ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

HEARING

BEFORE THE

SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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what they think and can learn something about their experience—it is called notice and comment rulemaking," their ears pick up, because they want to know how it works.

So they will do studies. How do we make it not too long? How do we actually get public involvement without dragging the whole thing not forever? How can we be sure the agency listens to relevant things without having to listen to every single individual, because there might be 5 million of them. That is where the studies come in.

Now, Justice Scalia has listed several instances from history. Our history is 6 years ago and more. I have listed some. I think they are important. He thinks they are important. So all we can say is where I started. I am really very, very glad indeed that you are here, because it shows support for this institution, and I think that institution, the Administrative Conference, is important to the ordinary American, even if he has never heard its name.

Mr. COHEN. Thank you, sir, and although you have a red light, if you would like to talk further, you would certainly—permission is granted.

Justice BREYER. I think I will stop, because I have made my point.

[The prepared statement of Justice Breyer follows:]

PREPARED STATEMENT OF THE HONORABLE STEPHEN BREYER

STATEMENT OF

STEPHEN BREYER
ASSOCIATE JUSTICE
SUPREME COURT OF THE UNITED STATES

BEFORE THE
SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

HEARING ON THE
ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

WASHINGTON, D. C.
MAY 20, 2010

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" from the Judicial Conference to the Administrative Conference. As I testified before this Committee six years ago, I believe that the Conference served an important purpose—improving our government, in many ways beneficial to the average American—at low cost. This statement, which I give in my capacity simply as a former participant in and observer of the Conference's activities, describes my recollections of the Conference's unique function and contributions.

The Conference primarily examined government agency procedures and practices, searching for ways to help agencies function more fairly and more efficiently. It generally focused on achieving "semi-technical" reform. That is to say, it focused on changes in practices involving more than a handful of cases and, frequently, more than one agency—but changes that were neither so controversial nor so 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 unnecessary legal technicalities, controversies, and delays through agency use of negotiation. While these subjects themselves and the related recommendations often sound technical, in practice they often simply make it easier for citizens to understand what government agencies are doing, to challenge arbitrary government actions that could cause harm, and to prevent such arbitrary decisions in the first place.

The Administrative Conference developed its recommendations by bringing together at least four groups of people: top-level agency administrators; professional agency staff; private practitioners (including practitioners from "public interest"

organizations); and academicians. The Conference would typically commission a study by an academician, say, a law professor, who would have the time to conduct the study thoughtfully, but who might lack first-hand practical experience. The professor would spend time with agency staff, who often have otherwise-unavailable facts and experience, but might lack the time for general reflection and comparisons with other agencies. The professor's draft would be reviewed and discussed by private practitioners, who typically brought a critically important practical perspective, and by top-level administrators such as agency heads, who could add further practical insights, make inter-agency comparisons, and add special public perspectives. The upshot was frequently a work-product drawing upon many different points of view, both practically helpful and commanding general acceptance.

In seeking to answer the question, "Who will regulate the regulators?" most governments have found it necessary to develop institutions that continuously review, and recommend changes in, 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. And 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 bring 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 per year), it is indeed a pity that, in allowing the Conference to lie dormant for years, 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 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 modest cost, should have been maintained. I recognize that the Conference was not the most well known of government agencies. 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 am, therefore, delighted that Congress authorized funding for the Conference last year. I hope the Conference will have sufficient resources to undertake the work it once did. And I hope my views on that work may provide some assistance as the Conference begins again.

Justice Breyer mentioned, and I think he is quite correct, that ordinarily these matters of administrative procedure are too technical to attract anybody's attention, and they tend to be under the radar. To tell you the truth, I am not sure that is all bad. One of the things I worried about with the conference was the danger of its being politicized of its studies being directed to helping business or not helping business, that one interest group or another would come to dominate either the conference assembly or the recommendations that were presented to the assembly.

I think that didn't happen during most of its previous existence, and I hope that that will continue, because this is technical stuff. And there is a good, fair way to do it. It should not be done in such a way as to push the substantive results in one direction or another.

And that is all I have by way of introductory remarks. Thank you, Mr. Chairman.

[The prepared statement of Justice Scalia follows:]

PREPARED STATEMENT OF THE HONORABLE ANTONIN SCALIA

STATEMENT OF

THE HONORABLE ANTONIN SCALIA

ASSOCIATE JUSTICE

SUPREME COURT OF THE UNITED STATES

AT

HEARING ON THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

MAY 20, 2010

PREPARED STATEMENT OF THE HONORABLE ANTONIN SCALIA

May 20, 2010

Mr. Chairman and Members of the Subcommittee:

I am happy to accept your invitation to testify once again about the Administrative Conference of the United States. As when I testified before (six years ago to the day), I am here to offer my perspective on the Conference and its work, not in my capacity as a member of the judiciary, but as the Conference's third Chairman, a post I held from September 1972 to August 1974. Although your focus is of course on the role of the recently reactivated Conference going forward, my prepared remarks will pertain primarily to the period in which I served.

Before discussing how the Conference worked and what it accomplished, let me begin by briefly describing why it was created. Within a few years of the passage of the Administrative Procedure Act in 1946, the need was recognized for expert advice and informed deliberation on how to improve administrative procedure. Several short-lived entities were established to that end—including the temporary administrative conferences convened by Presidents Eisenhower and Kennedy, as well as the Office of Administrative Procedure in the Justice Department. But support soon grew for a permanent independent agency, composed of agency officials as well as administrative-law practitioners and scholars, to study and recommend improvements in the administrative state on an ongoing basis. The Administrative Conference of the United States came into being in 1964 with Congress's passage and President Johnson's approval of the Administrative Conference Act, and it began operations four years later. The Conference's purpose, set forth in the Act, is to enable "Federal agencies, assisted by outside experts, . . . cooperatively [to] study mutual problems, exchange information, and develop recommendations

. . . to the end that private rights may be fully protected and regulatory activities and other Federal responsibilities may be carried out expeditiously in the public interest." Pub. L. No. 88-499, 2(e), recodified as amended at 5 U. S. C. §591(1). As President Johnson said when swearing in its first Chairman, the Conference was designed to be "a forum for the constant exchange of ideas between the agencies and the legal profession and the public," and "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." Remarks at the Swearing in of Jerre S. Williams as Chairman, Administrative Conference of the United States, *Pub. Papers* 68 (Jan. 25, 1968).

The Conference's structure and composition were tailored to that objective. The Conference is divided like Gaul into three parts: a Chairman, a Council, and an Assembly. The Chairman is appointed by the President, subject to Senate confirmation, for a term of five years. He is, by statute, the Conference's Chief Executive. His duties include presiding at plenary sessions of the Assembly and at Council meetings and serving as spokesman for the Conference in relations with the President, the Congress, the Judiciary, the agencies, and the public. His most important responsibility, however, is (or was when I served) to identify subjects appropriate for study by the Conference, and—if the relevant Committee of the Assembly agrees—to line up an academic consultant qualified to assist in the research. It also fell to the Chairman to seek implementation of Conference recommendations—a task that requires tact and diplomacy. The Conference, after all, has no enforcement powers over other agencies—let alone over the President and Congress, whose action is often needed to turn recommendations into reality. The Chairman was assisted in those days by a small permanent staff, whose duties included providing research and administrative support to the Assembly and its Committees, following and aiding

the work of consultants, and helping the Chairman in securing implementation of recommendations.

The statute establishes no eligibility requirements for the Chairman, but those who have held the post (excluding those who served on an interim or acting basis) have come from one of two places. Most came from academia. Like both of my predecessors (Jerre Williams, who was at the time of his appointment a professor at the University of Texas Law School, and Professor Roger Cramton, then of the University of Michigan Law School), as well as the newly appointed Chairman (Paul Verkuil, of Cardozo Law School), before my appointment I had been a law professor, at that time on leave from the University of Virginia Law School. The remaining chairmen, I believe, came straight from high-level government service in an agency or the White House.

The Council of the Conference is comprised of the Chairman and 10 other members appointed by the President for three-year terms, no more than half of whom may be employees of Federal agencies. Its functions resemble those of a corporate board of directors. It can call plenary sessions of the Conference and set their agenda, recommend subjects for study, propose bylaws and committees, receive committee reports and recommendations (and forward them to the Assembly with its own comments), and exercise general budgetary and policy supervision.

The Assembly consists of the Conference's entire membership, which can now range from 75 to 101 members. The Chairman and the Council account for 11 of that number. The rest fall into several groups: the chairman of each independent regulatory board or commission (or an individual designated by the board or commission); the head of each Executive Department or other administrative agency (or his designee) named by the President; with the Council's permission, additional delegates from independent or executive agencies; members

picked by the President; and up to 40 public members, who are appointed by the Chairman with the approval of the Council for two-year terms, who must comprise between one-third and two-fifths of the total membership, and who are chosen from among 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. Although as a practical matter the Chairman and Council managed the Conference's day-to-day work, the statute endows the Assembly with "ultimate authority over all activities of the Conference." 5 U. S. C. §595(a). Its primary responsibility, of course, is the adoption of Conference recommendations; it alone has that power. The Assembly can also adopt bylaws and regulations to govern the Conference's procedure, and can create standing committees to study particular issues. The names and number of the committees varied over time. During my tenure there were nine: (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.

The Conference pursued its mission of improving the efficiency and fairness of the countless varieties of federal agency procedures primarily by studying problem areas and making recommendations to the President, Congress, or the Judicial Conference. As in Congress, the work really began in the Conference's committees, which were of necessity the real workhorses. The committees met periodically to direct and supervise research by academic consultants and by the Conference's professional staff. Based on that research, the committees framed proposals for the Assembly to consider at its annual meetings. Once a study or tentative recommendation was prepared, it was circulated to the affected agencies for their reaction, after which it was

reexamined by the committee in light of the comments received. After final committee approval, a proposed recommendation would be considered by the Council, before being forwarded to the Assembly for final action in plenary session. The Assembly could adopt the recommendation as proposed, amend it, refer it back to the committee, or reject it entirely.

Despite the Conference's lack of leverage in encouraging reform—it has, in the parlance of administrative law, only the "power to persuade," *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944)—its efforts met with considerable success over the years. All told, it made roughly 200 recommendations from 1968 to 1995, many of which were eventually implemented in whole or in part. By one count, as many as three-fourths were implemented to some degree. See Katzen, *The Role of the Administrative Conference in Improving the Regulatory Process*, 8 Admin. L. J. Am. U. 649, 665 (1994). Some of its proposals were ultimately embodied in legislation. A few early examples include Public Law 94-574, which adopted Recommendation 69-1 to abolish the doctrine of sovereign immunity in suits seeking judicial review of agency action; the Parole Commission and Reorganization Act of 1976, P.L. 94-233, which implemented Recommendation 72-3's call for a right to counsel in parole proceedings, and other procedural guarantees recommended by the Conference; and the 1974 Freedom of Information Act Amendments, Pub. L. No. 93-502, which adopted many of the Conference's suggestions for improving FOIA. Some recommendations were implemented in more than one statute. The Conference's encouragement of according agencies the authority to impose civil money penalties has had a significant (and in my view laudable) impact, and many separate statutes implemented the Conference's recommendation regarding the appropriate standard of pre-enforcement judicial review of rules of general applicability. (Courts too looked to that recommendation 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).) The Conference's success continued in later years. In Public Law No. 100-236, Congress adopted the Conference's proposed solution (in Recommendation 80-5) to the "race to the courthouse" problem in appeals from agency action. And the Administrative Dispute Resolution Act, Pub. L. No. 101-552, the Negotiated Rulemaking Act, Pub. L. No. 101-648, and several other important statutes embodied Conference proposals.

Other recommendations were implemented directly by the affected agencies. During my tenure, these included among others the Justice Department's nearly verbatim adoption of the Conference's guidelines for implementation of the Freedom of Information Act (Recommendation 71-2); the Civil Service Commission's publication of proposals substantially applying the Conference's recommendation concerning adverse actions against Federal employees (Recommendation 72-8); and the Board of Parole's indication of its readiness to adopt the Conference proposals concerning parole procedures (Recommendation 72-3). Agencies that used publicity as a regulatory tool also adopted procedures conforming to the Conference's recommendations for protecting against unfair publicity that could harm a private party. And recommendations regarding procedures for resolution of environmental issues in licensing proceedings were embodied in regulations adopted by five of the six affected agencies.

Still other 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 suggested not what to do, but what to avoid—for example, the recommendation cautioning against Congress's imposition of complex rulemaking procedures, which has been followed with few exceptions.

The Conference's contributions, moreover, extended beyond formal proposals for legislative or administrative action. As Chairman, I testified 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, 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. Sometimes they did so at Congress's insistence. See, *e.g.*, 5 U. S. C. §§504(c)(1), 552b(g). But they often did so on their own, particularly in connection with their initiation of new programs or procedures. I regarded this sort of pre-implementation advice as especially beneficial; it is always much better to help get things started on the right foot than to criticize the defects 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, a number of academics who served as consultants to or members of the Conference have become household names in the arcane world of administrative law; during the years of my involvement, for example, Professors Jerry Mashaw, Richard Merrill, and Peter Strauss were each consultants. The practitioners who have served as members have also been, by and large, prominent and respected attorneys in the various areas of administrative practice.

What accounted for the Conference's success during its previous incarnation? No doubt the caliber of scholars, government officials, and private practitioners who took part in its

work—most on a *pro bono* basis—went a long way. But several other attributes stand out, in my view. Its permanence was pivotal. Longevity not only preserved institutional memory—a valuable commodity in a world of constantly changing administrations and even faster changing personnel—but also enabled the Conference patiently to pursue implementation of its proposals. Equally critical was the Conference's access to other agencies' information—due to its status as a Federal agency, its composition of officials from many or most of the agencies it studied, and a statutory provision requiring agencies to share information if not barred by another law, 5 U. S. C. §595(c)(3). No private think-tank or individual scholar could count on the cooperation the Conference enjoyed; agencies, after all, have no incentive to go the extra mile (or to travel it at more than a snail's pace) in responding to outside requests from groups scrutinizing their work. The Conference's independence from other Executive Branch entities also avoided injecting the agency into longstanding interagency feuds, and helped to preserve its image as an impartial observer seeking only to improve the administrative process, not to arrogate more power to itself. And success, of course, breeds success: The respect the Conference earned over time for its careful work, and its corresponding ability to attract able members to volunteer their time (which would otherwise come at an extraordinary price), enabled it to continue its successful course. I hope the Conference enjoys equal or greater success in this next phase of its existence.

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Mr. COHEN. You are welcome, Justice Scalia. And we appreciate your testimony and for your being here.

We will now begin the questioning. And I want to remind my colleagues that our witnesses are guided by Canon 3 of the Code of Conduct for United States Judges, which advises the judiciary to