

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

3 54th PLENARY SESSION

4 JUNE 16, 2011

5
6
7
8 The above-mentioned conference
9 was held on Thursday, June 16, 2011,
10 commencing at 2:00 p.m., at Pew
11 Charitable Trust, 901 E Street, N.W.,
12 10th Floor, Washington, D.C., before
13 Kathy Savich, RPR, CLR, and Notary
14 Public for the District of Columbia.
15

16 CHAIRMAN: PAUL VERKUIL.

17 EXECUTIVE DIRECTOR: MICHAEL T. McCARTHY

18
19
20
21
22
23 JOB NO: 38804

24 PAGE NO.: 1 - 252

25 REPORTED BY: KATHY SAVICH, RPR, CLR

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
2 AGENDA
3 54th Plenary Session
4 June 16, 2011
5
6

7 -- Call to Order of the Assembly of the
8 Administrative Conference of the United
9 States

10 -- Introductory Remarks by Chairman Paul R.
11 Verkuil

12 -- Consideration and Vote on Initial Business
13 (Order of Business, Adoption of Minutes)

14 -- Consideration of Proposed ACUS
15 Recommendation on Legal Considerations in
16 e-Rulemaking

17 -- Consideration of Proposed ACUS
18 Recommendation on Rulemaking Comments

19 -- Staff Presentations

20 -- Keynote Remarks by The Honorable Stephen
21 Breyer, Associate Justice, Supreme Court of
22 the United States
23
24
25

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
2 P R O C E E D I N G S

3 MR. McCARTHY: Good afternoon.
4 I'm Mike McCarthy. I'm the Executive
5 Director of the Administrative
6 Conference. And while everyone is
7 getting settled in, I'll just make a
8 few logistical announcements before
9 Chairman Verkuil calls the meeting to
10 order.

11 First, on seating, we have
12 seating for the Council and committee
13 chairs in the front rows. We have
14 seating for the public and the media
15 in the back rows. And the members of
16 the Conference can fill in anywhere in
17 between in the middle here.

18 So there are more seats on this
19 side of the room. If you're looking
20 for some space, you can work your way
21 over here. And I think that we should
22 have plenty of seating for everyone.

23 So members of the Conference
24 should have checked in at the
25 registration table downstairs and

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 received name tags and packets of the
3 materials. If you didn't check in and
4 get a name tag, can you make sure to
5 see one of the ACUS staff. It's
6 important that we have a count of the
7 members who are here for our quorum
8 and voting purposes. So if you don't
9 have a name tag and have not checked
10 in, please do that now -- please see
11 someone now to do that.

12 We're thankful to the Pew
13 Charitable Trust for the use of this
14 bright and modern conference center.
15 We're up here on the 10th floor, and
16 our breaks and this evening's
17 reception will be one floor down, on
18 the 9th floor. So when you came in
19 through the lobby, there are steps
20 right there that lead down. So for
21 our breaks and for the reception this
22 evening, you can -- you can go
23 downstairs there.

24 And we'll also have -- if you
25 need to use the elevator, one of our

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 ACUS staff will be able to assist you
3 going down on the elevator for the
4 breaks.

5 You can -- we'll have beverages
6 available downstairs. You can bring
7 your beverages back upstairs here, but
8 you can't bring food back upstairs
9 here in this room. So beverages yes,
10 food no, in this room.

11 Because this is a modern
12 Administrative Conference with modern
13 technology, there is Wi-Fi available
14 in this room for those using laptops
15 or iPads. The user name is guest and
16 the password is S2X2CHMJ. So that
17 seems a little more complicated than
18 it used to be, but I'll repeat it and
19 we'll have it on a slide, S2X2CHMJ.

20 We do ask that everyone take a
21 second now to put your -- your cell
22 phones and your various other devices
23 on silent mode so we -- so we don't --
24 so they won't ring and interrupt the
25 meeting.

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 Something that we have at this
3 plenary which we didn't have last time
4 is the ability to show the text of the
5 recommendations that we're debating
6 on. The screen is on the front of the
7 room, so we think this will be helpful
8 as people are talking about
9 amendments, we'll be able to visualize
10 it in real-time.

11 But we also have the tried and
12 true old technology, I think, on paper
13 which -- which is available in your
14 packets. We have copies of the
15 recommendations, both the original
16 format that was distributed a couple
17 of weeks ago as well as an annotated
18 format with the amendments that will
19 be considered in a red-line form so
20 you can see exactly what changes we're
21 talking about here.

22 Audio and video of the session
23 is being streamed live over the web at
24 www.acus.gov, and the video will be
25 archived there. To make sure that all

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 our words are broadcast, a speaker
3 should use the microphones that will
4 be passed around. So even if you have
5 a loud enough voice that you don't
6 need it, use the microphone so that it
7 will be heard on the -- on the
8 broadcast.

9 And there will also be a
10 transcript made. We have a court
11 reporter here. And so members who are
12 speaking should begin by identifying
13 yourself. Even if we all know who you
14 are, please identify yourself at the
15 beginning of your remarks so the court
16 reporter can attribute what you say to
17 the right person.

18 With the modern technology, you
19 can also follow the progress of the
20 plenary session on Twitter using the
21 hash tag #acusrecs -- acusrecs. And
22 you can get ACUS news on Twitter by
23 following the user name acusgov,
24 a-c-u-s-g-o-v.

25 So -- and one reminder is that

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 the Conference is a federal advisory
3 committee, so that means that all of
4 our proceedings, including this
5 session, are open to the public and on
6 the record.

7 So with these logistical
8 announcements out of the way, let me
9 introduce Chairman Paul Verkuil to
10 call the session to order.

11 CHAIRMAN VERKUIL: Thank you,
12 Mike.

13 Welcome. The 54th Plenary
14 Session of the Administrative
15 Conference of the United States will
16 now come to order.

17 Welcome to all of our members
18 and guests here in the room and those
19 watching online and also those members
20 of the public who are in an adjoining
21 room and are watching us as well.

22 At our plenary session in
23 December, the Conference was just
24 getting started. We voted on one
25 recommendation and had productive

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 discussion about the future priorities
3 and goals of the Conference.

4 Now, six months later, our six
5 committees have been meeting
6 regularly. We have four
7 recommendations to consider today,
8 more than a dozen other projects in
9 the pipeline, and numerous workshops
10 and programs under our belt.

11 We are, in sum, fully at work and
12 operating at the level achieved before
13 ACUS was shut down and with a smaller
14 staff. Our meeting today is provided
15 by the Pew Charitable Trust, as Mike
16 said, whose dynamic president, Rebecca
17 Rimel, sends greetings to us all.

18 We hope this venue will be both
19 a convenient and inspirational setting
20 for our work for the next two days.
21 It is certainly more high-tech and
22 collegial, more like a classroom, and
23 I know our professors are happy about
24 that, if it's not as imposing, of
25 course, as the National Archives

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 certainly were.

3 So let me provide a brief
4 overview of our activity since the
5 last plenary. First, your thoughts in
6 December on the priorities of the
7 Conference have been incorporated into
8 our mission. We distilled four
9 essential themes from those sessions
10 and converted them into strategic
11 goals. These themes are the promotion
12 of participation, collaboration,
13 innovation, and education in the
14 administrative process.

15 As for participation, ACUS will
16 build on initiatives to expand citizen
17 involvement in the regulatory process
18 through increased use of interactive
19 communications technology and creative
20 means of outreach in order to provide
21 essential information to government
22 officials and to better inform the
23 public.

24 You will see this theme in the
25 two recommendations on rulemaking

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 that we will be considering today as
3 well as on ACUS' own website, which,
4 under Kathy Kyle's leadership, seeks
5 to model the best in public
6 communication and interaction.

7 As for collaboration, ACUS is
8 exploring and promoting the most
9 efficient means of sharing information
10 and responsibility among the federal
11 government, state and local
12 governments, businesses, and citizens.
13 This will include new models of
14 collaborative governance, such as
15 third party or audited
16 self-regulation, as well as the use of
17 established techniques that we
18 pioneer, like regulatory negotiation.

19 The recommendation we considered
20 last December on preemption of state
21 law by federal agencies is directly
22 responsive to the collaboration theme,
23 as is a new project on harmonization
24 of international regulations that
25 should be ready for next December's

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 plenary.

3 As for innovation, the
4 Conference seeks the new ideas that
5 advance the core values of fairness,
6 efficiency and satisfaction. We are
7 looking at existing government
8 programs to identify what works, what
9 doesn't, and what can be done more
10 creatively. Forthcoming research
11 projects will address the use of
12 science, improvement of data quality,
13 and the effectiveness of performance
14 standards by agencies.

15 Tomorrow's video hearing
16 recommendation shows how agency
17 adjudicative processes can be
18 innovative and can innovate through
19 technology to become more efficient at
20 no cost to fairness or public
21 acceptance.

22 Finally, a still evolving new
23 project may best reflect how our
24 discussions in December have inspired
25 us to action. The model agency

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 project, called model A for short,
3 after my favorite car when I was
4 growing up -- some of you can remember
5 that car; I used to work on it in my
6 backyard -- was inspired by
7 suggestions from George Madison. I
8 don't know if George is here yet, but
9 George, of course, is our member from
10 the Treasury Department.

11 The idea behind the project is
12 to identify what the government agency
13 of the 21st Century should look like
14 and how it should behave across a
15 range of areas from its administrative
16 processes to its innovation policies
17 to its ethics systems.

18 We had the benefit of a small
19 planning group consisting of George,
20 Ivan Fong at DHS, David Horowitz at
21 HHS, Preeta Bansal at OMB and Len
22 Kennedy of the new Consumer Financial
23 Protection Bureau, and Shawne
24 McGibbon, our energetic General Counsel, who
25 helped bring these inchoate ideas to

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 life.

3 We are taking three initial
4 steps. First, we are developing a
5 website that will bring together past
6 ACUS research on best practices with
7 examples of innovative ideas adopted
8 by agencies throughout government.
9 Shawne and Kathy will provide a short
10 introduction at the end of the session
11 today.

12 Second, we are interviewing
13 recently established or reorganized
14 agencies to learn what were the
15 greatest challenges they faced so that
16 we can identify and find solutions to
17 some common problems.

18 And, third, we will be surveying
19 agencies to learn what programs or
20 practices they are most proud of that
21 can serve as a model for other
22 agencies, and what are the successful
23 programs in other agencies that they
24 envy and wish they could replicate.
25 We intend to honor these best programs

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 at our December plenary and do so on
3 an annual basis.

4 As for our final goal of
5 education, we have undertaken a number
6 of initiatives. After the president's
7 executive order calling on agencies to
8 draft policies on how to conduct
9 retrospective reviews of regulations,
10 we convened a workshop to share
11 strategies on how to accomplish that,
12 attended by over 50 government
13 officials, including many of you.

14 We've also partnered with the
15 U.S. Chamber of Commerce to do a
16 workshop on global -- global
17 regulatory cooperation where
18 administrative and government
19 officials discuss our regulatory
20 agencies, how they collaborate and
21 work with their international
22 counterparts, as well as U.S. trade
23 promotion agencies, to harmonize
24 regulations and facilitate trade.

25 And I've reconvened the Council

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 of Independent Regulatory Agencies,
3 known as CIRA, started by my
4 predecessor, Loren Smith, which
5 provides a forum for those sixteen
6 agencies to engage views and exchange
7 ideas on common issues.

8 Our bimonthly meetings have been
9 very productive and tackled topics
10 like how agencies handle the Sunshine
11 Act requirements, make information and
12 decisions available on their websites,
13 and, back in March, what steps they
14 would take during a government
15 shutdown, itself a fascinating
16 proposition.

17 On that note, there is no need
18 to remind you that this year has been
19 one of budget uncertainty at many
20 agencies, and we were no exception.
21 At the beginning of the year, with
22 Mike McCarthy's help, we deferred some
23 projects because we were operating
24 with temporary funding. But I am
25 happy to report that, ultimately,

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 we've received sufficient funding to
3 undertake a full plate of projects
4 which are listed in your packets and
5 will be discussed by Jon Siegel and
6 Scott Rafferty at the end of the day
7 tomorrow.

8 President Obama has told us the
9 mission of ACUS is to make government
10 work better, but since there is no
11 shortage of organizations both inside
12 and outside of government with that
13 same goal, what is it that we add?
14 What is our comparative advantage?
15 What's our edge?

16 I see two key elements. First
17 is that the Conference is part of the
18 government, but unlike entities such
19 as GAO, OMB, or inspectors general, we
20 do not have an auditing and compliance
21 role. Our mission is to work
22 cooperatively with agencies to
23 identify solutions to problems and
24 broadly implement them.

25 I suspect that this allows

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 government officials to be more
3 relaxed in their dealings with us than
4 they may be with oversight agencies.

5 Our legacy of over 200
6 recommendations is still referred to
7 and used by agencies. You would be
8 proud, as I am, to hear how sincere
9 agency officials throughout government
10 have been to welcome us back.

11 The second key is the high
12 quality of our membership and the
13 thought and time that you, all of you,
14 put into both doing and spreading our
15 work. There is no other institution
16 of government where over 50 senior
17 federal officials come together with
18 40 outstanding public citizens and
19 others in the general area of
20 expertise in government to solve
21 problems on a bipartisan basis.

22 When I go on the Hill, I
23 emphasize how the annual value of
24 member services to the Conference,
25 both public and government, at any

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 reasonable hourly rate, approaches the
3 value of our entire budget. That's a
4 powerful selling point in these
5 fiscally challenged times, as you
6 might appreciate.

7 There is a lot of heated
8 rhetoric in government and politics,
9 of course, but there's -- that's in
10 stark contrast to what happens in the
11 meetings of our committees. What I
12 see is merely the best of public
13 service, talented people from public
14 and private sectors freely exchanging
15 views, working together to reach
16 consensus and solve complex problems.

17 This process at the committee
18 level vetted the recommendations you
19 will consider at this plenary session.
20 And our discussions today and tomorrow
21 can only make those recommendations
22 better.

23 In 1960, James Landis, legendary
24 former dean of the Harvard Law School
25 and early SEC commissioner, was asked

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 by President Kennedy to prepare a
3 report on the state of the regulatory
4 agencies. In December of that year,
5 but even before the President was
6 inaugurated, Landis reported as
7 follows, and I quote, "The concept of
8 an Administrative Conference of the
9 United States promises more to the
10 improvement of administrative
11 procedures and practices and to the
12 systemization of the federal
13 regulatory agencies than anything
14 presently on the horizon."

15 Well, ACUS is no longer a
16 concept, nor is it on the horizon. We
17 are in the foreground. I am looking
18 at us. Best wishes for a productive
19 two days.

20 Let me just turn to a few
21 business items before we start the
22 recommendations. Ground rules for
23 debating and voting. The privilege of
24 debate extends to all members of the
25 Conference, including me, the Counsel,

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 Government Members, the Public
3 Members, Senior Fellows, the Liaison
4 Representatives, and the Special
5 Counsels. I ask that you exercise
6 that privilege not sparingly,
7 necessarily, but succinctly, so we can
8 keep within designated time limits.

9 The voting members of the
10 Conference, the voting members,
11 include me, the Counsel, the
12 Government Members, and the Public
13 Members. Only those members may vote.
14 Senior Fellows, Liaison
15 Representatives and Special Counsels
16 have the privilege of debate, but may
17 not vote.

18 In addition, in the course of
19 debate, only voting members may make
20 or second a motion. So if a nonvoting
21 member has an idea for an amendment to
22 a pending item, that person may
23 suggest the amendment be made, but a
24 voting member would then have to make
25 the motion for the amendment.

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 And there is one other category
3 present, and that's alternates. By
4 the term "alternate," I mean anyone
5 who is attending today on behalf of a
6 member of the Conference who was
7 unable to attend personally.

8 Alternates are, in many cases,
9 standing in for government officials
10 and are most welcome, but the bylaws
11 of the conference state that
12 alternates may not vote and do not
13 have the privilege of debate.

14 So anyone present today as an
15 alternate can engage in debate only
16 with the unanimous consent of the
17 Assembly, which I will gladly seek, if
18 so requested, by an alternate.

19 Similarly, members of the
20 general public are welcome to attend
21 and to observe the proceedings, but
22 may not vote or exchange -- engage in
23 debate without unanimous consent if
24 there is time, and others, including
25 alternates, have spoken.

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 With that understanding, there
3 is some initial procedural business to
4 vote on before we begin consideration
5 of the recommendations. The first
6 item is approval of the minutes from
7 the last plenary session. These are
8 included in your packets and have been
9 available on our website. And I trust
10 you've had the chance to look at them.

11 And so, therefore, is there a
12 motion to approve the minutes of the
13 53rd plenary session?

14 PARTICIPANT: So moved.

15 CHAIRMAN VERKUIL: Moved. And
16 seconded?

17 PARTICIPANT: Second.

18 CHAIRMAN VERKUIL: Second.

19 Any discussion? All in favor
20 say aye.

21 (Chorus of ayes.)

22 CHAIRMAN VERKUIL: Opposed, nay.

23 (No response.)

24 CHAIRMAN VERKUIL: Ayes have it.

25 Very good.

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 The next item is adopting the
3 resolution on the order of business
4 for the 54th Plenary Session. This
5 resolution is similar to what was
6 adopted in December's Plenary Session.
7 It provides 60 minutes of debate on
8 each recommendation, which can be
9 extended by another 30 minutes with a
10 vote of a majority of the membership.
11 It provides that amendments offered in
12 advance will receive priority.

13 And in your packets there is a
14 version of each recommendation that
15 has been annotated with the amendments
16 that we received. In addition, these
17 amendments will be put up on the
18 screen to my left.

19 Is there a motion to approve the
20 resolution of the order of business?

21 PARTICIPANT: So moved.

22 CHAIRMAN VERKUIL: Second?

23 PARTICIPANT: Second.

24 CHAIRMAN VERKUIL: All in
25 favor -- any discussion. All in

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 favor?

3 (Chorus of ayes.)

4 CHAIRMAN VERKUIL: Opposed?

5 (No response.)

6 CHAIRMAN VERKUIL: Thank you.

7 Passed.

8 A final reminder. ACUS, as Mike
9 has said, uses the FACA committee
10 process to develop consensus advice
11 and recommendations through its group
12 deliberations. The full Assembly of
13 the Conference has historically been a
14 FACA committee. This is you.

15 The committee's charter was
16 published in the Federal Register
17 pursuant to FACA requirements. The
18 charter includes a listing of our six
19 standing committees which are
20 essentially our subcommittees of the
21 full committee.

22 We recognize that GSA's
23 regulations on committee management
24 state that subcommittees are not
25 generally subject to FACA

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 requirements; however, in an effort to
3 promote transparency, we voluntarily
4 follow FACA procedures when conducting
5 subcommittee meetings. FACA has two
6 relevant requirements, a requirement
7 for meetings of a FACA committee to be
8 open to the public with appropriate
9 notice of such meetings in the Federal
10 Register, which we did on May 24th,
11 and a requirement permitting public
12 access to committee records, reports,
13 minutes, et cetera, subject to certain
14 exemptions under FOIA and the Privacy
15 Act which we have provided for.

16 With that done, I can say now
17 the next item on our agenda is our
18 first recommendation, legal
19 considerations of e-rulemaking. Jon
20 Siegel, Research and Policy Director,
21 will give a brief introduction and
22 will also introduce the committee
23 chair and consultant. Jon.

24 MR. SIEGEL: Thank you,
25 Mr. Chair.

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 CHAIRMAN VERKUIL: You can sit
3 there if you want.

4 MR. SIEGEL: I think I will take
5 the podium. People come forward now.

6 Thank you, Paul.

7 Let me first say what a pleasure
8 it is to see everyone. Since we last
9 gathered in December, I've had the
10 opportunity to meet many more of you
11 now that we have all six of your
12 committees operating, and I have been
13 greatly impressed by the energy and
14 diligence that members are bringing to
15 their committee work.

16 When I took this job, people
17 told me that the best part was that
18 the conference is the highest
19 concentration of administrative law
20 workdom in the world. And I have now
21 learned that this is true. Certainly
22 in my fifteen years of teaching
23 administrative law, I have never seen
24 such vigorous debates of issues such
25 as use of reply comment periods and

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 the docketing of physical objects. So
3 it's been a real pleasure working with
4 all of you.

5 As you know, we have four
6 recommendations to consider. I will
7 very briefly introduce each one, but
8 before this first one, let me just say
9 a few words about the Conference's
10 recommendation process. You're all
11 more familiar with this than you were
12 in December, but I just want to remind
13 you -- and this is also for the
14 benefit of the press and the public --
15 that each of the recommendations that
16 will come before you at this plenary
17 have already been the subject of
18 extensive consideration.

19 Each recommendation is based on
20 a research report submitted by a
21 Conference researcher. Two of the
22 researchers were outside consultants;
23 two of the reports were done in-house.
24 The research report goes to one of our
25 committees. This is a committee made

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 up of Conference members, chaired by a
3 Conference member.

4 The committee prepares a
5 recommendation on the subject of the
6 report. Each of the committees met at
7 least twice. One of them met four
8 times. Some of them appointed
9 subcommittees to do work between
10 meetings. And all of them engaged in
11 a vigorous debate leading up to the
12 recommendations that you have before
13 you.

14 The recommendations produced by
15 the committees are then received by
16 the ACUS Council who are seated here
17 in the front row. Under our statute,
18 the Council transmits the
19 recommendations to the full Assembly,
20 which is you, along with the Council's
21 views.

22 And I can announce that, in the
23 case of all four recommendations that
24 you have before you this week, the
25 Council transmitted each

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 recommendation "with the approval of
3 the Council." So these are all
4 Council-approved recommendations.

5 So as you can see, there has
6 been a lot of consideration already.

7 The final step is for the
8 recommendations to be debated and
9 voted on in this plenary session. We
10 have instituted a couple of
11 innovations based on our experience
12 last time, which we hope will enhance
13 the discussion. First of all, as you
14 requested last December, we sent you
15 the proposed recommendations well in
16 advance of the plenary, so you had
17 time to consider them. We called
18 several times for proposed amendments
19 to be submitted in writing.

20 Yesterday, we posted all the proposed
21 amendments that we have received and
22 we sent you a notice that they were
23 posted.

24 After reviewing all the
25 amendments that were submitted, we

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 designated some of them as manager's
3 amendments. These are stylistic or
4 other minor details that we expect
5 will be uncontroversially accepted.
6 And we checked with the committee
7 chairs, and I can say the committee
8 chairs have agreed to the manager's
9 amendments.

10 So when we get to the stage of
11 amendments for each recommendation,
12 Paul is going to begin by calling for
13 a motion to adopt the manager's
14 amendments.

15 Other amendments will be shown
16 on the high-tech screen on my left,
17 your right. You also have in your
18 packets a printed copy of the proposed
19 amendments, and you'll see each one
20 has a comment showing whether it is
21 part of the manager's amendment, or,
22 if not, which member proposed it.
23 Except that Microsoft Word doesn't
24 allow comments on the footnotes, so
25 there are no comments on the

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 footnotes.

3 But, fortunately, as it turned
4 out, all the proposed changes to the
5 footnotes are part of the manager's
6 amendments. So the motion to adopt
7 the manager's amendments should be
8 understood to include adopting all the
9 changes to the footnotes.

10 All right. So here is the plan.
11 I am going to briefly introduce each
12 project. I am going to try to be very
13 brief because I want to preserve time
14 for the debate. Then I will call on
15 the researcher who will say a few
16 words about the course of his or her
17 research. The committee chair will
18 then describe the substance of the
19 proposed recommendation. Then Paul
20 will come back and open the floor to
21 general -- general discussion of the
22 proposed recommendation.

23 And after some time for general
24 discussion, Paul will move the
25 discussion to amendments, beginning

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 with the manager's amendment.

3 Then we will consider the other
4 amendments that were submitted in
5 advance. Then the floor will be open
6 for whatever other amendments people
7 have, or any other discussion. And
8 then, finally, we hope, there will be
9 a vote to adopt the recommendation.
10 Okay. So that's the general process.

11 Now let's get to the first
12 recommendation up which is legal
13 considerations in e-rulemaking. Let
14 me just say a word about the
15 provenance of this project. We when
16 we reopened our doors last year, the
17 first thing I did was to compile all
18 the suggestions that various people
19 and groups had made for what the
20 Conference should be doing, and
21 e-rulemaking was on everyone's list.
22 It's obviously one of the biggest
23 trends and the most important trends
24 in rulemaking since the Conference
25 went on hiatus in 1995.

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 But what exactly would we do in
3 e-rulemaking? Because there's a lot
4 being done already. The APA issued a
5 big report about it. OMB is very
6 involved. Obviously, the program
7 management office at EPA is very
8 involved.

9 But what no one seemed to be
10 doing was taking a broad look at legal
11 issues that arise in e-rulemaking,
12 issues such as whether an agency that
13 receives tens of thousands of
14 identical comments by e-mail, do they
15 really have to pay a human being to
16 read each such comment? If an agency
17 maintains electronic copies of
18 comments, is it also obliged to
19 maintain paper copies? So we thought
20 the Conference could really add value
21 by investigating these issues.

22 So we put a researcher on a
23 project who is with us today, Bridget
24 Dooling. Bridget came to us as a
25 detailee from OMB, and let me just say

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 we were extremely grateful to have
3 her, and we thank her for all her
4 work. And now she's going to say a
5 few words about the course of her
6 research.

7 MS. DOOLING: Thank you, Jon.
8 It is a tremendous honor to be here
9 with you today in this very beautiful
10 space. I completed this report, as
11 Jon said, while I was on detail to the
12 Administrative Conference a few months
13 ago.

14 I must thank Chairman Verkuil
15 for the opportunity to come to ACUS
16 for four months. It was a great honor
17 for me to serve as a special assistant
18 at ACUS, especially at a time when the
19 Conference was just reestablishing
20 itself.

21 And I'm also grateful to my home
22 agency for letting me spend four
23 months working side by side with the
24 Chairman's very excellent, very
25 service-oriented, and very bright

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 staff, especially Emily Schleicher
3 Bremer, the attorney advisor, who
4 shepherded me through the ACUS process
5 and who is recently back from
6 honeymoon -- but this is like a
7 honeymoon, right?

8 I can say from firsthand
9 knowledge that the Chairman has
10 surrounded himself with incredibly
11 bright service-oriented people, and
12 that it gives me great faith in the
13 Conference's continued success.

14 I should pause to say that the
15 views expressed in my report are my
16 own and not those of my employer.

17 So this is a report about the
18 legal issues that present themselves
19 entirely or perhaps more prominently
20 when agencies engage in electronic
21 rulemaking, or e-rulemaking, as we
22 call it.

23 Now, that "e" is critical here.
24 There are many, many books about the
25 legal issues associated with

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 rulemaking in general. We can spend
3 lots of time -- I am sure we will
4 spend lots of time, I am sure you
5 already have spent lots of time --
6 talking about the good cause standard
7 or Chevron deference or other aspects
8 of rulemaking, but by adding the "e,"
9 just one letter, the subject shifts to
10 a fascinating little set of legal
11 puzzles that pop up or come into
12 sharper relief when agencies conduct
13 their informal rulemaking using web
14 technology.

15 So that's my fairly loose
16 definition of e-rulemaking, the use of
17 web technology in informal rulemaking,
18 basically using the web to improve the
19 rulemaking process, whether it's
20 electronic docketing or the use of
21 Twitter to encourage public
22 participation. And there's lots of
23 experiments underway with different
24 types of e-rulemaking.

25 An example of a legal issue that

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 presents itself more sharply with
3 e-rulemaking is related to how
4 agencies handle posting public
5 comments online. So does an agency
6 have a duty to screen these comments
7 before posting them? And what would
8 they be screening for? Sensitive
9 information? Personal information?
10 Profane information? Confidential
11 information? Copyrighted information?

12 And we have no reason to think
13 that comments are now more sensitive
14 or perhaps more profane than they have
15 ever been, but in the past, agencies
16 might have placed these comments in
17 reading rooms, which, although
18 publicly accessible, required a trip
19 to the agency's headquarters to take a
20 peak.

21 So when you put these comments
22 online, concerns about whether
23 agencies should serve as content
24 moderators really come to the fore.
25 If they're that much more accessible

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 and if there is a legal duty to screen
3 them, doesn't that up the ante once
4 comments are online?

5 So in the report I gather about
6 a half dozen of similar types of
7 puzzles. I drew upon existing
8 scholarly articles in this area, many
9 of which were written by people in
10 this room.

11 And I was delighted to find an
12 ACUS report from 1995 on the use of IT
13 in rulemaking and adjudication. That
14 was one of the last ACUS reports
15 before ACUS closed its doors in 1995,
16 and the vast majority of its findings
17 are still very relevant today. So in
18 my report, I have a link to that 1995
19 report, and I recommend it to you very
20 much, notably because, while my report
21 deals with rulemaking, that one also
22 touches on adjudication.

23 I also canvassed federal
24 regulatory attorneys, reaching out to
25 them for one-on-one discussions in the

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 very early stages of this project, and
3 I'm very grateful for the time these
4 folks spent with me, sharing their
5 experience and agency practices.

6 I created and fielded an
7 exploratory survey designed to help me
8 shape discussion topics for an
9 informal workshop around these issues.
10 About a dozen of my federal colleagues
11 came to the table, including Neil,
12 actually, with lively and incredibly
13 thoughtful insights and tough
14 questions.

15 And this workshop is an example
16 of the kind of resource that ACUS
17 provides, unrelated necessarily to the
18 recommendations that the Conference
19 might put out. It can really serve as
20 a common ground, a place to come
21 together and share best practices.

22 So I encourage you to think of
23 that as different problems present
24 themselves to you over time. ACUS, in
25 my experience, can be a tremendous

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 resource for bringing people together.

3 I think fondly upon our
4 discussions from that workshop,
5 perhaps most memorably, because I
6 think this stuck in Jon's head too, a
7 discussion of how to handle electronic
8 docketing of certain physical items
9 that are submitted as a part of public
10 comment. Coconuts, I think, were --
11 presented one agency with a unique
12 electronic docketing question.

13 So with this issue -- and you
14 probably have other examples,
15 actually, that are just as good.

16 With this issue, and others, the
17 report finds that agency staff really
18 work very hard to come up with
19 creative ways to address legal issues
20 that arise along the way in
21 e-rulemaking, even as those underlying
22 technologies that we use to conduct
23 e-rulemaking change.

24 So the report gets into, you
25 know, maybe a half a dozen various

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 issues, so I won't take the time to go
3 through them in detail here.

4 I should also note that the
5 report will be published in final form
6 in the Administrative Law Review at
7 the end of this year, so I welcome
8 any comments you have as I'm
9 frantically working on my final set of
10 notes. So I welcome your feedback as
11 I put the finishing touches on my
12 article, and I look forward to the
13 reaction of the ACUS membership today.
14 Thank you.

15 (Applause.)

16 MR. SIEGEL: Let me just
17 mention, this is where we would
18 normally hear from our committee
19 chair. The committee chair, Bob
20 Rivkin, General Counsel of the
21 Department of Transportation, couldn't
22 be with us today, but fortunately, a
23 member of his staff who is also on the
24 committee and a member of ACUS, Neil
25 Eisner, will be filling in for him.

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 MR. EISNER: Thank you, Jon.

3 As Jon said, this is an issue
4 that goes back many years. This is a
5 project that we were involved in in
6 the mid-'90s when we were creating our
7 first electronic docket before the
8 government library was created, and
9 that was the study that Bridget was
10 referring to that was being done.

11 We asked ACUS, who probably
12 funded it, to have someone follow the
13 process of creating this system. And
14 one of the interesting things that
15 came out of it was the kinds of
16 problems people within our agency saw
17 when they first were confronted with
18 electronic technology.

19 One person raised his hand as we
20 were demonstrating our new system, and
21 he said, "well, how do I know, when a
22 comment comes in electronically, that
23 it really is, for example, from the
24 president of General Motors?" I said,
25 "How did you know when it was a hard

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 copy that it was from the president of
3 General Motors?"

4 And that is still a problem
5 today. People are a little afraid of
6 the technology. One of the primary
7 purposes that we point out in doing
8 this recommendations is to address
9 some of those concerns and to dispel
10 some of the legal uncertainty.

11 This system -- it can be very
12 efficient, it can be very effective,
13 it can help us develop a better
14 product, but we have to help people
15 understand when they can use it, how
16 they should use it and what the best
17 practices are.

18 We have nine, I believe it is,
19 recommendations. The -- some of them
20 are relatively simple, some are
21 complex and controversial, or we've
22 got a number of amendments. So I will
23 try to be brief and go through what
24 those recommendations are.

25 First of all, the issue that's

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 been alluded to: What do you do when
3 you get thousands of comments that all
4 say the same thing? Well, the first
5 question is, how do you know they all
6 say the same thing? And if they do,
7 do you still have to read them?

8 Well, there is -- and this is a
9 key word -- reliable technology out
10 there to help us address this. It can
11 save time. You are not required by
12 the APA, we believe, to read every
13 comment after reliable technology
14 tells us it's exactly the same. And
15 we can share best experiences and
16 practices on how to do this. But we
17 think people should simply consider
18 using that reliable technology that is
19 now available to review comments and
20 identify those that are -- that are
21 the same.

22 In fact, some of the technology
23 can say these are all exactly the same
24 over here in this group, and over
25 here, these are all based on this set

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 of -- on this set of comments. We've
3 highlighted in yellow the slight
4 variations that they've made to the
5 comment that they're submitting.

6 The second recommendation is we
7 should explore methods to allow the
8 public to let us know when they see
9 something that they think is
10 inappropriate or protected. It's
11 actually a valuable tool for the
12 government to ask the public to let us
13 know when there is something on the
14 docket that shouldn't be there. We
15 can review it and we can take it down.

16 If we're going to post comments
17 in a timely manner, it would be
18 difficult for us to have to read every
19 single one of them before we post a
20 comment.

21 The third recommendation has to
22 do with confidential or trade secret
23 information. We are suggesting that
24 we should explore methods for the
25 commenter to indicate to us when he or

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 she has confidential information. I
3 note we're using the word
4 "confidential," and there is a
5 recommendation that we expand -- or
6 actually narrow it to confidential
7 business information.

8 Right now what we're worried
9 about, if somebody wants special
10 treatment, they should have a process
11 for being able to get that before it's
12 posted online. Many agencies already
13 have this, and they have good
14 practices out there that we looked at.

15 The fourth one is to confirm
16 procedures -- to confirm that the
17 agencies have procedures for handling
18 confidential or trade secret
19 information. For example, in some
20 agencies, you would not send it to the
21 docket. You would send it to the
22 Chief Counsel's Office, ask them to
23 review it under their appropriate
24 standards and determine whether it
25 should get confidential treatment.

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 The fifth recommendation is to
3 determine whether the docket system
4 used by the executive branch, not
5 necessarily used by all the
6 independent agencies but used by all
7 of the executive branches, the Federal
8 Docket Management System, or
9 regulations.gov, where it has
10 sufficient Privacy Act compliance.

11 The sixth one is that we should
12 maintain records -- and this is
13 important and this has got some
14 controversy attached to it -- whether
15 we should maintain electronic records
16 only and eliminate all the paper to
17 the greatest extent permitted or
18 simply as appropriate, as one
19 recommendation would have it.

20 We recommended, to the greatest
21 extent practicable, or I guess
22 permitted under the records schedule,
23 because we believe there is no reason
24 to retain paper unless you have some
25 special unique circumstance, and there

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 are great savings available to the
3 federal government if we do eliminate
4 the need for paper.

5 The seventh point is, what do
6 you do with a three-dimensional
7 object? We think -- a
8 three-dimensional or a physical
9 object. We think that, again, a
10 standard good operating practice would
11 be to either put a descriptive entry
12 in the electronic docket or a photo of
13 the item in the electronic docket and
14 indicate that it is available in the
15 docket office for someone wants to
16 come in and see it.

17 The eighth one has to do with
18 submissions to courts. We think that
19 agencies should take advantage of the
20 opportunity to submit electronic
21 copies of their file to -- their
22 docket to the court. That is
23 sufficient. Many agencies are already
24 doing this. And we think that the
25 courts should also encourage this by

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 minimizing requirements for paper.

3 Again, a tremendous savings for
4 government agencies who won't have to
5 print out what might be tens or
6 hundreds of thousands of pages, put a
7 ribbon around it, and mail it off to
8 the court.

9 Then the last recommendation is
10 we should share our records and
11 include records generated during the
12 e-rulemaking -- excuse me, our records
13 schedule if we want to make sure
14 everybody is up-to-date and has a
15 proper set of records that include
16 what they will do if they need to send
17 their records off to the records
18 center.

19 This is one that always
20 interested me when we created our DOT
21 docket management system and we were
22 told -- and this is was in the
23 mid-'90s; things have improved since
24 then -- that we could keep our records
25 in that system about for 300 or 400

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 years before we have to send them off
3 to a records center.

4 If somebody someplace has a
5 problem -- and we're saying, if you do
6 and you've got to send them to the
7 records center -- make sure you've got
8 a schedule to do that.

9 I hand it back to Paul now to
10 come up and start taking
11 recommendations for changes.

12 CHAIRMAN VERKUIL: Thank you,
13 Neil and Jon and Bridget.

14 Okay. So now we will -- let's
15 have some general comments about the
16 area we're working in, and then we
17 will turn to the amendments that
18 are -- both manager's and individual
19 amendments. And then we can follow on
20 with some other comments with respect
21 to any other amendments that you might
22 have. So the floor is open.

23 Yes.

24 MR. DON ELLIOTT: Don Elliott,
25 Senior Fellow.

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 CHAIRMAN VERKUIL: Mike.

3 MR. DON ELLIOTT: Don Elliott,
4 Senior Fellow, holding mike.

5 I just really had a question
6 about the provision for members of the
7 public to flag inappropriate comments
8 and wondered what was contemplated by
9 this very general standard of
10 inappropriate and whether the
11 committee had considered the
12 possibility that there might be a good
13 deal of satellite litigation, so to
14 speak, in which commenters question
15 the appropriateness of other -- of
16 other comments on the grounds that
17 they're untrue or unsupported or
18 whatever, and the agency will have to
19 rule on them.

20 And then a related question: I
21 was wondering what the legal
22 consequences would be of possible
23 removal? Would a comment still have
24 exhausted administrative remedies or
25 raised an issue if it had been removed

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 by the agency as inappropriate?

3 CHAIRMAN VERKUIL: Good.

4 MR. EISNER: That's actually a
5 very good question, and it is probably
6 written that way because there is
7 disagreement among government agencies
8 as to how to handle what some think
9 are inappropriate and others think
10 they don't have the authority to
11 remove from the docket.

12 We probably could all agree on
13 some things that we would not put in
14 the docket. But some -- as I said,
15 some agencies will remove what they
16 think are obscene words. I don't know
17 how they determine what the obscene
18 words are, but they do do this now.

19 Other agencies, such as mine, do
20 not believe we should be censoring the
21 docket, although we would acknowledge
22 that printing something we wouldn't
23 put in the docket for probably
24 significant privacy reasons,
25 photographic evidence in an

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 adjudicatory proceeding.

3 So, yes, we recognize that.

4 What we're trying to do here is not
5 answer the question of whether we
6 should all censor our dockets or not
7 censor the dockets, but, rather, say,
8 give the public an opportunity to come
9 in and let us know that they think
10 it's inappropriate.

11 We didn't think there was any
12 legal obligation to do something about
13 it, but it would give us a chance to
14 look at it and say, yes, maybe we
15 should take that out of the docket.

16 MS. DOOLING: And one follow-up
17 to that might be that -- I think there
18 is a distinction between what is
19 displayed on a website, like
20 regulations.gov which is where most of
21 the public comments are placed these
22 days, and then -- so that's one area
23 where a comment would appear and where
24 the public could potentially flag to
25 say something was inappropriate. And

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 on -- on the back end, though, is the
3 docket itself. And I don't I think --
4 at least I had contemplated the notion
5 that the comments would be removed
6 entirely from the docket. It would
7 still be part of the legal record;
8 it's just a question of whether they
9 would be on the website, like
10 regulations.gov.

11 That's how I understood it, if
12 that helps.

13 CHAIRMAN VERKUIL: Any further
14 thoughts? Jody.

15 MS. FREEMAN: Just a follow-up
16 on that --

17 CHAIRMAN VERKUIL: Stand up,
18 please, if you don't mind.

19 MS. FREEMAN: And the mike also.
20 Jody Freeman. Just a quick follow-up
21 as we circle the same thing. Do you
22 consider possibly making a
23 recommendation to eliminate that
24 heterogeneity across the agencies and
25 maybe, you know, ask agencies --

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 suggest that they develop guidance on
3 criteria for what might be
4 considered -- you know, because if
5 some agencies are censoring and some
6 agencies aren't, you've got a strange
7 heterogeneity that you might want to
8 suggest is in need of some guidance.

9 CHAIRMAN VERKUIL: Peter.

10 MR. STRAUSS: I wonder if this
11 issue -- I'm sorry. Peter Strauss,
12 Senior Fellow.

13 I wonder if this issue mightn't
14 be resolved just by inserting the
15 words "from the electronic docket." I
16 take it this is a recommendation about
17 the electronic docket. And to the
18 extent there are obscene things in the
19 paper docket, that's a matter of less
20 concern.

21 CHAIRMAN VERKUIL: Do you want
22 to think about that?

23 Let's see. Randy?

24 MR. MAY: Randy May. I was a
25 member of this committee, and it's

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 true that we have quite a bit of
3 debate back and forth about what might
4 be inappropriate and so forth, but
5 following up on Jody's point, and I
6 guess Don's, if you look at the
7 language, I think it's important to
8 recognize that the recommendation
9 basically says -- suggests working
10 with the e-rulemaking PMO and its
11 interagency counterparts to explore
12 providing a method.

13 So I think it's sort of inherent
14 explicitly -- and that is that there
15 needs to be really a process with the
16 PMO to really develop, probably after
17 some study, this method which would
18 then be subject to further
19 development.

20 So I think that's why that
21 language ended up being in there
22 rather than a more direct -- more
23 direct recommendation.

24 CHAIRMAN VERKUIL: Yes. Who is
25 that? Judge Plager, I believe.

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 JUDGE PLAGER: You're correct.

3 Jay Plager, Federal Circuit. I'm a
4 senior fellow, used to be a member of
5 the organization when it was in its
6 infancy.

7 I think one of the things that
8 may be stressing us a little bit about
9 this recommendation is that it seems
10 to suggest there is only one possible
11 remedy for inappropriate comments, and
12 that is removal either from the
13 electronic record or something else.
14 There may be other things that an
15 agency would consider for action in
16 terms of dealing with inappropriate or
17 protected content.

18 So it seems to me removing the
19 last clause "to call the agency's
20 attention to it for possible
21 removal" -- it might be better if it
22 said "to call the agency's attention
23 to it for appropriate action."

24 That opens up the possibility
25 for exploring other mechanisms for

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 dealing with this problem. And since
3 I can't make a motion, I won't, but I
4 would suggest it's something to
5 consider.

6 CHAIRMAN VERKUIL: So what we
7 will do, because Peter had an idea,
8 Jay had an idea, but these aren't --
9 we're going to go through the
10 amendments that we already had
11 received. Then we'll come back to
12 those as amendments. Okay? Maybe you
13 can think about it up front and decide
14 how to proceed.

15 Let me just -- for further
16 general comments.

17 Yes, John.

18 MR. ROSE: Jonathan Rose, Senior
19 Fellow. I don't know -- this is a
20 comment on a different matter, Paul.
21 I don't know if -- a different
22 subject. Do you want me to make it
23 now or --

24 CHAIRMAN VERKUIL: Yeah. Yeah.
25 These are general comments. I'd

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 prefer that anything, you know, about
3 what we're doing...

4 MR. ROSE: My comment goes to
5 whether any consideration was given to
6 time periods and how to measure them.
7 This is a problem that's arisen in
8 eCommerce. If comments have to be in
9 within so many days, when do you start
10 counting and when do you stop
11 counting? Same questions with
12 replies.

13 I don't know whether that issue
14 can be dealt with in individual rules
15 or whether there are other general
16 rules that govern that type of thing.
17 But you might give some consideration
18 to that.

19 And also somewhat related, this
20 issue that Neil raised about, how do
21 you know it was the president of
22 whatever it was, General Motors, who
23 sent it in? eCommerce has also
24 developed methods for authenticating
25 electronic documents on both the

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 timing and authentication issues. You
3 might want to take a look at Amended
4 Article I of the Uniform Commercial
5 Code which attempts to deal with all
6 these things, but perhaps the timing
7 issue is dealt with elsewhere.

8 CHAIRMAN VERKUIL: Do you want
9 to respond, Neil?

10 MR. EISNER: Well, I think that
11 is an issue that probably is more
12 appropriate for the next
13 recommendation on the schedule today,
14 the timing and reply time periods.

15 CHAIRMAN VERKUIL: Okay. Very
16 good. So let's -- let's see. One
17 more. Ron?

18 MR. LEVIN: Ron Levin. If
19 you'll indulge me just a moment. This
20 topic is one that I got interested in
21 after talking with Neil Eisner a few
22 years ago, and the consensus is that
23 there was some dialogue at the federal
24 and state level. At my suggestion,
25 the model state APA basically

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 adopted -- contains language that
3 speaks to this exact point: "If an
4 agency determines that any part of the
5 rulemaking record cannot be displayed
6 practicably or is inappropriate for
7 public display on the internet
8 website, the agency shall describe the
9 part and note that the part is not
10 displayed."

11 So at the state level they gave
12 an answer to Judge Plager's comment.

13 Now, at least to an actual
14 question I want to pose, which is
15 this: The resolution, as written --
16 recommendation, as written, provides
17 that material might be removed at the
18 suggestion of a member of the public
19 who flags it, it might be removed at
20 the insistence of the submitter, but
21 it doesn't expressly say that the
22 agency might proactively find
23 something there that it thinks
24 oughtn't to be there.

25 And it seems to me, following up

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 on Jody's comment, that we may want to
3 include something that says more
4 explicitly that they should develop
5 criteria by which they can take that
6 action. And then, if someone flags
7 the comment or someone requests
8 removal, they could apply those
9 criteria as well.

10 If that meets with general
11 thoughts, I have language that might
12 affect that, but right now we're not
13 talking about those.

14 CHAIRMAN VERKUIL: Yes. One
15 more.

16 MS. ZIEVE: Allison Zieve,
17 Public Member. I have concern about
18 the undefined terms "inappropriate,"
19 "protected" and "confidential."
20 And -- "inappropriate" to one person
21 certainly might not be to another
22 person. Is it inappropriate to say
23 something nasty about the agency or
24 about the industry in the comment?

25 "Confidential," at least in the

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 FOIA context, has been very broadly
3 used by people who submit information
4 to agencies, and then the agencies
5 respect those designations in ways
6 that really impacts public
7 transparency.

8 So I would -- hopefully, we
9 could either define these terms a
10 little bit or, at a minimum, add some
11 sentence suggesting that they be
12 narrowly construed or something like
13 that. Thanks.

14 CHAIRMAN VERKUIL: Any comments.
15 Jon? Did you --

16 MR. SIEGEL: I mean, it's a good
17 point. I think I would just refer
18 back to what Neil said earlier on a --
19 on a similar point, but I think what
20 the committee was trying to do was to
21 talk about the mechanism by which this
22 would happen rather than the substance
23 of the definitions or the terms you
24 just mentioned.

25 So, I mean, Allison, you are

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 right to point out that the terms
3 "inappropriate," "protected" and
4 "confidential" are used somewhat
5 colloquially in this recommendation;
6 they're not meant to have precise
7 definitions. And I think the reason
8 for that, as Neil said earlier, is
9 that the committee was trying to make
10 a recommendation about the mechanism
11 by which this would be handled more
12 than the substance of what those terms
13 meant.

14 CHAIRMAN VERKUIL: Why don't we
15 do this. Let's -- let's hold this
16 idea of "inappropriate" and we'll come
17 back to it and see if there's some
18 amendments that might work.

19 But let's take in order now
20 that -- we promised to do this and
21 we're committed to take our first ones
22 that have been provided in advance.

23 So I would like to do first the
24 manager's amendments. And if you look
25 on -- obviously, you can see and have

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 had the chance, I entrust, to have
3 looked at the manager's amendments.
4 And so I'm hoping to hear a motion to
5 approve the manager's amendments.

6 PARTICIPANT: So moved.

7 CHAIRMAN VERKUIL: So moved.

8 PARTICIPANT: Second.

9 CHAIRMAN VERKUIL: And seconded.

10 And any discussion on manager's
11 amendments?

12 (No response.)

13 CHAIRMAN VERKUIL: Okay. Fine.

14 And so -- all in favor of approving
15 the manager's amendments on the
16 recommendation.

17 (Chorus of ayes.)

18 CHAIRMAN VERKUIL: Opposed, nay.

19 (No response.)

20 CHAIRMAN VERKUIL: All right.

21 So that covers -- that passes. So we
22 have the manager's amendments.

23 Now we're going to turn to the
24 ones that have been prescribed. And
25 the first -- actually, the first two

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 come from Carol Ann Siciliano. And
3 Carol Ann --

4 MS. SICILIANO: Yes, I'm right
5 here.

6 CHAIRMAN VERKUIL: -- you're up.
7 And -- let's see. That's the -- just
8 so you have it, it's the last -- it's
9 page 4, the last sentence of the
10 preamble and then another...

11 Go ahead.

12 MS. SICILIANO: Thank you. All
13 right. Carol Ann Siciliano.

14 CHAIRMAN VERKUIL: Wait a
15 minute. You've got to appreciate
16 this.

17 MS. SICILIANO: U.S.
18 Environmental Protection Agency
19 member. My proposal at the top of
20 page 4 is to refer to copyrighted
21 works as another issue for this
22 subcommittee to discuss in future
23 deliberations as we're considering
24 other e-rulemaking issues -- higher up
25 on the list. And what this is is just

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 a placeholder to recognize that
3 agencies do face liability when a
4 commenter submits copyrighted work
5 that belongs to somebody else.

6 And so it's just a suggestion,
7 as a placeholder, if the members want
8 to consider that amendment.

9 CHAIRMAN VERKUIL: Do you want
10 to respond, Neil?

11 MR. EISNER: Carol Ann, I don't
12 disagree with you on that. The
13 problem I have is I think there are a
14 lot of issues we would want to put on
15 that list, some of which we've talked
16 about here today, as to whether we
17 should have standards for determining
18 what is inappropriate or what is --
19 what is obscene.

20 And I don't think anybody
21 disagrees that is an issue we have to
22 respond to in the future.

23 MS. SICILIANO: I'm comfortable
24 withdrawing it if that's the -- if
25 that's the preference of the

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 membership.

3 CHAIRMAN VERKUIL: That --
4 unless someone in the membership would
5 resist that, I think withdrawing it
6 would be fine for the committee and
7 for the chair.

8 Let's keep moving, Carol Ann.

9 MS. SICILIANO: The next issue
10 that I had was a suggestion that we
11 modify the term "confidential" as it
12 appears in paragraphs (c) and (d) to
13 refer to "confidential business
14 information" which is a term of art
15 that the Environmental Protection
16 Agency uses with respect to certain
17 information. And for our agency's
18 purposes, that clarification would be
19 helpful.

20 And then, while we're on that
21 subject, I'll address the next one,
22 and this is to call folks' attention
23 to -- I misplaced my proposed edit.
24 You'll see on -- in paragraph (d) an
25 inserted sentence that would say,

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 "agencies should ensure that these
3 mechanisms," et cetera, et cetera.
4 That actually is intended to go in
5 paragraph (c) where we talk about
6 mechanisms to allow a commenter to
7 indicate confidentiality. That
8 sentence. I ask people mentally to
9 move that sentence up to paragraph (c)
10 as you're considering its validity.

11 And so that the purpose of that
12 amendment is to say that, as agencies
13 consider -- explore mechanisms to
14 allow a commenter to indicate
15 confidentiality, that we also make
16 sure that those mechanisms do indeed
17 protect the confidentiality.

18 CHAIRMAN VERKUIL: Okay. So we
19 have two amendments, one involving the
20 use of the term "business information"
21 added in the two places, (c) and (d).
22 And the other has to do with the
23 sentence that's in (d), moving it up
24 to (c).

25 So let's take the first one.

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 Neil, do you want to respond to the
3 committee or...

4 MR. EISNER: Sure. On the
5 "business information" issue, my
6 experience is the same as Carol Ann's.
7 Every time I hear the term, it's with
8 "business information" added at the
9 end.

10 However, my recollection of the
11 committee discussions is that this
12 might be too narrow for the interests
13 of others on the committee; that is,
14 that the use -- that the item that
15 should be protected, the information
16 that should be protected, is broader
17 than just business information.

18 And perhaps some other members
19 who are involved or others in the
20 audience might want to comment on
21 whether they see a need for something
22 broader.

23 CHAIRMAN VERKUIL: Alan.

24 MR. MORRISON: Alan Morrison,
25 Senior Fellow. It wouldn't include

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 personal privacy information, for
3 example if the word is limited to
4 business. So it seems to me that we
5 should make it as general confidential
6 information, period, and that would
7 include trade secrets. I don't have
8 an objection to keeping trade secrets
9 in there. But it seems to me that...

10 The second thing, as long as I'm
11 up, the last sentence needs to be
12 clear -- Carol Ann has added -- should
13 make it clear that these mechanisms
14 are maintained while the -- while the
15 agency is deciding what to do about
16 it. As written, it looks like it's
17 absolutely forever if somebody
18 designates it as confidential, and I
19 don't think anybody intended that to
20 occur.

21 CHAIRMAN VERKUIL: During the
22 rule -- what did you say, during the
23 rulemaking?

24 MR. MORRISON: Well, while they
25 are deciding how it should be handled,

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 or maybe "during the process."

3 MS. SICILIANO: "During the
4 process."

5 MR. MORRISON: "During the
6 process," I think -- we'll just add it
7 at the beginning, during the
8 process -- "during this process,
9 agencies should... "

10 CHAIRMAN VERKUIL: Right. Does
11 that work?

12 MS. SICILIANO: I'm comfortable
13 with that.

14 CHAIRMAN VERKUIL: All right.
15 So the friendly amendment to the
16 amendment. More discussion on the
17 amendment?

18 MS. SICILIANO: Would you move
19 that up to paragraph (c) while we're
20 typing? Because that's where I --

21 MR. MORRISON: Sorry. If it
22 goes in (c), then we don't have a
23 process to hang on to. So I think
24 it's probably better at (d).

25 MS. SICILIANO: Well, except

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 it's referring to the mechanisms that
3 (c) identifies, so, technically, it
4 does not make sense where it is.

5 MR. MORRISON: Mr. Chairman, we
6 used to have a procedure in the old
7 days that matters like this would be
8 relegated to the staff and the
9 Chairman at the end as to whether that
10 sentence belongs one place or the
11 other.

12 CHAIRMAN VERKUIL: All right.
13 Let's --

14 MR. MORRISON: I assume that
15 process is still in place and we can
16 not have that discussion anymore. Is
17 that correct? Is that a fair
18 understanding?

19 CHAIRMAN VERKUIL: That's fine.
20 We can do that. We can move a
21 paragraph up or down, or a sentence up
22 or down.

23 Sallyanne.

24 MS. PAYTON: Sallyanne Payton --
25 Sallyanne Payton, Senior Fellow.

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 You know, there are a couple of
3 ways to think about how to go about
4 this. One is to try to prescribe in
5 advance what we're interested in -- in
6 getting taken down and the other is to
7 authorize and encourage the agencies
8 to learn.

9 Because what's happening --
10 what's going to happen here, as we go
11 through an e-rulemaking, is that this
12 system is going to be gamed. It's
13 going to be gamed by some people who
14 are going to try to figure out how to
15 get the government to publish on its
16 website the kind of scurrilous remarks
17 and illegitimate information that they
18 would like to put up. And it's going
19 to be gamed by people who like to
20 flood the government's website with
21 information, and so on and so forth.

22 We don't know what we're going
23 to confront. And so what we need to
24 do is to authorize the agencies to
25 have a continuous learning process,

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 perhaps a best practices kind of blog
3 or something that they -- something
4 that allows them to talk among
5 themselves as to what they are
6 encountering and how best they think
7 they ought to handle it, and to evolve
8 over time some understandings.

9 Like, it's not -- the government
10 is not simply in the matter -- in the
11 business of, you know, encouraging
12 decorum and preventing abusive remarks
13 about itself to be posted. I think
14 someone pointed that out.

15 We've all received abusive
16 remarks, and they are what they are.
17 Sometimes they're even deserved. But
18 for -- it's a protection for the other
19 people who are posting, it seems to
20 me. And we need to learn about that
21 before we try to prescribe anything.

22 CHAIRMAN VERKUIL: Fair enough.
23 So let's just focus on the two
24 amendments now, because then maybe we
25 could go to a vote. Anything more on

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 the two amendments? Michael?

3 MR. HERZ: Michael Herz. Just
4 echoing what Neil and Alan said, I
5 took this change as to be a huge
6 change because when I -- I read
7 "confidential" to include personal,
8 and that this eliminated protection of
9 personal, leaving all privacy
10 protections simply to item 2 in
11 compliance with the Privacy Act.

12 And the report itself, you know,
13 implies that agencies ought -- or at
14 least should consider protections much
15 broader than just the Privacy Act.
16 And "confidential" alone speaks to
17 both, I think, personal and business
18 privacy, and that seems to me like a
19 good idea.

20 And I think the problem could be
21 solved if we added to the amendment --
22 so a friendly amendment to your
23 amendment would be "containing
24 confidential personal or business
25 information." And that answers your

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 concern but also retains the original
3 meaning of the...

4 CHAIRMAN VERKUIL: Comments on
5 that?

6 MS. DOOLING: I have a follow-up
7 question, actually, for maybe --

8 CHAIRMAN VERKUIL: Well, do we
9 like that?

10 PARTICIPANT: Well, there were
11 other -- there are other --

12 CHAIRMAN VERKUIL: There are
13 other things, right?

14 PARTICIPANT: Security.

15 CHAIRMAN VERKUIL: Yeah, there
16 could be national -- so -- okay.

17 MS. DOOLING: So what I actually
18 wanted to ask, would Carol Ann -- do
19 you know if "confidential business
20 information" -- is that a statutorily
21 defined term? Or does anyone know?

22 PARTICIPANT: Privileged --

23 PARTICIPANT: All kinds of FOIA
24 cases.

25 CHAIRMAN VERKUIL: Why don't we

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 do this. Why don't we vote. I think
3 we have enough. Let's just vote on
4 the first amendment, Carol Ann's
5 amendment, on adding the two words
6 "business information" in two places.
7 I think we've heard the case for and
8 against. Could we bring that to a
9 vote?

10 Let's say, all in favor -- I
11 should ask, all in favor of the Carol
12 Ann Siciliano amendment -- amendments,
13 please say aye.

14 (No response.)

15 CHAIRMAN VERKUIL: Opposed, nay.

16 (Chorus of nays.)

17 CHAIRMAN VERKUIL: So the nays
18 have it on that one.

19 Now let's go to the second one,
20 which has been friendly amended by
21 Alan Morrison, right?

22 MS. SICILIANO: My amendment
23 actually is on (c), not (d). So with
24 all due respect to what Alan was
25 saying, it was intended --

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 CHAIRMAN VERKUIL: It's not
3 going to work.

4 MS. SICILIANO: -- to be
5 something different.

6 CHAIRMAN VERKUIL: Sure.

7 MS. BANSAL: Just sticking to
8 that second amendment, I actually
9 don't think that second sentence is --

10 CHAIRMAN VERKUIL: Hold on one
11 second. We've got to get -- can we
12 get a microphone?

13 MS. SICILIANO: Well, here.
14 Just, again, to clarify --

15 CHAIRMAN VERKUIL: Oh, I'm
16 sorry.

17 MS. SICILIANO: I am comfortable
18 with any debate on that sentence and
19 any modification to it, but for the
20 membership to consider how I proposed
21 it, I'd like it to be considered in
22 the context in which I proposed it,
23 which is to amend (c) so that the
24 mechanisms that that sentence refers
25 to are mechanisms for a commenter to

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 indicate confidentiality.

3 CHAIRMAN VERKUIL: Okay. So we
4 are putting it in (c).

5 Now, could you come forward with
6 a mike for Council Member --

7 MS. BANSAL: Hi. Preeta Bansal.
8 I just -- I mean, I understand the --
9 I think it's a good thought. I don't
10 think it's needed, that new sentence,
11 because I think, if you look at (c) in
12 conjunction with (d), I mean, it's
13 implicit in there that agencies should
14 review and determine how such
15 information should be handled.

16 I mean, I don't think there's an
17 understanding that they would make it
18 unconfidential while they're
19 determining it. So I guess my -- and
20 I think the new sentence is a
21 little -- you know, without trying to
22 edit it here, I mean, I think it may
23 not be the same mechanisms that
24 maintain and protect the information
25 as identified. So I would be inclined

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 just to -- to not add the new
3 sentence.

4 CHAIRMAN VERKUIL: Any further
5 discussion on this amendment? And
6 then are we ready to vote?

7 I'm sorry.

8 MS. SICILIANO: I mean, I'm
9 comfortable with withdrawing it
10 because I appreciate what the speaker
11 just said.

12 CHAIRMAN VERKUIL: Okay. Well,
13 thank you if you are. And unless
14 anyone wants to reinstate it, we will
15 proceed as if neither one of those
16 amendments have been approved.

17 And then -- what are we left
18 with here?

19 Peter Strauss. I think you're
20 next, Peter.

21 MR. STRAUSS: So I see this
22 recommendation which is clearly
23 warranted as involving legal
24 considerations in e-rulemaking and the
25 general set of recommendations under

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 maintaining rulemaking comment dockets
3 in electronic form, and I wondered why
4 it was limited to comments.

5 Now, I understand, in some
6 respects, this has to do with
7 maintaining electronic records in lieu
8 of paper records. But so far as legal
9 requirements for e-rulemaking, it
10 seems to me important to state what
11 has been established law in the
12 District of Columbia at least for 30
13 years, that the dockets should include
14 scientific reports and other matters
15 to the extent at least that they would
16 be subject to a request under the
17 Freedom of Information Act, which
18 ought to take care of any
19 confidentiality issues, as a way of
20 really enhancing the electronic
21 rulemaking process by encouraging
22 agencies to put the data out there for
23 comment in electronic form at the
24 earliest possible time.

25 CHAIRMAN VERKUIL: So you have

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 two suggestions. One is, on the
3 heading on page 5, "Maintaining
4 Rulemaking Dockets in Electronic
5 Form," is to delete "comment."

6 MR. STRAUSS: Delete "comment"
7 because I would have it not be only
8 about --

9 CHAIRMAN VERKUIL: Broader than
10 "comment" because these are reports
11 that have already been submitted by
12 the -- or read by the agency.

13 MR. STRAUSS: Right.

14 CHAIRMAN VERKUIL: And the
15 second one is on the next page
16 starting with --

17 MR. STRAUSS: "To facilitate..."

18 CHAIRMAN VERKUIL: -- "To
19 facilitate."

20 MR. STRAUSS: Right.

21 MR. SIEGEL: Paul?

22 CHAIRMAN VERKUIL: Yes, please.

23 MR. SIEGEL: If I could just
24 clarify, in -- late yesterday,
25 Professor Strauss and I worked out a

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 slight change to his amendment, so
3 it's not exactly what you see in the
4 packet, but on the screen, the
5 difference is that, instead of being
6 part of paragraph 3, it would be a new
7 separate paragraph.

8 And there's also a slight
9 change. It's no longer saying it
10 should be in the FDMS docket because the
11 independent agencies don't all use
12 FDMS, so just says "a publicly
13 available electronic docket."

14 So two -- two slight changes to
15 the proposal.

16 MR. STRAUSS: "Publicly
17 available electronic docket," it
18 should be.

19 MR. SIEGEL: Right.

20 MR. STRAUSS: It doesn't have
21 the word "electronic" in it.

22 MR. SIEGEL: Oh, it should.
23 Yes. The word "electronic" should be
24 in front of that.

25 CHAIRMAN VERKUIL: So am I

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 correct, committee chair, that we
3 have -- the committee is accepting
4 these changes?

5 MR. EISNER: Neither Bridget nor
6 I get a vote, but we're fairly
7 confident the committee would support
8 both of these changes.

9 MR. MAY: Randy May. I'm a
10 member of the committee, and I support
11 it. I can't speak for any other
12 members, but from my experience at the
13 FCC, where they do these types of
14 studies frequently, but they often
15 aren't put in the docket until the
16 very end, if then, and particularly --
17 I particularly like the suggestion or
18 the language that they be put into the
19 docket as early as possible. So I
20 think it's a very good amendment.
21 Thank you.

22 CHAIRMAN VERKUIL: Further
23 comments. Jody. Over here. There
24 you go.

25 MS. FREEMAN: It just follows --

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 sorry. Jody Freeman again.

3 This just follows to your point.

4 And, Jon, a reminder that not all the
5 agencies use the FDMS. But -- the FTC
6 and the SEC have their own, so going
7 back to paragraph 2, "Assessing
8 Privacy Concerns," maybe I
9 misunderstand this, but do you want to
10 not -- have them assess not just
11 whether the FDMS system provides that
12 there be Privacy Act compliance but
13 also whether other electronic
14 docketing systems used by the agencies
15 does so? Or have I misunderstood it?

16 MR. SIEGEL: That particular
17 paragraph I think was specifically
18 directed at FDMS --

19 MS. FREEMAN: It was
20 specifically --

21 MR. SIEGEL: -- which has a
22 system of records notice which is now
23 about six years old. We might need to
24 reconsider it. That's not to say it
25 might not also be a good idea to --

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 MS. FREEMAN: Yeah.

3 MR. SIEGEL: -- address other
4 electronic docket systems record
5 notices, but I think the committee did
6 have that one particularly in mind.7 CHAIRMAN VERKUIL: Okay. So
8 now -- yes.9 MS. SFERRA-BONISTALLI: Esa
10 Sferra-Bonistalli, Coast Guard Liaison
11 Representative. I would just like to
12 note that the language is, "as soon as
13 they are known to the agency that it's
14 been introduced and discussed as soon
15 as the reports or studies are
16 available or as soon as practicable."17 And I would just note that
18 "known to the agency" could make a
19 little bit of a timing issue for an
20 agency if they relied on something but
21 there are some technical difficulties
22 in putting in a large number of data
23 or something out on the public website
24 for it to be usable by the public.

25 So I would just note that. But

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 as a Liaison Representative, I may not
3 make an amendment.

4 CHAIRMAN VERKUIL: Okay. One
5 more. Ivan. Duly noted.

6 MR. FONG: Ivan Fong, Government
7 Member, Department of Homeland
8 Security. As a member, I will make an
9 amendment, if I could, to this
10 amendment on the same point, which is,
11 to reiterate, that the "as soon as
12 they are known to the agency" I think
13 creates problems for when that would
14 occur. In addition, it modifies
15 "studies and reports on which the
16 proposal for rulemaking draws," and it
17 may not be clear which studies and
18 reports qualify.

19 So I would propose that that
20 language be amended to say "as soon as
21 practicable during or after the close
22 of the comment period," and then the
23 rest would continue, "and insofar as
24 they would be disclosed in response to
25 an appropriate FOIA request."

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 So I will say that again.

3 Replace "as soon as they are known to
4 the agency" with "as soon as
5 practicable during or after the close
6 of the comment period."

7 Thank you.

8 CHAIRMAN VERKUIL: All right.

9 So this is an amendment to an
10 amendment, and it does take
11 precedence. Who wants to speak to it?
12 I guess we should let Peter have
13 his --

14 MS. CHRISTIAN: I want to speak
15 to it at some point, Paul --

16 CHAIRMAN VERKUIL: Okay.

17 MS. CHRISTIAN: -- on the same
18 amendment.

19 CHAIRMAN VERKUIL: Oh, okay.
20 Well, that --

21 MR. STRAUSS: I would be happy
22 to accept the "as soon as practicable"
23 as a friendly amendment, but not the
24 rest of the language.

25 CHAIRMAN VERKUIL: Is that okay

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 with you?

3 MR. FONG: It's not ideal, but
4 we'll put it to a vote.

5 CHAIRMAN VERKUIL: Okay. So we
6 do have an amendment accepted. So
7 we're still back on the main
8 amendment. And we're still discussing
9 the Strauss amendment as has been
10 accepted by the committee.

11 Yes?

12 MS. CHRISTIAN: Betty Jo
13 Christian, Senior Conference Fellow.
14 I have a concern as to whether this is
15 going -- as presently written, is
16 going to be placing an excessive
17 burden on agency staff which would be
18 particularly inappropriate at a time
19 when agencies are under pressure to
20 operate more efficiently and at a
21 lower cost, if possible.

22 And that the concern comes from
23 the phrase at the very end "insofar as
24 they would be disclosed in response to
25 an appropriate Freedom of Information

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 Act request."

3 Now, my experience has been that
4 responding to a FOIA request takes an
5 enormous amount of staff time. First
6 you have to review the file cabinets,
7 locate the documents, and then you
8 have to determine what is and is not
9 required for disclosure.

10 And I am wondering if we
11 couldn't consider -- I can't propose
12 an amendment, but if we couldn't
13 consider some more general language,
14 instead of referring to a FOIA
15 request, and, in effect, saying that,
16 in every rulemaking, the staff has to
17 perform the same tasks that they would
18 perform in responding to a FOIA
19 request, even though there is no FOIA
20 request, with something more generic
21 that simply says insofar -- and I'm
22 not really suggesting language -- but
23 "insofar as the agency deems it
24 appropriate to disclose such -- to
25 disseminate such material publicly,"

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 something like that.

3 MR. STRAUSS: My impression is
4 that this is already a clearly
5 established legal requirement, at
6 least in the D.C. Circuit, and what
7 is -- all that was intended by
8 "insofar as they would be disclosed in
9 response to an appropriate Freedom of
10 Information Act request" was to make
11 clear that when the agency has a
12 reason to treat this particular study
13 or elements of this study as
14 confidential, the recommendation
15 doesn't extend to it.

16 I certainly was not either
17 expecting or intending that there
18 would be a Freedom of Information Act
19 search. The document is in hand and
20 the issue is, does it go on the
21 electronic docket and to what extent?

22 CHAIRMAN VERKUIL: Okay.

23 MS. CHRISTIAN: Would -- would
24 this be appropriate to refer to the
25 staff and Peter to work this out

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 and -- with the committee to just try
3 to avoid the problem that I certainly
4 saw when I read the recommendation?

5 CHAIRMAN VERKUIL: Well, I think
6 we'll note the comment. I don't have
7 language or an amendment to an
8 amendment yet, but I appreciate the
9 comment.

10 Yes.

11 MS. WALKER: Hi. Helgi Walker,
12 Wiley Rein. I have a concern with the
13 language that says that the study
14 should go into the rulemaking docket
15 as soon as practicable because, under
16 the APA, I believe they have to go in
17 in sufficient time so that parties
18 have an opportunity to comment on
19 them.

20 And so this suggests to me that
21 record evidence studies that the
22 agency relies on heavily could just be
23 put in the docket but one day before
24 the record closes, and I don't think
25 that's permissible. So "as soon as

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 practicable" concerns me, and I would
3 suggest "in sufficient time to allow
4 for public comment on the studies."

5 And I understand also the FOIA
6 point, but I wouldn't want the
7 language to suggest that it's only
8 FOIA-able studies that are subject to
9 this requirement. The APA requires
10 all scientific data, studies,
11 evidence, upon which the agency relies
12 in making its decision to be part of
13 the record and subject to public
14 comment.

15 CHAIRMAN VERKUIL: Okay. So "as
16 soon as practicable..."

17 MS. WALKER: My specific
18 suggestion would be -- a specific
19 suggestion would be "in sufficient
20 time to allow for public comment" --

21 CHAIRMAN VERKUIL: Okay. That's
22 good for you?

23 MS. WALKER: -- "on the studies
24 and reports."

25 CHAIRMAN VERKUIL: Yeah. "In

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 sufficient" -- and Ivan, "In
3 sufficient time to allow for public
4 comment." Okay. Everyone can buy
5 that? Who doesn't buy it?

6 MR. MORRISON: My understanding
7 is -- is that these studies have to be
8 put in the public docket, as Peter
9 said, for independent reasons anyway.
10 The only question is, which this is
11 addressed to, when do they have to go
12 in the electronic docket? So,
13 therefore, we don't need the last part
14 of it because, presumptively, it's in
15 the public docket already, and just
16 say "as soon as practicable" or at
17 some point.

18 That's the only -- we're not
19 talking -- there's no FOIA aspect,
20 there is no exempt aspect, there is no
21 time for comment aspect. Everything
22 has to be in the public docket. The
23 only question is we're reminding
24 people to put those studies in the
25 electronic docket in addition to

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 putting comments in the electronic
3 docket.

4 PARTICIPANT: Right. Right.

5 MS. SICILIANO: This is Carol
6 Ann. And I would say that the
7 amendment would be "prior to the
8 commencement of the comment period,
9 these reports need to be put into the
10 electronic docket." Because then -- I
11 think Mr. -- Professor Strauss, that's
12 what the point is, that the public has
13 full access in the electronic docket
14 to everything that they would have in
15 the written docket.

16 And then -- just one last thing.
17 I'd go on to say that the studies and
18 reports and data would be the material
19 that the agency relied upon in
20 developing the proposal and would not
21 need any reference to FOIA as well.

22 CHAIRMAN VERKUIL: One more.
23 Let's see. Gillian.

24 MS. METZGER: Yeah. On both of
25 those -- on the first point, I don't

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 think that we want to encourage that
3 the eDocket be -- include the -- not
4 just rely on the fact that they have
5 to be disclosed and comment could be
6 done on the paper hearing.

7 So I would actually prefer that
8 we use this to have that encouraging
9 aspect as part of what the
10 recommendation is doing. In response
11 to Alan's point that it wasn't needed,
12 I actually see that as adding a
13 benefit.

14 CHAIRMAN VERKUIL: Jon. Let me
15 catch up with our team, and then we'll
16 come back.

17 MR. SIEGEL: One point that we
18 considered internally, in thinking
19 about this amendment, is the study
20 might already be published. So if an
21 agency, for example, says, "in the
22 course of this rulemaking, we will be
23 relying on a study which appeared in
24 the New England Journal of Medicine,"
25 they might not be able to put that in

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 the electronic docket. It's already
3 available. It's presumably subject to
4 copyright. So that's just one thing
5 to consider in whether you want to say
6 it has to be in the electronic docket.

7 CHAIRMAN VERKUIL: Let's see.
8 Judge Wald.

9 JUDGE WALD: Am I misreading the
10 context? If it says -- the sentence
11 above, which is not in dispute, says,
12 "Agencies should examine their record
13 schedules and maintain electronic
14 records in lieu of paper records."

15 So I guess what I'm worried
16 about is if you're telling them go
17 ahead to the maximum degree, just have
18 electronic records, then how -- how
19 good is --

20 CHAIRMAN VERKUIL: How good is
21 Alan's answer?

22 JUDGE WALD: -- how good is it
23 to have -- to have a requirement that
24 something be in the paper record?

25 CHAIRMAN VERKUIL: Right. Okay.

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 I'm sorry. Preeta?

3 MS. BANSAL: Just as a point of
4 information, the current -- the most
5 recent president's executive order on
6 this subject in January 2011 actually
7 has, I think, stronger language on
8 this front than what this
9 recommendation is.

10 So the current executive order
11 says that, "To the extent feasible and
12 permitted by law, each agency shall
13 also provide for both proposed and
14 final rules, timely online access to
15 the rulemaking docket on
16 regulations.gov, including relevant
17 scientific and technical findings in
18 an open format that can be easily
19 searched and downloaded. For proposed
20 rules, such access shall include, to
21 the extent feasible and permitted by
22 law, an opportunity for public comment
23 on all pertinent parts of the
24 rulemaking docket, including relevant
25 scientific and technical findings."

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 So it's just a -- I mean, I
3 think -- I don't know -- I don't know
4 where we're going with this now, but
5 it feels to me that that's a weaker
6 version of what's already in place.

7 CHAIRMAN VERKUIL: So we should
8 thoroughly cite that. Okay. Any --
9 Neil.

10 MR. EISNER: I just had a couple
11 of technical points. I agree with
12 Judge Wald that we're looking for --
13 at least the recommendation is looking
14 for -- having the electronic record be
15 the record. We're not talking about
16 two different records.

17 Number two, we have to be
18 careful. There are two kinds of
19 documents that you rely on during a
20 rulemaking. One is that it helps you
21 develop a proposal. I believe it
22 should go in the record with your
23 proposal, not before your proposal
24 goes in the record.

25 But, number two, we oftentimes

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 refer to ongoing studies or find out
3 about studies that we intend to place
4 in the docket before the close of the
5 comment period, but we want to put
6 them in with sufficient time for
7 comment. We clearly don't want to
8 require that all have to be put in at
9 the time of the NPRM.

10 And in fact, we, at the
11 Department of Transportation, have
12 extended comment periods to allow
13 comment on a study that was completed
14 during a rulemaking comment period.

15 CHAIRMAN VERKUIL: All right.
16 So do we have -- Allison, one more
17 time. Then we'll see if we can --

18 MS. ZIEVE: I just wanted to
19 comment on the FOIA part of it. I
20 think that what Peter was trying to do
21 is say that exempt material obviously
22 didn't have to be disclosed, and some
23 people are reading it as if there --
24 as if it's creating a new disclosure
25 requirement and maybe flipping the way

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 it's written to say "except to the
3 extent that the material contains
4 material -- contains information to be
5 exempt under the Freedom of
6 Information Act," it might make people
7 more comfortable.

8 Is that, Peter, what you had --
9 is that what you had in mind?

10 MR. STRAUSS: That's fine, and I
11 would also be happy with an
12 introductory clause on the order of
13 "consistent with executive order
14 number" --

15 CHAIRMAN VERKUIL: Yes, we
16 should certainly do that, Peter's
17 point.

18 So, Jon, I don't know if we're
19 going to be -- can we put something up
20 or do you want to let the committee on
21 style deal with it?

22 MR. SIEGEL: Committee on style.

23 PARTICIPANTS: Committee on
24 style.

25 CHAIRMAN VERKUIL: All right.

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 So we have, I think, accepted Peter's
3 proposition. It's been helpfully
4 annotated by a variety of good
5 comments.

6 I think we have -- do you
7 have -- can you certify to the group
8 that you have it in mind, and we will
9 straighten it out? And you can
10 even -- we'll even circulate it
11 tomorrow morning so you can see it
12 before the things are gone. Okay?

13 MR. SIEGEL: Okay. As soon as
14 practicable.

15 CHAIRMAN VERKUIL: As soon as
16 practicable. I love that phrase; I
17 say it all the time.

18 Okay. Shall we vote on the
19 amendment? All in favor?

20 (Chorus of ayes.)

21 CHAIRMAN VERKUIL: Opposed.

22 PARTICIPANT: Opposed.

23 CHAIRMAN VERKUIL: The ayes have
24 it.

25 No. That's coming.

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 MR. SIEGEL: That's next.

3 CHAIRMAN VERKUIL: That's
4 coming.

5 So the third and final
6 amendment, at least the ones that have
7 been prepared, you know, has to do
8 with -- which is Ron Cass' amendment.

9 And I'll let, Ron, you speak to
10 that. That's right above the Strauss
11 amendment.

12 MR. CASS: It definitely should
13 be above the Strauss amendment. I'm
14 Ron Cass, Member of the Council. And
15 while I'm presenting this, I should
16 also say that five of the six members
17 of the Council who made their views
18 known on this also support this
19 amendment. It would replace "to the
20 extent" -- "to the greatest extent
21 permitted" with the word "as
22 appropriate."

23 Right now the agencies get to
24 say what their record schedule is. It
25 seems a little bit odd that we're then

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 saying, once you've made that up, we
3 are going to push you to put as much
4 information as possible just in the
5 electronic record, and then destroy
6 all the paper records that were
7 originally submitted.

8 I think that agencies vary,
9 rulemakings vary, and we should allow
10 agencies to do this as appropriate
11 rather than saying that we believe
12 that the greatest possible destruction
13 of paper records is what we're in
14 favor of.

15 And particularly -- I said this
16 earlier to some other members of the
17 Council -- particularly in a week when
18 the CIA's data system has been hacked
19 into, we may have some concern about
20 destroying all paper records and
21 having them only available in
22 electronic form.

23 CHAIRMAN VERKUIL: Well, that
24 threat would kind of drive the whole
25 recommendation out the window.

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 MR. CASS: Well, I think we're
3 saying "as appropriate" here takes
4 care of --

5 CHAIRMAN VERKUIL: All right.
6 So, Neil, I know you'd like to speak
7 to that.

8 MR. EISNER: Yes. I appreciate
9 the concern. I've heard that many
10 times about the quality of an
11 electronic record. We could also talk
12 about the quality of a paper record.
13 My understanding is that electronic
14 records are backed up every night on
15 premises. They are backed up at least
16 once a week, I believe, off premises.
17 You can't get much security.

18 We can talk about giving the
19 only copy of a docket to somebody who
20 comes into a reading room and letting
21 them read it and figure out whether
22 we're going to get the same thing back
23 that we handed over to them.

24 We have not heard of any
25 problems with electronic records with

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 respect to rulemaking. Yes, things
3 get hacked into, but there are
4 millions of dollars in potential
5 savings, and we're not aware of
6 anybody having a problem with their
7 recordkeeping systems.

8 Stuff is coming in
9 electronically. Stuff is being filed.
10 Pretty soon we'll probably be getting
11 about 90 or 95 percent or 100 percent
12 of stuff filed electronically. The
13 question is are we going to tell
14 people to run off a hard copy record.

15 I'm not aware of anything unique
16 about this. I'm not aware of any kind
17 of problems. I'm not aware of any
18 kind of difficulties.

19 CHAIRMAN VERKUIL: Okay. Any
20 further comments on this point?

21 Yes.

22 MS. DOOLING: I would just add
23 that the -- this is Bridget. The
24 report was dealing with just whether
25 there was a legal retirement to retain

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 paper copies or whether electronic
3 copies would be sufficient. And I
4 think on those -- on those grounds --
5 that's sort of our starting point.

6 There may be discomfort with
7 destroying paper copies of things, but
8 at the heart of it -- sometimes what
9 we would hear was, "well, I think I
10 have to keep these documents," as
11 though it was a legal matter. And I
12 think what we found, in looking at
13 these issues, was that, from what we
14 could find, there was no legal
15 requirement to retain them.

16 CHAIRMAN VERKUIL: Miriam.

17 MS. NISBET: Thank you. Miriam
18 Nisbet, National Archives and Records
19 Administration.

20 I think the sentence that says
21 "agencies should examine their record
22 schedules and maintain electronic
23 records in lieu of paper records" and
24 with the amendment "as appropriate"
25 works.

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 The key here is the record
3 schedules, because you cannot destroy
4 or -- and should not maintain records
5 in any way other than approved record
6 schedules which the agencies propose
7 and archivists of the United States
8 approve. So I think we're good with
9 this.

10 CHAIRMAN VERKUIL: You like the
11 Cass amendment?

12 MS. NISBET: Yes. Yes.

13 CHAIRMAN VERKUIL: Okay.

14 MR. EISNER: You know, I think,
15 again, we may be talking about the
16 same thing. Agencies are getting
17 approval from the records center, from
18 the archives, to keep nothing but
19 electronic records if they have a
20 system of records that is -- is
21 showing that they have good business
22 practices.

23 MS. NISBET: It's just that
24 they're not all there yet.

25 MR. EISNER: I agree. We're

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 encouraging them to get there --

3 MS. NISBET: Yes. Yes.

4 MR. EISNER: -- rather than
5 saying, "do it as appropriate." We
6 recognize that they have to have a
7 business process as well as a system
8 of records that will ensure that they
9 are going to maintain an adequate --
10 an accurate record.

11 And, remember, if we go the
12 other way, we're talking about having
13 to have them run off hard copies of
14 what is submitted electronically.

15 CHAIRMAN VERKUIL: Ron?

16 MR. CASS: Well, I don't think
17 that's right, Neil. The -- as
18 written, this talks about destroying
19 paper copies that have been properly
20 scanned into electronic form. It
21 doesn't talk about putting additional
22 requirements on agencies to print out
23 copies that were electronically filed.

24 And all that I am suggesting
25 with the amendment is that we don't

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 encourage people to destroy all the
3 paper records, to the greatest extent
4 possible, without taking account of
5 the fact there may be some good
6 occasions and good reasons for people
7 not to do that.

8 CHAIRMAN VERKUIL: Let's see if
9 we can line this thing up because
10 we've got other things too. Alan I've
11 heard. Let's see. Nina, yes.

12 MS. MENDELSON: Nina Mendelson,
13 Public Member. I wonder if the issue
14 with the language is that "maintain to
15 the greatest extent permitted
16 thereunder" makes it sound as if
17 agencies are being encouraged to
18 maintain electronic records perhaps
19 sometimes intentionally with the
20 record schedules. Is that the
21 problem?

22 I wonder if it could be changed
23 slightly maybe via the style committee
24 to perhaps reflect the idea, as Peter
25 was saying, that agencies should be

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 examining the extent to which they can
3 increase the use of electronic
4 records. Maybe that means revising
5 their record schedules. But one
6 revision could be to say "consider
7 maintaining electronic records with
8 paper records, to the greatest extent
9 possible."

10 MR. STRAUSS: "Practicable."

11 That old world.

12 MS. MENDELSON: "Practicable."

13 MR. STRAUSS: "To the greatest
14 extent practicable."

15 CHAIRMAN VERKUIL: We've heard
16 that before. And we can only have so
17 many "practicables" in any -- in any
18 recommendation of the Conference.

19 Neil, any response to Nina's --

20 MR. EISNER: I am not sure if I
21 followed it all. I would not have any
22 problem with making it clearer that
23 they should be maintaining them to the
24 greatest extent permitted under their
25 record schedule. I think that's what

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 we're getting at. They -- as long as
3 their record schedule approved by the
4 archives allows them to have an
5 electronic record, they should go as
6 far as they can with it, unless they
7 have some unique legal reason to
8 maintain paper.

9 CHAIRMAN VERKUIL: Does that
10 sound right?

11 MR. STRAUSS: Yes.

12 CHAIRMAN VERKUIL: Are you okay
13 with that? You still want yours?

14 MR. CASS: Jon, I think if in
15 giving them the opportunity on the
16 record schedule and to set it the way
17 they want, we should give them an
18 opportunity not to destroy except as
19 appropriate under the record schedule.

20 CHAIRMAN VERKUIL: All right.
21 Tino. One more.

22 MR. CUELLAR: I'll be very
23 brief. I actually think there's a
24 genuine difference of opinion here
25 about whether agencies should be

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 encouraged to go all the way on
3 electronic records as long as NARA
4 allows them to. And I think we should
5 just have a vote on that. I think
6 there are different views about that.

7 CHAIRMAN VERKUIL: That's fine.
8 I am for that too, actually.

9 So are we okay? Let's vote on
10 the Cass amendment. All in favor,
11 aye.

12 (Chorus of ayes.)

13 CHAIRMAN VERKUIL: All opposed,
14 nay.

15 (Chorus of nays.)

16 CHAIRMAN VERKUIL: All right.
17 This is only the first day. All
18 right. Let's go. All -- hands up,
19 please. All --

20 PARTICIPANT: Can he just
21 clarify the amendment.

22 MR. CASS: It deletes "to the
23 greatest extent and permitted
24 thereunder" and just says "as
25 appropriate."

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 PARTICIPANT: Can you use a
3 mike, please, so we can all hear.

4 MR. SIEGEL: The Cass amendment
5 is to delete the words "to the
6 greatest extent permitted thereunder"
7 and insert, in lieu thereof, the words
8 "as appropriate."

9 CHAIRMAN VERKUIL: One is pro,
10 as Tino said, and one is pro and one
11 is, let's say, neutral with respect to
12 electronic records.

13 And we had a division, I
14 believe. I can't honestly say who had
15 the voice.

16 So all in favor of the Cass
17 amendment, please raise your hand.

18 (Hands raised.)

19 PARTICIPANT: I count 33.

20 CHAIRMAN VERKUIL: 33.

21 All opposed.

22 (Hands raised.)

23 CHAIRMAN VERKUIL: It looks like
24 the Cass amendment passes.

25 MR. SIEGEL: We trust only

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 voting members raised their hand.

3 CHAIRMAN VERKUIL: We have the
4 Cass amendment passing. Anyone -- we
5 only have honorable voters here? So
6 that's it. The Cass amendment has
7 been accepted.

8 All right. Now let's quickly go
9 back to the language that we had
10 discussed at the beginning to see if
11 we have another amendment that we
12 should look at, and that is back to
13 (b), I think. Is that right?

14 And I don't know that -- did we
15 get an amendment -- "appropriate
16 action" was the amendment, right, in
17 lieu of "agencies action"? In lieu of
18 "possible removal."

19 MS. OLORUNNIPA: Paul, will you
20 repeat that? Please repeat it.

21 CHAIRMAN VERKUIL: "Possible
22 appropriate action" in --

23 MR. SIEGEL: Strike the words
24 "possible removal" and insert
25 "appropriate action" at the end of

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 1(b), I think.

3 CHAIRMAN VERKUIL: Okay. Okay.
4 That's good. We strike -- you got it,
5 Funmi?

6 MS. OLORUNNIPA: Yep.

7 CHAIRMAN VERKUIL: So has anyone
8 made this? This is not a motion. Is
9 it a motion?

10 MS. METZGER: Actually, I want
11 to just speak to another part of this
12 provision, so tell me if if you want
13 me to wait on that.

14 CHAIRMAN VERKUIL: No. I want
15 you to wait.

16 MS. METZGER: Okay.

17 CHAIRMAN VERKUIL: Is there
18 still enthusiasm?

19 MS. BANSAL: I'll move this.

20 CHAIRMAN VERKUIL: Enthusiasm,
21 at least Preeta moved it, so...

22 PARTICIPANT: Second.

23 CHAIRMAN VERKUIL: Second.
24 We're on -- all right. We're in
25 business.

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 Do we want more discussion? Can
3 we vote on it? Do we know what we're
4 doing?

5 PARTICIPANT: Those are
6 different questions altogether.

7 CHAIRMAN VERKUIL: All right.
8 Let's vote. So it's a Preeta Bansal
9 amendment which gathered from
10 others' -- who may have been Senior
11 Fellows -- conversations. So see what
12 it is.

13 All in favor of the amendment,
14 please say aye.

15 (Chorus of ayes.)

16 CHAIRMAN VERKUIL: Opposed, nay.

17 PARTICIPANT: Nay.

18 CHAIRMAN VERKUIL: Wow. That's
19 good. Ayes have it. Amendment
20 passes.

21 The judge is still in business
22 back there. We'll get him. But first
23 let's get the professor.

24 MS. METZGER: So this is Gillian
25 Metzger.

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 I have -- I think the points
3 that were made about the vagueness of
4 some of the terms there are quite
5 real. And there was also the point
6 that was made about agencies perhaps
7 wanting to explore some other kinds of
8 methods.

9 And I am little concerned that
10 we're a little bit too urging that
11 agencies should adopt a method for
12 members of the public to flag as
13 opposed to other methods for
14 identifying inappropriate or protected
15 conduct -- content.

16 So I am wondering whether, first
17 of all, we need to have the members of
18 the public. Could we just make it
19 more generic and say "for flagging
20 inappropriate," to leave the groups
21 who are exploring this more options
22 without suggesting it necessarily has
23 to be members of the public.

24 That doesn't address, however,
25 the question of the vagueness of the

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 terms.

3 CHAIRMAN VERKUIL: Well, choose
4 your -- do you want to make an
5 amendment?

6 MS. METZGER: I am making the
7 amendment to take out the language
8 "for members of the public" and simply
9 make it "a method for flagging" --
10 adding the i-n-g at the end.

11 CHAIRMAN VERKUIL: All right.
12 Now, I have to -- that's fine. Is
13 there a second to that? Is there a
14 second to that amendment?

15 PARTICIPANT: Second.

16 CHAIRMAN VERKUIL: Okay.

17 MS. METZGER: Somebody else
18 mentioned about to take out the last
19 phrase.

20 CHAIRMAN VERKUIL: What are we
21 gaining on this thing?

22 MS. METZGER: "For
23 appropriate" -- "in order for
24 appropriate action."

25 CHAIRMAN VERKUIL: All right.

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 So point one, we have run out of time.
3 We are past our 60 minutes. We are
4 actually into the 30 minutes that you
5 have to vote by majority vote to
6 extend to. So I'm going to give us
7 fifteen minutes.

8 And do I hear a vote to extend
9 the time for fifteen minutes?

10 PARTICIPANT: So moved.

11 PARTICIPANT: Second.

12 CHAIRMAN VERKUIL: And all in
13 favor, say aye.

14 (Chorus of ayes.)

15 CHAIRMAN VERKUIL: Okay. I
16 assumed it will pass. So let's finish
17 this one and then see where we are.

18 Any discussion on the Metzger
19 amendment?

20 MR. MAY: If I can just say
21 quickly, I take your point what you're
22 trying to do, but here the committee
23 -- this is Randy May.

24 I mean to me the focus was
25 really on getting the public to focus

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 on this when they're submitting
3 material. So I don't want to exclude
4 maybe others if there are other
5 categories you have in mind. But it
6 seems like to me one of the values of
7 these recommendations, when they
8 become public, when they're released,
9 is to sort of educate the public that
10 they ought to be aware of the process.

11 If you take out the language --
12 if you take out "for members of the
13 public," that when they see the
14 recommendation, it doesn't have that,
15 it seems like to me it's missing a
16 little bit of a function that the
17 recommendation is going to have, as
18 far as they go.

19 So I would like to leave it in,
20 as a committee, and if you want to add
21 in -- I mean as a committee member --
22 and add others. But I know you're on
23 the committee as well, I think, so...

24 That would be my view. It has
25 some value to have it in there.

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 CHAIRMAN VERKUIL: Any -- we've
3 got to get the Judge.

4 JUDGE PLAGER: I think both --
5 Jay Plager. I think both of those
6 comments are good; that is, one of the
7 issues we identified is that the
8 agency should be able to act on its
9 own initiative without the public.

10 And the other issue is, why
11 shouldn't the public be aware that
12 we're interested in having them act?

13 The rephrasing that I would
14 suggest that -- for the committee on
15 style, of course -- is that it would
16 read "work with the e-rulemaking PMO
17 and its interagency counterparts to
18 explore providing a method, including
19 for members of the public, for
20 flagging inappropriate or protected
21 content and for taking appropriate
22 action thereon."

23 We've already voted on the
24 "appropriate action." Thank you very
25 much.

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 CHAIRMAN VERKUIL: Okay.

3 Gillian?

4 MS. METZGER: That's fine.

5 CHAIRMAN VERKUIL: You buy that?

6 MS. METZGER: Uh-huh.

7 CHAIRMAN VERKUIL: Okay. Can we
8 have that?

9 MR. SIEGEL: If we can just hear
10 it one more time.

11 JUDGE PLAGER: One more time.
12 "Providing a method, including for
13 members of the public, for flagging
14 inappropriate or protected content,
15 and for taking inappropriate action
16 thereon."

17 I think that captures the two
18 issues that we were talking about
19 earlier.

20 CHAIRMAN VERKUIL: All right.
21 And it's acceptable to the maker of
22 the motion. So we now have the
23 amendment, as amended, friendly way.
24 Can we vote on that? All in favor of
25 that amendment say aye.

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 (Chorus of ayes.)

3 CHAIRMAN VERKUIL: Opposed nay.

4 (No response.)

5 CHAIRMAN VERKUIL: Okay.

6 PARTICIPANT: Thereon.

7 PARTICIPANT: Thereon

8 MS. OLORUNNIPA: Thereon.

9 CHAIRMAN VERKUIL: Thereon.

10 Okay.

11 MS. OLORUNNIPA: Thankk you.

12 CHAIRMAN VERKUIL: So now we're
13 going to go to the entire
14 recommendation?

15 PARTICIPANT: Yes.

16 CHAIRMAN VERKUIL: Good work.

17 May I hear a motion to adopt the
18 recommendation as amended?

19 PARTICIPANT: So moved.

20 CHAIRMAN VERKUIL: All in favor,
21 say aye.

22 (Chorus of ayes.)

23 CHAIRMAN VERKUIL: Opposed, nay.

24 PARTICIPANT: Nay.

25 CHAIRMAN VERKUIL: All right.

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 Thank you very much. Good work,
3 everybody.

4 (Applause.)

5 CHAIRMAN VERKUIL: So it's
6 perfect timing. It's now a quarter of
7 4:00. You'll have fifteen minutes.
8 There's coffee downstairs. And come
9 back at 4:00 and we'll start the
10 second one.

11 (Recess.)

12 CHAIRMAN VERKUIL: All right.
13 Let's get back to work.

14 Okay. We're going to start
15 again. If everyone can come in. I
16 appreciate it's a little hard to
17 maneuver in this room, but we'll make
18 it out okay.

19 This is rulemaking comments.
20 And I don't have any general comments,
21 unless I should, Jon, but I'm going to
22 turn it over to you and we'll start
23 up.

24 MR. SIEGEL: I'll just do this
25 sitting down because it's very short.

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 So our next comment -- our next
3 project is the rulemaking comments
4 recommendation. The purpose of this
5 project is to try to improve the
6 comment part of notice and comment
7 rulemaking.

8 Obviously, as many people noted
9 during the course of this project,
10 there is some overlap with the
11 previous project. Roughly speaking,
12 the difference was that the previous
13 project was primarily about those
14 aspects of rulemaking that arise
15 primarily because of the "E" in
16 e-rulemaking, and it was also
17 primarily about legal issues; whereas,
18 this project is primarily about issues
19 that arise in the comment process
20 without regard to whether comments are
21 paper or electronic. And as you'll
22 see, that's not a perfect distinction,
23 but that was roughly the idea.

24 This project arose out of the
25 Conference's longstanding interest in

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 rulemaking, and also, as you see in
3 the preamble, it grows out of a
4 specific request from the House
5 Judiciary Committee's Subcommittee on
6 Commercial and Administrative Law
7 which specifically suggested that the
8 Administrative Conference investigate
9 certain questions that it posed about
10 the comment process.

11 Our researcher for this project
12 is Professor Steven Balla, seated on
13 my right, from George Washington
14 University. The committee chair is
15 Russell Frisby, seated to his right.

16 We're going to hear first from
17 Professor Balla. If you read his
18 report, you will notice that he is not
19 an attorney, but a social scientist,
20 and I think we benefitted from the
21 very empirical scientific approach
22 that he took to the research that he
23 did, and he will now describe it for
24 us.

25 MR. BALLA: Is that something

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 I'm being praised for or is it going
3 to be held against me. There's an
4 audience of lawyers here.

5 MR. SIEGEL: Praised.

6 MR. BALLA: So the rulemaking
7 comments project that I served as the
8 consultant for came out of, as Jon was
9 just stating, came out of a House
10 report that laid out five specific
11 areas of public commenting that a
12 reconstituted ACUS might look into.

13 And I'll briefly just state what
14 those are and then talk about how I
15 went about investigating those five
16 specific areas that were handed to
17 ACUS, if you will, by the House.

18 Should there be a required, or
19 at least recommended, minimum length
20 for a comment period? Second, should
21 agencies immediately make comments
22 publicly available? Should they allow
23 reply comment periods?

24 Third, must agencies reply to
25 all comments, even if they take no

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 further action on a rule for years?

3 Along those same lines, do comments
4 eventually become sufficiently stale
5 that they cannot support a final rule
6 without further comment?

7 Fourth, under what circumstances
8 should an agency be permitted to keep
9 comments confidential and/or
10 anonymous?

11 And, fifth, what effects do
12 comments actually have on agency
13 rules?

14 Now, in constructing a report to
15 address these five specific areas in
16 rulemaking comments, I considered
17 three different sources of
18 information. First what I did was
19 review germane published research
20 that's been done by both lawyers and
21 social scientists. And my aim in
22 doing this literature review was to
23 identify the most salient arguments,
24 the most up-to-date evidence that's
25 been offered by researchers in both

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 law and social sciences when it comes
3 to these areas of public commenting.

4 And what I discovered in the
5 course of doing this review of
6 published research is that the extant
7 literature provides a more solid
8 guidepost in some areas of the
9 report's inquiry than in others.

10 So, for example, the collection
11 of information on agency use of reply
12 comment periods. This hasn't -- this
13 is not to say there is no published
14 research on this topic. Of course
15 there is. But, generally speaking,
16 this has not been a focal point of
17 research in law and the social
18 sciences.

19 Now, that's in contrast to all
20 the ink that's been spilled when it
21 comes to the issue of agency
22 responsiveness to comments that are
23 submitted in response to notices of
24 proposed rulemaking. There
25 substantial attention over a long

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 period of time across a large number
3 of agencies and rulemaking proceedings
4 have been given to this topic, both by
5 lawyers and by social scientists.

6 So given this variation in the
7 breadth and the depth of our knowledge
8 of these five areas of rulemaking
9 comments, what I did as a second way
10 of gaining -- gathering information
11 was conducted some original empirical
12 research of my own. And, again, the
13 aim here was to do that original
14 empirical inquiry especially in areas
15 where our existing store of knowledge
16 is pretty limited in scope, it's
17 pretty limited in certainty.

18 So I was looking with my own
19 independent original research to fill
20 in some of the gaps that I saw as I
21 was working through the literature in
22 these five areas. So, for example, I
23 assembled information about the
24 duration of comment periods. What I
25 found, interestingly, is that there is

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 relatively little known systematically
3 about just how long are comment
4 periods typically.

5 And so what I did, as a way of
6 investigating this, in a preliminary
7 fashion, was put together information
8 about the length of more than 700
9 comment periods that were provided by
10 agencies during the course of 2010.
11 These were comment periods associated
12 with actions taken by dozens of
13 different agencies. And the aim here
14 was to use this information as a
15 source of new insight about agency
16 practices when it comes to how long
17 their comment periods tend to be.

18 So this original information I
19 found to be valuable in considering
20 what recommendations to deliver to the
21 committee on regulation; in this case,
22 in the area of integration of comment
23 periods.

24 In addition to the literature
25 review and the original information

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 that I put together for the report,
3 the third source of information that I
4 considered that I put together was
5 interviewing experts on rulemaking
6 comments who are both inside and
7 outside of government. And, of
8 course, a number of those experts are
9 here in the room today.

10 The aims of these interviews
11 were to learn more about agency
12 experiences, both in particular cases
13 and both in general as agencies have
14 gone about rulemaking over the years,
15 to learn about agency experiences and
16 to bring the insights of practitioners
17 and researchers who in the past have
18 been practitioners, to bring their
19 insights to bear on the issues that
20 are being addressed on the report.

21 So based on these three sources
22 of information, then, what the report
23 does is draw conclusions about the
24 state of practice in these areas and
25 our state of understanding of these

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 five areas.

3 And the report also proposes
4 benchmarks for how we would go about
5 assessing the impacts of the
6 recommendations if they were to
7 ultimately be carried out by agencies.

8 Now rather than, of course, talk
9 about the report's recommendations in
10 any detail, what I want to do is just
11 lay out broad brush the flavor, the
12 tenor of the results -- of the
13 recommendations that the report puts
14 forth, and that the committee then
15 came up with after receiving my
16 report.

17 I would characterize the
18 recommendations as a series of modest
19 steps, perhaps best practices, if you
20 will, that agencies can take to
21 enhance transparency and participation
22 in the commenting process without, I
23 think, significantly diminishing the
24 efficiency of rulemaking proceedings.
25 So the recommendations, to put it

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 differently, are grounded in the
3 notion that the commenting process, as
4 it's currently constituted, is not
5 broken, it's not in need of
6 fundamental repair.

7 Now, this is not to say that the
8 published findings, the empirical
9 research, the interviews, it's not to
10 say that any of these sources of data
11 didn't come across uncertainties in
12 current proceedings, concerns about
13 current practices, but just on balance
14 the sources collectively suggest that
15 the commenting process continues to
16 carry substantial utility both for
17 agencies and for parties who are
18 interested in rulemaking proceedings.
19 So that's -- that's one overall trait
20 of the recommendations.

21 Second, there is a focal point
22 of these recommendations on the
23 provision of information. The idea
24 here is that the provision of
25 information about various aspects of

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 public commenting would serve to
3 enhance the transparency of the
4 process. Now that, it would seem,
5 would go without saying.

6 But also, as I outline in the
7 report and I won't go into detail
8 here, I argue that information
9 provision. Some of these modest steps
10 have the potential to bring about
11 increases in participation and
12 increases in efficiency in rulemaking
13 as well. So there is a premium placed
14 in this report and these
15 recommendations on the provision of
16 information about commenting.

17 And then finally it's emerged
18 during the preparation of the report
19 that systematic empirical
20 investigation of the effects of the
21 recommendations is going to be a
22 natural way that these
23 recommendations, their efficacy, will
24 be evaluated.

25 So I would like to highlight the

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 importance, and here is where I put my
3 social scientist hat on in front of an
4 audience of lawyers, I'd like to
5 highlight the importance of empirical
6 studies of rulemaking in facilitating
7 the important procedural work that in
8 general is being done, not just in
9 this project, but, in general, the
10 important procedural work that's being
11 done by the Administrative Conference.

12 Social scientist's hat off.

13 Thank you.

14 (Applause.)

15 MR. FRISBY: Thank you very
16 much. I am going -- well, first of
17 all, I would like to thank the
18 Committee on Regulation as well as
19 Professor Balla. We did -- as a
20 committee, we reviewed his
21 recommendations over the course of
22 several meetings, and he was very kind
23 to accommodate us. It did entail
24 somewhat involved discussions. I'm
25 not sure if we would whomp them, but

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 we did have detailed discussions on
3 things such as reply comments, comment
4 periods.

5 Our recommendations incorporate
6 the substance of the professor's
7 report, but obviously do differ in
8 some significant ways.

9 Our first recommendation was
10 that in order to promote optimal
11 public participation, the e-rulemaking
12 project management office should
13 consider publishing a document
14 explaining what types of comments are
15 most beneficial in listing best
16 practices.

17 This came about out of the
18 discussion, particularly from the
19 practitioners, who observed that you
20 can always tell when comments are
21 being made by someone who is not
22 familiar with the process. Many times
23 these comments are poorly structured,
24 don't -- the authors clearly don't
25 understand agency rules and practices

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 and, as a result, the comments are
3 probably not given the internal
4 attention that they should be.

5 And one of the ways that we
6 might address this is having
7 guidelines or recommendations, some
8 sort of best practices document, that
9 potential -- potential commenters can
10 refer to. Instead of having --
11 putting each individual agency to that
12 test, we thought it would be better to
13 centralize that function in the
14 project management office and permit
15 agencies to supplement, as necessary.

16 Our second recommendation was,
17 quite frankly, somewhat contentious.
18 I think there is a general feeling
19 that there was a need for some
20 specified comment period, all other
21 things being equal, and that comment
22 period was at least 30 days. However,
23 we did recognize that the executive
24 order proposed 60 days. And, as a
25 result, what we did was propose that,

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 for significant regulatory actions,
3 there be a comment for -- a comment
4 period of at least 60 days.

5 There should be a comment period
6 of at least 60 days. For other
7 rulemakings, there should be a comment
8 of at least 30 days. But, obviously,
9 there could be shorter comment periods
10 when the agency thought necessary.

11 And this was -- these comment periods
12 were generally left to agency
13 discretion.

14 The third recommendation was
15 that agencies should adopt standard
16 policies of posting public comments to
17 the internet within a specified period
18 after submission. This came about --
19 again, it was interesting because you
20 had different experiences in different
21 agencies. For many of us, it was our
22 experience that comments are posted
23 almost immediately after filing, but
24 we found that for other agencies that
25 is not the case. And we thought that

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 all agencies should at least have
3 stated policies as to when the
4 comments should be posted, and, if
5 possible, the comment -- the comments,
6 those comments which are submitted in
7 paper format, should be scanned and
8 made available online as well.

9 The fourth recommendation went
10 to anonymous comments, and that
11 agencies should establish and publish
12 policies regarding the submission of
13 anonymous comments. This -- there is
14 a close tie in between this and the
15 e-rulemaking recommendations that we
16 discussed previously, because we
17 discovered that, particularly with
18 regard to e-rulemaking, agencies are
19 increasingly facing the phenomenon
20 when comments are filed, and they're
21 basically anonymous comments, and
22 how -- how should you address
23 comments.

24 And, quite frankly, again,
25 tying back to the e-rulemaking

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 situation, the agencies did -- are
3 running into problems with anonymous
4 comments that may contain improper
5 material. And so their question was
6 how to handle this. And we thought
7 that agencies should at least have
8 policies regarding how to handle
9 anonymous comments.

10 The fifth recommendation was
11 that agencies should adopt and publish
12 policies on late comments and apply
13 those comments consistently. There
14 are some agencies that just don't
15 accept late submissions. There are
16 other agencies which will accept a
17 late submission routinely. Others
18 will accept it subject to a request to
19 accept late-filed comments.

20 And we thought that, in general,
21 agencies should indicate whether or
22 not they will accept late submissions,
23 and how they will be treated. But,
24 clearly, the late submissions should
25 be disfavored.

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 The sixth recommendation was
3 that, where appropriate, agencies
4 should make use of reply comment
5 periods. I think there were a number
6 of us on the committee that felt that
7 reply comments do serve a purpose and
8 are beneficial. But there are
9 obviously a lot of agencies which
10 never -- never accepted or really
11 don't provide for the use of reply
12 comments.

13 So we were recommending that,
14 where appropriate, reply comments
15 should be permitted and that -- but we
16 did, as you will note, give the agency
17 some flexibility in terms of how to
18 structure the reply comment periods.

19 The seventh recommendation went
20 to the issue of staleness. And we
21 recommended that agencies should
22 closely monitor their rulemaking
23 documents and, where a change is
24 warranted, consider the use of
25 available mechanisms, such as

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 supplemental notices, in order to
3 refresh the record. We were not
4 supportive of the notion that comments
5 should automatically expire but really
6 encourage the agencies to refresh
7 records, as necessary.

8 And, finally, we propose that
9 agencies should include in their
10 statement of basis and purpose in the
11 Federal Register, to the extent
12 possible, the number of comments
13 received.

14 There was a lot of back and
15 forth on this, because, again, the
16 practice of different agencies are
17 different. And in some agencies, you
18 can easily go on their website and
19 simply count by number each -- say,
20 each comment has received a number.

21 So if you know of comment 1001,
22 that's that 1001 comments have been
23 filed. Other agencies you don't have
24 that situation.

25 And we did not -- we wanted to

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 make it as easy as possible for the
3 agency. We did not want to burden the
4 agency with having to make a special
5 filing with regard to the actual
6 number of comments, but we thought,
7 since the agencies were going to
8 include a statement of basis and
9 purpose in the Federal Register, that
10 should be included at that point.

11 Paul, this concludes my
12 description -- review of the
13 recommendations. So, Paul, thank you.
14 All yours.

15 CHAIRMAN VERKUIL: Thank you.
16 So let's do it this way. I thought
17 maybe -- a suggestion of one of our
18 sage Senior Fellows -- the general
19 discussion probably doesn't make a lot
20 of sense because everyone wants to
21 talk about specifics.

22 So let's do the amendments that
23 have been submitted in advance, and
24 then we'll turn to either general
25 discussion or further amendments, if

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 you have them. That might move things
3 along a little more efficiently. Is
4 that okay?

5 So manager's amendments. Can I
6 have a motion to accept the manager's
7 amendments?

8 PARTICIPANT: So moved.

9 CHAIRMAN VERKUIL: So moved.
10 Seconded?

11 PARTICIPANT: Second.

12 CHAIRMAN VERKUIL: Any
13 discussion?

14 All in favor, say aye.

15 (Chorus of ayes.)

16 CHAIRMAN VERKUIL: Opposed, nay.

17 (No response.)

18 CHAIRMAN VERKUIL: So the
19 manager's amendments carry. They're
20 part of the -- your question?

21 MR. BALLA: They have a chance
22 to raise a question on the manager's
23 amendments.

24 CHAIRMAN VERKUIL: Oh, I'm
25 sorry. I didn't see you, Warren. It

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 stands to reason. Then, please hold
3 the vote.

4 MR. BELMAR: Thank you. Warren
5 Belmar, Senior Fellow. I've got no
6 problem with all of the manager's
7 amendments. Just one suggestion on
8 the proposed amendment to item 7
9 where we're addressing the question of
10 a stale record.

11 Then I have a comment to the
12 conclusion that the record is stale or
13 the agency has concluded that it's
14 stale. We say they should consider
15 the use of available mechanisms. I
16 would make that more affirmative and
17 say "utilize available mechanisms,
18 such as..." rather than just consider
19 the use of once they've concluded it's
20 stale and action is required.

21 I would welcome further
22 discussion.

23 CHAIRMAN VERKUIL: Yes.

24 MR. HARTER: I'd like to
25 generalize -- I'm Phil Harter, public

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 Member. I would like to generalize on
3 Warren's comments on "consider." I
4 propose that "consider" is in almost
5 all of the paragraphs.

6 Why don't we just make the
7 recommendation that they ought to do
8 it instead of consider doing it? That
9 if we have confidence in what we're
10 recommending, let's do that.

11 So I would -- I would propose
12 striking "consider" throughout, passim
13 as it were.

14 CHAIRMAN VERKUIL: This is
15 exciting. We're getting manager's
16 amendments. Yes. Go ahead. Go
17 ahead.

18 MS. CHRISTIAN: Betty Jo
19 Christian, Senior Conference Fellow.
20 I completely disagree with Phil
21 Harter. We're talking about a lot of
22 agencies, and I don't think that we
23 are in a position to say categorically
24 that in every instance every agency
25 should adopt these recommendations.

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 There may be some in which it is not
3 appropriate.

4 And so I would vaguely favor
5 leaving the word "consider."
6 Generically, there may be one or two
7 instances in which we can be more
8 specific than that, but I think
9 otherwise we would really be stepping
10 outside our own area of expertise.

11 CHAIRMAN VERKUIL: Look, we
12 don't want to debate this too much.
13 So all in favor of "consider" being
14 removed, please say aye.

15 MR. BALLA: In this one place or
16 throughout?

17 PARTICIPANT: In one place or
18 throughout?

19 CHAIRMAN VERKUIL: No. No.
20 Just 7. I'm not going to go beyond 7.
21 That was -- that's yours, Warren,
22 right? That's your --

23 MR. BELMAR: Yeah. That was my
24 amendment. But my thought is that if
25 their conclusions are stale, then they

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 ought to do something about it.

3 CHAIRMAN VERKUIL: Right. Go
4 ahead, Judge.

5 JUDGE WALD: Okay. My only
6 question is -- that seems log -- my
7 only question is can a situation arise
8 where you've got a stale rulemaking
9 record, but the agency, there may be
10 circumstances where they don't even
11 want to proceed with that and the
12 whole inference of the rulemaking has
13 gone away anyway.

14 CHAIRMAN VERKUIL: That's a good
15 point.

16 MR. BALLA: That is a good
17 point. And as you were talking, I
18 thought about that. Because I know,
19 for instance, the FCC has put out a
20 notice dismissing a number of stale --
21 or proposing to dismiss a number of
22 stale items.

23 CHAIRMAN VERKUIL: All right.
24 So there is a negative pregnant in
25 here which is -- we hadn't thought

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 about which is if you take out
3 "consider," then you have to do it.

4 MS. FREEMAN: Well, if you want
5 to address Phil's concern and the
6 Judge's, and I guess with the Judge's
7 point you could say "becomes stale and
8 the matter is still pending" or "and
9 the matter is still active," then
10 remove -- you know what I mean?

11 So that it says, you know,
12 "agencies should closely monitor and,
13 where they believe the circumstances,
14 blah, blah, blah, become stale, and
15 the matter is still moving forward or
16 it's still something that's under
17 consideration, then they should take
18 action to remedy it," at least if you
19 want to deal with both problems.

20 CHAIRMAN VERKUIL: Is that okay?
21 Is that okay with you, Phil?

22 MR. HARTER: I don't have a
23 microphone. Okay.

24 I would suggest that, in meeting
25 Judge Wald's point, is that either use

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 one of these processes or terminate
3 the rulemaking so everybody knows it's
4 gone; otherwise, it's just hanging
5 around.

6 MR. BALLA: Well, by saying the
7 matter is still forward, then that
8 would be all right, wouldn't it?

9 JUDGE WALD: I think the word
10 "consider" captures all of those
11 options, and I would propose that we
12 just do an up or down on "consider"
13 and --

14 CHAIRMAN VERKUIL: I appreciate
15 that. And, frankly -- frankly, I like
16 the idea. It's one word.

17 So let's see. All in favor of
18 this -- of the amendment as it is, the
19 amendment to the amendment, including
20 the word "consider" in this amendment,
21 say aye.

22 (Chorus of ayes.)

23 CHAIRMAN VERKUIL: Opposed, nay.

24 MR. MORRISON: Paul, I don't
25 think it gives us a chance to vote on

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 the "consider" point. Why don't you
3 have an up or down vote.

4 CHAIRMAN VERKUIL: With
5 "consider" --

6 MR. MORRISON: We had to vote
7 against the amendment the way you put
8 it. Your prior suggestion, vote
9 either for "consider" or take it out
10 seems to be appropriate procedure.

11 CHAIRMAN VERKUIL: What would
12 you like, Alan?

13 MR. MORRISON: "Consider." Vote
14 up or down on "consider."

15 CHAIRMAN VERKUIL: That's what I
16 thought we did.

17 Okay. Let's vote up or down on
18 "consider." All in favor of retaining
19 "consider," say aye.

20 (Chorus of ayes.)

21 CHAIRMAN VERKUIL: Opposed, nay.

22 (Chorus of nays.)

23 CHAIRMAN VERKUIL: Okay. So,
24 now, all in favor of the manager's
25 amendment, including the word

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 "consider," say aye.

3 (Chorus of ayes.)

4 CHAIRMAN VERKUIL: Opposed, nay.

5 (No response.)

6 CHAIRMAN VERKUIL: Okay. Are we
7 clear? All right. So now we have the
8 manager's amendments accepted, and I
9 appreciate that.

10 Now let's go to the first
11 amendment, which is Ivan Fong's
12 amendment, on paragraph 2. Ivan?

13 MR. FONG: Thank you. So this
14 amendment does two things. It
15 reflects the Executive Order 13563
16 which establishes a general period of
17 60 days, or at least 60 days. And it
18 removes the distinction between
19 significant regulatory actions and
20 other actions.

21 And the reason, of course, is
22 that agencies are bound by the
23 executive order, and it puts the
24 agency in an untenable position. It,
25 in fact, I think, means that this

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 recommendation could not be
3 implemented since the agency would
4 have to conform to the executive
5 order.

6 The executive order is flexible.
7 It does say "to the extent feasible,
8 if permitted by law, each agency shall
9 afford the public a meaningful
10 opportunity to comment through the
11 internet on any proposed regulation
12 with a comment period that should
13 generally be at least 60 days."

14 As this recommendation
15 indicates, the purpose of the time
16 period is to balance the need for
17 sufficient time for the public to
18 submit comments with the desire to
19 avoid undue delay in the regulatory
20 process.

21 In my view, the executive order
22 strikes a good balance. It maintains
23 flexibility, as I indicated, by using
24 the words "generally," which is
25 captured in the recommendation, with

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 the phrase "as a general matter," and
3 finally, because the executive order
4 doesn't make the distinction between
5 significant and nonsignificant rules,
6 I think we should simply carry that
7 forward in this particular
8 recommendation. Thank you.

9 CHAIRMAN VERKUIL: Thank you.

10 So that's the amendment, and
11 that's to conform the time period to
12 the executive orders.

13 Would you like to respond,
14 Russell or Jon, on behalf of the
15 committee?

16 MR. FRISBY: Okay. We did
17 consider that and, quite frankly, we
18 were -- we were reacting more to the
19 notion that the actual -- the initial
20 recommendation was that there be no
21 specified time period. And we went
22 back and forth. I'm not sure that
23 there was a strong feeling either way,
24 but I think the general sense was that
25 the better practice should be 30 days

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 because there were a lot of rule --
3 there were a lot of rulemakings that
4 didn't require more than 30 days.
5 There were actually some which could
6 be shorter, but for more significant
7 ones.

8 I guess given the general
9 language in the executive order, we
10 thought we were still within the
11 bounds -- excuse me -- within the
12 bounds of the executive order, but we
13 didn't -- there wasn't an intense
14 discussion that surrounded that.

15 CHAIRMAN VERKUIL: What are the
16 facts on the ground, Steve?

17 MR. BALLA: A couple of facts on
18 the ground. One is that, among those
19 especially agency officials, who I
20 interviewed as part of the project,
21 there was a pretty widespread
22 sentiment that comment periods of
23 shorter than 60 days, shorter than 30
24 days in many instances are called for.
25 And, of course, agencies have the

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 ability to invoke exceptions and have
3 those shorter comment periods, but
4 that those kinds of comment periods
5 are not at all uncommon. They may be
6 more common than you would think.

7 CHAIRMAN VERKUIL: What do the
8 statistics show?

9 MR. BALLA: And I -- yeah. I
10 mean the average period -- the average
11 duration of a comment period is about
12 30 days, slightly more than that,
13 and --

14 CHAIRMAN VERKUIL: With
15 regard --

16 MR. BALLA: -- it varies across
17 agencies as well. Certain agencies,
18 like the Department of Transportation
19 and the Environmental Protection
20 Agency, it's pretty uncommon for them
21 to have comment periods less than 30
22 days; whereas, the SEC, two or
23 three-week comment periods are the
24 norm.

25 CHAIRMAN VERKUIL: And what

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 about the relationship to significant
3 rules?

4 MR. BALLA: Sure. The evidence
5 there that I have in the report is
6 pretty limited, but it does suggest
7 that -- that it is the case that
8 significant rules have longer comment
9 periods, on average, than -- than --
10 than other types of actions.

11 CHAIRMAN VERKUIL: Okay.

12 So, yeah, Susan.

13 MS. DUDLEY: Susan Dudley,
14 Public Member. One concern is that
15 Executive Orders 12866 and 13563 apply
16 to executive branch agencies and would
17 not apply to the ones that you thought
18 used shorter comment periods.

19 So one question for the lawyers,
20 which I am not, is, does this mean --
21 does this suggest that this only
22 applies to agencies that are subject
23 to the executive order?

24 MS. BANSAL: Yeah. I think we
25 would need to clarify that, that this

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 applies -- that this does not -- it's
3 not limited to the agencies of the
4 executive order.

5 CHAIRMAN VERKUIL: Okay. It's
6 clear that it applies to all agencies.
7 Go ahead, Jon.

8 MR. SIEGEL: Yeah. The
9 Conference's recommendations, when
10 they just say "agencies," generally
11 refer to all agencies, unlike the
12 executive orders which define agencies
13 as one of the executive agencies.

14 So that's one thing to consider
15 in whether you want to recommend 60
16 days for all rulemaking because the
17 independents are not subject to the
18 executive order on that issue.

19 MR. FONG: A couple of
20 responses. First, I don't -- we don't
21 take the position that the 60 days is
22 a straight jacket, as the following --
23 or the last sentence indicates. The
24 recommendation as a whole continues to
25 contemplate that shorter comment

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 periods may be appropriate. So I
3 don't want to leave you with the
4 misimpression that the amendment would
5 somehow set a floor.

6 I think the point is simply that
7 if uniformity is what is desired, then
8 we think the at least 60 days, as set
9 forth in the executive order, sets a
10 good benchmark.

11 The other point is, I forgot to
12 mention that some agencies -- and I'm
13 more familiar with the Coast Guard --
14 actually has a regulation that
15 requires comments to be open for 90
16 days. So there are trade-offs that
17 are made and, in some circumstances,
18 when, in fact, you want to encourage
19 members of the public to actively
20 participate where a longer period of
21 time is in the public interest.

22 So it ought to vary. I think
23 everybody accepts that there is not a
24 desire for one size fits all. So this
25 is meant to be a modest amendment

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 simply to reflect that agencies are
3 going to be, or at least the ones to
4 which the EEO is applied, are bound by
5 it.

6 CHAIRMAN VERKUIL: Any further
7 comments? We either have 60 across
8 the board recommended or we have 60
9 for significant and 30 for others with
10 some flexibility.

11 Any further comments on that?

12 Yeah.

13 JUDGE PLAGER: One question.
14 What do we do when the executive
15 orders are repealed? Would that
16 affect the recommendation? Unless I'm
17 mistaken, my experience at OIRA was
18 that as soon as a new administration
19 comes in they repeal the executive
20 orders that relate to regulatory
21 review. That could happen or not in
22 the relatively near future, and I
23 wonder if that affects the reading of
24 our recommendation.

25 CHAIRMAN VERKUIL: I just think

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 from the point of view of the
3 conference that we should be free to
4 make a judgment separate from. I
5 don't think we're bound by the
6 executive order, although 12866,
7 Judge, has been in force, you know,
8 for three administrations, so that
9 it's not necessarily going to be the
10 item that gets changed, assuming any
11 change is coming.

12 Rick Revesz? Dean Revesz.

13 MR. REVESZ: Rick Revesz, Public
14 Member. If we make reference to the
15 executive order, we should make
16 reference to statutes -- if we make
17 reference to the executive order, we
18 should make reference to statutes that
19 prescribe longer comment periods, as
20 is true in some of the environmental
21 statutes. There is no reason for
22 privilege of the executive order over
23 the statute.

24 So, you know, I wonder if there
25 is not a cleaner way to do this. If

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 we think that a certain way of setting
3 the time period is right, then we
4 should say that that's what it should
5 be unless inconsistent with -- with
6 the law or the statute or executive
7 order or if there are any other agency
8 regulations or any other legal
9 constraints on agencies.

10 Why don't we just make it more
11 generally and sweep everything under
12 there as opposed to privileging the
13 executive order. And that also takes
14 care of Judge Plager's point.

15 CHAIRMAN VERKUIL: Yeah, that's
16 a good thought. Phil.

17 Did we get that?

18 MR. HARTER: At least as I read
19 what this is, is that the parts on --
20 on the executive orders and everything
21 are really just explanatory, but isn't
22 what we're really talking about now is
23 as a general matter agencies should
24 use a comment period of at least 60
25 days? Isn't that what we're actually

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 recommending? So why don't we just
3 say that and we don't have to worry
4 about it?

5 PARTICIPANT: No, that's not --

6 MR. HARTER: I think it is.

7 PARTICIPANT: But that's the
8 amendment.

9 CHAIRMAN VERKUIL: But that's
10 the Ivan Fong amendment.

11 MR. HARTER: I mean, I think, at
12 least as I understand the amendment,
13 what its burden is is striking the
14 word "significant" and we'll just say
15 as a general matter it ought to be 60
16 days. The rest is explanatory as to
17 how we got there.

18 PARTICIPANT: Can we vote on
19 that?

20 CHAIRMAN VERKUIL: All right.
21 Jon?

22 MR. SIEGEL: Well, I think what
23 Phil is correctly pointing out is the
24 that reason the executive order is
25 mentioned in the committee's

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 recommendation is to assert this type
3 of reference for significant
4 regulatory action. We didn't want to
5 make up a whole new definition of
6 that, and that's why the committee, I
7 think, referred to the executive
8 order.

9 I think Phil is right, that if
10 the Fong amendment were to pass, then
11 the references to the executive orders
12 are not as necessary.

13 CHAIRMAN VERKUIL: And then you
14 have the Revesz point that we also
15 have statues. We don't want to get
16 into that. We don't want to search
17 throughout.

18 All right. Any other thoughts?
19 Can we -- assuming we could take -- I
20 think -- can we have the Revesz point?

21 MR. FONG: I would prefer to
22 stand on the amendment up or down.

23 CHAIRMAN VERKUIL: Okay. Let's
24 have an up or down vote on the Fong
25 amendment. Everyone understand it?

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 It's up there. All in favor, aye.

3 (No response.)

4 CHAIRMAN VERKUIL: All opposed?

5 (Chorus of nays.)

6 CHAIRMAN VERKUIL: Does everyone
7 understand what we just did?

8 MR. FONG: So now the question
9 is whether or not I would accept the
10 amendment.

11 CHAIRMAN VERKUIL: Yes.

12 MR. FONG: So can you restate
13 the amendment?

14 MR. HARTER: I would just
15 propose "as a general matter, agencies
16 should use," just getting rid of the
17 blue.

18 CHAIRMAN VERKUIL: You want to
19 forget the "significant"?

20 MR. HARTER: I would -- exactly.
21 So I would say, "as a general matter,
22 agencies should use a comment period
23 of at least 60 days, period."

24 CHAIRMAN VERKUIL: That's
25 essentially what we just voted on.

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 PARTICIPANTS: No, it's not.

3 MR. HARTER: I quit.

4 CHAIRMAN VERKUIL: Slightly
5 different.

6 MR. HARTER: Take it back.

7 MR. BALLA: But -- excuse me.
8 Can I just ask Phil, and then keeping
9 the last sentence?

10 MR. HARTER: Yes.

11 PARTICIPANTS: Yes.

12 CHAIRMAN VERKUIL: Oh, you are
13 going to keep the last sentence.

14 PARTICIPANTS: Yeah.

15 CHAIRMAN VERKUIL: How are you
16 going to -- you didn't say "for other
17 rulemaking."

18 PARTICIPANT: No.

19 MR. HARTER: No. No.

20 PARTICIPANT: It's the Fong
21 amendment without the clause in the
22 middle.

23 MR. FRISBY: So I could be -- I
24 can be clear, Phil, are you suggesting
25 that what we can say is, "as a general

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 matter, agencies should use a comment
3 period of at least 60 days"?

4 MR. HARTER: Then the last
5 sentence.

6 MR. FRISBY: Yeah, "when
7 agencies, in appropriate
8 circumstances..."

9 PARTICIPANT: Yes.

10 CHAIRMAN VERKUIL: Okay. We
11 could vote on that. All in favor of
12 that one?

13 (Chorus of ayes.)

14 CHAIRMAN VERKUIL: All opposed?

15 (Chorus of nays.)

16 CHAIRMAN VERKUIL: We're going
17 to have to do this again. I'm sorry.

18 MR. MICHAELS: Can we discuss
19 it?

20 CHAIRMAN VERKUIL: Of course,
21 especially our distinguished member
22 from the --

23 MR. MICHAELS: David Michaels, a
24 Government Member from OSHA. Only to
25 repeat a comment that was made before,

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 there are plenty of instances where --
3 oh, thank you.

4 There are plenty of instances
5 where there are minor rulemakings or
6 announcements of many agencies' better
7 work. It seems ridiculous to think
8 about 60 days.

9 PARTICIPANT: There is the last
10 sentence.

11 MR. MICHAELS: I know that, but
12 -- I know that, so -- but it makes
13 little sense then to say "in general"
14 because the majority of ones will not
15 be that way.

16 It really -- it's unusual to do
17 the 60 days rather than -- to make 60
18 days the rule is strange because the
19 significant regulatory action, of
20 course, you know, as we define it in
21 the executive order are the exception
22 rather than the rules of things we
23 were actually regulating.

24 CHAIRMAN VERKUIL: So you're in
25 favor of where we are?

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 MR. MICHAELS: The original.

3 Yeah, I thought of that.

4 CHAIRMAN VERKUIL: Any other
5 comments?

6 MR. PIERCE: Richard Pierce,
7 public member. I just wanted to agree
8 completely with that, and I'd want to
9 stick with the original. Because what
10 Steven Balla found is that 60 days is
11 not the norm. 30 days or less is the
12 norm.

13 And so we would be really
14 recommending a pretty dramatic change
15 if we were to say, "as a general
16 matter," agencies should do something
17 that agencies do not often do today.
18 I think we need to think real
19 carefully before we put that to
20 agencies.

21 MR. BALLA: Paul?

22 CHAIRMAN VERKUIL: Yes.

23 MR. BALLA: Yeah. The comment
24 periods lasting 60 days were about 20
25 percent of the notices and proposed

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 rules that I found.

3 CHAIRMAN VERKUIL: So this is
4 what I was thinking. So we don't have
5 the empirical data, but, on the other
6 hand, we have the power to do as we
7 see fit.

8 The member from OSHA is an
9 epidemiologist, you know. He's not a
10 lawyer.

11 MR. BALLA: Nonlawyers.

12 CHAIRMAN VERKUIL: Can we vote
13 or is there further comment? Oh, I'm
14 sorry.

15 MS. SFERRA-BONISTALLI: Esa
16 Sferra-Bonistalli, Coast Guard Liaison
17 Representative. I just have a
18 question, Professor, whether or not
19 your data was pre-Executive Order
20 13563 or post-Executive Order 13563.

21 MR. BALLA: So these were all
22 comment periods that occurred during
23 the calendar year 2010.

24 MS. SFERRA-BONISTALLI: Thank
25 you.

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 CHAIRMAN VERKUIL: Judge?

3 JUDGE WALD: Can I just suggest
4 that we keep the old, you know, what
5 we wish things would be, or this is a
6 policy we think is a good policy, but
7 drop a footnote which at least just
8 explains we're aware of executive
9 order 13, just stating what it says,
10 because I think --

11 CHAIRMAN VERKUIL: That would be
12 -- I think that's a very good idea.

13 JUDGE WALD: -- 13563 says,
14 blah, blah, blah, blah, blah.

15 CHAIRMAN VERKUIL: So that we're
16 not at least going into this thing --

17 MR. FRISBY: Footnote 3 already
18 references that.

19 JUDGE WALD: No. Okay.

20 CHAIRMAN VERKUIL: Footnote 3
21 picks it up? We're covered, Judge?

22 JUDGE WALD: Okay. All right.
23 But then I would --

24 MR. SIEGEL: I think we can
25 highlight the --

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 JUDGE WALD: -- I would just
3 keep it the way it was.

4 CHAIRMAN VERKUIL: Right, we can
5 highlight.

6 So can we vote on this now?
7 This now becomes -- let's see. This
8 is an amendment to an -- this is the
9 amendment, the Fong amendment.

10 All in favor of the Fong
11 amendment, which is the 60-day rule,
12 say aye.

13 (Chorus of ayes.)

14 CHAIRMAN VERKUIL: All opposed.

15 (Chorus of nays.)

16 CHAIRMAN VERKUIL: Now we're
17 back to our text. And we've got to
18 keep plugging because we've got other
19 amendments to do. And that's Alan
20 Morrison, next, on paragraph 4.

21 MR. MORRISON: Alan Morrison,
22 Senior Fellow. This recommendation
23 was prompted by a request from the
24 House committee. And the fourth
25 question was under what circumstances

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 should an agency be permitted to keep
3 comments confidential and/or
4 anonymous.

5 Our answer is item 4, the
6 e-rulemaking management, and so forth,
7 individual agencies should establish
8 and publish policies regarding the
9 submission of anonymous comments.

10 That doesn't seem to be very
11 responsive to the question that was
12 asked. And it seems to me that either
13 we should say nothing or we should say
14 what the comments should be about and
15 what -- what is anonymous, and at
16 least under what circumstances they
17 are anonymous, what things we're
18 worried about, and what's not.

19 This looks to me like a
20 nonrecommendation, and for that reason
21 I recommend that it be deleted. I
22 can't make a motion, but that's my
23 recommendation.

24 CHAIRMAN VERKUIL: If I might
25 respond. We'll assume your motion can

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 be made by someone in the room;
3 namely, the Chairman, if you need it.

4 MR. MORRISON: Thank you.

5 MR. FRISBY: If I might respond,
6 we -- I understand your concern, but
7 when we began discussing, we realized
8 that there were a variety of agencies
9 facing a variety of situations and
10 that we -- it would not be wise for us
11 to come up with a one-size-fits-all
12 rule but instead encourage agencies to
13 determine what was best under their
14 circumstances.

15 CHAIRMAN VERKUIL: Any
16 further -- further comments?

17 Could we vote, then, on the
18 Morrison -- Alan Morrison amendment?

19 MR. REVESZ: If it needs to be
20 moved, I so move it.

21 CHAIRMAN VERKUIL: Oh, thank
22 you. Thank you, Dean.

23 So we now are moving it. It's
24 seconded?

25 PARTICIPANT: Second.

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 CHAIRMAN VERKUIL: All in favor?

3 (Chorus of ayes.)

4 CHAIRMAN VERKUIL: All opposed?

5 (Chorus of nays.)

6 CHAIRMAN VERKUIL: Okay. The
7 nays have it. We're on to Ivan,
8 paragraph 8.

9 MR. FONG: Thank you.

10 Paragraph 8, the amendment would add
11 the phrase "or the number of
12 commenters." The simple purpose here
13 is to reflect what occasionally occurs
14 which is that a comment is written on
15 behalf of a number of commenters.

16 We'll get comments from a trade
17 association, for example, that may
18 represent many, many members, and
19 there are appropriate circumstances in
20 which the agency would like to reflect
21 not simply the number of comments
22 received but also, or in the
23 alternative, the number of commenters.

24 Flexibility, I think, is
25 retained.

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 CHAIRMAN VERKUIL: Thank you.

3 Comments? Mr. Pierce.

4 MR. PIERCE: I have a problem
5 with it. I have prepared a lot of
6 comments for a lot of trade
7 associations that you cannot attribute
8 to all members of a trade association
9 everything in the comments.

10 That process alone is far more
11 of a massive negotiation, often taking
12 several days, with lots of compromises
13 and lots of dissenters and all. And
14 if it is a trade association with 500
15 members, I guarantee you not all 500
16 have agreed on all the points made in
17 the comment submitted on behalf of the
18 association.

19 Associations have rules about
20 how many members it takes to support
21 a -- a point in the comment.

22 CHAIRMAN VERKUIL: Further
23 comments.

24 MR. STRAUSS: This is a comment
25 to the recommendation as a whole which

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 seems to me more directed at academic
3 study than at agency practice.

4 One of the tendencies that it
5 might have, as directed at agency
6 practice, is to suggest that we are,
7 in effect, endorsing a plebiscitarian
8 view of rulemaking, that the more
9 comments are received, the more
10 important.

11 In the last recommendation that
12 we considered, we said, oh, agencies
13 could consolidate the thousands of
14 electronic comments that they might
15 receive having the same text into one.
16 Well, does that get counted as one?
17 Does that get counted as 65,233? This
18 seems to me to be, in general, a
19 recommendation better not made.

20 CHAIRMAN VERKUIL: So this
21 slippery slope problem in number of
22 comments has been -- do you care to
23 address -- Ivan, have you any further
24 comments?

25 Sallyanne, do you want to get...

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 MS. PAYTON: This goes to my
3 gaming the system comment from before.
4 If agencies start counting how many
5 comments came in on a particular
6 subject, then people will arrange to
7 submit multiple thousands of comments.

8 We find that on every website,
9 the egov -- the whitehouse.gov had the
10 same problem; they game the system.
11 If you say you're going to vote by
12 quantity, they'll produce quantity.

13 CHAIRMAN VERKUIL: Further
14 thoughts?

15 MR. MAY: Can I ask a question?

16 CHAIRMAN VERKUIL: Yes. One
17 second.

18 MS. FREEMAN: Jody Freeman
19 again. I noticed, and I'm curious to
20 know if people from EPA could maybe
21 speak to this, is on prominent
22 rulemakings that really are very
23 highly politically and economically
24 salient, when you have thousands, and,
25 indeed, sometimes into the hundreds of

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 thousands of comments, which I know
3 you have, it can be very, very helpful
4 to see the EK breakdown, which they do
5 provide, of numbers, and they actually
6 give some nuance and, on important
7 rules, they actually say "and this
8 many appear to be duplicative and this
9 many appear to be real," and it's
10 actually, frankly, I think, very
11 helpful.

12 Now, maybe that's an academic
13 talking, but I'd rather know than not
14 know. I'm not sure it gratifies a
15 plebiscitary -- sorry, I don't know
16 what -- Peter, what you said. I don't
17 know that it suggests that we ought to
18 pay particular attention in terms of
19 what the outcome ought to be, but in
20 terms of knowing the information, I
21 think it would be quite useful.

22 CHAIRMAN VERKUIL: Carol Ann,
23 did you want to respond on behalf of
24 the EPA --

25 MS. SICILIANO: Yes.

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 CHAIRMAN VERKUIL: -- quickly?

3 And then we'll go to Randy, and then
4 we'll go to Don.

5 MS. SICILIANO: Carol Ann
6 Siciliano from EPA. EPA is
7 comfortable with this amendment
8 because it is something we routinely
9 do and that our decisionmakers find
10 helpful.

11 CHAIRMAN VERKUIL: Randy, do you
12 still have a question?

13 MR. MAY: Randy May. I'm
14 sympathetic to Peter's remark because
15 increasingly, at least at the FCC, we
16 see that there seems to be a race to
17 the top to see how many comments can
18 be submitted, and it's counted
19 regularly, and it's in the tens of
20 thousands, so...

21 But in order to address your
22 concern, I think you were suggesting
23 that you would remove perhaps all --
24 it's not just the amendment, but
25 it's --

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 MR. STRAUSS: All of 8.

3 MR. MAY: It's all of 8. And
4 I'm sympathetic to that. But if we
5 don't do that, this is -- if we didn't
6 do that, I would think this would be a
7 place where we could at least soften
8 it by saying that agencies should
9 consider --

10 (Laughter.)

11 MR. MAY: We have "consider" in
12 other places. And this would be
13 appropriate here because, as it is,
14 it's just going to encourage, I think,
15 people to file in the thousands.

16 CHAIRMAN VERKUIL: Let's see.
17 Dan -- Don Elliott, and then...

18 MR. DON ELLIOTT: Don Elliott,
19 Senior Fellow. I agree with Jody and
20 Carol Ann that the EPA practice is
21 sometimes very useful in identifying
22 the number of comments that have
23 raised a particular point, but I also
24 agree with Peter.

25 And I would just point out that

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 I don't read the language of number 8
3 as indicating that agencies should
4 mention the number of comments
5 received on a particular issue but
6 rather the total number of comments
7 that are received in the rulemaking
8 proceeding.

9 And I don't see why that's a
10 particularly useful or an important
11 number. So I guess I would favor
12 taking the whole thing out and leaving
13 it to agency discretion. EPA can
14 continue to do what it does, but I'm
15 not convinced that essentially
16 mandating that every agency say,
17 "overall, we received 300 comments in
18 this proceeding and we received 8,000
19 comments in that proceeding" is
20 creating useful information as opposed
21 to indicating how many comments may
22 have been received on a particular
23 point.

24 CHAIRMAN VERKUIL: Let's see.
25 Neil, and then Warren. Warren, you

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 have the mike. Go ahead.

3 MR. BELMAR: I was just going to
4 agree. If we're not addressing what
5 the comments address, then there's
6 really no value in knowing how many
7 comments were made. And in some of
8 the complex rulemakings, there are so
9 many different issues, that knowing
10 that 12,000 people commented doesn't
11 tell me how many were in support of
12 this issue or were against that issue.

13 So I don't see the benefit to be
14 gained by, certainly, making it
15 mandatory.

16 CHAIRMAN VERKUIL: Neil.

17 MR. EISNER: Neil Eisner, Senior
18 Fellow. I also agree with concerns
19 that Peter and others have raised. I
20 would point out it's not that easy,
21 when there are massive numbers of
22 comments, to give you a total. Even
23 though you think you have a total in
24 the computer, many comments come in
25 twice, many people bring them in in

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 hard copy even though they've already
3 submitted them electronically, so you
4 might have meaningless numbers if you
5 didn't go through the docket very
6 carefully. When they're smaller
7 numbers, agencies will sometimes give
8 you totals for particular issues.

9 MR. CUELLAR: This is Tino
10 Cuellar from the Council. It's been a
11 very interesting discussion,
12 particularly because it touches on
13 some very big issues, you know, what
14 Peter is bringing up about whether
15 this is a plebiscitary view of
16 rulemaking.

17 My own view, for what it's
18 worth, is that this is a very simple
19 recommendation that doesn't set a very
20 high bar. All it's doing is it's
21 saying to the agency, essentially, if
22 you're holding yourself out to the
23 public as meeting your responsibility
24 of considering every comment -- and,
25 you know, query whether "considering"

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 means read every comment -- we
3 addressed that a little bit in the
4 e-rulemaking recommendation -- you
5 should be able to tell the public how
6 many.

7 The question of how important
8 that information is is really, I
9 think, not so much the issue, because
10 part of what we're trying to create
11 here, presumably, is a means for
12 researchers to do something with that
13 information. And I think the concerns
14 that Neil brought up were addressed by
15 the "to the extent practicable"
16 language.

17 So I think the issue Peter
18 brought up is a very big one, but this
19 is actually not something that
20 endorses that view. It's simply
21 making some public information
22 available that might be useful to
23 researchers.

24 CHAIRMAN VERKUIL: Okay. Right
25 over here.

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 MR. MICHAELS: David Michaels
3 from OSHA. I'm going to put my hat on
4 as a researcher. I think just a
5 number is probably not useful -- not
6 useful information, except for the
7 crudest research. And if we want to
8 encourage sort of an indirect look,
9 maybe we could say something not much
10 less vague, but provide, to the extent
11 practicable, a numerical discussion of
12 the comments received; and, therefore,
13 we can do it --

14 Well, that's the way you do it
15 in general. You say we got this many
16 comments, and more or less this many
17 said this thing and this many said
18 that, this many came from public
19 citizens, this many came from trade
20 associations, in general, without
21 having to be -- dealing with Neil's
22 point -- not having to be very
23 specific and say numerical
24 description.

25 MR. FRISBY: If I might reply.

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 I am not sure the committee felt
3 strongly on this point. And I think,
4 quite frankly, to the extent we
5 recognize that it might be good for
6 researchers, but we did not want to
7 impose any undue burdens on the
8 agency, which is why we just left it
9 at number of comments, and then the
10 agencies can do whatever, structure it
11 however. But we were really concerned
12 about not putting another -- more
13 burden on an agency for something that
14 really didn't mean that much outside
15 of a research environment.

16 But it really -- because I agree
17 with Peter, the agency should not make
18 its decision based on how many people
19 file on one side or another, because
20 that's too easy to manipulate these
21 days.

22 CHAIRMAN VERKUIL: One more with
23 Sallyann Payton, Professor, and then
24 we can vote.

25 MS. PAYTON: It seems to me this

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 is a perfect example -- a perfect
3 opportunity to do another study, which
4 is, how can ACUS --

5 CHAIRMAN VERKUIL: That's why
6 we're here.

7 MS. PAYTON: -- how can ACUS
8 facilitate empirical research into the
9 rulemaking process? This, I think, is
10 a dog, but, you know --

11 (Laughter.)

12 MS. PAYTON: -- there may be
13 something we can do that would
14 actually be useful to people doing
15 quantitative and qualitative research.
16 We ought to think about that.

17 So why don't we drop this and --
18 and put it on the agenda to be
19 considered as a problem later.

20 CHAIRMAN VERKUIL: Well, I don't
21 think it's fair to our -- the General
22 Counsel of DHS who made this motion to
23 drop it. So let's vote on it and see
24 where it comes out. I think we
25 understand it.

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 PARTICIPANT: What are we voting
3 on?

4 MR. PIERCE: There are two
5 different issues out there, the
6 proposed change and dropping all of 8.
7 Most of the commenters have suggested
8 dropping all of 8.

9 CHAIRMAN VERKUIL: Ivan, it's
10 your -- it's still your amendment,
11 right?

12 MR. FONG: Well, I have a narrow
13 amendment, and then Peter, I think,
14 has a broader amendment.

15 CHAIRMAN VERKUIL: Right. And
16 which would you prefer?

17 MR. FONG: Well, I have mine, so
18 if we could vote on that, and then
19 move to the broader amendment.

20 CHAIRMAN VERKUIL: Okay. So we
21 are going to vote on adding -- or the
22 number of commenters.

23 JUDGE WALD: That's an either/or
24 basis.

25 CHAIRMAN VERKUIL: Right.

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 JUDGE WALD: They can do -- the
3 agency can either do a number --

4 PARTICIPANT: Microphone,
5 please.

6 CHAIRMAN VERKUIL: Oh, I don't
7 think it's either/or.

8 MR. FRISBY: It's left up
9 to -- it's -- as I understand it, it's
10 left up to the agency's discretion as
11 to whether they want to do the number
12 of comments --

13 MS. BANSAL: Yeah, they can do
14 it or --

15 MR. FRISBY: Or not either/or.
16 They could do, as I read it, the
17 number of comments --

18 MS. BANSAL: Or both.

19 MR. FRISBY: -- or both. They
20 could do whatever.

21 MS. BANSAL: Maybe we should --
22 yeah, we should vote on that. Of
23 course, if we delete that, we don't
24 need to.

25 PARTICIPANT: That's right.

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 CHAIRMAN VERKUIL: All right.

3 Is that okay?

4 MR. FONG: Yes. Absolutely.

5 CHAIRMAN VERKUIL: So let's vote
6 on deleting paragraph 8 first, and
7 then we will come back. Is that okay?

8 MR. FONG: Yes. Original
9 paragraph 8, as proposed.

10 CHAIRMAN VERKUIL: The original
11 paragraph 8, as proposed, the
12 amendment is to delete it.

13 PARTICIPANT: Second.

14 CHAIRMAN VERKUIL: Second. Can
15 we say all in favor?

16 (Chorus of ayes.)

17 CHAIRMAN VERKUIL: All opposed?

18 (Chorus of nays.)

19 CHAIRMAN VERKUIL: Can you --
20 could you tell? Let's do a show of
21 hands. All in favor of deleting?

22 (Hands raised.)

23 CHAIRMAN VERKUIL: 26 in favor?

24 PARTICIPANT: 23.

25 CHAIRMAN VERKUIL: I'm sorry.

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 23.

3 All opposed.

4 (Hands raised.)

5 CHAIRMAN VERKUIL: 20.

6 What are the rest of you doing?

7 This is so interesting. Should I

8 say --

9 PARTICIPANT: Most of us don't
10 have a vote.

11 CHAIRMAN VERKUIL: That's right.
12 You're honorable people. Okay. So
13 we've deleted paragraph 8. We're done
14 with paragraph 8.

15 There is a hand in the back.
16 Mort?

17 MR. ROSENBERG: Yes. I wonder
18 if I might -- in reading these, I
19 wonder if we could just look at it
20 for -- recommendation 6.

21 CHAIRMAN VERKUIL: Let's say --
22 here's what we're going to do. By the
23 way, we've had 60 minutes. Let's do
24 this. Let's take another fifteen. We
25 have got Justice Breyer coming, and I

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 don't plan on keeping him waiting, and
3 I do want to get this thing done, if
4 we can. So let's say we'll open it up
5 for a little more for fifteen minutes
6 and then hopefully we can vote on the
7 whole thing.

8 Mort.

9 MR. ROSENBERG: Mort Rosenberg.
10 The reason for --

11 CHAIRMAN VERKUIL: Oh, we need
12 unanimous consent.

13 PARTICIPANTS: Yes.

14 CHAIRMAN VERKUIL: Yes. Thank
15 you.

16 MR. ROSENBERG: The reason for
17 the subcommittee recommendation on
18 reply comments stemmed from the --
19 some experience that there were
20 documented information dumps not
21 beyond the 60 to 30 days in the
22 comment period but right near the end
23 such that information, data, comments,
24 or whatever were influential,
25 important, but it was too late to

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 comment on, and that was one of the
3 reasons for it.

4 And I thought that, looking at
5 footnote 6, 35 years ago we pinpointed
6 that, saying that where the comments
7 present new and important issues or a
8 series of conflicts of data -- and I
9 think that may be -- that quote should
10 be put in the beginning of 6 and then
11 "and where otherwise appropriate."

12 In other words, pinpoint what
13 the real problem was, which is there
14 sometimes are strategic dumps late in
15 the comment period that aren't
16 answered and the no reply period is
17 recommended by the --

18 MR. FRISBY: Thank you. If I
19 might respond, Mort. That was part of
20 the problem, but also there was the
21 notion, particularly by the
22 practitioners, that common practice
23 for most agencies is to file the
24 afternoon that comments are due. So
25 that -- and that was one of the things

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 we probably would discuss in -- with
3 regard to recommendation 1 in terms of
4 timing of filing.

5 And, therefore, in most major
6 proceedings these days, you're not
7 going to get the comments in until the
8 last day; and, therefore, unless you
9 have a reply period, there is really
10 no opportunity to reply to any of the
11 information.

12 So, Mort, it really goes beyond
13 what you're talking about.

14 CHAIRMAN VERKUIL: Okay. Any
15 further questions or comments?

16 MR. ROSE: Jonathan Rose, Senior
17 Fellow. I would just reiterate the
18 comments I made before that were said
19 to apply to this rather than the prior
20 recommendation, that some method be
21 developed for determining how to
22 measure these time periods, when
23 things start, when things end,
24 posting. There are problems with spam
25 filters, some of which stop things

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 before they even get to the
3 recipients.

4 These problems, as I said, have
5 arisen with eCommerce, and they're
6 just going to have to figure out, if
7 they're going apply these periods with
8 any kind of formality, when they start
9 and stop running.

10 MR. FRISBY: That's something we
11 can look at. We addressed -- we
12 addressed that in part when we said
13 "after all comments have been posted,"
14 which was an attempt to address the
15 problem that you're talking about.

16 CHAIRMAN VERKUIL: Any further
17 comments. Ron?

18 MR. LEVIN: I was just
19 wondering -- Ron Levin, Public Member.
20 I was just wondering if this
21 recommendation, this part of it, ought
22 to apply not just to comments that
23 come at the end but also studies that
24 the agency may generate and come in at
25 the end too late for people to comment

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 during the initial comment period.

3 So you might broaden it, not
4 just submit comments, but other items
5 added to the rulemaking record too
6 late for effective response during the
7 initial comment period.

8 CHAIRMAN VERKUIL: Is that okay?

9 MR. BALLA: That's fine. That
10 was not an issue we discussed, but I
11 think it's a good idea.

12 CHAIRMAN VERKUIL: Can we add
13 that, Ivan.

14 MS. METZGER: This is Gillian
15 Metzger, Public Member. I am just
16 concerned, in those instances, will we
17 be considering that to be in reply
18 comment or there would never have been
19 any initial comments, right?

20 PARTICIPANT: Right.

21 MS. METZGER: I'm not -- I'm
22 just not sure that we -- I would like
23 to talk a little bit more about
24 whether or not that's appropriate in
25 this -- in number 6, at least, before

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 we went there.

3 MR. FRISBY: Well, what we said,
4 if you look, it said, "make use of
5 reply comment periods or other
6 opportunities for receiving public
7 input on submitted comments." And,
8 theoretically, that would fall within
9 the category of other opportunities
10 for input. Now --

11 CHAIRMAN VERKUIL: You could say
12 "submitted comments or studies"?

13 MR. FRISBY: "Or studies."

14 CHAIRMAN VERKUIL: Okay. One
15 more question.

16 MS. ZIEVE: If the agency is
17 putting studies in at the end, then
18 the agency should extend the comment
19 period but not use a reply period for
20 people to make comments on really
21 what's the agency's initial thinking.
22 I think that's a really different
23 category than it's implying to other
24 people's comments and it sort of
25 suggests a bad practice.

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 MR. STRAUSS: I think that's
3 right, and I think that issue was, to
4 some degree, dealt with in the
5 previous recommendation.

6 CHAIRMAN VERKUIL: Right.

7 MR. STRAUSS: But nonetheless,
8 not only comments come in at the last
9 moment, so do studies from the
10 agencies, from the Chamber of
11 Commerce, let's say, so that the
12 addition of receiving public input on
13 submitted comments or studies -- on
14 submitted comments or studies -- "on
15 submitted comments or studies" seems
16 to me to be a sample.

17 CHAIRMAN VERKUIL: Okay. We
18 have -- Dawn?

19 MS. SMALLS: Dawn Smalls.

20 CHAIRMAN VERKUIL: Wait until
21 you get your --

22 MS. SMALLS: Dawn Smalls,
23 Department of Health and Human
24 Services. I would just ask the
25 question of what studies mean.

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 Scientific studies? I mean, "studies
3 by the agency," I don't know what that
4 means.

5 If we're -- if that's going to
6 be inserted into that paragraph, how
7 we would make a judgment about -- I
8 mean, a lot of issues that we cover
9 are, you know, constantly evolving
10 with new information all the time. I
11 mean, what is that? During a comment
12 period, a new study on a critical
13 issue, a substantive issue on which
14 the rulemaking is based, what kind
15 of study, a scientific study, a social
16 study?

17 PARTICIPANT: A relevant study.

18 CHAIRMAN VERKUIL: All right. I
19 you convinced me. I don't know about
20 the rest of you.

21 Quickly, let's see if we can do
22 this. Yeah.

23 MS. McFADDEN: Elizabeth
24 McFadden, Department of Education,
25 Government Member. Wouldn't a study

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 be a comment?

3 CHAIRMAN VERKUIL: That's what I
4 was thinking.

5 PARTICIPANT: Yes.

6 MR. FRISBY: Exactly.

7 MS. McFADDEN: So I don't see --
8 I don't see why we would have to
9 specify that.

10 CHAIRMAN VERKUIL: Can you say
11 that?

12 MR. FRISBY: I don't know. I
13 thought that -- I had heard that
14 there's some agencies that put studies
15 in the record at some point, and I
16 thought we were addressing that issue.

17 MR. EISNER: Neil Eisner, Senior
18 Fellow. Again, we're -- we're
19 confusing different concepts here. I
20 agree, a study that is part of some
21 public person's comments is a public
22 comment. Agencies will have studies
23 that are done for them that may be
24 done before the end of the comment
25 period. And I agree with the comment

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 that was made earlier, that should be
3 separate from a reply comment period.
4 That should be handled as an extended
5 comment period or some other way.

6 Reply comment periods are not
7 just for the late-filed comments.
8 They're the end point -- and at least
9 that's the way I think most agencies
10 use them. They're made to reply to
11 anything that anybody said at any time
12 during the comment period because you
13 think they're wrong. It doesn't
14 matter whether it came on the last day
15 or the middle of the comment period.

16 CHAIRMAN VERKUIL: All right. I
17 don't think there is a motion, is
18 there? So let's just leave it and
19 vote on -- we're going to vote on the
20 whole thing. I think we're ready for
21 that. So would someone move -- you
22 don't have to. It's --

23 PARTICIPANT: So moved.

24 PARTICIPANT: What's the
25 amendment?

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 PARTICIPANT: It's the whole
3 recommendation.

4 CHAIRMAN VERKUIL: The whole
5 recommendation.

6 PARTICIPANT: So moved.

7 CHAIRMAN VERKUIL: Moved and
8 seconded. Ready to vote? All in
9 favor?

10 (Chorus of ayes.)

11 CHAIRMAN VERKUIL: Opposed?

12 (No response.)

13 CHAIRMAN VERKUIL: Thank you
14 very much. Okay. So --

15 (Applause.)

16 CHAIRMAN VERKUIL: Mike, could
17 you see, is the Justice there? No?
18 All right. So, Kathy, could you and
19 Shawne come up and do your little
20 thing? I don't want you to -- I want
21 you to stay seated, except at the
22 moment when we have to stand, right?

23 And we have a few minutes.

24 Perfect timing.

25 MS. MCGIBBON: All right. We'll

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 go ahead and get started. I guess I'm
3 Justice Breyer's warm-up act, so
4 I'll -- I'll try and keep it lively.
5 Good afternoon, friends and family of
6 the Administrative Conference.

7 Well, we've got big things going
8 on at the Conference. And I'm not
9 just talking about our recommendations
10 and our projects, I'm talking about
11 our staff too. Is Emily around?
12 Emily.

13 Well, this is one of those
14 asking for forgiveness rather than
15 permission. And I didn't ask Emily if
16 it was okay to say this. She got
17 married two weeks ago, and she was
18 back at the Conference from her
19 honeymoon just two days ago, so that's
20 dedication for you.

21 Congratulations, Emily.

22 (Applause.)

23 MS. MCGIBBON: And Mike
24 McCarthy, our very calm, cool,
25 collected Executive Director. If he

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 appears to be a little sweaty today,
3 it's because his wife is due to
4 deliver their third child any minute.
5 So maybe later we can debate how Mike
6 can survive in a household of four
7 women.

8 So congratulations, Mike.

9 (Applause.)

10 MS. MCGIBBON: Well, now to the
11 matter at hand.

12 Paul gave you a brief
13 description earlier in his opening
14 remarks about our model agency
15 project. He said that the concept was
16 hatched by our fantastic member from
17 the Department of Treasury, George
18 Madison. And the idea is to identify
19 all of the practices and procedures
20 that make up a model 21st Century
21 agency and share those practices
22 government-wide.

23 The Conference is uniquely
24 situated to help both new and
25 established agencies build better

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 organizations in this still new
3 century.

4 So to some extent our
5 recommendations and other activities
6 do much the same thing. We have been
7 expanding our thinking about this and
8 realize that we can do much more. The
9 centerpiece of our effort will be a
10 new website which we hope will be
11 called bestpractices.gov. And we can
12 give our own Scott Rafferty credit for
13 coming up with that name.

14 So I'm going to give you my best
15 Vanna White impression here. So this,
16 not that, but that, this is the look
17 of our new website. Our web
18 developers and, especially our own
19 fabulous Communications Director, Kathy
20 Kyle have come up with this design.
21 It's going to be a completely
22 interactive website. And I'm hoping
23 that Kathy can sort of point you
24 through some of the features.

25 MS. KYLE: Sure. Well,

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 basically, the site is dedicated to
3 collaboration. We believe in the
4 power of really -- I am very loud, so
5 I don't think that -- everyone knows
6 when I'm in the office.

7 We believe in the power of good
8 ideas and in technology and
9 collaboration, the value of
10 collaboration at ACUS. I never worked
11 at a more collaborative or collegial
12 place. And I think you can all attest
13 to that. Working on our committees,
14 you see that every day. And that's
15 what brings us all together.

16 And so that's the idea behind
17 this website. We want to engage
18 people and we want to create a
19 conversation, a two-way conversation,
20 between you, our members, people who
21 have know-how, and people who need it,
22 people who want answers, and so that's
23 the idea behind this.

24 And so along the top, along the
25 navigation bar we have tabs for a best

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 practice forum, for ACUS
3 recommendations. Obviously, we have a
4 lot to share and we want to share that
5 information with the federal
6 government and with our stakeholders.

7 And then we have success
8 stories, and that's where you come in,
9 and where other federal agencies and
10 stakeholders come in.

11 Did we have the Justice?

12 MS. MCGIBBON: No. I was going
13 to get a mike for you.

14 MS. KYLE: Oh, okay.

15 And then we also have the new
16 agencies lessons learned, and that's
17 where we have the newly established
18 agencies or reestablished agencies
19 where we have their case studies and
20 that's where they come in.

21 And then we have resources, and
22 that's where we will GAO studies or
23 URLs for different events or just --
24 that's where we kind of want to house
25 like a library for information for --

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 for those who visit the site.

3 And then we're going to have a
4 social media aspect as well.

5 Everything we do we try to ensure that
6 we're engaging people on different
7 levels because we understand -- thank
8 you -- we understand that people
9 communicate on different levels. And
10 so we're going to try to reach out to
11 people as best as we can in different
12 ways.

13 And then we're going to have,
14 I'm not sure you can read this, but
15 it's going to be called the know-how
16 blog. And like I said, we're very
17 collegial. We work together as best
18 as we can at ACUS. And Harry Seidman,
19 our Administrative Director, came up
20 with that name. So "from need-to-know
21 to know-how," that's going to be the
22 name of our blog.

23 And where you come in is -- just
24 an example of one of our two-way
25 communication pieces is we're going to

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 list a topic and ask you to serve as
3 guest bloggers and share your
4 knowledge with our stakeholder
5 community.

6 Can I see the next slide,
7 please. Okay. So just to take you
8 through -- this is just -- this is a
9 mockup that I came up with. We
10 haven't sent this to the developers
11 yet, and we're waiting for them for
12 our inside pages.

13 So we're going to leverage our
14 Idea Scale applications where you
15 submit an idea, people vote on it, and
16 then we idea it, and so we will have
17 this crowd sourcing element to the
18 website, and then we'll have a "click
19 here" where you can just submit ideas.
20 We'll have a bit of a forum, if you
21 will, and then we'll have a basic just
22 submit ideas via e-mail. I mean,
23 everyone communicates in different
24 ways, and so that's that piece.

25 And then we'll have a "share

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 your expertise" where people can
3 submit just on a comment basis, and
4 we'll have an ongoing moderated blog
5 type of an element.

6 And then the last piece -- and
7 Shawne will probably talk about this a
8 little bit more, I'm guessing -- is
9 just, we're going to highlight via
10 case studies the newly established or
11 reorganized agencies. And Paul spoke
12 about that earlier as well.

13 And just at a glance we want to
14 highlight different agencies. And
15 that's, I think, basically it.

16 MS. MCGIBBON: Thanks, Kathy.
17 So Kathy did refer to learning from
18 newly established and reorganized
19 agencies. We're going to select a
20 handful of agencies to study on an
21 in-depth basis to figure out what it
22 is that they had problems with when
23 they started up.

24 When they had to write their
25 first regulation, for instance, what

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 was that like? What sort of problems
3 did they encounter? What sort of
4 problems did they have with staffing?

5 We're also going to be surveying
6 each of you, our members, to find out
7 what your best practices are, the ones
8 that you want to share with other
9 agencies, the ones that are adaptable.

10 And finally, to encourage a
11 little friendly competition among
12 agencies, we're going to offer an
13 award at each December plenary once a
14 year for the best best practice. And
15 that's going to be judged on whether
16 it's innovative, whether it creates
17 greater efficiency, whether it saves
18 government and taxpayer money, whether
19 it can be duplicated at other
20 agencies, and whether it enhances
21 transparency.

22 Now, immediately prior to this
23 plenary, the Council agreed that we
24 would name the award after the father
25 of administrative law and long-term

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 and founding Council Member, Walter
3 Gellhorn. So this award, we hope,
4 will be a tribute to Walter Gellhorn
5 and an honor for the agency receiving
6 it.

7 So that's in a nutshell what we
8 have. We're looking forward to it,
9 and it's coming your way soon. Thank
10 you.

11 (Applause.)

12 CHAIRMAN VERKUIL: Have you seen
13 your husband?

14 MRS. BREYER: On his way.

15 CHAIRMAN VERKUIL: On his way.

16 So we have half the Breyer family
17 here, we're very lucky to get that
18 far, but we won't ask you to comment
19 on his comments.

20 So just a word. I know Peter --
21 I meant to tell Peter before. The
22 Council voted today to name the award,
23 which is the best practices award,
24 given on an annual basis in December,
25 after Walter Gellhorn. And we're

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 going to do a more formal way, and
3 Tommy Rogers, one of his students, and
4 Peter, his colleague, inherited his
5 chair at Columbia and a friend of mine
6 and others, many in this room, and a
7 grand figure who really started the
8 Administrative Conference and has been
9 with it all of these years. So it's
10 quite, I think, appropriate, and we'll
11 do that. But really what we need from
12 you is getting good ideas that we can
13 properly honor.

14 It looks like there is activity.

15 PARTICIPANT: Yes. He's here.

16 (Applause.)

17 JUSTICE BREYER: You're supposed
18 to watch where you're going when you
19 ride a bicycle.

20 CHAIRMAN VERKUIL: I had the
21 same problem. I hit my head. Best
22 practices.

23 (Laughter.)

24 CHAIRMAN VERKUIL: Justice
25 Breyer is a long-term friend of this

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 Conference. As many of you know, he
3 was a Conference consultant back when
4 we were aspiring young law professors.
5 And as a member of the First Circuit,
6 he was the liaison to ACUS from the
7 Judicial Conference in our prior
8 incarnation.

9 Show the photos, please.

10 You must come and see these.

11 I'm sure you -- there you are. You're
12 making that -- do you see that motion?

13 JUSTICE BREYER: Who is that who
14 talks a lot?

15 CHAIRMAN VERKUIL: This is what
16 happens when you keep records. You
17 know, even when the Conference went
18 out of business, we kept the photos.
19 So these photos show the Justice as
20 what Jeff Lubbers, in a very nice
21 article about him called a purveyor of
22 common sense, Justice Breyer is now a
23 Senior Fellow, but it is his role with
24 Justice Scalia in the revival of the
25 Conference after fourteen years in the

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 wilderness that puts them -- both of
3 them in our pantheon of heros. Their
4 joint appearances before congressional
5 committees on numerous occasions,
6 always SRO events, made our rebirth
7 possible.

8 In his academic days, Justice
9 Breyer was one fine administrative law
10 scholar. He's famous for breakthrough
11 concepts such as calibrating the use
12 of regulatory tools to achieve
13 regulatory objectives, what he called
14 match and mismatch, in regulation and
15 its reform, and for highlighting the
16 problem of agency tunnel vision and
17 the last ten percent fallacy presented
18 in Breaking the Vicious Cycle and
19 applied in his memorable First Circuit
20 opinion U.S. versus Ottati & Goss.

21 More recently in Active Liberty
22 he argues that, dare I say what might
23 be called a living, argues for what
24 might be called a living Constitution,
25 in contrast to his colleague Scalia's

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 dead one.

3 (Laughter.)

4 CHAIRMAN VERKUIL: His latest
5 book, *Making Democracy Work*, is an
6 eloquent plea for public faith in our
7 courts and institutions of government.

8 And he does all this in French
9 as well. We were once part of a team
10 led by Justice O'Connor that visited
11 the Conseil d'Etat in Paris. Justice
12 Breyer fluently commented en Francais
13 while we, the rest of us, struggled to
14 be understood.

15 He is by now something of a
16 cultural hero in France, a fact
17 attested to by his recent award of the
18 Legion d'honneur from the French
19 government.

20 To this day, when his Francophile
21 thoughts overcome him, he has
22 been known to cite foreign sources in
23 his opinions.

24 (Laughter.)

25 CHAIRMAN VERKUIL: Please

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 welcome Justice Breyer.

3 (Applause.)

4 JUSTICE BREYER: It's always
5 nice to be back here. I didn't -- I
6 see so many old friends. Pat Wald.
7 Peter Strauss. I saw -- I just see
8 everybody, it's wonderful, and some
9 new friends too, who outright we're
10 now a special group of senior
11 Administrative Conference freaks --

12 (Laughter.)

13 JUSTICE BREYER: -- of the
14 Administrative Conference, and -- what
15 we've always liked. And I looked up.
16 It is a Phoenix, isn't it? I mean,
17 it's a comeback. It's the Phoenix.

18 And so I looked up on the
19 internet -- you can do that now -- see
20 what's a Phoenix. Let's see if it's
21 fit. I've got the definition. It
22 says "a Phoenix is a mythical bird" --
23 well, all right -- "with a colorful
24 plumage and a tail of golden scarlet
25 or purple, blue and green." Okay.

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 "According to some legends, it has a
3 500 to 1,000-year life cycle."

4 Well, so far.

5 (Laughter.)

6 JUSTICE BREYER: "Near the end
7 of which it builds itself a nest of
8 twigs and then ignites." That seems
9 to have happened. Who was that --

10 (Laughter.)

11 JUSTICE BREYER: What was his
12 name? He did it. And then it
13 ignites. "Nest and burn fiercely" --
14 and they were looking for an agency to
15 eliminate over there, so they burned
16 us and reduced to ashes -- "from which
17 a new young Phoenix, or Phoenix A,
18 arises, born anew to live again."

19 "The new Phoenix is destined to
20 live as long as its old self." That's
21 very good. We want even longer. "In
22 some stories, the new Phoenix embalms
23 the ashes of its old self in an egg
24 made of myrrh and deposits it in the
25 Egyptian city of Heliopolis."

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 (Laughter.)

3 JUSTICE BREYER: "It is said
4 that the bird's cry is that of a
5 beautiful song," and anyone who has
6 read the reports.

7 (Laughter.)

8 JUSTICE BREYER: "Its ability to
9 be born from its own ashes implies it
10 is immortal." Indeed. "Though in
11 some stories the new Phoenix is merely
12 the offspring of the older one."
13 Okay. "In a very few stories, they
14 are able to change into people." And
15 that's what has happened. This is
16 good.

17 (Laughter.)

18 JUSTICE BREYER: Anyway, it is
19 the Phoenix.

20 We love administrative law,
21 everyone in this room. Now the
22 question is why?

23 (Laughter.)

24 JUSTICE BREYER: And there are
25 many, many good reasons, if you think

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 about. I mean, for one thing, it
3 gives the academics among us something
4 really, really esoteric to talk about.
5 I mean, we love to talk about why is
6 there a special exception for
7 ratemaking in the separation of
8 function provisions of the APA?
9 Nobody knows the answer. A few
10 academics --

11 (Laughter.)

12 JUSTICE BREYER: -- are equal to
13 that and we will discover them.

14 It's wonderful for the agencies
15 because they have someone really to go
16 into things that are happening in the
17 agency they might not even know about.

18 Paul MacAvoy and I wrote a book
19 years and years ago about regulation
20 of energy by the Federal Power
21 Commission, and one of the great
22 moments was when we spent quite a lot
23 of time -- no one had thought of
24 leaving the ivory tower, perhaps, in
25 this area before -- but we went to the

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 Federal Power Commission. In those
3 days, wasn't it Joe Swidler and Lee
4 White?

5 And it was this building, kind
6 of greenish cement, and we wanted to
7 know how did they actually set a rate.
8 How? I mean, how do you set the rate
9 for the transmission line? And we
10 kept getting referred to other people.

11 (Laughter.)

12 JUSTICE BREYER: And finally
13 down in the bowels of the basement, we
14 found the person, a very nice woman
15 called Georgia Ledakis, and we said
16 "apparently you're the one we go to."
17 "Yes," she said, "I do it."

18 (Laughter.)

19 JUSTICE BREYER: We said, "how
20 do you do it?" And she said, "well,
21 what we do is we -- you know, we look
22 at comparable industries like trucks,"
23 she said, "supermarkets and cereals,
24 and then we sort of can't get it
25 exact, but we sort of figure it out."

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 And that was the basis for a
3 whole science of cost of service
4 ratemaking which later became more
5 refined. It's wonderful for the
6 agencies, and of course for the
7 lawyers, we understand. Their work,
8 for the lawyers, several decades, not
9 all of you may know, but where at
10 least 45 percent of the bar of the
11 Washington, D.C. area made a living
12 from peanut butter. This is the FDA's
13 famous rule. They were trying to
14 decide how chewy should peanut butter
15 be, and if you added lard it was not
16 peanut butter, and if you didn't add
17 lard you couldn't open your mouth.

18 (Laughter.)

19 JUSTICE BREYER: This is
20 absolutely true. And what is best --
21 and what is best actually is the
22 company and it always has been. I
23 mean we love to get together. Alan
24 Morrison entertained us for years by
25 telling us that Jay Plager, who some

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 of you know -- oh, great. Jay is
3 here. Well, then you can tell me if
4 this is true. I've told this story
5 for a long time.

6 (Laughter.)

7 JUDGE PLAGER: If you told it,
8 it has to be true.

9 JUSTICE BREYER: Yes.

10 You stopped once in the airport
11 in Denver and you were going to buy a
12 book and you went into a bookstore and
13 it was something to do -- you got into
14 a conversation with a foreign-looking
15 gentleman who was selling books, and
16 after a while, you were waiting for
17 the plane, you were talking, and he
18 said, "what do you do?" And you said,
19 "I teach administrative law." He
20 said, "What? You teach administrative
21 law? I am Chadha."

22 (Laughter.)

23 JUSTICE BREYER: Is that a true
24 story?

25 JUDGE PLAGER: Yes, it is true.

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 JUSTICE BREYER: It is. And we
3 used to go to meetings where we would
4 discuss all these things. And Tommy
5 Sussman was always in charge of
6 getting his client, who happened to be
7 the Wine Association of France, to
8 come to the meeting and to help
9 officiate. So it's wonderful. We've
10 had a very good time over the years,
11 and it's very nice to have you back.

12 There also are serious things
13 that we do. If you think about it,
14 what I used to tell my classes is, the
15 true basic question that we all have
16 to answer, or help, we help answer, is
17 quis ipsos custodiet -- I say that to
18 my class in order to appear to be very
19 knowledgeable and erudite, who will
20 regulate the regulators. That is a
21 problem that has existed forever.

22 And we, in the United States,
23 have answers to that. We say, well,
24 the president will try. President?
25 He will? I mean, I used to tell my

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 class a story about -- what was his
3 name -- he became -- Phil Heymann who
4 became -- at a very young age became
5 Assistant Secretary of State for
6 something or other. And the reason
7 was because his predecessor, Abba
8 Schwartz, had suddenly got appointed
9 and -- because she was a protege of
10 Eleanor Roosevelt. This was many
11 years ago.

12 And he discovered that he was
13 the boss of a woman called Frances
14 Knight. That name means little to
15 you, but she was known as the dragon
16 lady equivalent of J. Edgar Hoover
17 over at the State Department and she
18 would not give visas to anyone she
19 didn't like.

20 And this was offensive to people
21 like Abba Schwartz who, being a
22 protege of Eleanor Roosevelt, was a
23 good liberal. So he thought, "She
24 works for me. Great. I'll fire her,
25 or at least transfer her to Idaho."

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 I said the smallest time limit
3 ever measured by the human brain or
4 any scientist was the period of time
5 that passed between the instant that
6 he fired her and the instant she fired
7 him.

8 (Laughter.)

9 JUSTICE BREYER: So I say
10 usually "and didn't the president
11 intervene?" "What do you mean the
12 president intervene? Of course not.
13 He has a lot to do," and unfortunately
14 a lot of -- or fortunately, perhaps,
15 these questions don't necessarily go
16 to his agenda.

17 Well, Congress. In Congress --
18 well, in a sense, but Congress has
19 delegated the power to make the
20 decisions you make to you. And if
21 they had time to make them all, why
22 did they delegate it? And they don't,
23 and they don't have the expertise,
24 et cetera.

25 Well, the judges. The judges

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 love to think that they're the ones
3 who are controlling what goes on in
4 the agencies. And they do to a
5 degree, but it's a very big envelope
6 that they can't get beyond, because
7 they just have to say, is it arbitrary
8 and capricious, abuse of discretion,
9 if you're talking about policy, and
10 they have other things that they
11 apply, but still it leaves this vast
12 area, this vast area where it's just
13 up to the agency.

14 So we call in another tier or
15 group. On the substantive side, it's
16 OIRA, which is gone under many, many
17 different faces, many different names,
18 and it's been there since President
19 Nixon, and it sort of polices a lot of
20 the substance of what goes on.

21 And then we have, when Americans
22 complain, as Walter Gellhorn, our
23 ombudsman. And who is our ombudsman?
24 Our ombudsman really are the
25 caseworkers in Congress because when

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 somebody gets into trouble, they call
3 the member of Congress, and then the
4 member of the Congress sends up from
5 his machine somebody -- something to
6 the agency.

7 And then who is it that tries to
8 see that this is really working
9 smoothly, that one agency can learn
10 from other, that they follow fair
11 procedures, and occasionally we delve
12 into the substance of it so we can
13 control, through advice, sound advice,
14 substance, procedure, learning one
15 from the other, agency to agency, bar
16 to academy to agency, our heros, the
17 Administrative Conference of the
18 United States. So here we are.

19 CHAIRMAN VERKUIL: And that's
20 what we were saying when you...

21 JUSTICE BREYER: Now I would
22 like to point out that just by chance
23 two days ago somebody sent to me a
24 very, very interesting article that
25 was printed in China. And he said

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 that the magazine in -- the -- do I
3 have it here? I don't know if I have
4 the name but it's a very distinguished
5 journal China and is not either rebel
6 or establishment. And people read it
7 and they listen to it and they do it.

8 And they were talking about rule
9 of law in China. And they said, "We
10 really need a rule of law, not a rule
11 by law that two or three people make
12 up, a rule of law."

13 And they listed a number of
14 areas where they thought it was
15 important to actually focus on this,
16 and one was the legislature and
17 another were the courts. They wanted
18 an independent judiciary. And
19 another -- at the same time, two major
20 problems in administration must be
21 tackled.

22 One is lack of transparency.
23 Government officials often operate in
24 a chaotic way without proper
25 procedures and many local governments

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 make up rules while bypassing the
3 existing laws.

4 Second, the exercise of
5 administrative power lacks clear
6 limits, government officials... but,
7 so I thought, who are they asking what
8 questions? And I thought, well, we're
9 being asked here.

10 Because sometimes when I talk to
11 foreign groups, I say, "I know it's
12 important to have a constitution, and
13 it is, and I know it's important to
14 protect human liberty, and it
15 certainly is. And you can list a lot
16 of provisions. But, see, I would like
17 to have, in that list of things that
18 you are going to put in just one that
19 you will not think of, and that is a
20 rule called "what's a rule?" And a
21 rule or a law is public. And if it
22 isn't public, it's not a law.

23 I said that's a principle of
24 administrative law. That is a
25 principle that our government follows.

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 There is no such things as a secret
3 law; and, therefore to a foreigner we
4 are transparent. Good advice. Who
5 had given that advice? We would in
6 this room.

7 And when we think how are we
8 going to control the uncontrollable,
9 how are we going to control? There,
10 we have two or three more courses of
11 administrative law to teach and we
12 also have the experience of people in
13 this room to draw upon.

14 So what we're doing has national
15 and international implications and, of
16 course, I, being very biased, think
17 it's for the better. So I am
18 delighted that Phoenix-like you have
19 arisen from the ashes and we have a
20 new and an old group as well. Thank
21 you.

22 (Applause.)

23 CHAIRMAN VERKUIL: The Justice
24 will receive questions from the
25 assembled experts on fields even

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 beyond administrative law, I expect.

3 MR. SIEGEL: I am Jon Siegel.

4 I'm the Research and Policy Director
5 for the Conference. Mr. Justice, what
6 projects would you recommend that the
7 conference take up?

8 JUSTICE BREYER: You are better
9 at that than I. I mean I haven't
10 thought about this in such a long
11 time. I know that there are laws that
12 we could -- find out what is annoying
13 people the most about each other.

14 (Laughter.)

15 JUSTICE BREYER: And out of
16 that, undoubtedly, things will emerge.
17 I mean, there is a lot. There is so
18 much. Is there anything that's come
19 up?

20 We've only -- we've only
21 gotten -- we don't get that many -- we
22 get some administrative law cases. I
23 don't have very much. I haven't
24 thought it through. If I think it
25 through, I'll let you know.

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 Yes.

3 MR. MALAMUD: Mr. Justice, you
4 said if it's not public, it's not a
5 law. Would that include things like
6 building codes and statutes with
7 copyrights that are only available
8 with a credit card? Are those laws?

9 JUSTICE BREYER: Is that a law?

10 MR. MALAMUD: Well, a lot of
11 laws are --

12 JUSTICE BREYER: Are there
13 building codes that aren't -- there
14 are building codes that they keep
15 secret? All right. There's your
16 project.

17 MR. MALAMUD: No, but they do
18 cost \$100.

19 JUSTICE BREYER: They what?

20 MR. MALAMUD: They cost \$100.

21 JUSTICE BREYER: You mean you
22 can get them but you have to pay \$100?

23 MR. MALAMUD: Yeah. Is that
24 public?

25 JUSTICE BREYER: I don't know.

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 I am not expressing a legal opinion.

3 (Laughter.)

4 JUSTICE BREYER: That's a
5 problem of the --

6 CHAIRMAN VERKUIL: That's Carl
7 Malamud back there whose project, as
8 we all know, is data.gov, and he is --

9 PARTICIPANTS: Law.gov.

10 CHAIRMAN VERKUIL: I'm sorry.
11 Law.gov.

12 JUSTICE BREYER: Oh, I see. You
13 want to put them online so that --

14 CHAIRMAN VERKUIL: But he wants
15 to get rid of secret law because you
16 shouldn't have to pay for it, and he's
17 got a very good point.

18 JUSTICE BREYER: I see. Well,
19 so far I've given terrific answers to
20 your first questions.

21 (Laughter.)

22 CHAIRMAN VERKUIL: So -- well,
23 I've got to tell one story as long as
24 I don't see hands up, and that has to
25 do with your earlier point about who's

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 in charge and who can fire who.

3 And I just saw that the Civil
4 Rights Commission has a website, and
5 there is this -- only in Louisiana --
6 there is this justice of the peace in
7 Louisiana who refuses to perform
8 interracial marriages. And he's been
9 refusing to perform all these years.

10 And so the Civil Rights
11 Commission wrote him and said, you
12 know, Loving versus Virginia was
13 decided in 1967. And so then he
14 didn't do anything. And then they
15 filed -- apparently he has to report
16 to somebody. And so they finally went
17 after him and, after all these years,
18 he resigned.

19 But that shows you sometimes how
20 long it takes to get the word out. I
21 mean that is only amazing.

22 JUSTICE BREYER: You might look
23 at Reinventing Government. Remember
24 that study? It seemed to me they went
25 into all kinds of things. And I don't

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 know if all that's been implemented or
3 if it's -- I don't know whatever
4 happened to it. Actually, I do have
5 my favorites. I can look into it and
6 I can tell you.

7 PARTICIPANT: Mr. Justice, as we
8 have gone off of the administrative
9 law page, could you speculate or
10 discuss what you would consider the
11 most important Supreme Court decision
12 and why?

13 JUSTICE BREYER: Oh, well, I
14 mean everybody is -- I think people
15 would come down to two. They'd
16 probably say Brown -- it would
17 certainly be one because it created a
18 single country -- and the other would
19 be Marbury, you know, because you
20 couldn't quite get that off the list.

21 (Laughter.)

22 JUSTICE BREYER: I don't have
23 anything really unusual on that. I
24 think probably nine people out of
25 ten -- I talk about this some, and

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 when I do I usually say I hope there
3 is one I hope you won't forget. It's
4 not the -- I think Brown is perhaps
5 the most important maybe, but I like
6 to talk -- and I wrote about it --
7 Cooper versus Aaron.

8 And the reason I talk about
9 that, I'd say the following, that
10 after Brown, which many of you know,
11 it was decided in 1954, and the next
12 thing that happened over the next
13 year, what happened, exactly what
14 you're saying, nothing. Well, let's
15 not exaggerate, next to nothing,
16 virtually nothing.

17 And then 1956, and what
18 happened? Right, the same thing
19 happened again.

20 And then in early '57 in Little
21 Rock, the district judge ordered the
22 Little Rock Board to integrate.
23 That's where the Little Rock Nine came
24 in. And the Little Rock Nine were
25 going to enter the Central High School

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 in September 1957.

3 And during that summer, as most
4 of you know, Governor Faubus decided
5 that he would sort of move to the side
6 of the White Citizens Council. And on
7 that early September morning, when
8 they were supposed to come there under
9 the order of the judge, after he had
10 exhausted about every legal maneuver,
11 the White Citizens Councils, they were
12 surrounding the school, and the
13 militia is in -- under the orders of
14 Governor Faubus. And they were there,
15 but they weren't there to let anybody
16 in. They were there to keep them out.

17 And one girl, Elizabeth Eckford,
18 very dignified -- there were at least
19 nine. They were pretty brave and they
20 were pretty -- they were careful what
21 they did, but she didn't get the
22 message that she wasn't supposed to be
23 where she was and she started walking
24 towards the school and someone snapped
25 a picture of a white woman's face

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 behind her enraged. And she's looking
3 very dignified. She walked in. That
4 picture went around the world.

5 And there were news people, all
6 kinds of noise, and they couldn't get
7 in the school. So Brooks Hays, who
8 was the congressman from Little Rock
9 called President Eisenhower and
10 arranged for a meeting between
11 Eisenhower and Faubus.

12 And he went up to Newport where
13 the -- to the summer White House and
14 he met with Eisenhower and he said
15 afterwards that it was like a general
16 dressing down a sergeant. And he told
17 Eisenhower he would integrate, and he
18 didn't. He told the newspeople he
19 would.

20 And so that pretty much annoyed
21 Eisenhower. What was interesting to me
22 about -- what he was then going to do
23 is he called in advice, and got advice
24 from Jimmy Byrnes. Jimmy Byrnes had
25 been a member of our court and he had

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 resigned in World War II to help run
3 the domestic mobilization effort and
4 then he was governor of South
5 Carolina. He was not a bigot. He was
6 not a -- he was a great advisor to
7 Harry Truman.

8 And he met with Eisenhower and
9 he said, "I know the south, and if you
10 send troops into Little Rock, you're
11 going to have to have a second
12 reconstruction. You will have to
13 reoccupy the entire south. And the
14 best thing that will happen will be
15 they'll close the schools and nobody
16 will be educated." He said, "You
17 better not do it."

18 And Brownell, who was the
19 attorney general, said, "You have to.
20 You've got to do it." And Eisenhower,
21 which was a -- yes, in retrospect,
22 obvious -- not really that obvious at
23 the time, he said, "I am doing this."
24 And he called up the 101st Airborne.
25 The 101st Airborne, as we know at that

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 time, was -- everyone in the United
3 States knew who they were. They were
4 the heros of Normandy. They had
5 parachuted in. Their parachutes got
6 hung up on the steeples or a lot of
7 them were shot down. They were heros
8 of the Battle of the Bulge.

9 Everyone, every American knew
10 who they were. And he purposely
11 called that division. And he put
12 1,000 of them on airplanes, and he
13 flew them into Little Rock. And the
14 next day they got those children and
15 they walked those children right into
16 that school. And they took a lot of
17 pictures and those went around the
18 world. That was a much happier story.

19 So very interesting, that story.
20 But I want to tell that story and I
21 like the case because most people
22 think that flowed from Cooper v.
23 Aaron. No, it didn't. It was
24 afterwards when they had to withdraw,
25 because they can't stay there forever,

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 and a new board is elected, White
3 Citizens Council board, and they say,
4 "We're not going to do this anymore.
5 Bring a case. Tell them we can't.
6 Too much violence."

7 And it gets up to the Supreme
8 Court by the end of the next summer.
9 And the Supreme Court then says, "You
10 have to do it. You do it. Of course
11 you have to." And they all signed it,
12 all nine. All nine. They all signed
13 it. Okay. And that's -- because they
14 wanted to show them "You really have
15 to do it." They're nine people, nine
16 people called judges. It could have
17 been 9,000. They didn't have troops.
18 I mean, the paratroopers had gone
19 home.

20 And the day after they wrote
21 that decision, the day after they
22 reached their decision saying of
23 course you have to continue to do
24 this, Governor Faubus closed the
25 schools, and Little Rock High School

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 was -- Central High School was closed.
3 It was closed until -- for the rest of
4 the year.

5 And it was closed. Nobody got
6 education -- any education. You go
7 read an article in Sports Illustrated
8 where they found many, many years
9 later in many of the class of 1950 --
10 of that class that was there in 1957
11 and '58 and so forth, and their lives,
12 a lot of them, were really hurt,
13 really hurt.

14 Well, it didn't have a happy
15 ending. Oh, yes, I think it did. I
16 think it did, because, like it or not,
17 they couldn't keep that up, and they
18 had -- finally, the people in Little
19 Rock said, "No, no, no, we can't have
20 this board," and they elected another
21 board, and they opened the schools,
22 and they came back and so forth, and
23 that was the beginning of something.

24 But I like to tell that story
25 about Cooper versus Aaron because of

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 course it was the right decision. And
3 I told it to a Russian paratroop
4 general who came over. He had been in
5 charge -- the State Department called
6 us and said, "He had all these
7 missiles pointing toward the United
8 States. He's shifted the direction,
9 so that we should be nice to this
10 man."

11 (Laughter.)

12 JUSTICE BREYER: We brought him
13 over. And he said just what you said,
14 "What's the case?" And I said "I just
15 don't want you to forget that case."
16 And I told him that story, and I said,
17 "You see, it shows that paratroopers
18 and the judges must be friends."

19 (Laughter.)

20 JUSTICE BREYER: But what it
21 really shows with all that, what it
22 really shows with all that, is both
23 the need, the optimism, the difficulty
24 of a simple thing of getting people to
25 follow the law.

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 And we sort of have it. We
3 think, knock on wood. But I mean we
4 can remember that period, my goodness,
5 touch and go.

6 But I think that case was a
7 beginning. And I love that case for
8 that reason. And I love the fact that
9 he sent the paratroopers. And I love
10 the fact of what happened, but it also
11 did all work out, and that's what we
12 are part of in the law.

13 I mean we're part of something
14 that goes well beyond the 1,000,000
15 people who are lawyers. There are
16 actually 308,000,000 people in the
17 United States who are not lawyers.

18 (Laughter.)

19 JUSTICE BREYER: But you do. I
20 mean, they are the ones, they are the
21 ones who have to understand what we
22 do, and they're the ones that have to
23 understand the importance of it, and
24 they're the ones that understand that
25 sometimes we judges are wrong, and

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 they're the ones that have to
3 understand that what we do is quite
4 often blah, blah, blah, et cetera.
5 It's a speech.

6 But, nonetheless, you see the
7 point. You wanted to know why I think
8 that's important or what's it. I
9 think that's it.

10 CHAIRMAN VERKUIL: Thanks.

11 (Applause.)

12 CHAIRMAN VERKUIL: Well, why
13 don't we adjourn and go downstairs to
14 the reception and there will be a
15 little receiving line for our
16 Vice-Chair, myself and Justice Breyer.

17 (Adjourned at 5:56 p.m.)

18
19
20
21
22
23
24
25

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 CERTIFICATE OF REPORTER

3 I, Kathy Savich, RPR, do hereby
4 certify that the foregoing proceedings were
5 taken by me in stenotype and thereafter
6 reduced to typewriting under my supervision;
7 that I am neither counsel for, related to,
8 nor employed by any of the parties to the
9 action in which these proceedings were taken;
10 and further, that I am not a relative or
11 employee of any attorney or counsel employed
12 by the parties hereto, nor financially or
13 otherwise interested in the outcome of the
14 action.

15
16 _____
17 Kathy Savich, RPR, CLR
18
19
20
21
22
23
24
25