you to find ways to facilitate the administration of justice in a manner that best serves our country under the principles of the Constitution.

And I guess to try to throw you what I hope will be a soft ball, maybe in my short time—I've read your testimony and we appreciate just how far we've come since 1946, for example, in the Administrative Procedure Act. I'd like to ask both of you, given that you're not only, you know, great Justices but that you've got a great historical background in terms of the judicial system and with the changes from Justice Marshall right up through today, if you would maybe give us some predictions about what our court system will look like not 50 years ago but 50 years from now as we continue to evolve as a society. Maybe you could some forward thinking for us, if it's not asking too much.

Justice SCALIA. I'm hesitating, Congressman, because Justice Breyer and I came here to talk about the Administrative Conference, and I am afraid that if I answer your question, I am going to be on what is known as the slippery slope. We really didn't come to talk about the courts, and——

Mr. CANNON. May I just suggest, we were just talking with staff, and, frankly, we would appreciate it if all the Members of the Committee would focus on ACUS. I don't mean to correct you because that's a fascinating question that I'd like to——

Mr. FEENEY. In that case, I'll withdraw my question

Mr. CANNON.—sit around with a root beer and talk to the Justices about.

Justice BREYER. I'll say one thing about the difference. An administrative process, by and large, is individuals dealing with a bureaucracy. It's absolutely necessary, it's supposed to be accessible, and it's supposed to help. The judicial branch is the last place, I think—maybe Congress still is—where an individual who has a problem with the Government comes into a courtroom and looks face to face at the sole individual, usually a district judge, who is going to make that decision.

Now, to me, that's an incredibly valuable thing. And to me as well, although the judicial process is too expensive and it takes too long, I think it's essential to preserve its nature, which is not an administrative bureaucracy. And there is room for both. So I can't predict but I can hope, and I hope that 50 years from now the judicial branch will still not be a bureaucracy; it still will be a place where the individual comes face to face with that high Government official who will decide his or her case; and I also hope it will be a lot less expensive and will be run more expeditiously.

But as I say, those are hopes and they are not predictions.

Justice SCALIA. He's provoked me now. [Laughter.]

If I were going to compare the two, one of the great things about our judicial system is that our courts are not a bureaucracy. It is the principal difference between our judicial system and the judicial systems of most of the civil law countries. In the Anglo-Saxon system, a judge becomes a judge, at least on a prestigious court such as a Federal district court or any of the Federal courts, at the summit of a successful legal career. He not only has not been a bureaucrat his entire life, he has usually been litigating against the Government. So he comes on to the bench with a really independent mind. He is not inclined to swallow everything the Government tells him and so forth.

In the civil law system, you become a judge right after law school. You pick your career. If you want to become a judge, you start off as a baby judge and you get promoted through the whole judicial system. This creates a wholly different mindset. The strength of our courts is precisely that they are not a bureaucracy. And that's why they can help the citizen confronted with a sometimes misunderstanding bureaucracy. But I don't want to talk about the court——

Mr. CANNON. If the gentleman yields back, let me just point out that the comments from the panel are very important in the context of what we're doing here because, before you get to a judge, you often have to go through a very long process. And the fact that a judge who may be a little bit contrary to the Government, has an independent streak, is going to oversee that, is a remarkably important part of the process. But, of course, how we get that person through the process, his claims are adjudicated, are dealt with early, saving him time and money is very, very important. So we appreciate that.

I'd like to inform the panel that we expect five votes within about 10 minutes from now, so I am going to actually tap the gavel at

5 minutes. And I hope that we have—Mr. Delahunt, did you want to take 5 minutes?

Mr. DELAHUNT. I will try to limit myself.

Mr. CANNON. Let me just poll the panel here. I take it, Mr. Conyers, you'd like to ask questions. Mr. Scott, yes. Good. Let me recognize Mr. Delahunt. We'll go to Mr. Scott. If there is some time left, I will wrap. But we do have votes coming, so let's watch the clock.

Thank you, Mr. Delahunt.

Mr. DELAHUNT. Thank you, Mr. Chairman. And welcome to both judges, and a particularly warm welcome to Justice Breyer, who served, as you've indicated and as he's alluded to, in the First Circuit, where he served so well and earned the admiration of the Massachusetts Bar and the citizens of Massachusetts and obviously other States encompassed in it. It's good to see you, Judge.

Justice BREYER. Thank you.

Mr. DELAHUNT. Clearly, both of you indicate, you know, support for reauthorization, and as we discuss it among ourselves, I dare say there's a consensus that when it was functioning, it served a very valid purpose. I think both of you have at least implicated that it resulted in efficiencies, improvements that translated into savings—savings of tax dollars.

I'd speculate that this panel and most likely the full Committee would support reauthorization. I think that's the inclination of the Chair of the Subcommittee. I can't find any reason not to. Is there any reason not to? Let me pose that question to you.

Justice SCALIA. Well, there's always money, but I guess nobody's mentioned, and I meant to mention at some point in my testimony, that I think the Administrative Conference was an enormous bargain because you are really getting the benefit of the legal advice of, I think, some very good private lawyers whose time nowadays probably goes out at 500 bucks an hour or something like that. Their time was contributed. They got no compensation for serving on the Assembly of the Conference. The only expense to the Government was their travel expenses to come to Washington for the meetings. But they expended a considerable amount of time in committee meetings, in preparing drafts of recommendations—and all of this was provided to the Government gratis.

Mr. DELAHUNT. It's a good investment. You know, earlier, I think it was you, Justice Scalia, that indicated—I mean, this is not an issue that's attracting a standing-room-only crowd. You know, it's tough to keep your eyes open.

Justice SCALIA. I'd worry for the country if it did, Congressman. [Laughter.]

Mr. DELAHUNT. Right. And I would concur with those sentiments. But I think it was you, Justice Breyer, that indicated that during your tenure there and during the course of the AC's existence, you know, there were significant savings, that it's a good investment. It wasn't just a question of taking advantage of high-priced talent, but the results translated into efficiencies that, in fact, saved considerable dollars.

We have to—if this Committee at some point in time should have legislation before it and it leaves here, our responsibility is going to be to sell it to our colleagues to ensure passage. And I think

what our responsibility is—and I think your testimony, both of your testimony here today have provided a record to be able to honestly relate that this is a way to save money, as well as to make it more streamlined.

Mr. CANNON. Would the gentleman yield?

Mr. DELAHUNT. Sure.

Mr. CANNON. Justice Scalia, you just said that you compared the value or the cost to the Government with the value of the inputs, that is, a $500-an-hour lawyer. And I think Mr. Delahunt is moving toward another perspective, which is that we got a lot of value out. We would just love, for the record, if you have some way to give us a comparison between, say, the $3 million we're looking at authorizing and the value Government gets as product.

Justice BREYER. Suppose, for example, that you—and I think this is a fair example. In a world where it did at one point take an average of several years from the time a rulemaking was considered until the time it went into effect as a result of improved procedure you cut a month or two off that process, as undoubtedly regulatory rulemaking negotiation, even where imperfect, did, and cut off far more than that, well, you've saved your $3 million right there.

Mr. CANNON. That might be billions of dollars.

Justice BREYER. It could. It easily could, a major environmental rule, and that's not even taking account of the fact that the environment will then be protected that much sooner. So there is huge saving directly to the public, I think, through a more efficient set of rules.

Mr. DELAHUNT. Mr. Chairman, what I would recommend is that you, along with the Ranking Member, request either the CRS or some appropriate agency to conduct a review, if you will, that could prospectively provide us at least a vague range of the savings that could be effected if it was reauthorized, and maybe we could end up passing this, getting it on the suspension calendar, and go where we should.

Thank you. Thank you, Judge.

Mr. CANNON. We expect to have another panel at some point in the future. Maybe we can get that cost/benefit then. But let me just say for the record now, it appears to me that we're talking about a few million dollars compared to billions of dollars in cost to industry, and as Justice Breyer pointed out, a failure to implement protections to save the environment which may be incalculable in value.

Justice Scalia, I think you——

Justice SCALIA. I was just going to say, don't judge it just on how much money it saves, because not all of its recommendations are money-saving recommendations. There are two values involved here: one is efficiency, the other one is fairness. Sometimes you have agencies' procedures that are just unfair, and it might take a little more money to make them fair. But you'd want to do that.

So I don't think you can just judge it on the basis of financial cost saving, although I wouldn't be surprised if it ended up having saved money overall in its recommendations.

Mr. CANNON. Thank you, Justice Scalia.

We've had Mrs. Blackburn from Tennessee join us. We have a short—time is—we have a vote coming up, and I was going to rec-

ognize Mr. Watt first, if that would be okay with you—pardon me. My Ranking Member is so prominent in my mind that I sometimes mistake that. Mr. Scott, would you like to be recognized for 5 minutes?

Mr. SCOTT. Thank you, Mr. Chairman.

When Justice Breyer talked about a rate setting, it reminded me of that line in "A Man for All Seasons" when Sir Thomas More was charged more than the regulated rate for a boat trip, and the response from the boatsman was that the fee coming this way downstream is the same as the fee going back upstream. Whoever set the rate doesn't row a boat. [Laughter.]

Justice SCALIA. I remember that line.

Mr. SCOTT. And I've remembered that.

The Conference presents nonpartisan, well-documented facts and analysis. We ought not be afraid of intelligent experts' advice, even if it disagrees with our political position. And so I've always been a supporter of the Conference.

Let me just ask one question. The members of the Conference don't fall out of the sky. The executive branch, the President appoints the Chairman. Who appoints the others? And should that be looked at?

Justice SCALIA. That's in my testimony. The Chairman is confirmed by the Senate, so it's not just a Presidential appointment. The private members of the Conference are appointed just by the President. And—I think that's right. Yes. And I think one of the jobs of the Chairman is to make sure that the organization does not become a partisan organization, that it is not used in order to further the policies of the current Administration. If that happens, it is deprived of all of its usefulness.

Mr. SCOTT. Is there something we can do in the appointment—membership appointment process to make that more likely?

Justice SCALIA. I think you have to be very careful in selecting the Chairman. I think it's the Chairman's job. You have to remain friendly to the Administration. You know, if the Administration thinks that you're a bomb thrower and, you're going to be hostile to them, you're not going to get the kind of access you need. But, on the other hand, you cannot let the Administration load up the Conference with people who don't have the expertise that you want or with people who have axes to grind. It's up to the Chairman to fight against that. And to the extent he's unsuccessful, the Conference will not be what it ought to be.

Justice BREYER. You might, Congressman, put a word "bipartisan" somewhere, you know, appropriate as an objective. I used to attend the meetings when President Carter was President and then again when President Reagan was President. And so I saw that change of Administrations. I don't think it makes a big difference. It made some difference. I wouldn't say zero. But I don't think it made an enormous difference to the output of the Conference.

Mr. SCOTT. Were Chairmen reappointed?

Justice BREYER. No. There were different Chairmen, and it was viewed as a prerogative of the Administration. But as I say, the nature of the entity was such that they were searching for bipartisan members. It mostly—there were law professors and there were pri-

vate practitioners. So that's why I say—I didn't think it was a problem, but I can't say it's a zero impact. So urging I think helps. I don't think it's necessary to legislate it.

Mr. SCOTT. Thank you, Mr. Chairman.

Justice SCALIA. I take back what I said earlier. The public members were appointed by the Chairman with the approval of the Council. So it wasn't a matter of the President appointing the private members. The Chairman did have good control over who went into the body of the Conference. And so long as he was able to resist any untoward pressures from the Administration to appoint people that they for some reason—I don't know—owed a debt to or wanted to put in there so that they could push Administration policies, it was the job of the Chairman to resist that. And he had the power to do it because ultimately he was the one who nominated the members of the Assembly. And it worked very well in that manner, for as long as I knew it anyway.

Justice BREYER. I would hope that they would go back for the first set of appointments and look for some people that have a historic memory—there are a lot of them around—to try to reconstruct the mores of the institution.

Mr. CANNON. It is my sense that the power of the Administrative Conference is actually derived from the credibility of the members, and that if you ever got in a partisan situation, it would destroy the reputation of the Chairman, principally, and would set the Conference back a year or two or three before you would get it changed out and get new people in. And no man or woman who is of the stature to become Chairman of the Administrative Conference is going to allow his or her reputation to be destroyed over partisanship when, in fact, no matter how partisan you are, the rules are the critical thing here. And administrative interests are best protected by having clear rules that then the Administration and political people can play with.

Justice SCALIA. That is absolutely true. And let me mention one other factor. As I said in my prepared testimony and in my opening remarks, the initial Chairmen of the Conference—and I think this continued for a long time—were academics. And you can't push academics around too much because, you know, "I'll just go back to teaching, which is a great racket. I don't have to stay in Washington." So, that was, I think, one of the strengths of the Conference, that it usually had an academic as the Chairman. You just can't push them around too much.

Justice BREYER. I agree.

Mr. CANNON. Thank you. That is a bell for votes. We have 15 minutes. That should leave us time. Mrs. Blackburn?

Mrs. BLACKBURN. Thank you, Mr. Chairman.

Mr. CANNON. The gentlelady is recognized for 5 minutes.

Mrs. BLACKBURN. Thank you, Mr. Chairman. And we do have the vote, and we need to get out of here. And I've enjoyed listening to your comments.

I would just say very quickly, you've talked a little bit about the importance of the bipartisan, nonpolitical nature of the ACUS, and what I—and I'll have to say this: sometimes in the day and age in which we live, when our constituents hear about trying to eliminate waste and red tape and reports from the GAO and the CRS

and Government reform and the Inspector Generals and the CFO and the CFO Act, many times their eyes just glaze over. And so we appreciate you all and your concern and your attitude toward this and toward the hearing.

What I'd like to hear from you very quickly is, in light of all of this and looking at the bipartisan, nonpolitical nature, if you will, of the ACUS, what would you see as being the top priorities for a reconstituted ACUS?

Justice SCALIA. I think it's similar to a question that was asked earlier, and my response to that was I have been out of the business for too long to know what the first things I would investigate are. Probably the most difficult job of the Chairman was precisely to identify those areas that are worthy of study. That's what I spent most of my time doing; it doesn't jump up at you. You have to take some time to speak to a lot of people and find out what are the most pressing concerns in the administrative field—which, as you point out, is a very dull field that not many people are interested in. But there are those of us who love it.

Justice BREYER. Yes. We are administrative law buffs. [Laughter.]

I can't say what's the most important for the same reason, but it does come to mind the fact that we in our Court have divided about five ways about the correct meaning of a case called *Chevron*, which has significance. And if I were running that now, I think maybe one thing I might like to do is to ask the agencies whether the five different things that we have said have mattered. Has it hurt them? Has it helped them? That's a subject they might look into.

Mrs. BLACKBURN. Well, I agree with you. I think those could be instructive. And for those of us in each branch of Government and across the field that do appreciate an effective, efficient administrative process, it would be a question worth answering. And I think we will depart for the votes, and, Mr. Chairman, I thank you for the time.

Mr. CANNON. Thank you. I do have a couple of questions to follow up.

Just along this line, while I recognize that you both are out of this business, it seems to me there's some large trends in society that might be appropriate for the Administrative Conference. For instance, litigation has increased, especially in some of the environmental areas. We have a phenomenal flourishing of science in America, and we're not integrating that very well, I don't think yet, into our administrative process. We have communication processes that are remarkable, online processes that allow people to keep track of everybody's comments and everybody's input and communications between people within and without an agency. And, of course, there's always the need to create an environment where we can have more transparency, and there are probably limits on that.

So it would seem to me that some of those areas—and there may be others in your mind—where as a matter of broad scope, the nature of society has changed, and, therefore, the focus of ACUS may be appropriate to be adjusted to look at those things.

Justice SCALIA. Well, I would certainly tell the new Chairman, one thing you might look into is whether teleconferencing couldn't

be used by agencies more than it is. I don't know whether that's something that is taken advantage of as much as it ought to be. Certainly there have been enormous strides in the facility of that procedure, the cost of it, and how close it comes to being in the same room. I don't know if the agencies are doing enough with that. Maybe that's one thing the Conference might look into. Instead of having lawyers and citizens come to Washington or to Peoria—wherever they have their hearings—maybe things could be done over the phone. I don't know.

Justice BREYER. I think science is a very, very good idea, good subject, because scientists disagree about a lot of things, but, still, the serious scientists are within a range of disagreement. And how to create a process that focuses the actual controversy within what I would call the consensus range is a hard topic to do. It's been very difficult in the courts. We've had cases trying to focus on that issue. In Britain and in continental Europe, they've had major studies and major efforts to reform their judicial system in that respect, and they've proved reasonably successful.

So there's a lot to look at, and I think if you could make progress in that area, that would be very helpful to everyone.

Mr. CANNON. Do either of you have an opinion as to whether it would be useful to have Members of Congress on the Administrative Conference?

Justice BREYER. I'm not sure that it would.

Justice SCALIA. I don't know any Member of Congress who is an expert in administrative procedure. And I don't want anybody on the Conference who's not an expert in administrative procedure.

Justice BREYER. The nature of the job is so different. I mean, the nature of the job as a person in Congress is to respond to those issues that are at a level where they have a generalized response—a generalized impact upon——

Mr. CANNON. You're cutting me out of the process, which is sort of painful, I might say, with all due respect. [Laughter.]

Justice SCALIA. You have enough work to do, Mr. Chairman.

Mr. CANNON. What I was thinking, actually, is perhaps Members of—or Chairmen of the Committees that deal with administrative law may have an ad hoc or some other sort of role.

Justice SCALIA. Well, they're welcome to attend all of the plenary sessions, and I'm sure any of the committees would be delighted to have a Member of Congress sit in on the committee meeting. I think maybe one useful thing that could be done is to keep Congress informed of when all of these committee meetings occur. If they want to attend, fine.

Justice BREYER. Congressional staffs I think did sometimes come.

Justice SCALIA. Staff did come to the plenary sessions. I'm sure of that.

Mr. CANNON. Let me just ask then a very general question. Are there any recommendations you would have for how to change what was the Administrative Conference as we go forward in the future?

Justice BREYER. No, I haven't thought about that.

Justice SCALIA. I haven't given thought to it, Mr. Chairman, and I don't want to do it off the top of my head. Nothing immediately occurs to me. The most important thing is what I mentioned ear-

lier. You have to be very, very demanding in the selection of the chief executive officer. I think it makes a big difference if you get people like Jerre Williams and Roger Crampton, good, solid people who will keep it on the right track.

Mr. CANNON. I must say that I—you've said many of the things that I have wanted in this record. We appreciate that. The Administrative Conference has been great and been effective because of the kind of people that have run it and the kind of people that have contributed their time. I certainly would like to see it reestablished. I think it would have a great benefit to the American people, far beyond the nominal costs that we're looking at right now.

We thank you very much, both of you, for coming down. You honor us with your presence, and you've done great service to our cause of bringing back the Administrative Conference to America. Thank you.

Justice BREYER. Thank you.

Justice SCALIA. Thank you, Mr. Chairman, Members of the Committee.

Mr. CANNON. We will now be adjourned. Thanks.

[Whereupon, at 3:08 p.m., the Subcommittee was adjourned.]

WHY IS THERE A NEED TO REAUTHORIZE THE CONFERENCE?

THURSDAY, JUNE 24, 2004

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCIAL
AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:30 p.m., in Room 2237, Rayburn House Office Building, Hon. Chris Cannon (Chair of the Subcommittee) presiding.

Mr. CANNON. The Subcommittee will please come to order. I apologize for being late. We appreciate your being here and I apologize to this esteemed panel for keeping you waiting. This is a matter of great interest and great concern and great importance. I think that you are important people and so I appreciate your sufferance because I believe you all believe the same thing about the Administrative Conference.

Last month, as you may recall, our Subcommittee held its first of two oversight hearings regarding the issue of whether the Administrative Conference of the United States should be reauthorized. Supreme Court Justices Antonin Scalia and Stephen Breyer, the two witnesses at last month's hearing, enthusiastically testified about the many benefits and accomplishments of ACUS. The Justices concurred in what may be for them a rare unanimous opinion in their unqualified support for the Conference's reauthorization. This first hearing, at which not one but two esteemed Supreme Court Justices extolled the virtues of ACUS, clearly underscores the importance of the Conference and significance of our efforts to reauthorize it.

To build on that record, today's hearing is intended to focus in greater detail on exactly how we should go about reauthorizing the Conference. Specifically it is my hope that our witnesses will further explain the need for reauthorizing ACUS and provide guidance with respect to the form in which the Conference should be reauthorized, the priorities that a reauthorized ACUS should consider, and the anticipated amount of funding necessary to reauthorize the Conference.

For those who are not familiar with the work and the accomplishments of the Conference let me briefly explain. Over the course of its 28-year existence the Conference issued more than 200 recommendations, some of which were Government-wide and others that were agency-specific. It issued a series of recommendations eliminating a variety of technical impediments to the judicial re-

view of agency action and encouraging less costly consensual alternatives to litigation. The fruits of these efforts included the enactment of the Administrative Dispute Resolution Act in 1990, which established a framework for the use of ADR.

In addition to those accomplishments, ACUS served as the chief implementing agency for the Negotiated Rulemaking Act, the Equal Access to Justice Act, and the Congressional Accountability Act. The Conference also played a key role in the Clinton administration's National Performance Review Project with respect to improving regulatory systems. Throughout its existence, ACUS has served as a valuable resource for Members of Congress, Congressional Committees and various Federal agencies.

Some might ask, how can we justify reestablishing and funding another Government agency, especially in this belt-tightening environment? The answer, at least to me, is obvious. According to the Congressional Research Service, there are growing patterns of evasion among the agencies with respect to notice and comment requirements as evidenced by the increasing number of regulations being successfully challenged in the courts. An informal study by CRS indicates that 51 percent of these rules were struck down by the courts. Needless litigation hurts everyone. It slows the rulemaking process, encourages agencies to try to circumvent public comment requirements, and costs taxpayers, I might add industry, millions or billions of dollars.

Another serious area of concern is the lack of a coherent approach among the agencies with respect to emerging issues and technologies. These issues include, for example, how the Government should handle private information it collects from our Nation's citizens and how agencies in this Internet age can promote greater public participation in the regulatory process. There are also concerns about the need to have peer review and to have regulations well grounded in more or less clear science. Our Nation's people and business communities depend upon Federal agencies to promote scientific research and develop science based policies that protect the Nation's health and welfare. Integral to the Federal regulatory process is the need to assess the safety, public health and environmental impact of proposed regulations. Regulations lacking scientific support can present serious safety and health consequences as well as cause the private sector to incur unnecessary and burdensome compliance costs. Businesses suffer with the ability to prioritize their investments, and that is a very serious problem. Restoring the Conference in some form, from my perspective, would provide a cost effective yet highly valuable solution to these problems.

It is against this backdrop that I look forward to hearing from our witnesses today. Now I turn to my colleague, Mr. Watt, the distinguished Ranking Member of the Subcommittee and ask if he has any opening remarks.

[The prepared statement of Mr. Cannon follows:]

PREPARED STATEMENT OF THE HONORABLE CHRIS CANNON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH, AND CHAIRMAN, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

The Subcommittee will please come to order.

Last month, as you will recall, our Subcommittee held the first of two oversight hearings regarding the issue of whether the Administrative Conference of the United States should be reauthorized. Supreme Court Associate Justices Antonin Scalia and Stephen Breyer, the two witnesses at last month's hearing, enthusiastically testified about the many benefits and accomplishments of ACUS. The Justices concurred—in what may be for them a rare unanimous opinion—in their unqualified support for the Conference's reauthorization.

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In addition to these accomplishments, ACUS served as the chief implementing agency for the Negotiated Rulemaking Act, the Equal Access to Justice Act, and the Congressional Accountability Act. The Conference also played a key role in the Clinton Administration's National Performance Review Project with respect to improving regulatory systems. Throughout its existence, ACUS served as a valuable resource for Members of Congress, Congressional Committees, and various Federal agencies.

Some might ask, "How can we justify reestablishing and funding another governmental agency, especially in this belt-tightening environment?"

The answer—at least to me—is obvious. According to the Congressional Research Service, there are growing patterns of evasion among agencies with respect to notice and comment requirements as evidenced by the increasing number of regulations being successfully challenged in the courts. An informal study by CRS indicates that 51% of these rules were struck down by the courts. Needless litigation hurts everyone—it slows the rulemaking process, encourages agencies to try to circumvent public comment requirements, and costs taxpayers millions of dollars.

Another serious area of concern is the lack of a coherent approach among the agencies with respect to emerging issues and technologies. These issues include, for example, how the government should handle private information it collects from our nation's citizens and how agencies—in this Internet Age—can promote greater public participation in the regulatory process.

There are also concerns about the need to have peer review and to have regulations based on sound science. Our nation's people and business communities depend upon Federal agencies to promote scientific research and to develop science-based policies that protect the nation's health and welfare. Integral to the Federal regulatory process is the need to assess the safety, public health, and environmental impact of proposed regulations. Regulations lacking sound scientific support can present serious safety and health consequences as well as cause the private sector to incur unnecessary and burdensome compliance expenditures. Restoring the Conference in some form—from my perspective—would provide a cost-effective, yet highly valuable solution to these problems.

It is against this backdrop that I look forward to hearing from our witnesses today.

Mr. WATT. Thank you, Mr. Chairman, and I thank the Chairman for convening another hearing on this subject, the reauthorization of the Administrative Conference of the United States. If this works, the process that we are following, this will be a classic example of how the legislative process should work, which is to say you start by thinking about whether there is a need for something to be reauthorized or to be approved and you have a series of legis-

lative hearings to document the need that you think exists and to document the arguments against whatever you are proposing and to evaluate how you ought to implement or reauthorize.

We started this process, thanks to the Chairman, with two distinguished members of the United States Supreme Court and both of them were in agreement about the need for the Administrative Conference of the United States, and we are taking this second step in the process with what appears to be an equally distinguished panel of witnesses, and I am looking forward to hearing their testimony. We obviously have our predilections about the need for reauthorizing the Administrative Conference of the United States, but need to hear from people who have dealt with it more close up, more hands on and to justify having such an entity in place and, if there is a need for it, justify how it ought to be reauthorized.

So I thank the witnesses for being here, and I am looking forward to your testimony, and I am looking at the reporter now who is saying, man, he talks a lot slower than that other guy, which was the reaction that I used to get when I was practicing law. All of the court reporters loved me because I do talk slow enough that they can take down what I am saying.

Mr. CANNON. You are thinking as you are talking, and I was reading and that is probably why. I just try to get through the reading so we can get to the real stuff and ask questions.

Mr. WATT. All right. Well, I yield back. I appreciate you having a hearing and I certainly support the process and the objective.

Mr. CANNON. I thank the gentleman. Without objection, the gentleman's entire statement will be placed in the record. It has been a pleasure to work with the Ranking Member on this issue and on many other issues. He and his staff have worked with us and it has been good to move this process forward. I think it has been a thoughtful process, and I think we are at a point where after this testimony we are able to refine what we project to do and get some legislation moving.

Without objection, all Members may place their statements into the record at this point. Any objection? Hearing none, so ordered.

Without objection, the Chair will be authorized to declare a recess of the Subcommittee today at any point. Hearing no objection, so ordered.

I ask unanimous consent that Members have 5 legislative days to submit written statements for inclusion in today's hearing record.

In that regard I ask unanimous consent that the record include two letters we received in support of reauthorizing the Conference, both of which were previously distributed to the Subcommittee Members. The first is from Richard Chernick on behalf of the American Bar Association's Section of Dispute Resolution. The other is from Professor Paul Verkuil of the Benjamin N. Cardozo School of Law of Yeshiva University. Professor Verkuil is the Chair-elect of the Association of American Law School's Section on Administrative Law.

[The information referred to follows:]

AMERICAN BAR ASSOCIATION SECTION OF DISPUTE RESOLUTION
Reply to: 740 Fifteenth Street, N.W.
Washington, D.C. 20005-1022
(202) 662-1680
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E-mail: dispute@abanet.org
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June 21, 2004

The Honorable Chris Cannon
Chairman
Subcommittee on Commercial and Administrative Law
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Melvin L. Watt
Ranking Member
Subcommittee on Commercial and Administrative Law
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Re: Subcommittee Hearing on the Reauthorization of the Administrative Conference of the United States, Scheduled for June 24, 2004

Dear Chairman Cannon and Ranking Member Watt:

As the Chair of the American Bar Association's Section of Dispute Resolution, I write to express our support for the reauthorization and refunding of the Administrative Conference of the United States, the subject of the Subcommittee hearing. I ask that this letter be included in the official record of the hearing.

The ABA Dispute Resolution Section, with over 9,000 members nationwide, is one of the ABA's fastest growing Sections. The Section's objectives include maintaining the ABA's national leadership role in the dispute resolution field; providing information and technical assistance to members, legislators, government departments and the general public on all aspects of dispute resolution; adapting current legal procedures to accommodate court-annexed and court-directed dispute resolution processes; and conducting a program of research and development including programmatic and legislative models.

As you know, the Administrative Conference was established in 1964 as a permanent body to serve as the federal government's in-house advisor on, and coordinator of, administrative procedural reform. It enjoyed bipartisan support for over 25 years and advised all three branches of government before being terminated in 1996.

Through the years, the Conference was a valuable resource providing information on the efficiency, adequacy and fairness of the administrative procedures used by administrative agencies in carrying out their programs. This was a continuing responsibility and a continuing need, a need that has not ceased to exist.

The Conference's work in some cases resulted in bipartisan legislation to improve the administrative process. For example, both the Negotiated Rulemaking Act of 1990 and the Administrative Dispute Resolution Act were the product of the Conference's work, both in terms of the studies and reports that underlay the justification for these two laws and also in terms of the interested persons and agencies brought together to support the law.

In other cases, the Conference's work made legislation unnecessary. For example, early studies indicated that the exemption from notice and comment in the original Administrative Procedure Act for rulemakings involving public property, grants, contracts, loans, and benefits was no longer necessary or desirable. As a result of the Conference's work, virtually every agency voluntarily subjected itself to notice-and-comment rulemaking when dealing with these subjects, improving the transparency and acceptability of government rules without the need for legislative amendment.

The hallmark of the Conference's work was its ability to provide expert and non-partisan advice to the three branches of government. Drawing on the large number of volunteer public members of the Conference, as well as representatives from a wide spectrum of agencies, the Conference fostered a conversation among all interested persons and agencies. Utilizing academics for empirical research, which was reviewed first by subject matter committees staffed by members of the Conference and then by the full Conference, the Conference was able to provide a factual predicate for improvements in the administrative process that were not identified as ideologically or partisan-based proposals.

Over a quarter century, the Administrative Conference of the United States maintained a reputation for non-partisan, expert evaluation of administrative processes and recommendations for improvements to those processes. It had no power but the power to persuade, and no political constituency other than those interested in improving administrative government. The lack of a particular constituency was its undoing when a political need for visible symbols of budget cutting and a special interest attack on the Conference combined in a perfect storm of politics. The error of that penny-wise, pound foolish decision to sacrifice the Conference stands out today, when a divisive and corrosive partisanship on issues of national concern cries out for the kind of independent, respected expert view that the Conference exemplified.

Not only was the Conference a source of expert and nonpartisan advice, the Conference played an important facilitative role for agencies in implementing changes or carrying out recommendations. Thus, a number of statutes, including the Government in the Sunshine Act and the Equal Access to Justice Act, specified that the Conference work with agencies in adopting the agencies' initial regulations. More recently, the Conference worked tirelessly to help agencies understand and utilize the Negotiated Rulemaking Act and the Administrative Dispute Resolution Act. Today,

adapting administrative processes to make best use of the internet is a hot topic, but one for which there is no central organization to study different techniques, assess them, and then facilitate the implementation of those that are best.

The Conference proved itself effective at promoting efficiency in government for over 25 years. The American Bar Association has long supported the Conference and the role it played in advancing administrative procedural reform. We urge you to support legislation that would reauthorize the Conference and provide it with funds that are sufficient to permit it to continue its important mission.

Thank you for your consideration, and if you have any questions regarding our views on this matter, please feel free to contact me at 213/253-9790 or the ABA's legislative counsel for alternative dispute resolution and administrative law issues, Larson Frisby, at 202/662-1098.

Sincerely,

Richard Chernick
Chair
ABA Section of Dispute Resolution

cc: All members of the Subcommittee on Commercial and Administrative Law

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Professor of Law

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June 22, 2004

Honorable Chris Cannon
Honorable Mel Watt
Chairman and Ranking Member
Subcommittee on Commercial and Administrative Law
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Messrs Cannon and Watt:

I am writing in support of the reauthorization of the Administrative Conference of the United States (ACUS). I write as someone who has served both as a frequent consultant and as a long term member of ACUS. I am currently Professor of Law at Cardozo Law School and Chair elect of the Association of American Law Schools Section on Administrative Law and I have served as Chair of the ABA Section on Administrative Law and Regulatory Practice. While I do not speak for those organizations, I believe I reflect the views of many of my colleagues who are teachers of administrative law and related disciplines or are lawyers in regulatory practice.

The ACUS has a long and distinguished place in the evolution of research about administrative law and the federal government. The people our profession admires most have been involved with the conference, starting with Walter Gellhorn and including Supreme Court Justices Breyer and Scalia along with many others too numerous to name.

ACUS's unique role has not been absorbed by any other institutions of government and it is sorely missed. The administrative law community is collectively poorer for the lack of real-world research that used to emanate from ACUS. But more importantly, government agencies, Congress and Executive branch are all the poorer for the absence of the bi-partisan forum the Conference provided. It was that rare thing in government—an agency devoted to hearing all sides and getting the answers right, without ideological preconceptions or commitments. This was a place where members left their politics at the door.

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It would be enormously in the public interest if the ACUS is reauthorized. Its mission is in the best traditions of government and is especially needed today when a lack of exposure to differing points of view threatens the objectivity that makes for the most successful decisions of our government.

The legal academic community and the bar are implicit allies of sound government processes but often cannot find ways to participate or even to be heard. The ACUS was able to bring people together on often seemingly small issues of administrative procedure that, when properly addressed, actually made the government program involved work better. And, on occasion, these suggestions led to legislative changes that either improved processes or helped determine they were unnecessary. Deregulatory as well as regulatory changes was championed. And all this was done at virtually no cost to the United States, for the members contributed their time pro bono.

I heartily endorse a revival of ACUS on behalf of all those who believe in the enlightened processes of government.

Respectfully yours,

Paul R. Verkuil

Paul R. Verkuil
Professor of Law

Mr. CANNON. And now I would like to recognize the gentleman from North Carolina for 5 minutes for the purpose of making a statement on the record.

Mr. COBLE. Well, thank you, Mr. Chairman. I will be very brief, Mr. Chairman. I have another meeting I have got to attend, but I want to commend you and Mr. Watt. I think you two have done a good job of steering the Subcommittee on Commercial Administrative Law very adeptly through the sometimes shoals, reefs, and rocks that await you up here. But you all have managed to avoid those.

As you pointed out, this is a very significant issue and, Mr. Chairman, you have assembled a very distinguished panel, not the least of whom is Mr. Watt's and my fellow Carolinian, Mr. Boyden Gray. But it is good to have all of you here. I apologize, Mr. Chairman, for departing, which is going to be in about 12 or 15 minutes, but I thank you.

Mr. CANNON. Thank you for coming. Mr. Feeney, did you want to make any comments to start.

Mr. FEENEY. Well——

Mr. CANNON. The gentleman is recognized 5 minutes.

Mr. FEENEY. Well, like Mr. Coble, I will have to be leaving early, too, but I have read the testimony of all the witnesses. Appreciate you being here. I am very optimistic, like Mr. Watt is especially, about this meeting. My short time here in Congress leads me to believe that there is an inverse relationship between how much work we get done in Committee and how many live TV cameras and microphones there are, so I am optimistic.

Mr. CANNON. The suggestion being that we do boring and important stuff.

Mr. Chabot, did you want to address the——

Mr. CHABOT. I enjoy boring stuff as much as anybody else does, Mr. Chairman. I am happy to be here this afternoon. But important stuff.

Mr. CANNON. Thank you.

Mr. WATT. Mr. Chairman, can I ask unanimous consent to submit for the record the testimony of Sally Katzen that has been offered for the record.

Mr. CANNON. Without objection, so ordered.

[The prepared statement of Ms. Katzen follows:]

PREPARED STATEMENT OF SALLY KATZEN

Mr. Chairman and Members of the Subcommittee:

I greatly appreciate the invitation to testify in favor of the reauthorization of the Administrative Conference of the United States (ACUS). For the last several years, I have been teaching undergraduates (at Smith College) and graduate students (most recently at the University of Michigan Law School and at Johns Hopkins University); among the courses I teach are Administrative Law and The Regulatory Process. During the Clinton Administration, I served as the Administrator of the Office of Information and Regulatory Affairs at the Office of Management and Budget (1993–1998), where I was responsible for the development and implementation of the Administration's regulatory policy. Before joining the Clinton Administration, I was a partner in the Washington DC law firm of Wilmer Cutler and Pickering, where I specialized in administrative law. I also served as the Chair of the American Bar Association Section on Administrative Law and Regulatory Practice (1988–89).

Most relevant in establishing my credentials on the subject of today's hearing is the extensive experience I have had with ACUS. I was first appointed a Public

Member in 1988 while I was in private practice. I served on several of the ACUS committees, eventually chairing the Committee on Judicial Review. I was therefore actively involved in the preparation and presentation of various reports and recommendations of ACUS in the late 80's and early 90's. In l994, President Clinton appointed me one of the five government members of the Council (the governing board of ACUS) and designated me as the Vice Chairman. I served in that capacity (and for a time as Acting Chairman) until ACUS was closed.

In fact, I was privileged to testify before this Committee on April 21, 1994, in support of reauthorization of ACUS. [A copy of that testimony, which was reprinted in 8 Admin. L.J. Am. U. 649 (1994), is attached.] Today, I again urge your favorable consideration to authorizing ACUS as an independent agency to study administrative law issues and make recommendations to improve the efficiency, adequacy and fairness of the federal government's administrative procedures (paraphrasing the 1964 Administrative Conference Act).

Others have testified about the significant substantive contributions made by ACUS, citing specific studies or recommendations or advice to the Congress, the Executive Branch and even the Judiciary. Others have made the point that the structure and composition of ACUS enabled a relatively modest amount of taxpayer funding (less than $3 million annual appropriations) to be leveraged by the far greater contributions in kind by practicing lawyers and academics. And you have heard that several of the recommendations of ACUS actually saved the federal government significant amounts of money by increasing the efficiency of administrative processes without decreasing fairness for the participants. I do not want to repeat what others (including my earlier testimony) have said.

The point I want to emphasize is that my (and others') judgment on the value of ACUS have only strengthened with the passing of time. It is often said that you do not appreciate what you have until you no longer have it. That, I believe, sums up the past decade for those of us who work in the field of administrative law.

After ACUS closed and while I was still in government, there were several occasions when I and other senior government policy officials would have greatly benefited from having ACUS opine on pending developments—from how to conduct rulemaking proceedings in an electronic age to how to implement a new program in the most efficient, effective and equitable way. We knew from past experience that the ideas being considered, while meritorious, might well be improved as the result of an objective, non-partisan appraisal/critique. I cannot imagine that those in the current Administration would have any different view. In fact, at a conference held recently at American University on electronic rulemaking, several participants in the session on "next steps" (some with government experience and others currently in government) called for resurrecting ACUS to provide the kind of broad-based public and private input that is essential for good decision making in this area.

There are two aspects of ACUS that I think are sorely missing. First, on matters of substance, ACUS provided an invaluable institutional memory. Invariably, administrations change, and with each new administration there are some bright new ideas about how to conduct or carry out administrative processes. Some of these ideas are fresh and productive and welcome. Some, however, may sound good or appear simple at first look, but they have in fact been tried before and failed or been seriously flawed for one reason or another. What ACUS provided was a forum for those who worked and wrote in the field to discuss, evaluate, and provide constructive suggestions based on real life experience. Now when senior government officials are presented with a proposal to address or resolve a particular problem in administrative practice, they can—and presumably do—seek out the views of some in the academy, individual private practitioners, or their colleagues in other federal agencies (if they know or can find out that these officials have dealt with this or a similar issue). But there is no central repository of expertise and experience that can provide a collective view—incorporating the considered judgment of those in the public and private sectors, those in academics and those in public administration, and importantly, both Democrats and Republicans. That was the beauty, or genius, of ACUS—for its very small staff was able to reach out to almost 100 of the most knowledgeable and experienced people in the field and tap the accumulated wisdom of the profession for the public good. The absence of ACUS is a tremendous loss to good government.

The second aspect follows from a point made above. As I said, the members of ACUS came from, and brought with them, varied perspectives. This diversity of views was enhanced by the long-standing and time-honored tradition of appointing the public members—those from the private sector—across party and philosophical lines. And the bi-partisan and collegial nature of ACUS was maintained not only in the selection of members, but also in the operating committees and the plenary sessions. Simply stated, ACUS was one place where Democrats and Republicans

worked together. We might have disagreed (strenuously) on the substance of the proposal—should there be a government program in this area or not—but if, in the wisdom of Congress, there was to be such a program, we could all agree that it should be conducted fairly and efficiently. It is significant, I believe, that both Justices Scalia and Breyer testified in favor of reauthorizing ACUS. Today, Boyden Gray and I both speak as stalwart supporters of ACUS. With divided government and the increased partisanship that has characterized the last several decades in Washington, there are very few such bi-partisan institutions—I should probably say non-partisan institutions—where people with vastly different political views can and do see eye to eye on administrative processes. That too was the beauty, or genius, of ACUS—for those with differing positions to be heard and be reconciled for the public good, and that too has been sorely missed.

I thank this Subcommittee for reexamining this issue and for favorably considering the reauthorization of ACUS.

Westlaw.

8 ADMLJAMU 649 Page 1
(Cite as: 8 Admin. L.J. Am. U. 649)

Administrative Law Journal of The American University
Fall 1994

Commentary

***649** TESTIMONY BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS IN SUPPORT OF THE REAUTHORIZATION OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

The Role of the Administrative Conference in Improving the Regulatory Process

Sally Katzen [FNaa]

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Katzen

April 21, 1994

Testimony of Sally Katzen, Acting Chairman, The Administrative Conference of the United States

(Editor's Note: The Administrative Conference of the United States, created in 1964 by the Administrative Conference Act, studies administrative law issues in the federal government and makes recommendations to improve the efficiency, adequacy, and fairness of administrative procedure. In 1994, Congress considered the Conference's quadrennial reauthorization. The hearings reproduced below address the Conference's reauthorization. Although the House Committee on the Judiciary reported favorably on reauthorization, the 103rd Congress did not resolve the matter before adjournment. Meanwhile, Congress appropriated $1.8 million for the Conference for fiscal year 1995, [FNa] the same amount the Conference received in fiscal year 1994.

The Administrative Law Journal of The American University takes no position on the Conference's reauthorization. In the interest of fostering debate in the administrative law community, however, the Journal presents the submitted statements of five witnesses who testified earlier this year in favor of reauthorizing the Conference before the House Subcommittee on Administrative Law and Governmental Relations. The Journal received permission from the authors to publish their statements. Also, the Journal, in cooperation with the authors, made a limited number of stylistic changes and added a few citations for clarity. The opinions expressed in the statements represent the views of the authors only and not necessarily those of The Administrative Law Journal of The American University.

***650** Although the subcommittee invited testimony from individuals who might oppose reauthorization, no dissenting witnesses appeared or submitted written statements for the record. Consequently, the Journal invites comments, responses, or rebuttals suitable for publication in its Commentary section. In the interest of timeliness, the Journal will work with interested authors to expedite publication of statements in immediately forthcoming books. For more information, please call The Administrative Law Journal of The American University at (202) 885-3412.)

Introduction

I am pleased to appear in support of the request of the Administrative Conference of the United States (ACUS or Administrative Conference) for a reauthorization of its appropriations. The Office of Management and Budget (OMB) has authorized the Administrative Conference to request the following ceiling amounts on appropriations for the next four years:
FY 1995 $2.6 million
FY 1996 $2.704 million

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FY 1997 $2.814 million
FY 1998 $2.928 million.

***651** The Structure of the Administrative Conference

The structure of the Administrative Conference is unique within the federal government, and this unique structure underlies its "genius." Created in 1964 by the Administrative Conference Act [FN1] as a permanent, independent advisory agency, the Administrative Conference has a statutory maximum of 101 members. [FN2] The Administrative Conference is headed by a chairman who is appointed by the President with the advice and consent of the Senate. [FN3] The chairman acts as the chief executive officer of the Administrative Conference, [FN4] presides over its meetings, [FN5] and heads the Office of the Chairman, which consists of a small career staff of eighteen to twenty employees. [FN6]

The Administrative Conference includes a council of ten presidential appointees who serve much like a board of directors. [FN7] Typically, five Council members are senior government officials, and the other five are prominent lawyers or experts on government operations from the private sector. The President designates one of the council members to serve as vice chairman. [FN8] As you know, I am ACUS's vice chairman, and serve as acting chairman until the President nominates, and the Senate confirms, a full-time chairman. A short time ago, the President announced his intention to nominate Thomasina V. Rogers to a five-year term as the Administrative Conference's full-time chairman.

By statutory design, a majority of the Administrative Conference's members represent government departments and agencies. All major departments and agencies are represented and each department or agency chooses its own representative. The caliber of the individuals who represent these agencies attests to the importance that the agencies, as well as the Administration, assign to the Administrative Conference's functions. Many government members are Clinton administration political appointees like me, while others are senior career civil servants. We take on this added responsibility because of the importance we assign to the Administrative Conference's mission.

The government officials join forces with distinguished private citizens, ***652** called "public members"--law professors, public interest lawyers, private practitioners, economists, public administrators--who volunteer their time and talent because they share the view that this unique public-private partnership significantly improves the way government regulates its citizens or delivers services to them. The Administrative Conference Act requires that the Administrative Conference chairman select members from the private sector who are "members of the practicing bar, scholars in the field of administrative law or government, or others specially informed by knowledge and experience with respect to federal administrative procedure." [FN9] The overall membership shifts gradually because public members of the Administrative Conference serve two- year staggered terms [FN10] and the terms of half of the members expire each June. [FN11] The Administrative Conference has a long-standing tradition of private sector membership that crosses party and philosophical lines--a tradition that I honored recently in making fourteen appointments.

The participation of these volunteer "citizen-members" allows the government to leverage a relatively small appropriation to attract considerable in-kind contributions for its programs. As a consequence, the Administrative Conference receives hundreds of thousands of dollars each year in donated services from leading U.S. experts in administrative law and government, making it one of the "best bargains" in the federal government. [FN12]

Various government entities that are not members of the Administrative Conference, as well as private sector organizations that are interested in the proper functioning of the administrative process, maintain liaison arrangements with the Administrative Conference. Among them is the federal judiciary. The judiciary has traditionally assigned two of its most distinguished jurists to participate in Administrative Conference activities. Chief Judge Stephen Breyer of the U.S. Court of Appeals for the First Circuit and Judge Stephen Williams of the U.S. Court of Appeals for the District of Columbia Circuit have been designated by Chief Justice Rehnquist as the judicial branch's official representatives to the ***653** Administrative Conference. Judges Breyer and Williams are prominent administrative law scholars and participate actively in the Administrative Conference's work. [FN13]

Administrative Conference bylaws also establish a category of emeritus membership, called Senior Conference Fellows, for former chairmen and those individuals who have served at least eight years as Administrative Conference members. [FN14]

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By this means, the Administrative Conference retains the expertise of these distinguished administrative law authorities while permitting new members to contribute their ideas. The bylaws also authorize the chairman to appoint "special counsels" who assist the membership in areas of their special expertise. [FN15] Liaison representatives, senior fellows, and special counsels participate in Administrative Conference activities, but cannot vote at plenary sessions.

The Reason for ACUS's Creation

(T)he heavy pressures on Government to discharge immediate responsibilities may at times rob administrators of the time needed for consideration of procedures. Imperfections in method . . . may acquire the protective coloration of familiarity; and the demands of the daily job may lessen the will to achieve change . . . .
The committees of Congress, suitably concerned as they are with matters of substantive policy, can only sporadically occupy themselves with the details of methodological and organizational problems . . . Nor do we think that hope of major accomplishment lies in occasional studies by groups external to the Government . . . . (T)he current need is for continuous attention to somewhat technical problems, rather than for public enlightenment concerning a few dark areas that cry for dramatic reforms. A discontinuous commission . . . is unlikely to have great impact upon the day-to-day functioning of the Federal agencies. [FN16]

The idea of having an organization dedicated to recommending improvements in agency procedures goes back almost fifty years and has received support from all three branches of government on a bipartisan basis. Temporary committees or conferences to review administrative procedures and develop methods of preserving fair process without undue time and expense were created in the 1940s, 1950s, and 1960s. One thing became clear from these efforts: What was needed was a permanent ***654** government-sponsored institution, melding the expertise of the government, the academic community, and the private sector, to monitor on an ongoing basis the way government interacts with those it is intended to serve. The current Administrative Conference is a direct outgrowth of President John F. Kennedy's "New Frontier" vision.

On swearing in the first Administrative Conference chairman in 1968, President Lyndon B. Johnson set forth the principles that have guided the Administrative Conference's mission since its creation:
The success of two temporary conferences--both chaired very ably by Judge Prettyman--convinced us that we needed a permanent agency for continuing review of the administrative process.
We needed a forum for the constant exchange of ideas between the agencies and the legal profession and the public.
We want the Administrative Conference to be the vehicle through which we can look at the administrative process and see how it is working and how it could be improved and how it could best serve the public interest. [FN17]

The Administrative Conference had advised the President and federal departments and agencies on ways to improve the fairness and efficiency of federal agencies' administrative procedures. It has advised the Judicial Conference of the United States [FN18] on the relationship between agency action and subsequent judicial review. A critical part of the Administrative Conference's work, although much less publicized, has been its provision of nonpartisan advice to Congress on agency administrative procedure.

The Need for ACUS Today

The Administrative Conference . . . provides advice and assistance on a continuing basis to Federal agencies charged with the implementation of new laws and regulations--to help those agencies improve and simplify their regulatory, enforcement, and adjudicatory functions. The agency also assists Congress by recommending or analyzing legislative changes intended to increase the efficiency and fairness of agency procedures.
In short, the Administrative Conference acts as an ongoing mini-national performance review in its area of expertise, just as the . . . Judicial Conference does in overseeing the operations of the judiciary. [FN19]
***655** The Administrative Conference provides unique, expert advice to the executive branch, the independent regulatory agencies, the Federal courts, and to the Congress. As a member of the Judiciary Committee, I have frequently relied on the Conference's expertise in drafting and formulating legislation. It is the only entity in the U.S. Government which focuses on administrative law, in all of its many facets. Decisions made as part of the Federal regulatory process . . . have a tremendous impact on the substantive direction of important public policy issues. We are talking here about health, education, public safety, the environment, transportation and consumer protection--just to cite a few areas impacted by Federal administrative

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procedure and regulatory enforcement. [FN20]

ACUS is needed more today than ever before. One researcher has estimated that federal regulatory programs affect $500 billion of the gross domestic product, and that figure likely will increase as we move toward the year 2000. [FN21] New statutes continue to be enacted, and programs are much more complicated than they were twenty-five years ago. The procedures by which agencies implement these programs critically affect the daily lives of countless Americans with real problems--farmers whose farms might not have been foreclosed had statutory mediation programs worked better; public housing tenants who would not need to wait in line to have housing discrimination complaints resolved in court if their complaints could be resolved through administrative adjudication; or disability claimants who would have their claims handled more promptly if the mechanism for producing the necessary information was better at the outset. ACUS is the only entity that addresses these nitty-gritty procedural problems. Chairman Brooks is correct that ACUS is, in a real sense, an ongoing, mini-National Performance Review for administrative process issues.

Advice and Assistance to the Executive Branch

Since its creation, ACUS recommendations have had a major effect on the workings of the federal government. Many of ACUS's proposals--such as the creation of a regime of administratively imposed civil penalties, including the drafting of a prototype statute that became the model for more than 200 civil penalty laws--are so ingrained in our administrative process today that the Administrative Conference's role in developing them has either been forgotten or is taken for granted.

***656** ACUS continues to address important administrative process problems. Over the period of its current authorization, for example, ACUS adopted twenty- eight recommendations that cover the administrative process spectrum from promoting simplified procedures for hearing appeals from the Occupational Safety and Health Administration (OSHA) citations; [FN22] to improving the process by which four million Social Security beneficiaries who cannot care for themselves receive payments through "representative payees"; [FN23] to making it easier for so-called "de minimus parties" to avoid significant legal and consultant fees by reaching early settlements with the Environmental Protection Agency to clean up hazardous waste sites under the Superfund program; [FN24] to streamlining attorney fee litigation under the Equal Access to Justice Act. [FN25] Additionally, at the request of the National Commission on Migrant Education, we examined the many federal migrant and seasonal farmworker programs and suggested improvements in the coordination of these programs; [FN26] the Commission incorporated our findings into its final report in 1992.

ACUS's Role in Alternative Dispute Resolution

In recent years, the Administrative Conference has assigned a high priority to assisting agencies in streamlining the rulemaking process and reducing or eliminating needless administrative adjudication. It does so by encouraging the use of consensual techniques known as alternative means of dispute resolution, or "ADR," that allow parties, including government agencies, to resolve conflicts in mutually acceptable ways. These activities are in furtherance of the responsibility Congress gave the Administrative Conference in 1990 to implement the Administrative Dispute Resolution Act [FN27] and the Negotiated Rulemaking Act. [FN28]

***657** Passage of these laws represented the congressional response to ACUS initiatives to foster less costly alternatives to traditional litigation and rulemaking. But, as Congress realized, passage of the new laws is not enough. Continuing coordinated effort to implement these statutes is essential if the government (and, coincidentally, the public) is to reap the benefits of these innovative approaches.

About half of our staff time goes to these ADR activities. We have a congressionally imposed responsibility to compile data under both statutes and report to Congress before the ADR Act's statutory sunset on October 1, 1995, [FN29] and the Negotiated Rulemaking Act's statutory sunset on November 29, 1996. [FN30]

ACUS also assists agencies in developing and putting into effect statutorily required policy statements for using ADR. ACUS has assisted many agencies, such as the Nuclear Regulatory Commission, the Equal Employment Opportunity Commission (EEOC), and the U.S. Air Force in developing their ADR programs. ACUS provides support and assistance to a recently established intergovernmental coordinating committee and five interagency working groups to help ensure uniform compliance with the statute throughout government, avoid needless duplication of effort, and tackle problems that are beyond

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the capability of a single department or agency. Among the groups' many activities in 1993 were presenting programs to educate agencies' Equal Employment Office directors on using ADR to improve the fairness and efficiency of civil rights complaint handling, creating a system for interagency sharing of the services of federal employees trained as mediators to resolve employee discrimination and other workplace disputes, and developing prototype training courses and materials that agencies across the government can use.

Last year, the Administrative Conference published several guidance documents and "primers" to assist agency officials responsible for implementing the ADR statute, including English and Spanish language versions of a brochure on the use of mediation in federal disputes. Administrative Conference staff recently participated in agency ADR implementation programs sponsored by the Federal Deposit Insurance Corporation (FDIC), the U.S. Army, the Departments of Transportation, Interior, Health and Human Services, Labor, Agriculture, and Justice, the Office of Personnel Management, the Internal Revenue Service, the EEOC, the ***658** Federal Energy Regulation Commission, the General Services Administration and the Small Agency Council. In cooperation with the Society for Professionals in Dispute Resolution, ACUS presented a day-long program for more than 300 federal employees on implementing the ADR Act. We also sponsored a full-day roundtable to assist agencies in finding and hiring qualified ADR neutrals.

The Administrative Conference also has assisted the local federal district court in developing programs on use of ADR.

Our work for these entities is well understood by those we assist. Labor Secretary Robert Reich has observed:
As a result of study and recommendations developed (by ACUS) over many years, Congress adopted both the Negotiated Rulemaking Act and the Administrative Dispute Resolution Act several years ago. The Department of Labor has experimented with the use of the approaches authorized under these laws, and believes that, in appropriate circumstances, they may be very productive. In particular, these approaches can facilitate public participation and trust in the processes of government and avoid wasteful litigation. The ACUS staff has devoted considerable time to educating and assisting the Department in this regard, and in turn has conveyed the lessons learned here to other agencies of the government which are experimenting with such approaches . . . While not a part of this Department, ACUS has considerably benefited our efforts. It has set an example which will facilitate the reinvention of government and its procedures in order to better serve the needs of the public. [FN31]

Those segments of the private sector that are concerned about the improvement of the federal administrative process also recognize the value of the Administrative Conference's work in this area. The President of the American Arbitration Association, for example, has noted
the importance of the Administrative Conference of the United States in our national effort to encourage the use of alternative dispute resolution by Federal government agencies, thereby saving millions of dollars that would otherwise be frittered away in litigation costs. Many of us in the private sector are doing our part to move the administration and its various agencies in this direction . . . . But ACUS has done a splendid job of creating a network of ADR specialists in the Federal government, and represents a prudent investment for the future. [FN32]

The President of the National Institute for Dispute Resolution has observed:
ACUS has been a major proponent of dispute resolution in the federal government, ***659** serving as an information resource on dispute resolution tools and techniques, as a central contact for information on qualified and competent third parties, and as an advocate and innovator in applying dispute resolution to the tasks of the federal government. [FN33]

The private sector has even contributed funds to support ACUS's efforts. [FN34] A set of private grants from the Hewlett and Culpeper Foundations illustrates an unusual commitment of money in recognition of the value that the private sector attaches to the Administrative Conference's promotion of consensual decisionmaking throughout government.

Tangible savings are already evident. The FDIC, relying on ACUS recommendations, began a pilot mediation program that saved more than 9 million dollars in legal fees and expenses during the first eighteen months. A pilot project by the Department of Labor, on which ACUS has worked closely, has, according to the Department, reduced the cost of litigation in cases resolved by mediation by seventeen percent and expedited resolution of disputes by six months, or more than sixty percent.

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I am convinced that we have just scratched the surface of cost savings. Increased use of ADR over the next four years can produce very substantial savings if agencies are encouraged and trained to use it. ACUS is the one agency that is doing that job today and, with the committee's encouragement, hopes to continue its efforts to foster the use of ADR.

Advice and Assistance to Congress

Congress has numerous resources, both inside and outside government, including the General Accounting Office and the Congressional Research Service, to which it can turn for assistance in resolving legislative issues. Yet, on issues of administrative law and procedure, members of Congress and congressional committees and their staffs routinely turn to the Administrative Conference because ACUS provides a level of expertise and assistance that Congress cannot obtain elsewhere.

Most of our work is done behind the scenes, at times on a confidential basis. ACUS hears from congressional staff members literally every week. Not too long ago our General Counsel received a call from a ***660** congressional staff member requesting information regarding how staff adjudicatory officers in the executive branch were supervised. "Can you fax something to me within an hour?" she asked. He did. That is routine business for our staff. Once in a while our behind-the-scenes work receives public acknowledgment. When introducing legislation that incorporated ACUS Recommendation 83-1: "The Certification Requirement in the Contract Disputes Act," [FN35] bringing to an end wasteful litigation between the government and scores of small and large businesses that contract with the government every year, Senator Howard Heflin, the Chairman of the Senate Subcommittee on Courts and Administrative Practice, acknowledged that "(t)he language I include today is the result of much discussion between the Administrative Conference, members of the Judiciary Committee, and the Claims Court." [FN36]

At times, Congress publicly asks ACUS to provide its institutional expertise. When the savings and loan crisis was front page news, two congressional committees were studying a critically important, but far less visible, aspect of the problem--namely, the structure of the Resolution Trust Corporation (RTC) and its Oversight Board. They asked ACUS to provide them with an overview of structural arrangements for regulatory oversight. ACUS had never studied the issue in the context of the RTC, but the Chairman and the professional staff promptly provided testimony that outlined a framework within which the committees could devise a solution to the relevant problems. Representative Bruce F. Vento, the Chairman of the House Task Force on the RTC, described ACUS's efforts as follows:

What was so good about the Conference's work was that they had no stake in the outcome. Rather, they provided us with an extremely valuable, impartial overview of structural arrangements within the government, highlighting the strong and weak points of each arrangement . . . . I know these are tough times. But, from my experience, at least, the Conference provides a lot of "bang for the buck" for Congress. [FN37]

On occasion Congress has asked ACUS to formulate a specific solution to a practical, perhaps seemingly intractable, legislative problem. In 1990, ACUS conducted a major study of how the Federal Aviation Administration (FAA) had implemented a two-year demonstration civil ***661** penalty program affecting the safety of the national air transportation system. The congressional committees reviewed the Administrative Conference report and decided to extend the program for another two years. As part of the extension legislation, Congress directed ACUS to do a follow-up study and submit recommendations. [FN38] The Administrative Conference's proposals, made within the one-year time-frame requested by the House Aviation Subcommittee, led directly to passage of Pub. L. No. 102-345, the Federal Aviation Administration Civil Penalty Administrative Assessment Act of 1992, [FN39] which made the civil penalty program permanent and transferred authority over the adjudication of civil penalties affecting pilots and flight engineers from the FAA to the National Transportation Safety Board. [FN40] Your colleagues, Aviation Subcommittee Chairman James Oberstar and Ranking Minority Member William Clinger, described ACUS's work as follows:

The Aviation Subcommittee has benefited greatly from the work of the Conference. Over the past few years we have had to deal with the controversial issue of allowing the Federal Aviation Administration to assess civil penalties for violations of aviation safety and security regulations. During our deliberations, the Conference supplied us with two very important studies which were instrumental in informing the Congress and the aviation community on whether the procedures for FAA civil penalties followed general principles of administrative procedure and practice. It was invaluable to our ability to develop legislation on civil penalties to have the benefits of the Conference's thorough and objective studies. [FN41]

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The Judiciary's Reliance on ACUS Scholarship

The courts continue to rely on the scholarship of the Administrative Conference, its staff and consultants. During its most recently completed term, the Supreme Court expressly referred to one of ACUS's recommendations and another of its studies. Justice Blackmun's opinion for a unanimous Court in Darby v. Cisneros [FN42] pointed to one of ACUS's ***662** oldest, but most influential, proposals "urging Congress to adopt the very language (regarding the abolition of sovereign immunity) that was eventually incorporated verbatim into the 1976 amendment" to the Administrative Procedure Act. [FN43] In Lincoln v. Grover Vigil, [FN44] the Court took note of a 1992 consultant study for the Administrative Conference entitled Interpretive Rules, Policy Statements, Guidance, Manuals and the Like--Should Federal Agencies Use Them To Bind the Public? [FN45]

The Administrative Conference's views with respect to the applicability of the Equal Access to Justice Act (EAJA) [FN46] and the Model Rules developed by the staff of the Office of the Chairman to implement EAJA were noted in six separate court of appeals decisions in recent years. [FN47] Chief Judge Merritt of the U.S. Court of Appeals for the Sixth Circuit explained that ACUS's Model Rules "provide guidance (for the court's) inquiry" because of the role assigned to the Office of the Chairman by Congress for promulgating model rules to govern EAJA awards in administrative proceedings. [FN48]

Administrative Law Assistance to Foreign Countries

In 1992, Congress gave ACUS a new statutory responsibility--to provide administrative law assistance to foreign governments. [FN49] Under the new law, any assistance initiative must be provided on a fully reimbursable basis and receive the concurrence of the Department of State, the U.S. Agency for International Development, or the U.S. Information Agency (USIA). In 1993, ACUS planned and carried out two overseas seminars, one in the Ukraine and the other in China. ACUS has just entered into a two-year interagency agreement with USIA to provide assistance in recruiting law professors, judges, court administrators, and administrative law experts as part of a major "rule of law" initiative in several African countries. [FN50]

***663** The Role of ACUS's Staff

Most of the Administrative Conference's budget each year goes toward staff salaries. That may seem peculiar at first blush because the ACUS members donate their time, ACUS contracts for much of its research, and its recommending function gets most of the public attention. The staff, though, is deeply involved in ACUS's day-to-day research, implementation, clearinghouse, outreach, and coordination activities.

To begin with, the staff is directly involved at all critical stages in the research and recommendation function. The Chairman and Research Director select the research projects, the Research Director maintains ongoing contacts with the academic and legal communities so as to find and select qualified consultants, and the staff defines the project. The staff works with the consultant during the course of each project and reviews the draft report to ensure that the product covers all relevant areas and is of high quality. Working with the chairman of the relevant committee, the staff thereafter drafts recommendations for consideration by the full committee. Committee consideration typically spans several months and includes many meetings. The small professional staff oversees twenty to twenty-five projects at any one time.

The professional staff also provides independent research. As I noted before, the staff prepares testimony before Congress and gives informal assistance to congressional and agency staffs. It offers comments to the OMB on pending legislation and responds to agency requests for comment on proposed regulations. From time to time, the staff undertakes individual research projects or portions of projects. Recommendation 92- 1: "The Procedure and Practice Rule Exemption from the APA Notice- and-Comment Rulemaking Requirements" [FN51] was entirely the product of staff research.

The staff writes or edits books on a regular schedule--at least one major book per year --that contain materials useful to other government departments and agencies. In FY 1992, ACUS staff published the second edition of the Federal Administrative Procedure Sourcebook, [FN52] which contains the text, a short analysis, a legislative history, bibliographic ***664** references, and related Code of Federal Regulations citations for eighteen procedural statutes applicable to federal agencies government-wide. Before issuance of the first Sourcebook in 1985, [FN53] agencies typically compiled and reproduced the needed copies of the statutes individually. Centralized publication by ACUS saved the government approximately $500,000.

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As required by the ADR Act, the staff maintains a roster of neutrals [FN54]--a computerized database of about 1000 dispute resolution specialists (e.g., mediators, arbitrators, and neutral evaluators) available to agencies to help resolve conflicts. The staff reviews both Sunshine Act [FN55] regulations proposed by the multi-member agencies under the Government in the Sunshine Act [FN56] and proposed agency regulations under the Equal Access to Justice Act. [FN57] The staff collects statistics on awards under the Equal Access to Justice Act and reports annually to Congress. [FN58]

The staff produces a periodic newsletter that contains information useful to agency personnel concerning ongoing research activities and other Administrative Conference initiatives. By alerting agencies to these projects, ACUS saves them the time and expense of independent research. The entire publication is prepared in-house, using desktop publishing equipment, at a substantial cost savings over outside contracting.

ACUS has a part-time professional librarian and maintains a library that not only includes ACUS publications and the archived records of past Administrative Conference research projects, but also specialized collections of materials on administrative law subjects. It is a Federal Depository Library and is open to other agencies and the public.

Importantly, the career staff, under the chairman's direction, has primary responsibility for implementing Administrative Conference recommendations. Because the Administrative Conference has advisory powers only, the professional staff closely monitors congressional and agency activities to discover windows of opportunity. At times, the chairman or the staff initiates contacts with appropriate agencies or congressional committees to encourage reform efforts. The staff or the chairman ensures that the interested body is made aware of the Administrative Conference ***665** recommendation and offers Administrative Conference assistance. As a result of these implementation efforts, over the years about three- fourths of the Administrative Conference's recommendations have been favorably acted on, in whole or in part.

The Administrative Conference's Research Budget

Historically, ACUS devoted as much as twenty percent of its annual appropriation to basic research leading to its recommendations. That percentage has steadily declined, as salaries, benefits, rent, and other less controllable costs have risen and the Administrative Conference, responding to suggestions from our Appropriations subcommittees, increasingly relied on interagency transfers of funds to conduct research on behalf of other agencies. [FN59] Direct research funding in both FY 1992 and FY 1993 was approximately four to five percent of the total Administrative Conference budget.

A special committee of ACUS members established in 1992 to review the operation of the Administrative Conference--a committee on which I served while a public member of the Administrative Conference--expressed concern about undue reliance on outside funding of research. The committee recognized the value of responding favorably to requests from other agencies for studies of their programs. But the committee concluded that "(e)xcessive reliance on interagency transfers to fund the research program can skew the Conference's research toward narrow topics, undermine the public's confidence in the objectivity of the Conference's research, and introduce instability in the Conference's research program because a constant flow of funds from other agencies cannot be assured." The special committee urged the Administrative Conference to seek sufficient appropriations to undertake "a reasonable number of directly funded studies" during each fiscal year. [FN60] ACUS actively will continue to seek opportunities to perform studies for particular agencies, especially when those agencies are prepared to underwrite those studies with funds transferred to the Administrative Conference ***666** under the Economy in Government Act. [FN61] At the same time, the reauthorization levels we are seeking will ensure that the Administrative Conference maintains an ability to initiate autonomous studies and thus permit some balance between independent research and that funded by other agencies.

Implementation of National Performance Review Recommendations

Last September, Vice President Al Gore issued Creating A Government that Works Better & Costs Less, Report of the National Performance Review (NPR or Report), which includes many initiatives to streamline the administrative process. [FN62] Enhanced use of ADR and negotiated rulemaking are prominent Reinventing Government procedural initiatives. [FN63] Specifically, the Report's section on cost-cutting initiatives (Section Four) recommends:

"Agencies will expand their use of alternative dispute resolution techniques." [FN64]

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"All agencies should establish alternative dispute resolution methods and options for the informal disposition of employment disputes." [FN65]

"Agencies will make greater use of negotiated rulemaking." [FN66]

The Department of Labor should "provide administrative guidance more quickly and cheaply through negotiated rulemaking" and "expand the use of alternative dispute resolution" to "reduce litigation and produce significant long-term savings." [FN67]

ACUS is a primary coordinating and implementing agency for this ***667** effort. The Administrative Conference's Research Director participated in the NPR as head of one of the teams. Recently, the Administrative Conference brought together the country's leading dispute resolution organizations--public and private--to work together to assist the NPR in getting agencies to carry out the recommendations for increased use of ADR.

Last September, President Clinton issued a memorandum directing the heads of selected executive departments and agencies to identify at least one rulemaking that would be appropriate for use of negotiated rulemaking. [FN68] Negotiated rulemaking is a procedure originally developed by the Administrative Conference, which has a decade-long experience with its use. I have already participated in a seminar, co-sponsored by ACUS and OMB's Office of Information and Regulatory Affairs, to acquaint agency officials with the negotiated rulemaking process. Several agencies are drawing on ACUS's staff expertise to assist them with new negotiated rulemaking proceedings.

The Administrative Conference was selected by NPR to undertake a pilot demonstration of the use of electronic mail as a means of enhancing ADR processes. A planned part of the demonstration is an "electronic reg neg" that will allow interactive rule development to occur simultaneously at a number of technical and policy levels. This project, which is now in progress, implicates a range of novel administrative law issues.

NPR also recommended creation of a basic training program for presidential appointees assigned to regulatory agencies. [FN69] For the past several years, ACUS has provided the only training for such presidential appointees--an annual, half-day seminar addressing issues of common concern, and NPR urged the President to "direct ACUS, which has expertise in the administrative adjudication and rulemaking processes and access to experts across the federal government and academia, to establish . . . an ongoing training program for presidential appointees." [FN70] At a recent meeting of the Regulatory Working Group, which was created by Executive Order 12,866,[FN71] and consists of most of the agencies with domestic regulatory authority, ACUS was charged with developing a training program and working with the agencies to encourage its early ***668** implementation.

FY 1995-98 Reauthorization Levels

Four years ago Congress approved legislation that authorized modest and gradual increases in the Administrative Conference's appropriation from $2 million to $2.4 million over four years, essentially to accommodate inflationary increases. [FN72] Since then, Congress has passed several measures that have given ACUS new roles. Most important for present purposes are --

Pub. L. No. 101-552, which assigned to the Administrative Conference the principal responsibility for promoting and coordinating alternative means of dispute resolution by federal agencies to reduce needless litigation costs to agencies and the private sector; [FN73] and

Pub. L. No. 101-648, which gave the Administrative Conference the primary leadership role in encouraging and assisting agency use of negotiated rulemaking. [FN74]

As I noted earlier, the OMB has authorized the Administrative Conference to request appropriations for the next four years. [FN75] Our reauthorization request is designed to do two things--allow ACUS over the next four years to continue to perform the many statutory missions already assigned to it by Congress, and to undertake important new responsibilities in support of the recommendations of the National Performance Review to streamline government operations." [FN76] The President has requested an FY 1995 appropriation of $2.6 million, which currently is pending before the Appropriations

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committees in both Houses of Congress.

As this committee is aware, Congress reduced ACUS's actual appropriation for FY 1994 to only $1.8 million--twenty-three percent below the FY 1993 appropriation and ten percent below the authorized FY 1990 level. Given the budget reduction, no money can be earmarked for independent research in FY 1994. No new major publications are scheduled ***669** to be released, except for a revised Manual For Administrative Law Judges that had already been scheduled for release and paid for with funds previously obligated. [FN77] Acquisitions for the ACUS library, which is part of the Federal Depository Library chain, have been sharply reduced, and computerized legal research has been largely eliminated. Seminars on important topics have been cancelled or postponed. Systematic monitoring of legislation has stopped.

Four members of ACUS's staff--two lawyers and two secretaries--have left. To reduce expenses further, several lawyers have been temporarily detailed to another agency (one full-time for three months, the others part-time) and still another lawyer, who was granted a nine month leave of absence without pay to work in Eastern Europe, was not replaced.

Temporary measures--including the acquisition of two key employees from other agencies on temporary, nonreimbursable loans, prepayment of certain expenses, and concentration on projects previously paid for and already in the pipeline-- have permitted ACUS to function at a reasonably high level despite the budget reduction. These interim steps cannot become a permanent part of the Administrative Conference's operation over the next four years. The budget and staff reductions have seriously compromised ACUS's ability to accomplish its many statutory missions this year. Unless remedied, these reductions also will impair ACUS's ability to play the active role envisioned for it by the Administration in implementing certain NPR recommendations.

In short, we ask the committee to approve the ceiling amounts authorized by the OMB.

The Role of ACUS's Public Members

Apart from extending the Administrative Conference's authorization of appropriations for another four years, at the levels requested, we also ask the committee to clarify the terms of the Administrative Conference Act to reflect precisely the functions the Administrative Conference's public members actually perform. Although that role has not changed significantly over more than twenty-five years, we ask for this clarification in light of recent concerns by the Department of Justice that individuals from the private sector who serve on the Administrative Conference should be considered to hold "Office(s) of . . . Trust" under the ***670** Emoluments Clause of the U.S. Constitution; [FN78] therefore, the Clause may proscribe service on the Administrative Conference by (a) members of firms that had a foreign government as a client, whether or not the Administrative Conference member represented or performed any service for the foreign government; and (b) professors who teach, even only occasionally, at universities that are instrumentalities of a foreign government. ACUS believes that it is important to clarify whether private sector members of the Administrative Conference exercise functions that make them holders of an "office of profit or trust" under the Constitution.

The members appointed by the chairman from the private sector participate in the Administrative Conference's advisory activities in much the same manner as members of most of the hundreds of other advisory committees across the government. They meet intermittently in small committees to review consultant reports and formulate recommendations and, collectively in semi-annual plenary sessions, to act on committee recommendations. They are expected to bring their personal and professional perspectives to their deliberations. Indeed, since its inception, the Administrative Conference has had a bylaw that reads as follows: "Each member is expected to participate in all respects according to his own views and not necessarily as a representative of any agency or other group or organization, public or private." [FN79]

The Administrative Conference's advisory activities are conducted in accordance with the provisions of the Federal Advisory Committee Act (FACA), [FN80] which require, among other things, that the committee membership "be fairly balanced in terms of the points of view represented" [FN81] and that its advisory activities be open to the public." [FN82]

Public members do not participate in the administration or operation of the Administrative Conference as an agency. The responsibilities and functions of the Administrative Conference in its role as a federal agency--e.g., the collection and exchange of information; [FN83] the development of inter- agency arrangements; [FN84] the coordination of assistance efforts for ***671** foreign governments; [FN85] and the implementation of recommendations and the conduct of various

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administrative functions, such as the preparation of the Administrative Conference's annual budget or the appointment and supervision of staff [FN86]--are in the hands of the presidentially appointed chairman, the presidentially appointed council, or the career staff.

From time to time, Congress asks the Administrative Conference to undertake specific tasks. Those tasks fall generally into two distinct categories: (1) providing advice and making recommendations, and (2) undertaking government-wide coordination activity. As a general matter, the public members participate only in the advisory and recommendation function. [FN87] Other, more operational tasks, such as interagency coordination, are typically assigned to, and performed by, the chairman and the permanent staff in the Office of the Chairman. [FN88]

We ask this committee to add a final sentence to section 593(b)(6), which concerns the non-government members of the Administrative Conference appointed by the chairman, that will expressly recognize that the Administrative Conference's public members undertake their functions as citizen-advisors and not as government officials. [FN89] The sentence would read: "The members shall participate in the activities of the Administrative Conference solely as private individuals without official responsibility on behalf of the Government of the United States and, ***672** therefore, shall not be considered to hold an office of profit or trust for purposes of Article 1, Section 9, Clause 8 of the U.S. Constitution." [FN90]

The first clause is identical to that contained in President Kennedy's Executive Order establishing the Temporary Administrative Conference in 1961. [FN91] It is similar to that included in early versions of legislation to establish the permanent Administrative Conference. [FN92] The language was removed by the House Judiciary Committee, which explained:

The Committee was concerned lest this requirement be thought to prohibit agency personnel or, for that matter, non-Government personnel from recognizing problems encountered by their own agency or outside organizations. While the committee expects conference members to exercise intellectual independence, it believes it best to omit from the bill any instruction on this point. [FN93]

As explained in a contemporaneous analysis, by removing this provision "the House implicitly recognized that the members will naturally tend to represent the preconceptions and practices of their own backgrounds." [FN94]

In light of the uncertainty occasioned by the recent Justice Department advice, ACUS believes it is important to restore a provision that sets forth the traditional--and contemporary --understanding regarding the function Administrative Conference public members are expected to play in ACUS's activities. We emphasize that we are not asking Congress to consent to the acceptance of any emolument that should otherwise be prohibited. We are asking only that the Administrative Conference's governing statute be clarified to reflect with precision the role that the Administrative Conference's public members are expected to carry out, and actually perform. [FN95]

***673** Reimbursement for Publications Costs

During ACUS's House Appropriations Subcommittee hearing last month, several committee members suggested that the Administrative Conference could obtain additional revenues by charging interested persons or organizations outside the government for publications produced by the Administrative Conference. The Administrative Conference uses the Government Printing Office (GPO) to produce its major publications, such as the Federal Administrative Procedure Sourcebook. [FN96] The Administrative Conference orders a number of copies of these publications for its own use, including some distribution. GPO offers government agencies the opportunity to order copies of these publications at a prepublication price that reflects only the printing cost for the additional copies ordered, typically no more than a few dollars per copy. GPO prints additional copies for sale to the public at a higher price. [FN97] Smaller, less elaborate publications, such as consultant reports and pamphlets, are produced by the Administrative Conference using its desktop publishing equipment and are not sold by GPO. Upon request, the Administrative Conference distributes individual copies of all of its publications free of charge to government agencies or members of the public, as long as supplies last, but directs requesters to GPO for multiple copies of those publications that are offered for sale by GPO.

In response to questions from Appropriations subcommittee members, ACUS stated that it was our understanding that we lacked the necessary statutory authority to charge members of the public for our publications and retain the proceeds. We

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believe that such authority would be useful. If such authority should be added to the Administrative Conference Act, we could establish a reduced price for academic institutions, nonprofit organizations, and the like. Guidance from the committee would be most welcome.

Conclusion

In my mind, the ACUS's mission is an ongoing and vital one which cannot be replaced. The ACUS is the voice of authority on many administrative issues that ***674** remain invisible to most Americans, yet affect them profoundly . . . . The ACUS works to make our federal agencies more efficient, more effective, and, most importantly, more cognizant of the rights of the Americans affected by their activities. The ACUS is the voice of authority in this regard and it's imperative that it not be silenced. [FN98]

In these times of limited resources, finding ways of reducing the costs of government--and of government regulation and government program administration--presents an enormous challenge. As an agency that effectively combines public and private expertise to tackle the single-minded task of improving federal administrative processes, the Administrative Conference is uniquely suited to meet this challenge. [FN99]

The fundamental justification for the Administrative Conference lies in the reason for its creation--namely, the need, in a complicated modern democracy in which citizens depend on government, or are regulated by it, for a permanent, independent watchdog over the fairness and efficiency of the administrative process. ACUS's studies and recommendations are nonpartisan and nonideological. Over its twenty-six year history spanning seven presidential administrations, ACUS has taken pride in saying that it is the Administrative Conference, not the Administration's Conference. Its independent advisory role cannot be duplicated by another executive branch agency.

ACUS has never precleared its recommendations through any presidential administration. That is undoubtedly one reason why distinguished law professors are prepared to serve as ACUS consultants and prominent private citizens of both major political parties are willing to donate their time to ACUS's deliberations. ACUS enforces its proposals solely by persuasion or force of logic. So it is important not only that the advice it provides be objective, but that it be perceived as objective.

The appropriations ceilings requested by ACUS will provide modest and gradual increases in the Administrative Conference's appropriation over the next four years. They will permit ACUS to continue its efforts--both short-term and long-term--to end needless litigation and streamline government administrative procedures and make them less costly to the taxpayer and the private citizen. They will allow the Administrative ***675** Conference to continue this vital work of streamlining the administrative process while ensuring that the government deals fairly with its citizens.

[FNa]. Pub. L. No. 103-329, 108 Stat. 2382 (1994).

[FNaa]. Sally Katzen is now Vice Chairman of the Administrative Conference of the United States. At the time of this hearing, she served as the Acting Chairman of the Conference. The Senate confirmed Thomasina V. Rogers as Chairman in October 1994.

[FN1]. 5 U.S.C. SS 591-596 (Supp. V 1993).

[FN2]. Id. S 593(a).

[FN3]. Id. S 593(b)(1).

[FN4]. Id. S 595(c).

[FN5]. Id.

[FN6]. 1 C.F.R. S 301.5 (1994).

[FN7]. 5 U.S.C. S 595(b) (Supp. V 1993).

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[FN8]. Id.

[FN9]. 5 U.S.C. S 593(b)(6) (Supp. V 1993).

[FN10]. 1 C.F.R. S 302.2 (1994).

[FN11]. Id.

[FN12]. Members from the private sector, who make up about 45% of the Conference membership, donated more than 1,000 hours of time in 1992 participating in ACUS committee meetings and plenary sessions. That does not include the substantial additional time spent reading reports, revising recommendations, and participating in other ACUS activities.

[FN13]. Congress recently confirmed Judge Breyer as the 108th Justice of the Supreme Court.

[FN14]. 1 C.F.R. S 302.2(e) (1994).

[FN15]. Id. S 302.2(f).

[FN16]. Letter from Judge E. Barrett Prettyman to President John F. Kennedy (Dec. 17, 1962) (urging establishment of permanent Administrative Conference) (on file with ACUS).

[FN17]. Remarks of President Lyndon B. Johnson at the swearing in of Jerre S. Williams, Chairman, Administrative Conference of the United States, 1 Pub. Papers 68 (Jan. 25, 1968).

[FN18]. 5 U.S.C. S 331 (Supp. V 1993) (comprising federal judges who direct policy and research for court-related activities).

[FN19]. 139 Cong. Rec. H6575-76 (daily ed. Sept. 9, 1993) (statement of Rep. Brooks).

[FN20]. 139 Cong. Rec. H6575 (daily ed. Sept. 9, 1993) (statement of Rep. Fish).

[FN21]. Budget of the Government of the United States, Fiscal Year 1993, 397 (citing Thomas D. Hopkins, Costs of Regulation, Rochester Inst. Tech. Pub. Policy Working Paper (Dec. 1991)).

[FN22]. Administrative Conference of the United States, Recommendation 90-6: Use of Simplified Proceedings in Enforcement Actions Before the Occupational Safety and Health Review Commission, 1990 ACUS 27.

[FN23]. Administrative Conference of the United States, Recommendation 91-3: The Social Security Representation Payee Program, 1991 ACUS 17.

[FN24]. Administrative Conference of the United States, Recommendation 92-9: De minimus Settlements Under Superfund, 1992 ACUS 45.

[FN25]. Administrative Conference of the United States, Recommendation 92-5: Streamlining Attorney's Fee Litigation Under the Equal Access to Justice Act, 1992 ACUS 19.

[FN26]. Administrative Conference of the United States, Recommendation 92-4: Coordination of Migrant and Seasonal Farmworker Service Programs, 1992 ACUS 15.

[FN27]. 5 U.S.C. SS 571-583 (Supp. V 1993).

[FN28]. 5 U.S.C. SS 561-570 (Supp. V 1993).

[FN29]. Pub. L. No. 101-552, S 11, 104 Stat. 2747 (1990) (codified as amended at 5 U.S.C. S 571 note (Supp. V 1993)).

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[FN30]. 5 U.S.C. S 561 (Supp. V 1993).

[FN31]. Letter from Robert B. Reich, Secretary of Labor, to Sen. Dennis DeConcini (July 20, 1993) (on file with ACUS).

[FN32]. Letter from Robert Coulson, President, American Arbitration Association, to Rep. Steny Hoyer (Sept. 3, 1993) (on file with ACUS).

[FN33]. Testimony of Marge Baker, President, National Institute for Dispute Resolution (Mar. 23, 1994) (on file with ACUS).

[FN34]. The Conference has statutory authority to accept gifts from outside sources. 5 U.S.C. S 595 (c)(12) (Supp. V 1993).

[FN35]. Administrative Conference of the United States, Recommendation 83-1: The Certification Requirement in the Contract Disputes Act, 1983 ACUS 3.

[FN36]. 138 Cong. Rec. S11228, 11236 (daily ed. Aug. 3 1992) (statement of Sen. Heflin).

[FN37]. Letter from Rep. Bruce F. Vento, to Rep. Steny Hoyer (June 17, 1993) (supporting ACUS funding) (on file with ACUS).

[FN38]. Administrative Conference of the United States, Recommendation 91-8: Adjudication of Civil Penalties Under the Federal Aviation Act, 1991 ACUS 44.

[FN39]. Pub. L. No. 102-345, 106 Stat. 923 (codified as amended in scattered sections of 49 U.S.C.).

[FN40]. Id.

[FN41]. Letter from Rep. James L. Oberstar, Chairman, House Committee on Aviation, and Rep. William F. Clinger, Jr., Ranking Minority Member, House Subcommittee on Aviation, to Rep. Steny Hoyer, Chairman, Subcommittee on Treasury, Postal Serv., and Gen. Gov't (June 15, 1993) (supporting funding for ACUS) (on file with ACUS).

[FN42]. U.S. , 113 S. Ct. 2539 (1993).

[FN43]. Id. at 2548 n.13.

[FN44]. U.S. , 113 S. Ct. 2024 (1993).

[FN45]. Id. at 2033 (citing Robert A. Anthony, Interpretive Rules, Policy Statements, Guidelines, Manuals, and the Like -- Should Federal Agencies Use Them to Bind the Public, reprinted in 41 Duke L.J. 1311, 1321 (1992)).

[FN46]. 5 U.S.C. S 504 (1988).

[FN47]. See, e.g., National Truck Equip. Ass'n v. National Highway Traffic Safety Admin., 972 F.2d 669, 672 (6th Cir. 1992); St. Louis Fuel and Supply Co., v. FERC, 890 F.2d 446, 451 (D.C. Cir. 1989); Owens v. Brock, 860 F.2d 1363, 1366 (6th Cir. 1988); Ruiz v. INS, 838 F.2d 1020, 1024 (9th Cir. 1988) (en banc).

[FN48]. National Truck Equip. Ass'n., 972 F.2d at 672.

[FN49]. 5 U.S.C. S 594 (Supp. V 1993).

[FN50]. Administrative Conference of the United States, Foreign Assistance Initiatives (1994) (on file with ACUS).

[FN51]. Administrative Conference of the United States, Recommendation 92-1: The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements, 1992 ACUS 1.

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[FN52]. Administrative Conference of the United States, Federal Administrative Procedure Sourcebook, (2d. ed. 1992).

[FN53]. Administrative Conference of the United States, Federal Administrative Procedure Sourcebook, (1985).

[FN54]. 5 U.S.C. S 573 (Supp. V 1993).

[FN55]. 5 U.S.C. S 552b(g) (1988).

[FN56]. Id. S 552b.

[FN57]. 5 U.S.C. S 504(c) (1988).

[FN58]. 5 U.S.C. S 504(e) (1988).

[FN59]. See, e.g., Senate Comm. on Appropriations, S. Rep. 101-411, Treasury, Postal Service, and General Government Appropriations Bill, 1991, 101st Cong., 2d Sess. (1990) (stating "The Committee expects the Conference to increase its efforts to secure funding transfers from other Federal agencies as well as private foundations to support its research agenda.").

[FN60]. Report of the Special Comm. on the Future of the Administrative Conference, at pp. 2-3 (May 1992) (on file with ACUS).

[FN61]. Id. at 1-3.

[FN62]. See generally Al Gore, Report of the National Performance Review, Creating a Government that Works Better & Costs Less (1993) (hereinafter Gore, National Performance Review) (suggesting methods of improving government efficiency).

[FN63]. 62. Id. at 118-19.

[FN64]. Id. at 119.

[FN65]. Id. at 163 (listing Recommendation HRM08 that called for improvement of processes and procedures established to provide workplace due process for employees and elimination of jurisdictional overlaps, recommending that all agencies establish alternative dispute resolution methods and options for informal disposition of employment disputes).

[FN66]. Gore, National Performance Review, supra note 62, at 18.

[FN67]. Id. at 146 (listing Recommendations DOL03, calling for the expansion of negotiated rulemaking and improvement of up-front teamwork on regulations; and DOL04, recommending expansion of use of alternative dispute resolution by Dept. of Labor.)

[FN68]. Memorandum, 58 Fed. Reg. 52391 (1993).

[FN69]. Gore, National Performance Review, supra note 62, at 168.

[FN70]. Al Gore, Improving Regulatory Systems (Sept. 1993) at 71, accompanying Al Gore, Report of the National Performance Review, Creating a Government That Works Better & Costs Less (1993).

[FN71]. Exec. Order No. 12,866, 3 C.F.R. 638 (1993).

[FN72]. Pub. L. No. 101-422, 104 Stat. 910 (codified as amended at 5 U.S.C. S 596 (Supp. V 1993)).

[FN73]. Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2736 (codified as amended at 5 U.S.C. 573 (Supp. V 1993)).

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[FN74]. Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4969 (codified as amended at 5 U.S.C. 569 (Supp. V 1993)).

[FN75]. Supra p. 653.

[FN76]. The Administrative Conference Act sets out ACUS's primary missions. Numerous other statutes and regulatory documents assign additional responsibilities to the Administrative Conference.

[FN77]. Morell E. Mullins, Manual for Administrative Law Judges (3d ed. 1993).

[FN78]. U.S. Const. art. I, S 9, cl. 8.

[FN79]. 1 C.F.R. S 302.2 (1994) (enacting bylaw adopted at ACUS's initial plenary session in 1968).

[FN80]. 5 U.S.C. app. I (1988).

[FN81]. Id. S 5(b)(2) (1988).

[FN82]. Id. SS 10(a), (b) (1988).

[FN83]. 5 U.S.C. SS 594(2), (3) (Supp. V 1993).

[FN84]. 5 U.S.C. S 594(4) (Supp. V 1993).

[FN85]. 5 U.S.C. S 594(5) (Supp. V 1993).

[FN86]. 5 U.S.C. SS 595(b), (c) (Supp. V 1993).

[FN87]. For example, in the Magnuson-Moss Warranty-Federal Trade Commission Improvements Act, Pub. L. No. 93-637, Congress asked the Administrative Conference to study and make recommendations regarding the so-called "hybrid rulemaking" procedures in the statute. The statutorily mandated study culminated in ACUS Recommendations: Administrative Conference of the United States, Recommendation 79-1: Hybrid Rulemaking Procedures of the Federal Trade Commission, 1979 ACUS 3; Administrative Conference of the United States, Recommendation 79-5: Hybrid Rulemaking Procedures of the Federal Trade Commission - Administration of the Program to Reimburse Participants' Expenses, 1979 ACUS 29; and Administrative Conference of the United States, Recommendation 80-1: Trade Regulation Rulemaking Under the Magnuson Moss Warranty-Federal Trade Commission Improvement Act, 1980 ACUS 3.

[FN88]. For example, the EAJA requires agencies to issue regulations for the award of fees and expenses "(a)fter consultation with the Chairman of the Administrative Conference of the United States," 5 U.S.C. S 504(c)(1) (1988), and the Government in the Sunshine Act requires agencies to issue regulations regarding open meetings "following consultation with the Office of the Chairman of the Administrative Conference of the United States." 5 U.S.C. S 552b(g) (1988) (emphasis added).

[FN89]. 5 U.S.C. S 593(b)(6) (Supp. V 1993).

[FN90]. The members of the council appointed by the President have statutory responsibilities that are not shared by the other conference members. 5 U.S.C. S 595(b) (Supp. V 1993). Therefore, the statutory change is limited to those members of the public appointed by the chairman with the approval of the council.

[FN91]. Exec. Order No. 10,934, 26 Fed Reg. 3233 (1961).

[FN92]. Section 6(c) of S. 1664, 88th Cong., 2d Sess. (1964) provided that "(e)ach member of the Conference shall participate in his individual capacity and not as a representative of any governmental or nongovernmental organization." Section seven of H.R. 7201, 88th Cong., 1st Sess. (1963) provided that "(e)ach member of the Assembly shall participate in his individual capacity and not as a representative of any governmental or nongovernmental organization." See Establishing

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Administrative Conference: Hearings Before Subcomm. No. 3 of the House Comm. on the Judiciary, 88th Cong., 2nd Sess. 4, 8 (1964).

[FN93]. H.R. Rep. No. 1565, 88th Cong., 2d Sess., reprinted in 1964 U.S.C.C.A.N. 3202, 3204.

[FN94]. Note, The Administrative Conference Act, 53 Geo. L.J. 457, 472 (1965).

[FN95]. We are focusing narrowly on the Emoluments Clause and not on any other statutory or regulatory conflict-of-interest provisions. Moreover, this statutory change is not intended to affect the various requirements of the Federal Advisory Committee Act that will continue to govern ACUS's activities.

[FN96]. Administrative Conference of the United States, Federal Administrative Procedure Sourcebook (2d ed. 1992).

[FN97]. For example, the GPO sells our most recent publication, The Manual for Administrative Law Judges, for $9.50.

[FN98]. Letter from Rep. Joel Hefley to Rep. Steny Hoyer (Sept. 10, 1993) (on file with ACUS).

[FN99]. FY95 Appropriation for the Administrative Conference of the United States Before the Subcomm. on Treasury, Postal Serv. and Gen. Gov't, 103d Cong., 2d Sess. (1994) (testimony of Thomas Susman, on behalf of the American Bar Association).

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Mr. CANNON. I would now like to introduce our witnesses for today's hearing.

Our first witness is C. Boyden Gray. Mr. Gray is a partner in the newly reconstituted firm of Wilmer Cutler Pickering Hale and Dorr. His practice focuses on a broad range of regulatory issues with emphasis on environmental matters, including those related to biotechnology, clean air, trade and the management of risk.

Mr. Gray received his undergraduate degree from Harvard University and his law degree from the University of North Carolina. After serving as a law clerk for Chief Justice Earl Warren of the United States Supreme Court, Mr. Gray joined the predecessor of his current law firm. In 1981, he served as Legal Counsel for Vice President George Bush. He also served as Counsel for the Presidential Task Force on Regulatory Relief. Thereafter, Mr. Gray was Counsel to President Bush from 1989 to 1993. Mr. Gray appears today on behalf of the American Bar Association.

Joining Mr. Gray is Professor Gary Edles. Professor Edles is a Fellow in Administrative Law at American University Washington College of Law. He is also a visiting professor at the University of Hull Law School in England. In addition to an extensive academic career, Professor Edles has had a wide-ranging legal career as a senior civil servant, specializing in Government regulation and the administrative process. Of particular interest, he served as General Counsel of ACUS from 1987 to 1995.

Professor Edles received his law degree from New York University and his Master of Laws and Doctor of Juridical Sciences Degrees from George Washington University Law School.

Our next witness is Professor Sallyanne Payton. Professor Payton teaches at the University of Michigan Law School. During her professional career she has worked in the public and private sectors. In the 1970's, for example, she was a Staff Assistant to the President for the White House Domestic Council. She later became Chief Counsel for the Urban Mass Transportation Administration of the U.S. Department of Transportation. Over the course of nearly 20 years, Professor Payton served as either a Public Member or Senior Fellow at ACUS.

Professor Payton received both her undergraduate and law degrees from Stanford University. She appears today on behalf of the Executive Organization and Management Standing Panel of the National Academy of Public Administration.

Our final witness is Professor Philip Harter. I understand that you interrupted your vacation in Vermont to attend today's hearing, for which you are to be commended. We thank you. Professor Harter is the Earl F. Nelson Professor of Law At the Center for the Study of Dispute Resolution at the University of Missouri-Columbia School of Law. Over the course of his 35-year career in academia and the private sector, Professor Harter worked closely with ACUS in various capacities. While the Conference's senior staff attorney, he created a program on regulatory reform. As a consultant to ACUS, he developed the concept of negotiated rulemaking and authored a series of articles on the use of dispute resolution techniques by the Federal Government.

Professor Harter received his undergraduate degree from Kenyon College and his law degree from the University of Michigan.

I extend to each of you my warm regards and appreciation for your willingness to participate in today's hearing. In light of the fact that your written statements will be included in the hearing record, I would request that you limit your oral remarks to 5 minutes accordingly. Please feel free to summarize and highlight the salient points of your testimony.

You will note that we have a lighting system before you that starts with a green light. After 4 minutes it turns to a yellow light and then 5 minutes it turns to a red light. My habit is to tap the gavel at 5 minutes. We would appreciate if you finish up your thoughts within more or less that time frame. We don't like to cut people off in their thinking and so we are not strict on this point, but it works better especially—well, I am not sure how many people we have here to question but I have some questions of the witnesses. We will go through those and you will have an opportunity to flesh out your thinking thereafter. After the witnesses have presented their remarks, the Subcommittee Members in the order of the time of their arrival will be permitted to ask questions of the witnesses, also subject to the 5-minute rule.

That said, Mr. Gray, would you precede with your testimony?

STATEMENT OF C. BOYDEN GRAY, ESQ., WILMER CUTLER PICKERING HALE AND DORR LLP, ON BEHALF OF THE AMERICAN BAR ASSOCIATION

Mr. GRAY. Mr. Chairman, thank you very much for inviting us and inviting me, and I testified before, I think, this very same Subcommittee a couple of years ago against the termination of ACUS. So I am very honored to be back to help support its reauthorization.

I just want to make a couple of observations in addition to what my prepared text says, which is the official position of the ABA. The U.S. administrative law system I believe is the best in the world. It is the most transparent, the fairest and the most economically productive, especially when you look at it in comparison to the emerging EU, European Union, system, which is far more bureaucratic, biased against innovation, opaque, and encouraging support for incumbents rather than for a level playing field and equal opportunity for all competitors. I think ACUS deserves some of the credit for this state of affairs.

The Administrative Procedure Act is unrecognizable in the sense of its original language. It has been largely rewritten, not in derogation of the congressional intent, but to flesh out what the words mean, ACUS was an important part of this evolving growth and we have a very, very sophisticated administrative system as a result. There are now, I think, some strains in the system.

OIRA, the nerve center at OMB, the Office of Information and Regulatory Affairs, often provoked a polarized political response notwithstanding the fact that I believe Dr. Graham has done a great job, especially with his innovations of the so-called prompt letter, which is a guide to agencies to do something if to do so would produce a result where its benefits greatly exceed cost. He has been very, very evenhanded in his administration of that office, I believe, but it would be an enormous help, I think, to the Govern-

ment as a whole, if he could have a forum for ventilation of arguments for and against his administration of that office.

There are some other issues that have come up during his tenure, issues involving data quality and related issues involving peer review. I think that these three issues would be very useful subjects of study by ACUS if it were to be reauthorized. And I would add to this that the notion of looking at the European Union and comparative study of its procedures. The Administrative Law Section of the ABA has embarked now on such a study. I am not sure it wouldn't be better if this study could be picked up by a neutral, obviously neutral Government entity, rather than have the private sector do it with questions about where the funding came from and what the funding influence is. I am not sure this transfer could be made, but to do a comparison I think is something that hopefully ACUS would be in a position, if it were reauthorized, to do.

Many of the problems that—and they are not serious problems, but they are serious enough to warrant the reauthorization of this entity. Many of the problems result, if you step back, from a lack of dialogue and nonpartisanship or bipartisanship which has characterized the development of the administrative system in this country. We need to reinject some bipartisanship into the administrative process. That was the genius of ACUS.

You asked how it should be reauthorized, the form. I am not sure I understand exactly the question, but I am not sure I would make it any different than it was before. There was a town hall air to much of what it did, a little boisterous, a little out of hand sometimes, people shouting at each other, but it was all in an effort to maintain a dialogue in the public meetings, and it was enormously successful. I should point out that the history of substantive administrative law has been one of bipartisanship, often forgotten.

We perhaps think today, and we shouldn't do this but we probably do, of deregulation as a Republican idea to be opposed by Democrats, something that Reagan started, to be frustrated by Democratic Presidents. This is, I think, an erroneous view. The major deregulation that we have was started really by Senator Kennedy and then Professor Breyer, doing transportation deregulation. It was picked up and carried by President Carter with Stu Eisenstat taking the lead as Domestic Policy Adviser. Then of course it was picked up by Reagan in a more intensive way. But there is a direct line of antecedence going all the way back, actually to President Nixon, I think, and it is shared by all Democratic Presidents, and I think it would be a mistake to lose this sense of shared bipartisanship which has made our system the envy of the world. And I do think that ACUS would be very critical to getting us back to where we were some years ago.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Gray follows:]

PREPARED STATEMENT OF C. BOYDEN GRAY

I am pleased to be asked to testify here on behalf of the Administrative Law and Regulatory Practice Section of the American Bar Association, and the ABA itself, on the question of the reauthorization of the Administrative Conference of the United States ("ACUS"). The views expressed in this testimony are similar to the letter previously sent to this Subcommittee by Professor William Funk, Chairman of the Administrative Law Section. I am myself a former member of the Conference,

as well as a former Chair of the Administrative Law Section of the ABA, and I testified before this Committee on May 11, 1995 to oppose the termination of ACUS (testimony attached).

As you know, the Administrative Conference was established in 1964 as a permanent body to serve as the federal government's in-house advisor on, and coordinator of, administrative procedural reform. It enjoyed bipartisan support for over 25 years and advised all three branches of government before being terminated in 1996.

Through the years, the Conference was a valuable resource providing information on the efficiency, adequacy and fairness of the administrative procedures used by administrative agencies in carrying out their programs. This was a continuing responsibility and a continuing need, a need that has not ceased to exist.

The Conference's work in some cases resulted in bipartisan legislation to improve the administrative process. For example, both the Negotiated Rulemaking Act of 1990 and the Administrative Dispute Resolution Act were the product of the Conference's work, both in terms of the studies and reports that underlay the justification for these two laws and also in terms of the interested persons and agencies brought together to support the law.

In other cases, the Conference's work made legislation unnecessary. For example, early studies indicated that the exemption from notice and comment in the original Administrative Procedure Act for rulemakings involving public property, grants, contracts, loans, and benefits was no longer necessary or desirable. As a result of the Conference's work, virtually every agency voluntarily subjected itself to notice-and-comment rulemaking when dealing with these subjects, improving the transparency and acceptability of government rules without the need for legislative amendment.

The hallmark of the Conference's work was its ability to provide expert and nonpartisan advice to the three branches of government. Drawing on the large number of volunteer public members of the Conference, as well as representatives from a wide spectrum of agencies, the Conference fostered a conversation among all interested persons and agencies. Utilizing academics for empirical research, which was reviewed first by subject matter committees staffed by members of the Conference and then by the full Conference, the Conference was able to provide a factual predicate for improvements in the administrative process that were not identified as ideologically or partisan-based proposals.

I stress the fact that over a quarter century the Administrative Conference of the United States maintained a reputation for non-partisan, expert evaluation of administrative processes and recommendations for improvements to those processes. It had no power but the power to persuade, and no political constituency other than those interested in improving administrative government.

Not only was the Conference a source of expert and nonpartisan advice, the Conference played an important facilitative role for agencies in implementing changes or carrying out recommendations. Thus, a number of statutes, including the Government in the Sunshine Act and the Equal Access to Justice Act, specified that the Conference work with agencies in adopting the agencies' initial regulations. More recently, the Conference worked tirelessly to help agencies understand and utilize the Negotiated Rulemaking Act and the Administrative Dispute Resolution Act. Today, adapting administrative processes to make best use of the Internet is a hot topic, but one for which there is no central organization to study different techniques, assess them, and then facilitate the implementation of those that are best.

It is a testament to the Conference's unique position that today persons of such differing judicial philosophies as Justices Scalia and Breyer can rally behind the re-creation of the Conference. Nor is it hard to find many others from across the political spectrum who will similarly commend the re-creation of the Conference to your subcommittee. Past chairs of the Conference, such as Professors Marshall Breger and Robert Anthony and Judge Loren Smith from one side of the aisle, can join hands with lawyer Sally Katzen and administrative judge Thomasina Rogers on the other side.

The Conference proved itself effective at promoting efficiency in government for over 25 years. The American Bar Association has long supported the Conference and the role it played in advancing administrative procedural reform. We urge you to support legislation that would reauthorize the Conference and provide it with funds that are sufficient to permit it to continue its important mission.

You have asked for comments on the form in which the reauthorization should take place, and for the regulatory reform priorities a reauthorized Conference should examine. I see nothing obvious to change in the way the Conference worked before; sometimes it behaved like a town meeting, but that was, and hopefully will again be, part of its success as a non-partisan venue. As for items to study, we

would suggest some empirical research on the innovation of the OMB "prompt" letter, matters relating to data quality and peer review issues.

ATTACHMENT

[The prepared statement of Mr. Gray follows:]

PREPARED STATEMENT OF C. BOYDEN GRAY, COUNCIL MEMBER, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, AND PARTNER, WILMER, CUTLER & PICKERING

Good morning, Mr. Chairman. My name is C. Boyden Gray. I am a partner at Wilmer, Cutler & Pickering and a member of the Council of the Administrative Conference, appointed by President Bush.

The Administrative Conference is a tiny but unique and valuable body that provides an important link to the private sector on critical issues of administrative law and legal reform that would otherwise be orphaned because they benefit or affect no particular special interests.

Most of the Administrative Conference's support is, in fact, volunteer and most of its influence stems from this volunteer effort. But the central support staff does have to be paid to provide a coordinating role. It is unrealistic to expect its tiny budget to be volunteered by the private sector as well.

Although others have said and will say it again, let me emphasize that the Administrative Conference is uniquely bipartisan, having been chaired by Justice Scalia and having frequently benefited from the participation of Justice Breyer. It is the only place where administrative law experts from all parts of the ideological spectrum can meet to share insights on administrative law which is essential to the workings of the regulatory process. If ACUS were lost I think the country would lose a highly valuable meeting place where civil discourse develops free of any political or special interest rancor.

I should add that the Administrative Conference has been a pioneer in alternative dispute resolution and, therefore, on the vanguard of legal reform. It has also been an effective proponent of negotiated rulemaking, which is a key building block of regulatory reform because of the elimination of legal challenges to rulemaking. In this sense it is also a good implementing agency for Vice President Gore's effort to reinvent government. While not everybody supports everything the current Administration is doing, few oppose its efforts to improve the functioning of government's regulatory process.

In conclusion, I would just like to urge that this tiny agency be retained. It is an investment repaid many times over in the volunteer activities that its budget generates.

Indeed, because of its unique insight into government process, the Conference has been called upon with increasing frequency by Congress to assist in the implementation of a wide variety of statutes. My guess is that if Congress terminates ACUS now, it will have to recreate it some time in the future, at considerable extra expense.

Mr. CANNON. Thank you, Mr. Gray. You have packed an enormous amount of ideas into 5 minutes. I want to go back and explore some of those. Let me just point out here in conjunction with what Mr. Watt said and what I would also say. Some of the most important issues we have before us today are some of the things that we believe will make a difference, are absolutely not partisan and have been kept out of the partisan environment. They ought to be developed in a nonpartisan environment like ACUS so that we can work on some of those very important issues.

Appreciate your testimony. Mr. Edles.

STATEMENT OF PROFESSOR GARY J. EDLES, FELLOW IN ADMINISTRATIVE LAW, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW AND GENERAL COUNSEL, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (1987–1995)

Mr. EDLES. Mr. Chairman and Members of the Subcommittee, I am truly delighted to be here this afternoon to participate in these hearings that I do hope will lead to the reauthorization and re-creation of the Administrative Conference. I served in both Republican and Democratic Administrations at ACUS, and I thoroughly endorse the thoughtful comments offered by Justice Scalia and Justice Breyer last month as to the need to reestablish ACUS at this point in time. But it is certainly reasonable to ask, it seems to me, why there is a need for ACUS nearly a decade after it was abolished.

The simple answer I think is that new regulatory issues have arisen in the past decade so that the type of analytical work that ACUS once did again needs to be done, and there really isn't any other institution capable of taking on the task in quite the same way. So even if one believes that ACUS had to some extent completed its earlier mission by 1995, it is certainly time to start it up again. Other individuals or institutions, law professors, experts in public administration, bar associations have to some degree stepped into the vacuum that was created by ACUS's demise. But those individuals or groups rarely have the type of resources or the inclination to take on day in and day out the numerous and various issues that ACUS did, to see projects through from a recognition of the problem to its meticulous examination to the design of a solution and eventually its implementation.

I should also add on a personal note that judging from the voice mails and e-mails that I get in my American University office from Government employees even to this day, there is obviously still a need for the type of institutional memory and expertise that ACUS once provided.

I don't have the precise agenda for an ACUS of the 21st century, but I do know that much has changed in the 9 years since ACUS was abolished. The era of electronic communication and its role in Government decision making, for example, was just beginning in 1995, and it is now in full flower. Problems affecting immigration procedures are surely different today in light of our country's security needs occasioned by 9/11. There are certainly new questions concerning the organization of the Federal Government. What's the proper role for public-private partnerships, self-regulatory organizations, Government contractors for example? Are there problems of governmental organization or interagency coordination that impede our country's ability to compete in world markets. And, Mr. Chairman, you mentioned a number of items that I think would also warrant ACUS style analysis.

I think that ACUS's historic structure, which was a mix of Government officials, leading academics, lawyers from the private and public interest bars, plus a range of non-lawyer experts such as public administrators, remains the best blend of talent to accomplish ACUS's mission. The key ingredient for any revitalization, though, is it must be a genuinely nonpartisan and independent in-

stitution that is both objective and impartial and seen as objective and impartial.

ACUS's operation and budget were tiny in absolute terms when it comes to Government entities. It had 18 employees and $1.8 million budget when it was eliminated in 1995. Perhaps more important, it was extremely small relative to its mission. It was the only Federal agency with exclusive responsibility for improving administrative justice and Federal programs that at the time affected about $500 million in gross domestic product and involved agencies and departments that adjudicated more cases than the Federal courts. In fact, the money saved by both the Government and the private sector by ACUS's seminal work in alternative dispute resolution alone far exceeds its annual budget. Those are, I think, ACUS's real value for money.

My prepared statement offered some modest organizational and technical suggestions regarding the revitalization of ACUS. But more important than any precise modifications that Congress might have, being desirable modifications over the past 9 years, I believe that there has to be a political recognition that it is worth spending a tiny amount of taxpayers' money to obtain genuinely independent, nonpartisan, expert analysis of issues bearing on the governmental process with a view toward improving the fairness and efficiency of that process.

As Justice Breyer pointed out last month, other countries with significant administrative systems—Britain, France, Australia, for example—have permanent oversight bodies. In fact, the Canadian Parliament, which abolished its advisory review body in 1992 during a period of retrenchment and budget cutting that was not terribly different from what went on in this country, quickly realized that it had made a mistake and reestablished its commission only 4 years later. Our citizens, it seems to me, Mr. Chairman, deserve no less.

I want to applaud the work of this Committee and staff in holding these hearings, and I hope they will be the first step leading to the reauthorization and funding of the Administrative Conference. I will try as best I can to answer any questions that you may have.

[The prepared statement of Mr. Edles follows:]

PREPARED STATEMENT OF GARY J. EDLES

Mr. Chairman, members of the subcommittee. I want to applaud the subcommittee's decision to hold theses hearings and I hope that they will lead to the long-overdue reauthorization and funding of the Administrative Conference of the United States, or ACUS. I served as ACUS' General Counsel from 1987 to 1995, and urged its re-creation in a 1998 law review article, *The Continuing Need for an Administrative Conference,* 50 Admin. L. Rev. 101 (1998). I thoroughly endorse the thoughtful comments offered at the subcommittee's hearing last month by Justices Scalia and Breyer, and the observations of the American Bar Association, setting out the reasons for—indeed, the need for—ACUS' re-establishment at this time.

THE NEED FOR AN ADMINISTRATIVE CONFERENCE

I strongly believe there is a need for the reauthorization of an Administrative Conference and that ACUS is "very good value for money." Despite the presence of a written Constitution and a government-wide procedural statute (the APA), the federal administrative process, by design and evolution, is characterized by a considerable degree of procedural flexibility and agency discretion. Given that flexibility and discretion, some form of independent oversight entity is needed to help ensure

that the process is effective, accountable, and, perhaps most important, fair to our citizens. ACUS successfully played a key oversight role in the past and I believe such an institution is still needed.

As a practical matter, there are no other entities that can play the unique role that ACUS played. The courts are ill suited to perform a meaningful role as supervisor of the details of agency operations. Very few agency actions, even those that significantly affect members of the public, turn into litigated cases, in part because they are not amenable to judicial remedy or the average citizen simply can't afford the cost of litigation. So, many agency procedures and practices don't find their way into the courts. And the best a court can do in any event is to correct a problem in the case before it. The courts are simply not set up to be pro-active in proposing systematic change.

Likewise, Congress cannot be expected to oversee the minutiae of agency operations and procedures. Congressional oversight of administrative agencies has always been episodic. Congress, quite frankly, has many more fundamental issues on its plate. For example, Title II of Public Law 104–121, the Small Business Regulatory Enforcement Fairness Act of 1996, gave Congress an opportunity to review agency regulations before they became effective and enact legislation to prevent them from going into effect. But the provision is limited to rulemaking initiatives, which make up only a portion of overall agency activity. Moreover, agencies place several thousand regulatory actions in the Federal Register annually, but Congress has historically managed to enact only 150–200 bills each year. As a consequence, to my knowledge, Congress has used its rulemaking review power only once since the statute was enacted. Congess, in short, rarely involves itself in the type of procedural particulars that ACUS regularly examined.

It is doubtful that centralized review by the President, or even his senior deputies, can effectively oversee the finer points of the regulatory process. Although presidential review is theoretically possible, my colleague, Professor Thomas Sargentich, has suggested several factors that necessarily limit the President's power as a practical matter: the multitude of issues flowing through agencies daily, the severely limited resources of executive oversight, and the variety of control relationships that exist in the administrative system.

Nor can agencies be expected to devote their time and energy to critical self-examination. In an era when resources are scarce and must be channeled into accomplishing the numerous tasks assigned to them by Congress, agencies can devote very little time to reflection unless pressed to do so by outside political pressure.

Individual scholars or ad hoc advisory groups can study agency practices and procedures to some degree. Indeed, the Section of Administrative Law and Regulatory Practice of the American Bar Association has done an excellent job of picking up some of the slack after ACUS was abolished. But the details of day-to-day administrative procedure are often arcane and typically agency-specific, so they rarely attract the attention of academic scholars, who prefer to devote their time and energy to doctrinal or policy issues that have a larger audience. Moreover, neither academic researchers nor ad hoc advisory groups have the time or incentive to pursue research or recommendations to the implementation phase, particularly where such phase can last a decade or more.

A permanent, independent body such as ACUS also melds the expertise and perspectives of the government agencies, the private sector, including, importantly, the practicing bar, and members of the judiciary and the academic community. The participation of senior government officials—especially career civil servants—brings a unique form of expertise and experience. Agency officials are typically thoroughly familiar with the intimate workings of their own agencies. That expertise is essential to effective procedural reform. But agency officials can also have a stake in existing procedures that they administer or may even have created. And I have always found it surprising how unfamiliar agency officials often are with the experience of sister agencies. So sensible oversight requires the bringing together of expertise from numerous agencies across the government.

The participation of non-government members is crucial. It helps ensure that recommendations reflect the problems and perspectives of those who must actually deal with government and have experienced the frustration of trying to work their way through the bureaucracy or perceive government procedures as unfair. Judges lend their perspectives as generalist experts in fair procedure and reviewers who examine administrative action when it is challenged in court. Participation by members of the academic community helps guarantee that studies are thorough and doctrinal elements are not ignored.

Finally, a permanent institution allows a career staff to develop expertise in the areas of administrative law and government organization and process and devote time and resources to implementing recommendations. Judging from the number of

telephone calls or e-mails I received at my American University office after ACUS was abolished, the need for some form of institutional memory is critical.

Over 40 years ago, federal Court of Appeals Judge E. Barrett Prettyman, reporting on behalf of the temporary Administrative Conferences created by President Kennedy, summarized ACUS' value as follows:

> The heavy pressures of Government to discharge immediate responsibilities may at times rob administrators of the time needed for consideration of procedures. Imperfections in method . . . may acquire the protective coloration of familiarity, and the demands of the daily job may lessen the will to achieve change.
>
> The committees of Congress, suitably concerned as they are with matters of substantive policy, can only sporadically occupy themselves with the details of methodological and organizational problems. . . . Nor do we think that hope of major accomplishment lies in occasional studies by groups external to the Government. . . . The current need is for continuous attention to somewhat technical problems, rather than for public enlightenment concerning a few dark areas that cry for dramatic reforms. A discontinuous commission . . . is unlikely to have great impact upon the day-to-day functioning of the Federal agencies. Letter from Judge E. Barrett Prettyman to President John F. Kennedy (Dec. 17, 1962), Legislative History of ACUS (on file, ACUS Collection, American University Washington College of Law Library),

Those reasons help explain why other countries with significant administrative systems have permanent oversight bodies. For example, Britain has its Council of Tribunals that continuously monitors the work of that country's numerous tribunals and makes recommendations for procedural improvement. Much like ACUS, its detailed work is its greatest strength. The Australian Administrative Review Council has responsibility for giving advice on the workings of the administrative review system in that country. Canada too has a Law Commission that advises its Parliament on how to improve and modernize Canadian law. In fact, in 1992, a new Canadian government introduced a budget package designed to reduce both the federal budget and the deficit. It proposed abolition, privatization or consolidation of 46 separate agencies or programs. The Law Commission of Canada was one of the agencies abolished. The Commission was smaller than ACUS, but its jurisdiction was far broader, extending to "the statutes and other laws comprising the laws of Canada." It employed the same general methodology as ACUS—systematic review and oversight of Canadian legal matters and the submission of recommendations for improvement to Parliament and the agencies and departments of government. The government quickly realized that abolishing the Commission had been "penny-wise and pound foolish" and the Canadian Parliament re-established the Commission, in a somewhat modified form, only 4 years later.

NEED FOR INDEPENDENCE

The need for a genuinely nonpartisan and independent advisory body has been recognized throughout ACUS' history. A Republican President, Dwight Eisenhower, established the first Administrative Conference on a temporary basis in 1953. A Democratic President, John Kennedy, created a second temporary Conference in 1961. Apart from their numerous proposals for specific improvements in agency procedures, both temporary groups strongly endorsed the need for a permanent institution. Congress agreed, and created what was designed to be a permanent institution in 1964 with passage of the Administrative Conference Act.

A separate, independent institution serves to maintain both objectivity and the appearance of objectivity. From its earliest days, ACUS had a bylaw providing that each member participated "according to his own views and not necessarily as a representative of any agency or other group or organization." It is doubtful, for example, that federal judges would have, or could have, participated in an institution that was not genuinely independent of an incumbent political administration. So ACUS would have lost the valuable insights of numerous federal judges, such as Justice Breyer, if it were seen as closely allied to the President, irrespective of which party was in power. Although the ACUS Chairman and staff were careful not to lock horns unnecessarily with an incumbent administration, ACUS' recommendations at times parted company with the official view of the President or particular departments or agencies of government. I think that committees of Congress especially appreciated that when ACUS provided its advice, it was not doing so simply as a spokesperson for a current administration.

As part of its independence, Congress needs to ensure that ACUS has some funds for independent research. Over the years, ACUS affected major alterations in the

federal administrative process. It recognized the need to develop fundamental changes in the process of the entire government. But it also examined the need for improvements in the organization and procedures of individual agencies. Its studies almost always focused on empirical inquiry, although they did not ignore doctrinal elements. During the period when I served as ACUS' General Counsel, from 1987 to 1995, agency-specific studies were conducted at the request of several agencies, often with the financial support of the requesting agency. Congress encouraged this approach in an effort to make ACUS more self-sustaining. Although ACUS was always receptive to conducting studies on behalf of agencies interested in self-examination, a number of us were concerned about excessive reliance on funds from other agencies to sponsor projects. I would emphasize that no agency was ever able to influence ACUS' recommendations despite having requested or underwritten a study. Still, I believe that excessive reliance on agency funds can undermine public confidence in the objectivity of ACUS' research. Equally important, too much reliance on agency funding introduces instability in the research program because areas that need examination may not get it for lack of outside funding and a constant flow of funds from other agencies can never be assured. In my judgment, some independent research budget is essential.

STRUCTURE AND MISSION FOR A REAUTHORIZED ACUS

Any revitalized ACUS should remain essentially advisory. From time to time during ACUS' history, elements within ACUS or its supporters urged that it be given authority to compel, rather than merely recommend, action by agencies. In my view, that's a bad idea. Such expansion of its authority will compromise ACUS' ability to achieve actual reform. Much of its success stemmed from its ability to enlist an agency's support even when that agency was the subject of study. Numerous agencies actively solicited ACUS' help. And, in most cases, agencies adopted ACUS' recommendations. Any change from advisory to mandatory powers would alter ACUS' relationship with its member agencies from that of an impartial adviser to that of a policeman or potential adversary and compromise its ultimate ability to effect change. Nonetheless, I do believe that ACUS should undertake to bring to the attention of Congress or the President whether, and to what extent, its recommendations have been adopted. Providing Congress and the President with impartial advice, including a status report on agency implementation of ACUS recommendations, is not inconsistent with ACUS' advisory mission.

Given the changing complexion of regulatory problems, and the recognized public dissatisfaction with government regulation, but the apparent lack of consensus on how to reform it, I think a revitalized ACUS should examine whether there are institutional elements that bear on regulatory failure. During my tenure, ACUS had economists among its members, such as OMB Director James Miller, and I think a revitalized ACUS would benefit from a membership that also included public administrators.

A revived ACUS can be smaller than the 101-member Assembly. Such a large group provided broad representation of interests but, at times, frustrated efficient operation. As with any organization, not all members were equally active. Senior political officials from the government, in particular, often had schedule conflicts that compromised their participation. These scheduling conflicts also intermittently led to quorum problems. So the work typically fell to a smaller group of active members. As long as the balance between government and private interests is retained, and all cabinet departments and a fair representation of other agencies are included, fewer than 101 individuals could accomplish ACUS' statutory mission.

Reform of entrenched administrative practices and attacking bureaucratic inertia takes time and perseverance. One of ACUS' strengths was its ability to see its ideas through from concept, to design, to implementation. So, in reauthorizing ACUS, Congress needs to ensure an ongoing role for a permanent, career staff.

However, the permanent staff might be a bit smaller than the 24 employees that made up the Office of the Chairman during the high water mark of ACUS' activities. While a small corps of permanent employees is essential, there is no reason why employees temporarily assigned from other agencies could not supplement the permanent staff. The existing statute permits this arrangement and, over the years, ACUS had an active "visiting executive" program that allowed a number of highly talented government employees to join the ACUS staff for temporary periods while remaining on their home agency's payroll. A new ACUS could also augment its operations without an additional outlay of funds through an affiliation with a law school or school of public administration, whose students and faculty could assist in, or supplement, the conduct of research, the coordination of peer review for oversight of projects, and the drafting and implementation of recommendations.

ACUS' budget was tiny by governmental standards—only $1.8 million when it was eliminated in 1995. Even ACUS' critics acknowledged that its abolition had no meaningful effect on the overall federal budget. Perhaps more importantly, ACUS' budget was also small relative to its mission—it was the only agency with exclusive responsibility for improving administrative justice in federal programs that, at the time, affected about $500 billion of the gross domestic product and involved government departments and agencies that adjudicated more cases that the federal courts. Indeed, the amount of money saved by both the government and the private sector from ACUS' seminal work in the area of alternative dispute resolution, standing alone, far exceeded its annual budget. Given inflation since 1995, I think that ACUS could operate successfully at the outset on a modest budget in the $2–3 million range.

In summary, though, I think that the precise size and organizational structure of a new ACUS is much less significant than the political recognition that some entity needs to be available to police the inner recesses of the administrative process, and that ACUS is the best available option. It provides, as Justice Scalia pointed out, "a unique combination of scholarship and practical know-how, of private-sector insights and career-government expertise." Its essential purpose today would be the same as when it was originally created—to identify the causes of government inefficiency, ineffectiveness, delay and unfairness, recommend ways to change things, and pursue those recommendations to fruition.

EMOLUMENTS CLAUSE ISSUE

As part of the reauthorization process, I urge the committee to clarify the uncertainty that exists over a rather technical issue, namely the applicability of the Emoluments Clause of the U.S. Constitution to non-government members of ACUS. The uncertainty arises because of a 1993 opinion by the Office of Legal Counsel, Department of Justice (OLC), and ACUS' inability to have the matter resolved before it went out of business in 1995. Congress should make clear that, in its view, ACUS' members from outside the federal government who serve part-time, are unpaid for their services, and are explicitly required by the statute to be chosen for their expertise do not, simply because of such service, hold an "Office of Profit or Trust" within the meaning of the Emoluments Clause. Rather, they should be treated like members of any other federal advisory committee. Absent resolution of the issue by Congress, the status of ACUS' non-government members will remain in doubt and the ability of a revitalized ACUS to attract the most distinguished individuals from the private sector will be seriously compromised.

As you may know, the Emoluments Clause provides that "no Person holding any Office of Profit or Trust . . . shall, without the Consent of the Congress, accept . . . any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." U.S. Const., art. I § 9 cl. 8. The Constitutional Convention included the Clause in order to shield foreign ministers and other officers of the United States government from undue influence and corruption by foreign governments. However, in a 1991 opinion, OLC substantially expanded the historic understanding of the Clause when it concluded that even "[f]ederal advisory committee members hold offices of profit or trust within the meaning of the Emoluments Clause." *Applicability of 18 U.S.C. § 219 to Members of Federal Advisory Committees,* 15 Op. O.L.C. 65 (1991). The 1991 opinion, although presumably affecting a thousand or more advisory committees at scores of federal agencies, went essentially unnoticed at the time.

On October 28, 1993, OLC issued a further opinion addressing two rather esoteric Emoluments Clause questions specifically affecting ACUS members. First, it concluded that ACUS' academic members, such as law professors, are prohibited by the Emoluments Clause from serving on ACUS if, absent Congress' consent, they accept any payment from a commercial entity owned or controlled by a foreign government, including universities or law schools. That ruling had the effect of preventing any academic from serving as an ACUS member if he or she at any time undertook any employment relationship with a foreign government-owned academic institution—even a one-semester visiting professorship or a single compensated lecture. Second, OLC determined that an "Emolument" within the meaning of the Clause included any distribution of partnership shares that includes some proportionate share of the revenues generated from the firm's foreign government clients even though the ACUS members themselves did not personally represent any foreign clients and had no dealings with them. *Applicability of the Emoluments Clause to Non-Government Members of ACUS,* 17 Op. O.L.C. 114 (1993). What we discovered at the time was that, at most law firms, it is impossible to segregate partnership earnings to exclude from one partner's share some amount—often miniscule—associated with another

partner's foreign government clients. So, absent Congress' consent, lawyers in large law firms whose partners had foreign clients could no longer serve on any advisory committee. Importantly, in reaching its decision, OLC did not reconsider its fundamental 1991 view that advisory committee members, such as non-government ACUS members, occupy an "Office of . . . Trust" within the meaning of the Emoluments Clause. Some of ACUS' members resigned in light of OLC's decision.

The matter has been partially—but, unfortunately, not fully—resolved in the years since 1993 because OLC has retreated from its original determination. Immediately on the heels of its October, 1993 ACUS opinion, OLC, at the behest of the Department of State, reconsidered and revised its underlying view regarding the applicability of the Emoluments Clause to unpaid members of advisory committees. On March 1, 1994, in an unpublished letter to State Department Legal Adviser Conrad Harper from OLC Assistant Attorney General Walter Dellinger, subsequently cited in *Applicability of 18 U.S.C. §219 to Representative Members of Federal Advisory Committees,* 1999 OLC LEXIS 11 (1999), OLC determined that "not every member of an advisory committee necessarily occupies an 'Office of Profit or Trust' under the [Emoluments] Clause." Later in 1994, OLC modified its view regarding advisory committee members from the academic community. It determined that while foreign public institutions, such as universities, were presumptively instrumentalities of a foreign state for Emoluments Clause purposes, individuals did not come within the Emoluments Clause if the foreign academic institutions with which they had a relationship are independent of the foreign government when making employment decisions. See *Applicability of Emoluments Clause to Employment of Government Employees by Foreign Public Universities,* 18 Op. O.L.C. 13 (1994). In 1996, OLC publicly rejected what it now characterized as its previous "sweeping and unqualified view" that federal advisory committee members hold offices of profit or trust and were thereby subject to the Emoluments Clause. It went on to conclude that members of the State Department's Advisory Committee on International Economic Policy do not occupy an "Office of Profit or Trust" within the meaning of the Emoluments Clause. See *Letter Opinion for the Deputy Legal Advisor, Department of State, The Advisory Committee on International Economic Policy,* 1996 OLC LEXIS 63 (1996).

Unfortunately, the 1994 unpublished letter to Conrad Harper at the Department of State has not, to my knowledge at least, been made public. When I learned of its existence, long after ACUS had been abolished, I requested from OLC and the Department of State both a copy of the letter and any underlying documents from the State Department to OLC that might help illuminate OLC's new rationale. Because I was now a member of the academic community, I had to make my request pursuant to the Freedom of Information Act. My FOIA requests were denied by both agencies. So the bases for OLC's 1994 change of heart, and the factors that influenced it, are, as best I can tell, still not publicly known.

OLC did issue a brief, two paragraph, published opinion on the subject in 1996. However, in that opinion OLC simply pointed to various factors that took members of the State Department's Advisory Committee on International Economic Policy out from under the Emoluments Clause. OLC pointed out that the members of that advisory committee met only occasionally, served without compensation, took no oath, and did not have access to classified information. OLC further indicated that the State Department committee was purely advisory, was not a creature of statute, and discharged no substantive statutory responsibilities. Beyond noting these factors, however, OLC failed to set out in any principled way which of these seemingly key characteristics, or combination of them, would render other advisory committee members subject to, or not subject to, the Emoluments Clause. For example, is the mere fact that Congress created the advisory committee by statute sufficient, by itself, to render advisory committee members subject to the Clause? If so, why is that so, and are the other factors thus either irrelevant or surplusage insofar as OLC's analysis is concerned? In the circumstances, OLC's view on the applicability of the Emoluments Clause to prospective ACUS members cannot be determined. Nonetheless, if rigidly or individually applied, the fact that the Conference is created by statute, that the membership as a whole is technically responsible for the Conference's activities, and that, through its Chairman and permanent career staff, it performs statutory duties other than making recommendations, could be seen to subject the non-government members to the Emoluments Clause. So Congress needs to declare its intent that ACUS' non-government members be treated in the same way as members of other advisory committees and indicate that it is aware of the OLC opinion but does not believe that the Emoluments Clause should be a barrier to service by ACUS' academic members or individuals in large law firms as long as the non-government members do not, themselves, represent foreign governments. This is plainly within Congress' constitutional capacity to do.

I would point out that, apart from ACUS' statutory creation, none of the other factors noted as relevant in OLC's 1996 opinion apply to non-government ACUS members. Non-government members meet only occasionally, serve without compensation, do not have access to classified information, and are not required to take an oath. They perform purely an advisory role akin to that performed by advisory committee members throughout government. The job of the Assembly of the Conference, made up of its entire membership, is to study issues of administrative procedure and adopt recommendations for improvement. See 5 U.S.C. § 595(a), setting out the Assembly's statutory responsibilities. Although the Assembly technically "has ultimate authority over all activities of the Conference," its functions are necessarily confined by the specific administrative and executive powers conferred expressly on the Chairman and the Council in 5 U.S.C. § 595(b) and (c). And, as a practical matter, during my term of office at least, the Assembly and its non-government members (apart from the 5 non-government members of the Council) did not perform any functions that were not related to their advisory responsibilities. In short, the Assembly, meeting twice a year in Plenary Session, and through its committees on an irregular basis at other times, was entirely a recommending or advisory body.

ACUS' statutory footing or its other statutory responsibilities do not alter the advisory role of its non-government members. Although ACUS is both a statutorily created federal agency and an advisory committee, its non-government members participate only in its advisory functions. The statute created the position of Conference Chairman as its chief executive. He or she is a full-time federal employee who, along with the professional staff, conducts ACUS' day-to-day activities. The Chairman and staff ensure implementation of ACUS recommendations and the accomplishment of any statutory assignments given to ACUS by Congress. They serve as a clearinghouse for government agencies on administrative process issues. In other words, to the extent that ACUS as an agency performs tasks that might be considered to be non-advisory, these tasks fall within the purview of the Chairman and staff, who, as federal officials, are clearly subject to the Emoluments Clause.

ACUS' 40-year history testifies to the fact that Congress has always known about—and, indeed, has endorsed and statutorily required—the appointment of distinguished law professors, lawyers in private practice, and other experts as non-government members. There were two temporary Conferences, neither of which was established by statute—the first created by President Eisenhower in 1953, the second established by President Kennedy in 1961. They were made up of law professors, lawyers in private practice, and other experts, with a federal judge as chairman. Those Temporary Conferences were explicitly the model for the statutorily established Conference created by Congress in the Administrative Conference Act of 1964, P.L. 88–499. Indeed, in section 593(b)(6) of Title 5 Congress expressly required that non-government members shall be chosen to "provide broad representation of the views of private citizens and utilize diverse experience. The members shall be members of the practicing bar, scholars in the field of administrative law or government, or others specially informed by knowledge and experience with respect to Federal administrative procedure." Establishment of ACUS by statute worked no change in the basic advisory role of its non-government members. An Administrative Conference rooted in a statute, as recommended by both temporary Conferences, was intended solely to give the advisory body permanent status. In my opinion, if anything, ACUS' statutory underpinning, and Congress' express articulation of membership qualifications, manifests *de facto* congressional consent to any Emoluments Clause issue that a statutory foundation, standing alone, might be seen to pose.

But I recognize that the 1993 OLC opinion will complicate and compromise ACUS' ability to attract the most distinguished individuals from the private sector. So Congress should eliminate any ambiguity by amending the statute as part of the reauthorization process. There is no drawback in doing so. The Assembly, and its committees, have always operated, and must continue to operate, pursuant to the openness requirements of the Federal Advisory Committee Act, 5 U.S.C. Appendix, as do other federal advisory committees. Non-government members must comply with pertinent Office of Government Ethics disclosure requirements. So I recommend that Congress make two statutory modifications. First, it should delete the second sentence of section 595 that confers on the Assembly "ultimate authority over all activities of the Conference." This will eliminate any technical argument that the Assembly plays a role in the administrative operation of the agency. Second, it should add a final sentence to section 593(c) to provide explicitly that "Members of the Conference from outside the Federal Government do not, by virtue of their appointment, hold an "Office of Profit or Trust" within the meaning of Article I, § 9, cl. 8 of the U.S. Constitution." At a minimum, Congress should make clear in the

legislative history that, in reauthorizing ACUS, it fully anticipates, and consents to, membership by individuals who are members of the practicing Bar, scholars in the field of administrative law or government, or other experts in federal administrative procedure irrespective of any highly attenuated relationship with a foreign entity of the type OLC found to implicate the Emoluments Clause.

I appreciate the opportunity to participate in the subcommittee's hearings and I sincerely hope that they are the beginning of a process that leads to the reauthorization, re-creation, and funding of the Administrative Conference.

Mr. CANNON. Thank you, Professor.

Ms. Payton, would you—we have only one microphone but it works, which is nice.

STATEMENT OF PROFESSOR SALLYANNE PAYTON, WILLIAM W. COOK PROFESSOR OF LAW, THE UNIVERSITY OF MICHIGAN LAW SCHOOL, ON BEHALF OF NATIONAL ACADEMY OF PUBLIC ADMINISTRATION

Ms. PAYTON. I will try not to say anything too startling.

Mr. Chairman, Members of the Committee, thank you for inviting me to testify on the reauthorization of the Administrative Conference of the United States. I am the Cook Professor of Law at the University of Michigan Law School. As you know, I served on the Administrative Conference continuously for five presidential administrations. I am a past Chair of the Administrative Law Section of the American Association of Law Schools, and since 1998 I have been a Fellow of the National Academy of Public Administration and a member of the Standing Panel on Executive Organization and Management, which I will refer to as EOM panel.

I currently serve as the Director of the Academy. The Academy itself does not take positions on pending legislation. That function is located in the standing panels, such as the EOM panel, and I am here on behalf of the EOM panel. I am expressing today the management view, if you will, of the Administrative Conference. I have coordinated my testimony with Sally Katzen, who has contributed a statement for the record, and I concur in her views. Since she cannot be here in person today she has authorized me to speak to any questions regarding her statement.

My testimony reflects also the strong views of the EOM panel, which recently met and after deliberation voted to express its strong support of restoring the Administrative Conference. The EOM panel includes many present and former senior managers of the Government. I must say that this is the first time I have ever known my colleagues on the EOM panel to express enthusiasm for lawyers, and so the position of the panel should be taken as a measure of this wide esteem in which ACUS is held.

You have my written statement. In these oral remarks the principal point I want to make is that good administrative process and procedure are part of the critical infrastructure of Government. Like other infrastructure, they are likely to be taken for granted and neglected until problems build into crises or something major goes wrong. In the Government of the United States, only ACUS ever had the mission of engaging in constant correction and improvement of the procedure and process infrastructure.

ACUS was what we call a community of practice. It was a community of practice of administrative law professionals. Its members spanned all the agencies, administrations and different political

parties. It included both academicians and practitioners which fused public and private. ACUS was led from the top. The roster of its public members and consultants was a virtual Who's Who of administrative law.

Moreover, these luminaries worked hard. ACUS projects for the most part were difficult, technical and esoteric, some would say boring, the ordinary work of tending after the administrative process.

Now many of the lawyers who are supporting restoration of ACUS have spoken warmly of the bipartisan and collegiality of the Conference. From a management perspective, the attractiveness of ACUS to the professional community meant that prominent and distinguished people were willing for the sake of that collegiality to focus on operational issues that would otherwise never have claimed their attention. The Government benefited enormously by assembling and hosting ACUS. It stimulated the members of the Conference to do the work of the Government.

Now, I don't mean that ACUS was perfect, only that it was, as we now know, irreplaceable. The EOM panel therefore encourages restoring it with its virtues intact.

Now, our analysis of the relationship between ACUS's structure and performance leads us to urge caution with respect to changing in any significant respect its role and responsibilities. We recognize that the world has changed since 1994 and so have the concerns of administrative lawyers, as Professor Edles just pointed out. We have moved off the old agenda on to a new agenda, but it is still the agenda of administrative law. We believe that the task of deciding how to retain the old virtues of ACUS, while meeting new challenges, can safely and appropriately be entrusted to the administrative law community, itself operating under its original and quite flexible ACUS charter.

The EOM panel therefore supports restoration of ACUS under its original charter. I thank the Subcommittee for reexamining this issue. You are doing a great service.

[The prepared statement of Ms. Payton follows:]

PREPARED STATEMENT OF SALLYANNE PAYTON

Mr. Chairman and Members of the Subcommittee:

I greatly appreciate your invitation to testify in favor of the reauthorization of the Administrative Conference of the United States, known as ACUS or "the Conference." I am the William W. Cook Professor of Law at the University of Michigan Law School. I served on the Conference continuously through five presidential administrations as a Public Member and then a Senior Fellow, beginning in 1978 and ending in 1995 when the Conference was disbanded. In 2001–2002 I was Chair of the American Association of Law Schools Section on Administrative Law. Since 1998 I have been a Fellow of the National Academy of Public Administration and a member of its Standing Panel on Executive Organization and Management (EOM Standing Panel). I currently serve as a Director of the Academy.

My testimony today has been coordinated with that of Sally Katzen, and I concur in her views. Since she cannot be here in person today she has authorized me to speak to any questions regarding her testimony. My testimony also reflects the views of the EOM Standing Panel, which recently met and deliberated on the question of restoring the Administrative Conference. The panel voted to express its strong view in support of reauthorization. I will focus these remarks on the reasons for this solid endorsement.

One of the challenges of managing a government as diverse in mission and organization as is the Government of the United States is to locate responsibility for common functions where they can be performed most effectively at the appropriate

scale. Administrative processes and procedures are ubiquitous in government, but being matters of technique rather than substance they tend to claim a smaller share of the attention of agencies and the Congress than do more concrete and pressing concerns.[1] They are not for that reason unimportant. It is through administrative processes and procedures that most people interact with government. These processes and procedures are part of the essential infrastructure of government, and continuous attention must be paid to them. The ability of government to conduct itself appropriately, and to monitor and improve its procedures and processes, is therefore a critical piece of organizational competence. It is true that the judiciary has power to review agency action at the behest of an appropriate party with a legally-protected interest, but judicial review is available for only the thinnest sliver of the work of government, and in any event the mission of the courts is to decide disputes and to focus on larger-scale institutional relationships, not to improve administrative systems.

There is thus a void, which the Administrative Conference was created to fill. The Conference was a remarkable institution. In the current argot of organizational theory, it would be called a "community of practice." In her 1994 testimony in support of the reauthorization of ACUS, Sally Katzen described the Conference as it then existed:

> By statutory design, a majority of the Administrative Conference's members represent government departments and agencies. All major departments and agencies are represented and each department or agency chooses its own representative. The caliber of the individuals who represent these agencies attests to the importance that the agencies, as well as the Administration, assign to the Administrative Conference's functions. . . . The government officials join forces with distinguished private citizens, called "public members"—law professors, public interest lawyers, private practitioners, economists, public administrators—who volunteer their time and talent because they share the view that this unique public-private partnership significantly improves the way government regulates its citizens or delivers services to them. The Administrative Conference Act requires that the Administrative Conference chairman select members from the private sector who are "members of the practicing bar, scholars in the field of administrative law or government, or others specially informed by knowledge and experience with respect to federal administrative procedure." . . . The Administrative Conference ha[d]s a long-standing tradition of private sector membership that crosses party and philosophical lines . . .[2]

I am sure that all of the witnesses before this Committee who have been on the private side of this public-private partnership would attest that serving as a Public Member of the Conference was challenging, the work being frequently complicated, esoteric and technical. Nonetheless, Public Members of startlingly distinguished professional standing viewed participation in the Conference as a high calling and worked their way devotedly, largely at their own personal expense, through procedural and process issues of which no notice was likely to be taken outside of the circle of administrative lawyers, and for which they would receive no credit.

This willingness on the part of the leaders of the administrative law community to contribute personally to the work of ACUS was an expression of their commitment to improving the important below-the-radar processes that are critical to the

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[1] This observation was a principal motivation for the creation of ACUS as a permanent body. Here is what Judge E. Barrett Prettyman wrote to President Kennedy after having led two committees studying the possibility of creating the Conference:

> The heavy pressures on Government to discharge immediate responsibilities may at times rob administrators of the time needed for consideration of procedures. Imperfections in method . . . may acquire the protective coloration of familiarity; and the demands of the daily job may lessen the will to achieve change. . . . The committees of Congress, suitably concerned as they are with matters of substantive policy, can only sporadically occupy themselves with the details of methodological and organizational problems . . . Nor do we think that hope of major accomplishment lies in occasional studies by groups external to the Government. . . . *The current need is for continuous attention to somewhat technical problems,* rather than for public enlightenment concerning a few dark areas that cry for dramatic reforms. A discontinuous commission . . . is unlikely to have great impact upon the day-to-day functioning of the Federal agencies. *Letter from Judge E. Barrett Prettyman to President John F. Kennedy* (Dec. 17, 1962) (urging establishment of permanent Administrative Conference) (on file with ACUS), cited in *Testimony of Sally Katzen before the House Committee on the Judiciary Subcommittee on Administrative Law and Governmental Relations in Support of the Reauthorization of the Administrative Conference of the United States, April 21, 1994,* reprinted in 8 ADMIN. L.J. AM. U. 649, 653 (1994) (emphasis supplied).

[2] *Id.* at 652.

well-being of those who have to depend on or do business with government. I think, for example, of the work that ACUS did on the process for designating "representative payees" for Social Security recipients who cannot care for themselves but who have not been declared legally incompetent.[3] What was unique about the Conference was that highly-compensated lawyers, leading academicians who specialized in constitutional theory, and sitting federal judges who turned out to be future Supreme Court Justices, among others, believed that making sure that processes of this sort were tailored correctly was worth their time, because these processes mattered to the public.

Even partisan competition was subordinated to the members' determination to achieve good administrative principle and practice. The Conference's bipartisanship was so pervasive that it functioned as nonpartisanship, in the tradition of "good government."

Like any organized community of practice, the Conference maintained an informal institutional memory and a repository of useful information that was made available to those who sought its advice, whether or not they were located in the Executive Branch. It is worth remembering in this context that at any given time a substantial fraction of the people who have responsibility for designing, conducting or reforming administrative processes and procedures are new to their jobs, or have never had occasion to think about the type of issues confronting them. There are new Hill staffers and new independent agency commissioners, who need a source of trustworthy information and advice. Turnover among agency officials produces a constant inflow of people who need to be informed about their responsibilities. Best practices need to be identified and information about them disseminated. No individual agency is in a position to maintain a comprehensive information base on federal administrative process and procedure; nor can any administrative or other operating agency always take on the role of thinking conceptually about its own work in the context of general principles of administrative process. Responsibility for these functions must be centralized; it must be prestigious; and it must be impartial. The Conference was all of these things. Some of the greatest praise for ACUS has come from Members of Congress who had occasion to call on it for information and advice. Many members of the EOM Standing Panel have had similar experiences, and view ACUS as having been a highly useful organization.

The case for restoring ACUS thus seems overwhelming to my colleagues on the EOM Standing Panel, because we have great respect for its unique—and, as we have observed during the years since its demise, irreplaceable—function. Much has changed during the past ten years, however, and we understand that among those who favor placing ACUS back in service there might be some sentiment for modifying its charter to give the organization a broader role and responsibility, and an instruction to take on matters of greater salience. On this point the members of the EOM Standing Panel were unable to agree among ourselves, and we urge the Committee to be cautious. It is not intrinsically difficult to attract high-level attention to high-visibility issues; it is much more difficult to attract high-level attention to low-visibility issues. The genius of ACUS was that although its charter was (and still is) flexible enough to encompass virtually any subject that can plausibly be characterized as a matter of "agency organization, procedure, or management"[4], as distinct from pure substance, its broadly representative structure drove it away from issues that might have provoked partisan strife and toward addressing a continuous stream of low-salience problems that were important to people who actually had to deal with the government. As we have learned during the years of its absence, if ACUS does not do this work, no one will. We urge the Committee to reauthorize ACUS using the existing language of its charter, to put ACUS back together

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[3] Administrative Conference of the United States, Recommendation 91–3: The Social Security Representative Payee Program, 1991 ACUS 17.

[4] 5 U.S.C. § 594 provides:

To carry out the purpose of this subchapter, the Administrative Conference of the United States may (1) study the efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies in carrying out administrative programs. . . .

5 U.S.C. § 592 (3) defines "administrative procedure:"

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

as nearly as possible just as it was, and to allow ACUS to find its own way in its new environment.

I thank the Subcommittee for reexamining this issue and for considering the restoration of the Administrative Conference.

Mr. CANNON. Thank you. We appreciate your comments.

Mr. CHABOT. Mr. Chairman.

Mr. CANNON. Yes.

Mr. CHABOT. If I could speak out of order for just a moment.

Mr. CANNON. Absolutely. Do you have other commitments?

Mr. CHABOT. Yes, I have a hearing that I have to attend on Iran nuclear proliferation. I have heard the other three testify. Professor Harter, I have yours in my hand. I assure you I will read it this afternoon. So I apologize.

Mr. CANNON. Thank you. More time for questions for us. Professor Harter.

STATEMENT OF PROFESSOR PHILIP J. HARTER, EARL F. NELSON PROFESSOR OF LAW, CENTER FOR THE STUDY OF DISPUTE RESOLUTION, UNIVERSITY OF MISSOURI LAW SCHOOL

Mr. HARTER. Well, this is the part of the schizophrenia of this issue.

Mr. CANNON. We would hope that the structure that we come up with for ACUS is simple and flexible enough to accommodate the problems that we have in daily life, like getting our light system to work.

Mr. HARTER. Let me begin by saying that after a—my title of Earl F. Nelson Professor of Law is very much of a newbie. I have spent 35 years here in Washington working with agencies, among them, and in that I have observed them in action, and I do want to point out that that is two words. And I am here to wholeheartedly support the resurrection of the Administrative Conference, and I want to do it really on two grounds. One is that I think that the reestablishment would not only save the Government significant sums of money. Clearly I think we need it as an investment, but also that it would enhance democratic or, if you want to be nonpartisan about it, civic republican values in America, of just how the people participate in the Government.

You look back, since the APA was enacted in 1946, significant changes have taken place in the management structure of the Federal Government. There are new forms, major new forms of public-private interaction, reliance on the private sector with oversight by Government, new developments and relationships between Federal and State governments, new perceptions of how the Government should and should not function when making important decisions in relationship with individuals in the private sector. If you think about it, agencies in each individual agency, entity, each individual subagencies, hundreds of them, must confront each of those demands daily, each time they take action, and so similar choices must be made over and over and over again in Washington. Agencies lack the way of finding out what works and what doesn't work.

Let me go over some specifics as to some of the needs. I was recently—gave a little pep talk to an agency on how negotiated rulemaking works and whatever, and a couple of representatives from other agencies heard that I was going to do it and asked if they

could attend, and the answer was no. Bizarre. It was a lack of sharing experiences across agencies to support insights.

One of the major provisions of the Administrative Resolution Act is its confidentiality provision. It was one of the leading early provisions. It had some ambiguity, some interpretation. How do you dovetail mandatory confidentiality at agencies with inspector generals, how various parts work.

What do we have? Federal Government set up a committee to talk about guidance for confidentiality and dispute resolution proceedings. The American Bar Association set up a committee to talk about confidentiality in administrative dispute resolution proceedings. Now, even though these parties are going to be in the same proceeding, those two committees don't talk to each other. They come up with different advice. There is no way to share the insights or to come up with a common set of goals on how to implement. The communication has broken down.

Second, if you go through and look at an awful lot of the recent legislation, that because there is no ACUS, Congress is ad hocking it. It will require agencies—well, go talk to the National Research Council. There is no continuity. There is no standing membership. There is no particular insight into the broad perception, so let's just go out and find out individual aspects.

One that I found interesting was American University held a major conference on electronic rulemaking earlier in January. One of the major reasons given for expanding e-rulemaking, and certainly it has major aspects in e-data acquisition and management but another aspect is the accessibility of the American public, an ability to participate in rulemaking via the Internet. And I will tell you when they were talking about what they were going to do it just sent shivers down my spine. If implemented without care, it will just basically disenfranchise individuals because what they are talking about is establishing a dialogue for rulemaking, basically an ad hoc, negotiated rulemaking. What individual has the time to be there? Only the organized interests are going to be on the other end of that communication. It will be in fact ex parte communication in broad daylight.

We broke down into work groups and in my work group that I chaired, and it was really a bizarre, you know, which turned out to be a broadly representative group—was strongly of the view that the Government needed to establish an advisory committee of public and private people to advise on public participation. After all, the whole name of it is how the private people participate in Government. Wouldn't it be nice if the Government asked the private people how it ought to work? And so based on that, I sent a petition, or a letter I guess actually, to three of the leaders of the e-rulemaking effort suggesting that an establishment of an advisory committee could be a good idea, to which I got a resounding nothing. Not an answer. I was told by somebody who was at the meeting that my answer said all they want to do is take a hold and take it away. It was some kind of pejorative answer. All of those issues would be addressed by an Administrative Conference wishing to have a dialogue among the parties, desperately.

So what has happened is the private sector is talking to themselves, the Government is talking to themselves without bridging,

and we have got to get over that. That is what we are talking about in the e-rulemaking—I mean in the EU process.

I think as to the membership, I would—although I think that the statute is fine, I would urge a much broader membership of—I mean if you listen to the four of us the words "administrative law" creep in a lot. It isn't just administrative law. It is administration. It is the Administrative Conference, not the Administrative Law Conference. I think you need experts in management. You need economists. You need public administrators. You need all levels of Government. You need political agencies, senior service, and you need the staff. After all, it is the staff that is going to implement all of that and I think the staff has been woefully underrepresented in the Conference.

So I would hope that in its new incarnation that it be really broadly represented of diverse interests that would be affected by it.

Lastly, the question of appropriations. I would admit to a mistake, an error in my prepared testimony that I sort of abstracted, which I think the current value of the original appropriation would be $10 million, and I was wrong as to what the original appropriation is. But I still think that is a good figure, because I think that you really do require resources to go out and do the sophisticated stuff, to answer a lot of the questions that have been raised by you and by the other panelists, and again I think that will be an investment well made. Iurge your action and I am excited that you are undertaking this.

[The prepared statement of Mr. Harter follows:]

PREPARED STATEMENT OF PHILIP J. HARTER

My name is Philip J. Harter. I am the Earl F. Nelson Professor of Law at the Center for the Study of Dispute Resolution at the University of Missouri—Columbia School of Law. I whole heartedly support the resurrection of the Administrative Conference: Its re-establishment would not only save the government significant sums of money, it would also enhance democratic—or, to be non-partisan about it, civic republican—government.

BACKGROUND AND PERSPECTIVE

I would like to provide a bit of my background since it forms the perspective for the observations that follow. To a very real extent, the Administrative Conference has determined the course of my professional life. Thirty five years ago right now I was a research assistant to Professor Roger Cramton at the University of Michigan Law School. The project we were working on ultimately became ACUS Recommendation 2, and Professor Cramton became Chair of ACUS. I later became Senior Staff Attorney at the Conference and developed a program on regulatory reform. After I entered private practice, I was subsequently a consultant to the ABA's Coordinating Committee on Regulatory Reform that played such a crucial role in the debates of the late 70s and early 80s. In the mid-90s I chaired that committee, and in that capacity I had the honor to work closely with this Committee.

I have been a consultant to the Conference on several occasions. Probably most notably, I developed negotiated rulemaking as a consultant to ACUS and wrote a series of articles on the use of dispute resolution techniques by the Federal Government. Those articles resulted in the Negotiated Rulemaking Act and the Administrative Dispute Resolution Act. Through its recommendations, oversight, and consultations, the Conference played a pivotal role in improving the way government agencies make decisions affecting the public.

THE DESPERATE NEED FOR ACUS

The processes government agencies use to make decisions are complex, difficult, and continually evolving. The flexible, scant procedures outlined in the Administrative Procedure Act have been supplemented by numerous Executive Orders, judicial

decisions, and ad hoc statutory requirements. Moreover, since the APA was enacted in 1946 significant changes have taken place in the management structure of the Federal government, and there are new forms of public-private interaction, new developments in the relationship between Federal and State governments, and new perceptions as to how the government should function when making important decisions. Officials in each agency must confront all of these demands each time they take action. As a result, similar choices must be made over and over again in the halls of Washington about *how* to make decisions.

Oftentimes officials have little information as to how well a program implemented by another agency works or little guidance as to how the duties could be successfully discharged or major pitfalls avoided. Those who deal regularly with multiple agencies have witnessed the dire need for some means by which agencies can share insights and experiences and to gain expert advice as to the best ways to go about the public's business. Without it, agencies necessarily incur high transaction costs by repeatedly reinventing similar procedures; the lack also means the best ideas are not recognized, strengthened, and used more widely nor the worst improved or discarded.

Further, advice would be helpful both to Congress and the agencies as to the potential structure of new ways to achieve public goals and to respond to public inquiries and criticisms about how individual agencies have functioned. And, Congress and the agencies alike could benefit from the insights and advice of those who are directly affected by the administrative process and from those who study it from a variety of perspectives.

Since the demise of ACUS, we lack the means to refine how we do the public's business: no office or organization regularly convenes a broadly representative group of experts to deliberate about how to improve the quality of the administrative process. A permanent entity such as renewed ACUS is needed that can be devoted to solving the problems of excess costs, delays, and burdens that are imposed upon the agencies and upon the public by inadequate, inefficient, and duplicative government processes.

Individual agencies, while they have the ability to review their own performance, lack the capacity to make cross-cutting agency reforms and comparisons. Furthermore, agencies acting alone cannot make the necessary procedural reforms for the improvement of administrative process as a whole. And, agencies usually do not have the incentive, will, or resources to conduct a thorough self-examination to see if they could do things better.

A forum for collegial self-critique and development of effective administrative practices is eminently desirable. Moreover, one is needed that can bring a sense of unity to administrative agencies and promote an appropriate degree of uniformity in their procedures. Congress should, therefore, establish such an institution that will systematically seek to promote improvements in the administrative process: The Administrative Conference is just such an agency.

The primary purpose of revitalized ACUS would be to care for the improvement of the administrative process. In doing so, it would examine government procedures and practices, with the goal being to search for new ways of helping governmental agencies function more fairly, efficiently, and effectively. The organization could play a leading role in the development of domestic administrative law doctrines. One of its foremost functions would be to review and evaluate whether the basic law governing administrative procedure, the Administrative Procedure Act ("APA"), as well as other procedural requirements should be revised and updated. It could also arrange for the interchange among administrative agencies of information potentially useful in improving administrative procedures. Another role it could discharge would be the preparation of resource documents, bibliographies, and advice and recommendations on various topics confronted by agencies. Although now aging, ACUS handbooks are on the desks of many of the leaders in the administrative process on both sides of the great public-private divide.

The new ACUS could also focus on the more minute details of the administrative process as well. Specifically, it could study and adopt recommendations concerning better rule-making procedures, or ways to avoid legal technicalities, controversies, and delays through agency use of alternative means of dispute resolution. For example, the exploding use of the internet and other forms of electronic communication present wonderful opportunities for increasing the information available to our citizens and their participation in our affairs. But, tapping these resources and making sure they work effectively and efficiently is itself a daunting task. A recent conference on e-rulemaking held at American University pointed out many potential problems that could arise if the procedures used for e-rulemaking were not carefully developed; the public at large could effectively be disenfranchised. Moreover, a strong recommendation was made that since much of the work on e-rulemaking is

being done in the name of enhancing public participation, it would help if those in the government actually consulted with interested parties in the private sector. Yet, multiple requests to leaders of the e-rulemaking effort for the establishment of an advisory committee that could provide such advice and make recommendations to protect against abuse went unanswered. That experience alone points to the dire need for an oversight body.

Another focus would be to collect information and statistics from administrative agencies and to publish reports that could be useful for evaluating and improving administrative procedure. It could also evaluate the judicial review of agency actions and make recommendations for its improvement. A major issue confronting the administrative process that has emerged forcibly in the past few years is the delicate balance of open government in a time of concern over national security and the means by which requirements are imposed on our citizens and businesses to protect our homeland.

Another purpose for renewing ACUS could be to serve as a regulatory ombuds. It could in appropriate circumstances investigate and respond to individual complaints and undertake a systematic performance review of various government agencies, especially of those agencies with serious operational and programmatic problems. Individual agencies themselves often resist any critical self-evaluation in response to public complaints due to burdensome workloads or a failure to admit the flaws in one's own prior decisions. An independent, objective entity, unfettered by internal agency politics and its own inertia, can offer meaningful recommendations to improve the operational structure of administrative agencies.

We also lack a repository on administrative processes that the various state governments could call upon for high quality administrative procedural advice. ACUS could consider ways to improve federal, state, and local relations in different areas, including those in which state and local agencies administer federal programs. The organization could attempt to promote cooperation and coordination on interstate administrative procedural matters to foster a responsible and efficient administrative process among the several states. The entity would be equipped to advise state agencies and their staffs of significant legal developments and emerging trends occurring in the area of administrative procedure.

Another major issue in administrative procedure comes from the international harmonization of laws and regulations. As a result of harmonization, many domestic regulations will need to be changed to bring them into conformity with the international requirements. Just how that is to be done is a complex, controversial issue that needs to be addressed.

ACUS was structured to develop objective, non-partisan analysis and advice. It had sufficient independence from particular policy-based responsibilities, and hence its recommendations were given credence and were seen as a detached analysis. The structural makeup could bring together an inter-disciplinary collection of experts in the administrative process. Membership would preferably include: committed senior management agency officials, professional agency staff, representatives of diverse perspectives the private sector who deal frequently with agencies, leaders of public interest organizations, highly regarded scholars from a variety of disciplines, and respected jurists. The problems that ACUS should address include management as well as legal issues. Thus, its panel of experts should be comprised of members with both legal backgrounds and those who may not have legal training, such as management, public administration, political science, dispute resolution, and law and economics. State interests should also be included in the entity's membership by sending representatives from certain state agencies or state organizations.

One final point should be made: Although it is currently politically unfashionable to suggest that funding should be increased, that is clearly the case here. Throughout its life, ACUS was a huge bargain for the United States. But towards the end, inflation had taken a huge toll on its stationary authorization, and it was not able to function to the full extent of its potential. I suggest strongly that the in the process of re-establishing the Conference, the appropriate level of funding is the amount of the original statute updated to reflect inflation. My own, back of the envelope calculation is that that figure would be about $10 million. From 35 years of observing the Federal government in action (note that's two words), I firmly believe that such an amount should be viewed as an investment that would be paid back many times over. Even if it were not, the improved quality of the decision making process would be more than worth it. For example, what number would anyone put on the costs to our society if the procedures that are bursting upon us from the electronic age and globalization are not implemented appropriately? This is a tiny price.

The new ACUS will help significantly in ensuring that our public decisions are made effectively, efficiently, and fairly. That is clearly a major undertaking, but one ACUS is structured to discharge for the benefit of us all.

Mr. CANNON. Thank you, Professor. We only have two Members here but we are going to strictly abide by the 5-minute rule and I will—you poke me, because I think we are going to have several rounds and then I would probably do better if we go back and forth in that fashion.

Now, you know, I have a brother who actually served on the ACUS twice and you know him, Professor Harter.

Mr. HARTER. Can I tell a wonderful story?

Mr. CANNON. Yeah, you can, but let me ask a question first. You worked on neg reg a lot, and he keeps telling me that he is solely responsible. Can you clarify the record on his role?

Mr. HARTER. Well, it is certainly true. We were on a panel together and it really resulted in one of those lines that I absolutely love. And I can't remember how the line came up, but we reached a disagreement. He said, well, wait a minute, I have the authority to issue that rule. Why should I work with this committee? And I turned to him—this is all off the record—and I said you have the authority but you lack the power. And that is when he became really very much of a proponent of the whole idea of working it out with the political constituents.

Mr. CANNON. That was between times, I think, on the ACUS. Thanks. Let me just ask a question that I would like you to respond to and then Ms. Payton, because Ms. Payton is saying no changes and you are suggesting a substantial broadening to bring in professionals from other scientific areas.

I take it you are actually thinking in terms of an increased appropriation to have more staff because you talked about staff in particular, and then going to all levels of Government. Do you want to flesh that out a little bit and then, Ms. Payton, I would like to get your view on that.

Mr. HARTER. I think that the structure at the Conference both in terms of numbers and everything is probably okay. I would just again in the appointment process, would look for more diversity of professional and diversity in general and I mean, I think some of the serious management expertise, which I think would—really a little more economic ideas, a little more, again, different levels of Government, State representatives, maybe a NAAG or State Governors. I think it would because of the public-private. And I think that on the staff level, having a different perspective, and I think some of the issues that both—the committee and here have talked about, we are facing huge scientific issues. So I think having some degree of a technical ability would also help as well. So I don't think it needs to be major, and I think the structure still works.

Mr. CANNON. Is that consistent with what you are thinking, Ms. Payton?

Ms. PAYTON. Well, the way I read the charter, I thought that there was authority to appoint those kinds people as public members anyway.

Mr. HARTER. Oh, absolutely.

Ms. PAYTON. And I also think that ACUS has the authority to appoint to its committees people who are not public members of ACUS. I believe we have done that. We can. They can.

Mr. CANNON. So you believe that when you talk about the group could regulate itself, you believe that there is plenty of latitude in the current charter to do the kinds of things?

Ms. PAYTON. That is the way I see it. Now Gary may have more.

Mr. EDLES. I think that is absolutely right. I mean it does, the statute does indicate that there are to be private citizens, members of the private bar, but also other experts in the administrative process. And historically ACUS did have economists. We often had members, I remember—I believe David Piddle, who was then a Consumer Products Safety Commissioner, who was basically an engineer, who participated actively in ACUS activities. So we did have representation even in the old days of people who were not lawyers, although I must say it was fundamentally, I think, a lawyers organization.

Mr. CANNON. Mr. Gray.

Mr. GRAY. I think in terms of the studies that were commissioned, they could be studies by economists or scientists. There was no limit. It wasn't only study by lawyers. So there was plenty of access to expertise outside the law.

Mr. CANNON. Good. Maybe in this context can we talk about funding, because when you go outside, I mean what you had in ACUS was all these incredibly brilliant people who came together and participated with relatively small budgets. But when you did study on the outside you commissioned those funds for those and that cost money. I suspect what we will do is include in our report language the idea that we should be looking at these broad groups of people to be representative. But do we need more money than what we are talking about so we can do these kinds of studies, and maybe, Mr. Gray, you can take that question.

Mr. GRAY. I really would like to get Gary's perspective on this, but I think it would be very useful to have more funding because our outreach would be much broader. I have taken as an example, what I suggested, which may not be workable, but this EU comparative project I think would be ultimately better done by an impartial entity like ACUS rather than a private entity with questions about its funding. It is going to cost a hundred thousand dollars to do that.

Mr. CANNON. I am sorry. How much?

Mr. GRAY. A couple of $100,000 and that is not the kind of thing the private sector can come up with without raising questions about where it came from, and yet it is not that much, it seems to me, for it be funded out of something like that because it is not a backbreaking, seems to me, figure. All I know is there are all kinds of budget constraints.

Mr. CANNON. I would like to pursue this topic a little bit more so we can get some clarity on the record, but my 5 minutes has expired and we will come back to that.

Mr. Watt, would you like to take 5 minutes?

Mr. WATT. Thank you, Mr. Chairman. Let me just play devil's advocate here for a little bit, because we have now heard from six witnesses, all of whom have been vigorously in support of reauthorizing, and while I certainly share that view, one of our obligations, I think, and in the process that I described and referred to in my opening statement works best, we get both sides of an issue and

there has not been any witness yet who has said this would be a terrible idea.

Let me be further provocative to—and probably counterintuitive to assume that there was a rational basis for terminating the Administrative Conference of United States. When I look back and realize that that happened in 1995, I kind of have to step back from that because there was a lot of stuff happening in 1995 that was not based on any rational evaluation. So I have got an opportunity here to put all of this together because I have got people, I think, who understand the history of how we got here.

What was the rationale, if there was a rationale, for terminating this agency?

Mr. EDLES. I can tell you what the House Appropriations Committee report said, which is simply that ACUS had completed its mission as of 1995. As to whether there were other rationales, I can only say what the public report said.

Mr. WATT. Were there any kind of hearings to document the completion of that mission or any discussion to build a record in support of that conclusion?

Mr. EDLES. There was a hearing—there were hearings, I think, before this Committee which fundamentally came out supporting the Administrative Conference. We did have our usual, you know, hour and a half or 2 hours before the Subcommittee on Appropriations. That was the oversight provided for us insofar as our annual appropriation was concerned and it was presumably on the strength of that, you know, hour and a half meeting and information we had submitted in which the Subcommittee came to the conclusion that we should be—we should no longer be funded. But I think it was an era, quite frankly, in which there was a looking around to see if there could be widespread Government retrenchment.

Mr. WATT. This was reform.

Mr. EDLES. And our little agency, I think, is what came up in that time.

Mr. WATT. Mr. Harter, you look like you are just chomping at the bit——

Mr. HARTER. No, I am not sure I am chomping.

Mr. WATT.—to respond to this question.

Mr. HARTER. I will add a little bit to the discussion, and in my view I think it was time that the Conference needed to be revitalized. I mean I think that it needed to be energized and what not. I am not sure that I would take the boot heel that was taken to it, I mean to this kind of the ultimate one. But I think it needed resparking along the lines that I think a lot of us have been talking about here, and I think in part my view is that it lacked as much of the energetic and enthusiastic support at that time that you are seeing now for the reconstruction of it.

I mean, I think that a lot of issues have emerged that are not getting addressed, and so it might be that this had become slightly torpid in that way.

Mr. WATT. Mr. Gray, you were—you said you testified at a hearing where this was evaluated. Were there compelling reasons advanced on the opposite side of where you were? You were in favor of reauthorizing, according to your testimony. Were there other

people on the other side who were making some compelling arguments to terminate?

Mr. GRAY. Well, I have to be candid since I am testifying. There were interests, private interests, if you will, that were opposed to the reauthorization. But they never really surfaced publicly with their arguments. I think what was public was the testimony rather to the contrary that it should be reauthorized.

Mr. WATT. Okay.

Mr. CANNON. We will come back for another round. Did you want to add something to that, Ms. Payton?

Ms. PAYTON. Well, I think that everyone here at the witness table is being reluctant to say what we all know. May I suggest that——

Mr. WATT. I am prone to go to meddling in stuff that makes people have to come to grips with that.

Ms. PAYTON. Right. Well, I think you might find it useful to read at least some excerpts of a law review article by Toni Fine, which appeared in the U.S. Law Review[1] a little while ago, that really goes to the legislative issues of the demise of ACUS. You would find that very useful in its meticulous detail.

Mr. CANNON. Ms. Payton, could you make that article available for our review or at least give us the citation so we would like to have that be part of the record?

Ms. PAYTON. Certainly.

Mr. CANNON. Thank you. Just for the record you should be aware that the Administrative Law Subcommittee had a hearing on ACUS and reported out that language to reauthorize it when the Appropriations Committee decided not to. I have actually talked to people who were engaged in that process, both Democrat and Republicans, and they don't remember it. I think this is just—I would love to suggest the point of all that is that ACUS's work was not widely understood beyond the people that were involved, and I would hope that one of the agenda items, one of the things that the ACUS would do would be to have staff to make sure that Congress understands what they are doing.

I don't think we have any real serious opposition to reestablishing ACUS short of that. We were talking about funding a bit ago, and in my opening statement we talked about a couple of other projects that ACUS did over a 28-year period of time and we are talking about this study.

Mr. Gray, do you think it would cost $100,000—I think it would be at least that—to do that kind of depth that we want to do? How many studies—given the kind of workload of 28 years, you are looking at 10 or fewer series of projects—how many studies should we be looking at? One per year, one every other year, five per year? Do you have any sense of how much ACUS can do and how much?

Mr. GRAY. Well, I think because it has not been around for nearly 10 years there is a backlog of things that need to be looked at. I mentioned just three of them, including in addition to the European Union project that come to my mind, and in dealing with the quality of purity, which are related topics. So perversely it might

[1] The correct reference to the article cited by Professor Payton in her testimony is as follows: Toni M. Fine, A Legislative Analysis of the Demise of the Administrative Conference of the United States, 30 Ariz. St. L. J. 19 (1998).

take more to get it underway and make the backlog through of things that need to be looked at, and it might then drop afterwards.

Again I look to Gary. I think he ran this. I was on the council, but I wasn't involved in daily administration, and I think you had a better answer.

Mr. CANNON. Let me just say here that I agree with your analysis. You may have a big need that may trail off, and so my sense is that when we are talking $3 million you might need to pick it up a little bit so that we authorize enough to actually do what needs to be done?

Mr. EDLES. Yeah. Over my period, 1987 to 1995, I think we probably tackled a dozen fundamental, major projects each year. I think a couple points on the value here. One is that we—all the private sector members who participated did so pro bono. I mean, people like Boyden Gray did not get their hourly rate when they did work for the agency. They did all of that as volunteers and did a lot of hard work as volunteers. Secondly, the law professors by and large, although some of them were not law professors who served as consultants to ACUS, never really got market rates for what they were doing. There was first of all, their desire to have entree to Government agencies, which they got through the Administrative Conference, which they could not have gotten if they were just a law professor doing a study of some agency. They would not have gotten a hospitable relationship of the type that they got because of ACUS. So they were eager to do their projects through the Administrative Conference, and the Administrative Conference on the other side was quite willing to have them publish their studies in an independent law environment. So through that sort of symbiotic relationship we managed to get them at well below market rates.

And I think our projects, we used to fund them in the range of $10,000. I mean, things of that nature. I think some probably as little as $5 or $6,000. Maybe some were a little more pricey if they had to be done fast or if there was more than one consultant that needed to be used. But, you know, we were not talking in the hundreds of thousands of dollars for individual consulting projects the way the Government does normally.

[3:30 p.m.]

Mr. CANNON. Thank you.

Professor Harter, I resonated with your personal comments about the Internet. I would like to go to you.

You talked about the Internet rulemaking and what essentially becomes ex parte communications in the open. In the last 4 days, I have had four opinion pieces or opinion page articles in the Washington Journal about me and what I am doing on immigration; and that is sort of cool, except there are at least a dozen and probably 100 Web sites out there that are saying horrible things about me. And I looked a little bit, or attempted to look, but there is no way on the face of the Earth that I could respond to all that is said by people who don't like what I stand for and do on immigration.

How do you deal in a world of information with people who want to see things—how do you deal with that? Nobody has the resources except the fanatic or the corporation that has the money

to do it. So I am impressed by your thinking about that, and I have been thinking about that.

We have had issues on the Forest Service where we had 2 million comment, because they are organized. They are in environmental groups. And the other side, maybe you had 50,000 barbers who inarticulately got online and said I don't like what they are suggesting. And so you weigh those which we don't do but we do do and you come up with skewed decisions.

You obviously have thought about this a little bit. Would you mind commenting about what we do with the Internet?

And secondly, both of you, Ms. Payton, is the structure—the current structure of ACUS sufficient to deal with these kinds of challenges?

Mr. HARTER. I am not sure I can address the technical aspects of the Internet. There is a lot of thinking going on about it; and, in fact, the Forest Service rule is one that is commonly used in talking about, well, let us have the computer screen the rule. The computers will read the 2 million rules and tell you what the various comments were.

I think what my point is, is that what really—and NSF has a program that is looking at it. American University has a program that is looking at it. There is one inside the Government that is sponsored by the White House and EPA that is looking at it. But these groups need to talk to each other, and the public at large needs to participate in some of the discussions.

I mean, I gather, from talking to people who have been deeply involved in it, this whole issue of the response, the ex parte in the open is really not looking at it. They are looking at the technology, as opposed to what is happening with—the average person can't keep up with it. So I don't have an answer to it.

Those of us who do what I do often quip: I don't do substance, I do procedure. And what is really needed, I think, is an advisory committee to talk about it and come up with guidelines on it that will take these issues into account. It strikes me that is the perfect vehicle to do it. It is built that way and comes up with the recommendations that are broadly representative, so it is the perfect vehicle to do that. When I raised the prospect of an advisory committee, I didn't get the courtesy of a response.

Mr. CANNON. You think ACUS, the way it was set up, could handle it?

Mr. HARTER. Absolutely. They may need a new committee, but that is easy, and that takes 4 minutes.

Ms. PAYTON. Let me muse a little in a way that I don't ordinarily do on the record.

The revised ACUS needs to have both the range of interests represented that allows it to be a kind of very high-status, diverse group. On the other hand, it needs to be nimble and flexible and needs to be able to do something about all these problems; and it needs to be able to respond in a shorter time frame than having recommendations deliberated at a plenary session.

I guess the one thing I would suggest is that recommendations be allowed to be promulgated—to be made by groups that are smaller than the plenary session. Now that is how the National

Academy of Sciences does it, and that is how the National Academy of Public Administration does it.

I am not taking a position on behalf of NAPA as a whole. The organization that is authorized to comment is the EOM panel, which is a subunit of NAPA; and this is the way in which we compromise between our interests in having a diverse general membership and then subject matter panels that are expert but that themselves are fairly diverse and they can respond to these things.

I think the work of ACUS would be enormously improved if all recommendations didn't have to go through that plenary and if people who were not public members of the conference as a whole could sit on committees, and then you would have something that looked a lot more like the National Academy of Sciences.

I would say that when you start expanding that mandate—and I am speaking as an advocate—when you start expanding that mandate, I am afraid that you draw the attention of ACUS away from the small. Now, ironically, it is the small that can't get any attention paid to it unless ACUS pays attention to it. So what I would say, if you want to expand that mandate, you have to give ACUS some sort of incentive to make sure that it keeps tending after these fairly minor issues. It has to have a division that does that or something of the sort.

Mr. CANNON. Thank you. I have gone over my time, and I apologize. Mr. Watt.

Mr. WATT. I just wanted to get an appreciation of what the prior budget was before the termination and if we extrapolate out with some reasonable cost of living adjustment what that would result in.

Mr. EDLES. The budget when ACUS was abolished was $1.8 million, and it had a staff of 18 employees at that time. At the high water mark of ACUS, I think it had a budget of $2.3 million. That was the highest ever, and that supported a staff of 24 employees.

Mr. WATT. And if you were thinking about the ideal—taking into account the backlog of things that has not been attended to since ACUS has not been in existence, first of all, for how long—how long do you think it would take to get that backlog taken care of and to what extent would the budget be ramped up for that period of time and for what period of time?

Mr. EDLES. I don't think I can answer either of them, how long it would take or how much it would cost.

I can tell you that when President Eisenhower set up the first temporary conference, he did that in 1951. That conference lasted for 2 years. So it was over, I guess, in 1955. By 1961, President Kennedy had to set up another temporary conference, which means that over a period of 4, 5 years there was again a need for additional work.

The first temporary conference came up with about 30 recommendations, as I recall reading, and the second temporary conference also with something on the order of 30 recommendations. I don't really have a real strong feeling as to, you know, how many various projects there are out there. I suspect there are scores of them that could be usefully done at this stage. And I think $10 million would probably be a wonderful figure. I think, quite candidly,

something in the neighborhood of 2 to 3 million would probably be more politically acceptable.

Mr. WATT. At least for a start. At least to start.

I am just trying to create a record here with expert input, which I think, even if you are guessing, if it is an educated guess, is better than having an appropriator pull a figure out of the sky, I guess is the point I am making. So I want—let me just encourage each of you to do some creative thinking about this, whether you do it today or whether you submit it to us to supplement the record subsequent to today's hearing. I think you all are in a better position to evaluate this than either the Chairman or I would be and certainly in a better position than some appropriator pulling a figure out of the sky would be. So if you don't have a good feel for it today, I would just hope that you would give it some thought, give us your input and the basis on which you make that input.

Mr. CANNON. Without objection, I suggest we leave the rest of the record open for 7 days so you all could submit your thoughts on funding to us.

Mr. WATT. There are some responses that they may be prepared to make today.

Mr. CANNON. Without objection, so ordered, on leaving the record open.

Ms. PAYTON. I am so nervous about the prospect of diluting the main focus of ACUS. One of the reasons why you are getting such a bipartisan, enthusiastic response is exactly that ACUS did something that was enormously important and irreplaceable, something that only ACUS could do and no one else will.

When you start expanding the role of ACUS, you may wind up in terrain that other people think they already occupy; and it is almost possible that this measure that at the moment is going forward so smoothly may encounter some rocky places.

Mr. WATT. I guess my response to that is I think it is part of our responsibility to forward some parameters with this, not just to say we reauthorize ACUS, but we reauthorize it up to a figure of x amount per year. Now whether the appropriators buy that figure or not, I think may be—if this process works as it should work, it will be in direct proportion to the—our having justified it and built a record in support of it. And I think that is much—a much better way, even if you come up with different figures, with different visions. As long as we understand what your assumptions are, we have built a record and can take that into account in our Subcommittee and full Committee's evaluation on the authorizing side, which is what our responsibility is in this process.

Mr. HARTER. When I discovered my error in the testimony, I actually gave considerable thought—although, obviously, a lot of it is guess. Let me just sort of give food for that. And I share the concern one wants to keep it closely cabined or corralled, focused on the administrative process. My definition may be broader, but when it gets beyond that, it will encounter opposition that will be adverse.

On the other hand, I think there are a number of different parts of what the conference does that we need to be focused on. I think there are a whole series of large processes that Boyden has been

talking about that would need to be undertaken, especially given the hiatus. There are a whole series of smaller ones.

In individual research areas, you get professors to do things on the cheek so long as there is not a lot of research, but research is expensive to get it done. And it strikes me in the latter days of the conference that it was having trouble coupling together enough resources to do good projects. It was getting money from other agencies. It was soliciting from the people it was going to study. It makes me a little nervous, and I think it diminished its nimbleness.

I certainly echo the idea of having the broader committees. So, from my view, I would be concerned if it really were constrained only $2 million or $2.5 million. I don't think it can really function effectively at that rate to get it done. My own view, a minimum of $5 million is necessary; and, frankly, I would go with the $10 million, with the urging that 5 is probably the minimum. If it is too scant, the quality of the studies just aren't as thorough and as good; and part of its real advantage was thorough studies and a bipartisan support of the recommendation.

Mr. WATT. Can I ask one more question, Mr. Chairman, just a corollary to that? For a 5 or $10 million investment, what would you project the savings were that resulted from just the—what was the major initiative?

Mr. HARTER. Let me give a figure you can't put a number on. I just completed 2 years ago a negotiated rulemaking for OSHA on building steel buildings. The subpart R of OSHA's rules that had been on OSHA's docket for 20 years, they had tried multiple times to revise the rule, each time unsuccessfully. The negotiated rule worked it through. Unanimous recommendation. OSHA implemented it. The fatalities in steel erection are currently about a third of what they were then. We are talking about probably 20 deaths a year. What is the number? The regular rulemaking didn't work for 20 years.

Mr. WATT. There is method to my madness here, because this is the record building stage. Because I think it is our obligation to document the best we can the cost benefit of this reauthorization, and so I am being a little bit more meticulous than I would normally be because of that. I think we need to anticipate some of these issues, and if you all can submit something to us having thought about it in some more detail—I am not looking for you to be uniform. There is benefit I think in not being uniform. We are not asking you to get together as a group and come up with a group figure or a group vision or a group benefit, cost-benefit analysis, but this is the kind of information that I think would be helpful to have in the record to document not only the cost and what the reasonable costs should be to accomplish whatever the vision is that could differ from panelist to panelist but to document also the benefit of that cost; and that is, I think, what we don't do nearly enough of in this body.

I will yield back.

Mr. CANNON. I would like to go through some notes and make some statements; and if you want to take notes, I will leave it open for you to comment on that.

I appreciate, Mr. Gray, very much your statements. I think it extraordinarily important that we do this so that we stay ahead of the rest of the world. For me, that is very, very important. We have a world in which we can be transparent instead of opaque. We may be more transparent than Europe, but we want to be more transparent. I am a big fan of John Graham, and I appreciate your comments on him. This Subommittee is actually focusing on helping out there.

Mr. Edles, you talked about—you made a great record. I really appreciate that. And you talked about the institutional memory. I just think that is remarkably important. We can put this back together with many people who are now and were in the prime of their lives that know what happened and know what we can do. And one of the things I hope we can do here is go from taking the negotiated regulation or rulemaking model to a negotiated permitting model.

We are in a position where we have had massive forest fires, and we can't deal with that in Congress. We fiddled around for 2 or 3 years now on the Healthy Forest Initiative, and we still can't get a consensus out of this body. We will never get a consensus out of this body. And we are not going to cut trees until we come up with a process that a rulemaking agency can do, and that is in part rulemaking but I think in larger part it is going to be a negotiated process for permitting—permitting the cutting of trees, permitting of drilling the wells and things like that so we that can come up with a process that actually works.

The problem with it, of course—and, Ms. Payton, you talked about these things don't work until something major goes wrong. And we have some major problems. In the case of forests, for instance, you have a forest fire because we didn't tend to the forests because we could issue permits for cutting trees in a way that everybody agrees. There is a way to make sense. It is just that no agency is going to come up with a permit that doesn't allow for litigation to stop the cutting of trees; and if it is not a healthy forest, we end up with massive forest fires. We lose the trees, lose the watershed, lose the endangered species. We are letting extreme conditions drive major issues that, when you get settled into a discussion with reasonable people, you come to conclusions.

But it is not the reasonable people that bring the lawsuits. It is the people that have an agenda that is outside and choose their judge and all that because we abdicated. That is, America got rid of acres and acres. So negotiating the permitting I think is one of the incredibly important things that we are doing.

Many things have been said today, and we appreciate your comments. Are there any comments on what I have said or——

Well, then I will yield back the time I have. Mr. Flake, do you have any questions?

Mr. FLAKE. No questions.

Mr. CANNON. Thank you for your attendance here. Your being here I think has created a record that is remarkable. More importantly, it will draw attention to people who need to understand how important this is and give us a boost in moving this legislation through and getting not only the reauthorization but funding from

the appropriators. We appreciate your presence here today and thank you.

The hearing is adjourned.

[Whereupon, at 3:55 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

RESPONSE TO POST-HEARING QUESTIONS FROM C. BOYDEN GRAY

F. JAMES SENSENBRENNER, JR., Wisconsin
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LINDA T. SÁNCHEZ, California

July 12, 2004

C. Boyden Gray, Esq.
Wilmer Cutler Pickering Hale and Dorr LLP
2445 M Street, NW
Washington, DC 20037

Dear Mr. Gray:

Thank you for appearing before the Subcommittee on Commercial and Administrative Law at the oversight hearing on the "Administrative Conference of the U.S. - Part II: Why Is There a Need To Reauthorize the Conference?" on June 24, 2004. Your testimony, and the efforts you made to present it, are deeply appreciated and will help guide us in whatever action we take on this matter.

Pursuant to the unanimous consent request agreed upon at the hearing, Subcommittee Members were given the opportunity to submit written questions to the witnesses. These questions are annexed. Your response will help inform subsequent legislative action on this important topic. Please submit your written response to these questions by Friday, July 30, 2004, to: Susan Jensen, Counsel, Subcommittee on Commercial and Administrative Law, B353 Rayburn House Office Building, Washington, DC 20515. Your responses may also be submitted by e-mail to: susan.jensen@mail.house.gov

We have also enclosed for your review a copy of the official transcript of this hearing. The transcript is substantially a verbatim account of remarks actually made during the hearing. Accordingly, please only make corrections addressing technical, grammatical, or typographical errors. No substantive changes are permitted. Please return any corrections you have to Ms. Jensen by Friday, July 30, 2004.

Mr. C. Boyden Gray
July 12, 2004
Page Two

If you have any questions, please feel free to contact Ms. Jensen at (202) 225-2825.

Thank you for your continued assistance.

Sincerely,

CHRIS CANNON
Chairman
Subcommittee on Commercial and Administrative Law

Enclosure
CC/sj

c: The Honorable Mel Watt

QUESTIONS FROM THE HONORABLE CHRIS CANNON
FOR MR. C. BOYDEN GRAY

1) It has been nearly nine years since the Administrative Conference of the United States (ACUS or Conference) was terminated. What, if any, problems have arisen in administrative law and practice that could have been addressed by the Conference if it was in existence over this period?

2) If ACUS were reconstituted, what, if anything, would you recommend be changed about the Conference?

3) How important is it to preserve the bi-partisan, non-political nature of ACUS?

4) Should ACUS be reconstituted as part of another agency, such as the Justice Department or the General Services Administration?

   Should it be privatized?

5) What should be the priorities for a reauthorized ACUS?

6) What, if anything, should be done to ensure that the Conference's membership is representative?

7) Do you have any recommendations as to how ACUS could be given more authority/leverage to achieve implementation of its recommendations?

8) Should ACUS be given any administrative responsibilities (e.g., vis à vis ADR implementation, Government in the Sunshine Act, Unified Agenda of Federal Regulations, Equal Access to Justice Act)?

QUESTIONS FROM THE HONORABLE MEL WATT
FOR MR. C. BOYDEN GRAY

1) What level of funding would be necessary to fund the ACUS you envision being reauthorized?

2) Are there any legislative changes that would prevent the types of criticisms and/or concerns that led to the demise of ACUS in 1995?

-----Original Message-----
From:
Sent: Tuesday, August 17, 2004 4:07 PM
To:
Subject: Replies from C. Boyden Gray
Importance: High

Re: C. Boyden Gray's testimony before the Subcommittee on Commercial and Administrative Law at the ACUS oversight hearing on June 24, 2004, here are Mr. Gray's replies to the questions posed by Chairman Cannon:

1) Issues relating to Peer Review and Data Quality (and these two issues are themselves related) are the two domestic issues that most quickly come to mind. The Ad Law and Administrative Practice Section of the ABA made useful comments to OMB on some of these questions and can continue to do so in the future, but ACUS would have the staff and time to work through the potential problems more intensively. On the international front, as I testified, attention need to be paid to the diverging procedures employed by the EU and US to address the same problem -- bearing in mind that at some point, procedural rules will determine the substantive outcome. As I testified, the Ad Law Section is conducting a thorough comparison of EU and US administrative law, but ACUS would have been (and possibly could still be) the better forum, if for no other reason that it would presumably be federally funded and thus not subject to criticism because of the source of its private funding.

2) I wouldn't recommend any major changes, because it worked before and worked well.

3) It would be very important to preserve the non-political and non-partisan nature of ACUS. In large part because of ACUS (with some credit to the Ad Law Section of the ABA), administrative law has not been politicized even as some of the substantive laws themselves have been so tarnished -- i.e., the Clean Air Act, the Food, Drug and Cosmetic Act, the Medicare statutes, to name a few.

4) ACUS should be independent but not privatized because of inevitable questions about the influence of the private money that would have to be raised to support it. The Ad Law Section is, in any event, a private entity.

5) Peer Review and Data Quality issues, along with an evaluation of OMB's so-called "prompt letter" process, whereby OMB suggests implementing rather than eliminating regulations. The EU-US Ad Law comparison project is worthy of notice as well, as

indicated above.

6) The membership process worked before to provide a membership that was never criticized, to my knowledge, for being unrepresentative.

7) I do not see how it could be given more authority than it had (which was considerable, even if more "moral" than legal) and still remain independent -- because it would raise questions of Presidential Authority and be opposed by the White House.

8) For the reasons given in the answer to #7, I would not give it any substantive responsibilities.

Re: Questions from The Honorable Mel Watt to Mr. Gray:

1) I would double what it had before.

2) The reasons for ACUS' earlier demise related to problems which should be dealt with separately from ACUS, if in fact they require any legislation at all.

RESPONSE TO POST-HEARING QUESTIONS FROM GARY J. EDLES

AMERICAN UNIVERSITY
WASHINGTON, DC

PROGRAM ON LAW AND GOVERNMENT

July 27, 2004

Hon. Chris Cannon, Chairman
Subcommittee on Commercial and Administrative Law
House Committee on the Judiciary
B-353 Rayburn House Office Building
WASHINGTON, DC 20515-6221

Attention: Susan Jensen, Esq.
Counsel

Dear Mr. Chairman:

Let me, again, express my appreciation for the opportunity to testify in support of the re-establishment of the Administrative Conference of the United States. I genuinely believe that, on an objective cost-benefit balance, ACUS represents good value for taxpayer money. I enclosed an edited copy of the transcript of my testimony and am pleased to respond as best I can to the written questions that you and Ranking Member Watt have put forth.

Questions from Chairman Cannon

1. Given the fact that the recommendations of the Administrative Conference of the United States (ACUS or Conference) were only advisory in nature, how were the agencies encouraged to adopt them?

Some agencies recognized that they had a problem but were unable to fashion an appropriate solution. That was often the case because potential solutions were opposed by various interest groups. However, when ACUS was able to craft a consensus solution, the agencies could point to that as support for adopting a needed change. In other instances, the ACUS Chairman actively lobbied the agency to implement a recommendation, often meeting personally with agency political appointees or senior career staff. Knowledge that ACUS recommendations represented a consensus position of government and private sector members, including, importantly, members from the White House and the Office of Management and Budget, also created peer

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pressure. Oversight committees in Congress were also told of the ACUS recommendation and agencies at times found it preferable to implement a recommendation than explain to Congress why it had declined to do so.

2. What were some of the Conference's most significant accomplishments?

Over the years, ACUS affected major alterations in the federal administrative process. It recognized the need to develop fundamental changes in the processes of the entire government as well as promote improvements in the procedures of individual agencies.

During its early days as a permanent agency, ACUS adopted three of its most influential government-wide recommendations. Recommendations 68-7, 69-1, and 70-1 urged elimination of a variety of technical impediments to judicial review of agency action. The first recommendation proposed a modification to the judicial review requirements to eliminate the $10,000 jurisdictional threshold where the injury resulted from adverse action by a federal department or agency. A dollar threshold had long been a statutory jurisdictional requirement before federal courts could entertain cases arising under the Constitution or certain federal statutes. The requirement was plainly anomalous in cases where a genuine deprivation was alleged but the aggrieved party could not put a monetary value on the adverse effect of governmental action, or where the monetary value was small. The second proposal urged abolition of the doctrine of sovereign immunity that deprived the federal courts of jurisdiction to entertain citizen suits in the absence of an express abrogation of the doctrine by Congress. The doctrine had already been abandoned for actions to recover in tort or contract from the United States. ACUS argued that the doctrine should not block the right of citizens to challenge in court the acts of government administrators. Finally, the third recommendation proposed that plaintiffs' claims not be dismissed merely because a particular agency official had been improperly identified or could not be joined as a defendant. ACUS campaigned for the reforms against the opposition of the Department of Justice. The Department of Justice reversed its position, however, when former ACUS Chairman Antonin Scalia became Assistant Attorney General in charge of the Office of Legal Counsel. Congress implemented all three proposals in 1976 when it passed Public Law 94-574.

ACUS adopted its first major rulemaking recommendation in 1969. It proposed the elimination of certain exemptions from the APA's rulemaking requirements for rules involving grants, benefits, loans and contracts. Although Congress never statutorily eliminated the exemptions from the APA, the recommendation was highly influential because most major rulemaking agencies agreed to follow it and have voluntarily adopted policies declining to employ the APA exemption. In addition, Congress in many subsequent statutes expressly required the use of notice-and-comment rulemaking for grant, benefit, loan and contract programs.

In 1988 ACUS adopted Recommendation 88-9, entitled *Presidential Review of Agency Rulemaking*. This highly influential recommendation validated the practice of presidential review of agency regulations begun in the Reagan Administration, suggested guidelines for the enhanced openness of that review, recommended the reconsideration of existing rules looking toward the repeal of unnecessary regulations, and proposed inclusion of independent agencies within the presidential review mechanism. The Clinton Administration, in Executive Order No. 12866 (1993), adopted the openness proposals suggested by ACUS, required each executive department and agency to undertake an examination of its existing regulations to determine if they are unjustified or unnecessary as a result of changed circumstances as proposed by ACUS, and partially brought the independent agencies within the presidential review mechanism. The current Bush Administration has carried over the Clinton Executive Order in substantial measure.

In the mid-1970s, ACUS undertook its most exhaustive study of the procedures of a single agency -- a review of the practices and procedures of the Internal Revenue Service (IRS). ACUS produced seventy-two separate proposals in six principal areas of IRS activity, including the confidentiality of taxpayer information, the IRS' settlement procedures, the handling of citizen complaints, methods to ensure fair and consistent treatment in selecting returns for audit, and the availability of information to the public. The IRS adopted fifty-eight of the recommendations entirely, endorsed another five partially, and disagreed with only nine. In commenting on the ACUS study, IRS Commissioner Donald Alexander observed:

> The fact that we endorse the vast majority of the proposals is, I believe, a good measure of the collaborative nature of the effort. Further, the fact that the Service has already put a number of the proposed changes into effect, or is about to do so, reflects the very practical orientation of the Administrative Conference study. . .. It is clear to me that the Administrative Conference Report on the Internal Revenue Service will have substantial, long-term beneficial effects upon the IRS. Even in those relatively few instances where the Service disagrees with the Conference's recommendation, the public will still be served as a result of the sound research and thoughtful presentation of issues reflected throughout the Report. Letter of Commissioner Donald C. Alexander, Internal Revenue Service, to the Administrative Conference, June 15, 1975, Administrative Conference Implementation Binder 75-7 (on file, Washington College of Law, American University).

In 1982, then-Chairman Smith created the Council of Independent Regulatory Agencies, consisting of the chairmen of fourteen major multi-member, independent regulatory agencies, to provide the first-of-its-kind forum for the exchange of ideas on issues of mutual concern. President Reagan hosted the Council's first meeting at the White House. In 1987, then-Chairman Breger inaugurated a popular series of annual seminars on the administrative process for members of congressional staffs that continued until ACUS' abolition.

In the early 1990s, Congress asked ACUS to study the Federal Aviation Administration's civil money penalty demonstration program. It did so and resolved some previously intractable jurisdictional differences between the FAA and the National Transportation Safety Board. In 1992, Congress passed, and the President signed, Public Law 102-345, the Federal Aviation Administration civil penalty legislation, that expressly adopted the ACUS recommendations and made permanent the transfer of authority over adjudication of civil penalty cases affecting pilots and flight engineers from the FAA to the National Transportation Safety Board.

A commitment to both the efficiency and fairness of the administrative process led ACUS, in the decade starting in the early 1980s and running through its abolition in 1995, to assign a high priority to formulating recommendations to stem the growing tide of expensive administrative litigation. It encouraged agency use of less costly consensual alternatives to conventional courtroom-style procedures ordinarily involving the use of a neutral third party mediator, known as alternative dispute resolution, or "ADR." ACUS undertook seminal research into the litigation crisis within the federal government, producing more than a dozen separate recommendations. Its first ADR recommendation, for example, urged increased use of mediation under federal grant programs. See *Recommendation 82-2, Resolving Disputes Under Federal Grant Programs, 47 Fed. Reg. 30,701 (1982).* ACUS' principal recommendation was issued in 1986. *See Recommendation 86-3, Agencies' Use of Alternative Means of Dispute Resolution) 51 Fed. Reg. 25,641* (1986). ACUS then worked closely with the American Bar Association (ABA) in an effort that led to enactment of the Administrative Dispute Resolution Act in 1990 that established a statutory framework for the use of ADR.

The Administrative Dispute Resolution Act, Public Law 101-552, and the Negotiated Rulemaking Act, Public Law 101-648, were enacted in 1990, with strong support and assistance from the Conference. Both statutes included major oversight and coordination roles for the Conference. Neither statute mandates the use of ADR or Negotiated Rulemaking in any particular case or category of cases. But the ADR Act does obligate each department and agency to adopt a policy for using ADR, and requires each department and agency to designate a senior official to be the dispute resolution specialist to oversee the implementation of ADR activities. In furtherance of its government-wide coordinating responsibility, ACUS assisted agencies in implementing their ADR policies, and provided support for interagency working groups to help ensure uniform compliance with the statute throughout government and address problems that were beyond the capability of a single department or agency. In the years before its abolition, ADR activities occupied about half of ACUS' staff time. However, it was worth it. As noted in response to question 7, ACUS' commitment to ADR has brought about a thorough integration of ADR into agency programs government-wide and continues to result in significant cost savings to both the government and the private sector.

3. How was the Conference able to attract such high caliber members, staff, and fellows?

Because it was a genuinely independent, bipartisan, non-ideological agency, and not wedded to the agenda of any Administration, ACUS was held in very high regard by members of both parties in Congress, officials of the executive departments and agencies, and in the private sector, especially among members of the private bar and the academic community. It could attract senior level government officials and federal judges (judges would have been precluded from an association with an agency tied to an incumbent Administration). In my judgment, the ability to participate in an interaction among senior government officials, judges, leading academics, and other notable members from the private sector, encouraged individuals to serve as ACUS members. Most found it rewarding to be engaged in genuinely nonpartisan "public interest" activity.

ACUS staff members were given a considerable degree of freedom to suggest projects and work on assignments in which they had a keen interest. As a small agency, there was very little bureaucratic interference with individual initiative that one might find in larger institutions. Staff members also had an opportunity to work personally with senior government officials, judges, distinguished members of the private Bar, and well-known academics. These factors encouraged career civil servants to join ACUS' staff and remain for long periods.

ACUS was also able to attract a mixture of distinguished administrative law experts and up-and-coming academics as consultants. Because they worked for a prestigious and independent agency, scholars were not concerned that their research would be perceived as being influenced by any sponsoring agency. Moreover, researchers knew that, working under the auspices of the Administrative Conference, they would receive unprecedented access to government documents and officials. An ACUS committee composed of knowledgeable academic authorities, private lawyers, judges and government officials would also subject their work to an interactive peer review process. Furthermore, ACUS not only allowed consultants to publish their final products in academic journals, but encouraged them to do so. So their research work furthered their careers. Finally, ACUS' research consultants knew that formal ACUS recommendations, based on their work would be pursued by the permanent staff, and that these recommendations stood a reasonable chance of adoption by the President, Congress, or the affected departments or agencies. The ACUS staff has estimated that, over the agency's twenty-eight year history, over two-thirds of its recommendations were adopted, at least in part. In short, ACUS members, staff and consultants knew that ACUS studies and recommendations did not merely collect dust on the shelf but that recommendations were highly likely to be adopted.

4. What were the principal reasons why ACUS was defunded?

The House Appropriations Committee provided simply a one-sentence explanation that ACUS had "fully accomplished its mission." See, for example, H. Rep. No. 103-127 (1993) at p. 76. Obviously, the issue was a bit more complicated than that. I agree with Professor Payton that the most thoroughgoing analysis of the reasons for ACUS' abolition is contained in Professor Toni Fine's 1998 article, *A Legislative Analysis of the Demise of the Administrative Conference of the United States*, 30 Ariz. St. L. J. 19 (1998). Professor Fine had no association with ACUS and her article is considered to be the most authoritative and impartial scholarly source of information on ACUS' rise and fall. She points out, correctly in my judgment, that a

confluence of events led to ACUS' abolition. But a key trigger was a behind-the-scenes effort by a small group of the government's administrative law judges following what they believed was an unfavorable ACUS report and set of recommendations that proposed changes in the method of selection and supervision of ALJs. This effort tapped into a prevailing mood in Congress following the election of 1994, consistent with the "Contract with America," looking toward the elimination of government agencies and programs. In my view, ACUS was simply swept up in the tide. Professor Fine observes:

> While no singular answer appears, it can safely be said that the lack of a political constituency to support the Conference, coupled with the strenuous and vocal disapproval of ACUS by a small, yet spirited, group of administrative law judges, was the impetus for the defunding of the Administrative Conference. Under pressure from this group, and with no public constituency to posit any opposition, Congress was presented with an opportune occasion to eliminate an agency. In doing so, Congress was able to prove to the American public that agencies were not necessarily perpetual. Nevertheless, ACUS by all accounts was doing its job exceedingly well at a budget so modest it defies any reasonable likelihood that the agency's significant contributions did not amply justify its existence. . . . Fine Article at p. 23 (footnotes omitted).
>
> Although the ALJs' opposition to ACUS was not at all unanimous, complaints by some ALJs that the agency ought to be eliminated apparently caught the ear of leaders on the House Appropriations Subcommittee responsible for funding ACUS - it was just after the ALJ debacle that the House voted to eliminate the Conference. . . . Fine Article at p. 96 (footnotes omitted).
>
> It thus appears that certain disenchanted administrative law judges set in motion a critical evaluation of ACUS by Congress. While this appraisal could hardly be seen as establishing any justification by which to defund the agency, the evaluation prompted by the administrative law judges did present Congress with a politically expedient opportunity to move toward its budget reduction goals (albeit ever so slightly) and, above all, to appeal to the public by having eliminated a federal agency. Fine Article at pp. 23-24 (footnotes omitted).

5. Are any of the forces that led to the defunding of ACUS back in 1995 present today?

Some administrative law judges may oppose ACUS' reauthorization. But they have other concerns that probably reflect their higher priorities, *e.g.*, the effort to retain pay parity with the Senior Executive Service that they have lost over the past 9 years, and the initiative, endorsed in 2000 by the American Bar Association, to turn every future administrative hearing into a formal APA hearing at which only ALJs could preside. I cannot predict whether, individually, or through any of their associations, ALJs would now devote significant energy or political capital to preventing ACUS' re-emergence. However, in light of the substantial independent recognition of ACUS' value in improving the administrative process, it is unlikely that members of House or Senate committees are going to be swayed simply by objections from ALJs stemming from a specific ACUS recommendation.

6. If you were testifying today before the appropriations subcommittee with jurisdiction over entities such as ACUS, what would be your most compelling arguments about why – in this fiscally sensitive environment – our taxpayers' dollars should be expended to fund a reauthorized ACUS?

First, ACUS represents a minimum outlay of taxpayer funds. Yet it leveraged this small expenditure by attracting as members individuals from the private sector who, if paid, would command substantial fees. It could also attract consultants prepared to work for well below "market rates." Second, ACUS saved the government and the private sector far more than its annual budget. Finally, if reauthorized, ACUS can be a vital ally in Congress' effort to "get the government off the back" of its citizens while protecting citizen rights. Betty Jo Christian, the distinguished Washington lawyer and Supreme Court litigator, summarized this fundamental argument in a 1998 law journal article. She wrote:

> [T]he decision not to provide funding for ACUS . . . was essentially a byproduct of a broad effort to reduce government expenditures, to eliminate unnecessary government programs, to reduce regulation, and to make government more efficient. It was in pursuit of these goals that Congress decided not to appropriate the approximately $1.5 million required for ACUS' continued existence . . . . Rather than abolish ACUS, those members of Congress seriously interested in reducing the burden of regulation and eliminating unnecessary agency functions should have embraced ACUS as their best – and most cost-effective – ally in achieving that goal. Indeed, had ACUS continued to function, I think it is fair to say that it could have rendered an enormous service to the cause of streamlined, down-sized government . . . . [O]ne of the last recommendations issued by ACUS, shortly before its demise, concerned the need for a review of existing agency regulations. That recommendation urged that all agencies develop processes for systematic review of existing regulations to determine whether to retain, modify or revoke those regulations. ACUS proposed

> standards for setting priorities in the review process, including whether the regulatory function could be accomplished by the private sector or another level of government more effectively and at a lower cost . . . . This is precisely the sort of guidance needed to eliminate outmoded regulatory activities and to lift unnecessary burdens from the public. Betty Jo Christian, *Penny-Wise and Pound-Foolish: The Demise of the Administrative Conference*, 30 Ariz. St. L.J. 11-12 (1998) (footnotes omitted)

7. Is there any way to estimate the savings in taxpayer dollars that resulted from the Conference's recommendations?

Regrettably, ACUS did not keep detailed or agency-by-agency records of the amount of money saved by the federal government or the private sector as a result of its efforts. Most data are anecdotal. Some tangible savings can nonetheless be estimated and others have been documented.

Among the recommendations adopted in 1980 was Recommendation 80-5, *Eliminating or Simplifying the "Race to the Courthouse" in Appeals from Agency Action*. An eight-year implementation campaign led to enactment of Public Law 100-236 in 1988, implementing the recommendation. Hundreds of thousands of dollars in needless litigation costs have been saved by both the government and private parties through implementation of this recommendation.

ACUS' most notable cost-saving contribution was in the area of encouraging what is popularly known as "alternative means of dispute resolution," or ADR. This initiative, begun in the 1980s in response to the growing litigation crisis, produced 15 separate recommendations between 1982 and 1990. Toward the end of its lifespan, ACUS was devoting about half its time to the practical implementation of these recommendations. I attach a list of cost savings and benefits associated with ACUS' ADR efforts. It was compiled in a February 1995 ACUS Report entitled *Toward Improved Agency Dispute Resolution: Implementing the ADR Act*. Moreover, former Acting Chair Sally Katzen's April 21, 1994 testimony before this subcommittee quoted from the President of the American Arbitration Association, who pointed to "the importance of the Administrative Conference of the United States in our national effort to encourage the use of alternative dispute resolution by Federal government agencies, thereby saving millions of dollars that would otherwise be frittered away in litigation costs."

A disarmingly simple ADR recommendation in 1988 urged agencies to use so-called "settlement judges." Recommendation 88-5, *Agency Use of Settlement Judges*. Such judges, who are members of an agency's corps of administrative law judges, work with parties to explore possibilities for consensual resolution in cases over which the settlement judge is not presiding. Two agencies – the Federal Energy Regulatory Commission and the Occupational Safety and Health Review Commission – had used settlement judges but their use elsewhere in government was virtually non-existent. ACUS' contribution was to study the FERC and OSHRC experience, develop a design and set of criteria that could be replicated at other agencies, and promote the new initiative across government. In 1995, for example, the National Labor Relations Board adopted the technique. According to former NLRB Chairman William Gould, in the first two

years employing the new technique, the Board increased its settlement rate by about 25 percent, thus eliminating the need for full-blown administrative hearings in many cases. Chairman Gould estimates that each litigated case cost the government about $35,000 and private parties spent at least as much. According to Gould's calculation, taxpayer savings over the initial period were in excess of about $2.3 million. Private litigants probably saved as much, if not more. See William B. Gould IV, *Labored Relations, Law, Politics, and the NLRB – A Memoir* (The MIT Press 2000), pp. 80-81. And such savings, of course, now continue indefinitely into the future at numerous agencies across government.

8. I note that you spend part of the academic year overseas teaching administrative law. Do other countries have counterparts to ACUS?

The principal common law countries with significant administrative systems have some form of advisory body akin to ACUS. Britain has the Council of Tribunals that continuously monitors the work of that country's approximately 70 administrative tribunals and makes recommendations for procedural improvement. Like ACUS, the Council on Tribunals has a salaried chairman and other part-time members. Much like ACUS, its detailed work is its greatest strength. The Council's Chairman has observed: "The functions of the Council were envisaged as ranging from general reflection to a focus on detail . . .. It is at the level of specific recommendation that our most valuable contributions are likely to be made." See the Franks Committee Report, *quoted in* Preface of Lord Archer of Sandwell, Council on Tribunals, Annual Report 1992/93, at vii. The Australian Administrative Review Council has responsibility for giving advice on the workings of the administrative review system in that country. Canada has a Law Commission. It employs the same general methodology as ACUS – systematic review and oversight of Canadian legal matters and the submission of recommendations for improvement to Parliament and the agencies and departments of government. The Commission is smaller than ACUS but its jurisdiction is broader, extending to "the statutes and other laws comprising the laws of Canada." So it advises the Canadian Parliament on how to improve and modernize all of Canadian law, not simply administrative law. As occurred in the U.S., a new Canadian government in the 1990s introduced a budget plan designed to reduce both the federal budget and the deficit. It proposed abolition, privatization or consolidation of 46 separate agencies or programs, and the Law Commission of Canada was one of the agencies abolished. However, the government quickly recognized that abolishing the Commission had been a mistake and the Canadian Parliament re-established the Commission, in a somewhat modified form, only 4 years later. Finally, in a civil law jurisdiction, the Section of Reports and Studies of the French Counseil d'Etat operates as the prestigious "think tank" of the Counseil, with responsibility for anticipating problems of the administrative system and proposing solutions.

Questions from Ranking Member Watt

1. What level of funding would be necessary to fund the ACUS you envision being reauthorized?

ACUS' actual appropriation reached $2.3 million in fiscal year 1992. During the reauthorization cycle immediately preceding ACUS' abolition, the Office of Management and Budget authorized ACUS to request a ceiling amount on appropriations that would have reached $2.928 million in FY 1998. My testimony indicated that, in my judgment, an authorization of $2-3 million would likely be sufficient to get ACUS up and running. Traditionally, ACUS had a 4-year authorization of appropriations. Given the large backlog of items that have accumulated over the past decade since ACUS' abolition, I think an initial authorization of appropriations should reflect the $3 million figure. But I remain convinced that ACUS can fulfill its mission on a limited budget. In the circumstances, I believe that ACUS can begin operations successfully at $3 million in its first year, and that its authorization should grow modestly each year to accommodate inflationary or unanticipated cost increases, to $3.2 million in the second year, $3.4 million in the third year, and $3.6 million in the fourth year.

2. Are there any legislative changes that would prevent the types of criticisms and/or concerns that led to the demise of ACUS in 1995?

I doubt that there are statutory changes that would absolutely eliminate the factors that led to ACUS' abolition because they were part of a broader effort in the mid 1990s to reduce the overall size of government. Nonetheless, as long as the balance between government and private interests is retained, all cabinet departments are included, and there is a fair representation of independent agencies and sub-cabinet agencies, I believe that a smaller ACUS, with fewer than 101 members could accomplish ACUS' statutory mission. Before 1986, ACUS had a statutory ceiling of 91 members.

One Further Matter: The Emoluments Clause Issue

In my prepared statement to the subcommittee, I recommended that Congress remove any ambiguity occasioned by the Office of Legal Counsel's restrictive construction of the Emoluments Clause that would constrain a revitalized ACUS' ability to obtain the most highly qualified members from the private sector. In my view, ACUS' non-government members should be treated like those at the approximately 1000 advisory committees throughout the government, including 20 such committees at the Department of State that, like ACUS, have distinguished law professors and members of the nation's largest law firms among its members.

I noted that ACUS' non-government members perform functions akin to those at other advisory committees and that, when ACUS was established by statute in 1964, Congress did not intend to change the advisory function of ACUS' non-government members from that performed by members of the two earlier, temporary, non-statutory conferences. ACUS' statutory footing, in other words, did not alter the traditional understanding by Congress that ACUS' members from the private sector undertake their functions as citizen-advisors and not as government officials.

In now reviewing former Acting Chair Katzen's 1994 testimony before this subcommittee regarding ACUS' reauthorization, I have discovered that she made the same point. She urged Congress to add a sentence to section 593(b)(6) of ACUS' enabling statute that would read: "The members shall participate in the activities of the Administrative Conference solely as private individuals without official responsibility on behalf of the Government of the United States and, therefore, shall not be considered to hold an office of profit or trust for purposes of Article 1, Section 9, Clause 8 of the U.S. Constitution." Frankly, I think her suggested change in section 593 is better than mine. Significantly, the initial phrase is identical to that contained in President Kennedy's Executive Order establishing the Temporary Administrative Conference in 1961. Please see Section 3 of Executive Order 10934, issued by President Kennedy on April 13, 1961, which I include. The language is also similar to that included in early versions of legislation to establish the permanent Administrative Conference. The language noted by Ms. Katzen was ultimately removed by the House Judiciary Committee, but the committee explained:

> The Committee was concerned lest this requirement be thought to prohibit agency personnel or, for that matter, non-Government personnel from recognizing problems encountered by their own agency or outside organizations. While the committee expects conference members to exercise intellectual independence, it believes it best to omit from the bill any instruction on this point.

However, as explained in a contemporaneous analysis, by removing this provision the House implicitly recognized that the members would naturally tend to represent the preconceptions and practices of their own backgrounds. In the circumstances, I recommend that Congress add to section 593 the sentence from Section 3 of E.O. 10934 of 1961 that reads as follows:

> Members of the Conference who are not in Government service shall participate in the activities of the Conference solely as private individuals without official responsibility on behalf of the Government of the United States.

This language would set forth the traditional and contemporaneous understanding regarding the role that ACUS' members from the private sector have always played and will continue to play. To reinforce this role, I continue to believe that Congress might usefully delete the second sentence of section 595 that confers on the Assembly "ultimate authority over all activities of the Conference." Ms. Katzen's testimony, which develops her ideas in greater detail, is reprinted as *Testimony Before the House Committee on the Judiciary Subcommittee on Administrative Law and Government Relations in Support of Reauthorization of the Administrative Conference of the United States*, 8 Admin. L.J. Am. U. 649, 669-672 (1994).

If I can be of further assistance to the subcommittee, please do not hesitate to call upon me. Because I return to England on August 17, I can best be reached through my U.S. voice mail at (202) 274-4186, which I access twice a week, or my e-mail at G.J.Edles@hull.ac.uk, which I access every other day or so.

Sincerely,

Professor Gary J. Edles

ADR Savings*

Cost Savings and Benefits of ADR

To date, there has been no comprehensive study of cost savings and benefits associated with ADR use in the federal sector. Evaluations of several pilot programs and anecdotal evidence, however, indicate that use of ADR in the federal sector has produced significant savings. Here are some examples (all from agencies' reports to ACUS unless otherwise noted).

Federal Deposit Insurance Corporation: Use of ADR rather than litigation in liquidation and litigation matters produced estimated cost savings in legal fees and expenses of $325,000, $4,200,000, and $9,300,000 in 1991, 1992, and 1993, respectively. The FDIC's ADR creditor claims pilot project resulted in cost savings of $410,475.

Resolution Trust Corporation: Use of ADR from 1991 through 1994 led to estimated agency savings of $115,497,232 in legal costs. (Annual Comparison of ADR in the RTC, February 15, 1995 fax to ACUS).

Department of Labor: A regional mediation pilot program for enforcement cases produced savings of 7-19% and case-processing time savings of 18-64% (depending on the statistical method chosen). (US DOL, *A Cost Analysis of the Department of Labor's Philadelphia ADR Pilot Project*, August 1993, at 15).

U.S. Air Force: Using mediation in over 100 EEO complaints, the Air Force saves an estimated 50% of its average $80,000 processing cost per complaint, resulting in an estimated $4 million savings.

Defense Mapping Agency: An ADR program to reduce the backlog of performance rating appeals saved an estimated 4200 personnel hours and over $135,000 in 33 appeals.

U.S. Air Force: Through partnering among the Army Corps of Engineers, prime contractors and subcontractors, the Air Force completed a $226 million Large Rocket Test Facility $12 million under budget and 114 days ahead of schedule (McDade, *An Overview of Selected Public and Private-Sector Alternative Dispute Resolution Initiates* (US Air Force, January 1995 Draft), at 12-13).

U.S. Information Agency: USIA used ADR to settle the largest contract claim in its history -- saving over $1 million in interest charges alone.

U.S. Mint: Using ADR on 220 cases in the EEO and grievance areas saved an estimated $3 million.

Federal Election Commission: During seven months of 1994, the FEC realized a possible savings of $640,000 by using ADR in EEO disputes.

U.S. Army Corps of Engineers: Using partnering, the Corps lowered the number of contract appeals in which it is involved from 779 in 1987 to 307 active appeals at the end of FY 1994 (January 17, 1995 FAX to ACUS from U.S. Army Corps of Engineers, at 3).

These initial results from federal programs are consistent with private sector studies. Some illustrations:

The **CPR Institute for Dispute Resolution** resolved business disputes involving 440 companies and $6.7 billion in controversy using ADR between 1990-1993, resulting in estimated legal cost savings in excess of $187 million, or an average of $425,000 per company (Cronin-Harris, *ADR Cost Savings & Benefits Studies,* (CPR, 1995), at 26). A 1994 survey of corporate law departments by **Price Waterhouse** produced similar findings: Forty-five percent of participants reported cost savings of over $100,000 through use of ADR, and 10% of those saved over $1 million. (*ADR Cost Savings* at 31).

Deloitte & Touche surveyed law firm attorneys and corporate general counsels about their experience with ADR. Sixty-seven percent of those who had used ADR and 78% of extensive users said it saved money, typically 11-50% of the cost of litigation (*Deloitte & Touche Litigation Services 1993 Survey of General and Outside Counsels* at 14).

Participants in an empirical study of 13 environmental enforcement mediations conducted by the **Florida Department of Environmental Regulation** from 1990 to 1992 reported average direct savings per case of $325,000 compared to litigation (*ADR Cost Savings* at 56).

* From *Toward Improved Agency Dispute Resolution: Implementing the ADR Act* (ACUS 2/95) at p. 37.

Executive Order 10934

ESTABLISHING THE ADMINISTRATIVE CONFERENCE OF THE U N I T E D STATES

WHEREAS the performance of regulatory functions and related responsibilities for the determination of private rights, privileges, and obligations by executive departments and administrative agencies of the United States Govemment substantially affects large numbers of private individuals and many areas of economic and business activity and

WHEREAS it is essential to the protection of private and public interests and to the sustained development of the national economy that Federal administrative procedures ensure maximum efflciency and fairness in the performance of these governmental functions; and

WHEREAS the steady expansion of the Federal administrative process during the past several years has been attended by increasing concern over the efflciency and adequacy of department and agency procedures, and

WHEREAS the experience of the several groups which have examined Federal administrative procedures in recent years demonstrates that substantial progress in improving department and agency procedures can result from cooperative effort by the departments and agencies, working together with members of the practicing bar, and other interested persons:

SECTION 1. *Establishment of the Conference.* There is hereby established a conference to be known as the Administrative Conference of the United States which shall consist of a Council of eleven members named by the President, one of whom he shall designate to be Chairman of the Conference, and a general membership from Federal executive departments and administrative agencies the practicing bar, and other persons specially informed by knowledge and experience with respect to Federal administrative procedures.

SEC. 2. *Purpose.* The purpose of the Conference shall be to assist the President, the Congress and the administrative agencies and executive departments in improving existing administrative procedures. To this end the Conference shall conduct studies of the efflciency, adequacy and fairness of procedures by which Federal executive departments and administrative agencies protect the public interest and determine the rights, privileges and obligations of

private persons. The Conference shall from time to time report to the President any conclusions reached by its members based on such studies, together with suggestions for appropriate measures to improve the administrative process The Conference shall make a Final Report to the President no later than December 31, 1962, summarizing its activities, evaluating the need for further studies of administrative procedures, and suggesting appropriate means to be employed for this purpose in the future.

SEC. 3. *Membership.* The composition of the general membership of the Conference shall be determined by the Council, provided that the total membership shall be not less than fifty persons, and at least a majority of the total membership shall be from Federal executive departments and administrative agencies, so distributed as to effect an appropriate representation among the several departments and agencies. General members from Government service shall be designated by the heads of their respective departments and agencies. Other general members shall be named by the Chairman with the approval of the Council from the practicing bar, scholars in the fields of administrative law and government, and other persons specially informed by knowledge and experience with respect to Federal administrative procedures. Members of the Conference who are not in Government service shall participate in the activities of the Conference solely as private individuals without official responsibility on behalf of the Government of the United States.

SEC. 4. *Staff.* The Attorney General of the United States is hereby authorized and directed to furnish to the Conference research and staff assistance from the Office of Administrative Procedure in the Department of Justice, through the Director of that Office and the Chairman of the Conference, and the Director of the Office of Administrative Procedure shall act as Executive Secretary of the Conference.

SEC. 5. *Operation of the Conference.* The Conference shall have authority to adopt bylaws and regulations not inconsistent with the provisions of this order for the conduct of its functions. Every member of the Conference will be expected to participate in all respects according to his own views, and not necessarily as a representative of any department or agency or other group from which he may have been chosen.

SEC. 6. *Committees.* Committees of the Conference shall be appointed by the Chairman, with the approval of the Council. Committees shall have authority to designate subcommittees from their own membership for the purposes of

conducting studies and making reports to the full committees.

SEC. 7. *Functions of the Council.* The Council is hereby authorized to perform the following functions:

(a) To meet under the chairmanship and upon the call of the Chairman of the Conference.

(b) To determine the composition of the general membership of the Conference as provided in section 3 above.

(c) To make appropriate arrangements with the President of the Senate and the Speaker of the House of Representatives for participation in the activities of the Conference by interested committees of the Congress. Representatives of the Congress shall have the privilege of the floor of the Conference.

(d) To determine the time and place of plenary sessions of the Conference.

(e) To propose bylaws and regulations, including rules of procedure and committee organization, for adoption by the Conference.

(f) To propose to the Conference the matters concerning which the Conference and its committees shall conduct investigations and studies.

(g) To receive and consider reports of committees of the Conference and proposals adopted by the Conference, and to transmit them to the President together with the views of the Council concerning such matters.

SEC. 8. *Cooperation of Federal agencies.* All executive departments and administrative agencies of the Federal Government are authorized and directed to cooperate with the Conference and to furnish such information and assistance not inconsistent with law as may reasonably be required in the performance of its functions.

SEC. 9. *Expenditures of the Conference.* Each executive department and administrative agency which is represented by one or more members of the Conference named or designated as provided in section 3 of this order shall, as may be necessary for the purpose of effectuating the provisions of this order, furnish assistance to the Conference in accordance with section 214 of the act of May 3, 1945, 59 Stat. 134 (31 U.S.C. 691). Such assistance may include detailing employees to the Conference to perform such functions consistent with the

purposes of this order as the Conference may assign to them.

JOHN F. KENNEDY

THE WHITE HOUSE,
April 13, 1961.

RESPONSE TO POST-HEARING QUESTIONS FROM SALLYANNE PAYTON

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Sallyanne Payton
William W. Cook
Professor of Law

30 July 2004

The Hon. Chris Cannon
Chairman
Subcommittee on Commercial and Administrative Law
Committee on the Judiciary
House of Representatives
Congress of the United States
2138 Rayburn House Office Building
Washington, D.C. 20515-6216

Dear Chairman Cannon:

This is in response to your letter of July 12, 2004, transmitting questions submitted by members of the Subcommittee regarding the ACUS reauthorization. Thank you for giving me the opportunity to respond. These views expressed in this letter are my own; they do not necessarily reflect the views of the Standing Panel on Executive Management and Organization of the National Academy of Public Administration or of Sally Katzen. The questions and the responses are set forth below.

Questions from the Honorable Chris Cannon

1) You served as a Member of the Administrative Conference of the United States (ACUS or Conference) for many years. What, if anything, would you recommend be done to ensure the Conference's membership is representative?

"Representation" has many dimensions. The one most frequently discussed in the context of ACUS is substantive: the Conference has been careful to create itself as a bipartisan group that includes diverse experiences of and attitudes with respect to the administrative process. A revived ACUS can be expected to continue this tradition, since the legitimacy of the Conference depends on its maintaining this kind of diversity. I want to associate myself with the views of Phil Harter on the importance of bringing a broader range of people into the Conference. He speaks of representatives of neighboring disciplines such as economics. I want particularly to urge attention to the management dimension. I also agree that the Conference ought to include representatives of state and local government and the nonprofit sector. The importance of enlisting this kind of

diversity is one reason why I argue for having the Conference operate through project panels, as discussed below.

I take it that the question invites me to comment on the fact that as of the time when the Conference was disbanded nearly all of its members of the Conference were white and the great majority were men. This was noticeable, but it was largely an age cohort effect. Members of the Conference are on average relatively senior: it is rare for a person to be an agency general counsel or be appointed a public member of ACUS in her youth. The pool of persons eligible to serve in these positions generally therefore will reflect the demographic of the law school classes that graduated at least 10 to 15 years earlier. The public members will be older on average than the agency counsels, since they tend to reflect past administrations. The government members will reflect the combined effects of the age cohort demographic and the hiring practices of the incumbent administration.

Since there were not significant numbers of minorities and women in law schools prior to the mid-1970s, it would have been unrealistic to have expected the emergence of large numbers of minority or women administrative lawyers into relatively senior positions until the late 1980s. At about that time we did experience a growth in the number of minority and women lawyers in the administrative law community, as was observed in both the ABA Administrative Law Section and the AALS (Association of American Law Schools) Section on Administrative Law. Unfortunately, ACUS was abolished during the period when these lawyers would have been moving into senior positions. It is reasonable to speculate that had ACUS continued in existence it would have acquired more minority and women members, although it must be said that minority lawyers are underrepresented in regulatory practice, which is the traditional background for a career in administrative law. None of the senior professional staff of the Conference was minority. The last Chair of the Conference, Thomasina Rogers, a Clinton appointee, was an African American woman.

If the Conference extends its activity to issues of the type outlined by Boyden Gray in his testimony before the Subcommittee, the work of the administrative law community may become more attractive to a wide range of lawyers involved in public policy, including minorities.

2) You testified at the Subcommittee's June 24th hearing on behalf of the Executive Organization and Management Standing Panel of the National Academy of Public Administration. Please explain why this entity supports the Conference's reauthorization.

My written testimony in its entirety reflects the views of the EOM Panel, and is posted on the Academy's website at http://www.napawash.org/resources/testimony/PaytonTestimony--6%2024%2004.pdf. To summarize that document, the EOM Panel supports the reauthorization of ACUS for the following reasons:

- ACUS was the central repository of knowledge about administrative processes, which are part of the essential infrastructure of government and require continuous attention from an expert body.
- ACUS brought high quality to its work by virtue of its distinguished membership and scholarly excellence.
- ACUS paid attention to the ordinary administrative processes of government through which government affects those who must deal with it or depend on it.

- ACUS was disinterested and bipartisan.

One sentence sums up the EOM position:

"The case for restoring ACUS thus seems overwhelming to my colleagues on the EOM Standing Panel, because we have great respect for its unique – and, as we have observed during the years since its demise, irreplaceable – function."

3) Do you have any recommendations as to how ACUS could be given more authority/leverage to achieve implementation of its recommendations?

Generally speaking, the authority of the Conference should be the authority of influence. ACUS should be a resource more than an enforcer, particularly if it aspires to have the agencies as part of its clientele. There may be times when a Congressional committee may commission an ACUS study and involve itself in monitoring implementation.

4) Should ACUS be given any administrative responsibilities (e.g., vis a vis ADR implementation, Government in the Sunshine Act, Unified Agenda of Federal Regulations, Equal Access to Justice Act)?

It would be beneficial for ACUS to be an active, useful agency with routine functions and therefore an ongoing role in the work of the government. Any such administrative functions should emerge out of the work of the Conference itself, as ADR did, and thus command government-wide support and bipartisan esteem. It would be important not to assign to ACUS any function that makes it part of the policy apparatus of the incumbent administration. See my answer to question 7 below, arguing for making ACUS the organizer of communities of practice.

5) Some say that many in Congress failed to recognize the contributions of ACUS and therefore did not strongly oppose its elimination in 1995. Whether for substantive or public relations purposes, would you recommend that Congress play a more active role in a reconstituted ACUS?

Even the most enthusiastic supporters of ACUS agree that its work was not sufficiently visible to the Congress. To some degree this is a structural fact of life: ACUS exists to *save* the Congress from being burdened by the business of ordinary procedural reform, and arguably does that job most perfectly when the doing of it requires no congressional attention. On the other hand, as ACUS was originally intended to be an organization on which the Congress might call for expertise, a closer bond might be forged if the Congress were to use ACUS more intensively. ACUS ought to have the same type of relationship to problems of administrative process that the National Academy of Sciences has to scientific questions, or the National Academy of Public Administration has to problems of executive management and organization – that is, to be a repository of institutional memory and expertise and a source of trusted analysis and advice. The other witnesses before the Subcommittee had long lists of issues in which ACUS needs to become engaged, and I concur in those lists.

I would also urge the Congress to use a reauthorized ACUS as its vehicle for becoming more involved in the process questions that are sprouting everywhere as the government moves from being an administrative hierarchy of full-time employees to being an organization that mainly manages its relationships with other organizations. Less and less of the work of the federal government is performed by the agencies themselves; more and increasingly more is performed by

the government's non-governmental or non-federal partners. Performance and relationships are managed through grants, contracts, intergovernmental agreements, participating provider agreements, loan guarantees, statutorily-mandated federalism arrangements, and other legally enforceable arrangements. Deregulation, devolution and contracting out have created unexamined legal and governance relationships. Regulatory process issues swirl in the legal and policy communities, but the federal government has disabled its institutional capacity for thinking about these matters, that capacity having been located in ACUS. If a reauthorized ACUS were to take on the administrative procedure issues arising out of the transformation of government, its work would not be obscure.

6) What were some of the Conference's most significant accomplishments?

I would associate myself with the list supplied by Gary Edles in his testimony before the Subcommittee, and with the list in Sally Katzen's 1994 testimony on reauthorization. I think that the Conference's championing of ADR, in particular, has had a positive impact.

7) If ACUS were reauthorized, what, if anything, would you recommend be changed about the Conference?

ACUS needs some modest changes in its structure and some important changes in its operations. With respect to the structure, I suggest that:

(1) the government membership be expanded to include, in addition to general counsels, all departmental assistant general counsels and chief counsels at the bureau level; and that

(2) the limit on the number of public members be eliminated from the statute, leaving the number of public members to the judgment of ACUS in consultation with its congressional committees.

With respect to operations, I suggest that:

(1) Consistent with the practice of other distinguished advisory organizations such as the National Academy of Sciences and the National Academy of Public Administration, ACUS should produce its reports and recommendations through project panels rather than requiring them to be adopted by the full Conference in plenary session; and

(2) ACUS should assume responsibility for organizing government-wide communities of practice among agency lawyers with similar responsibilities.

Explanation:

1. *Government members.* In principle, ACUS should function, as was intended, as a community of practice for agency counsels who have responsibility for managing administrative processes. The theory was that problems could be brought to the Conference and be worked on by a community of experienced professionals. In practice, however, there is a mismatch between ACUS membership and the actual distribution of work among agency counsel: while only the department-level general counsel is seated on ACUS as a government member, much of the actual experience and expertise that ACUS needs to have available for the conduct of its work resides at the levels below the general counsel. During my time on ACUS, lawyers at the second level, who frequently have responsibilities at least as extensive as those of department general counsels, were typically involved in the work of the Conference only when their own function was the subject of an ACUS report. They therefore did not participate in and did not benefit from the broad

exposure to administrative law issues that ACUS provides; nor could ACUS call on them freely, having no official relationship with them. ACUS as an institution needs to know what they know. This can be fixed by bringing them in as government members. The effect of such a change on the size of the plenary session is discussed in the section on project panels, below.

2. *Public members.* The presence of Public members in ACUS gives the organization the professional distinction and bipartisanship that accounts for the enthusiasm of those who urge reauthorization. Given the enhanced range of subjects now properly embraced by the term "administrative procedure," it is not clear that the rather low statutory ceiling on the number of public members serves any longer a useful purpose. It seems to have been placed in the original legislation in order to make the government members the heart of the Conference and to ensure the control of the incumbent administration over Conference activities. However, actual experience in operating the Conference has revealed that much of the energy of the Conference comes from the public members, for whom ACUS functions as the administrative lawyers' equivalent of a national academy. In light of the intellectually ambitious work that a reauthorized ACUS would be likely to undertake, it would be well to expand that capacity by either setting the statutory ceiling substantially or eliminating it altogether. Greater numbers of public member positions would also be necessary if the Conference were to add any substantial number of non-lawyer experts, as authorized by statute and urged by the witnesses before the Committee. There is no reason to fear dilution of the quality of the body of public members simply by virtue of an increase in numbers: the national academies all operate with much larger memberships. An increase in numbers would, however, entail a shift from having recommendations processed by the entire plenary session to having them be identified as the work of panels or committees, as suggested in the next section.

3. *Project panels.* ACUS was persistently hampered by its adherence to a rigid format of assigning work to standing committees that commissioned studies and constructed recommendations that were deliberated upon by the entire Conference in plenary session. What was gained by the demonstration of consensus across the extremely diverse membership was arguably outweighed by the cumbersome nature of the process itself, which prevented ACUS from responding flexibly and in a timely manner to problems and opportunities. ACUS should be instructed by the Committee to reconsider its practices of developing recommendations through standing committees and of adopting all of its recommendations in plenary session. Both the National Academy of Sciences and the National Academy of Public Administration have found it effective to assemble focused expertise in project panels as well as its standing panels, and to allow those panels to be the entities that make recommendations. The panel format also allows the organization to involve on particular matters persons who are not members of the organization. This works well for NAS and NAPA, is regarded by those organizations as contributing to the quality of their work, and does not appear to be forbidden by anything in the ACUS statute. Working through panels brings also the advantages of transparency and accountability: the members of panels are known individuals who take personal responsibility for their work and bring their professional authority to it. If there are lapses in bipartisanship and disinterestedness, those will be apparent.

4. *Communities of practice.* In order to fulfill its mission of developing and making available useful knowledge about administrative processes, ACUS should be directed by the Committee to

organize government-wide communities of practice to deal with common substantive and managerial problems of administrative procedure. Using communities of practice is now a standard technique of private sector knowledge management.[1] An example of a community of practice within the federal government is the Regulatory Working Group authorized by President Clinton's Executive Order 12866. Some communities of practice organize themselves in the bar associations, most notably now the ABA Section on Administrative Law and Regulatory Practice, which has stepped into some of the void left by the demise of ACUS. The government needs to take responsibility, however, for the quality of its own operations. Using modern management techniques to improve efficiency is particularly important when the government is reducing its personnel. Some communities of practice may include non-government persons, consistent with ACUS' own status as a public-private body.

8) How important is it to preserve the bi-partisan, non-political nature of ACUS?

It is absolutely critical. The stature of the organization is a function of the professional distinction of the individual members and the bipartisan nature of the whole body.

Questions from the Honorable Mel Watt

1) What level of funding would be necessary to fund the ACUS you envision being reauthorized?

On budget estimates I defer to my colleagues who testified at the hearing before the Subcommittee. I think it important not simply to extrapolate from the previous experience of operating ACUS, because the program projected at the hearing is more ambitious. ACUS needs the stability of an appropriation that will allow it to maintain itself institutionally and engage simultaneously in four or five major projects and six to eight smaller ones, all of which it might undertake on its own initiative out of its own resources. Stable funding for this core of activity would allow it to pursue other work, funded by agencies or foundations, without needing to compromise its integrity.

2) Are there any legislative changes that would prevent the types of criticisms and/or concerns that led to the demise of ACUS in 1995?

Short of changing the nature of ACUS entirely, as by tucking it under one of the cabinet-level departments, I cannot think of any legislative change that would make a decisive difference. I have suggested in my reply to No. 7 of Rep. Cannon's questions, above, that ACUS should expand its membership and take on higher-profile issues, which ought to generate a wider constituency and more enthusiasm. Its status as an independent agency will always, however, make ACUS problematic. From long experience with independent agencies, we know that the greatest risk to their satisfactory performance over time is that their need for high-quality personnel is not always consistent with the interests of those who hold the appointment power. We also know that

[1] For an overview of the current literature on communities of practice, see E. L. Lesser & J. Storck, "Communities of Practice and Organizational Performance," *40 IBM Systems Journal No. 4, 2001*, available online at http://www.research.ibm.com/journal/sj/404/lesser.html.

congressional interest in the independent agencies varies with the type of work they do and their relationship to constituents. Independent agencies that lose the attention of the executive branch and the Congress generally become vulnerable to capture by special interests that influence and protect them. ACUS experienced the first two effects of being an independent agency but not the third: it did not retain over time the interest of the White House or the Congress, but neither was it captured by special interests. The consequence was that by the early 1990s it was orphaned. ACUS was never intimidated by its vulnerability, which it appeared not to have appreciated; instead, it was murdered.

If ACUS is going to continue as an independent agency, therefore, it will be necessary to compensate for the intrinsic, and desirable, weakness in its ability to attract powerful patrons. I think the best strategy is for it to take on projects of greater visibility and salience to the Congress and the agencies. It should also be authorized to seek private funding, as to which it will have to exercise discretion.

I hope this response is useful. Thank you for giving me the opportunity to contribute.

Sincerely yours,

/s/

Sallyanne Payton

RESPONSE TO POST-HEARING QUESTIONS FROM PHILIP J. HARTER

QUESTIONS FROM THE HONORABLE CHRIS CANNON
FOR PROFESSOR PHILIP HARTER

1) Since the demise of ACUS, what are some of the most critical areas that a reauthorized Conference should consider?

Answer: There are so many that I'm hesitant to mention a few lest that be taken to exclude others that are also important. But, high on my list would be:

- We need an intense joint public-private effort to address the issues surrounding electronic rulemaking – how to make dockets easily accessible on line; the proper procedures for using interactive communications during rulemaking (without care, many citizens could be severely hurt); how agencies can cope with a million electronic comments (without care this could degenerate into a plebiscite instead of a quest for information and rational decisions making) ; how the web can be used to generate responsible information. While much of this work is being done, there is very little collaboration, and it is desperately needed.

- I think we need to look hard at smoothing the way for public-private collaboration. Agencies hate using the Federal Advisory Committee Act because of its extraordinarily burdensome and bureaucratic structure, so it should be streamlined to accomplish its basic goals while getting rid of its difficult, unproductive requirements. Moreover, as more functions that were previously the exclusive province the government are taken over by the private sector with sometimes minimal oversight, we as a society need to think through just what that relationship should be and where liability should reside. There is currently a broad distrust between the public and private spheres, with each tending to resist discussions and joint problem solving with the other. ACUS was a spectacularly successful vehicle for providing that dialogue.

- The world is increasingly linked together so that domestic decisions that were once clearly final are now subject to a type of review in the international community through important treaties such as the World Trade Organization. Moreover, companies that operate domestically also operate internationally and it is potentially highly burdensome for them to have to comply with competing and sometimes inconsistent sets of regulations. Further, how much credence should we place on a regulatory decision made by a foreign country; do we need to start from scratch, or could we simply adopt a rule that was crafted abroad if the circumstances met certain criteria; what criteria should be used? In short, many issues over the "harmonization" of US decisions with international institutions is vitally important.

- I also think it would be productive to step back and ask ourselves just what sort of information and analysis agencies need to make policy decisions, whether in rules, guidelines, or in adjudication. A whole series of executive orders and internal directives require agencies to undertake analyzes that only consume time and resources without adding significantly to the quality of the decision. We should weed these out and develop a common view as to what is appropriate; doing so will be difficult and controversial, but again it cannot really be done without a productive dialogue and we currently have no forum in which in can take place.

2) Can an agency that already exists – such as the Office of Management and Budget or the General Services Administration – perform the responsibilities of the Conference?

Answer: Either OMB or GSA, or possibly Justice, could theoretically perform the role served by ACUS. To get the benefit of the public-private deliberation they would have to empanel an advisory committee and staff the enterprise on an on-going basis. That might work. But, there are major downsides. The first is cultural: none of have done it even though doing so might well be within their existing jurisdiction; this is not something they envision as being part of their mission. And each has a conflict. OMB sets budgets and legislative priorities and reviews rules; agencies could well and reasonably be reluctant to participate in an open, honest way were OMB to undertake this task. The independence of the Administrative Conference has been seen historically as a major benefit that frees it to focus on the substance of procedure. So, while the other agencies could take over the functions, the result would very likely not be as good.

3) In your written statement, you note that there have been significant changes in the management structure of the Federal government among other important developments since the enactment of the Administrative Procedure in 1946.

a) Do you think there is a need to update the APA?

Answer: As one who headed the Regulatory Reform Committee of the American Bar Association, I certainly believe that there are beneficial changes that could be made to the APA and have testified before Congress many times concerning them. As I indicated above, some of those changes might address the delegation of formerly government functions to the private sector; some might streamline the process; others might try to make the administrative process more responsive to needs perceived in the private sector. But, that said, I also think that the basic structure of the APA is quite sound and hence I do not think any sort of "wholesale" change is merited.

b) If the APA was "updated," would this vitiate the need for ACUS?

Answer: Absolutely not! Much of what needs to be done is to provide forum in which agencies can exchange information and views as to what works and what does not work in administering a program, as well as providing a forum

between the government and the private sector as to how to improve the operation of government (not surprisingly, sometimes a government agency might think it is discharging its duties in a spectacularly skillful manner when the private sector has quite a different view). For example, in my own experience, I believe that major recommendations as to how to implement both the Negotiated Rulemaking Act and the Administrative Dispute Resolution Act would be helpful. Thus, the passage of new legislation addresses only part of the problem: it still must be implemented. And that was ACUS's speciality. Even if a revised and updated APA were quite comprehensive, a whole multitude of issues lies beyond it that are the stuff of a revitalized ACUS.

4) What issues would you recommend be the priorities for a reauthorized ACUS?

Answer: I think the issues described in Paragraph 1 are certainly priorities; I would probably add a good, hard-headed look at the APA as well. But, overall, I think the major priority should be in re-establishing the dialogue on an on-going basis.

5) According to your curriculum vitae, you rendered various services to the Conference over its period of existence.

a) Were any of those services rendered on a volunteered basis?

Answer: Yes. I served as a consultant to ACUS for a number of projects, at least some of which were on a volunteer basis and a couple of which were compensated but at far below market price.

b) Why were so many individuals willing to provide their services to ACUS free-of-charge?

Answer: ACUS provided a rare opportunity to "do good" by making sophisticated recommendations as to how to improve the functioning of government and improving our society. My experience both with ACUS and when mediating negotiated rulemakings, many people are very willing to go to extraordinary levels to provide that sort of help.

That said, it is also important to differentiate the different roles of people who are engaged with ACUS. While a short "think piece" or one with only a small amount of data underlying it might be done on a volunteer or reduced-cost basis, major studies need to be adequately funded. I am convinced, for example, that ACUS's negotiated rulemaking recommendation would not have been as solid and significant without the adequate funding that it provided (which, I also hasten to add, amounted to about half-price of the then market value of the research). Thus, it would be a mistake to try to get too much research done on a volunteer basis. Members attending plenary sessions and working in committees are perfect volunteers; but it is not reasonable to ask someone to engage in a substantial amount of their professional time without adequate compensation.

QUESTIONS FROM THE HONORABLE MEL WATT
FOR PROFESSOR PHILIP HARTER

1) What level of funding would be necessary to fund the ACUS you envision being reauthorized?

Answer: I strikes me that it would be a mistake of the highest order to re-establish ACUS but not give it sufficient funds to discharge its duty. It would be "re-born" crippled. It was my impression that at the end of its life ACUS lacked those funds, and hence it was forced into a position of begging for resources from the very agencies it wanted to study. That, it seemed to me, fundamentally converted it from a neutral observer to more of a consultant – not the function envisioned for the agency.

Having thought about it considerably after the hearing, I believe that a minimum of $5 million would be necessary and that $7.5 million would be a more reasonable figure on an on-going basis. It might even be higher, perhaps as high as $10 million, for a year or two given the start up costs and the back log of projects that have arisen since ACUS's demise.

2) Are there any legislative changes that would prevent the types of criticisms and/or concerns that led to the demise of ACUS in 1995?

Answer: My own view is that ACUS must maintain a strong political vitality, and that means that it needs to work closely with Congress and the Administration. It needs to preserve its independence and neutrality, to be sure, but it also needs to service its constituency of both parties and political orientations. Thus, in my view, what is needed more than any legislative change could provide would be an on-going dialogue between ACUS and the relevant Congressional committees and the relevant offices within the administration. Annual oversight hearings might be appropriate to show the interest and concern of the committee and to provide a means by which the committee could make suggestions for important projects and issues that need to be addressed.

LETTER FROM MICHAEL HERZ AND DAVID RUDENSTINE

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June 22, 2004

The Honorable Chris Cannon
Chairman
Subcommittee on Commercial and Administrative Law
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Re: Reauthorization of the Administrative Conference

Dear Mr. Chairman,

As co-directors of the Floersheimer Center for Constitutional Democracy, we are writing to express our enthusiastic support for the reauthorization and refunding of the Administrative Conference of the United States. We ask that this letter be included in the official record of the June 24 hearing.

The Floersheimer Center pursues and promotes research, scholarship, and action aimed at understanding and improving democratic governance. The grand aspirations of constitutional democracy can seem far removed from the tedious, day-to-day functioning of administrative agencies. But in fact the two could not be more closely related. For most citizens and firms, "the government" is not Congress, or the President, or the courts, with which they have no personal contact. Rather, it consists of the agencies, whose operations and decisions have direct effects on their lives and businesses. Therefore, the smooth, fair, effective functioning of government agencies is an essential aspect of a successful constitutional democracy.

From 1968-1996, the Administrative Conference made enormously valuable contributions to improving the functioning of the administrative state. ACUS brought together academics, private lawyers, agency staff, and agency heads – people with different professional backgrounds and political viewpoints who were united in having a strong understanding of administrative law and a desire to improve the functioning of the bureaucracy. After rigorous background study, inclusive debate, and careful consideration, it produced scores of useful recommendations for improving the administrative process. Not every study turned into a recommendation, and not every

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recommendation was adopted by Congress or individual agencies. If that were so, it would have meant that ACUS was producing uncontroversial pabulum and not doing its job. But even the studies and proposals that were not acted upon contributed importantly to our understanding of the administrative process. And time and again ACUS reports and recommendations did lead to identifiable and meaningful improvements in the operation of the federal bureaucracy.

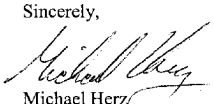
The demise of the Administrative Conference may reflect a truth about constitutional democracy, at least our particular version of pluralist democracy, in which so much policy is made through the conflict of interest groups. Precisely because it was nonpartisan, operated behind the scenes, and did not pursue particular *substantive* goals, ACUS lacked a constituency. No group fed at its trough, and no special interest existed to fight for it in 1996. However, this does not mean that ACUS was not useful; it is a sign of just how unusual a government program it was, and what made it politically vulnerable is also what made it practically valuable.

The strongest case for the Administrative Conference was made by the two extraordinary witnesses at your May 20th hearing. Not just by what they said – though what they said was compelling and we would endorse it – but by their joint appearance and their agreement. Justice Scalia and Justice Breyer see the world very differently in many respects. But they were both professors of administrative law before going on the bench; they were both closely involved with ACUS (Justice Scalia even having chaired the conference for two years); they are both deeply knowledgeable about the challenges of effective administrative governance; and they have no personal stake in the matter. They are in the perfect position to judge ACUS's value, and it is hard to quarrel with their joint conclusion that ACUS merits reauthorization.

You are to be congratulated for holding these hearings and pursuing the resurrection of the Administrative Conference. We hope that this small but important step toward fair, efficient, and effective administrative governance can be achieved.

Thank you for considering our views.

Sincerely,



Michael Herz
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David Rudenstine
Dean & Co-director,
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cc: Hon. Melvin L. Watt