

VOLUME 1

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

53rd PLENARY SESSION

DECEMBER 9, 2010

The above-mentioned conference was held on Thursday, December 9, 2010, commencing at 2:18 p.m., at the National Archives, McGowan Theater, 700 Pennsylvania Avenue, N.W., Washington, D.C. 20408, before Robert A. Shocket, a Notary Public.

CHAIRMAN: PAUL VERKUIL

EXECUTIVE DIRECTOR: MICHAEL T. McCARTHY

TSG JOB NO.34985

REPORTED BY: Robert A. Shocket

1 AGENDA

2 53rd Plenary Session

3 December 9, 2010

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5 -- Call to Order of the Assembly of the Administrative
6 Conference of the United States

7 -- Introductory Remarks by Chairman Paul Verkuil

8 -- Swearing in of Council and Conference Members and
9 Remarks by The Honorable Antonin Scalia, Associate
10 Justice, U.S. Supreme Court

11 -- Consideration and vote on initial business (order of
12 business, adoption of bylaws, setting terms of public
13 members)

14 -- Consideration of Proposed ACUS Recommendation 2010-1
15 Agency Procedures for Considering Preemption of State
16 Law

17 -- Staff Presentations

18 -- Keynote Address by Senator Sheldon Whitehouse
19 (D-RI), Chair, Senate Subcommittee on Administrative
20 Oversight and the Courts

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2 P R O C E E D I N G S

3 MR. McCARTHY: For seating, we have Council members
4 seated in the front row. We have the upper rows
5 reserved for members of the general public. And the
6 other members of the Conference, public members,
7 government members, liaison, senior fellows can fill in
8 anywhere in the middle.

9 I'm Mike McCarthy. I'm the Executive
10 Director of the Conference. And while everyone is
11 getting settled in, I'm going to make a few
12 logistical announcements before Chairman Verkuil
13 calls the Plenary Session to order.

14 First, members should have checked in at
15 the registration table and received name tags, a
16 package of material. I see a lot of name tags out
17 there. I think that pretty much everyone has done
18 that. If you have not checked in, please do so now.
19 It's important that we have a count of how many
20 members are in attendance for form and voting
21 purposes.

22 In preparing for this session we had the
23 occasion to review the introductions to some
24 previous Plenary Sessions from the last time we
25 existed, which ended in the mid 1990s, and it was

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2 instructive that times have changed. So in the
3 early 1990s a point of emphasis was that smoking
4 would not be permitted in the auditorium and would
5 only be allowed in the restrooms.

6 Today, needless to say, smoking is not
7 permitted in the building but we do still have
8 restrooms though, and those are located outside the
9 doors at the top of the theater. Also, food and
10 drink are not permitted in the theater although
11 there is a cafe located outside the doors at the top
12 of the theater and to the left if you need to step
13 out.

14 Another major announcement: the last time
15 the Conference met was how phone messages would be
16 delivered to members. That issue has been solved by
17 the cell phones and Blackberries and other sordid
18 devices we probably all have but we would ask
19 everyone in the room to please turn off your phones
20 or devices or set them to silent.

21 Something that has not changed is that the
22 Conference is a Federal Advisory Committee. That
23 means that our proceedings are open to the public
24 and on the record. We will have a transcript and an
25 audio and video of this meeting are being streamed

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2 live on the Internet -- fingers crossed, I'm getting
3 a thumbs-up from the booth -- and it will be
4 archived on our website.

5 And so to make this feed most useful,
6 members will be speaking during debate should do so
7 at the microphones. We'll have some stand mikes. I
8 believe we'll have some mikes that can be passed
9 around. It's important that, for our purposes that
10 people speak into the microphones so that the world,
11 I'm sure hundreds of thousands people are watching
12 this live over the Internet right now and so they
13 can all benefit from everyone's comments. The
14 written materials we provided to members are also
15 public and are also on our website. So no need to go to
16 WikiLeaks, just go to www.acus.gov. With these
17 logistics out of the way, Chairman Verkuil.

18 (Applause)

19 MR. VERKUIL: Thank you very much. This is an
20 exciting day and we have so many friends here as well
21 as people in the profession whom I greatly respect so
22 it's quite an honor to be up here. I want to welcome
23 you to the first Plenary Session of the new Conference,
24 what we are calling ACUS 2.0 for a variety of reasons.

25 This is an auspicious moment in our

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2 history, topped only by the first Plenary Session
3 presided over by Judge E. Barrett Prettyman on May
4 27th, 1968, at the Diplomatic Conference Room in the
5 Department of State. At that meeting, the first
6 Chairman, Jerry Williams, welcomed the membership,
7 which included famous regulators like Paul Rand
8 Dixon of the FTC and Lee White of the FPC,
9 distinguished practitioners like Carolyn Egger and
10 Warner Gardner and revered academics like K.C. Davis
11 and Walter Gellhorn, worthy predecessors indeed.

12 Chairman Williams introduced the Attorney
13 General, who was, if you can remember in 1968, none
14 other than Ramsey Clark, and General Clark took as
15 his theme for his talk law as an art. I won't take
16 the time to summarize his talk except to re-tell his
17 joke which holds up pretty well, and here it is.

18 General de Gaulle was visiting an
19 important museum in Paris with his Minister of
20 Culture, Andre Malraux, and Malraux, of course, was
21 a great historian of art who de Gaulle wanted very
22 much to impress. As they were passing the
23 impressionist paintings, the General said, "Ah, what
24 a beautiful Degas." "Oh, you are right, mon
25 General," Malraux replied. A little further de

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2 Gaulle said, "What a magnificent Dega." I already
3 said Dega -- Renoir. "Oh, of course, mon General."
4 And so the General goes a little further and he
5 stops in front, he puzzles a bit and he says "Ah,
6 that must be a Picasso." "No, no," Malraux says,
7 "no, no, General, that is a mirror."

8 (Laughter)

9 MR. VERKUIL: So it still works. That's very
10 reassuring. That's a 40-year-old joke. So here we are
11 today to hold our mirror up to our new Conference. Who
12 better to address us than our former Chairman and
13 current Associate Justice of the Supreme Court, Antonin
14 Scalia. Justice Scalia has two duties. Well, first
15 he's going to give remarks and then he's going to swear
16 in separately our counsel and our membership in his
17 inimitable style, I might say. I should add for the
18 record that our recent OLC opinion concerning member
19 status as special government employees doesn't require
20 that we do the oath but it's a very important symbolic
21 gesture.

22 And on a personal note I want to add that
23 my work as a consultant to the Conference many years
24 ago, 1974, in fact, was made an intellectual
25 pleasure largely because of Chairman Scalia, who as

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2 Justice has been instrumental in our revival through
3 numerous testimonies on the Hill for which we will
4 always be grateful. Justice Scalia.

5 (Applause)

6 JUSTICE SCALIA: Thank you, Paul. My remarks will
7 be brief because I, you know, I was not put on the
8 program to speak but to do the swearing in. But let me
9 say a few words. My joy at this occasion is greater
10 than the joy of most of you because I had three jobs in
11 the executive branch. One was the office of
12 telecommunications policy, I was the General Counsel.
13 I came from that to ACUS and I went from there to the
14 Justice Department, Office of Legal Counsel. The first
15 two of those agencies were abolished. I feared the
16 Justice Department was next. Fortunately that did not
17 happen and I feel indicated by this reauthorization and
18 reestablishment of ACUS.

19 As you have been told, I have been asked
20 to take on the swearing-in duties, not because or at
21 least not just because I am the most beloved Senior
22 Justice of the Supreme Court but because I was once
23 Chairman here. And I succeeded Roger Crampton,
24 previously and subsequently a professor at the
25 University of Michigan Law School, who in turn had

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2 succeeded the first Chairman, Jerry Williams,
3 formerly a professor at the University of Texas Law
4 School and later a judge on the Fifth Circuit, to
5 which I am the Circuit Justice. I had been a
6 professor at the University of Virginia Law School,
7 though between that and the Conference I had spent a
8 couple of years, as I told you, as General Counsel
9 of the federal agency. And I was succeeded as
10 Chairman by Bob Anthony, who is here today, who had
11 been a professor at Cornell Law School.

12 I go into all that to make the point that
13 your Chairman, Paul Verkuil, also a recovering
14 academic, from the University of North Carolina Law
15 School, Tulane Law School -- we say it that way in
16 the Fifth Circuit, "T00-lane," Cardozo Law School
17 and William and Mary, follows also in the tradition
18 of Conference Chairman, and to make the further
19 point that the Conference itself is something of a
20 quasi-governmental think-tank. Not only are its
21 Chairmen and some of its private sector members
22 academics but the legwork and the heavy lifting for
23 its committees will, I am sure, be done by academic
24 consultants. The list of consultants of the old
25 Administrative Conference is a variable Who's Who of

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2 administrative law academics.

3 And during the lifetime of the old ACUS a
4 vast percentage of the significant academic writing
5 in the field of administrative law was the product
6 of studies that the authors had done as consultants
7 to the Conference. There comes to mind, for
8 example, Jerry Mashaw's massive study of Social
9 Security adjudications. Jerry's back, too.

10 As I mentioned, I came to the Conference
11 from a job in an online administrative agency.
12 Those of you in the Assembly who are agency members
13 will find the job, as I did, strangely liberating.
14 In your work here you will not have agency or
15 administration substantive objectives to pursue.
16 Your task is simply to improve the administrative
17 process throughout the government.

18 And the same for the public members from
19 the practicing Bar. I am not so naive as to believe
20 that an agency member from an agency whose
21 procedures are studied and found wanting will not be
22 inclined to protect the status quo or that a lawyer
23 who has a particular specialty of administrative
24 practice will not be inclined to support extravagant
25 new procedures that will favor his clientele.

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2 I hope those tendencies will be restrained
3 but even if they are not, the beauty of this
4 Assembly, the beauty of the Conference Assembly is
5 that the members who do not have, so to speak, a dog
6 in the fight will always outnumber those who do so
7 that the outcome will almost always pursue the
8 common good of sound administrative practice.

9 One final observation. The Assembly of
10 the Conference is probably the world's best
11 networking medium for those interested, as all of
12 you are, in the administrative process. I cannot
13 count the number of lasting friendships I have made
14 during my few years as Chairman among the
15 outstanding lawyers, academics and agency members
16 with whom I worked at the Conference. My wish and
17 my expectation for all of you is that you will be
18 able to say the same.

19 Now let me proceed to my real job, which
20 is to administer the oath of office. I make it a
21 practice when do I this job to say a few words about
22 the oath of office. I'm not sure they don't have to
23 take it. It comes for the Constitution, Article VI,
24 Clause III requires all legislative, executive and
25 judicial offices both of the United States and of

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2 the federal states to be bound by oath or
3 affirmation to support the Constitution.

4 The first oath of office, it is literally
5 One-Stack-One. It was the very first law passed by
6 Congress because they couldn't proceed with their
7 business until they got sworn in. One-Stack-one was
8 the oath of office which in those more sensible days
9 simply tracked the words of the Constitution. That
10 is not the oath you will hear today. The one you
11 will hear today smells of the Civil War.

12 Those of you who have heard it before know
13 that the phrases like without any mental reservation
14 or purpose of evasion, you can see that it's there
15 to make sure that those who take it are not
16 supporters of the Confederacy.

17 In spirit and form it was signed into law
18 by Abraham Lincoln on the 2nd of July, 1862, a
19 couple of months before the Battle of Antietam. So
20 bearing in mind the antiquity and importance of what
21 we're doing here, let me ask the members of the
22 Council to stand and be sworn in. Please raise your
23 right hand and repeat after me. I -- say your name
24 -- do solemnly swear that I will support and defend
25 the Constitution of the United States against all

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2 enemies, foreign and domestic, that I will bear true
3 faith and allegiance to the same, that I take this
4 obligation freely, without any mental reservation or
5 purpose of evasion, and I will well and faithfully
6 discharge the duties of the office on which I am
7 about to enter, so help me God. Thank you.

8 (Applause)

9 JUSTICE SCALIA: And now the members of the real
10 power in this organization, the members of the
11 Assembly, of the Administrative Conference of the
12 United States, please stand, raise your right hands and
13 repeat after me. I -- state your name -- do solemnly
14 swear that I will support and defend the Constitution
15 of the United States against all enemies, foreign and
16 domestic, that I will bear true faith and allegiance to
17 the same, that I take this obligation freely, without
18 any mental reservation or purpose of evasion and I will
19 well and faithfully discharge the duties of the office
20 on which I am about to enter, so help me God.
21 Congratulations.

22 (Applause)

23 MR. VERKUIL: Thanks so much. The Justice has
24 done a great job, as usual, and that has brought us back
25 to our roots, which is a wonderful thing as well. So

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2 welcome to the Conference, new members. In addition, I
3 want to acknowledge liaison members and our senior
4 fellows who are here. Would they please stand: liaison
5 members and senior fellow, just so everyone knows who
6 they are.

7 MR. MASON: Malcolm Mason.

8 MR. VERKUIL: Okay. I'm going to get to Malcolm
9 Mason. And up in the back -- you may sit. Up in the
10 back is the most important of our senior fellows and
11 that's Malcolm Mason. Now, Malcolm Mason, of course, was
12 a senior fellow in the old Conference and Malcolm, it's
13 such a great pleasure to see you. Malcolm was born in
14 1910, the year when Haley's comet appeared in the solar
15 system. Malcolm got to see the comet a second time in
16 its 75th-year-cycle. That was in 1986. Malcolm, please
17 accept our gratitude for your incredible contributions
18 to this Conference virtually since its beginnings and
19 our congratulations on reaching your 100th year.

20 (Standing applause)

21 MR. VERKUIL: Thank you. In appointing the
22 Council in August, President Obama said ACUS was a,
23 quote, public-private partnership designed to make
24 government work better, unquote. That's a perfect
25 description of what we do and I have posted those words

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2 at our new offices, which I hope you will visit.

3 Earlier this week the President sent the Conference a

4 message which reads, "I send greetings to those

5 attending the 53rd Plenary Session of the

6 Administrative Conference of the United States. My

7 administration is committed to providing the American

8 people with an accountable and transparent government.

9 ACUS facilitates important dialogues that support this

10 endeavor offering nonpartisan practical recommendations

11 for improving federal agency procedures and operations.

12 These efforts enhance the efficiency and openness of

13 our government and ensure we successfully tackle the

14 great challenges before our nation. As you come

15 together on this occasion I wish you all the best for

16 continued success, Barack Obama."

17 Well, we are a remarkable public-private

18 gathering, where important agency officials, both

19 political and career, come together with leaders of

20 the Bar, the Academy, the public interest and

21 business communities to make government work better.

22 What a challenge; but also what a privilege.

23 As one who was a member of this

24 organization in its 1.0 -- and now presides over its

25 2.0 revival, I am deeply grateful for the

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2 opportunity President Obama and the Senate have
3 bestowed upon me. It is well to remember that our
4 mission to make government process work better, as
5 Justice Scalia indicated. Just as we leave our
6 politics at the door when we enter, we leave our
7 substantive commitments at the door as well. It is
8 procedure, a word that perhaps only lawyers can
9 truly love, that motivates and inspires us.

10 The benefits of bipartisanship are most
11 likely to be realized when we agree about how best
12 to implement a given government program through good
13 processes and management applications. In his book
14 Justice is Conflict, the philosopher Stuart
15 Hampshire made this point by arguing, quote,
16 fairness in procedure is an invariable value, a
17 constant in human nature, unquote. He contrasted
18 procedural justice with substantive justice where
19 moral conflicts are inevitable.

20 So there's plenty of work to do on the
21 procedural side of the much-attenuated
22 substance-procedure divide. ACUS 2.0 has another
23 meaning. We are in a way like Rip Van Winkle,
24 having been asleep for fifteen years and reawakening
25 in a dramatically different world. When we ask what

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2 has most changed from that time, it is of course the
3 Internet. We barely had e-mail when we were put to
4 sleep. Now we face the world of web-based
5 technology. Our newly created website is designed
6 to capture that world, as Kathy Kyle will show
7 later. But beyond that, our decisions, our
8 commitment to new media transparency and
9 collaboration led us to create a new committee
10 chaired by Jody Freeman, called Collaborative
11 Governance, which will look at how ADR, RegNeg and
12 audited self-regulation, among other things, can
13 make better regulation. So it should be no
14 surprise that this meeting and all Committee meetings
15 are being streamed live. I hereby welcome all the
16 Tweeters in the audience and I welcome all of you to
17 our new reality. Who would have "thunk" it,
18 Malcolm, fifty years ago, huh? It's quite an
19 experience.

20 We are grateful to each you for sharing
21 your time and talents with us. If you were to bill
22 us at the hourly rates that lawyers of your caliber
23 and experience charge these days, we couldn't
24 possibly afford it. By any reasonable rate the
25 value to the American people of your preparing for

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2 and attending the conference's semiannual, Plenary
3 Sessions, along with time spent on Conference
4 Committee work constitutes more than half the annual
5 budget of the entire Conference.

6 The other half, and much more beyond of
7 course, is recovered through the efficiency
8 dimensions of the recommendations you will approve
9 in these Plenary Sessions. One of our public
10 members, Carl Malamud -- I hope Carl is here --
11 Carl, good. I just want to recognize Carl. Carl
12 Malamud has recently done the Conference a
13 particular service that deserves to be highlighted.
14 Carl, if you will stand. I just want to say, Carl
15 has graciously digitized some of the central
16 documents from the conference's founding and the
17 work it did during at its 1.0 existence.

18 These documents will be available online
19 soon, will be useful a way that we couldn't have
20 imagined when they were initially created. So thank
21 you very much on behalf of the Conference. In
22 closing, I would like our dedicated and talented
23 staff to stand and be recognized.

24 (Applause)

25 MR. VERKUIL: Staff, I appreciate it. I won't

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2 take the time to introduce everyone but they are
3 fifteen strong. We are now fifteen strong now, and
4 it's a real achievement. Only eight months ago we were
5 one -- wow. I was there having been confirmed in March
6 with no one but myself to talk to, no place to go and
7 only a few friends. Preeta and Michael, I must say, on
8 the Council were certainly among them who helped set me
9 up.

10 There is a phrase when you start an
11 agency. It's called, in GSA-speak it's called stand
12 up an agency. So I had to stand up an agency. It
13 took five months to find space and begin to hire
14 staff. For much of that time I had only one helper,
15 David Pritzker, who, David's here of course for our
16 staff. He was a ACUS veteran detailed from GSA.

17 In July, the Council was appointed by the
18 President and we moved to our new offices. Then we
19 had to create the membership -- that is to say you
20 -- and that in itself was a wonderful assignment but
21 time-consuming. And we had to prepare at least one
22 recommendation, which we'll deal with next.

23 Thus, to have a Plenary Session within our
24 first year back having not been in existence at all
25 for the last fifteen years is quite an achievement

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2 and that is why I am so proud of my staff. Thank
3 you.

4 So, now we have some official business on
5 the agenda. It requires discussion of both. Before
6 we turn to the business let me go over the basic
7 ground rules for debating and voting on matters of
8 the Conference. The privilege of debate extends to
9 all members of the Conference including the Council,
10 the government members, the public members, the
11 senior fellows, liaison representatives and special
12 councils.

13 The voting members of the Conference
14 include the Council, the government members, the
15 public members. When any matter comes to a vote
16 only those members may vote. Senior fellows,
17 liaison representatives and special councils have
18 the privilege of debate but may not vote. In
19 addition in the course of debate only voting members
20 may make or second a motion. So if a nonvoting
21 member has an idea for an amendment on appending an
22 item that person may suggest that the amendment be
23 made but a voting member would then have to make it
24 as a motion. Please use the designated microphones
25 to speak, as Mike McCarthy indicated. It will be

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2 helpful if you could all begin any remarks by
3 stating your name and member status.

4 Finally, let me address the issues of
5 alternates. By the term alternate I mean anyone who
6 is attending today on behalf of a member of the
7 Conference who is unable to attend personally. The
8 bylaws of the Conference do not permit the
9 participation of alternates in the Plenary Session.

10 Alternates may not vote and do not have
11 the privilege of debate but we want to be cordial in
12 welcoming so anyone present today as an alternate
13 that wants to speak can do so with the unanimous
14 consent of the Assembly, which I suspect will be
15 generously granted. Similarly members of the
16 general public are welcome to attend and observe the
17 proceedings and we welcome you for that purpose but
18 you can engage in debate or vote without unanimous
19 consent if there's time after all work is done.

20 Resolution concerning the order of
21 business, our next item, adoption of the resolution
22 governing the order of business, and adoption of the
23 bylaws. A copy of the resolution is in your
24 packets. Text of the resolution reflects the
25 general procedures used by the Conference and

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2 similar to the language used in earlier years. I
3 should note for the record that no amendments or
4 substitutes were submitted in writing to the general
5 Council before the meeting. I will now entertain a
6 motion to adopt the resolution.

7 PARTICIPANTS: So moved.

8 MR. VERKUIL: So moved. Second?

9 PARTICIPANTS: Second.

10 MR. VERKUIL: It is moved and seconded that the
11 resolution governing the order of business be adopted.
12 Is there any debate or discussion?

13 (No affirmative response.)

14 MR. VERKUIL: All in favor signify by saying
15 "aye".

16 PARTICIPANTS: Aye.

17 MR. VERKUIL: All opposed? The ayes have it. The
18 motion is adopted. Next in order we will consider
19 adoption of the bylaws, copies of which were provided
20 in your packets. The bylaws were circulated in
21 advance; however, this week we identified one more
22 technical correction that is included in your packets,
23 specifically financial disclosure for senior fellows,
24 liaison members and special councils is now handled in
25 Section 3.25(c) but there is a reference to those

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2 categories in 3.25(a)2 that should have been deleted
3 and it is deleted in the latest version. Thank you.
4 That's courtesy of our general counsel, Shawne
5 McGibbon. I will now entertain a motion to adopt the
6 bylaws. Do I hear a motion?

7 PARTICIPANT: So moved.

8 MR. VERKUIL: So moved. Second?

9 PARTICIPANTS: Second. It is moved and seconded
10 that the bylaws be adopted. Is there any debate or
11 discussion? All in favor signify by saying aye.

12 PARTICIPANTS: Aye.

13 MR. VERKUIL: Opposed nay. The ayes have it. The
14 motion is adopted. So now we have another small
15 technical item, which is to divide the public members,
16 the forty public members of the Conference into two
17 classes. These are the people who bring us the private
18 sector perspectives and experience and some of them of
19 course are distinguished government, former government
20 employees, that make the Conference a public-private
21 partnership, well equipped to ensure that private
22 rights are fully protected, which is in our statute.

23 Under the Administrative Conference Act
24 public members serve a two-year term; however, under
25 our bylaws, which you just approved, the initial set

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2 of public members must be randomly divided into two
3 classes so that their terms can be staggered. Thus
4 half of the public members will be randomly selected
5 to serve an initial one-year term and the other half
6 will serve an initial two-year term.

7 In both cases of course with the potential
8 for reappointment, in fact the one-year term folk
9 can conceivably serve seven years rather than six.
10 This division will have no effect on the government
11 members, on the senior fellows, liaison
12 representatives or the special counsel.

13 Now, here is the quandary. By deciding
14 how to divide the public members I turned to our
15 research and policy director, Jon Siegel, who being
16 a good academic thought of the constitutionally
17 mandated division of the United States Senators into
18 three classes that also serve staggered terms. We
19 decided to model ourselves on this historic
20 division, which occurred during the meeting of the
21 first session of the first Senate of the United
22 States. It was Friday, May 15th, 1789. There were
23 at the time twenty Senators had reported for
24 service. They been divided on the previous day into
25 three classes, two classes of seven and one class of

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2 six.

3 It was agreed that three papers of equal
4 size, numbered one, two and three, would be rolled
5 up and placed in a box and that one representative
6 from each class would draw a paper from the box and
7 that the classes would then be assigned based on the
8 papers drawn by the class representatives. So we're
9 going to do the same thing that the Senate did in
10 1789. In your member package you will find two
11 lists of public members which were created
12 alphabetically. Jon has two pieces of paper of
13 equal size -- Jon, would you show these? -- numbered
14 not surprisingly one and two, which you can see he
15 is now rolling up and placing in a box. No sleight
16 of hand.

17 We now ask one representative from each
18 member class to come forward and draw a paper from
19 the box on behalf of his or her class. The class
20 whose representative draws the number one will serve
21 a one-year term and the class whose representative
22 draws number two will of course get the two-year
23 term. And again going alphabetically I would like
24 to call the first name, Fred Alvarez. Is Fred here?

25 MR. ALVAREZ: Yes, he is.

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2 MR. VERKUIL: Fred, come forward, to be
3 representative of Class A and hopefully Jodie Bernstein
4 will be here. Is Jodie here?

5 MS. BERNSTEIN: Yes, I am.

6 MR. VERKUIL: Oh, wonderful, to be representative
7 of Class B. Okay. Jon, you want to --

8 MR. ALVAREZ: Number two.

9 MR. VERKUIL: Oh, the Alvarez class gets, I guess
10 inevitably the two-year term. All right, Jodie. It's
11 okay. We still love you. And thanks very much, both
12 of you. So now we know that those of you who fall
13 under the Bernstein class are initially on one-year
14 terms and those on the Alvarez class get the two-year
15 terms and of course there are three full terms
16 renewable possibly. Thank you very much.

17 (Applause)

18 MR. VERKUIL: Now of course after this session we
19 also have in your packet Committee choices. All
20 members will serve on Committees. That's for members
21 and liaisons and senior fellows, public and private
22 members, in your packets so you can fill out a
23 Committee preference form and then we'll assign
24 Committees after the meeting.

25 So now we actually will go to the business

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2 of substance and the next item of business is the
3 proposed Conference recommendation on agency
4 procedures for considering preemption of state law.
5 This recommendation comes to us from the
6 Conference's Committee on Regulation and to
7 introduce the recommendation I call on Jon Siegel,
8 who will in turn introduce our consultant and
9 Committee Chair. Could Catherine Sharkey and
10 Russell Frisby come forward?

11 MR. SIEGEL: Thank you, Paul. We're very pleased
12 to have a recommendation to bring before you at this
13 first Plenary Session of the revived Administrative
14 Conference. Many people worked very hard to bring this
15 recommendation to you. And I would like to thank all
16 the people who worked on the Committee or with the
17 Committee that produced this regulation, and I would
18 particularly like to mention Professor Catherine
19 Sharkey of NYU Law School who tirelessly served as our
20 consultant on this project, Russell Frisby, our very
21 energetic Committee Chair and Emily Schleicher,
22 attorney advisor with the Conference staff, who all
23 worked very hard on this recommendation.

24 The recommendation is about the procedures
25 that federal agencies should follow as they consider

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2 regulations that might have the effect of preempting
3 state law. I'm going to let Cathy and Russell
4 describe the substance of the recommendation in some
5 detail. I would just like to say first a few words
6 about the process by which this recommendation came
7 about. I thought this might be useful since this is
8 our first recommendation in the new Conference so
9 you might be wondering who drafted it. The process
10 was explained, I will just mention in the guide for
11 members that we circulated to you last week but I'm
12 sure not everyone has had a chance to read it so
13 here's how it all works.

14 Once we identify a topic for study such as
15 agency preemption, the first step is to do research.
16 Frequently as in this case we hire a consultant, in
17 this case Professor Sharkey to do research for us
18 and write us a report. And Professor Sharkey's
19 research, you should understand, was not just an
20 academic study. She went out into the field. She
21 did interviews with officials from a variety of
22 government agencies and tried to empirically
23 discover for us what were the issues that require
24 attention.

25 Professor Sharkey put the results of her

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2 research into a report. The report is then
3 delivered to an Administrative Conference Committee,
4 which is to say a Committee made up of members of
5 the Administrative Conference. In this case the
6 report went to our Committee on Regulation, which we
7 formed in September, which has thirteen members, so
8 thirteen of you, thirteen members of the
9 Administrative Conference. The Committee is charged
10 with formulating a proposed Conference
11 recommendation.

12 Now, the Committee started, as would often
13 be true, with a draft recommendation prepared by
14 Conference staff, Emily Schleicher, on the basis of
15 the consultant's report but the Committee is not
16 bound to accept the report or the draft
17 recommendation. It is free to formulate the
18 recommendation however it wants. And in fact, our
19 Committee adopted some suggestions from Professor
20 Sharkey's report; it changed others and it came up
21 with some of its own and the result is the proposed
22 recommendation that you have before you.

23 The Committee's recommendation then goes
24 to the Council of the Administrative Conference,
25 which was introduced earlier. The Council is a

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2 group of ten members specially designated by the
3 President as the Council and in effect they are the
4 board of directors of the Conference. So under our
5 governing statute their role is to receive the
6 recommendation and then send it on to the membership
7 and they are permitted to add their own views.

8 So in this case I can report that the
9 Council voted to send the recommendation to the
10 membership, quote, with the approval of the Council.
11 Looking back at the prior history of the Conference,
12 that was a common phrase that the Council frequently
13 used to exercise its authority to add its own views
14 as it did here. And I can also report that the
15 Council's action in this regard was unanimous. So
16 between the Committee and the Council about a
17 quarter of the full membership has been involved in
18 bringing this recommendation to you.

19 In addition the Council asks that we
20 informally provide the recommendation to some
21 selected executive agencies prior to the Plenary
22 Session. So we chose a few agencies, trying to
23 choose those that would have a substantial
24 involvement with preemption and we informally asked
25 them if they had any concerns prior to the meeting.

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2 And we got back some expressions of support. We
3 received no expressions of opposition. Just in the
4 last day or two we have received some of questions
5 about various aspects of the recommendation from
6 agencies, and of course that's what today's debate
7 and discussion is to resolve. So we look forward to
8 that discussion.

9 So that is the process by which the
10 recommendation was crafted. And I hope this
11 explanation has clarified one point that has arisen
12 a couple of times as the recommendation has
13 progressed, which is, what is the relationship
14 between the consultant's report and the Committee's
15 recommendation? The most important thing to
16 understand is that what is before you today is the
17 Committee's recommendation. Professor Sharkey's
18 report was prepared at the request of the
19 Conference, for the use of the Conference, and we
20 think it's quite useful and that's why we want you
21 to hear about it from Professor Sharkey but the
22 Conference has not asked to adopt or approve the
23 consultant's report.

24 What you will debate and what you will be
25 asked to vote on is the Committee's recommendation.

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2 And to the extent that the two are different, as to
3 some extent they are, it's because, as I have
4 explained, it is the Committee that is charged with
5 crafting the recommendation and the Committee is
6 free to agree or disagree with anything in the
7 report. So, with that as background I will now ask
8 Professor Sharkey to give a short presentation about
9 her research and her report.

10 PROFESSOR SHARKEY: Thank you, Jon. It was an
11 honor to be asked to serve as an academic consultant on
12 this project. And I wanted to begin with a little bit
13 of background as I started out the research for this
14 project. So federal agencies, as you are all aware,
15 have an increasingly important role to play in
16 statutory interpretation and in preemption
17 determinations.

18 In May 2009, President Obama issued a
19 Presidential Memorandum on preemption in which he
20 articulated the administration's policy that full
21 consideration of the legal prerogatives of states
22 should be given and the sufficient legal basis for
23 any kind of preemptive rulemaking. In that
24 memorandum he also asked that agencies do a ten-year
25 retrospective looking at preemptive rulemaking to

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2 see whether those prior rules and regulations
3 satisfy these requirements. The Presidential
4 Memorandum also adverts to Executive Order 13132,
5 which is the Federalism Executive Order. President
6 Clinton passed this in 1999. It's an amended
7 version of President Reagan's 1987 executive order,
8 12612.

9 And this Federalism Executive Order
10 contains some specific procedures for any regulation
11 with federalism implications and that preempts state
12 law. And the two that I'll emphasize here that they
13 emphasize consultation with state and local
14 government elected officials and also the
15 preparation of federalism impact statements. This
16 federalism Executive Order 13132 applies to all
17 executive branch agencies and urges independent
18 regulatory agencies to follow it although they are
19 not bound. There's some dissatisfaction with
20 agencies' compliance with this executive order.

21 So, very briefly, to give you some
22 examples, in 1999 GAO published a report that looked
23 at 11,000 rules over a two and a half year period
24 and found that in only five of those did they
25 include a federalism impact statement. Of course

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2 the relevant denominator is somewhat unclear but
3 five out of 11,000 looks at GAO like it wasn't being
4 adequately enforced. Various scholars including
5 perhaps most prominently Professor Nina Mendelsohn,
6 who is here with us, have studied this as well and
7 her research provides some further empirical support
8 on this and also suggests that federalism impact
9 statements have been rare and of poor quality.

10 The ABA this past August, in August 2010,
11 adopted a recommendation urging the President to
12 improve agency compliance with Executive Order 13132
13 and the U.S. Supreme Court also has been
14 increasingly interested in these questions. In
15 *Wyeth versus Levine*, a 2009 case, the court
16 criticized the FDA's use of preemption by preamble
17 and not following the right procedural requirements
18 in terms of consultation with state and local
19 elected officials.

20 Most recently in the *Williamson versus*
21 *Mazda* case, which is pending before the U.S. Supreme
22 Court at oral argument, I thought it was
23 interesting, at least several of the Justices seemed
24 very interested in what kind of information could be
25 gleaned from the agencies. And Justice Breyer most

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2 prominently said, quote, it would make our job
3 simpler, referring to the fact that the agencies
4 were clear about the preemptive effect of their
5 particular regulations.

6 Against this backdrop I began my project.
7 And over the summer the first goal of my report was
8 to do a quasi-empirical assessment of agencies'
9 responses to the Presidential Memorandum. Starting
10 at first with looking at their compliance with doing
11 a ten-year retrospective review of preemptive
12 rulemaking, I identified six agencies, NHTSA, FDA,
13 OCC, CPSC, the Consumer Product Safety Commission,
14 FTC and EPA, and I interviewed very high-level
15 agency officials and all of those agencies about
16 preemptive rulemaking and procedures in connection
17 with the executive order on federalism.

18 In addition I conducted along with a
19 research assistant, who was phenomenal, an
20 independent review of all of those agencies'
21 rulemaking dockets during the relevant period and
22 also their intervention in litigation, putting
23 forward the agencies' views on preemption. I also
24 as part of this project, interviewed representatives
25 from six of the "Big Seven" organizations. They

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2 were all invited by six attended our roundtable
3 discussion.

4 The "Big Seven" are the national
5 organizations that represent state and elected
6 government officials and they are the organizations
7 that were singled out by OMB as the relevant
8 entities with whom this consultation should take
9 place. They include groups like the National
10 Governors Association and the National Center for
11 State Legislatures.

12 In addition, I tried to interview some
13 entities beyond just the "Big Seven" because there's
14 some interesting questions I thought about who is
15 the appropriate representative of state regulatory
16 interests. It's not altogether clear that the "Big
17 Seven" suffices in terms of representing the full
18 extent of state regulatory interests. So I
19 interviewed representatives of state court judges,
20 state attorneys general and various consumer and
21 business groups.

22 The second point of the report was to try
23 to develop some recommendations and the goals here
24 were to improve agency procedures for implementing
25 the preemption provisions of the executive order on

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2 federalism, to increase transparency about the
3 internal processes that agencies follow in
4 preemptive rulemaking and also to investigate
5 external enforcement mechanisms.

6 Russell is going to walk through the
7 precise recommendations of the Committee but these
8 dovetail with the areas that I identified in terms
9 of recommendations, the first being urging agencies
10 to have internal written guidance about their
11 procedures in preemptive rulemaking and also to make
12 these publicly available.

13 The second are a set of recommendations
14 along the lines of improving consultation with the
15 relevant groups that represent state interests and
16 in addition to coming up with some ideas about
17 urging consultation earlier in the rulemaking
18 process and increasing the relationships with the
19 "Big Seven," I also suggested a kind of attorney
20 general notification procedure which I did on the
21 theory that the state attorney generals might be
22 able to reach out and identify additional
23 state-based organizations and they themselves might
24 have an interest in these areas.

25 I was also motivated by the fact that my

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2 research uncovered that in consultation there was
3 really a kind of two-way street, namely there were
4 various state organizations that complained that
5 they didn't receive adequate notification but there
6 were also numerous instances when the agencies had
7 reached out and received nothing in response.

8 So the idea was to possibly add an
9 additional entity into the notification procedure.
10 And state AGs have also been increasingly involved,
11 as I detail in the report, with various of the
12 agencies that I studied, including the OCC and
13 Consumer Products Safety Commission.

14 Next, there are some recommendations about
15 an internal oversight procedure within the agency
16 whereby the agency would be evaluating the basis for
17 its assertions of preemption and also providing a
18 kind of reasoned basis and appropriate evidence for
19 their conclusions on preemption. And then finally
20 there are some suggestions directed towards OIRA,
21 the Office of Information and Regulatory Affairs
22 within OMB designed to encourage a more thorough
23 review of preemption in the regulatory review
24 process. So with that, I will hand things over to
25 Russell to go through the recommendations in more

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2 detail. Thank you.

3 (Applause)

4 MR. FRISBY:: Thank you, Professor Sharkey. As you
5 mentioned, my name is Russell Frisby. I'm serving
6 as Chair of the Committee on Regulation. Before I
7 go into the particulars of the recommendation I
8 would like to thank Professor Sharkey, the Chairman
9 and staff of ACUS as well as the Committee on
10 Regulation, all of whom have moved very quickly over
11 a short period of time to develop the very
12 substantive set of recommendations and reports.

13 Probably most, if not all of us, have had
14 experience with preemption issues over the years and
15 know that questions pertaining to preemption are
16 both important and significant. This recommendation
17 does not go into the more general questions of
18 preemption.

19 Instead this recommendation has several
20 goals: First, to improve agency procedures for
21 implementing the preemption provisions of Executive
22 Order 13132, as Professor Sharkey discussed; second,
23 to increase transparency regarding internal agency
24 policies and external enforcement mechanisms
25 designed to ensure compliance with those provisions

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2 of the executive order, and finally, to facilitate
3 federal agency consultation with state
4 representatives. It is not the goal of the
5 recommendation to either favor or disfavor
6 preemption but to improve agency procedures in
7 potentially preemptive rulemakings.

8 Finally, in drafting there recommendation
9 the Committee was very aware of the concern that we
10 not contribute to the ossification of the regulatory
11 process and we have attempted to provide agencies
12 with sufficient flexibility but also with the
13 principles they need and really some suggested best
14 practices. With regard to the actual
15 recommendation, this recommendation is essentially
16 divided into three subparts with a reiteration of
17 previous ACUS recommendations.

18 If you turn to the recommendation starting
19 at page five, paragraph one of the recommendation
20 really stands alone. In this paragraph, the
21 Conference would reiterate its previous
22 recommendation that Congress should address
23 foreseeable preemption issues clearly and explicitly
24 when it enacts a statute affecting regulation or
25 deregulation of an area of conduct. As I said, this

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2 is referenced to a previous ACUS recommendation and
3 unfortunately like death and taxes, lack of clarity
4 in Congressional legislation will always be with us.

5 Now, with regard to the remainder of the
6 recommendation, as I said, it can be divided into
7 three subparts. The first part, which is found in
8 paragraphs two through four under the section
9 entitled internal procedures for compliance with the
10 preemption provisions of executive order 1312 seek
11 to address the need for agencies to have internal
12 guidelines for compliance coupled with transparency
13 and internal oversight procedure.

14 The recommendations in the section are
15 really threefold, first, adding that those agencies
16 that engage in rulemaking procedures that might have
17 preemptive effect should have internal written
18 guidance to ensure compliance with the executive
19 order. The guidance should describe things such as
20 how the agency determines the need for any
21 preemption, how the agency consults with states and
22 local governments and how the agency otherwise
23 ensures compliance with the preemption provisions.

24 Additionally, these paragraphs propose an
25 agency should post their internal guidance either on

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2 the Internet or make it publicly available,
3 furthermore, that it suggests that agencies should
4 have an oversight procedure and this procedure
5 should include an internal evaluation process as
6 well as provide for, that the agency provide a
7 reasoned basis that supports its preemption
8 conclusion one way or another.

9 The next set of recommendations are found
10 in the section entitled updated policies to ensure
11 timely consultation with state and local interests
12 concerning preemption. These recommendations found
13 in paragraphs five through seven seek to encourage
14 meaningful agency contact with and participation by
15 state and local officials and the organizations
16 which represent them.

17 Again, these recommendations are really
18 threefold. First, that the agency should have a
19 consultation process which includes elements such as
20 an updated state contact list, regularized personal
21 contact, public disclosure of meetings with state
22 officials as well as some sort of outreach process
23 to state officials and organizations.

24 Second, it suggests that agencies should
25 establish contact with organizations and regulatory

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2 bodies that have both the substantive expertise as
3 well as jurisdiction. And finally, it promotes that
4 there should -- which is somewhat new, that there
5 should be process of notifying state attorneys
6 general when an agency is considering a rule with
7 preemptive effect.

8 The final section of the recommendation is
9 found in paragraphs eight through ten, and entitled
10 actions by OIRA and OMB to improve the process.

11 These recommendations are almost self-explanatory.

12 The recommendations, we would recommend that OIRA
13 and OMB should request agencies to post on their
14 open government websites a summary of the agencies'
15 response to the requirement that they conduct a
16 ten-year retrospective review. As the Professor
17 noted, we felt that that was fairly lacking.

18 Second, that OIRA and OMB should update its
19 federalism guidelines with respect to preemption and
20 finally that OIRA should include Executive Order
21 13132 in Circular A-4 on regulatory analysis. So
22 that concludes really my summary of the
23 recommendations and we are available for
24 discussions. Mr. Chairman?

25 MR. VERKUIL: Let me -- thank you, Russell.

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2 (Applause)

3 MR. VERKUIL: So since -- I got the gavel. We're
4 now, we're going to throw it open. Let me just remind
5 you we budgeted until 4:30 for discussion. We don't
6 have to use all the time. If we need more time we'll
7 have to figure out a way to do that but a little before
8 4:30 if we're still talking I'll see where we stand and
9 whether we can reach a vote or not. So that's one
10 thing.

11 Secondly, we do have a court reporter
12 here, I should say, right over there, who is
13 recording everything so when you stand up to speak,
14 make sure you identify yourselves so you can be
15 included in the record of the proceedings. Now, the
16 floor is open for comments. And, by the way, as I
17 mentioned earlier, members, senior fellows, liaison
18 members are the ones who are entitled to speak. Oh,
19 Malcolm, is that you?

20 MR. MASON: Thank you. I am Malcolm Mason, a
21 senior fellow. I do not have a vote. If I did have a
22 vote, I would vote in favor of the recommendation. I
23 would like to make, however, to make two comments. One
24 is that there is some action which may be considered
25 preemption or can be argued not to be considered

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2 preemption. But the purpose is the same as preemption
3 and the effect when successful is preemption and that
4 is when a federal grant is made with attached
5 conditions which compels the state if it wants to grant
6 to change these rules.

7 I suggest that it may be -- an example of
8 that by the way is South Dakota against Dole,
9 decided in June of 1986, and I wrote about it rather
10 extensively in the fall of 1986 or '7, I guess, in
11 my newsletter, where the Congress wanted to keep
12 teenagers off the roads under the influence of
13 alcohol and therefore provided that some of the
14 money for federal road-building would be withheld
15 from states that allowed teenagers to drive. South
16 Dakota wanted to let them drive. I believe that the
17 Supreme Court correct correctly held they shouldn't
18 be allowed to if the state wanted to receive the
19 money for the road-building.

20 I think that if the resolution is adopted,
21 as I trust it will be, the Conference might consider
22 after that whether it is appropriate, as I think is,
23 to include that form of what I think amounts to
24 preemption. Thank you.

25 MR. VERKUIL: Very good. Thank you for those

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2 comments.

3 MR. MASON: All right. My second point is that
4 I'm not sure that consultation with the state attorney
5 general is the most appropriate way of consulting the
6 people with the greatest interest in a proposed
7 preemption in those cases where what is being affected
8 by the preemption is state common law. The attorney
9 general will typically not have any direct interest in
10 the questions involved.

11 The people who will have the most direct
12 interests are the plaintiff and defendant in the
13 tort cases, for example, that would be affected. I
14 therefore suggest that some consideration should be
15 given after the resolution is adopted to an
16 alternative or additional consultation. I believe
17 there are three national, nationwide Bar
18 Associations: the Federal Bar Association, the
19 American Bar Association, the National Bar
20 Association and it might be well to provide for
21 consultation of those Bar Associations. Thank you.

22 MR. VERKUIL: Thank you very much, Malcolm. We
23 will certainly take that, those wise words as part of
24 the process. Let me just ask, I have to first ask
25 Russell to move the --

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2 MR. FRISBY:: Yes.

3 MR. VERKUIL: -- recommendation, which I should
4 have done and if you will, on behalf of the Committee,
5 if you will move the recommendation, then we can
6 continue with our discussion.

7 MR. FRISBY:: Mr. Chairman, on behalf of the
8 Committee I would move recommendation 2010-1, agency
9 procedures for considering preemption of state law.

10 MR. VERKUIL: And since it comes from a Committee
11 it does not require a second. So we are now open for
12 discussion, cannot vote yet but for discussion.

13 MR. FRISBY:: While we're waiting for our next
14 question, Mr. Chairman, I would point out, I would
15 agree with the prior comments that there are various
16 state entities that should be consulted and the
17 Committee was aware of the fact that it would be
18 impossible to prescribe a fixed list of entities
19 that would protect the state interest.

20 And if you look at the, if you look at
21 paragraph 5A through D you see a variety of at least
22 state organizations, state entities, et cetera, who
23 may or may not be consulted and we really left again
24 to avoid ossification. That was one of the things
25 we would leave up to at least in the first instance

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2 to the agencies.

3 MR. BURNS: Okay. Steve Burns. I'm from the
4 Nuclear Regulatory Commission. I have one clarifying
5 question. I didn't do my homework before I came. Is
6 the executive order applicable to independent
7 regulatory agencies? I believe it is not.

8 MR. FRISBY:: No, the executive order is not
9 applicable. What the report does say is that the
10 recommendation is aimed at both executive branch and
11 independent agencies that engage in preemptive
12 rulemakings with the recognition that the executive
13 directives, that is, executive order, bind the
14 former but not the latter and we do, however, urge
15 voluntary compliance by the latter.

16 MR. BURNS: My question goes, this, is, for
17 example, it may be relatively unique although I think
18 some other agency would have this. And I appreciate in
19 the recommendation how it addresses that it would be
20 nice if the Congress address the preemptive nature of
21 legislation, where we know it's not always going to
22 happen. But, for example, I have a regulatory scheme
23 which it's unquestionable that it is a federally
24 preempted scheme.

25 Simple example, no state agency can

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2 regulate the safety aspects of the nuclear power
3 plant. So from my standpoint while there may be for
4 other schemes where the federal government is
5 inserting itself, where it is fairly -- not fairly
6 clear, it is utterly clear in the circumstance that
7 the agency has that basically occupying a preemptive
8 authority, there's really no net benefit for that.

9 There are other aspects of our program
10 where we have delegated programs and where we have
11 relationships with the states and we have what we
12 call agreements that are viewed for compatibility
13 and we engage in, the behaviors I think are
14 encouraging which I think are good, are things we do
15 in that circumstance. But for example, and I'm not
16 sure how to articulate it, but there are areas where
17 it is fairly clear that the state could not intrude
18 on the federal government's regulatory scheme.

19 Thank you.

20 MR. FRISBY:: Well, Professor Sharkey, that goes, we
21 really discussed it with regard to express versus
22 implied preemption and we recognize that there would
23 be some situations like yours where there's clearly
24 expressed preemption but Professor, did you have any
25 thoughts on that?

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2 PROFESSOR SHARKEY: Only that we didn't draw on
3 any emphatic distinction between the doctrinal
4 categories of express and implied preemption because in
5 numerous of the express preemption cases there is a lot
6 of argument over the scope of preemption and likewise
7 agencies' views on that matter have been looked to by
8 courts.

9 MR. FRISBY:: Also just one other comment, I wanted
10 to recall, with particular concern to your agency,
11 we also thought that there were situations which
12 while there was express, maybe expressed preemption
13 you do have some state interest involved. For
14 instance, I know in Maryland we have a nuclear plant
15 and our state commission meets regularly before the
16 various federal agencies but even in the express
17 preemption situation there may be some need for at
18 least collaboration. So we were fairly flexible in
19 that situation.

20 MR. VERKUIL: Further questions? Yes.

21 MS. SCHIFFER: I'm Lois Schiffer from the National
22 Oceanographic and Atmospheric Administration. And I
23 think that looking to the "Big Seven" and I would
24 particularly compliment looking to the state attorneys
25 general who I think are thoughtful about these issues,

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2 is important but I also think it's important to look at
3 citizens groups and to identify the fact that if
4 preemption is an issue in the rulemaking that there are
5 members of the public and in particular, environmental
6 groups or consumer groups who may well have a view
7 about the appropriateness of preemption.

8 And I have some concern that the listing
9 looks to the state to speak but doesn't really, it
10 doesn't broaden it to members of what I would call
11 the organized public. And so I would suggest
12 consideration of adding a little "e" under 5 as a
13 recommendation to make clear that it is the agencies
14 who are developing a rule or regulation that may
15 affect, that may have a preemptive effect or not,
16 that there's a specific effort to reach out to
17 appropriate citizens groups with that question.

18 MR. VERKUIL: Okay. Let's get a few more. Yes.

19 MR. FREDERICK: Hi. My name is David Frederick
20 and I'm a public member with the law firm Kellogg
21 Huber. I have had the privilege to argue a number of
22 preemption cases in the Courts of Appeals and the
23 Supreme Court so I have a lot to say on the subject and
24 I'll try to confine it just to a couple of points that
25 seem to me to have arisen out of some of these cases

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2 that may be points for consideration as we continue to
3 debate these measures.

4 One is that preemption I don't think
5 originally started as the policy objective that it
6 has become in recent debate. In more recent years
7 preemption has become both a sword and a shield to
8 represent certain policy perspectives and objectives
9 and there's a certain amount in which the
10 recommendation, I think, takes -- I don't mean to be
11 pejorative here but kind of an antiseptic view of
12 how preemption actually plays out in the real world,
13 where litigation happens and people's rights and
14 remedies are affected.

15 And it seems to me that as part of this
16 consultative process the key point is the very first
17 thing that was referenced, which is that Congress's
18 objectives in the statute that the agency
19 administers are absolutely key in terms of
20 understanding whether Congress intended for the
21 agency to take preemptive action and where, you
22 know, the preemption battle has been fought out in
23 recent years has been over debating what Congress
24 meant where agencies have shifted back and forth.
25 And, you know, to the extent that that consultative

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2 process takes a very rigorous view of statutory
3 analysis it seems to me that that's the place where
4 the debate ought to start and have a very robust
5 discussion and whatever agency guidance is provided
6 to the public.

7 The second thing is there's a difference
8 between anticipating conflict with state laws in
9 which I think this concept of consultation has a
10 real meaningful and robust flavor and where conflict
11 with state law may not be so anticipated. And court
12 cases in recent decades have really had more of a
13 flavor of the latter I think than the former because
14 generally federal agencies have done a pretty decent
15 job of consulting with states where there has been
16 anticipated conflict with known or existing state
17 programs.

18 Where the difficulty lies is in the
19 situation that a state comes along, for instance,
20 after the Exxon Valdez spill and State of Washington
21 decides the federals do not have a robust enough oil
22 pollution prevention program and so they want to
23 enact their own positive law enactments that go
24 above and beyond oil tanker regulations promulgated
25 by the Coast Guard. And a conflict arises in that

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2 situation where the statutes were enacted well
3 before the Exxon Valdez spill and the Coast Guard
4 had issued its regulation.

5 So you have I think kind of a difference
6 between anticipatory preemption and anticipatory
7 conflict and then something that I'm not sure I see
8 in the recommendation, which is it what does the
9 agency do when a conflict starts to emerge and to
10 arise. And I'll give an example here in the telecom
11 area where there has been much debate among states
12 and localities over enhancing regulations for cell
13 phone radiofrequency emissions and the FCC had
14 promulgated regulations back in the 1990s as cell
15 phone technology was first emerging, the Third
16 Circuit recently held those to be preemptive but now
17 there are various states and localities that are
18 trying to alter the regime.

19 So I think that as part of the
20 recommendation process it seems to me that there
21 ought to be some distinction between those areas
22 where you can readily foresee conflict and some
23 process where the agency has to engage in some
24 action where emerging conflicts arise.

25 And then the last point I want to make --

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2 and I appreciate your patience listening to me -- is
3 that I think there's a fundamental difference for
4 preemption between positive state law enactments and
5 common law cases and the role of the different
6 players involved in analyzing what the preempting
7 consequences ought to be.

8 Where there are positive law enactments
9 you have a very clear set of state actors and they
10 may not necessarily be in the AGs office. They may
11 be the state environmental office, they may be a
12 state health and safety office, states insurance
13 office, whatever but you've got a clear set of
14 people to talk to about how the federal program is
15 going to rub up against the state program.

16 Where you're talking about private
17 remedies, many of which preexisted the founding of
18 the Republic, you've got a very different set of
19 objectives and concerns and I think that how federal
20 agencies deal with common law claims gives rise to a
21 very different set of issues with respect to
22 consultation and the role that the feds ought to
23 play displacing traditional state law remedies.

24 Thank you.

25 MR. VERKUIL: Okay.

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2 PROFESSOR SHARKEY: So I just wanted to comment on
3 two things, some of Mr. Frederick's remarks but also
4 earlier ones. So first on the state attorney generals;
5 just to tell you how I got to formulating the
6 notification there, I started from the premise that
7 preemption debates of the past including previous
8 recommendation of ACUS in 1984 that was focused on
9 preemption of state positive law had possibly changed
10 in a new environment where certainly since 1992
11 preemption of state common law tort in particular was
12 equally important.

13 And the idea that I began with was do the
14 "Big Seven" that are not something that I identified
15 but identified by OMB as the relevant entities with
16 whom to consult under the executive order,
17 federalism, do they suffice to cover the field of
18 those who represent the important states regulatory
19 interests for state interests in these common law
20 tort actions.

21 So in addition to talking with
22 representatives of the attorney generals I reached
23 out to representatives of state court judges, of
24 various consumer business groups. And it's actually
25 been difficult, as I'm sure you appreciate, to sort

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2 of think about which of those citizen-type groups or
3 business-type groups if any should be singled out.

4 The attorneys general, I kept coming back
5 to numerous different interviews with people before
6 I even went to speak with the National Association
7 of Attorneys General and what was interesting is in
8 my own research while it's true that the attorney
9 generals in their intervention and litigation had
10 focused historically on areas like banking
11 regulation, consumer protection and that in some of
12 the more recent preemption disputes involving state
13 common law.

14 So in Wyeth versus Levine of course they
15 filed amicus briefs in that case putting forward the
16 state's position. So it struck me as not, not out
17 of the blue to suggest that the attorney general
18 even if that office wouldn't be the perfect
19 representative might be in contact with other types
20 of entities. And then that sort of bore some fruit
21 when I went in and started interviewing various
22 agency officials.

23 For example, the general counsel of the
24 Consumer Product Safety Commission talked about a
25 new initiative where there were periodic phone calls

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2 with representatives from the AGs offices. I talked
3 to the executive director of NAAG, National
4 Association of Attorneys General, who thought this
5 was a very good idea and proposal.

6 I talked to various others who, the idea
7 is the state AGs may not be the perfect
8 representative but adding them into the mix in a
9 formal mechanism might actually get out to some of
10 these groups, including some groups that are more
11 representative of consumers' interests. So that was
12 the reasoning behind that.

13 On this, on the issue about how the focus
14 should just be on Congress's objectives and
15 statutes, my own normative view on that is that
16 there's nothing intentioned with urging Congress to
17 be more clear and urging some attention in that
18 sphere but likewise focusing on agency preemptive
19 rulemaking.

20 Because certainly as you are obviously
21 quite aware of cases, for example, the Geier case
22 and now Williamson pending in the U.S. Supreme Court
23 that are interpreting the Motor Vehicle Safety Act,
24 where there's an expressed preemption clause and a
25 savings clause and the U.S. Supreme Court has said

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2 while there can't be expressed preemption we
3 nonetheless are going to apply ordinary implied
4 conflict principles.

5 There's a lot of attention being given by
6 the court and other courts as well to the views that
7 are being us expressed by the agency. So it does
8 seem like an appropriate focus and I don't think
9 anything intentioned with people who would wish that
10 Congress instead would answer all of these various
11 questions.

12 I mean I think I certainly would be open
13 to suggestions about entities in addition to the
14 attorneys general who might better represent state
15 interests. I think the fear on the part of the
16 Committee was that you didn't want every single
17 organization listed there as a formal mechanism.

18 MR. FRISBY:: Just several comments. First of all, I
19 agree with the Professor but to some extent, this
20 wasn't an antiseptic view of preemption because we
21 did not, intentionally did not get into the more
22 substantive questions of preemption that an agency
23 has to come to grips with. That was not part of our
24 charge and that was an intentional decision.

25 You do raise an interesting question about

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2 what happens with an emerging conflict and we need
3 to think that through because I think the
4 assumption, folks who have the FCC experience which
5 is when that type of issue comes up it comes before
6 the agency as part of rulemaking process, then
7 eventually gets discussed.

8 But we didn't think about what the agency
9 should do if in the middle of its process it
10 discovers a new issue, almost, I guess we assumed
11 almost a second look but we didn't explicitly
12 discuss that. And there are a number of different
13 actors involved with regard to state issues and
14 there are different actors through different
15 agencies, in different states agencies in different
16 jurisdictions.

17 So again to avoid ossification and because
18 you recognize that you couldn't lock an agency into
19 a specific list because different agencies deal in
20 different areas, we made general recommendations
21 leaving up to agencies to figure out, the federal
22 agencies what state agencies they should be dealing
23 with.

24 MR. CHEN: Jim Ming Chen, Dean, University of
25 Louisville School of Law. Four points, I thought they

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2 were completely unrelated but the emphasis on judges
3 seems to connect always together. It strikes me that
4 we keep talking about state attorneys general and
5 various interest groups and there has been some mention
6 of the state legislatures but we are overlooking the
7 oldest and most obvious source of state common law and
8 the state, the chief justices of the states meet quite
9 regularly with the American Bar Association.

10 And I would say that that would probably
11 be the single best source in a case such as Wyeth or
12 Geier for issues regarding ordinary tort law, which,
13 by the way, happens to be a lot of the money
14 involved in many of these preemptive issues.

15 Speaking of judges, the debate over
16 especially paragraph one of the recommendation in a
17 way of thinking back about the first incarnation of
18 the Administrative Conference of the United States,
19 it seems about a generation ago there was a huge
20 amount of dissatisfaction, in particular by Senator
21 Bumpers, the Chevron doctrine and he proposed to
22 amend the positive law of the United States to
23 direct the federal courts to engage in de novo
24 interpretation of statutes notwithstanding the
25 administrative interpretation. Strikes me as

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2 exactly the same issue at a different level of
3 extraction, much more focused on a specific type of
4 statutory interpretation.

5 If this recommendation, in particular
6 paragraph one, were to take the form of actual
7 legislation, it's an interesting question whether it
8 should take hold in Title 1 of United States Code
9 alongside the Dictionary Act and there was a penal
10 colony case I believe in the 1992 term of the
11 Supreme Court talking about interpretation of the
12 Dictionary Act that would be analogous, or whether
13 it would be an amendment to the Administrative
14 Procedure Act. It's worth contemplating what
15 paragraph, what form paragraph one would take if we
16 were seriously to go about it.

17 Third point, it must be remembered that
18 all preemption questions are statutory
19 interpretation questions by their very nature and as
20 statutory interpretation questions I believe that
21 preemption questions are merely a subspecies of
22 statutory interpretation questions, raising the
23 classic Constitutional avoidance canon of Catholic
24 Bishop versus National Labor Relations Board or more
25 particularly in the case of extremely strong

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2 constitutional avoidance canons with specific
3 reference to the question of federalism in the Tenth
4 Amendment, Gregory versus Ashcroft, and one of
5 Justice Scalia's cases, the -- and I'm drawing a
6 blank but it has to do with the Bankruptcy Act and
7 its preemption of state law. Oh, it was BFP, thank
8 you, so it was the BFP case from the early 1990s,
9 following up on the Gregory versus Ashcroft case.

10 My point on this is that it is practically
11 speaking impossible just as Chevron is impossible to
12 decipher, which is which approach would be more
13 faithful to Congressional prerogatives to make a
14 law, whether you are better off avoiding
15 constitutional conflicts which preemption by
16 definition always brings up because it is a
17 displacement of state prerogatives over lawmaking.

18 But at the same time, to avoid the
19 constitutional question is quite often to fail to
20 give effect to the plain meaning of a statute and it
21 always engages in what I would consider incipient
22 constitutional interpretation and that, too, is
23 unavoidably a form of judicial infidelity to
24 congressional lawmaking prerogative. You can't
25 avoid it one way or the other.

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2 Finally, there is an established
3 federal-state cooperative brainwork for law making.
4 The interstate compact concept is one model of
5 cooperative lawmaking. The only difference of
6 course is that in the typical interstate compact the
7 states themselves are the initial undertakers of
8 legislative effort. Congress then endorses them on
9 the back end. It's an interesting model that is not
10 as frequently used but one in particular that might
11 be consulted as this recommendation is implemented.

12 MR. FRISBY:: Thank you. Sally?

13 MS. KATZEN: Sally Katzen, senior fellow, although
14 I still feel quite youthful. I just wanted a point of
15 clarification. Several times it's been said that the
16 "Big Seven" are the entities identified by OMB. They
17 did not draw this purely out of the air. It comes from
18 UMRA, the Unfunded Mandates Reform Act, which
19 specifically recognized the "Big Seven" as the
20 appropriate representatives of state interests.

21 I say that because if we add things like
22 citizens groups or business groups -- if this is to
23 be truly neutral as to preemption it should probably
24 include both -- it bears at least some look at UMRA
25 to see that the particular provisions there are

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2 complied with. One that comes to mind was a long
3 debate -- and I really don't remember how it came
4 out -- on what happens when the state is itself the
5 subject of the regulation, such as EPA regulation of
6 state water sanitation facilities.

7 And there was a lot of debate and
8 discussion not only about when the consultation
9 should take place, that is before or after it could
10 be a comment period ended but also how much public
11 notice was appropriate to be given under the
12 circumstances. So I would just hope that you fully
13 vet this against existing statutory law.

14 One other, just a tiny point, the very
15 last thing, it says OIRA should include Executive
16 Order 13132 in its Circular A-4, one of my all-time
17 favorite documents. I'm assuming that it's a
18 reference to or, rather than the entire executive
19 order being repeated, and since I cannot make an
20 amendment I hope that somebody will assume that is a
21 technical correction. Thank you.

22 MR. FRISBY:: We will. Sally -- partially for a
23 plug for the eRulemaking report that you and Cynthia
24 Farina did, one of the questions I have with this
25 person with regard to the question of including

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2 consumers and businesses; is that something, a
3 question more appropriately for a study of
4 eRulemaking in terms of how to expand so that
5 consumers and businesses can adequately participate
6 in regulatory proceedings.

7 MS. KATZEN: I think that's an excellent
8 suggestion. And this goes to the heart of what we're
9 trying to accomplish in eRulemaking. And I actually
10 would mention that under 5A of your own recommendation
11 you charge the Administrative Conference with
12 maintaining a list of appropriate state representatives
13 and therefore one could simply have that provision and
14 leave it to ACUS to decide who are the best and
15 brightest and who the contact should be rather than
16 engaging in extended debate about an illustrative
17 concept of state attorneys generals and then citizens
18 groups and business groups and leave it to eRulemaking,
19 which is a whole another subject that I hope the
20 Administrative Conference will devote considerable
21 attention to in the future.

22 MR. VERKUIL: It is coming. It is coming. Maybe
23 in June. But Jon, did you want to --

24 MR. SIEGEL: Oh, I just want to talk for my
25 thoughts on a few of the points that have been raised.

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2 Someone said that the recommendation should really
3 think about the substantive question of when preemption
4 is appropriate as a statutory matter. And when we
5 first started this project, that's what I thought too
6 but as the project was moving along I thought it's more
7 in line with the conference's mandate to think about
8 the procedures by which the agencies would decide to
9 preempt rather than I think the more substantive
10 question of whether preemption is appropriate under a
11 particular statute.

12 And as to whether preemption is always a
13 question of statutory interpretation, I think that
14 would very frequently be the case but one can
15 certainly imagine a situation which I think is
16 really one of the prototypical situations to which
17 this recommendation most applies. Imagine that you
18 have an agency which has clear authority to issue a
19 safety regulation; but then the question will arise,
20 okay, we've issued our policy, the safety
21 regulation, now the question is, does a private
22 party who complies fully with this regulation, has
23 that private party exhausted its duty to take
24 reasonable care to avoid injuring others, which
25 would therefore make the party immune from a state

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2 tort action?

3 And one could easily imagine that the
4 agency's organic statute leaves that question
5 entirely up to the agency. The agency can say yes,
6 we think this is the exhaustive content of the duty
7 to take reasonable care or the agency could say we
8 understand our regulation to be a minimum floor and
9 the states can choose to add more, including through
10 the vehicle, a state tort action.

11 So it's just up to agency and what this
12 recommendation suggests is that in making that
13 decision the agency should appropriately consult
14 with state and local officials and should have a
15 reasoned basis, as to this point, the agency should
16 have a reasoned basis for deciding ultimately if
17 it's going to preempt state law. So I just want to
18 offer those things.

19 MR. VERKUIL: Okay. More questions? Mike?

20 PROFESSOR HERZ: Well, I don't need a microphone.

21 MR. VERKUIL: You need a microphone?

22 PROFESSOR HERZ: No. All right. So I had one bit
23 -- Michael Herz from the Cardozo Law School. I'm a
24 public member. I had one element of confusion, one
25 genuine question and one minor drafting suggestion.

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2 The element of confusion has to do, in all the
3 discussion we've talked about consulting with state and
4 local officials -- that's the phrase that everyone's
5 used plus a couple of times, state or local officials
6 or their representatives, the executive order talks
7 about state and local officials but in fact in the
8 course of this there's a reference to state and local
9 governments, to state and local officials, to the
10 representatives of state and local interests, to state
11 and local regulatory bodies.

12 You'd think those may all be synonyms but
13 actually the way it's drafted it looks, for example,
14 like you notify the public when you meet with an
15 organization but not with an individual official. I
16 mean that's the implication of how it's drafted. So
17 I mean just some consistency in the usage is
18 required there.

19 The genuine question was paragraph 8 about
20 posting on agency websites, the result of the
21 ten-year retrospective. Just wasn't clear to me why
22 that is directed to OMB and not directed to the
23 agency itself. In other words, why ask OMB to ask
24 the agency? Why not just say agency should post
25 this. I think there may be a reason but I just, I

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2 didn't understand that. And then with Sally's point
3 about the last, I did sort of notice the same thing
4 and let me just find this.

5 The language I was going to suggest for
6 item ten with regard to reprinting the whole
7 executive order and so on would be, OIRA should
8 include compliance with, insert compliance with
9 Executive Order 13132 and the checklists in Circular
10 A-4. I mean that, I think, I mean that's the point
11 that I think the report seems to be making is
12 consistent with Sally's suggestion, so.

13 MR. VERKUIL: Is that good for you, Sally?

14 MS. KATZEN: That's perfect.

15 MR. VERKUIL: I think the Committee on Style can
16 handle that one. Thank you, Mike. Go ahead.

17 MR. FRISBY:: I know with regard to your final point
18 there was, I know that OIRA did have some concerns
19 about posting, the initial recommendation was OIRA
20 post the reviews on its website and I know it had
21 some concerns and do you remember --

22 PROFESSOR SHARKEY: You want me to talk about it a
23 little bit?

24 MR. FRISBY:: Go ahead. Yes.

25 PROFESSOR SHARKEY: So under, OMB has guidance for

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2 Executive Order 13132 and in their guidance document
3 they say that they, within OMB they have primary
4 responsibility for implementing. And so the idea was
5 that OIRA would have, play some role in terms of
6 oversight of this process, with respect to particularly
7 this ten-year retrospective review.

8 As it came to pass, as my report cites
9 from most of the agencies, in fact, had conducted such
10 a review when I looked at the review that they
11 conducted and they conducted comprehensive reviews
12 but none of this was publicly available.

13 So there were comments both by people that
14 I interviewed through this process and also in the
15 academic literature suggesting that the Presidential
16 Memorandum to the extent it had urged or directed
17 agencies to conduct this had just been kind of a
18 vague exhortation that hadn't been followed through
19 with. So the goal here was to provide some
20 transparency and information. My report suggests
21 that agencies could do this themselves as well but
22 it struck us as getting some urging from OIRA with
23 whom they had filed these initial reports would
24 serve as an additional incentive or impetus.

25 MR. SIEGEL: Can I just address Professor Hertz's

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2 point about the checklist? The checklist to Circular
3 A-4 mentions effect on state and local governments,
4 yeah, effect on state, local and tribal governments.
5 Circular A-4 is 48 pages. The first 41 pages are about
6 cost-benefit analysis. Then on, starting on Page 42,
7 there's a couple pages about, and here are other
8 directives that the agency needs to think about as it
9 does rulemaking, Regulatory Flexibility Act, the effect
10 on children, you know, there's a list. So that is
11 where I think the Committee contemplated that item ten
12 would be affected.

13 MR. VERKUIL: Hi. Looks good. Go ahead.

14 MS. FARINA: Cynthia Farina, public member. I
15 want to speak specifically to the, sort of the third
16 piece of the agency focus recommendations and that is
17 the idea that once a rulemaking is in process there's a
18 concern that the groups who actually are stakeholders
19 won't become aware of it even though all the formal
20 notice requirements are met and there's this whole idea
21 of notifying, talking about who should be notifying.

22 I would like to suggest that is a far
23 broader problem -- and I think, Russell, you alluded
24 to that statement -- for stakeholders who are not
25 aware of ongoing rulemakings. I think placing on

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2 agencies the responsibility to do better outreach is
3 wishful in thought rather than perhaps realistic,
4 partly because there are so many stakeholder groups
5 that if we started down that road we would want to
6 say to agencies, oh, make sure you outreach here,
7 make sure you outreach there.

8 What I would suggest is that we take a
9 slightly different approach to this and think about
10 the possibility of recommending to OIRA or OMB that
11 they create a website that is sort of a -- or page,
12 rather -- preemption watch list. Now, we have to
13 work on the wording of that so it's not quite so,
14 uh, but, it seems to me that the thing, the best
15 thing to do may be to provide a single location
16 where information about rules that may have
17 preemptive effect can reliably be found.

18 Preemption is a good candidate for that
19 because it's cross-cutting across substantive area
20 so rather than say to agencies, oh, let's add one
21 more thing to your website, you should have, you
22 know, a preemption list, better to have it in one
23 place. Having it at OIRA is not a bad thing. You
24 need some point to trigger, you know, placing things
25 on such a list. And as long as we're talking about

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2 having agencies, you know, make sure that they're
3 identifying federalism implications, you know,
4 whatever point, the earliest point at which it could
5 be placed on a website like that is probably a point
6 that OIRA would know best.

7 And I think what we're talking about here
8 are several audiences that in fact it's reasonable
9 to think they're sophisticated enough to check a
10 website if a website is publicized, Bar
11 Associations, state attorney generals, you know,
12 chief judges, if the word gets out that this is
13 where you can to look find things and if it has a
14 Listserv or whatever automated notification
15 requirement, I think you might find that if we can
16 get people acclimated to going and looking at
17 something like that, that actually we get more
18 reliable, broader notice that will work for a lot of
19 the problems, stakeholders who don't know about
20 rules because they don't know that they don't know
21 and they don't know to look. But these are fairly
22 sophisticated audiences and I think they could be
23 trained, if you will.

24 MR. FRISBY:: One, I would like to hear from some
25 government representatives because we got I think

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2 several, we, didn't discuss that directly, Cynthia,
3 but we got into questions on ossification and how
4 many requirements were too many to place on agencies
5 and I think there may be some reaction.

6 MR. VERKUIL: Susan and then Neil.

7 MS. DUDLEY: There is such a website. I'm Susan
8 Dudley, public member. There is such a website. The
9 Unified Agenda that comes up twice a year lists all the
10 agencies' upcoming regulations and there is a checkbox
11 there for federal and state and local impacts. So
12 there is a website for anybody who wants to. You can
13 check it and you can sort and dump out a list of all
14 the regulations that are likely to have a federalism
15 impact.

16 MR. VERKUIL: Neil?

17 MR. EISNER: I was just going to make the same
18 point Susan made.

19 MR. VERKUIL: Okay. Good. All right. Anything
20 further? Rick?

21 PARTICIPANT: Public member. I have a question
22 for the Committee. Can they consider taking a somewhat
23 stronger position on the question of harmonization?
24 Recommendation 2A asks the agency to determine the need
25 for any preemption and the agency presumably has a

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2 theory as to when preemption is appropriate. The
3 agency may think, well, federal safety standards are
4 generally regarded as floors, not ceilings, and that's
5 a preemption position.

6 There are some other agencies who might
7 say we don't like to get jury's involved in this
8 process, it's going to sort of be bad from a social
9 welfare perspective. That's a very different
10 position, or another agency might say uniform
11 national standards are important; that's a third
12 position. And agencies can say these things as long
13 as they were thoughtful to be complying with 2A.

14 And then OIRA would require checklist for
15 compliance with the executive order, each agency
16 presumably would say that their theory of preemption
17 complies with the President's executive order and
18 all this would be various websites maintained by the
19 agency and OIRA and then the public would see that
20 while everyone was being very thoughtful, the
21 federal government has radically different
22 approaches to preemption.

23 And I wonder whether this is a good state
24 of affairs and if it's not whether a somewhat
25 stronger position with respect to the benefits of

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2 harmonization might be appropriate. I understand of
3 course that that is then stepping into an area of
4 high political controversy. So I'm not making any
5 proposal at this point. I just wanted to know
6 whether the Committee had considered that issue and
7 what it had decided.

8 MR. FRISBY:: I think Jon discussed a bit of, you
9 raise very, very substantive issues and the
10 Committee decided that for a number of reasons we
11 were going to focus on some of the procedural as
12 opposed to the substantive aspects. I don't know if
13 that answers your question but I think the short
14 answer would be no.

15 MR. SIEGEL: Yeah, I think the answer is no, that
16 the Committee did not contemplate the possibility of
17 telling agencies you must across the government have a
18 harmonized answer to the question, when is preemption
19 appropriate. As the preamble states, the goal of the
20 recommendation is not to favor or disfavor preemption
21 at the end of the agency's decision-making process.
22 The Committee left it up to the agency to make that
23 decision. That's not to say that that's what you
24 suggested, not that I did but to answer your question,
25 I think the answer is the Committee did not consider

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2 that possibility.

3 PROFESSOR SHARKEY: There's a way in a sense too
4 where we could conceive of this as stage one and then
5 we would see what would happen at stage two. Because
6 just to be clear, at the present time the agencies that
7 I studied, the EPA is the only one that has publicly
8 available internal guidance on compliance with these
9 particular procedures.

10 I think it's interesting to think about if
11 at the end of this process it comes to pass that
12 there is diversity, sometimes the diversity might be
13 a positive thing because in a different regulatory
14 context we might actually have stronger or weaker
15 grounds for preemption but to the extent that they
16 seemed kind of illogical, et cetera, my own view is
17 that might be, that might raise a kind of stage two
18 project.

19 MR. VERKUIL: Yes.

20 MS. MacPHERSON: Yes, Rebecca MacPherson, with
21 Federal Aviation Administration. I'm a liaison member.
22 And I would like really to speak to the point of
23 harmonization from an agency perspective, which is that
24 I think taking a harmonized position is probably
25 impractical. If you look at my agency, we are a safety

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2 agency where our concern of a preemption would be very
3 consistent with what NHTSA's issue would be.

4 We have minimum safety standards and to
5 what extent does allowing state courts to come in
6 and set effectively higher standards through the
7 civil litigation impact the ability of the
8 manufactures to actually create a viable product
9 that meets minimum safety standards. At the same
10 token we control the national airspace system. That
11 system is absolutely and completely preempted.

12 So our position there is much different
13 than it would likely be when we are acting in our
14 safety role. We also provide millions and millions
15 of dollars' worth of grants to airports, most of
16 which in this country are owned by municipalities or
17 state governments. And our position there is going
18 to be yet different from what it would be in a
19 safety context and in the context of patrolling the
20 national airspace system.

21 So within a single agency we potentially
22 have three different answers. Extending that beyond
23 the entire federal government strikes me as
24 exceptionally impractical but by the same token we
25 do find that for certain types of preemption,

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2 probably most notably the implied preemption that
3 comes about because of civil litigation, that
4 depending on the administration at that particular
5 time that answer may change depending on whether the
6 administration favors civil litigation as a measure
7 off forcing social and economic change or does not
8 favor that. And to that extent assuming you fall
9 within that category I would suspect that there is
10 more harmonization now in a given administration
11 that may change in subsequent administrations but it
12 is probably not as disparate as it may appear.

13 MR. VERKUIL: Thank you. Yes, right behind you.

14 MR. LAZARUS: I'm Simon Lazarus. I'm with the
15 National Senior Citizens Law Center. And I just wanted
16 really to ask a question that picks up on I think the
17 first point that David Frederick was making, the first
18 concern voiced, and that concerns 2A in the
19 recommendation. And when you say that the first thing
20 the agency is supposed to do is determine, is how it
21 determines the need for preemption, I wonder whether
22 that suggests that it's kind of up to the agency to
23 decide when it would be a good idea to have preemption.

24 What I think David was stressing is that
25 it's important to remember, and so many of the

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2 important cases have really been debates about, what
3 is the statute, what are the purposes of the
4 statute, what does the statute require, and there
5 often have been debates about whether the courts or
6 the agency kind of ignored that.

7 And so I just wondered whether -- I know
8 you're looking at procedures but whether this is
9 kind of pushing, this is actually substantively
10 nudging the focus in a direction that involves the
11 substantive debate. And I may be exaggerating
12 because I don't know whether, you know, other people
13 would agree with this but it might be better to have
14 language that refers to how the agency determines
15 when or whether the statute in question requires or
16 is appropriate for the statute to have preemption,
17 something like that. I don't know whether David
18 would think that I'm nitpicking here or that this is
19 something that's relevant to what you are concerned
20 about.

21 PROFESSOR SHARKEY: So I'll take it. So I think
22 that the premise here is that under the preemption
23 provisions of the Executive Order 13132, urges when
24 agencies require engaged in rulemaking with federalism
25 implications and that preempts state law, they do a

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2 variety of things. So I think the recommendations here
3 are consistent with that, namely we're not getting into
4 the question of is it ultra virus for a particular
5 agency to engage in preemptive rulemaking or not. I
6 think that's been left kind of off the table, that an
7 agency's preemptive rulemaking that they, the design
8 here is to have them comply with preemption provisions
9 of Executive Order 13132 and also make additional,
10 additionally make these determinations more
11 transparent, et cetera.

12 MR. SIEGEL: And if I could add again, the
13 situation I just keep coming back to in my mind if I
14 think about what this is recommendation for is the
15 situation where an agency has adopted a safety
16 regulation and now the question is should state tort
17 actions be permitted in addition to impose further
18 safety requirements beyond what's in this
19 recommendation for state positive law for that matter.

20 And let's imagine that there's no question
21 of the agency's statutory authority to make that
22 decision, then the agency still needs to know well,
23 do we need, how would we determine whether it's a
24 good idea to say what we have said is the safety
25 rule is the exclusive rule and states cannot add

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2 anything else either through positive regulation or
3 tort law or should we decide that this is the
4 minimum floor and states can add more in either of
5 those two ways, how does the agency determine
6 whether preemption is needed in that situation. So
7 I think that situation can certainly exist and in my
8 mind that's what the recommendation is mainly about,
9 even where the question is not do we have the
10 statutory authority do it.

11 MR. FRISBY:: And I would also say that, I would
12 point you to paragraph four, the last sentence, the
13 agency should provide a reasoned basis with such
14 evidence as may be appropriate -- courts --
15 preemption conclusion. I think ultimately a lot of
16 your statutory analysis has to be included in that
17 reasoned determination. So, I think that really is
18 picked up in paragraph four.

19 MR. VERKUIL: One more. Professor Pierce?

20 PROFESSOR PIERCE: Richard Pierce, public member.
21 The question of whether the recommendation should go
22 beyond procedure and into substance has come up several
23 times and I just wanted to provide some history from
24 ACUS 1.0 on that, I was the consultant for the 1980 --
25 whenever it was -- recommendation and I actually

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2 included in my recommendation a substantive element
3 that was pretty bland and I didn't think it really went
4 very far in any direction. It just pointed to certain
5 substantive criteria.

6 And I was able to sell that to the
7 Committee and so it came as part of the Committee
8 recommendation and it was rejected by the Conference
9 as I recall unanimously on the basis that the
10 Conference deals with procedural and institutional
11 questions only and does not address substantive.

12 Now, I guess it is up to the Conference to
13 make that decision under ACUS 2.0 and perhaps we
14 want to go beyond procedure and institutional
15 allocation of responsibilities but historically the
16 line was drawn short of substance.

17 MR. VERKUIL: I don't think we'll start on our
18 first day with that. But let's see if we can wind --
19 yeah, David, I already got you. Right? So let's go to
20 Alan, Professor Morrison, excuse me.

21 PROFESSOR MORRISON: Thank you, sir. Alan
22 Morrison, senior fellow. There seems to be, Jon Siegel
23 is absolutely right that there are a whole category of
24 preemption questions. The issue is what the agency
25 should do within its statutory authority. But there

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2 are also preemption questions as to whether the agency
3 thinks it has the power to do it or what the statute
4 needs.

5 And it seems to me it would be useful to
6 point out the differences between those two kinds of
7 determinations in making this recommendation and
8 also to be sure that you are clear at various points
9 as to whether the preemption is a positive law or a
10 tort law of what tort or compensatory law, one kind
11 or another in the various parts of the regulation.

12 The second point I want to make is I have
13 been most troubled by agencies ad hoc determinations
14 after the fact when litigation is going on and
15 they're asked by one side or the other to come in
16 and say it's preempted or it's not preempted. And
17 my sense is that their judgments are determined by
18 what they think the proper outcome should be in that
19 case.

20 And there is nothing in the recommendation
21 that urges the agencies to try to address these
22 issues of preemption in advance so A, they don't
23 look like they're engaged in ad hoc determinations
24 and B, so that we could perhaps avoid some
25 litigation or have clearer boundaries to it. And so

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2 to the extent that the recommendation could say
3 those things to agencies it seems to me to be
4 important.

5 So far as letting everybody know who is
6 concerned, I think the attorney generals are getting
7 more and more things. The Class Action Fairness Act
8 mandates that we get all these settlements. Every
9 time a court seals a file some states require it. I
10 just wonder whether the attorney generals are really
11 going to be the filters that you expect them to be.
12 Surely the governors are not going to do this.
13 Maybe if we can get the proper state agency we
14 should be able to do it but I think the
15 recommendation overall has some positive aspects to
16 it. Thank you.

17 PROFESSOR SHARKEY: I just want to respond
18 briefly. I wrote, it's no surprise that the
19 notification provision here is somewhat patterned after
20 I wrote an article about AG notification provisions in
21 CAFA --

22 PROFESSOR MORRISON: I saw that in the report,
23 yeah.

24 PROFESSOR SHARKEY: -- in this context. What's
25 interesting is that AGs were resistant to getting

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2 notification in the CAFA context and every indication
3 is that the opposite is true in this context. As I
4 mentioned before the AGs although they have been
5 involved by submission of amicus briefs and banking,
6 consumer protection, et cetera, they actually now seem
7 to have a wider interest as well in some of the common
8 law tort areas possibly because they see that positive
9 state law preemption and common law preemption are not
10 so hermetically sealed off from one another, that there
11 are issues that transcend both frameworks.

12 PROFESSOR MORRISON: There's no question that the
13 attorney generals have been very active in litigation
14 preemption questions. The question is can you get them
15 to focus on regulatory at the front end as opposed to
16 litigation at the back end where you can see the
17 conflict as you saw in Wyeth against Levine where
18 somebody was going to lose, had lost an arm and was
19 going to lose a 12 million dollar judgment, that gets
20 the attorney generals attention.

21 MR. FRISBY:: If I might respond to several of your
22 points, first of all, with regard to the question of
23 the ad hoc nature, ad hoc decision-making and when
24 an agency should reach out, if you look to paragraph
25 5D, we propose that agencies that reach out to

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2 appropriate state and local government officials
3 early in the process when they are considering
4 preemptive rules. Such outreach should to the
5 extent practicable precede the issuance of the MPRMs
6 (phonetic). They will at least try to raise that --

7 PROFESSOR MORRISON: Then I didn't make my point
8 clearly. What I meant to say is that agencies should
9 try to decide as many preemption questions as they can
10 before the litigation arises rather than after the
11 litigation arises. That's talking about how we're
12 going to go about doing it, it does seem to me there
13 ought to be something in the recommendation about the
14 positive value of thinking these through in advance
15 before you got lawsuits right in front you where you
16 know the outcome is going to affect somebody one way or
17 the other.

18 PROFESSOR SHARKEY: Could I ask a question? Is
19 that appropriate?

20 MR. VERKUIL: Go ahead.

21 PROFESSOR SHARKEY: So I guess I'm genuinely
22 confused because the recommendations as I read it are
23 all focused on the rulemaking process and as Russell
24 just pointed out consultation takes place even before
25 the notice of proposed rulemaking and all of these are

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2 when they are engaged in rulemaking procedures, the
3 kinds of focus that they should give to these issues.
4 So it seems exactly directed to the concern that you're
5 worried about, namely instances where agencies would
6 have gone through and not have given any of these
7 things attention and then post hoc in litigation trying
8 to just put forward their views.

9 PROFESSOR MORRISON: I'm not proposing a change in
10 the recommendation. I'm proposing an addition to the
11 justifications that come before the recommendation that
12 explains to agencies why they ought to do these now and
13 why they would get more credence from the courts if
14 they did them in advance as opposed to coming in after
15 the fact.

16 MR. FRISBY: Are you talking about a situation
17 where the agency makes, in a brief, raise the issue
18 in a brief in the first instance?

19 PROFESSOR MORRISON: Yeah. It's happened all the
20 time in these tort cases that the FDA in particular has
21 been called in, Geier is a perfect example. If Geier
22 had been in the rule itself saying this is a preemption
23 it would have ended the discussion. It was only when
24 the lawsuit got in that NHTSA said, oh, yeah, we let,
25 it was too important that we not let states experiment,

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2 we want to have a unified view, that people say where
3 did they get that from, why didn't they just put it in
4 the rule, and that's the concern I have.

5 PARTICIPANT: Alan's point is that paragraph one
6 should be applied to agencies and rulemakings. We've
7 had it three times.

8 MR. VERKUIL: Okay. We got it. So we have five
9 minutes before the 90 minutes is up and I would be glad
10 to take any closing comments or hear from those who
11 feel there's not enough time to make closing comments
12 but --

13 PARTICIPANT: Can I propose an amendment to one of
14 the recommendations?

15 MR. VERKUIL: Yes, you may.

16 PARTICIPANT: I would like to propose the
17 amendment to 2A. Instead of having it read how the
18 agency determines, quote, the need for any preemption,
19 and substitute how the agency, quote, how the agency
20 determines, quote, whether Congress intended the agency
21 to preempt state law. The problem that I see with the
22 need for language is that --

23 MR. VERKUIL: Well, let's get this before we --

24 PARTICIPANT: Sure.

25 MR. VERKUIL: Do we have a second to the

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2 amendment?

3 PARTICIPANT: Second.

4 MR. VERKUIL: Okay. So we're on whether --

5 PARTICIPANT: -- Congress intended the agency to
6 preempt state law. The reason for the amendment is
7 that the current recommendation assumes that the agency
8 can act in a free-floating way to determine need for
9 preemption wholly apart from whether Congress in
10 delegating authority to the agency to act pursuant to
11 statute intended for the agency to act in that way.

12 And so the whole idea -- and Jon, I take
13 issue with the characterization as you've described
14 it about federal safety standards, is there is an
15 entire robust regulatory compliance defense that's
16 been in existence in the law for forty or fifty
17 years and the whole debate over product liability
18 here is whether a quote-unquote free-floating
19 perceived need by agencies to displace common law
20 remedies is somehow apart or different from what
21 Congress actually intended. And it seems to me the
22 agency's role in implementing Congress's intent
23 pursuant to delegated authority should be to
24 determine what did Congress mean.

25 MR. VERKUIL: All right. Let's have discussion on

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2 this amendment to the motion. It's been seconded.

3 Let's have discussion and we'll take it.

4 PARTICIPANTS: State it one more time. Could you
5 repeat it? Read the language.

6 MR. VERKUIL: The language as I have it is how the
7 agency determines whether Congress intended the agency
8 to preempt state law.

9 PARTICIPANTS: Authorized? Authorized? The
10 authority and the need, whether Congress authorized?

11 MR. FRISBY:: Well, it said intended but the
12 language --

13 PARTICIPANT: Intended or authorized. That was
14 what was I was going to --

15 MR. VERKUIL: I'm sorry. Well, we have the maker
16 of the motion over here.

17 PARTICIPANT: I couldn't hear.

18 PARTICIPANT: Authorized. Authorized. Substitute
19 authorized --

20 PARTICIPANT: I would accept authorized as a --

21 MR. VERKUIL: All right. How the agency
22 determines whether Congress authorized the agency to
23 preempt state law. That's, that's now an amendment to
24 the motion which has been seconded. Yes.

25 MS. METZGER: Gillian Metzger, public member. I

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2 have some concerns about that as a replacement for A.

3 I mean there's the question of how the agency

4 determines and it's got authority to preempt and

5 whether or not you need an expressed delegation of

6 authority to preempt or not. I think what sometimes

7 comes up is you've got a general delegation of

8 authority to an agency and then the question is the

9 agency promulgates a regulation in the course of

10 implementing its general authority and there is a

11 separate issue of whether or not that regulation on its

12 substance requires either uniformity or there's a need

13 for preemption or not. So I think that the question of

14 Congress's intent on authority is too narrow if it's

15 replacing just what we have for Number A.

16 MR. VERKUIL: So you would think it's an A or a B

17 or it's a separate -- read what we have, this is a

18 separate --

19 MS. METZGER: If we wanted to add this to focus

20 more attention on consideration of the authority

21 question that's one thing but I was seeing it as a

22 replacement for what we had for A and I have more

23 concerns about that.

24 MR. FRISBY: As I understand what you're saying, in

25 essence, the question of authorization would only be

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2 step one in the agency's decision?

3 MS. METZGER: Right. I think there are issues --

4 MR. FRISBY: And it would, after step one you would
5 also have to take into other factors which would be
6 more broadly encompassed by the reference to need?

7 MS. METZGER: Yeah, I think the two are, the need
8 is broader than just authority, exactly.

9 PROFESSOR SHARKEY: So I agree with Professor
10 Metzger and also just to be clear, when your focus --
11 and of course I should speak for my report. My report
12 focused on these internal guidelines. The idea was
13 that this is the place where agencies would explain
14 whether or not a specific rulemaking implicates
15 federalism concerns, what specific actions were taken
16 and justifying those particular decisions.

17 Again the idea here was that these are
18 implementing its obligations under the preemption
19 provisions of the Federalism Executive Order, and to
20 my mind that doesn't actually get into the question
21 of should, must agencies have specifically been
22 delegated preemptive rulemaking authority by
23 Congress. So nothing in this answers that question
24 so it would be introducing, I think, a new issue into
25 that.

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2 MS. ZIEVE: Allison Zieve, public member. I
3 wanted to agree with what Gillian said. The problem
4 that on the Committee we were trying to deal with -- we
5 actually had a discussion about whether there was a
6 problem that we should be dealing with -- was agencies
7 that put in regulatory commentary that proceeded MPRMs
8 (phonetic) or final notices, that there preemption with
9 little or no thought.

10 And NHTSA was a prime example. So, for
11 instance, now under the proposed amendment, NHTSA
12 could say that it has authority because the Supreme
13 Court has said that it has preempted so it must have
14 the authority do it though I think if they did that
15 analysis initially it would be hard to find one in
16 the statute.

17 The Supreme Court has said that NHTSA can
18 issue preemptive regulations. So the amendment, the
19 answer would just be yes and we would find that in
20 the Supreme Court's decision as well in its analysis
21 of the statute. But if our recommendation for the
22 agency's guidelines about how it approached
23 preemption ended there and didn't include the
24 current A, it wouldn't address the problem that the
25 Committee eventually decided existed, which was

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2 these numerous NHTSA rulemaking documents over the
3 past several years that just had a few sentences
4 saying we preempt.

5 And so A is really intended to, A in
6 combination with the one about reasoned, the
7 reasoned basis is to ensure that when the agency has
8 a process in place so if it's going to say in the
9 notice we preempt, it does that thoughtfully and
10 can't just do it because it has the authority.

11 MR. VERKUIL: Okay. So any further questions on
12 the amendment or can we move to a vote on the
13 amendment? Michael?

14 MR. FITZPATRICK: So I don't now if this is an
15 amendment because I don't know if I'm authorized to
16 make an amendment -- Council -- but in any event we
17 have been having some discussion up front here and I'm
18 wondering whether language along the following lines
19 might accommodate the various perspectives.

20 And we would rely on Professor Sharkey and
21 others who have actually read 13132 more recently
22 than us to see whether this would comport with the
23 overarching reference to the executive order because
24 these are intended to set forth the requirements of
25 the executive order. It would read, how the agency

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2 determines whether it has the, bracket, statutory,
3 close bracket -- - I don't know if that's --
4 required authority to preempt, comma, and if so,
5 comma, whether it should do so. So it sets up the
6 initial question, does it have authority to preempt;
7 if it does there seems to be views that, that
8 doesn't mean that it always should or how it should
9 and so that's a substantive question.

10 MR. VERKUIL: All right. So would that meet your
11 concerns, Allison?

12 MS. ZIEVE: Yeah.

13 MR. VERKUIL: Yes, and David, is that okay with
14 you?

15 PARTICIPANT: Yes.

16 MR. VERKUIL: So we just had both ideas in there
17 rather than trying to preempt one. And if that's true
18 -- yes, Neil?

19 MR. EISNER: Do we have local law or just state
20 law? It should be both.

21 MR. VERKUIL: Oh, okay. What did we say --

22 MR. EISNER: Item two, line two.

23 MR. VERKUIL: We didn't say about the law.
24 Authority.

25 MR. EISNER: To preempt what? I thought it said

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2 state law?

3 MR. VERKUIL: Oh, state or local law. Okay.

4 MR. SIEGEL: Isn't that like Michael's amendment?

5 MR. VERKUIL: It's not his amendment. People.

6 MR. FRISBY: You're right. It was in David's
7 amendment. I'm sorry.

8 MR. SIEGEL: Oh, I see.

9 MR. VERKUIL: All right. So could we read what
10 we've got and maybe this then becomes something that we
11 could agree on and put into the final version and we
12 can vote on it, on whether to adopt the overall. Does
13 that sound right? Do you have it in written down?14 MR. FRISBY: I think so. How the agency determines
15 whether it has the statutory authority to preempt
16 and whether it should preempt state or local law.

17 PROFESSOR SHARKEY: I think then, and if so --

18 MR. FRISBY: And if so --

19 MR. VERKUIL: So let's try it one more time.

20 MR. FITZPATRICK: So I bracketed statutory
21 authority. I don't know whether or not people feel
22 that that would exclude some theories of conflict
23 preemption or not. So I just wanted to make sure -- or
24 legal authority okay, so there you go. We're sort of,
25 we're weighing this down in front here.

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2 PROFESSOR MORRISON: Paul?

3 MR. VERKUIL: Yes.

4 PROFESSOR MORRISON: Is it clear that we're
5 talking about both tort and positive preemption and if
6 it is clear can it be made clearer either by saying
7 both of those? Because the question of whether an
8 agency should preempt positive state regulation is
9 different from whether it ought to preempt tort and
10 maybe the "whether" part can do that.

11 MR. VERKUIL: Well, the legal authority is --

12 PROFESSOR MORRISON: Tort and other kind of
13 compensatory.

14 MR. VERKUIL: Right. Wouldn't legal authority
15 cover it okay both ways, statutory and common law?

16 PROFESSOR MORRISON: Well, it's, for example, the
17 question is just in the banking area, should you
18 preempt both what the state bank regulator does and
19 what common law suits and other suits, and other
20 statutory suits, those are the two different questions
21 and there may be different answers and without trying
22 to wordsmith the Committee on Style I think it has
23 that.

24 MR. VERKUIL: We'll leave that to the Committee on
25 Style, which has been renewed, by the way, with the

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2 Conference along with the --

3 MR. FRISBY: I have been told that as revised would
4 read how the agency determines whether it has legal
5 authority to preempt state and local law and if so,
6 if it should do so -- whether it should do so,
7 whether it should do so.

8 PROFESSOR MORRISON: State or local.

9 MR. FRISBY: State or local law and whether it
10 should do so.

11 MR. VERKUIL: All right. Does everyone understand
12 the amendment?

13 PROFESSOR SHARKEY: Well, I have a comment,
14 though, right, because the report and the
15 recommendation all focus on agency procedures for
16 considering preemption of state law. So that would be
17 the one place, we're introducing state or local.

18 PARTICIPANT: Look at B. Look at 2B.

19 MR. VERKUIL: Consultation with state, local --
20 state law as opposed to local law --

21 MR. FRISBY: I mean I'm not sure there's a
22 difference between the state and local law from a
23 legal perspective.

24 MR. VERKUIL: All right. So -- yes.

25 MS. FARINA: Might you include a definition of

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2 state law so it says that it's state and local and
3 regulatory and statutory and judicial and that way use
4 just one term and define it --

5 MR. VERKUIL: Is that something we should leave to
6 the Committee on Style?

7 MS. FARINA: I would think it's a suggestion for
8 Style.

9 MR. VERKUIL: So we have, one more, let's just
10 read it one more time, what we have and then we're
11 going to vote on this as an amendment and if it
12 survives then we're going to vote on the entire
13 recommendation. Okay? Yes.

14 MS. SICILIANO: One remark, that I think the
15 chapeaux of this whole paragraph says that the agency
16 should write internal guidance describing how we decide
17 whether we have a authority, and I'm not sure I
18 understand how that guidance would work. And so I'm
19 not sure that I understand the significance of this
20 point in the context of the guidance that this overall
21 paragraph is intended to address. I get it in respect
22 to the need for preemption and where the guidance
23 would, say, tell us, you know, agency, let's figure out
24 how we're going to figure out the policy question,
25 assuming we have the authority. So I even use that as

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2 a question. And I'm Carol Ann Siciliano from the
3 Environmental Protection Agency.

4 MR. VERKUIL: We don't have any --

5 MR. FRISBY:: Presumably, I think -- I'm not sure --
6 the guidance, the guidance, what one of the elements
7 of the guidance would focus on is how the agency
8 does make its decision, number one, with regard to
9 authorization and two with regard to the need for
10 preemption assuming it has a legal basis. But I'm
11 not sure --

12 MS. SICILIANO: Is that guidance that would then
13 talk about Chevron 1, Chevron 2? Would it be a
14 statutory interpretation, guidance document? To me
15 that doesn't resonate. That doesn't seem like helpful
16 guidance that an agency would write for itself. That's
17 what the office of general counsel does for a living.
18 It answers that question. When the policymakers say we
19 sure would like to preempt here and then office of
20 general counsel would say yes, we find authority or no,
21 we don't find authority. I don't see that writing
22 internal guidance is going to contribute to that
23 analysis on behalf of the agency's lawyers.

24 MR. FRISBY:: I think perhaps someone in -- I think
25 perhaps Professor Sharkey could address this issue.

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2 If you look at I think the EPA manual in particular,
3 this was just one of vast, a number of issues.

4 MS. SICILIANO: And I could speak to that because
5 what our guidance says is that after the agency is
6 speaking to the policymaker, articulate the need for
7 the preemption and it has nice provision about that and
8 then it says, oh, and by the way, be sure you have the
9 legal authority, I think is sufficient.

10 MR. VERKUIL: Well, that's what this is saying
11 really.

12 MS. SICILIANO: No, it doesn't say that. Well,
13 first it says you have to write guidance in order to
14 explain how you're going to figure out.

15 MR. VERKUIL: Go and talk to the general counsel
16 would be one thing.

17 MS. SICILIANO: But I guess my submission, my
18 suggestion would be that I am going to vote no, I will
19 vote no on this.

20 Q Okay.

21 A Because I think that instructing the agencies
22 to articulate, well, to write guidance about how they
23 are going to construe the statute to find the authority
24 is a level of complexity and detail that I don't think
25 the Conference needs to provide to the agencies.

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2 MR. VERKUIL: Yeah.

3 PROFESSOR SHARKEY: Perhaps you should propose a
4 revised amended language because the EPA, in my report
5 the EPA's guidelines were used as a model of sorts in
6 terms of handling recommendations.

7 MS. SICILIANO: I think I will do that. My
8 motion, my proposal would be to revert to the language
9 as proposed by the Committee.

10 MR. VERKUIL: All right. So then vote against the
11 amendment?

12 MS. SICILIANO: Right.

13 MR. VERKUIL: Okay. So now I think we joined the
14 issue, and do we have any more comments?

15 MS. MENDELSON: I would like to echo that and
16 suggest that maybe it would be appropriate to revert to
17 the language as originally phrased. The concern I have
18 about the new language is that by focusing first on, by
19 asking the agency to explain its authorization
20 overlooks a problem which is when the agency expresses
21 a position on whether the goals of the statute as
22 implemented through it's duly authorized regulation are
23 undermined by state law, whether it's positive law or
24 common law, that category of agency statements might
25 not be covered by this language the way it is currently

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2 phrased and to focus solely on authority I think
3 distracts from also covering that sort of statement
4 from the agency but it would be covered by the original
5 language. Nina Mendelson, public member.

6 MR. VERKUIL: Thank you, Professor, Mendelsohn.

7 Are we prepared now to vote on the amendment? And all
8 in favor of the amendment say "aye".

9 PARTICIPANTS: Aye.

10 MR. VERKUIL: All opposed "nay".

11 PARTICIPANTS: Nay.

12 MR. VERKUIL: All right. The nays have it. And
13 now do we go, unless there's any question about that
14 but I don't think there's a question.

15 PARTICIPANT: I think there is an amendment that
16 could be introduced that --

17 MR. VERKUIL: We're back to the main motion,
18 right?

19 PARTICIPANT: Yeah.

20 MR. VERKUIL: Okay.

21 PARTICIPANT: I think harmonized what I see as a
22 position, the concern was the use of the word guidance
23 with the word authority and I was wondering, the
24 chapeaux to 2 and I was wondering whether the second
25 two lines are actually beginning to work given the rest

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2 of the language that we have for the amendment. Agency
3 that engage in rulemaking proceedings, agencies that
4 engage in rulemaking proceedings may have preemptive
5 effect on state law should and then go to A, B and C
6 because C says otherwise ensure compliance with the
7 executive order.

8 So the executive order doesn't have to be
9 mentioned twice. If A and B refers principally to
10 the executive order then C covers the rest. And
11 then I think you would have the concept of look for
12 legal authority, which I think is important and not
13 create this apparent procedural morass of having a
14 guidance to determine legal authority.

15 MR. VERKUIL: I'm not sure I follow your
16 suggestion.

17 PARTICIPANT: Right. The line that says should
18 have internal written guidance to ensure compliance is
19 necessary as opposed to describe A, B and C.

20 MR. SIEGEL: Could I make a suggestion, Paul? If
21 the Assembly liked the idea of addressing the issue of
22 legal authority and just rejected the amendment because
23 of the difficulty that was raised by the EPA member of
24 having guidance about authority, if that's why the
25 amendment was rejected, I think a substitute might

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2 perhaps better find a home in paragraph four, which, to
3 which a sentence could be added saying the agency
4 should make sure it has legal authority for preemption.

5 If the reason the amendment was rejected
6 was that people just don't want to get into the
7 issue of authority, then, of course, we should just
8 leave things as they are but if we're looking for a
9 home for the concept of the proffered amendment, I
10 think paragraph four might be a better home.

11 MR. FRISBY:: Or what we could do is perhaps in the
12 preamble discuss the fact that -- I can't imagine
13 that an agency could have a reasoned basis without
14 some sort of finding of authority and so that phrase
15 is probably better placed in preamble.

16 MR. VERKUIL: Well -- you have a question.
17 Someone -- yeah.

18 MR. STIER: Mr. Chairman, Max Stier, public
19 member.

20 MR. VERKUIL: Yeah.

21 MR. STIER: I'm not obviously familiar with your
22 process here and I understand we are running short on
23 time. There was an issue that was flagged earlier
24 first by Lois and Sally responded and a third person
25 and I don't want to impose upon the group if it's too

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2 late to try to get closure on it but I thought the
3 point about what kind of notice or rather what group
4 was needed to receive notice about to ensure that state
5 and local interests were adequately represented were an
6 important one.

7 And if you look at paragraph 5C there's an
8 implicit recognition that in fact the public needs
9 to know that there's a requirement that there be
10 public notice about meetings with, you know, the
11 "Big Seven". And I do think that it's insufficient
12 simply to direct agencies to a list that is held by
13 ACUS without at least some guidance by ACUS as to
14 what should be in that list.

15 And I think that I take Sally's point that
16 there are more interests in consumer groups or
17 environmental groups, and business groups
18 potentially belong as well although I do think that
19 there's a difference in degree here because
20 certainly some of the public groups will have less
21 in the way of resources to actually identify when
22 these issues are coming into play, it's more like
23 the business will be better informed.

24 But I would prefer to see some specific
25 requirement that some larger number of stakeholders

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2 be consulted and at least if we're going to have a
3 list that ACUS holds, which I find complicated for
4 agencies to have seek that list out, I would want to
5 see some guidance to it. So again, this is not
6 critical if you have a time constraint but it is
7 something that I did not understand we were trying
8 to drive for a conclusion --

9 MR. VERKUIL: Right. I think we'll be happy to
10 take that idea and if we can, although as we said we
11 deferred this because this is really an electronic
12 rulemaking, which is part of the --

13 MR. STIER: I actually don't think it's just an
14 electronic rulemaking issue. I think it comes up here
15 as well.

16 MR. FRISBY: I would suggest that I agree with you
17 in spirit but perhaps that I agree wholeheartedly
18 with Cynthia. I know we looked at it with the
19 ad-law section. It's a much broader issue and I
20 would suggest that with the sessions tomorrow that
21 might be another project for ACUS to think about how
22 agencies are more broadly --

23 MR. VERKUIL: So let's go back. We got to run to
24 get this thing done here today if at all possible.
25 Let's go back to where we are. The question is whether

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2 legal authority gets put in here or not, really
3 basically, right, and doesn't, and Dean Revesz had a
4 notion that you could put it into, by simply the
5 introduction of two, you can simplify that and then it
6 would be easier to put in and then the question is
7 really whether that meets your needs at EPA.

8 A Or there's another proposal which would be to
9 add the text, add the text in four.

10 MR. VERKUIL: How about in four, would four work
11 for you?

12 MS. SICILIANO: I'm actually an agnostic on the
13 question whether we refer to authority because that's
14 --

15 MR. VERKUIL: Yeah, I mean I don't know either.

16 MS. SICILIANO: I would make a motion to adopt the
17 suggestion of Mr. Siegel because I would like to
18 address legal authority but I agree it's somewhat silly
19 to ask an agency to explain how and I would not put it
20 in a preamble, with all due respect to Mr. Frisby on
21 this, actually the preamble is probably what got us
22 here in the first place. So I move to adopt Mr.
23 Siegel's language --

24 MR. VERKUIL: Then let's go with that idea, in
25 paragraph four. You want to add a sentence?

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2 MR. SIEGEL: We just need some language.

3 PROFESSOR STRAUSS: Basis and authority.

4 PARTICIPANT: Mr. Siegel, may I suggest you use
5 the last sentence of paragraph four, right after the
6 agency should provide a reasoned basis, and, insert the
7 language that was the part of Mr. Frederick's disputed
8 amendment, as amended several times, immediately after
9 the agency should provide reasoned basis, whether the
10 Congress, whether the agency has legal authority to
11 preempt state law and if so whether it should preempt
12 state law. You see what?

13 MR. SIEGEL: Yes. I think we've got the --

14 PARTICIPANT: Agency should provide reasoned
15 basis, strike the rest of the, of that sentence and
16 substitute what --

17 MR. FRISBY: There has been another suggestion
18 which goes along the way, maybe Professor Strauss,
19 if you could, you had mentioned, and authority or --

20 PROFESSOR STRAUSS: Actually -- Peter Strauss,
21 senior fellow. I can't propose this amendment but I
22 think the problem would be taken care of by adding the
23 words, authority and, before the word basis in the
24 third line of four.

25 MR. FRISBY: So yours would read provide reasoned

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2 authority and basis?

3 PROFESSOR STRAUSS: No, include an internal
4 process for evaluating the authority and basis asserted
5 in support.

6 MR. VERKUIL: Okay. I'm sorry. All right. That
7 sounds good. Let's do this --

8 PROFESSOR STRAUSS: While I have the mike --

9 PARTICIPANT: May I suggest -- I like that. How
10 about this? Evaluating the legal and factual basis
11 asserted in support of a preemptive rulemaking and that
12 way we pick up the two halves of the classical legal
13 function of --

14 MR. VERKUIL: All right. Legal and factual basis.
15 Now, we're going to have to go, we have our keynote
16 speaker, I must remind you, waiting to come and talk to
17 us. I want to get this thing if at all possible done.
18 Legal and factual basis, add to paragraph four, line
19 three. Peter, that's okay with you?

20 PARTICIPANT: I would make that a motion.

21 PARTICIPANT: I think Professor Strauss's
22 suggestion is better, authority and basis. The basis
23 doesn't need to be only legal and factual. There are
24 policy arguments and other things that might not be
25 either. So I would move that we adopt the suggestion

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2 that the professor made, authority and basis in the
3 third line in paragraph four.

4 PARTICIPANT: Second that.

5 MR. VERKUIL: Can you live with that? Okay.

6 Great. All right. So now we have an amendment for the
7 second, Strauss amendment, second. Let's vote on that.

8 Oh, Strauss can't propose it, that's right.

9 PARTICIPANT: It was properly proposed --

10 MR. VERKUIL: Okay. All in favor of that
11 amendment say "aye".

12 PARTICIPANTS: Aye.

13 MR. VERKUIL: Opposed, nay.

14 PARTICIPANT: Nay.

15 MR. VERKUIL: Good. We got it, now, now --

16 PROFESSOR STRAUSS: May I make one further
17 comment? On the proposition as a whole, we've been
18 talking all this time, almost all this time about
19 recommendations two through four, which strike me as
20 entirely sensible and not so much about five through
21 ten. And building on Cynthia's observations, and on my
22 sense that the United Agenda is perhaps the most
23 obscure and weakest place in the government's Internet
24 resources to go to get things at least at the current
25 moment. I'm struck that the actions by OIRA and OMB do

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2 not include anything on the order of that they should
3 consider how regulationsdot.gov or other unified
4 sources can best be improved to provide notice of
5 matters with federalism impact. Now I can't move that,
6 but --

7 MR. VERKUIL: That's good. I'm glad sometimes
8 that you're in this predicament because I would love to
9 get this motion gone through and we'll come back and
10 visit this. We'll take care of this in an eRulemaking
11 or in some other context we'll be back to it. So
12 listen, we got this amendment. Now we're sitting here.
13 Can we vote on it? This is to adopt the recommendation
14 as amended. All in favor say "aye".

15 PARTICIPANTS: Aye.

16 MR. VERKUIL: Opposed nay.

17 PARTICIPANT: Nay.

18 MR. VERKUIL: All right. The ayes have it. I
19 thank you very much. And that's a lot of good work.

20 (Applause)

21 MR. VERKUIL: Thank you very much and I appreciate
22 all your work. Let me introduce now our keynote
23 speaker. Senator Sheldon Whitehouse represents the
24 state. That is the smallest state in the union but one
25 with the longest official name, namely the state of

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2 Rhode Island and Providence Plantations. More
3 importantly for our purposes Senator Whitehouse chairs
4 the Senate Judiciary Committee's Subcommittee on
5 Administrative Oversight and Reports.

6 A graduate of Yale University and the
7 University of Virginia Law School, Senator
8 Whitehouse has spent the majority of his
9 professional career in public service, having served
10 as attorney general of Rhode Island, director of the
11 state's Department of Business Regulation, and
12 counsel and policy director to Governor Bruce
13 Sundlun.

14 At the federal level Senator Whitehouse
15 served as the United States Attorney for Rhode
16 Island and was elected to the United States Senate
17 in 2006. Senator Whitehouse has focused on
18 healthcare and the environment and has been an
19 advocate for improving the use of health information
20 technology and addressing the issue of climate
21 change.

22 As Chair of the Senate Judiciary
23 Subcommittee, Senator Whitehouse has been
24 instrumental in authorizing the work of the
25 Administrative Conference. Indeed without his

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2 support we might not be holding this Plenary Session
3 today. We look toward to hearing his views on how
4 to accomplish our mission of bringing the public and
5 private sectors together to make government work
6 better. Please join me in welcoming our keynote
7 speaker.

8 (Applause)

9 SENATOR WHITEHOUSE: Well, thank you, Chairman
10 Verkuil. It is a great pleasure to be with all of you
11 today as you undertake your Plenary Session. I was
12 pleased when I was brought down through the back alleys
13 of the Archives to have been informed that I was
14 following in the footsteps of Justice Scalia, who had
15 preceded me through those same tunnels. And I just
16 want to confess to you all that I think I could feel his
17 emanations and penumbras all the way.

18 The Conference is clearly undertaking its
19 work with real energy and focus, diving into the
20 issue of regulatory preemption of state law and I'm
21 very glad to see that you are taking steps to enable
22 public participation, and the extensive public
23 participation in your work through online outreach.
24 For an organization that last existed in the
25 pre-Internet era you have made bold steps to take

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2 advantage of this new technology since your
3 reemergence. And what you do is a true public
4 service that speaks to the importance of the
5 Conference admission.

6 I trust that the energy and focus you show
7 on public participation will help the Conference
8 play a vital role in maximizing the efficiency,
9 effectiveness and integrity of agencies that face
10 constant political, legal and economic pressures.
11 The Conference through what President Obama called a
12 public-private partnership to make government work
13 better can provide nonpartisan expert research and
14 analysis and recommend best practices for federal
15 agencies as well as improvements for judicial review
16 of agency action. The Conference also can improve
17 the work of Congress through statutory proposals or
18 by identifying cross-agency standards that can
19 assist congressional oversight.

20 As a member of the Senate I take our
21 oversight responsibilities very seriously, whether
22 it's in respect to the quality and impartiality of
23 science used in drafting environmental regulations,
24 promulgation of e-prescribing regulations, necessary
25 to unlock the potential of health information

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2 technology, or the types of exotic investments that
3 should be subject to regulation. I trust that you
4 will find plenty to study in each these and numerous
5 other areas.

6 Today, however, I would like to take this
7 wonderful opportunity that you have given me to
8 speak about a subject that I believe merits both
9 Congressional oversight and the attention of the
10 Conference and that is agency capture. As you all
11 know, agency capture is a familiar concept in
12 regulatory and economic theory. From Woodrow Wilson
13 in 1913 through Marver Bernstein, the first Dean of
14 the Woodrow Wilson School at Princeton in 1955 to
15 Nobel prize-winning economist, George Stigler, to
16 the editorial page of the Wall Street Journal this
17 year and through many texts and law reviews on
18 administrative law, Americans from across the
19 political spectrum have recognized the threat of
20 agency capture.

21 And it is not merely a subject of academic
22 interest. It has reared its ugly head in our real
23 world during some of the most disappointing
24 incidents in the history of our regulatory
25 apparatus, most recently during the failures of the

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2 Minerals Management Service in the lead-up to the
3 oil spill in the Gulf of Mexico.

4 At bottom, agency capture is a threat to
5 democratic government. We, the people, pass laws
6 through an open and democratic process. Powerful
7 interests then take a second bite at that apple.
8 They want to capture the regulatory agencies that
9 enforce those laws so that they can avoid their
10 intended effect, turning laws passed to protect the
11 public interest into regulations and enforcement
12 practices that protect limited private interests.

13 The long academic history and unfortunate
14 recurrence in real life of agency capture has
15 created broad ground for agreement on this subject.
16 For example, at a hearing that I chaired in August
17 in my administrative oversight and the courts
18 subcommittee, witnesses from various points on the
19 ideological spectrum agreed on the following seven
20 propositions. First, they agreed that agency capture
21 is a real phenomenon and a threat to the integrity
22 of regulatory government. That was a unanimously
23 accepted proposition.

24 Second, they agreed that regulated
25 entities have enormous stakes in the content of

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2 regulation, creating a concentrated incentive to
3 gain as much influence as possible over regulators
4 versus a very diffuse public interest on the other
5 side.

6 Third, they all agree that regulated
7 entities often have a substantial organizational and
8 resource advantage in the regulatory process when
9 compared to public interest groups, thus enabling
10 them to exert disproportionate influence.

11 Fourth, everyone agreed that some of the
12 processes of the regulatory state lend themselves to
13 gaming by regulated entities, allowing them undue
14 control over regulation. For example, a regulated
15 entity can overwhelm an agency with concocted
16 comments, jamming up the regulatory process.

17 Fifth, regulatory capture was agreed by
18 its nature to happen in the dark, done always as
19 quietly as possible. No trumpets announce the
20 success of capture of an agency. Sixth, the
21 potential damage of agency capture was agreed to be
22 enormous.

23 And finally, effective Congressional
24 oversight was agreed to be key to keeping regulators
25 focused on the public interest rather than on the

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2 narrow private interests of the entities that
3 participate in the regulatory process.

4 I trust that most if not all of you also
5 agree and find these propositions really
6 unremarkable and thus easily agreed to. Similarly,
7 I expect none of us seriously would expect that our
8 government, a government that we ordinarily take
9 great pride in, the government of Washington and
10 Jefferson and Madison and Lincoln and the
11 Roosevelts, this great government, this beacon that
12 has shown a light into the darkness of far corners
13 of the world, illuminated by the power of our
14 example, for this government to allow itself to be
15 turned over to private purposes and to doing the
16 bidding of powerful special interests is a shame in
17 many dimensions. So I doubt ultimately that agency
18 capture has many defenders other than perhaps its
19 successful entrepreneurs.

20 Given how we generally agree I believe
21 that agency capture poses a threat to the integrity
22 of our regulatory state, what was remarkable to me
23 is how little attention has been paid to the subject
24 by Congress over the years. The hearing that I
25 chaired was the first on the subject in memory and

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2 we found no record of a prior hearing. So there's
3 no particular institutional knowledge in Congress of
4 how to prevent agency capture, of how to identify it
5 when it occurs, or how to eliminate it, clean it up,
6 when it has set root. Academics continue to discuss
7 the issue, the concept in broad terms but there
8 similarly is no academic consensus on how to
9 identify it, prevent or eliminate it.

10 As a matter good government, this is a gap
11 that should be remedied. And as I believe the
12 agreement of my subcommittee hearing demonstrated,
13 it need not be a partisan issue. Again every
14 witness appointed by both sides of the aisle agreed
15 with all of those seven propositions.

16 Whether you think that agency capture is a
17 symptom of excessive or inadequate regulation,
18 whichever economic interest you think poses the
19 greatest threat to agency independence and however
20 you think capture should be resolved, we should all
21 be able to agree that whatever our government looks
22 like it should work as well as possible. Making
23 government work is one area in which we should have
24 common cause.

25 That end I have begun developing

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2 legislation that is intended to bring focus upon
3 agency capture, wherever it lurks, using sunlight to
4 refocus the agency on the public interest. While a
5 number of approaches are possible, the one that I am
6 currently exploring would create an investigatory
7 office within OMB, the Office of Management and
8 Budget, that would coordinate with inspectors
9 general and the Government Accountability Office to
10 identify and report specifically on agency capture.

11 It would ensure that abuses were not
12 overlooked in the far-neglected corners of the
13 regulatory state where decisions important to
14 industries are made often out of public view. And
15 it would sound the alarm if a regulatory agency were
16 overwhelmed by a more sophisticated and better
17 resourced regulated industry. I do not at present
18 imagine the office holding either prosecutorial
19 authority or having the power to demand reforms by a
20 subject agency but its ability to bring scrutiny and
21 publicity where agency capture had flourished should
22 be a powerful tool to defend the integrity of our
23 vital regulatory agencies.

24 There are, of course, innumerable
25 questions to work through on a piece of legislation

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2 of this kind. I have had the opportunity to begin
3 working with a range of administrative law experts
4 on this issue and I certainly would welcome the
5 input of the Conference. However these questions of
6 legislative focus and drafting are resolved, I
7 believe that Congress has a responsibility to build
8 mechanisms, to identify and end regulatory capture
9 and also to structure or if necessary restructure
10 federal agencies so that they are less prone to
11 capture in the regulatory process.

12 I believe that sustained attention to the
13 issue of agency capture not only is warranted but
14 also will be extremely productive. It is this
15 effort that I invite the Conference to join.

16 Whether by studying agency capture as a broad and
17 general concept, exploring its particular
18 ramifications in agencies or investigating ways to
19 ensure that the public retains its faith in the
20 integrity of their regulatory institutions, the
21 Conference can perform an enormous service for the
22 American people by bringing its expertise and
23 considered judgment to bear on this important and
24 well-established issue.

25 Here, as in other areas, the Conference has

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2 the capability to explain what bad government
3 consists of and to identify a path for achieving
4 good government. Many of the lessons we glean
5 regarding this topic as with others will prove to be
6 internal to the executive branch, relating
7 exclusively to steps that agencies can and should
8 take on their own without additional statutory
9 authority or other Congressional prodding.

10 I would ask, however, that the Conference
11 not limit itself to finding regulatory solutions to
12 regulatory problems. I hope you will also to look
13 Congress as a possible partner in the continuing
14 task of improving and protecting regulatory
15 agencies, not just as an initial authorizer and
16 provider of funds. Administrative law may not be
17 the stuff that political excitement is made of but I
18 believe you will find any number of members of
19 Congress on both sides of the aisle who are
20 committed to good government, who are willing to
21 work hand in hand with you and with one another to
22 make it even better. I count myself among that
23 number and I look forward to our future work
24 together.

25 Thank you very much again for the

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2 opportunity to be here with you today. I wish you
3 and the Conference all the best and I look forward
4 to working with you to make our government ever
5 better, our Union ever more perfect. Thank you.

6 (Applause)

7 MR. VERKUIL: Thank you very much for those
8 important words. Senator, I really think that one of
9 the reasons we're here is to deal with these critical
10 issues and the Conference, of course, as you know
11 operates both in this form, in terms recommendations,
12 formal recommendations and works through, with the
13 Council and comes up with good ideas and we will
14 certainly put that on our list and work with your staff
15 to see how we can help and be of service.

16 We also, I should say and, Jeff Lubbers is
17 here, our special counsel, we also on occasion can
18 give analysis of potential legislation short of the
19 recommendation process, which we'd be glad to do as
20 well, as we're working through the process, so that
21 we could have several ways in which we might
22 interact with you in this regard. It's certainly a
23 big issue, an important issue and one that we would
24 want to be part of as it reflects our concern about
25 good government.

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2 And I should tell you just when you come
3 to my new offices -- and I hope you will -- our new
4 offices not mine -- I put up two frescos, Lorenzetti
5 frescos from Sienna. You remember these frescos?
6 Some of you have seen them. They're 13th Century --
7 14th Century, 1310. One says good (sic) government,
8 and it's a picture of the devil, who is running
9 things and everyone is suffering, and the other one
10 -- these are the Lorenzetti's -- and the other one
11 -- oh, that's the bad government. The other one
12 says good government and that's what we're for. So
13 every day we walk in and we say to ourselves, which
14 one are we going to choose today. And so we're all
15 for that. I better not get confused, right? I
16 could be impeached, I suppose. But this is great,
17 very good for you to take the time.

18 Now, we, I just have a few items and then
19 we're done for the day. The evening, of course, is
20 -- and I hope that if you have time you'll spend
21 some time with us. It's going to be devoted to our
22 reception. But before we get there I just wanted to
23 thank not only the Senator but also of course
24 Justice Scalia for taking his time to come and make
25 this such a meaningful day in our lives.

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2 And as a small token of our appreciation
3 for this day we have mugs and certificates for all
4 Conference members. I hope that you will pick them
5 up. I personally have signed each one of them, not
6 an auto-pen, and we are, these are all being held at
7 the registration table so if you if you didn't get a
8 chance to pick them up today you can pick them up
9 tomorrow. And the reception will start at six
10 o'clock. We've got a little bit of time, I'm
11 afraid, but, in fact maybe Mike, you could do --
12 yeah, okay. So, it will start at six o'clock.

13 So there are several things you could do.
14 You could talk to each other. You could talk on
15 your cell phones. You can go to the, there's a very
16 nice little gift shop, and then here's what you have
17 to do. You have to collect your coats now and then
18 you, they'll be directed by staff where to put the
19 coats when you go to the reception. Is that right,
20 Mike?

21 MR. MCCARTHY: Yes.

22 MR. VERKUIL: All guests are requested to proceed
23 upstairs to the gift shop level, as I mentioned. All
24 guests attending the reception must keep their
25 nametags, please. All guests not attending the

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2 reception should exit upstairs on the Constitution
3 Avenue side. The Archives staff will be there.

4 So for today we are adjourned and we will
5 reconvene tomorrow morning at the McGowen Theater
6 here at nine o'clock for a session, by the way,
7 which will deal with the important business of
8 getting input into our -- as we did this afternoon
9 -- input into our agenda for the future. Thank you
10 very much and thank you for all the good work you
11 did today on this recommendation, which was made
12 better as a result.

13 (Applause)

14 (Conference adjourned for the day at 5:11
15 p.m.)

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2 State of Maryland,

3 Baltimore County, to wit:
4

5 I, ROBERT A. SHOCKET, a Notary Public of
6 the State of Maryland, County of Baltimore, do
7 hereby certify that the within-named witness
8 proceedings personally took place before me at the
9 time and place herein set out.

10 I further certify that the proceedings
11 were recorded stenographically by me and this
12 transcript is a true record of the proceedings.

13 I further certify that I am not of
14 counsel to any of the parties, nor in any way
15 interested in the outcome of this action.

16 As witness my hand and notarial seal
17 this 21st day of December, 2010.

18
19 _____
20 Robert A. Shocket,

21 Notary Public
22
23

24 My Commission Expires:

25 November 23, 2014

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ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
53rd PLENARY SESSION
DECEMBER 10, 2010

The above-mentioned Conference was continued on Friday, December 10, 2010, commencing at 9:12 a.m., at the National Archives, McGowan Theater, 700 Pennsylvania Avenue, N.W., Washington, D.C., 20408, before Robert A. Shocket, a Notary Public.

CHAIRMAN: PAUL VERKUIL

EXECUTIVE DIRECTOR: MICHAEL T. McCARTHY

REPORTED BY: Robert A. Shocket

TSG JOB NO. 34986

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 AGENDA

3 53rd Plenary Session

4 December 10, 2010

5
6 -- Introductory Remarks, The Honorable David Ferreiro,
7 Archivist of the United States

8
9 -- Introductions to breakout sessions/staff
10 presentations

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12 -- Breakout sessions Council Members lead five groups
13 of Conference Members in discussion of Administrative
14 Conference goals, project ideas, and proposed studies

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2 P R O C E E D I N G S

3 MR. VERKUIL: Good morning. Welcome again
4 to Day 2. We have all the stalwarts here. I
5 appreciate that and we have a good day's work
6 ahead. It should be enjoyable and interactive
7 and a chance for us to get to know each other
8 better and come up with some good ideas for the
9 Conference going forward. I have to say for
10 the purposes of this meeting, the opening
11 meeting, this is like an ideal venue and I hope
12 you enjoyed the reception last night.

13 We not only had the most amazing
14 opportunity to see the most important documents
15 in American history but also to have a very
16 nice presentation by the string quartet from
17 the Air Force, which is something only federal
18 agencies can do, is to get military bands or
19 other type organizations from the workforce.

20 So this morning we're going to hear from
21 our host, David Ferreiro. David is the tenth
22 Archivist of the United States and by
23 coincidence I'm the tenth Chairman of the
24 Administrative Conference. Prior to his
25 appointment David served as the Andrew Mellon

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2 director of the New York Public Libraries. He
3 earned bachelor's and master's degrees in
4 English literature from Northeastern University
5 and a master's degree from Simmons College in
6 library information science.

7 He has had a distinguished career,
8 including previously serving as the associate
9 director of the public library and acting
10 director of libraries at the Massachusetts
11 Institute of Technology and he also served as
12 University Librarian and vice provost at Duke
13 University. So please join me in welcoming our
14 host and the Archivist of the United States,
15 David Ferreiro.

16 (Applause)

17 MR. FERREIRO: Thank you, Paul. And
18 welcome all of you to my house. It's been just
19 over a year now so I'm feeling like it is my
20 house. And I hope you enjoyed the reception
21 last night and your close-up personal view of
22 the Charters of Freedom. We should acknowledge
23 Dolly Madison's role in last night's event. If
24 it wasn't for Dolly Madison, those Charters of
25 Freedom probably wouldn't be here. It was

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2 Dolly Madison who had the foresight the night
3 before the British burned the city to spirit
4 them out of Washington into the mountains of
5 Virginia wrapped in linen sacs. So I always
6 try and acknowledge her contribution to what I
7 do here.

8 We are the nation's record-keeper since
9 1934, created under the Roosevelt
10 administration. And our charge is to make vast
11 volumes of records dating back to the beginning
12 of our nation available to the public. They
13 document individual rights and entitlements.
14 They provide a record of the actions of our
15 governments and the individuals responsible for
16 those actions and they hold a history of the
17 nation's experience, the triumphs and the
18 darker sides.

19 The record we preserve are those with
20 permanent value, the most important two to
21 three percent of the records that are actually
22 created in conducting the public's business.
23 We are in 21 states and Washington, D.C., with
24 accession as permanent records, remember this
25 is just the two to three percent, more than ten

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2 billion pages of textual documents, seven
3 million mass charts, architectural drawings and
4 more than 40 million still photographs,
5 billions of machine readable data sets and more
6 than, the miles and miles of film and video.
7 And in the fastest growing category, as you can
8 imagine, 100 terabytes of electronic records;
9 77 terabytes of those are from the George W.
10 Bush White House alone.

11 As Paul said, we are ten years old. The
12 tenth, each us is the tenth to hold our
13 positions, and Paul helped us in November to
14 commemorate the 75th Anniversary of the
15 enactment of the Federal Register Act. An
16 important part of the National Archives, the
17 Federal Register is often called the
18 government's daily newspaper since it provides
19 public record of actions and proposed actions
20 of all the departments and agencies in the
21 executive branch. And last month also marked
22 the partnership between the administrative
23 Council and our Office of Information
24 Government, the office of Government
25 Information Services, OGIS, the new Federal

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2 Freedom of Information Act ombudsman, and
3 you've all met Miriam Nisbet, the first holder
4 of this position, in offering a workshop for
5 the administrative Council for agencies to
6 explore ways to use technology in the
7 management of high volume caseloads. The
8 workshop was a great example of the
9 Administrative Conference's mission of what
10 President Obama has described as making
11 government work better and OGIS's mission of
12 improving the administration of the Freedom of
13 Information Act.

14 As the agency entrusted with preserving
15 and providing access to our nation's history,
16 the National Archives is deeply appreciative of
17 the past achievements of the administrative
18 Council and is one of 94 executive branch
19 agencies who stand to benefit from what you
20 will be doing to improve the way government
21 operates.

22 I thought you would be interested in a few
23 historical documents that demonstrate the
24 context of your own work today. These are
25 scans of records from our holdings in the FDR,

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2 Eisenhower and Kennedy libraries as well as
3 here at Archives 1. First, is the cover of the
4 President's Committee on Administrative
5 Management, also known as the Brownlow
6 Committee or Brownlow Commission, so named
7 after one of the Committee members, Louis
8 Brownlow. Dated 1937, this report recommended
9 sweeping changes to the executive branch. The
10 original is housed in the FDR Library in Hyde
11 Park, New York.

12 The next image is a page from the draft of
13 FDR's message to Congress, transmitting the
14 report. The changes are in FDR's hands, and I
15 particularly like the passage in the middle of
16 the page which says, "A government without good
17 management is a house builded (sic) on sand."

18 On April 29th, 1953, White House Press
19 Secretary James Haggerty disseminated a press
20 release announcing, quote, a call for a
21 Conference of representatives of the
22 departments and agencies and of the judiciary
23 and Bar, for the purpose of studying the
24 problems of rulemaking proceedings of the
25 executive departments and administrative

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2 agencies. And here is the cover of the 94-page
3 report, Conference on Administrative Procedure,
4 called by the President of the United States.
5 Two two-page press releases and the report are
6 housed in the Eisenhower Presidential Library
7 in Abilene.

8 Next is after meeting with Justice
9 Prettyman of the U.S. Court of Appeals, Mr.
10 Katzenbach of the Department of Justice and
11 Professor Nathanson of Northwest University Law
12 School, James Landis, then special assistant to
13 the President, submitted this one-page memo to
14 President Kennedy regarding the drafting of an
15 executive order establishing the Administrative
16 Conference of the United States.

17 And here is the first page of executive
18 order 10934, dated April 13th, 1961,
19 establishing the Administrative Conference of
20 the United States. On the signatory page note
21 the President's signature as well as the
22 handwritten executive order in the bottom right
23 corner of the page. On the screen is the first
24 page of the act, quote, to provide for the
25 continuous improvement of the administrative

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2 procedure of federal agencies by creating an
3 Administrative Conference of the United States
4 and for other purposes. It is dated January 7,
5 1964, and you can see the date stamps at the top
6 margins. The one on the left says the White
7 House received, August 19, 1964, and the one on
8 the right says General Services Administration,
9 Office of the Federal Register, National
10 Archives Record Service received September 1st
11 1964.

12 For those of you have who may not know,
13 the National Archives began as an independent
14 agency in 1934 and in 1948 became part of the
15 General Services Administration. On April 1st,
16 1984, the agency gained its independence and
17 the long-timers here are still celebrating that
18 independence.

19 This last image shows the signatory page
20 of the act. John McCormick of Massachusetts
21 was Speaker the House of Representative. Lee
22 Metcalf of Montana was the Acting President Pro
23 Term of the Senate and under the stamp approved
24 August 30th, 1964, you can see the signature of
25 President Lyndon Johnson. This executive order

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2 and act are part of the general records of the
3 United States and the originals are housed here
4 in the National Archives Building. So let me
5 again welcome you and I hope you enjoy your
6 time here and come back and visit us often.
7 Thank you.

8 (Applause)

9 MR. VERKUIL: Thank you so much, David.

10 It's always a treat to get these historic
11 documents and we are going to use at least the
12 one, 1964 is our founding date, that's the
13 first date so actually we're going to be fifty
14 years old in only three more years when you
15 think about it. We're getting old.

16 David Ferreiro has this habit of giving
17 you amazing documents. When I first went to
18 visit him he gave me a document involving Walt
19 Whitman. Walt Whitman worked for the Post
20 Office Department at one point and he needed a
21 reference and his reference was an elaborate
22 letter from Ralph Waldo Emerson, which is
23 really quite, when you think about, an amazing
24 thing to have. So thank you so much for what
25 you do and for hosting us so well in these

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2 wonderful and really inspiring quarters.

3 I'm going to now do two things before we
4 break out and one is, I want you to hear from
5 -- we couldn't do this yesterday afternoon,
6 there wasn't time but Mike McCarthy will talk
7 just a little bit about our missions and goals
8 and Kathy Kyle will follow briefly with just
9 showing you what we're doing with technology so
10 you can get an update on that. Thank you.

11 MR. McCARTHY: Good morning. One of the
12 main goals for the Plenary Session is to think
13 about the future direction of the Administrative
14 Conference and that's the point of the breakout
15 sessions that you are going to going into
16 later. So as something for you to think about,
17 what we thought we would do is give a little
18 update on some of the meetings we've been
19 having and some of the themes that have emerged
20 from Chairman Verkuil and the staff, some of
21 the recurring themes that we've encountered in
22 setting up the agency and get some food for
23 thought here.

24 So the starting point for missions and
25 goals has to be the statute, the authorizing

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2 statute. And the original statute in 1964
3 directed the Conference to arrange for federal
4 agencies, assisted by outside experts,
5 cooperatively to study administrative problems,
6 exchange information and develop
7 recommendations for action so that private
8 rights may be fully protected and federal
9 responsibilities may be carried out
10 expeditiously in the public interest. So that
11 was the basic framework for the Conference.
12 When we were reauthorized in 2004 Congress had
13 a few more specifics to our mission, namely
14 promote public participation and efficiency in
15 rulemaking, and with regard to rulemaking,
16 adjudication, licensing and investigation,
17 reduce unnecessary litigation, improve the use
18 of science, improve the effectiveness of
19 applicable laws.

20 So with that as our starting point, to
21 meet our requirements under the statute such as
22 Government Performance Results Act and OMB
23 regulations, we have to put a little more meat
24 on the bones. Justice Scalia in our
25 Congressional hearing earlier this year said

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2 that, when asked about what the agency should
3 be doing, he said do good, avoid evil, which I
4 think we can all agree with but OMB wants more
5 than that.

6 So specifically we have to come up with a
7 strategic plan and performance goals to guide
8 our product selection and support our budget
9 requests. So what we have done at the staff
10 level is identify some themes to track our
11 statutory mandate and they have recurred in the
12 meetings we had our with our constituency, in
13 government agencies, the private Bar, academia
14 and interest groups. And so I will present
15 these themes and our goal is for you, the
16 members, to give us feedback through the
17 breakout sessions about whether these are the
18 right themes, what goals and priorities should
19 be added, what should be changed.

20 So the proposed mission statement that we
21 have really just tracts the statute. The
22 administrative Conference of the United States
23 brings together senior federal officials,
24 experts and citizens to develop formal
25 recommendations and convene informal

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2 collaborations that increase public
3 participation, improve effectiveness, reduce
4 costs and protect private rights in the
5 government's regulatory activities.

6 So the goal is that we want to come up
7 with something that is not too buzzword-heavy
8 or corporate-speak, that's going to be useful
9 in saying what we do but is broad enough to
10 give us the flexibility to do the range of
11 activities that the Conference can encounter.

12 And so these are the priorities that we've
13 identified, the first one being transparency.
14 And so we came up with this. The
15 Administrative Conference will improve openness
16 and transparency in government through
17 increased use of interactive technology,
18 development of standards and formats for
19 information sharing and proposals for reform of
20 laws and rules written before the Internet
21 revolution.

22 So some examples of what we're doing in
23 this area are one, what we're doing with our
24 own website and what Kathy will talk about is
25 use of collaborative workspace, another example

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2 of how to update things that were drafted
3 before the Internet existed, work on the
4 Federal Advisory Committee Act and bring that
5 into the 21st Century, what is it meaning this
6 days and does that need to be updated.

7 Another theme is participation. The
8 Administrative Conference will expands citizen
9 participation in the regulatory process through
10 increased use of interactive communications
11 technology as well as by alternative means of
12 outreach in order to provide essential
13 information to government officials. So the
14 examples in this area are the projects that we
15 have underway to study e-rulemaking and again
16 the Federal Advisory Committee Act.

17 This next one, the title, the one word is
18 efficiency. That might not be the best
19 one-word description. There maybe another one
20 about collaboration or balance of
21 responsibility but the point is that the
22 Administrative Conference will study and
23 promote the most responsive and efficient means
24 of sharing authority and responsibility among
25 the federal government, state and local

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2 governments, contractors, grantees, citizens.

3 This will include exploration of new models of
4 collaborative governance as well as the proper
5 division of labor between the government and
6 private sector.

7 So, you know, there's really two themes on
8 that, that were really ongoing about what we're
9 doing now. Obviously the preemption
10 recommendation yesterday that we just
11 considered and approved is an example of how
12 you look at the federal-state balance and the
13 project that they had a Committee, that we had
14 a Committee meeting on yesterday morning on the
15 application of government ethics rules to
16 contractors is looking at the public-private
17 balance, so looking at these balance issues and
18 how do we strike the right balance.

19 Another theme that has come up again and
20 again is timeliness. And because justice
21 delayed can be just denied the Administrative
22 Conference will work across federal agencies to
23 reduce backlogs and unnecessary delays in case
24 processing. The Conference will study what
25 works and what doesn't and help agencies revise

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2 their hearing processes, technology systems and
3 human capital to deliver more timely results.

4 And just as the forum that the Archivist
5 mentioned that we can meet here at the National
6 Archives with Miriam and the Office of
7 Government Information Services, we've brought
8 together representatives from DOJ and DHS, who
9 are working on immigration, and representatives
10 of Social Security who are working on
11 disability claims and representatives from the
12 V.A. who are working on veterans' claims and
13 basically compared notes about how these
14 various agencies are using technology like
15 video hearings and IT symptoms to reduce case
16 backlogs.

17 So these are the types of programs, that,
18 and just bringing people in the room together
19 who had not necessarily had occasion to speak
20 before, I think provided real value to these
21 agencies and maybe it will provide value to
22 other agencies who are encountering similar
23 problems.

24 Another theme that came out is
25 data-driven. Because regulations should be

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2 based on sound data, the Administrative
3 Conference will improve the use of science,
4 empirical data and performance evaluation in
5 regulations and administrative law. The
6 conference's own activities will be measured to
7 demonstrate the value that they provide. And
8 so an obvious example of this is the project
9 that we have, that we're about to commence
10 about use of science in the regulatory process
11 that's in our statute.

12 And so finally, innovation, and this is
13 more of an internal, for the Conference itself,
14 and Paul has made reference to this yesterday
15 in his speech but it's been a real driving
16 theme for us. As a new agency not shackled by
17 outdated infrastructure and process, the
18 Administrative Conference will be an innovative
19 test lab for experiments in agency management
20 and government performance, focusing on
21 flexible and transparent information
22 technology, minimal overhead and administrative
23 costs and drawing on top talent through
24 innovative personnel policies and
25 partnerships.

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2 So as Paul mentioned, and this has been my
3 experience in helping Paul stand up this
4 agency, the great disadvantage of starting an
5 agency from scratch is we have to do everything
6 for the first time. And there's a lot of
7 things that we have to do and there are the
8 things that we know we have to do and then
9 there are things that we didn't even know we
10 had to do and we find out we had to do.

11 But the great advantage is that we haven't
12 inherited the outdated technology or
13 infrastructure and so we can structure
14 ourselves when we build a new website, which
15 Kathy will talk about, we can build it from
16 scratch. We don't have to take what we've got
17 and try to update it or tweak it or modernize
18 it. We can start fresh on a lot of these
19 things and figure out with some planning from
20 the outset about how we can be on the cutting
21 edge and how we can look at new ways of doing
22 things.

23 So those are the main themes that we've
24 identified and no doubt there are more themes
25 and ideas for change and so the hope is that

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2 the members will give this some thought and
3 discuss it at the breakout sessions. So with
4 that I'll turn it over to Kathy who will talk a
5 little bit more about the web and the new
6 technology we're using.

7 MS. KYLE: Good morning.

8 AUDIENCE: Good morning.

9 MS. KYLE: Okay. When Paul and I first
10 discussed developing a website -- give this a
11 moment to load -- we sat down to lunch, and
12 Paul said, you know, I want to build a 21st
13 Century agency and I want our website to
14 reflect those same values and I want to give it
15 bells and whistles. And so I said -- and
16 audience laughs -- and I said -- go ahead.
17 It's okay. I know it's early. And I said
18 okay, I think I can do that. And what I want
19 to do today is begin by establishing a
20 baseline. And we have a lot of requirements
21 and a lot of rules and regulations to abide by
22 but we can also give it bells and whistles.
23 And so that's what we tried to do.

24 So I want to establish a baseline. As
25 every good communications director tries to do,

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2 we try to say this is the as-is and this is
3 where we're going to go so I want to give you
4 an idea of what we started with. And we
5 lovingly call this ACUS 1.0 and some of my
6 colleagues also call this.5. So this is what
7 we started with. We wanted to put something
8 out there so that we could just get started and
9 put a face to the name. And so this is what we
10 started with. We wanted to share information
11 with a diverse stakeholder community and we
12 lacked navigation but we still had a presence.

13 And we moved to R2B, which is ACUS 2.0,
14 and our current site denotes very specific
15 features. You will quickly notice what we've
16 done. We've changed our look and feel. We've
17 also featured our webcasting capability which
18 we are live so, as we said yesterday, feel free
19 to say what you have to say but remember
20 everyone is listening.

21 So we've also featured, we have a featured
22 resources section. We have good, clean
23 navigation and we have, we're also featuring
24 social media on our site. We also are working
25 kind of that phase one situation right now.

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2 What we wanted to do is to quickly stand up the
3 site by the Plenary. That was one of our goals
4 and we've hit that goal. We actually stood the
5 site up in six weeks and then announced it on
6 the seventh week and we're very proud of that.
7 We worked with a really great team internally
8 and externally. Members of that team include
9 GSA, EPA, who had great collaboration with
10 social networking, SMEs across the government.
11 Bill Richardson was a wonderful partner at ACUS
12 when I was at OMB, working on our terms of
13 service so we have had lovely partners across
14 the federal government and private sector as
15 well.

16 So in our phase one some of the features
17 that you will see on our site include social
18 networking elements. We have New Media. We
19 have Facebook, Twitter, YouTube, Dipity --
20 that's kind of a fun one -- Flickr,
21 Livestream, LinkedIn, Google Aps for
22 Government, which I'm going into in just a
23 moment, Google Analytics so we can track and
24 manage and monitor who is on our site and
25 track. We have, we're working on our terms of

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2 service agreement with SlideShare as well so
3 that we can share information, share our
4 presentations, not just PDF but put it up on
5 our website.

6 We have, we're kind of setting ourselves
7 up as a gateway to information. We want to
8 serve as a resource to all of our stakeholders
9 in our community so that we have a library of
10 our webcasts. We have, we're working with Carl
11 Malamud to digitize -- I can't even say the
12 word -- digitize all of our information. I see
13 you smiling over there, Michael. We're going
14 to put all of our historical artifacts on our
15 website as well. We are hosting our website,
16 in a cloud environment on the heels of GSA's
17 announcement to encourage posting of the cloud.
18 We're doing that so that's really exciting. We
19 are compliant with all of our FISMA regulations
20 and rules. We are compliant so that's also one
21 of our goals that we've achieved.

22 So, one of our goals is or three of our
23 goals is we're trying to engage, inform and
24 share information. So here's some of our
25 features. We have a slider bar where we're

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2 messaging appropriately. We're sharing
3 information, spreading the message where
4 individuals can click on Twitter or Facebook or
5 LinkedIn. We have an Rss feed. People can
6 share information to clicking on any of those
7 elements and share it that way. We can also,
8 people can click on our site and go to Facebook
9 and connect with us in a whole myriad of ways.

10 So we're really excited about that. And
11 then we also have the Dipity feature where we
12 have a really rich history, instead of just
13 listing information about us where we have a
14 whole slew of historical information you can
15 view it in a historical fashion where it's very
16 interactive and then other people can post
17 information about ACUS as well in a timeline
18 fashion or in a visual fashion.

19 So the phase two for us, after the Plenary
20 we're going to add additional features to the
21 site. Some elements that you really can't see
22 on the site, that's kind of on the
23 infrastructure side is we are integrating with
24 Google Aps for Government where we're using
25 their calendar pool for, so that you can list

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2 events. Some other elements of the site that
3 members can use and I'll show you in the next
4 phase, is we, there's a collaborative workspace
5 element where members can click and join and
6 view different elements of the site.

7 Let me, actually, let me click on this and
8 show you. We selected Google Aps for
9 Government where members can log in and we use
10 this collaborative workspace, which is a secure
11 FISMA-compliant five-based environment that
12 allows a unique public-private stakeholder
13 community greater collaboration. We're looking
14 through, we're basically looking for a solution
15 that allowed everyone e-mail, calendaring and
16 posting and viewing of documents and so we've
17 used this tool that allows us those
18 capabilities.

19 And we're basically using this as a kind
20 of a collaboration station. Emily Schleicher
21 kindly posted all of our documents for us there
22 so that you can actually view them here. So
23 you can post and view different minutes and
24 Federal Register notices and collaborate on
25 that. So this is basically what we have for

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2 our website. We're really excited about it.

3 If you have any questions or comments or

4 feedback we would welcome them. Sorry, let me

5 go back to this. You know, Paul, our Chairman,

6 is deeply committed to social media and

7 technology. He said that our Administrative

8 Conference should serve as an incubator for Web

9 2.0 technology. As we collaborate and

10 experiment on this tool we welcome your

11 feedback and I invite you to take a look at our

12 website. We worked really hard on it. And

13 thank you. Thank you, Paul.

14 (Applause)

15 MR. VERKUIL: So we're going to have our

16 breakout session now. And the idea is that

17 we've seen the breakout groups. There are five

18 groups, one of who is here in the theater,

19 which I will be chairing, and then there are

20 four up two flights. And, you know, divide

21 yourself. You'll find out where your name is

22 and you can go. We're going to have, each

23 group is going to be led by one or two members of

24 our Council and two staff supports, both of

25 whom will be capable of either taking notes or

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2 doing it electronically.

3 And the idea is to cover I think three
4 areas. One is to think a little bit about Mike
5 McCarthy's ideas about what our mission is. I
6 don't think we should spend too much time on
7 that, and certainly you can always follow-up
8 with notes to us about things but you might
9 want to just give that some thought. That's
10 one area.

11 The second is to talk about the projects,
12 which is really what we, you know, what we
13 produce, our output, our recommendations
14 fundamentally and as we know yesterday we got
15 our first one, which is quite a treat when you
16 think about it after fifteen years. So we want
17 to do more of those and frankly in June we want
18 to do more than one, certainly. We would like
19 to have, I don't know, four or five if that
20 works out, some big thoughts, some smaller
21 thoughts, some, you know, if you have an
22 instinct for the jugular that's good but also
23 for the capillaries, little ideas that help
24 government move forward are important to us.
25 As Justice Breyer said in our renewal hearing,

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2 you know, little ideas that people don't notice
3 in the administrative process that we make
4 things work better. It can be really
5 important. The interstices are some places to
6 look for new ideas.

7 And third, we just have your thoughts
8 about, you know, what are some problems in
9 government, maybe that you don't have solutions
10 to but just some problems that we ought to
11 perhaps address and learn more about. That's
12 maybe a third category. And also remember that
13 we don't have to act only through
14 recommendations. As Mike mentioned, we had
15 this wonderful program here at the Archives
16 involving video hearings across agencies. Now,
17 these agencies had never met before, to talk
18 about how to do a hearing, and in the case of
19 Social Security, for example, they do video
20 hearings on a discretionary basis.

21 In the case of immigration it's mandatory
22 and you got these problems with multipoint.
23 It's a wonderful, it was a wonderful
24 experience. Everyone was sitting around taking
25 notes. Now, that doesn't turn out to be a

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2 recommendation but it turns out to be very
3 valuable, so, suggestions along those lines, a
4 challenge as well.

5 When you go upstairs two flights we think
6 you will have some coffee and some Danish up
7 there. Those of you -- they haven't shown up
8 yet; maybe they have by now. But there's also
9 a little cafeteria there for those of you who
10 are here, except you can't bring food in here
11 but can you bring food into your breakout rooms
12 if you're in those rooms. So that's the idea.
13 Let's break off now and we'll come back here at
14 eleven o'clock and then we'll hear from each of
15 the groups. We'll post the words on the screen
16 and we'll then finish at twelve.

17 (There was a break in the
18 proceedings.)

19 MR. VERKUIL: Partner, member of the
20 Council, do this on my own but we've got
21 Bridget Dooling with us, who is our actually
22 detailee from OMB. Bridget is a very
23 experienced and highly qualified desk officer
24 at OIRA. And one of the nice things about
25 government is you can borrow people and they

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2 can teach you a lot, and that's what we're
3 doing with Bridget for four months.

4 So, I guess let me, just, look, no one is
5 shy, so, my only job is to throw out, help you
6 throw out ideas. And why don't we start, we've
7 got three potential thoughts and one is, if you
8 want to talk about Mike's, which I don't have
9 copies in front of you, but maybe that's less
10 important than talking about project ideas and
11 bigger ideas. So who wants to go first? Hi.
12 Sorry, I'm having a hard time seeing. Is that
13 Allison?

14 MS. ZIEVE: It's Allison. I don't know if
15 this is -- before agency's prior life agencies
16 were required to report EAJA fees paid to the
17 Administrative Conference, which were reported
18 to Congress and I don't know if that, it was by
19 statute -- so I don't know if that provision
20 still exists and has just been dormant when
21 ACUS didn't exist but --

22 MR. VERKUIL: What is the provision?

23 PARTICIPANT: What are the fees?

24 MS. ZIEVE: Equal Access to Justice Act
25 fees.

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2 MR. VERKUIL: Oh, right. We've been asked
3 to go back and we did that. We did report.
4 When we went out of the, EAJA, Equal Access to
5 Justice reporting requirement was by statute,
6 we went out of business, it went out of
7 business.

8 MS. ZIEVE: Does the statute exist still?

9 PARTICIPANT: No one else did the job. So
10 for fifteen years there hasn't been any
11 reporting. That's one of the things that
12 Congress in our reauthorization has now asked
13 us to go back, which we could do going forward
14 but it's going to be very hard to reconstruct
15 what happened in those fifteen years.

16 MS. ZIEVE: Oh, yeah. Yeah, I just wanted
17 to know --

18 MR. VERKUIL: So that's a good and that's
19 something I think we will end up doing. Yes,
20 Max.

21 MR. STIER: Six of them.

22 MR. VERKUIL: Pardon?

23 MR. STIER: Six. Ready?

24 MR. VERKUIL: Six ideas?

25 MR. STIER: Six ideas, yes.

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2 MR. VERKUIL: Oh, my God.

3 MR. STIER: All right. Here we go.

4 Number one, I think it would fascinating to
5 study the timeliness of regulations. So a case
6 example, there was a piece of legislation that
7 was passed by Tom Davis to create an exchange
8 program for private sector technology folks
9 coming to government and it was a task, they
10 had a five-year sunset provision. It took OPM
11 three and half years to get the regulations in
12 place and therefore no program ever happened
13 because the five-year sunset, you know, ran out
14 before you could actually have something
15 happen. So I think, you know, an examination
16 of and maybe some mechanism of trying to look
17 at the cost of slowness in the regulations and
18 what you might be able to do to make that more
19 apparent and therefore speed up the process.
20 That would be number one.

21 Number two, a related concept would be to
22 look at the regulatory overhang from the
23 inside. So, so much of agency energy right now
24 goes into compliance exercises, and that
25 includes, you know, in the regulatory process,

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2 and I think very rarely do you ever see a
3 review of the requirements to see whether
4 they're still useful. Typically it's an
5 incrustation about our responses to
6 individualized problems that happen in mandates
7 that build up on top of each other. No one
8 goes back says do we really do we really need
9 those mandates and they really do cost because
10 they actually create the, you know, the
11 enormous resource stock to be able to meet
12 them. So look at that, number two.

13 Number three would be -- I don't have any
14 really great order on this here. On the
15 contractor piece that you are already looking
16 at when you are looking at whether the ethics
17 applied, I don't know whether you were looking
18 more broadly to the general requirements that
19 federal government has, for example, veterans
20 hiring preference.

21 So you actually, one of the, you know,
22 quite substantial requirements for the federal,
23 for the direct federal hire is that you got to
24 be giving priority to veterans. That's not
25 something that applies to the contractor

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2 community and I think there are a broader set
3 of issues beyond just ethics that you want
4 might want to examine. When you think about
5 contractors doing the work of government,
6 should they also be fulfilling the policy
7 priorities that we have put in place for hiring
8 around government as well, so, that would be
9 number three.

10 MR. VERKUIL: That's a good point.

11 MR. STIER: Four, I love, first of all, I
12 think that what Mike has set out, there were a
13 lot of really great things. On the efficiency
14 side, I really thought it was terrific, the
15 example you gave of bringing together folks
16 from different agencies. I think I would love
17 to see more of that in terms of even process.
18 There are all kinds of ways where individual
19 agencies are doing smart things that no one
20 else knows about. Again your point was that it
21 doesn't have to be necessarily the study but I
22 think the more you do in that arena the better,
23 and creating a real community of practice in
24 the regulatory arena would be quite attractive.

25 The fifth piece that might be related to

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2 that would be examining whether you might
3 create a mobility program so that's not just
4 bringing people together temporarily but
5 getting people to move around agencies so that
6 they're actually able to experience the work in
7 the other environments, learn the processes and
8 meet the people because those relationships
9 matter a lot. That mobility element may be
10 something you could examine not just within
11 government but also without government.

12 MR. VERKUIL: Yeah.

13 MR. STIER: The IPA statute allows folks
14 from outside government to come in. It's
15 usually pretty, you know, ad hoc that that
16 occurs. You know, every once in a while it
17 does. If you create a standard program that
18 actually generated an increased flow with
19 talent inside and outside of government through
20 IPAs that would actually I think promote better
21 practice, better understanding relationships,
22 et cetera.

23 PARTICIPANT: What is an IPA?

24 MR. STIER: It's the Intergovernmental
25 Personnel Act and it --

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2 MR. VERKUIL: A good example is Jon
3 Siegel, is an IPA. I learned these things.
4 One of the things in setting up the agency, I
5 learned about detailees, both David Pritzker
6 and Bridget but also IPAs, Jon Siegel was. Of
7 course John is at GW. He's going back to GW
8 and it made it need easier to hire him and also
9 it's more beneficial to him for purposes of
10 salary and benefits, so.

11 PARTICIPANT: Yeah, and if you did that,
12 you know, you got the firsthand experience.

13 MR. VERKUIL: So you're thinking how we
14 can generalize?

15 PARTICIPANT: Correct.

16 MR. VERKUIL: Send people to do this.

17 PARTICIPANT: Absolutely.

18 MR. VERKUIL: Is this just the SES or
19 including the SES?

20 PARTICIPANT: It doesn't have to be SES.

21 MR. VERKUIL: But SES would a part of it?

22 PARTICIPANT: SES could be a part of it
23 for sure. I mean it could be at the SES level
24 and it would be great developmental experience
25 for the SES. But could they go into a faculty

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2 and be, you know, a resource around what it's
3 like to be in government and then at the same
4 time, you know, develop the relationships on
5 that faculty and then the faculty coming in for
6 a year, like John's doing but to do that and
7 imagine, you know, a more concerted effort to
8 great flow, a talent between the sectors around
9 these regulatory issues and that I think would
10 create, again I would say fundamentally we have
11 a very insulated and isolated workforce in the
12 federal government. The more we have that
13 reconnected to the outside the better. And
14 then two more that are a little more.

15 MR. VERKUIL: That will get us to seven.

16 PARTICIPANT: I know but I'm thinking
17 while I'm talking. So the one is; I was just
18 talking to Mike Fitzpatrick about this and this
19 is harder but we're in an environment right now
20 where the American public, you know,
21 fundamentally has no idea what its government
22 is doing for us. What it hears are the
23 negative stories. And I wonder whether there's
24 an opportunity for ACUS, given the
25 cross-governmental touch that it has, to be

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2 examining what are the positives that are
3 happening in government that might be better
4 communicated to the American public.

5 And I do feel that, you know, you look
6 again, there's a survey that came out yesterday
7 that looked at all the different
8 recommendations on cuts that budget commissions
9 have made and there were only two that were
10 actually supported by the majority of Americans
11 and one of them was, you know, freezing federal
12 salaries and the other was cutting the budget
13 of the government. And, you know,
14 fundamentally it's, you know, there's just
15 really almost no, I mean there are certain
16 things that are wrong but we don't hear about
17 the right things.

18 And then the last thing is thinking about
19 ACUS more generally. I think, you know,
20 obviously you've got the performance
21 requirements. I do think that is absolutely
22 fundamental. We know this organization's been
23 killed once. We don't want to it happen again.
24 So how you communicate what the value is, the
25 ROI of the organization is extraordinarily

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2 important. And I would just ask a very basic
3 question which is, what does success look like
4 and how will you know it? And then how you
5 will you know it is obviously the most vital
6 piece of it.

7 MR. VERKUIL: Okay. Maybe I'd just
8 respond briefly to some. I'm sure, maybe
9 everyone doesn't know Max but Max Stier, the
10 reason he has six, now seven ideas like that is
11 because he runs the Partnership of Public
12 Service, which is in itself a wonderful
13 institution that is designed to bring people
14 into government and also to make government,
15 the quality of government serve us better,
16 understood and respected, and you do your
17 Sammies.

18 MR. STIER: Yep, Service to America,
19 called Sammies, yes.

20 MR. VERKUIL: Sammies, after Sam Heyman,
21 the late Sam Heyman, I guess Service to
22 American awards to highlight like the Oscars
23 do, you know, significant government officials.
24 It's a wonderful black-tie event annually. So
25 here's what I briefly thought. Let me try it

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2 on you. I thought we might honor the most
3 progressive agency in government in terms of
4 what they're doing with their mission, you
5 know, come up with quite a formula. I sort
6 of thought about an award annually, by, from
7 this agency to give to a department or even a
8 private organization that has done the most to
9 spark innovation in government. Innovation in
10 government, that would be the theme. It would
11 be comparable with what you do.

12 MR. STIER: Absolutely. I think it's a
13 great idea.

14 MR. VERKUIL: Okay.

15 MR. STIER: There's so little recognition.
16 The only thing I think is when you associate it
17 with a person you have an easier time in
18 getting media attention to it. So, you know,
19 you might consider how you do that but anyway I
20 think the concept is exactly right.

21 MR. VERKUIL: Well, I don't want to, you
22 know, compete with the Sammies because you guys
23 do such a great job but I do want to, you know,
24 there are so many agencies being stood up these
25 days, in both senses of that term, that we got

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2 to, and then the notion that everyone's
3 salaries, you know, have been frozen and the
4 government is, it's really not great. Okay.
5 Those, fine, and on terms of what does success
6 look like, just so you know, I didn't have a
7 chance to present, unfortunately, Shawne
8 McGibbon has a presentation, Shawne, our
9 general counsel is -- oh, there she is -- oh,
10 I'm sorry -- in reality, and Shawne didn't have
11 the chance to show it.

12 We are looking at measures of success,
13 evaluation tools, which we wanted to show you
14 because that is, you asked the critical
15 question which is how do we keep in business
16 and we've got to have measures of performance,
17 ways to evaluate the success of our
18 recommendations and other activities. And we
19 are thinking about that. We'll probably
20 circulate that to you, Shawne, can we.

21 MS. MCGIBBON: Yeah.

22 MR. VERKUIL: All right. So, thanks,
23 yeah.

24 MS. MENDELSON: Okay. So I don't have
25 seven. I just have a couple to just maybe add

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2 to the list although I thought those were all
3 great. On contractors I think --

4 MR. VERKUIL: Nina --

5 MS. MENDELSON: Yeah.

6 MR. VERKUIL: Mendelsohn.

7 MS. MENDELSON: Right.

8 MR. VERKUIL: Okay. Just so everyone
9 knows.

10 MS. MENDELSON: I think the contractor
11 suggestions so far are great. I'm really
12 excited about the ethics piece that you're
13 already working on, that we're already working
14 on and Max's point about considering what sorts
15 of policies we have in government hiring and
16 how those are or aren't getting carried over to
17 contractors is great. I wonder if we might
18 also consider the contracting process itself
19 because, you know, as your own work has pointed
20 out there's big issues about which functions
21 get allocated to contractors and whether
22 there's any kind of thought or consideration of
23 which really need to stay inside government and
24 which are appropriately outsourced.

25 And contractor oversight, where there have

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2 been real systematic failures, maybe because,
3 maybe it's a resource issue but it may be also
4 be a process issue that seems worth looking at.
5 So that's one category of issues.

6 A second category of issues is lots of
7 issues around e-rulemaking because we're seeing
8 dramatic increases -- well, they look dramatic
9 to me -- dramatic increases in public
10 participation because it's so easy to go on
11 Regulations.gov and comment. And so right now
12 there are probably five rules and the comment
13 period is still open where there are tens of
14 thousands of comments on each rule right now
15 and the comment period is not even closed yet
16 and on a wide range of topics.

17 So it's a couple of issues there. One is
18 I think the issues that Sally Katzen and
19 Cynthia Farina's report identified a couple of
20 years ago, just around the design of these
21 kinds of sites so that they really are workable
22 for a wide array of people. Obviously
23 participation rates are high but one thing I
24 don't think we have a sense of is who is
25 participating and how that's changed from the

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2 era prior to e-rulemaking. Related to that
3 might be whether kind of the anecdotal stories
4 about Astroturfing are true, whether we're
5 having a high rate of submission of comments
6 that are duplicative or paid or otherwise not
7 really representative of views actually held in
8 the public and the quality of commenting.

9 The third piece is what agencies are going
10 to do and what they ought to do with this high
11 rate of comments, especially from laypersons.
12 It's a category of the public that it's not as
13 if there haven't been high rights of
14 participation in the past. There certainly
15 have been. You know, the Tobacco Rule B
16 ownership rule, these were rules with hundreds
17 of thousands of comments filed and I think
18 we're going see that more and more often as
19 this issue with what agencies should be doing
20 with that, with all that outpouring of views on
21 policy issues from the public, I think these
22 may be distinctive in that they tend to focus
23 more on policy issues.

24 You know, we want you to regulate tobacco
25 or we don't. We want you to prioritize air

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2 pollution control or we don't. There's a huge
3 level of participation in these areas and I
4 think agencies are a little puzzled about what
5 to do with that and you might look at that
6 process. Okay. So the third category is, Max
7 mentioned timeliness. I think you could take
8 that one step further and look at inaction.

9 MR. VERKUIL: I'm sorry. Inaction?

10 MS. MENDELSON: Inaction, inaction, and
11 this is a, you know, this is an area where we,
12 the way agencies prioritize issues has really
13 been kind of left in the shadows and maybe
14 that's appropriate but there's certainly not a
15 lot of judicial control of prioritization, and
16 political control is hard to figure out and it
17 doesn't seem that systematic even with the
18 right majority planning that agencies are
19 supposed to do and to send in into OMB. I
20 don't know if there's something to look at
21 there because there are lots of programs and
22 it's not even three and a half years to
23 implement a five-year program. It never
24 happens. And that might be something for us to
25 look at too.

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2 MR. VERKUIL: Can I just respond quickly
3 to these and then we'll keep going?

4 MS. MENDELSON: Sure.

5 MR. VERKUIL: Because I want you to know
6 what's in the pipeline. Contractors, yeah,
7 exactly. We're studying contractor ethics, the
8 application of government ethics rules to
9 contractors, which is a free fire-zone now and
10 we've got the right people in the room. We've
11 got OGE, Bob Cusick, who is one of our members
12 and we've got -- OFPP. So we've got the key
13 players.

14 Part of it what's the inherent government
15 function and I think the closer you get to
16 inherent government functions the more
17 important it is to have ethics rules apply to
18 contractors. And anytime you're dealing with
19 judgment issues that becomes an issue. Now,
20 you know, the notion of veterans' preferences
21 and other things applied to contractors is one
22 of the reasons probably we have contractors.

23 MR. STIER: That's correct.

24 MR. VERKUIL: So I don't know how, you
25 know, and I understand the Obama

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2 administration's position on supporting the
3 veterans' preference but that is certainly part
4 of it. So we're all over contractors. And
5 that's a big issue. John?

6 PARTICIPANT: Yes.

7 MR. VERKUIL: I'm sorry. You're the
8 Chairman of the Committee. So, I know maybe
9 you would want to say a little more but I just
10 want you to know we're on that. On
11 e-rulemaking, everything you say is, that is
12 such rich area and we had a program, Brookings
13 did a co-program with us on eRulemaking
14 recently and turned out really good people and
15 missed some people, we got everybody we could
16 get together for a room in the morning and
17 these issues, crowd sourcing issues, data
18 mining issues.

19 You know, you get 60,000 comments, there's
20 evidence that that's produced by six people.
21 You know, so how do you determine what a
22 comment is and then once you get 60,000 does it
23 matter, is it not a plebiscite, right, but it's
24 the whole issue of, you know, how many
25 comments, does the weight of comments matter

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2 even if they're ill-formed like a vote rather
3 than --

4 MR. STIER: Exactly.

5 MR. VERKUIL: Good stuff. And so we're
6 doing that. And in terms of, I think I'll just
7 throw this in the mix because it stunned me.
8 Just yesterday in the New York Times,
9 "Rulemakers Emerge from the Shadows." I think
10 you saw this.

11 MR. STIER: Yeah.

12 MS. MENDELSON: Yeah.

13 MR. VERKUIL: They have to do 200 and some
14 rules, number of rules for the healthcare
15 legislation. They've hired 200 or more people
16 to be rule writers and they got space at some
17 exorbitant rate at some hotel or office
18 building and these rule writers, I'm sure many
19 of whom are contractors, who don't have any
20 ethics rules, are sitting with all the
21 industries and writing the rules together.
22 This is before the notice, I assume before the
23 notice of proposed rulemaking. It's a free,
24 again a wide-open zone. That sounds, that may
25 be the opposite of inaction but there's a lot

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2 going on.

3 PARTICIPANT: I wonder if I could just add
4 to that comment a little bit. I've been
5 working on the Financial Services bill and I've
6 seen how the Federal Reserve staff has been
7 meeting with outside groups since the day the
8 statute was passed and like about the middle of
9 November they finally had to declare a halt.
10 They're doing their rule writing in-house. But
11 they were just in meetings for months to get
12 handle on it. The healthcare people were the
13 same way. EPA rules are the same way on large
14 sources.

15 We are actually in the most prolific
16 period for rule writing probably in thirty
17 years and I don't know how to get a handle on
18 that but it may be a staff function for ACUS
19 but to have people working for the general
20 counsel of the major rule writing agencies and
21 finding out what are the initiatives, what are
22 the problems you are spotting as this happens,
23 when you were talking about e-rulemaking the
24 first thing that came to me is the Fed is going
25 to have its rulemaking to authorize the first

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2 set of rules next Thursday and every investment
3 bank in Washington is going to have somebody in
4 the room or trying to get in the room because
5 it will be so small.

6 And in this climate it seems insane that
7 that's not being web-streamed the way that your
8 Committee meetings so that the world at large
9 can see that in part because there's limited
10 access but in part because when the agency just
11 has it in the old closed-room system they don't
12 need to explain much to the public about what
13 they're doing. But I represented the Detroit
14 City Council when it transitioned from being
15 meetings in a building to meetings that were
16 publicized and as soon as people knew cameras
17 were on then the nature of the debate changed
18 completely they had to explain what they were
19 doing in much greater detail to the public.

20 They just couldn't say agenda item number
21 twelve is hereby approved. They had to explain
22 what they were doing, especially in big items.
23 So if there's some way that you all can develop
24 a staff capacity simply to talk to the agencies
25 and track the problems that they're

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2 encountering in this unusual period where it's
3 a very inactive government but it's really, if
4 you look at it from a different level one of
5 the problems that you're experiencing today
6 when you're having to write massive quantities
7 of rule and the public is all over you.

8 MR. VERKUIL: That's really good. I
9 really think we should get into this, figure
10 out exactly how to enter it but it seems to me,
11 what are we going to have, 30,000, judicial
12 review of it, Ron? Think about judicial
13 review. Pump all these rules out there and
14 we're going to be, the logical outgrowth test
15 is going to become alive again I'm sure.

16 PARTICIPANT: That's right. And there's a
17 new issue that's coming out with the sheer
18 volume of rules that are being written. There
19 are petitions pending before the D.C. Circuit
20 to try to organize how cases will be reviewed
21 because the concern is that the facts that you
22 will need in one, to challenge one rule are
23 being developed in another rulemaking and if
24 they're not somehow conjoined at the appellate
25 review process you won't have the facts, won't

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2 have the administrative record to challenge it.

3 And I know that the same problem is starting to
4 arise in the healthcare arena because so many
5 of the rules are interrelated and they've been
6 segmented and it's going to make it very
7 difficult for judicial review.

8 MR. LEVIN: Ron Levin, public member.

9 Does that mean consolidate at the agency level,
10 consolidate at the judicial review level or
11 both? I mean there should be some management
12 plan where you do some elements of each.

13 PARTICIPANT: The new development that's
14 happening now is that the courts are being
15 petitioned to enjoin them for the first time
16 when they were done separately at the agencies.
17 And I've never seen this phenomenon cropping up
18 but there ave been massive, hundreds of pages
19 of filings from the best of the law firms in
20 the country trying to figure out how to
21 consolidate or coordinate the review so that
22 people challenging the rule have the
23 appropriate record even though it wasn't
24 developed as part of the record by the agency.
25 It was developed over there.

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2 MR. VERKUIL: Let's just throw out some
3 more ideas and then we maybe, I want to make
4 sure everyone gets to --

5 MR. SLOCUM: Ted Slocum, I'm a liaison.

6 MR. VERKUIL: Ted, yeah.

7 JUDGE SLOCUM: I'm an administrative law
8 judge with Social Security. And I'm going to
9 be more specific about some problems. I don't
10 think anyone is happy with the selection
11 process anymore. I think everyone is unhappy
12 with the OPM, with the ALJ selection process.
13 I started thirteen years ago and we all had
14 rough years. It took me three months to fill
15 out my application form. I'd list ten trials,
16 who the judge was, who the opposing counsel
17 was, and now it's a race to the computer. No
18 prior notice, all of a sudden they say okay,
19 tomorrow it's open for 24 hours. You got to
20 sit down to look at a computer for eight hours
21 and fill out your application.

22 I went to meeting at OPM and the new
23 director is very sympathetic, John Berry,
24 general counsel, Elaine Kaplan, but there's
25 some bureaucrats there, that they explained

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2 that they decided that they were going to
3 select judges the same way they select other
4 employees. Now, I didn't say anything but I
5 said to myself, you're going to select judges
6 the same way you're going to select your
7 secretaries and clerks? More than one
8 well-qualified attorney was rejected because
9 they inadvertently forgot to put that on the
10 Bar roll (phonetic). When I raised that issue
11 I was told --

12 MR. VERKUIL: Tom, just so you know, we've
13 met with Elaine Kaplan. She's a member of the
14 Conference. She is the general counsel of OPM.
15 She is aware of this. We will take a look at
16 that. We really asked her to set the situation
17 up so we could be of help. You know, we're
18 not, I always say to people we're not GAO, you
19 know, we haven't been assigned to your case.
20 We would like to do something that is helpful
21 to you when you go to an agency. I said the
22 only thing we can't promise you is an outcome
23 you're happy with but we can certainly, you
24 know, work with you to define the project so
25 that's underway. Oh, sorry. You have another

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2 one?

3 JUDGE SLOCUM: Yes. The next issue is, I
4 was -- and I don't mean to bring up your
5 problem areas but did someone, I had lunch
6 yesterday with a judge at Department of Labor
7 and she gave me a, I think a catalogue you may
8 have sent her but I was surprised that the
9 number of ALJs has decreased over the years. I
10 mean we all hear about Social Security's hiring
11 somebody who is an ALJ and total number of ALJs
12 has increased but --

13 MR. VERKUIL: Not so.

14 JUDGE SLOCUM: It seems at other agencies,
15 I know at Labor it's gone down, and at other
16 agencies it's gone down. And I think you might
17 want to look at why.

18 MR. VERKUIL: Yeah. I mean --

19 JUDGE SLOCUM: Life isn't less complicated
20 and in adjudication we're not doing fewer
21 adjudications so why has there been a decrease?

22 MR. VERKUIL: Yeah. Right.

23 JUDGE SLOCUM: And then the last thing I
24 think that you might look at is -- and this is
25 certainly nothing new but once again a judge at

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2 EEOC who wrote to me in my capacity, I'm the
3 Chair of the ABA National Conference of
4 Administrative Law Judge Review and EEOC judges
5 are AJs. Immigration judges are AJs. And they
6 pointed out problems with that, independence
7 problems, lack of subpoena power. So it may
8 be, you know, it might be worthwhile to take a
9 look at what is the appropriate type of
10 adjudicator for the particular forum.

11 MR. VERKUIL: Right. Yeah, well, we
12 almost did that.

13 JUDGE SLOCUM: Look what happened.

14 MR. VERKUIL: Right. But, you know, that
15 was in '92 and you're even more correct now in
16 terms of the alternate deciding regime in
17 government.

18 MR. BARDOS: Paul Bardos.

19 MR. VERKUIL: Paul.

20 MR. BARDOS: I'm from a small agency and
21 we have had very mixed results trying to get
22 feedback from our customers, both in the
23 government and in public. And I was looking at
24 what Kathy Kyle was doing with the technology.
25 I'm hoping that there might be some best

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2 practices that might help us and other agencies
3 communicate with the public and our other
4 customers to get feedback on how well we're
5 doing.

6 MR. VERKUIL: Sure. And I should say
7 this. You know, we're, as I say, this is one,
8 as Mike said, this is one of the reasons we're
9 so advantaged because we can actually start
10 with the new technology, we haven't invested in
11 it, we're in the cloud already, GSA is pushing
12 the cloud now, you know, that didn't happen,
13 where everyone had to have servers and so we're
14 really on the cutting edge. I hope we'll get
15 smart enough that we can be of benefit to other
16 agencies like yours and to the public and use
17 it ourselves so that when we're, you know, not
18 meeting, we're actually interacting.

19 And Cynthia Farina came up to me and said,
20 look, I've got a program that can help you. If
21 you want to analyze recommendations in draft
22 form we can do it paragraph by paragraph and
23 before you get to the meeting we can actually,
24 you know, have things pretty well worked out.
25 Well, that's exciting. And as you say, John,

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2 the old notion of why should you have ex parte
3 meetings like FCC likes to do, you know, what
4 about technology, when everyone can show up.
5 Anyway, sorry Dick.

6 MR. LEIGHTON: Dick Leighton, senior
7 fellow. A comment on one thing and then maybe
8 a suggestion. The courts in terms of all these
9 regulations and what are the courts going to
10 do, they may want to look at what was done
11 during the tobacco situation where you had an
12 administrative agency at the first level and
13 then you had thousands of appeals that happened
14 overnight and they developed a lead case
15 concept that was used and they just didn't want
16 to look at that. After about a month it worked
17 and everything got done. But the idea, it may
18 be done but picking up on some things that you
19 said, Paul, you know, nowadays coordination of
20 governments and interest groups, especially in
21 emergency times, you know we have seen with
22 Katrina and with BP, even in the fiscal
23 emergency where you have to real quickly set up
24 something and talk and I think it's becoming,
25 realize sort of like in the early days of ADR

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2 when they realized that mediation isn't just a
3 talented person in a room. If you think about
4 it, there are procedures that work and
5 procedures that don't.

6 And coordination is both an art and a
7 science and I don't know if anybody is studying
8 it, especially, when there's a big federal
9 element on these things. It's a kind of thing
10 that could be in the Office of the President,
11 you know, that type of, and who, and it's not
12 just being a coordinator but how you coordinate
13 and are there the procedures that require due
14 process, transparency, use of media, all this
15 published stuff.

16 Because we've seen, I mean, first what did
17 the Coast Guard do and what it did not do in
18 the meantime with the oil pumping out and it
19 looked like every time this happens they had to
20 re-create something. There's nobody looking at
21 the procedure of coordination.

22 MR. VERKUIL: That's a great collaborative
23 governance idea. We got this new Committee
24 designed for it, coordination of government
25 activities and certainly, you know, FEMA and

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2 all you have to do is go back to the classic
3 cases like the oil spill and Katrina.

4 MR. STIER: Thad Allen is the guy you have
5 to --

6 MR. VERKUIL: Thad --

7 MR. STIER: Thad Allen is extraordinary.

8 MR. VERKUIL: The Coast Guard.

9 MR. STIER: Yeah. Admiral.

10 MR. VERKUIL: Admiral, yeah.

11 MR. STIER: He's now retired and on our
12 board.

13 MR. VERKUIL: Oh, he's on your board?

14 MR. STIER: Yeah.

15 MR. VERKUIL: Maybe we'll get him to talk
16 to us. He'd be great. Sorry.

17 PARTICIPANT: My idea was already
18 captured, best practices, so appreciate it.

19 MR. VERKUIL: Oh, thank you. Professor
20 Hertz?

21 PROFESSOR HERTZ: So first of all the ABA
22 ad-law section sent you a long list and all the
23 corporations --

24 MR. VERKUIL: Yeah, of course.

25 PROFESSOR HERZ: Right. And so I have

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2 sort of a general thought and then a specific
3 application. The general thought is just in
4 thinking about all these, you know, I mean what
5 is that the Conference, what's its comparative
6 advantage, right? I mean there are a million
7 topics out there and what are the kinds of
8 topics that the Conference has? The Conference
9 is sort of resources and skills are best suited
10 to doing better than other people might do,
11 right? And so what does the Conference have?
12 One of the things it has is it has a gathering
13 of really smart, informed people. Another
14 thing, though, in terms of the research side is
15 access to all the agencies, right?

16 So what are the problems where being, you
17 know, we saw this a little bit in Cathy
18 Sharkey's report already but, you know, it made
19 a big difference with the ACUS perimeter she
20 could get in and talk to people. So, and I
21 think a lot of the suggestions have been made
22 so far reflect that, some a little more than
23 others and it's something to bear in mind.

24 One thing that might reflect it is the
25 whole long-standing debate about guidance

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2 documents, right, and, you know, there is this
3 narrative. It's the, you know, Judge Randolph
4 appellation (phonetic) power narrative about
5 agency abuse of guidance documents and there's
6 some suggestions that that might actually just
7 be false as an empirical matter and there's
8 this note that you know well that suggests it's
9 false.

10 MR. VERKUIL: Right.

11 PROFESSOR HERZ: And, you know, there's a
12 question about are guidance documents covered
13 by 12-866 or not. They seem not to be when you
14 read it and then Rorzak (phonetic) says they
15 are and what's going on there. And so there's
16 just a lot of sort of empirical questions about
17 in fact is there a problem here or not and if
18 so, you know, what are the appropriate, you
19 know, are documents more good or more bad and
20 so on so forth that I think A, is a good topic
21 in itself and B, might be the kind of thing the
22 Conference is especially equipped to grapple.

23 MR. VERKUIL: Sure. Thank you. That's
24 certainly resonates for me.

25 MR. MADISON: So I'm George Madison. I'm

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2 the general counsel and treasurer.

3 MR. VERKUIL: Hi, George.

4 MR. MADISON: Needless to say we're in the
5 business of standing up a bunch of agencies.

6 MR. VERKUIL: Yes, indeed. We're talking
7 about you a little bit here.

8 MR. MADISON: Among other things. And,
9 you know, it struck me that this Conference in
10 being regenerated is a good opportunity to do
11 what we're doing in stand-up, which is step
12 back and think about how to do something, you
13 know, new and fresh. And rather, you know, one
14 approach is to have committees focus on lots
15 of, you know, discrete issues or try to resolve
16 and make an impact and so forth.

17 Another is to step back and have one sort
18 of overarching, especially in the beginning of
19 the organization, overarching issue and that
20 has a narrative thread that runs through, you
21 know, using your committees to help make some
22 progress there. So, you know, this may be too
23 lofty but we built up over time this regulatory
24 state. I don't know that anybody outside of,
25 you know, maybe individual agencies have really

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2 looked at it in terms of the role of
3 regulation, the process around it, the costs
4 involved, the opportunities for simplification,
5 for reducing regulation, for benchmarking, you
6 know, best practices for educating the public
7 about what the regulatory state is and why.

8 I mean I think the only people that
9 actually get educated in some way on it is in
10 law school. And so, you know, some effort to
11 put it in context to find out what the problems
12 are with it, the processes around it, make the
13 contribution towards simplification and, you
14 know, easing it and making it make sense,
15 efficiency and timeliness and so forth.

16 MR. VERKUIL: You know, this is a
17 wonderful thing to present and given your
18 position I really am grateful that you're
19 thinking in these terms. And obviously for
20 most of us who are academics are so used to
21 thinking in, you know, we do this in the
22 classroom but to do it in real time, to actually
23 come up with a sense of, you know, what -- and
24 Max does this too in this world but what's the,
25 how to improve the regulatory state, right?

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2 In a way that's sort of a, that at the end
3 after you've finished all your work and then
4 maybe you come up with a speck of a thing but
5 to integrate it, what you're saying is
6 integrate that into our cause and maybe that
7 should be in our missions statement is really
8 what you're saying. And we return to it, you
9 know we keep saying, well, how does this help
10 us understand what it is we want the regulatory
11 state to be if there's an ideal form we could
12 ever reach.

13 MR. MADISON: Yeah, I think it's, you
14 know, it goes to the point of using a
15 nonpartisan think-tank organization not tied to
16 anybody else for what it could be, you know,
17 you know, best used for, a contribution that it
18 could make on an overarching kind of topic.
19 And I know it's, I'm guessing that, you know,
20 you could get muddled in, you know, you know,
21 there are questions around whether you could,
22 how much progress you could really make and so
23 forth but my view is, if not here, where?

24 MR. VERKUIL: Right. Well, maybe one way
25 to go at this and since you're willing to put

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2 it on the table, I come back to you and, you
3 know, you would and your folks would be welcome
4 to help shape it but it seems to me we might
5 come up with a program with carefully selected
6 people who can talk about these things and just
7 incorporate that, you know, the results of that
8 which are likely to be not determinative of
9 anything but it would give us some focus and
10 maybe some measures.

11 You know, simplification is talked about.
12 After all, we heard from Senator Whitehouse.
13 He's concerned about the co-optation problems.
14 And there may be a list of things we could
15 actually agree about in terms of how we analyze
16 and critique the performance of government and
17 I think we can start. I mean that really
18 excites me, I have to say. David.

19 MR. FREDERICK: David Frederick, I'm a
20 public member. I want to go off of George's
21 comment because one of the things that I wrote
22 down is governmental efficiency. As a way of
23 understanding where our government goes in the
24 next couple of decades we're going to have to
25 find ways to do more with less.

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2 MR. VERKUIL: Right.

3 MR. FREDERICK: And finding a process or
4 set of values or some set of measurements to be
5 thinking in terms of how do we accomplish more
6 with less is something that has got to be
7 systematically done, it seems to me. And
8 George's comment, you know, triggered that,
9 that thought.

10 One element of that -- and I say this from
11 my experience when I was at DOJ in the
12 inspector general's office -- is there seemed
13 to be a fundamental breakdown in the agency
14 budgeting process where you have bottom-up
15 driven budgetary desires and demands that then
16 would be presented to politically appointed
17 persons who would make a judgment, well, can I
18 really ask for thirty more auditors or fifty
19 more FPE, will I get shot down by my superior
20 in the department who doesn't want to try to
21 present that to Congress. And there became
22 this big disconnection between the bottom-up
23 process for what do you need to do to justify
24 your existence in your programmatic mission
25 versus what could be sold politically and got

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2 from the Hill.

3 And it seemed to me that there really
4 could be a much more integrated approach to
5 figuring out how you sync up what Congress
6 thought was politically viable with what the
7 programmatic mission was at the base level of
8 the particular agency. And I observed, you
9 know, just a big disconnection between what the
10 people within agencies thought was realistic in
11 terms of what they thought they needed versus
12 the political reality. And we haven't really
13 talked about the relationship between the
14 agencies and Congress or oversight but I think
15 that there's probably a role that the
16 Administrative Conference could play and I
17 appreciate that this is kind of an amorphous
18 thought.

19 Two other more capillary points. One is
20 there is, I would assert this in several
21 agencies where I have litigated. There's a
22 disconnection between politically appointed
23 commissioners and ALJ processes where there is
24 confusion over what ALJs are supposed to be
25 doing in particular cases and they're not

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2 getting appropriate guidance from the
3 commission.

4 And so things sit there because the
5 commission isn't sure exactly how to guide the
6 ALJ and the ALJ doesn't want to act in a case
7 without guidance. And I'm involved in cases
8 that have been sitting literally for years in
9 this netherland between ALJ process and
10 politically appointed commission process and
11 there's got to be some way to break through
12 that log jam.

13 The second capillary-type idea is there
14 has been an increasing use of outside
15 arbitrators by federal agencies but there has
16 not been what I observe to be a needed view of
17 how you evaluate or review arbitrator decisions
18 by agencies. The normal process for, you know,
19 ALJ review doesn't really seem to work for the
20 outside arbitrator context and yet, you know,
21 you've got pretty serious discrepancies over,
22 you know, an independent arbitrator making
23 credibility determinations that, you know,
24 politically appointed commission members just
25 sort of blow through, you know, the

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2 fact-finding and development process. And I
3 just wonder whether the Conference could take a
4 look at that set of review, internal
5 review-type issues.

6 MR. VERKUIL: Do you have any sense of the
7 number of arbitrators that are out there these
8 days?

9 MR. FREDERICK: Well, I know the SEC has
10 employed a bunch.

11 MR. VERKUIL: So we should --

12 MR. FREDERICK: And that speaks to the
13 Judge's except about the decline in ALJs. I
14 mean it used to be there were a slew of ALJs at
15 the SEC and I think I did the last case before
16 the last sitting ALJ. I'm not sure if the SEC
17 even has any ALJs anymore.

18 MR. VERKUIL: Yeah. Okay. I'm sorry.
19 What time are we supposed to be --

20 MS. MCGIBBON: We need to be done by
21 quarter till so we need to start now to --

22 MR. VERKUIL: Oh. Well, let's make sure
23 we have everybody, everybody's been heard.

24 PARTICIPANT: A quick thought. I see now
25 that part of the, our mission is to reduce

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2 litigation.

3 MR. VERKUIL: Yes, which plays into the,
4 David's comment about arbitration.

5 PARTICIPANT: It seems to me there's an
6 empirical question first. I'm not sure anybody
7 has taken a snapshot, something that could
8 easily, relatively easily be done, in terms of
9 what in the hell is going on.

10 MR. VERKUIL: Exactly, exactly. You know,
11 Jeff Lubbers in the old days used to count, he
12 once published a little volume on the total
13 number of adjudications in government.

14 PARTICIPANT: Right.

15 MR. VERKUIL: You know, we all know the
16 disability cases eat up the big bulk of it but
17 no one does that anymore. And so I don't mean
18 to interrupt you.

19 PARTICIPANT: Well, I just say, somebody
20 in some law can get a bunch of law students and
21 supervise it -- ACUS at the same time.

22 MR. VERKUIL: So let me give you a better
23 idea because I have been thinking about this if
24 you'll accept this. We ought to, you know, it
25 ought to be electronic. I mean we shouldn't

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2 have to go count cases.

3 PARTICIPANT: Oh, no, no. Sure, sure.

4 MR. VERKUIL: So our friend Carl Malamud,
5 whom I put on the membership for these kind of
6 reasons, who has already put our, digitized all
7 our old documents, has been asked by the White
8 House, by the Beth Noveck, you know, OSTP
9 office to put administrative decisions up. And
10 he's got this concept of Law.Gov where, you
11 know, every decision of government, federal,
12 state and local should be available to the
13 public, which isn't the case of course. To our
14 chagrin I think we should say that in a
15 democracy. But suppose we got a -- and it will
16 have to be on a going-forward basis of course
17 but suppose we got all the decisions, ALJs and
18 other deciders and, you know, they're up and we
19 can then count them and we can then decide, you
20 know, the relative --

21 PARTICIPANT: Well, I took --

22 MR. VERKUIL: That's one staff.

23 PARTICIPANT: I took litigation to go
24 beyond the administrative adjudication of
25 disputes into --

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2 MR. VERKUIL: Court?

3 PARTICIPANT: -- appeals --

4 MR. VERKUIL: Oh, yeah, that's a lot
5 easier because those --

6 PARTICIPANT: Yeah, but the reason it's
7 easier to do that would be PACER now is fairly
8 institutionalized.

9 MR. VERKUIL: Right.

10 PARTICIPANT: And we don't have a PACER --

11 MR. VERKUIL: Right.

12 PARTICIPANT: -- for administrative
13 adjudications and --

14 MR. VERKUIL: And we don't want one
15 actually.

16 PARTICIPANT: Well, that type of -- why
17 not?

18 MR. VERKUIL: Well, a PACER costs,
19 generates \$120 million in revenue and costs --
20 people ought to pay for it. We want, I'm part
21 of the Carl Malamud world, you know, it's open
22 source. PACER is not open source.

23 PARTICIPANT: PACER is open source.

24 MR. VERKUIL: I'm going to introduce you
25 to Carl Malamud. Carl's not here.

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2 PARTICIPANT: One of those ideas if you do
3 that, interesting to note how many adjudicators
4 do we have? I mean nobody knows that.

5 MR. VERKUIL: We don't know exactly.

6 PARTICIPANT: I mean, so, part of that
7 process I would recommend that you do a survey.
8 How many adjudicators do we have in the federal
9 government?

10 MR. VERKUIL: And what is an adjudication?

11 PARTICIPANT: Right. Right.

12 MR. VERKUIL: My favorite example is
13 always, you know, the park ranger when you get
14 to Yosemite, you can't come in, they say the
15 park's full. That's an adjudication. How many
16 of those are there? Allison?

17 MS. ZIEVE: Well, I have a question and a
18 suggestion. First on the question, is our
19 mission about reducing litigation, does that
20 include arbitration, because shifting, is it
21 eliminating disputes or is it eliminating
22 litigation?

23 MR. VERKUIL: Oh, well, you know, I would
24 love for the lion to lie down with the lamb
25 like --

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2 MS. ZIEVE: Because I don't think it's
3 that valuable.

4 MR. VERKUIL: But that's not quite on our
5 --

6 MS. ZIEVE: If we just shift from
7 litigation to arbitration --

8 MR. VERKUIL: Yeah.

9 MS. ZIEVE: -- I don't know what we've
10 accomplished.

11 MR. VERKUIL: You don't think we've
12 accomplished much?

13 MS. ZIEVE: No, I don't. And my
14 suggestion is though that just because the
15 following problem is very old and everyone
16 accepts it we should still think about maybe
17 why there are such long FOIA backlogs and if
18 there are, if there's some systematic way to
19 look at it and figure it out. It's decades old
20 but it doesn't mean it's, maybe not --

21 MR. VERKUIL: So backlogs, which is an
22 item we should put on our list is already
23 something we're in the midst of and that was
24 the purpose of this Conference we had here
25 because we looked, OGIS, which is part of the

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2 Archives, right, is trying to get rid of FOIA
3 backlogs by mediation. So it is the
4 alternative dispute model.

5 And we're watching their work. We want to
6 get rid of, you know, Social Security backlogs
7 and especially immigration backlogs where
8 people are detained and they don't get
9 compensated for that and other serious problems
10 of the backlog as a problem. You know, that
11 itself is a real important issue. Yeah.

12 MR. PATTERSON: Patrick Patterson with the
13 Equal Employment Opportunity Commission,
14 speaking of backlogs, that's an issue we're
15 very interested in and would want to be
16 involved in.

17 MR. VERKUIL: Right. Okay. We should
18 have -- we need to incorporate you into this.

19 MR. PATTERSON: I was interested to hear
20 about that because we would have been very
21 interested to be a part of that Conference.

22 MR. VERKUIL: Yeah. You see some of it,
23 we think, is with technology can solve, help
24 solve backlog. Some of it is, you know,
25 understanding what you are facing. I mean even

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2 for an applicant with Social Security and
3 others you can knock off of a backlog if you
4 can just channel people properly and give them
5 more information and so forth.

6 MR. PATTERSON: I also wanted to just say
7 because of where I am, we're very interested in
8 the functioning of commissions, of independent
9 or quasi-independent commissions and we have a
10 five-member bipartisan commission which has a
11 lot of different issues I think than some of
12 the other agencies. And we have the backlog
13 issues but I see that one of your possible
14 projects here is Government and the Sunshine
15 Act --

16 MR. VERKUIL: Right.

17 MR. PATTERSON: -- which has a significant
18 impact on the way business is done in our
19 agency and we're interested in that issue as
20 well. So I'm glad we can be a part of this.

21 MR. VERKUIL: All right. So we need to
22 decide what the top ones are. Nina, do you
23 want to add more or can we help --

24 MS. MENDELSON: Just a quick comment, just
25 to follow-up on Allison's point, which is about

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2 focusing on maybe reducing disputes. It could
3 be that at some agencies where there's an
4 enormous amount adjudication one reason is
5 because of lack of clarity in decision rules
6 but even looking at decisional backlogs and
7 rates of adjudication, you know, an item to
8 consider might be causes in the authorizing
9 statute or causes in the regulations. Anyway,
10 it's a minor point and I don't know if that's
11 where we want to allocate our resources but --

12 MR. VERKUIL: Well, that's fine. Let's
13 try and come up with, what is it, now is the
14 hard part and I am going to turn it over to
15 Shawne. Shawne, how do we reduce this to three
16 to five big ideas?

17 MS. MCGIBBON: All right. We got about 28
18 ideas. Allison, you were saying something
19 about EAJA as I walked in. Did you recommend
20 that we reexamine --

21 MR. VERKUIL: Yeah, that's not a big item.
22 I mean that's, it's an item. It's something we
23 should do.

24 MS. ZIEVE: Paul's already on it.

25 MR. VERKUIL: Yeah.

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2 MS. MCGIBBON: All right. Let me finish
3 David's thought --

4 MR. VERKUIL: All right. So, Max, you
5 started off with seven. You want to get us
6 down to two or three, at least to sort of make
7 the motion and we'll decide if we like it.

8 MR. STIER: I'm the wrong person to start
9 with because I started with seven.

10 MR. VERKUIL: Yeah, I know but someone --

11 MR. STIER: May I say I think I would
12 second your point that I think George's sort of
13 wrapper is really quite important and I do
14 think that there's a unique opportunity when
15 you start something to have a fresh look. And
16 I think it does tie very much into the climate
17 we're in today which is one in which we're
18 going to have to find ways to do a lot more
19 with less.

20 MR. VERKUIL: Yes.

21 MR. STIER: And so I think that, that I
22 would see that as a strong candidate for one.

23 MR. VERKUIL: Is that a consensus for you,
24 that if we're going to really take a look at
25 how we should do the whole process, the

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2 overarching --

3 MS. ZIEVE: This, what George said, I
4 agree with it.

5 MS. MCGIBBON: And what David said --

6 PARTICIPANT: Well, 19 and 20 your list.

7 MS. ZIEVE: Yeah.

8 MR. STIER: It's a combination of 19 and
9 20, correct. I mean I think 19 is the action
10 item. I think 20 is one of the motivations for
11 why you want to do it.

12 MR. VERKUIL: Yeah.

13 MS. MCGIBBON: All right.

14 MR. RIVKIN: Could I just make a comment,
15 Paul? Bob Rivkin, DOT.

16 MR. VERKUIL: Hi, Bob.

17 MR. RIVKIN: I agree that what George said
18 is important and should inform everything but I
19 think one of the key challenges here is not to
20 get too abstract.

21 MR. VERKUIL: Right.

22 MR. RIVKIN: And so really it's more akin
23 to a mission statement or adding it to your
24 mission statement than it is to a priority for
25 action.

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2 MR. VERKUIL: Oh, okay. And that's okay,
3 though, because we, you know, one of our jobs
4 here is to sort of improve the mission
5 statement as well. But, so maybe that's, let's
6 keep that on the list for whatever use we could
7 make of it as the big idea. But now --

8 MS. MCGIBBON: May I just make the point
9 that we're going to keep all of your
10 suggestions and review them, so these are just
11 sort of the ones we can come to consensus on to
12 present before the entire Plenary later on in a
13 few minutes so we're going to keep everybody's
14 ideas.

15 PARTICIPANT: If you could read off your
16 list that would remind us.

17 MS. MCGIBBON: All right. So we have the
18 seven from Max, study the issue of timeliness
19 of regulation, study regulatory overhang on the
20 inside, study V.A. hiring preference issues,
21 create a community of practice among
22 administrative law and other experts, encourage
23 mobility in and outside of government, looking
24 at IPAs and issues like that, communicate
25 positives in government to combat all the

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2 negative stories we hear daily, communicate the
3 value of ACUS and define our success, and we're
4 working very hard on that.

5 I think I'm going to send each of you the
6 presentation I plan to give on evaluation and
7 solicit your comments and feedback. It's
8 probably going to look like a combination of a
9 prospective analysis of our good work and
10 ex-post review of our success stories.

11 Nina suggested a study, the contracting
12 process in addition to what we're already doing
13 with contracting issues, looking specifically
14 at outsourcing and other issues, make
15 e-rulemaking sites manageable, how do you deal
16 with regulations when you've got tens of
17 thousands of comments. The issue of timeliness
18 came up again and the issue of inaction and how
19 that contributes to timeliness or lack thereof.
20 Help agencies write their rules and improve
21 their transparency is a project that ACUS could
22 take on, especially some of the new agencies
23 that are just being stood up, fix the ALJ
24 selection process, figure out why the number of
25 ALJs has decreased, why are some agencies using

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2 AJs and not ALJs.

3 What of the best practices to gather
4 information from agency stakeholders, are those
5 necessarily going to be web based, how to
6 manage court cases that are necessarily going
7 to be coming out of all these regulations that
8 are impending, how to coordinate government
9 procedures to reduce inefficiency, study abuse
10 of guidance documents and other problems
11 associates with guidance documents. We have
12 already decided we like 19 and 20.

13 Study the problem of bottom-up budgeting.
14 That's the issue of sort of agency needs versus
15 politics. How can the commission-ALJ process
16 work better, how do we address the problem of
17 use of outside arbitrators. We should take a
18 snapshot of a litigation picture. Paul talked
19 about digitizing ALJ cases, administrative law
20 cases. How many adjudicators exist, as a
21 subset of that previous question, study the
22 issue of FOIA backlogs, study how commissions
23 function in dealing with backlogs, examine
24 statutory causes of decisional backlogs, so.

25 MR. VERKUIL: Ron?

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2 MR. LEVIN: So I was listening to the list
3 and trying to winnow in my mind the things,
4 leave out the ones that are too abstract to be
5 a project and too small to be a big project in
6 their own right. And in the middle some ones
7 that occurred to me all had to do with mass
8 volume problems. There's the e-rulemaking
9 comment mass volume problem. There's the
10 judicial review and multiple rulemaking mass
11 volume problem and there's the FOIA backlog
12 mass volume problem and all those struck me
13 offhand and off the cuff as things that some
14 kind of ACUS type project could address.

15 MR. VERKUIL: So what would be the
16 heading?

17 MR. LEVIN: Well, not all combined into
18 one. Three separate items for consideration.

19 MR. VERKUIL: And we do certainly think
20 that's an area which would be high volume
21 caseloads and backlogs and the advantages of
22 technology.

23 MR. LEVIN: Yeah. I was not suggesting we
24 put them all into one box.

25 MR. VERKUIL: Oh, okay.

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2 MR. LEVIN: But those are three things
3 that I would sort of put forward as
4 semifinalists.

5 MR. VERKUIL: You got that?

6 MR. GUNN: Will Gunn from V.A. In order
7 to make this body as useful as possible to
8 someone in my situation as a general counsel it
9 then, these things that go to I guess Max's
10 idea about a community of practice, those ideas
11 are helpful. While the studies and such are
12 beneficial, what I'm looking for and what my
13 team of lawyers are looking for is what's going
14 to make our job easier, how are we going to be
15 able to respond to our mandate.

16 So to the extent that the best practice
17 idea is so that if people are doing great
18 things that this body serves as a central
19 purpose, the central purpose of this body is
20 one of sharing the ideas of what is working,
21 what is innovative, those things, that
22 information-sharing, I think that's a critical
23 function that isn't done elsewhere and this
24 body is uniquely suited to do.

25 MR. VERKUIL: So could I just mention to

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2 support that point about our role is that we
3 have restarted this Council with independent
4 agency Chairs obviously, you know about that,
5 at the FTC, and, you know, the independent
6 agencies of which are sixteen on our list don't
7 ever meet because they don't -- so now we're
8 doing that.

9 So that, that's one, not one of the
10 substantive things necessarily, just gets
11 people together to talk about common problems
12 and so we want to keep best practices high up.
13 You know, as an objective of the Conference it
14 seems to me pulling together disparate
15 agencies.

16 MS. MENDELSON: I was really impressed by
17 the comment that we're in, that there's
18 potentially a big learning opportunity here for
19 rulemaking because of the high-volume rules in
20 healthcare and financial services and it seemed
21 like a group of projects that have been listed
22 here could give us an opportunity to take
23 advantage of that learning process. The
24 regulatory overhang point, I think we can learn
25 a lot from this high volume of rules that have

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2 been going on for ossification, regulatory
3 overhang and efficiency, for timeliness for
4 e-rulemaking for his best practices point and
5 for what to do with the mega-rules. So this is
6 five different points that all could build on
7 the fact that right now we're in a real
8 environment of potential learning.

9 MR. VERKUIL: The mega-rulemaking
10 environment, how to analyze.

11 MS. MENDELSON: Yeah.

12 MR. VERKUIL: That's got to be one. I
13 would think one. That's such an opportunity.

14 MS. ZIEVE: Do you mean big rules or you
15 mean lots of rules?

16 MS. MENDELSON: I actually meant both.

17 MR. VERKUIL: Both.

18 MS. MENDELSON: The mega-rule in the sense
19 of the beg set of interrelated rules. Somebody
20 mentioned that in litigation problems it
21 creates, right, and the other is just the high
22 volume of individual rules that happen to be
23 worked on now by agencies. I think it's a
24 chance for us to really examine overall
25 improvements that if not in this setting in

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2 future settings, that could be implemented.

3 MR. STIER: I just want to take, to
4 connect again to the value of ACUS and how you
5 can communicate that more generally. I do
6 think that timeliness and the overhang issues
7 have direct potential outcomes that you can
8 measure and that you can quantify in a way that
9 would demonstrate real value both in terms of
10 financially but also in terms of the ultimate
11 outcome that you want from government.

12 MR. VERKUIL: Yeah. That, that's an
13 important point because we got to back to our
14 mission and also remember that we have to be
15 able to show Congress and others that we're
16 improving the process, we're saving money,
17 we're doing the things you want to do. So
18 timeliness, we can measure costs and benefits
19 much better in those areas maybe so we should,
20 that we should gravitate to areas that we can
21 measure to some extent, not exclusively but to
22 some extent.

23 PARTICIPANT: I thought that a lot of these
24 had communications built in and I thought
25 originally the idea of shifting a little bit,

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2 right now in the past the ACUS's audience was
3 primarily a very narrow audience, experts,
4 agencies and things like that but with the New
5 Media and some of the ideas shifting to the
6 general public, the interested general public
7 and having more access, I think that that's a
8 good one when it's combined with a mission
9 statement that says, you know, we are the
10 advocates for good, efficient government and
11 then you explain what that is. And I like the
12 idea of some sort of, if not some sort of a --
13 at least letting the world at large know the
14 positive side of good government.

15 MR. VERKUIL: Okay. Emphasize the
16 positive. Yeah, I mean I think that has to be
17 what we do. We're all committed to this
18 venture. Okay. That sounds pretty good to me.
19 We can take ten and report back, huh? At
20 eleven?

21 (There was a break in the
22 proceedings.)

23 MR. VERKUIL: All right. We're back in
24 session. Please find a seat. I know that the
25 most important job of the Chair is to get you

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2 out on time so I want to make sure we all are
3 through at twelve o'clock as you have plans and
4 you have already given us so much of your time
5 and we're grateful for it so I don't want to
6 delay it. But this was a wonderful idea to
7 have this session, to be able to talk to each
8 other and to come up with some good ideas.

9 I'm going to run through, actually, Tommie
10 Rogers and I were supposed to put this
11 together. Tommie was not able to come today,
12 she's not feeling too well so I'm doing it.
13 Anyway, I'll start since I'm Group A, and here
14 are my five. Explore what the regulatory state
15 should look like in a world of limited
16 government resources.

17 Well, this actually is a wonderful idea
18 and there is one of the big ideas about
19 everything we do really aimed at this and
20 should we be evaluating what we're learning as
21 we go along and maybe this is part of our
22 mission statement as much as anything, you
23 know, and how this affects some view of the
24 regulatory state and the ideal of good
25 government.

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2 Second one, mass volume problems. Mass
3 volume not just in adjudication, which of
4 course we think of it a lot but also in
5 rulemaking, especially when we can have
6 e-comments and the notion that multiple link
7 rulemaking and backlogs all connect to each
8 other.

9 Third is the idea of creating a community
10 of practice, highlight best practices, a
11 function that certainly the Conference should
12 perform and we will perform. Share ideas,
13 which we're trying to do now with these
14 meetings I'm talking to you about. And collect
15 statistics, just a bit on that last one. This
16 is my favorite one actually because in the old
17 days, in the Jeff Lubbers days when Jeff was
18 the research director he had to manually go out
19 and find -- good question. How many
20 adjudications occur in government? Jeff once
21 at least calculated that number and I don't
22 remember the number, Jeff.

23 MR. LUBBERS: I was at Social Security.

24 MR. VERKUIL: But, you know, why are we
25 learning more statistics and in connection with

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2 that as one of our jobs, the baseline job, how
3 we'll use them, what to do with it, how will we
4 use it but it's important to know. We don't
5 even know these things. And there is a
6 possibility now with the Carl Malamud world of
7 Law.Gov that we can get all adjudications in
8 government online. The White House is
9 interested in this. OSTP is interested in
10 this. If we can actually get an online source
11 of adjudications we can then nationally count
12 it. So that's a good idea. Study the
13 mega-rulemaking environment. This is coming
14 out of the healthcare legislation, the
15 financial regulatory legislation. You know,
16 we're looking at thousands of rules coming down
17 the pike.

18 VOICE: Hundreds.

19 MR. VERKUIL: Hundreds of rules, if not
20 thousands. It's still a lot. It's going to
21 have judicial review implications. And of
22 course how do you decide, it will be easier,
23 you know, there's a lead rule and it's almost,
24 you know, like talking about new ways of
25 analyzing and completing rules and studying the

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2 way these rules are being made, which we should
3 really do. So it's a lot of these, new
4 agencies setting up without people, without
5 structure, okay. And five, highlight successes
6 of good government, communicate the positives.

7 Max Stier from Partnership of Public
8 Service is here and he obviously is one who
9 with his Sammies, he highlights government
10 officials who do great things. I know many of
11 you who have attended those meetings but I'm
12 thinking we should do maybe government agencies
13 that do great things, innovative, thoughtful,
14 highlight a government agency and maybe even a
15 public organization as well. So that's, those
16 are the five thoughts we have. And I'll turn
17 it over next, let's see, to Preeta. Are you
18 going to take those?

19 MS. BANSAL: Sure.

20 MR. VERKUIL: Want me to put yours up.

21 MS. BANSAL: Sure. I will present on
22 Group B findings and recommendations.

23 VOICES: Can't hear you.

24 MR. VERKUIL: Do it up there.

25 MS. BANSAL: All right. I am going to

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2 present Group B's findings and recommendations.

3 We divided the presentation into three large
4 things. We talked about one was substantive
5 themes we thought that ACUS could be involved
6 in. The second set of issues we talked about
7 were specific projects; the deliverables we
8 thought ACUS could achieve in the short term, a
9 one to two year frame, and the last were some
10 specific recommendations to ACUS as an agency
11 itself. In terms of the substantive themes
12 that came up, obviously many of the themes we've
13 been talking about last few days, one is just
14 the changing technology and special use of
15 social media by agencies and by the public and
16 that leads to certain projects that we'll talk
17 about.

18 International harmonization of regulations
19 and regulatory processes and standards,
20 focusing on ways in which agencies are starting
21 to do that, making sure the public is a part of
22 that discussion. A third is just enforcement
23 of regulatory schemes, either through criminal
24 statutes and also agency enforcement through
25 inspections, talking about in terms of specific

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2 projects. A fourth theme is lines of
3 government activity inherent, the issue of the
4 workforce, federal employees versus
5 contractors, and also preparing for a 21st
6 century workforce in terms of hiring and
7 recruitment. And then the last big theme was
8 just public accessibility to agency
9 information.

10 In terms of specific projects and
11 deliverables the group thought that ACUS could
12 achieve, I think we were thinking, I was
13 thinking about this in the context of you know,
14 a lot of really impressive people in this room
15 who are devoting their time and what would we
16 like to see, what would all of you like to see
17 achieved over the course of the next year or
18 so, say it's worth the investment of time.

19 For agencies there were a few things that
20 some of the agency representatives thought
21 would be very valuable short-term projects.
22 One is obviously e-rulemaking, which I know is
23 well underway and a lot of discussion on that.
24 Another is looking at the cumulative burdens
25 that are placed on agencies whether through

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2 executive orders, memoranda, OMB guidances, all
3 of these directions we tell to agencies, kind
4 of cataloging what are the cumulative burdens
5 and helping to prioritize those.

6 Third, would be some kind of guidance to
7 agencies or best practices with respect to the
8 usage of social media. A lot of talk about how
9 in some agencies it takes three days to clear a
10 Tweet and so it doesn't become much of a useful
11 exercise, and, just what are the appropriate
12 uses of Tweet, of social media.

13 A fourth project agencies thought would be
14 very useful, it would be a kind of a
15 comprehensive review of the PRA, the Paperwork
16 Reduction Act in the context of the 21st
17 Century. It hasn't been updated I think since
18 the mid-nineties statute so looking at whether
19 the burdens of that makes sense. And a fifth
20 project for agencies were inspectors general.
21 And I think there was some discussion both of
22 looking at the authority of the inspectors
23 general, the testimony and subpoena authority
24 issue that's come up and also the Council on
25 inspectors general and how well they're

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2 performing in terms of a self-regulating body.

3 In terms of projects that would be of some
4 use to the regulated community, regulated
5 entities, there was talk of looking at the
6 extent to which there are criminal penalties,
7 and the manner in which regulatory statutes may
8 have criminal penalties and how could the
9 criminal laws used and enforced in some cases
10 is not enforced at all but then all of a sudden
11 some prosecutor in Georgia, I think it was
12 pointed out, might pull something out. So
13 looking at the criminal penalties and the
14 manner in which criminal laws are enforced with
15 respect to regulation.

16 A second piece for regulated entities is
17 looking at the inspection regime, how agencies
18 do and should carry out their inspection
19 authorities under various regulatory schemes,
20 whether it's FDA type inspections, whether it's
21 TSA, with respect to individuals, whether, you
22 know, the former MMS, oil inspections, so
23 looking at practices and best practices on how
24 inspections are carried out.

25 The last project that came up for

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2 regulated entities is again a look at burdens,
3 burdens of regulation on regulated entities,
4 cumulative burdens especially and maybe a look
5 at retrospective evaluations, costs and
6 benefits and how those kind of
7 retrospective evaluations can be carried out.

8 In terms of projects that would have a
9 special interest to the public, one, the main
10 project there, I think it's the Law.Gov type
11 project of accessibility of legal information,
12 making sure that regulations and anything
13 related to the rulemaking process or agency
14 processes are posted online in some kind of a
15 standardized format so that the public is able
16 to access them and download them in a usable
17 way. And then we thought e-rulemaking
18 obviously as a mode of public participation, is
19 also a project that's of benefit to the
20 regulated entities.

21 In terms of recommendations to ACUS and
22 how we as an agency can best achieve and use
23 our resources over the next year, there was
24 discussion about the ACUS, really, it's
25 important to study a lot of issues but

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2 especially in its early years, the first few
3 years it's very important to focus and
4 prioritize and make sure that we not just issue
5 recommendations but really see through a couple
6 recommendations, have follow-up, really work
7 with the agencies to make sure that the
8 recommendations are implemented, be very
9 strategic in our initial choices of projects,
10 our initial choices of recommendations, so that
11 they are things that we can show real success
12 in.

13 Establishing credibility within the
14 government, that means not only through
15 recommendations but also through liaising and
16 some of the ways Paul is doing and other ways
17 of existing bodies of government that are
18 focusing on some of these issues, whether it's
19 the GAO or whether they're the various councils
20 like the inspector general councils and other
21 entities that are looking at these things.

22 And then a third recommendation for ACUS
23 was to encourage public participation in our
24 own work and using web technologies to have
25 public input into ACUS's projects and possibly

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2 a blog by ACUS to the public. So those are
3 some of the things that our group talked about.

4 MR. VERKUIL: That's great. Ron, I'm
5 going to put you up next if you're -- Ron and
6 Julius Genachowski had to decide who goes
7 first. You won the tallest --

8 MR. GENACHOWSKI: Shortest straw.

9 MR. CASS: Julius was busy twittering I
10 think at the time, so, I think I was set up
11 here. But I was actually struck by the
12 similarity between ours and Preeta's although I
13 notice that you put FDA and TSA
14 inspections. I thought the pat-down of poultry
15 was going to be implemented.

16 (Laughter) I'm going to take
17 these a little bit out of

18 Order and start with some recommendations
19 for ACUS and these go from the small to large
20 or the other way around. It included things
21 like looking at our Committee structure to make
22 sure they line up better with what it is we
23 actually wind up doing. In a start-up
24 operation you think about what sort of ideas
25 you're probably going to be dealing with and

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2 then when you get down to actually throwing the
3 ideas on the table they may be a little
4 different.

5 A lot of what the agency has done in the
6 past or done recently that is outside the
7 traditional report and recommendation frame of
8 things that people in our group thought were
9 good ideas and should be continued, they
10 thought the idea of best practice forums for
11 regulators would be something that would be
12 very useful, training sessions for incoming
13 regulators would be useful and something that
14 this agency could contribute to in an important
15 way. And also a help for people in Congress
16 who are drafting laws that have a variety of
17 administrative law points in those, may not be
18 as well understood by the drafters as by people
19 at the Conference.

20 One of the things that is sort of an
21 overarching set of concerns that our group
22 identified was that the APA itself, which is
23 approaching its 65th birthday, so we like to
24 think of it as relatively young statute, is
25 something that is in need of updating and

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2 reform and while that's a big project it's
3 something that we could get started looking at
4 how we might contribute to a revitalized and
5 reformatted APA.

6 On the substantive matters there were a
7 whole bunch of different groups and these
8 overlap to a significant degree, which you have
9 heard already. One involves the basis for
10 decision, when we make decisions how do we use
11 science, how do treat science, how do we test
12 science, what do we do with respect to data and
13 data analysis and the economics, what's the
14 right way to think about not just cost but cost
15 and benefits, and what we're about, how do we
16 handle and package data and how do we get
17 access to it.

18 A second set of issues involves records
19 and recordkeeping and in fact this is actually
20 two broad categories. One involves not just
21 the records themselves and the record
22 management, but access and discovery of records
23 and what we do with the record in the
24 electronic age, how we update it. I commented
25 that my 13-year-old daughter when we talk about

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2 technology, I frequently try to impress her
3 with what I know. She'll shake her head and
4 say, "Dad, that was so last week."

5 The other thing that we were talking about
6 with records comes at these things not from the
7 rulemaking and adjudication side but instead
8 from the side of the investigation, of law
9 enforcement. What do you do with privacy
10 issues? What do you do with the record you
11 collect there? How do you deal with that in an
12 increasingly electronic age?

13 Another category on the subject was
14 updating rulemaking. Again the question wasn't
15 just looking out for the problem of piling on
16 cumulatively the ideas that each individually
17 may seem like a good thing to put in rulemaking
18 but also is it really an ossified process, is
19 it something we talk about as commonly
20 ossified, is it really, and is it ossified to
21 the right degree, is it too ossified or maybe
22 not ossified enough. Maybe we need more formal
23 structure there. And that was something that a
24 lot of people were interested in looking at how
25 we update it, how we use it, what we ought to

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2 be doing about it, not just the e-rulemaking,
3 not just the mechanics of it but also a lot of
4 the formal requirements that go into it in
5 different contexts.

6 Last, we had an interest in looking at
7 improving procedure, especially again through
8 technology in areas outside the rulemaking and
9 adjudication. There's a whole array of things
10 that agencies do in making grants and in
11 providing service to the public as well as to
12 one another, that could be improved and we
13 ought to make sure that our focus doesn't get
14 narrowed to the big categories that we're used
15 to dealing with. Thanks.

16 MR. VERKUIL: Thank you, Ron. Very
17 efficiently done. Very good. So, okay, D,
18 we've got Tom Perez. Oh, I'm sorry -- Tom,
19 okay. Tom Perez. You've got your list, okay.

20 MR. PEREZ: Good morning, yes, Tom Perez.
21 And we had a process observation at the outset
22 of our meeting which I know is already underway
23 which is to make sure that as we go through
24 this exercise that we are identifying other
25 organizations, whether it's foundations, other

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2 entities that have a community of interest and
3 figure out what they're doing so that we can
4 maximize the synergies that would be in place
5 by partnering with various entities. And I
6 know there was a recent event with Brookings by
7 way of example. So we know there are many more
8 and people cited them. A number of
9 organizations are looking at the issue of the
10 use of science in various contexts so hopefully
11 we can avoid any kinds of silo building in this
12 process and make sure we're all in one sandbox.

13 Our recommendations are outlined there.

14 We realize that there are entities like the,
15 Elizabeth Warren is working to stand-up a new
16 agency. You will have just done that. We may
17 see other reforms over time in the years ahead
18 and I think our vision for this is that when
19 person X is standing up a new agency we would
20 like them as part of their due diligence in
21 doing that to come to the Conference for a
22 tutorial on that because you just did it and
23 perhaps we can study how others have done it
24 and come up with hopefully a useful blueprint
25 on how to do that. So that's recommendation

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2 number one.

3 Recommendation number two relates to the
4 fact there are many, many executive orders.
5 When I think about this, Mike, I think about
6 the time that and you and I and others and our
7 good friend Sally Katzen spent together a
8 couple years ago in the area of executive
9 orders. Every administration has a number of
10 executive orders. One piles on top of another.
11 For a host of reasons, many executive orders
12 don't get formally rescinded but it might be a
13 useful exercise as we move forward to have
14 clean-up, was the term I think that our friend
15 Elaine used and taking a look at what's out
16 there, what conflicts might exist, what
17 guidance we can give both to agencies and other
18 stakeholders in that area.

19 Next item was a very small undertaking,
20 which is simply the modernization of our
21 rulemaking. We should be able to accomplish
22 this before the end of, the Senate's I think on
23 the 18th, something like that, so we can take
24 this up. And frankly I think, you know, part
25 of our goals might be we'd like to get to the

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2 late 20th Century, we would love to get to the
3 year 2011 but a host of issues in that area.

4 We had a very robust dialogue about the various
5 challenges involved and simply how long it's
6 taking.

7 And a number of us in the room have worked
8 in state government. We've seen it work a
9 little bit faster there and justice delayed can
10 indeed be justice denied. And we feel that the
11 Conference can play a very important role in
12 addressing a host of issues relating to
13 regulatory modernization.

14 We spoke about the Chevron guidance and we
15 thought that the unique role that the
16 Conference could play would be to talk to
17 agencies, talk to judges, get a sense of do
18 agencies read Chevron, do any agencies follow
19 Chevron, what do agencies think of Chevron and
20 perhaps that would understand and educate the
21 process of rulemaking and demystify the process
22 of rulemaking.

23 And then finally, FOIA modernization,
24 there's an issue of backlogs. One thing I
25 learned today I was unaware of is that all of

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2 the other nations that have enacted recently
3 similar laws, they don't necessarily call it
4 FOIA but they are FOIA in fact. And so what
5 can we do to reduce the FOIA backlog, what can
6 be done to perhaps introduce principles of or
7 continue to introduce but make more effective
8 principles of ADR, e-records et cetera. FOIA
9 is I know a big issue in my neck of the woods
10 and it's an issue across government.

11 So those were the areas where we
12 discussed, I've have already talked about the
13 last bullet point there which was more of a
14 process bullet point and I know that you're
15 already working on that, Paul. So that's what
16 we talked about and we had a great discussion
17 and I want to thank all the members who were
18 there who participated.

19 MR. VERKUIL: Thank you, Tom. All right.
20 Michael Fitzpatrick with the famous Group E.

21 MR. FITZPATRICK: It is famous. We had a
22 great group, a lot of fun, jokes, stores, and
23 we spent a little time thinking about this and
24 we summarized it in six bullets. First of all
25 let me just note the extraordinary overlap of

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2 ideas between the groups. I'm just struck by
3 some of the themes that kept returning group to
4 group and some that aren't on our list but PRA,
5 cumulative burdens, executive orders and OMB
6 guidance, and standing up an agency,
7 interestingly, all came up in our group as
8 well. So obviously great minds are thinking
9 alike.

10 And ours, let's start with rulemaking
11 effectiveness and efficiency. We had about
12 five pieces of paper stuck on the wall by the
13 time we were done and so rather than pick out
14 each discrete variation of a theme we sort of
15 funneled them together and there did seem to be
16 some obvious buckets.

17 And so there were quite a few
18 recommendations that surrounded improving
19 rulemaking, both its effectiveness and its
20 efficiency. And some of the ideas there were
21 how, whether ACUS could conduct some case
22 studies on agencies that seem to have different
23 rulemaking processes, some take much longer,
24 some take much shorter.

25 Can we learn something from that, are

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2 there particular processes or impediments,
3 externalities that are allowing certain
4 agencies to get to the process more quickly
5 versus others and then develop perhaps some
6 ideas and best practices that could be shared.

7 Can we create avenues for interagency or
8 cross-agency communication on this topic? We
9 can break out of our agency silos and start to
10 talk to each other about challenges and also
11 how we do things right. Creative methods of
12 regulation and enforcement, something that I
13 think agencies and certainly the White House
14 are doing and promoting even as we speak but
15 ideas of third-party inspection and
16 certification, disclosure simplification, ways
17 of achieving regulatory objectives perhaps with
18 a lighter touch where appropriate but also ways
19 that are still enforceable. So those were the
20 sort of, more particular ideas under that broad
21 topic.

22 The next was e-rulemaking and social
23 media. And let me stop here and just
24 acknowledge that in some of these areas ACUS is
25 already thinking about studies in these areas

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2 and then the question becomes with its limited
3 resources, is ACUS designing just the right
4 study to kind of tackle these issues and might
5 want to revisit its current plan.

6 E-rulemaking and social media, one issue
7 is interaction with the public, both inflow of
8 information and the pushing out of information
9 by the agency. Is it being done effectively
10 now? Could it be done more effectively or more
11 collaboratively by using new social media
12 tools? Legal issues that are associated with
13 this, many agencies in part because of OMB
14 guidance that's been issued over the last year
15 are really exploring ways in which they can use
16 social media and Web 2.0 tools to interact with
17 more citizens in ways that citizens expect to
18 be interacted with now. But coming along with
19 that are a series of tough legal issues with
20 respect to how that intersects with the APA
21 process.

22 Are there temporal restrictions on when
23 that input can be used as part of the
24 rulemaking record? How do you treat kind of
25 feedback loop types of comments where you're in

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2 an open discussion? What are the comments
3 there and how are they described as comments
4 with respect to the APA. This would probably
5 be a very useful area for ACUS to explore and
6 perhaps offer some legal conclusions and some
7 guidance to the agencies. And then again best
8 practices and challenges in this area, because
9 there are definitely challenges in terms of
10 resources, setting expectations appropriately
11 with the public, on what they ought to expect
12 to hear back from the agency or how an
13 individual comment might resonate with an
14 agency. Those are challenges that need to be
15 dealt with.

16 And then finally the interoperability of
17 all of the government websites that are
18 associated with e-rulemaking. We've got
19 regs.gov, we've got Federal Register 2.0, which
20 is a fantastic new version of that website,
21 we've got reginfo.gov and we have others, and
22 agencies themselves, EPA, DOT, other agencies
23 are exploring their own agency-specific
24 websites. It might be nice to have some
25 thinking on how these should sync up and work

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2 efficiently together.

3 The next is empirically evaluating the use
4 of data in the rulemaking process and just data
5 issues in general. One idea that was floated
6 was try to do an empirically-based evaluation
7 of rulemaking. How many rules are coming
8 through the system, how many comments are
9 agencies receiving on rules, what type of
10 comments and how many of those, the
11 cookie-cutter versus the very substantive
12 comments and how is data being relied upon and
13 used in the rulemaking process.

14 Another issue is quality of the data
15 that's being used by the agencies in rulemaking
16 and also in the open government arena, where we
17 every pushing out a lot of data through
18 data.gov and other websites. The form and use
19 of data both in developing policy through
20 regulation but also in how we're presenting it
21 to the public for their own use. Technological
22 limitations in this area, and those are real
23 and I think resource issues come along with
24 that.

25 And finally the interactivity of various

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2 databases and data systems across government.

3 They're now proliferating and it might be

4 useful to have some thinking about how are

5 these all going to sync up and if that's even

6 possible. Next was FACA. I would say the

7 catch-line there is FACA is a four-letter word.

8 The idea is, is FACA working?

9 And I would note, Paul, that this is

10 already on the project list and so there was a

11 lot of enthusiasm for that as a priority

12 project. I think the sad fact is that FACA

13 doesn't have the greatest reputation in the

14 world, not necessarily because of its

15 underlying mission or objective but how it

16 actually operates in practice and that there's

17 an awful lot of tactical maneuvering when it

18 comes to FACA, an awful lot of horrific gasps

19 when people set off on initiatives and realize

20 they're presented with the possibility of FACA

21 being invoked and then does this result in

22 people either going underground or ceasing to

23 pursue valuable initiatives. None of that

24 seems particularly helpful nor does seem to

25 advance the goal and missions of FACA. So like

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2 the PRA perhaps FACA is due for a sprucing up
3 for the 21th Century.

4 And then lastly the IG issues, again
5 something that has come up with at least one or
6 two of the other groups. The role of IGs, the
7 status of IGs, peekaboo issues, the fact that
8 there are so many different IG statutes that
9 set up and provide duties and responsibilities
10 and powers to IGs in different ways, and
11 finally subpoena power, which is sort of an
12 issue in the news now. So those were our
13 priority items. There were many others that
14 were taken down for your consideration.

15 MR. VERKUIL: Great. Well, this is
16 wonderful. We have a few minutes but I wanted
17 to say one thing. By the way, this is an
18 amazing event. Only this organization can pull
19 it off because you all came and because we had
20 the talent in the room that is gathered no
21 where else in government, no other agency that
22 I'm aware of to do this. So it's good we're
23 back in business.

24 We are, by the way -- we've checked this
25 out -- we're the largest FACA Committee in

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2 government. Maybe that's something to be proud
3 of. Here-here. And we'll get to FACA. We got
4 a lot to deal with there. But more
5 importantly, it's getting people together and
6 sharing ideas.

7 Now, all this and the other ideas that
8 didn't make the final list are all going to be
9 preserved. We've got them. We might rework it
10 a little bit. We might try and compare these
11 and come up with a, more of an overarching list
12 when we get through and that will be on our
13 website and you'll be working with us. I mean
14 one of the beauties of the new media is that we
15 can talk to each other all the time. We don't
16 have to only come together here in this room.

17 So let me, we got few minutes for
18 questions. Let me do that and then I wanted to
19 close with telling you when the next meeting
20 is. But are there any thoughts that the group
21 has as a whole or are we happy with where we
22 have come to? All right.

23 MR. LEIGHTON: I would just like to say
24 this is a great start.

25 MR. VERKUIL: Thank you, Dick. You've

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2 been through several of them. Any other
3 thoughts? Peter?

4 MR. PETER: So just reflecting what was
5 part of our conversation, I would be interested
6 in knowing what your thoughts were about the
7 allocation of resources within ACUS between
8 running projects that produce recommendations
9 and running what could be described as internal
10 coordination resource provision exercises for
11 the rest of the federal government. Because
12 most of this conversation has been about
13 projects and at least some of the thought in
14 our room was that the way ACUS best builds
15 credibility and importance within the federal
16 government is by push-out rather than projects.

17 MR. VERKUIL: Right. That, may I just say
18 a few things about allocation? Because that's
19 a very good question, Peter Strauss, and we
20 think about, we're especially thinking about
21 this because we're worried about our budget and
22 we were saying, oh, my gosh, what would happen
23 if we get cut back, which hopefully will not
24 happen and we are, I should say, on the list.
25 We have an exception that the House has already

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2 voted on so we're looking good for our budget
3 but even with our budget, which is not a large
4 budget, we have to really be careful what we
5 do. We think push-out is a good idea.

6 On the other hand we've got this internal
7 resource. We've got at least five attorneys
8 working, who are capable and they're well
9 qualified, carefully trained people who could
10 be consultants internally, and so that's an
11 asset we have to take advantage of. And I
12 think all of us in a way are committed to that
13 and we've got, you know, we've minimized the
14 number of people who don't have the capacity to
15 help us with our research, frankly, so that's
16 one area we're careful about.

17 And in terms of consultants I think we're
18 very fortunate that we can hold the line on
19 what I think are very stingy consultant
20 contracts where the numbers don't look a lot
21 different than they were fifteen years ago, I
22 hate to say, but we've gotten still, you know,
23 good people who want to be part of this. And
24 that's because the academic community I think
25 has its own ability to subsidize this work and

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2 people care a lot about where their work
3 appears and the ways in which it has improved
4 by participating with us in the work. So we
5 can, I think we could push out twenty projects
6 a year, fund twenty projects a year with
7 consultants on top of our own internal. And
8 then the question is how much do we push out to
9 other agencies and get them involved in it.

10 That is a, you know, we're allowed to -- I
11 shouldn't say this. I sound like an old
12 college president. Are we allowed to accept
13 funds from the outside as well as from
14 government to help us with our projects, and it
15 may well be that we can collaborate with other
16 agencies sharing resources in that fashion
17 which we will manage directly or with a junior
18 partner or a senior partner and with
19 foundations.

20 And I got my eyes on at least a few
21 foundations, not individual gifts now, not --
22 just foundations who are interested in the work
23 of government and might like to see us do
24 projects that they think will push their
25 agendas as well. And so both with government

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2 and outside government I think we can
3 collaborate and we've got to think of ways to
4 maximize our resources in that regard. So,
5 yes, Jeff.

6 MR. LUBBERS: Yeah, this is a follow-up to
7 Peter's question. As many of you know, I've
8 worked at the Conference for about twenty years
9 and I was often asked which recommendations I
10 thought were the most valuable or which ones I
11 liked. And it was hard to answer that question
12 but I think what I was most sort of proud of
13 was just sort of the overall body of work, all
14 the recommendations put together formed the
15 output of the Conference and that's what gives
16 this Conference staff and members the ability
17 to push out to the other agencies.

18 Because when the Conference would do
19 training and would do implementation work or
20 work with the Hill there was this official body
21 of work that the Conference members produced
22 that, you know, still exist and some of them
23 need to be updated programs but there are over
24 200 recommendations out there, a lot of which
25 are still quite valid today.

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2 So I think it's hard to separate the
3 actual process of coming up with
4 recommendations like we did yesterday with
5 future activities of training, implementation
6 and that sort of thing because it's kind of a
7 seamless sort of body of work.

8 MR. VERKUIL: So training function is one.
9 Peter, maybe you were thinking of that too,
10 that we should give serious thought to.
11 Certainly the idea of how to stand up an
12 agency, you know, we might as well make -- I
13 have my notes. I was going to put it in my
14 memoir when I retired. Of course actually some
15 of these stories are hard to believe but maybe
16 we should sanitize those a bit and use them as
17 a way to communicate with others who are going
18 through similar problems but we are now, you
19 know, I think fairly safe, fair to say past
20 that and in record time.

21 The next meeting is going to be -- I'll
22 give you the dates -- the Council approved June
23 16 and 17, June 16 and 17, here in D.C. We're
24 not going to meet here again but this was, this
25 is a wonderful venue and for the symbolic first

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2 meeting it's perfect, I think, but it isn't
3 great in terms of, no one has facilities, it's
4 hard to, first of all it's hard for me to see
5 people let alone you see the work and we need
6 to do better than that.

7 So we're going to find, and we may have,
8 be asking you if you've got a great idea for a
9 Conference area or a large classroom with a
10 table so we can put our, you know, electronics
11 together, use our computers and notebooks. We
12 need a good venue. We may even look back on,
13 we used to be Office of Thrift Supervision was
14 our, in the old days.

15 MR. LUBBERS: Home Loan Bank.

16 MR. VERKUIL: Now it's the Home Loan Bank?

17 MR. LUBBERS: No, it was the Home Loan
18 Bank.

19 MR. VERKUIL: It was the Home Loan Bank.
20 Whatever it's going to be in this new
21 legislation it's no longer OTS either but that
22 was a venue that worked. Maybe there's a
23 better one and so if anyone has a good idea
24 please let us know. It's important to know
25 that. And we'll work a little bit on how we

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2 present recommendations. I think we can be
3 more efficient, especially with respect to
4 amendments and how do we get things out. We'll
5 do that but we need a good place.

6 Now, we also need a venue for the
7 reception so any thoughts on that are equally
8 important. We, in the old days we went to the
9 Anderson House but we need someone who is
10 eligible to take us there and I don't know if
11 we have anybody.

12 MR. LUBBERS: Cabinet member.

13 MR. VERKUIL: You have to be a cabinet
14 member?

15 MR. LUBBERS: Talk to Lawrence Smith.
16 That's how he got it.

17 MR. VERKUIL: Oh, okay. Well, we'll
18 figure it out, on any thoughts on where to
19 meet. When we meet is June 16 and 17. That's
20 the same framework. We'll start at two o'clock
21 on a Thursday and we'll end at twelve o'clock
22 on Friday and we'll have the reception on
23 Thursday evening.

24 We'll have more, I promise you, we'll have
25 more than one recommendation. I don't know how

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2 many yet but I would like to see hopefully four
3 or five, if we, that's one measure of our own
4 output is to make sure we're getting
5 recommendations out there and also evaluating
6 recommendations including I think, Jeff, we
7 have 200 recommendations, we've got them online
8 now, they're digitized, maybe you ought to
9 think about one of our projects being, well,
10 some of these recommendations, are they still
11 good, I mean, you might want to dust them off
12 and see if they're, you know, people remember
13 them. We'll remind people. So there's a lot
14 we can do internally in those respects.

15 That's, as far as I'm concerned, unless there's
16 another need for anything else, and unless Mike
17 McCarthy tells me I forgot something --

18 MR. McCARTHY: Mugs and certificates, pick
19 them up.

20 MR. VERKUIL: Mugs and certificates.

21 MR. McCARTHY: Pick them up.

22 PARTICIPANT: Pick them up.

23 MR. VERKUIL: Pick them up. And thank you
24 very much for what I think is a great first
25 meeting back.

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2 (Applause)

3 (Conference adjourned at 11:54 a.m.)

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2 State of Maryland,

3 Baltimore County, to wit:

4
5 I, ROBERT A. SHOCKET, a Notary Public of
6 the State of Maryland, County of Baltimore, do hereby
7 certify that the within-named witness personally
8 appeared before me at the time and place herein set
9 out, and after having been duly sworn by me, according
10 to law, was examined by counsel.

11 I further certify that the examination was
12 recorded stenographically by me and this transcript is
13 a true record of the proceedings.

14 I further certify that I am not of counsel
15 to any of the parties, nor in any way interested in the
16 outcome of this action.

17 As witness my hand and notarial seal this
18 22nd day of December, 2010.

19
20 _____
21 Robert A. Shocket,

22 Notary Public

23
24 My Commission Expires:

25 November 23, 2014