

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

3 54th PLENARY SESSION

4 JUNE 17, 2011

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8 The above-mentioned conference  
9 was held on Friday, June 17, 2011,  
10 commencing at 9:04 a.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

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25 REPORTED BY: KATHY SAVICH, RPR, CLR

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 AGENDA

3 54th Plenary Session

4 June 17, 2011

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7 -- Consideration of Proposed ACUS  
8 Recommendation on Compliance Standards for  
9 Government Contractor Employees -- Personal  
10 Conflicts of Interest and Use of Certain  
11 Non-Public Information

12  
13 -- Consideration of Proposed ACUS  
14 Recommendation on Agency Use of Video  
15 Hearings: Best Practices and Possibilities  
16 for Expansion

17  
18 -- Staff Presentations  
19  
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2 P R O C E E D I N G S

3 CHAIRMAN VERKUIL: Good morning.

4 We're going to reconvene here. It's  
5 time to move on and thank you so much  
6 for yesterday and your participation.  
7 And I hope you had a good time at the  
8 reception and the event speaker.

9 Today we're going to do two  
10 major recommendations, but before we  
11 do that, I want you to note what's  
12 being handed out by Reeve Bull is the  
13 legal considerations in e-rulemaking  
14 changes that we agreed to now.

15 And the staff cleverly didn't  
16 underline them, so you probably can't  
17 tell where they are, but I have it on  
18 good faith that we have done exactly  
19 what we were told to do.

20 If there are, in fact, any  
21 questions, Emily -- is Emily the one  
22 who did the work?

23 PARTICIPANT: Yes.

24 CHAIRMAN VERKUIL: Emily Bremer  
25 over there, with any questions and, if

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2 there are, at the end of the day we  
3 can talk about them, just basically  
4 forms, changes that were requested,  
5 items and others.

6 So today we'll start off with  
7 contractor ethics. And I suppose,  
8 Jon, you've got the order.

9 MR. SIEGEL: First of all, I  
10 neglected to mention yesterday how  
11 grateful I am to all the people who  
12 worked so hard to make these  
13 recommendations possible, which really  
14 includes all of you for working so  
15 diligently on our committees. But I  
16 wanted particularly to thank our  
17 committee chairs and researchers.

18 So for yesterday's first  
19 recommendation, that was Bob Rivkin  
20 and Bridget Dooling. And then, for  
21 the second recommendation, Russell  
22 Frisby and Steve Balla. And then the  
23 unsung heroes of the recommendations  
24 are the attorneys on the ACUS staff  
25 who also just worked really hard on

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2 yesterday's first recommendation. The  
3 attorney formerly known as Emily  
4 Schleicher, now Emily Bremer, worked  
5 very hard on that recommendation, and,  
6 for the second one, Reeve Bull. So  
7 thanks to all who made these  
8 recommendations possible.

9 As Paul mentioned, we've just  
10 handed out what we understand to be  
11 what was adopted yesterday. He left a  
12 couple of details to the staff, so you  
13 see what we did in response to  
14 yesterday's forum.

15 Today's first recommendation is  
16 our recommendation on government  
17 contractor ethics. This comes from  
18 the Committee on Administration and  
19 Management chaired by John Cooney,  
20 seated right here, who did a lot of  
21 work on this. This committee met four  
22 times over a period of six months.

23 As you can see, it's our longest  
24 recommendation. It was a lot of work.  
25 So thanks to John Cooney for guiding

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2 this recommendation through the  
3 committee. Also to our researcher,  
4 Kathleen Clark. And let me also,  
5 again, mention Reeve Bull. You know,  
6 because of the complexity of this  
7 recommendation, the committee  
8 requested additional research after  
9 the first couple of meetings, and  
10 Kathleen and Reeve split that up and  
11 did a great job of reaching out to  
12 agencies and groups; such as, you  
13 know, the Public Contract Law section  
14 of the ABA and other industry groups,  
15 the Defense Industry Initiative, so  
16 they both did a lot of research work.

17 So over the last couple of  
18 decades more and more of the  
19 government's work has been done by  
20 government contractors rather than  
21 government employees. This gives rise  
22 to the concern that whereas government  
23 employees are covered by a very  
24 extensive ethics regime, the ethics  
25 rules applicable to employees of

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2 government contractors are much less  
3 extensive, so we thought it was vital  
4 that the Conference develop a  
5 recommendation covering this  
6 increasingly substantial portion of  
7 the federal government's spending, and  
8 we tried to develop a recommendation  
9 that would appropriately protect the  
10 public and promote ethical behavior  
11 while, at the same time, not imposing  
12 excessive compliance burdens.

13 So Professor Kathleen Clark of  
14 the law school at Wash U, St. Louis  
15 will now tell you about the parts of  
16 her research on this project.

17 MS. CLARK: Thanks, Jon.

18 So I want to start with just an  
19 illustration of the problem of the  
20 lack of regulation of contractor  
21 personnel ethics. And the  
22 illustration that I started my report  
23 with is a fellow named Dan Jester who  
24 advised the Treasury Department back  
25 in 2008 on the AIG bailout. Jester

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2 owned stock in Goldman Sachs, and he  
3 handled the AIG bailout in a way that  
4 benefited Goldman Sachs and himself.

5 If Jester had been a government  
6 employee, he would go to prison for  
7 what he did because there's a federal  
8 criminal conflict of interest statute  
9 that prohibits government employees  
10 from giving advice in matters that  
11 could affect their financial interest.

12 But because Treasury hired  
13 Jester as a contractor rather than as  
14 an employee, this statute didn't apply  
15 to him and most of the government  
16 ethics statutes and regulations didn't  
17 apply to him. Those statutes and  
18 regulations, as I discuss in my paper,  
19 are in there protecting the public  
20 trust, and so the premise of this  
21 paper is to look at whether there is a  
22 need for statutes and regulations to  
23 protect the public trust when it's  
24 contractors that are doing the  
25 government's work.

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2 I want to discuss the problem a  
3 little bit more analytically than just  
4 an illustration. As Jon indicated,  
5 the amount of -- or I think alluded  
6 to -- the amount of government  
7 spending has increased substantially,  
8 rising from about 60 percent in  
9 constant dollars from 1983 to 2007.  
10 At that -- during that same period the  
11 number of government employees has  
12 dropped substantially.

13 And to take up the slack, the  
14 government is turning to contractors,  
15 service contractors. And spending on  
16 service contracting increased 85  
17 percent in constant dollars from '83  
18 to 2007. So contractor personnel are  
19 now performing lots of services that  
20 in the past have been performed by  
21 government employees.

22 In my paper, I discuss five  
23 different types of government ethics  
24 standards dealing with financial  
25 influences on a government employee's

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2 work, use of government position for  
3 private purposes, outside activities,  
4 post-employment restrictions, and then  
5 restrictions on someone based on their  
6 pregovernment work.

7 And in thinking about these  
8 ethics standards, I identify a number  
9 of different principles that seem to  
10 motivate these, you know, detailed  
11 statutes and regulations. And I think  
12 two key principles that are worth  
13 considering in this context of  
14 contractors is the fiduciary nature of  
15 public office, the fiduciary nature of  
16 work on behalf of the government, and  
17 also the need to shore up the public's  
18 confidence in government.

19 Now, in contrast to the very  
20 detailed and extensive set of  
21 regulations of government employee  
22 ethics, there are very few  
23 restrictions, very few ethics  
24 restrictions, on contractor personnel.  
25 Only a handful of agencies have

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2 adopted ethics regulations for their  
3 contractor employees and, in general,  
4 those are very narrow in scope.

5 I do want to acknowledge that at  
6 least one agency, actually, the FDIC,  
7 has adopted comprehensive ethics  
8 standards for its contractor  
9 personnel. I also need to acknowledge  
10 that the government has addressed  
11 organizational as opposed to personal  
12 conflicts; that is, financial  
13 interests of a contracting  
14 organization, but that doesn't reach  
15 the financial interests of the people  
16 who are actually doing the  
17 government's work.

18 And then I also need to  
19 acknowledge that major contractors  
20 have internal ethics codes, but most  
21 of them don't -- they protect the  
22 company, but they don't protect the  
23 company's client, the government.

24 So finally I just want to  
25 acknowledge to you my methodology. In

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2 addition to book research and looking  
3 at newspaper articles and so on, I  
4 also interviewed over 90 government  
5 employees, procurement and ethics  
6 officials, and these are two  
7 communities that generally don't talk  
8 to each other much. And so this  
9 process that we are now engaged in, I  
10 think, is hopefully part of an ongoing  
11 conversation along those lines.

12 I also talked to investigators  
13 at the IG offices and the GAO,  
14 contractors, and their professional or  
15 trade associations, NGOs, unions, and  
16 good government groups, open  
17 government groups, accountability  
18 groups, Hill staffers and False Claims  
19 Act lawyers.

20 Before I end, I just wanted to  
21 thank Paul Verkuil and the  
22 rest of the ACUS staff for the  
23 opportunity to do this work. As you  
24 can see, I did a fair bit of work, but  
25 it's been tremendously exciting for me

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2 as an academic to engage in this way.

3 (Applause.)

4 MR. COONEY: So I'm John Cooney,  
5 and I was fortunate enough to have  
6 ACUS ask me to take a hand in working  
7 on this recommendation.

8 My background is from OMB, and I  
9 thought that the best way to approach  
10 this issue was to put my old OMB hat  
11 on and look at the recommendation and  
12 see if it works, whether it would  
13 survive review if it came in cold  
14 across the threshold, and I'm  
15 convinced it does.

16 The first and most important  
17 issue is, is there a real world  
18 problem here that needs solving? And  
19 for the reasons that Jonathan and  
20 Kathleen had told you, I think that  
21 there is. There is a substantial risk  
22 of ethics abuses occurring the way  
23 government services are delivered  
24 today in which you often have civil  
25 servants and contractor employees

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2 sitting side by side doing the same  
3 work.

4 And if one of the contractor  
5 employees were to do something that  
6 would be a criminal violation or a  
7 serious firing offense for the federal  
8 official, it's not necessarily an  
9 ethics issue for that individual even  
10 though, to the public's mind, they  
11 would be in equivalent positions.

12 The problem is real, but there  
13 is no systematic approach to trying to  
14 address the problem. There is a  
15 hodgepodge of solutions out there.  
16 Congress has worked in some aspects of  
17 this by passing statutes that requires  
18 people to address organizational  
19 conflicts of interest and ethics  
20 problems for the contractor as a  
21 whole.

22 It's required OFPP, the Office  
23 of Federal Procurement Policy at OMB  
24 to take actions on parts of this, but  
25 they are limited in scope. As

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2 Kathleen said, agencies have rules  
3 that address aspects of this problem.  
4 The Department of Energy Nuclear  
5 Weapons Lab discussed these kinds of  
6 problems and the same kind of  
7 solutions in place. FDIC has them.  
8 But there is nothing systematic among  
9 the way the agencies are doing this.

10 OFPP has become very active in  
11 these issues in the last couple of  
12 years, but they're still a long way  
13 from issuing rules. And, again, their  
14 rules address parts of the problem but  
15 are not systematic in any respect.

16 And large companies have --  
17 especially the big metal benders who  
18 service the Defense Department -- have  
19 programs in place, but those programs  
20 are there in their own self-defense.  
21 But they do have good internal  
22 reporting programs and good internal  
23 tracking programs and training  
24 programs that have been very helpful  
25 in suggesting a pathway that the

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2 federal agencies might use to make a  
3 systematic approach. But, again, the  
4 coverage of the individual company  
5 programs is scattered and it's  
6 intended to protect the company's own  
7 self-interest to keep them from being  
8 debarred and doesn't necessarily  
9 protect the federal interest in the  
10 way that an agency might. So I'm sure  
11 that we have identified a real problem  
12 here that requires a solution before  
13 there is a problem.

14 The second question, have we  
15 identified the most important aspects  
16 of the problem that should be  
17 addressed. This, I think, was the  
18 particular contribution of Professor  
19 Clark's work. She identified the two  
20 areas that seemed most rife with  
21 problems: Personal conflicts of  
22 interest by a contractor employee and  
23 the contractor employee's access to  
24 certain kinds of nonpublic information  
25 that could be of great financial value

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2 if they were purloined and used  
3 inappropriately by the worker. Other  
4 risks exist, but we think that those  
5 are the two most important ones and  
6 the best place to begin.

7 Third, have we identified the  
8 proper tools to deal with the problem  
9 and have we figured out the  
10 appropriate processes. And the answer  
11 there certainly is yes. The Office of  
12 Federal Procurement Policy at OMB is a  
13 little-known entity outside the  
14 contracting world, but it basically  
15 runs the Federal Acquisition  
16 Regulatory Council, which is a group  
17 of major contracting agencies that get  
18 together and discuss problems of  
19 common concern and share their own  
20 solutions, how they've dealt with  
21 these issues in their own spheres and  
22 how that kind of approach could be  
23 generalized to federal contracting in  
24 general.

25 OFPP has enormous discretionary

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2 authority and has it within its power  
3 now to adopt these kinds of conflict  
4 of interest rules. And OFPP also has  
5 great experience with the issues here  
6 or, if it doesn't have immediate  
7 experience, it can get that in one  
8 meeting by tapping the major  
9 contracting agencies like Defense and  
10 NASA and GSA to come in and present on  
11 the problem.

12 And particularly important in  
13 our sense of a solution to this  
14 problem, OFPP has a great deal of  
15 history in adopting standard contract  
16 clauses to be used by contracting  
17 officers in addressing concerns at a  
18 micro level.

19 And so when we looked at the  
20 OFPP tools, that helped us solve the  
21 fourth problem, and this is probably  
22 the second most important problem,  
23 which is, would the benefits of the  
24 solution we recommend outweigh the  
25 costs. And here I think that we have

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2 made a recommendation that OFPP will  
3 be able to take and run with and come  
4 out with a solution in which the  
5 benefits will be higher than the cost.

6 We recommend that the program be  
7 run by the agencies themselves. The  
8 agencies are going to understand where  
9 the greatest risks are on an  
10 individual contract basis, and they  
11 will know the kinds of contracts that  
12 have the potential for abuse and where  
13 they really need to set up controls to  
14 be in the public interest to prevent  
15 abuses.

16 Second, we recommend a  
17 risk-based program. We don't want to  
18 have a "cover the waterfront" scheme.  
19 That wouldn't be in anyone's  
20 self-interest. We want to focus in on  
21 where the problems exist and then come  
22 up with a solution that's tailored to  
23 the particular problem.

24 Third, as I mentioned, we want  
25 the program to be run at the

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2 contracting officer level. If -- some  
3 of you may not have worked on  
4 government contracts before, but the  
5 contractor officer is the person  
6 through whom the agency communicates  
7 with the contractor and the contractor  
8 communicates with the agency, and  
9 that's basically the -- it's like a  
10 federal bank regulator, it is the  
11 person who must be of aid.

12 If you don't like the  
13 contractor's recommendation, it's  
14 going to be a hard relationship for  
15 you. And so the contractors have  
16 every incentive to make the  
17 contracting officer happy. But the  
18 contracting officer has a vast  
19 experience for the number of contracts  
20 that that person will supervise over  
21 the course of a career and has a sense  
22 of where risks are and what  
23 corporations can be required to do in  
24 a manner that's cost-effective, it  
25 just won't turn into a paper drill,

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2 but will allow them to focus on the  
3 individual problem.

4 And that's where we -- we  
5 finally came out that we did not want  
6 to have a large monitoring program in  
7 place where the agencies would be  
8 collecting information willy nilly.  
9 We want the issue to be addressed at  
10 the contracting officer level and  
11 reported up through the contracting  
12 officer chain of command which already  
13 exists and is marvelously effective in  
14 communicating up and down the chain.

15 And, also, we don't want to have  
16 a disproportionate burden on the  
17 contractors. We have seen some of  
18 their plans. We have seen how those  
19 can work. We can see how the  
20 contractors can work with them to  
21 fine-tune them, if we're available, to  
22 make them appropriate for a particular  
23 case.

24 But we're very cognizant of the  
25 fact that there are economies of scale

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2 when responding to regulation, and we  
3 don't want to set up a system that  
4 would knock small businesses out of  
5 competition simply by virtue of their  
6 reporting demands that we would impose  
7 on them.

8 I think that's going to be one  
9 of the issues OFPP has to wrestle with  
10 when it gets to the implementation  
11 stage would be, how do we make certain  
12 that we design something that protects  
13 the public interest but does not pose  
14 burdens to small businesses to be able  
15 to continue to compete for federal  
16 business.

17 And finally the fifth question,  
18 are there unintended consequences of  
19 the proposal? And, here, the way we  
20 tried to address that by was massive  
21 outreach. The ACUS staff was heavily  
22 involved in reaching out to interest  
23 groups who have experience in this  
24 area, especially the Defense Industry  
25 Initiative and others, the American

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2 Bar Association. And so we have a  
3 good real-time sense from people who  
4 work in this area every day for large  
5 contractors what their problems might  
6 be with the proposal, and we responded  
7 to them and tried to address the  
8 concerns that we heard.

9 Within the government, we've  
10 also had a great deal of support,  
11 first from OFPP itself and Dan Gordon,  
12 who participated in several of the  
13 meetings and had very valuable things  
14 to say.

15 The Office of Government Ethics  
16 also was extremely active in the  
17 meetings and brought its expertise to  
18 bear, especially as to the nature of  
19 the ethics problems presented and the  
20 kind of mechanisms that might work  
21 effectively.

22 And we were very fortunate, and  
23 as time went on we attracted the  
24 interest of the contracting agencies,  
25 especially the Department of Defense

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2 which was very active in the last two  
3 meetings and really brought its broad  
4 experience to bear and indicated what  
5 it thought could work and how the  
6 contracting officer process could be  
7 brought to bear to make it work.

8 The -- I think I'll close just  
9 by mentioning one thing. Those of you  
10 who are on the ABA Administrative Law  
11 section have seen a request for  
12 blanket authority for a letter that we  
13 ultimately received from the Public  
14 Contracting section of the ABA which  
15 basically says, "we share your pain,  
16 we share your concern, but we don't  
17 think that there is any pressing need  
18 for a program here, the kind of  
19 recommendation you're making, because  
20 the agencies are already at work  
21 addressing various kinds -- various  
22 aspects of this problem."

23 To me this was a most curious  
24 letter. It was surprising to receive  
25 it because the Public Contracting Law

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2 section had been very helpful along  
3 the way in sharing -- in inviting us  
4 to their meetings and having us make  
5 presentations and expressing our views  
6 in real-time.

7 And then Reeve Bull was able to  
8 go down to Annapolis when the section  
9 met in one of its quarterly meetings  
10 and address it, and he made a  
11 presentation on what was under  
12 consideration, and he received very  
13 favorable responses and helpful  
14 comments from the group. So the ABA  
15 had been participating along the way.

16 And the letter that came in  
17 doesn't disagree with any specific  
18 aspect of the proposal. It simply  
19 says, well, there is no pressing need  
20 for it now.

21 And my response to the letter  
22 was twofold. First, we don't want to  
23 wait for a scandal to occur. We're  
24 trying to prevent a problem before it  
25 occurs, and we're convinced that the

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2 risk is real, and we want to have the  
3 agency working on something that's  
4 designed to prevent a pressing need  
5 from arising; that is, from there  
6 being an embarrassing situation that  
7 will undermine public confidence in  
8 the contracting system.

9 And the second point is I think  
10 that the ABA's point that different  
11 agencies are working on different  
12 aspects of it. Congressional statutes  
13 that cover different aspects or have  
14 different approaches to this confirms  
15 the point that Paul had identified  
16 when we first looked at this problem  
17 several years ago, which, there is a  
18 risk here and there is no systematic  
19 approach to it within the federal  
20 government.

21 But there should be a systematic  
22 approach because we have the public  
23 interest at stake, the abuses are  
24 real, and there are real gaps in the  
25 current program. So I take the ABA

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2 letter not as a reason to slow down,  
3 but as confirmation that the problem  
4 is real, and that the approach that we  
5 are proposing that the OFPP and the  
6 agencies pursue is a real approach  
7 that doesn't have any prima facie  
8 problems with it.

9 There may be problems that are  
10 identified in the course of the OFPP  
11 work. I would expect that, and I  
12 would welcome it if the agencies can  
13 fine-tune it, but I think what the  
14 committee has come out with here is a  
15 very important and a very viable  
16 recommendation, and the kind of thing,  
17 frankly, I think Congress must have  
18 had in mind when it reauthorized the  
19 Administrative Conference because the  
20 Administrative Conference here has  
21 identified a gap in agency efforts to  
22 address a real problem and has come up  
23 with a common sense solution about how  
24 the agencies can use existing  
25 authority without needing new statutes

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2 and -- and address the problem before  
3 a crisis of some kind breaks out.

4 Thank you.

5 CHAIRMAN VERKUIL: Thank you,  
6 John. That was a very, very effective  
7 presentation, obviously, and from  
8 someone who knows what he is talking  
9 about.

10 So now what we'll do is we'll  
11 have some discussion, but I'd like to,  
12 first of all, get through -- there is  
13 one manager's amendment. Let's just  
14 vote on that. And that happens to be  
15 footnote 1. And I don't think we need  
16 to be certainly --

17 MR. BULL: There are a couple  
18 other ones throughout.

19 CHAIRMAN VERKUIL: And a couple  
20 other ones throughout.

21 MR. SIEGEL: The only proposed  
22 amendment on this recommendation is  
23 the manager's note.

24 CHAIRMAN VERKUIL: Yes. So  
25 where does it appear?

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2 MR. BULL: There is the word  
3 "employees" on page 6.

4 CHAIRMAN VERKUIL: So if we  
5 could have a motion on the manager's  
6 amendments.

7 PARTICIPANT: So moved.

8 PARTICIPANT: Second.

9 CHAIRMAN VERKUIL: Second. Any  
10 discussion?

11 Can we vote? All in favor?

12 (Chorus of ayes.)

13 CHAIRMAN VERKUIL: Opposed?

14 (No response.)

15 CHAIRMAN VERKUIL: Okay. Thanks  
16 very much.

17 Now what I'd like to do in order  
18 to present this is to call on -- we  
19 need unanimous consent to this, but I  
20 would like to call on Dan Gordon who  
21 is the administrator of the Office of  
22 Federal Procurement Policy and head of  
23 the FAR council and obviously the  
24 person who will be picking up the load  
25 of work when we get to that point.

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2 Dan, would you -- well, first of  
3 all, do I have unanimous consent?

4 PARTICIPANT: Yes.

5 CHAIRMAN VERKUIL: Do I hear any  
6 dissent?

7 Dan, it would be a pleasure to  
8 have you come up.

9 MR. GORDON: Do you want me to  
10 come up there?

11 CHAIRMAN VERKUIL: Well, you can  
12 just take a mike. You don't have to.

13 MR. GORDON: Well, I'll still  
14 stand up front so I don't have my  
15 back --

16 CHAIRMAN VERKUIL: That would be  
17 fine.

18 MR. GORDON: I'm going to end up  
19 having my back to people.

20 CHAIRMAN VERKUIL: Come up here.

21 MR. GORDON: You know what, let  
22 me come up.

23 CHAIRMAN VERKUIL: Come on up.

24 MR. GORDON: I'm speaking on  
25 behalf of a little known agency,

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2 right?

3 CHAIRMAN VERKUIL: Right.

4 MR. GORDON: I'm Dan Gordon, the  
5 Administrator for Federal Procurement  
6 Policy, and it's a great honor to be  
7 here. I want to speak very briefly  
8 because John and Kathleen have  
9 actually set out all the key points.

10 Let me say a couple of words,  
11 though, just to put things in context  
12 as it looks from this administration.

13 The fact is that (A) federal  
14 procurement spending has grown  
15 enormously over the past dozen -- 20  
16 years, actually. Within that increase  
17 in spending, the increase on the  
18 services sector has been  
19 disproportionate so that, for example,  
20 in fiscal year '10 we spent more than  
21 half a trillion dollars on goods and  
22 services but of that more than 60  
23 percent was on services.

24 Within the services sector,  
25 we're not talking only about

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2 janitorial services or grounds  
3 maintenance. The fastest growing  
4 areas are, in fact, the most sensitive  
5 areas, the areas of advisory services,  
6 professional -- professional support  
7 services, management services to  
8 agencies.

9 Only six weeks after taking  
10 office the President signed a  
11 memorandum on government contracting  
12 in which he expressed concern about  
13 overreliance on contractors. And we  
14 in the administration, including in  
15 OMB, have been addressing various  
16 aspects of that overreliance on  
17 contractors.

18 I welcome ACUS' focus on this  
19 issue. I think that what the  
20 Administrative Conference is doing is  
21 shining a light on an extremely  
22 important area. The fact is we are  
23 dependent on contractors in very  
24 sensitive areas. We need to re -- we  
25 need to think through the implications

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2 of that dependence. And I think that  
3 it's helpful to focus on, as one of  
4 those areas, the question of the  
5 ethics standards that apply to  
6 contractors' employees.

7 I appreciate, and John made this  
8 point as well, if, in fact, you adopt  
9 this recommendation and if the FAR  
10 Council, the Federal Acquisition  
11 Regulatory Council, moves forward,  
12 opens a case on this area, obviously  
13 that process itself will involve what  
14 I think John called fine tuning.

15 The FAR Council is a very open  
16 process where we hear from the  
17 agencies. There would eventually be a  
18 proposed regulation with notice and  
19 comment, and eventually a final  
20 regulation.

21 So my focus here isn't on any of  
22 the details of the recommendation. My  
23 focus is on, is this an important area  
24 where it would be helpful to have  
25 government-wide guidance when we talk

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2 about the ethics obligations of  
3 contracting employees. I think it is  
4 an area where government-wide  
5 attention is appropriate and may be  
6 more useful than agency-specific  
7 guidance which is what we sometimes  
8 see today.

9 So in that sense I want to very  
10 much welcome the Administrative  
11 Conference's approach to this, I think  
12 it can be helpful, and I think I'll  
13 leave it at that. If people have any  
14 questions, obviously I'm happy to  
15 address them, but I hope that that is  
16 helpful in terms of showing you the  
17 context as we see it in the Office of  
18 Federal Procurement Policy within OMB.

19 Thank you for the opportunity,  
20 sir.

21 CHAIRMAN VERKUIL: Will you be  
22 able to stay through this meeting this  
23 morning?

24 MR. GORDON: Of course.

25 CHAIRMAN VERKUIL: So if there

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2 are questions, maybe Dan could answer  
3 them along the way.

4 MR. SCHULTZ: Bill Schultz. I  
5 do have a question. The regulations  
6 that you're issuing, are they going to  
7 impose requirements on me, because, if  
8 so, that's inconsistent with  
9 recommendation number 3 that says the  
10 agencies should have discretion  
11 whether to modify the model FAR  
12 provisions or clauses.

13 MR. SCOTT: You need to speak  
14 into a mike for the record.

15 MR. GORDON: Yeah.

16 I was very careful to say that  
17 the FAR process, as I'm sure you know,  
18 is an open process where a proposed  
19 regulation needs to be drafted. There  
20 is no proposed regulation, so I can't  
21 answer the question.

22 But even if there were a  
23 proposed regulation and it answered  
24 your question either as a yes or a no,  
25 that still wouldn't tell you what the

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2 final regulation, if there is a final  
3 regulation, will, in fact, say.

4 We go through notice and  
5 comment, and we take comments very  
6 seriously. We are an agency -- the  
7 FAR Council -- as I suspect you know,  
8 the FAR Council brings representation  
9 to all of the executive branch  
10 agencies.

11 The specific members are DOD,  
12 NASA, and GSA, but, in fact, all  
13 agencies participate in the process of  
14 writing proposed regulations and final  
15 regulations. I'm not going to predict  
16 what any regulation, if there is one,  
17 ultimately --

18 MR. SCHULTZ: All I need to know  
19 is whether that's under consideration.  
20 Don't you have an advance notice of  
21 proposed rulemaking that, at least if  
22 it's under consideration, we would  
23 actually impose certain standard  
24 requirements on -- on agencies.

25 MR. GORDON: There are -- there

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2 are regulations underway right now  
3 that address various issues, including  
4 personal conflicts of interest and  
5 organizational conflicts of interest,  
6 as Kathleen pointed out, but we don't  
7 have a FAR case that is responsive to  
8 what ACUS has recommended because ACUS  
9 hasn't acted yet, and we would then  
10 afterwards have to decide whether and  
11 how to open a FAR case.

12 CHAIRMAN VERKUIL: Let me  
13 also -- I'm sorry. Is Don Fox here  
14 from OGE? Don. I'm sorry, of course  
15 you are, right in front. Would you  
16 like to -- I'd like to get the key  
17 players in, and then we'll generally  
18 have some conversation.

19 Don, may I ask you to...

20 Office of Government Ethics,  
21 Ric's successor.

22 MR. FOX: I'd like to avoid  
23 turning my back on anyone either. My  
24 name is Don Fox. I'm the Acting  
25 Director of the United States Office

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2 of Government Ethics. First of all, I  
3 want to thank Jon for his leadership  
4 of our committee, Kathleen for her  
5 research and perspective, and the  
6 professional staff who has synthesized  
7 perhaps hundreds of suggestions on  
8 exactly how to phrase these -- these  
9 recommendations and produce what we at  
10 OGE think is a very -- a very good  
11 product and one that we wholeheartedly  
12 endorse.

13 At the Office of Government  
14 Ethics, our business has been for over  
15 30 years figuring out how to identify,  
16 mitigate, and prevent personal  
17 conflicts of interest insofar as  
18 federal government employees in the  
19 executive branch are concerned.

20 Over that 30 years, working with  
21 the federal government, and indeed 90  
22 some countries around the world,  
23 international organizations, and as  
24 active members of the Ethics  
25 Compliance Officers Association which

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2 represents the ethics officials of  
3 most of the major corporations in the  
4 United States, we think that we have a  
5 pretty good idea of what works and  
6 what doesn't work in terms of  
7 preventing personal conflicts of  
8 interest.

9 And by that, let me tell you  
10 what I mean by personal conflicts of  
11 interest in the context of government  
12 employees. As our former Director  
13 used to say, it really means nothing  
14 more than public -- the decisions  
15 about the public interest are based  
16 upon that interest rather -- informed  
17 by that rather than someone's private  
18 personal interest or someone's private  
19 financial interest.

20 As Dan mentioned, there is a  
21 current proposed rule pending before  
22 OFPP right now that addresses a  
23 limited set of personal conflicts of  
24 interest of contractor personnel who  
25 are performing acquisition-related

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2 functions.

3           What I think this committee  
4 identified is that we have contractors  
5 participating in a whole variety of  
6 things outside of the acquisition  
7 process that, nevertheless, impact  
8 directly upon federal policy, to  
9 include, for example, the drafting of  
10 regulations, proposing of budgets, and  
11 other things in which contractors  
12 bring a great deal of expertise.

13           Where those functions are  
14 performed by federal government  
15 employees, in all likelihood, they may  
16 be filing confidential financial  
17 disclosure statements, they are  
18 subject to certain ethics rules, they  
19 receive certain types of training and  
20 counsel, and they have people  
21 available to give them advice on how  
22 to avoid personal conflict between  
23 their interests and their government  
24 duties.

25           Those are the elements that we

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2 see that work, whether it's in major  
3 corporations, whether it's in an  
4 agency here in one of our agencies in  
5 the United States government or  
6 abroad. That was our focus coming to  
7 this.

8 The simple solution that a  
9 number of people proposed over the  
10 years is why don't we just take the  
11 government laws and regulations and  
12 just impose them upon people in the  
13 private sector who directly support  
14 the government.

15 It has a great deal of -- it has  
16 a great deal of appeal at first blush;  
17 however, the situations are entirely  
18 different. We have resisted that  
19 approach in OGE, we have never favored  
20 that approach, but we do know that  
21 there are things that work.

22 Uniform standards, training and  
23 advice, financial disclosure, where it  
24 is appropriate, and, ultimately, where  
25 there is problems, enforcement.

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2 That's the thrust that we bring  
3 to this and we think that these  
4 recommendations are sound; that is,  
5 that the FAR Council open a case to  
6 consider whether or not there should  
7 be, in fact, model clauses developed  
8 to reach a certain set of contractors  
9 which we would hope would have those  
10 contractors decide how to effectuate  
11 those types of standards, but not a  
12 one size fits all with, you know,  
13 massive regulations written by OGE or  
14 anybody else in the government.

15 Thank you.

16 CHAIRMAN VERKUIL: Thank you.

17 Okay. So questions? Tozzi, sir.

18 MR. TOZZI: I'm Jim Tozzi, a  
19 Public Member of ACUS, and I served on  
20 a committee.

21 I would like to address the ABA  
22 letter that the committee received.  
23 The essence of the ABA section letter  
24 is that they see no evidence of a  
25 problem. And I will suggest there's

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2 plenty -- a lot of evidence of a  
3 problem.

4 And I would call your attention,  
5 if you to go to a regulatory shop in  
6 any major agency, look at the GS-13s,  
7 14s and 15s that are writing rules in  
8 the agencies. They are surrounded and  
9 accompanied by huge amounts of  
10 contractor personnel. They don't wear  
11 a different kind of beads or a  
12 different kind of suit. They all look  
13 the same and they all work the same.

14 I might argue that they in many  
15 instances provide inherently  
16 governmental functions, and maybe they  
17 shouldn't be doing it, but in my mind  
18 they are very close to writing  
19 regulations.

20 Now, this -- our committee  
21 emphasizes personal conflicts of  
22 interest, but if you read our  
23 recommendations very finely, they  
24 address the nonuse -- the misuse of  
25 nonpublic information. And within

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2 terms of these people that are writing  
3 the rules or writing many of the  
4 supporting documents, there's no  
5 constraints on those people. Now  
6 what -- how can those problems be --  
7 occur?

8 Those people -- the contractor  
9 personnel are free in the mega  
10 consulting firms to give consulting  
11 services for compliance or ways not to  
12 comply. They are free to give  
13 consulting services to -- if a law  
14 firm asks to challenge a government  
15 rule. So there is absolutely no  
16 constraint on those people. They work  
17 at length in the agencies.

18 And so my essence of the ABA  
19 letter, go look at the regulatory  
20 shops, see how the contractors are  
21 interwoven with the feds, and I think  
22 you'll see the need for the actions of  
23 our committee. Thank you.

24 CHAIRMAN VERKUIL: Thank you.  
25 Peter.

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2 MR. STRAUSS: I think this is  
3 just a terrific recommendation, like  
4 everyone else. I have a couple of  
5 comments. One is, as the former  
6 General Counsel of an independent  
7 regulatory commission that, in fact,  
8 did a great deal of contracting, not  
9 all of which perhaps is within the  
10 purview of this recommendation, I want  
11 to be sure that I didn't hear a  
12 reference to executive agencies as if  
13 they excluded independent regulatory  
14 commissions because it strikes me as  
15 essential that they do not.

16 And the second thing -- and here  
17 I need to admit my own conflict of  
18 interest. I work for an organization  
19 that has several hundred million  
20 dollars' worth of contracts with the  
21 federal government every year, I  
22 believe, Columbia University, and it  
23 isn't really clear to me whether  
24 compliance standards for government  
25 contractor employees would prevent any

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2 of my colleagues from working on  
3 research projects that affect their  
4 salaries. Probably it doesn't, and I  
5 just don't understand the  
6 recommendation well enough, but that's  
7 the question.

8 CHAIRMAN VERKUIL: Sure. John,  
9 do you want to respond, or Kathleen?

10 MR. COONEY: Sure. I'll go  
11 first, and then I'll pass it to you,  
12 Kathleen.

13 On the first question, this is  
14 the typical separation of powers issue  
15 that ACUS comes across all the time  
16 and that we heard yesterday.

17 As I understand the FAR  
18 Council's authority, and it's good to  
19 have the guru on that in the room, but  
20 that it applies to the executive  
21 agencies, those that are in the  
22 presidential family, but that, in some  
23 instances, it may not have authority  
24 to control the actions of the  
25 independents. That's why we included

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2 recommendation 6 here, is to encourage  
3 the independent agencies to  
4 participate, and we hope that they  
5 will with the peer pressure of seeing  
6 the rest of the government setting up  
7 a program will persuade them that they  
8 ought to do that and also show them  
9 that the hard work has been done and  
10 that they can free ride and the work  
11 of the FAR Council has been done.

12 And my overall response to your  
13 second question about what the effects  
14 will be, this is why we wanted to push  
15 the decisions down to the contractor  
16 officer level. A number of questions  
17 like that came up in the course of the  
18 debate, that there is no way that we,  
19 as a bunch of generalists making  
20 recommendations to a federal agency  
21 could solve, it seemed to us this is  
22 something that needs to be addressed  
23 by the FAR Council.

24 And we thought that the best  
25 recommendation would be to try to

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2 delegate that responsibility down to  
3 the contracting officer insofar as  
4 possible so that the contracting  
5 officer could look at an institution  
6 like Columbia and not impose a  
7 reporting requirement on every faculty  
8 member of the institution but just on  
9 those who might present a particular  
10 risk of abuse.

11 CHAIRMAN VERKUIL: Did you have  
12 follow-up, Peter?

13 MR. STRAUSS: I did.

14 MR. COONEY: But perhaps we  
15 ought to let Kathleen complete the  
16 other half of the sentence before we  
17 come back to you.

18 MS. CLARK: Yeah. Thank you so  
19 much. I think that you make a very  
20 good point. I just want to clarify  
21 that I believe that this  
22 recommendation, the focus of my  
23 report, is contracts, government  
24 contracts with other parties.

25 I believe what you're talking

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2 about in the university setting is  
3 primarily grants rather than  
4 contracts. But what I just want to  
5 clarify, one way or another, is that  
6 the government actually spends more  
7 money on grants than contracts.

8 The same issues apply, it seems  
9 to me, and I don't know that this  
10 recommendation reaches that, and I am  
11 wondering whether you're suggesting --  
12 or the implication of your question is  
13 a follow on or -- to address the  
14 perhaps different environment of  
15 grants as opposed to contracts.

16 MR. STRAUSS: I don't have a  
17 view as -- as to that specifically,  
18 but I do think that whether it's a  
19 grant or a contract, there will be  
20 situations -- and I appreciate John's  
21 response -- there will be situations  
22 in which there is a certain amount of  
23 conflict of interest inherent in the  
24 relationship that can't be avoided and  
25 that need to be addressed.

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2 On the first point, which is  
3 what I wanted to respond to, when I  
4 was General Counsel at the NRC, there  
5 was an issue of claiming the executive  
6 privilege that came up in a  
7 legislative proposal. And we said,  
8 well, of course, this should extend to  
9 us too. We've got nuclear bomb  
10 recipes in our safety deposit boxes.

11 And we got back from the Office  
12 of Legal Counsel advice that, no, you  
13 can't have executive privilege because  
14 you're an independent regulatory  
15 commission, which seemed to me, and  
16 continues to seem to me, the silliest  
17 advice that ever came out of the  
18 Office of Legal Counsel.

19 So I would suggest, if someone  
20 in there with the power to make a  
21 motion would be willing or interested  
22 to do it, that recommendation 6 be  
23 amended to include a recommendation  
24 that the FAR be extended to the  
25 maximum extent constitutionally

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2 permitted, which would include the  
3 IRCs.

4 MR. COONEY: Do you want to  
5 address that? We've had some debate  
6 on this.

7 CHAIRMAN VERKUIL: Is there  
8 anything else?

9 MR. SIEGEL: I think that's --  
10 that, you know, may well be a good  
11 suggestion. It strikes me as quite  
12 far afield from the focus of this  
13 recommendation to say that everything  
14 in the FAR should be extended to a  
15 whole set of agencies that are  
16 currently not covered. I think that  
17 would require much more research than  
18 -- I really don't think we have done  
19 the homework necessary to make that  
20 recommendation.

21 CHAIRMAN VERKUIL: Okay. Any  
22 other -- let's see. I think Jonathan.

23 MR. ROSE: Jonathan Rose, Senior  
24 Fellow. I have a couple of questions  
25 about sort of how this will change

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2 things and what its impact will be.

3 First of all, I gather from what  
4 you're saying that there is now no  
5 standard clause in RFPs used for, for  
6 example, procuring personal services,  
7 like the investment advisor or  
8 whatever, that bars people who have  
9 some economic or financial interest  
10 from being an applicant under the RFP.  
11 That's my first question. The second  
12 question is to what extent this is  
13 both a problem of having adequate  
14 statutes or regulations and a problem  
15 of enforcing them.

16 My experience with the  
17 procurement process is that it is not  
18 totally uncommon from those writing  
19 the specifications in an RFP to get  
20 advice from those who are going to  
21 submit proposals on the RFPs which may  
22 have the effect of excluding some  
23 people and favoring others, and to  
24 what extent your recommendations deal  
25 with that problem of -- that goes as

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2 much to the enforcement as it does to  
3 having the adequate rules and  
4 regulations.

5 MR. COONEY: Let me take the  
6 first crack at that, if I could. On  
7 your first question, the answer is  
8 that the response is scattered  
9 throughout the government as to what  
10 kind of clauses would flow down to a  
11 contractor.

12 The FDIC has comprehensive rules  
13 in place. My assumption is that if a  
14 contractor comes in at the FDIC and  
15 looks at the portfolio of defaulted  
16 commercial real estate loans and the  
17 failed banks portfolio, that that  
18 person would be under a strict ethics  
19 rule not to take that information out  
20 and use it later.

21 But if a person were performing  
22 exactly the same function through the  
23 TARP program that was run by Treasury  
24 as opposed to the FDIC, there wouldn't  
25 necessarily be that kind of Treasury

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2 rule that would flow down to the  
3 contractor, and so the contractor  
4 might be able to leave after the  
5 contract ends, go back to the hedge  
6 funds, and try to put together a pool  
7 of money that the person could then  
8 use to cherry pick the portfolio that  
9 the person had just spent all that  
10 time investigating.

11 So what we're trying to do here  
12 is to make a recommendation by which  
13 we take the best practices, the best  
14 contract provisions that have been  
15 identified by the agencies, and find a  
16 way to have them instituted  
17 systematically so that we don't have  
18 these inadvertent gaps.

19 MS. CLARK: If I could just  
20 clarify. I identified, I think, seven  
21 agencies that had regulations. FDIC  
22 had really broad regulations of  
23 contractor ethics and conflicts. It  
24 turns out that TARP, Treasury's TARP  
25 program, is one of the few units that

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2 actually had comprehensive ethics  
3 standards for TARP contractors.

4 But John's point, more  
5 generally, is accurate. In general,  
6 there is no standard approach in  
7 government to protect against  
8 conflicts among contractor personnel.

9 CHAIRMAN VERKUIL: Okay. Jon.

10 MR. ROSE: Excuse me. You were  
11 going to say something, Jon?

12 MR. SIEGEL: I would just also  
13 like to say, I think it's important to  
14 remember that this recommendation  
15 takes the form of a recommendation to  
16 the FAR Council. So the biggest thing  
17 the recommendation does is to identify  
18 the areas that the Conference believes  
19 require attention, and it devolves the  
20 duty upon the FAR Council to work out  
21 most of the details of what should be  
22 done.

23 To the extent that the  
24 recommendation recommends the content  
25 of what the FAR Council will do, you

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2 can find that particularly in  
3 recommendations 4 and 5 so that, you  
4 know, that provides some content,  
5 which I also think helps address the  
6 second question asked by Peter Strauss  
7 earlier, what effect would this if an  
8 organization like Columbia University  
9 has a contract with the government, is  
10 every professor at Columbia University  
11 subject to conflict of interest of  
12 rules.

13 I think, if you look at  
14 recommendation 4, it seems to me that  
15 the most that would happen is that if  
16 some individual professor had a  
17 conflict of interest with that  
18 contract, well, that professor  
19 wouldn't be working on that contract,  
20 that they would be screened, as  
21 recommendation 4 says.

22 But anyway the main point is  
23 most of what the recommendation says  
24 is it asks the FAR Council to work out  
25 answers to the questions such as -- as

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2 Mr. Rose just asked, and the content,  
3 the recommended content is in 4 and 5.

4 CHAIRMAN VERKUIL: So let's move  
5 on. I've got Alan, I've got Jody, and  
6 John Kamensky. And -- no? John is  
7 okay? Okay. Anyone else that would  
8 like to get on? Oh, Bob. Yes.

9 So Alan first, please.

10 MR. MORRISON: I would like to  
11 focus on Peter's question before about  
12 the independents and, in particular,  
13 recommendation 6. The seventh word in  
14 recommendation 6 is the word "may."  
15 Our recommendations can be "may,"  
16 "should" or "must." And it seems to  
17 me that "may" is not an appropriate  
18 word here because it suggests that in  
19 the absence of this recommendation  
20 independent agencies; that is, those  
21 not covered by FAR, could not use the  
22 FAR provisions or clauses, and that  
23 "may" is too soft, and that at least  
24 we ought to say that they should use  
25 them or should consider using them, if

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2 we can get back to yesterday. But  
3 "may" is too soft. I vote for  
4 "should."

5 I made this suggestion. It was  
6 declined, and perhaps I could ask the  
7 committee as to why they chose "may"  
8 as opposed to "should."

9 PARTICIPANT: So moved.

10 CHAIRMAN VERKUIL: Well, let's  
11 ask -- yeah. Who moved it?

12 PARTICIPANT: I move it.

13 CHAIRMAN VERKUIL: We have a  
14 motion. All right. Let's discuss the  
15 motion. Is there a second to the  
16 motion?

17 PARTICIPANT: Second.

18 CHAIRMAN VERKUIL: Okay. This  
19 becomes -- this is very Talmudic now.  
20 I think "may" versus "should" is very  
21 important. Go ahead.

22 MR. COONEY: We had discussed  
23 this in -- when we were before the  
24 full members of the Conference, and I  
25 thought that the way we addressed that

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2 concern, which Judge Wald was  
3 particularly intent on raising, was  
4 that in the last sentence under  
5 recommendation 6 we said they should  
6 consider employing.

7 We were trying to be respectful  
8 of the agency's authority, but we  
9 wanted to make ACUS' intent clear that  
10 we thought that this was a very good  
11 idea for the agencies to do this.

12 CHAIRMAN VERKUIL: So we're --

13 MR. MORRISON: I believe you say  
14 "should" twice in that -- in your  
15 comments below.

16 CHAIRMAN VERKUIL: "They should  
17 consider employing." And where do you  
18 want to end it?

19 PARTICIPANT: First line.

20 MR. MORRISON: Strike "may" and  
21 put "should."

22 CHAIRMAN VERKUIL: Go ahead,  
23 Jon.

24 MR. SIEGEL: If you change "may"  
25 to just the word "should" in 6, I

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2 think you would then be imposing a  
3 stronger recommendation on the  
4 independents than on the core  
5 executive agencies because the rest of  
6 the recommendation recommends that the  
7 FAR Council set these up as optional  
8 clauses and encourage the agencies to  
9 use them.

10 So I think if you want to change  
11 "may" to "should consider," that would  
12 put the independents --

13 CHAIRMAN VERKUIL: I think that  
14 might be the --

15 MR. MORRISON: I don't have an  
16 objection to that.

17 CHAIRMAN VERKUIL: Is that okay  
18 to the mover? And that's okay to the  
19 team?

20 MR. SIEGEL: Yeah. I mean,  
21 because we've got --

22 CHAIRMAN VERKUIL: "Should  
23 consider"?

24 PARTICIPANTS: Using.

25 CHAIRMAN VERKUIL: "Should

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 consider using." Good. "Should  
3 consider."

4 PARTICIPANTS: "Should consider  
5 using."

6 CHAIRMAN VERKUIL: "Using."

7 MR. HERZ: Not just think about  
8 it, but...

9 CHAIRMAN VERKUIL: Oh, that's  
10 true. All right. Let's see. Now let  
11 me keep on my order. I've got Jody  
12 next. I'm sorry, Jody and then Bob  
13 Fox. Are you okay? Oh, we have got  
14 to vote, right? It's accepted, so do  
15 we have to vote?

16 MR. SIEGEL: Well, I don't think  
17 we need speak of whether or not --

18 MR. SCHIFF: Are the words --  
19 are the words "as a resource,"  
20 still "should consider using them as a  
21 resource"? That's the way we should  
22 consider using them when they go to  
23 the contract just as the agencies...

24 Bob Schiff, Government Member.

25 Agencies should have the

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 discretion whether to use or modify  
3 the FAR operations or clauses.

4 CHAIRMAN VERKUIL: Yeah.

5 MR. SCHIFF: And then agencies  
6 not covered by FAR should consider  
7 using the FAR provisions as a  
8 resource.

9 MR. SIEGEL: You want to cut "as  
10 a resource."

11 MR. SCHIFF: If you're going to  
12 say "should consider using," I would  
13 take out "as a resource."

14 CHAIRMAN VERKUIL: David?

15 PARTICIPANT: Ask if we get  
16 staff because the point of this was  
17 that --

18 CHAIRMAN VERKUIL: Go ahead.  
19 Wait. Wait one second.

20 MR. FREDERICK: David Frederick,  
21 Public Member. The purpose of having  
22 "as a resource" was that there might  
23 be particular language that wouldn't  
24 necessarily fit within an agency  
25 context but would contain a concept

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 that might be used and modified. So  
3 the whole idea behind having these  
4 provisions worded in a general way was  
5 that agencies could use them as  
6 resources in making appropriate  
7 modifications for those appropriate  
8 circumstances.

9 CHAIRMAN VERKUIL: Okay. So  
10 we'll leave that in. So now we still  
11 have to vote on it. Do you want -- do  
12 you want to change "if you could."

13 MR. SCHIFF: Can I just make one  
14 other comment?

15 CHAIRMAN VERKUIL: Sure.

16 MR. SCHIFF: I guess the  
17 question is -- I guess the question is  
18 whether we are having to proffer the  
19 recommendations to independent  
20 agencies or not, because we don't say  
21 agencies should have the discretion  
22 whether to use or modify -- or whether  
23 to use the model FAR provisions as a  
24 resource in recommendation 3.

25 And I think the point of the

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 original -- the original point Alan  
3 was making was that we ought to take a  
4 position, and I agree with it, that  
5 independent agencies should use this  
6 in the same way that executive  
7 agencies do. And in that case, I  
8 would say "as a resource" changes  
9 that.

10 CHAIRMAN VERKUIL: Let's see.  
11 Go ahead, and then we'll vote.

12 MR. FREDERICK: The last part --  
13 the last part of number 6 talks about  
14 customizing provisions in the same way  
15 that 3 talks about modifying  
16 provisions. I think they are parallel  
17 although with slightly different  
18 records.

19 CHAIRMAN VERKUIL: Now let's see  
20 if we can speak to the motion and then  
21 we can vote on it. And right now the  
22 motion is "should consider using," and  
23 the question is whether to include  
24 that other clause or not.

25 So Jim and then Peter.

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2 MR. CHEN: Having taught  
3 legislation for about two decades. I  
4 recommend the use of the same verbs,  
5 "consider using or modifying." If  
6 that could be accepted by the  
7 proponent as a friendly amendment,  
8 that would take care of the issue.

9 PARTICIPANT: Makes it parallel  
10 to 3?

11 MR. CHEN: Yep.

12 CHAIRMAN VERKUIL: Did we get  
13 that? How does it read, Jim?

14 MR. CHEN: "Using or modifying."

15 PARTICIPANT: Say the same  
16 verbs.

17 MR. CHEN: So it's tracking the  
18 verb in 3. Since 3 says -- if you go  
19 back to recommendation 3, it says  
20 "agencies should have the discretion  
21 whether to use or modify." That's the  
22 operative language. So instead of  
23 saying, you know, we'll achieve the  
24 same thing with roughly -- roughly the  
25 same thing with different verbs, why

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 don't we achieve the same thing with  
3 the same verbs?

4 PARTICIPANT: Such as a friendly  
5 amendment.

6 CHAIRMAN VERKUIL: "Should  
7 consider using or modifying." Okay.

8 PARTICIPANT: And take them off  
9 as a resource.

10 CHAIRMAN VERKUIL: Well, I'll  
11 let my team do this. I'm not going to  
12 do it by myself. Does that make  
13 sense?

14 MR. CHEN: One more -- one more  
15 thing. If you look at the verb in the  
16 final sentence of paragraph 6, it says  
17 "they should consider employing or, if  
18 necessary, customizing."

19 If we're going to use the same  
20 verbs over and over, I would replace  
21 "customizing" with "modifying." I  
22 mean, it's all -- all I am trying to  
23 do here is -- is put language that  
24 would actually implement the intent of  
25 the original proponent, Alan Morrison.

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2 CHAIRMAN VERKUIL: Let's just  
3 see. Have we got that up on the  
4 screen? Can we do that or should we  
5 just -- you're all set?

6 So now we know what we're voting  
7 on? Is there any other question on  
8 the language? Yes.

9 MR. STRAUSS: I'd suggest adding  
10 the word "also" before "consider."

11 CHAIRMAN VERKUIL: "Also  
12 consider."

13 MR. STRAUSS: "Agencies not  
14 covered by the FAR should also  
15 consider using or modifying the model  
16 FAR provisions or clauses when  
17 negotiating..."

18 PARTICIPANT: You don't want it  
19 after "should."

20 PARTICIPANT: I think he wants  
21 it before should.

22 MR. SCOTT: Oh, I'm Sorry.

23 PARTICIPANT: It should be  
24 "also."

25 MR. STRAUSS: I wanted that --

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 PARTICIPANT: It should be "also  
3 consider."

4 PARTICIPANT: In addition to the  
5 other.

6 CHAIRMAN VERKUIL: Listen. All  
7 right. The committee on style is  
8 capable of taking "also" and putting  
9 it where it should go.

10 (Laughter.)

11 CHAIRMAN VERKUIL: And the word  
12 "modifying" rather than "customizing"  
13 is part of --

14 MR. STRAUSS: Right.

15 CHAIRMAN VERKUIL: -- the  
16 friendly amendment, right?

17 MR. STRAUSS: Right.

18 CHAIRMAN VERKUIL: And that's  
19 all right. So let's -- so now that we  
20 know what we're doing, can we vote on  
21 this?

22 PARITICIPANTS: Yes.

23 CHAIRMAN VERKUIL: Then it's  
24 still the Morrison amendment, I  
25 suppose, as touched up a bit.

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2 All in favor?

3 (Chorus of ayes.)

4 CHAIRMAN VERKUIL: Opposed?

5 (No response.)

6 CHAIRMAN VERKUIL: Okay. That's  
7 fine.

8 Now I'm back to a more general  
9 discussion of -- and I think I have  
10 Jody listed. And I don't know -- is  
11 there anyone else? And Bob Fox and  
12 Bill Schultz.

13 MS. FREEMAN: Jody Freeman. So  
14 just three quick things. The first is  
15 that I wonder if there is any value in  
16 addressing the ABA letter just  
17 directly with a sentence or two, only  
18 because once you read it -- you know,  
19 once you read it, you actually could  
20 possibly conclude that there is a  
21 systematic regime in place if you  
22 really --

23 CHAIRMAN VERKUIL: Right.

24 MS. FREEMAN: You know, and  
25 although on page 5 in the first full

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2 paragraph you do talk about the  
3 significant disparity between the two,  
4 the public and private regimes, and  
5 although in recommendation 1 you also  
6 allude to -- I think maybe on page 5  
7 there might be a spot to actually just  
8 say, while there are a combination of  
9 measures either in statute or  
10 regulation or in the process of being  
11 promulgated, it's not a comprehensive  
12 regime, as you said, it's piecemeal  
13 it's limited in scope, and the focus  
14 may be somewhat different than on  
15 protecting the government as the  
16 client, because there is a lot of  
17 focus on unfair advantage and other  
18 things.

19 So you might just want to give a  
20 nod in the direction of why this is so  
21 important by adding a sentence or two.  
22 This isn't a motion. It's just a  
23 suggestion for the committee on style.

24 And the second point is just to  
25 suggest, as Jim I think also seemed to

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2 suggest, that there could be a follow  
3 on project. I think it could be very  
4 important to talk about not only  
5 inherently governmental functions  
6 actually in reality being performed  
7 systematically by contractors, but  
8 also all the larger problems and  
9 implications that Dan suggested need  
10 to be looked at.

11 So while ethics is crucial,  
12 there is a massive project here that I  
13 think this would be extremely  
14 important to look at.

15 And, finally, I do think that  
16 this is a really excellent model for  
17 how to do this. I mean, this  
18 recommendation in particular, with the  
19 way you framed the question, John, and  
20 the way the real world problem was  
21 defined, the excellence of the  
22 research, the thoroughness of the  
23 empirical study, 90 plus interviews is  
24 really impressive compared to some  
25 other empirical bases. So I think

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2 this could really serve as a model,  
3 especially with the government support  
4 you had going in. So we might want to  
5 try to reproduce the method on all our  
6 committees.

7 CHAIRMAN VERKUIL: A high  
8 standard, but thank you.

9 (Applause.)

10 CHAIRMAN VERKUIL: So I think --  
11 by the way, I think it's a very  
12 good -- we ought to refer to the ABA  
13 letter, and we will take liberty to do  
14 that, because we don't want it to be  
15 thought that we didn't notice what  
16 they were talking about and then it  
17 goes up the ABA chain and before you  
18 know it we've got to re-address it.  
19 So that's a very good point. Thank  
20 you for that.

21 Yes.

22 MR. MAY: Just quickly. I  
23 know John knows this, but as someone  
24 involved in the ABA as well, make  
25 sure, you know, when you refer to the

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2 ABA, this is only the ABA section  
3 speaking in that disclaimer.

4 PARTICIPANT: Public member.

5 MR. MAY: The ABA is the public  
6 member. When you write anything about  
7 it, be very clear on that.

8 CHAIRMAN VERKUIL: We will.  
9 Thank you.

10 So now we're still back to --  
11 let's see. I've got Bob Fox and Bill  
12 Schultz. Okay. Bob.

13 MR. TAYLOR: I'm Robert Taylor.

14 (Laughter.)

15 CHAIRMAN VERKUIL: I'm sorry.  
16 Bob Taylor.

17 MR. TAYLOR: You invited me with  
18 Don Fox, and it's good company, and so  
19 I feel flattered by the mistake.

20 But I'm Robert Taylor. I'm a  
21 Government Member, Department of  
22 Defense. I too would very much like  
23 to commend the committee, Kathleen in  
24 particular, for the very hard work and  
25 the excellent job. And I think that

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2 what we've come up with is what I  
3 characterize as a suitably modest  
4 proposal.

5 There was temptation to reach  
6 beyond the scope. One of the  
7 temptations Kathleen referred to is to  
8 cover grants. I think we don't know  
9 enough and haven't looked hard enough  
10 at that issue to reach a  
11 recommendation at this point to  
12 include grants.

13 As Kathleen pointed out, it's a  
14 lot of money involved, but there are a  
15 lot of different considerations that I  
16 think we need to at least wrestle with  
17 if we're going to encompass grants.  
18 And it may be appropriate in many  
19 cases to have what could be regarded  
20 as a conflict in a grant situation  
21 where we know, with our eyes wide  
22 open, that we are providing money to  
23 somebody who stands to benefit if they  
24 can accomplish a purpose that we  
25 decide, going in, is a public interest

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2 purpose.

3 So I think this proposal is  
4 modest. We spent a lot of time to  
5 make sure that we were confident that  
6 it would be addressing what Kathleen  
7 and others have identified as a very  
8 real problem out there and a real  
9 concern to assure that government is  
10 viewed as acting with integrity and  
11 that, in fact, we do act with  
12 integrity and with our eyes focused  
13 squarely on what's in the public  
14 interest.

15 So I think this is a very  
16 important recommendation, but it's a  
17 modest recommendation, and that  
18 doesn't preclude us from going further  
19 later, as we develop information and  
20 we see how this works. But part of  
21 the modesty of this proposal is to  
22 rely on the FAR Council, which will  
23 engage in a very open public process.  
24 And, again, thank you very much.

25 CHAIRMAN VERKUIL: Thank you,

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2 Bob Taylor.

3 (Laughter.)

4 CHAIRMAN VERKUIL: So the last  
5 one is Bill Schultz.

6 MR. SCHULTZ: This has to do  
7 with recommendation number 3,  
8 "agencies should have the discretion  
9 whether to use or modify the model FAR  
10 provisions or clauses."

11 It's my understanding that FAR  
12 has the authority to issue regulations  
13 that would be agency-wide. So, for  
14 example, you know, there are serious  
15 conflict of interest issues and, at  
16 some point, FAR might issue a  
17 regulation that is binding on the  
18 agencies. This recommendation seems  
19 to suggest that we're saying FAR  
20 shouldn't do that.

21 I would modify it by adding at  
22 the end "unless otherwise required by  
23 statute or regulation."

24 CHAIRMAN VERKUIL: This is at  
25 the end of the heading or --

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2 MR. SCHULTZ: The heading, yeah.

3 I mean, unless they're -- I assume it  
4 wasn't intended to urge FAR never to  
5 issue a government-wide regulation.

6 MR. COONEY: The intent was to  
7 drive home the theme that we wanted to  
8 have a flexible program here where the  
9 agencies should have the discretion to  
10 modify the contract clauses as  
11 appropriate to address the specific  
12 problems addressed by a specific  
13 contract.

14 Frankly, we didn't know enough  
15 about the FAR drafting process to  
16 answer your question, but we have an  
17 expert with his hand up, so I think we  
18 might hear Mr. Gordon on this point.

19 MR. GORDON: Thank you. I don't  
20 think the amendment causes any  
21 problem, but let me say the agencies  
22 already have authority to issue  
23 supplements to the FAR. Agencies  
24 have -- there is an ability for  
25 agencies to have waivers or deviations

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 from the FAR, so I don't think that  
3 the amendment is necessary, but I also  
4 think it doesn't do any harm.

5 CHAIRMAN VERKUIL: Well, in that  
6 status I think then we should  
7 probably -- is there a second?

8 PARTICIPANT: Second.

9 CHAIRMAN VERKUIL: All right.  
10 Any other views on the amendment?

11 MR. DON ELLIOTT: Don Elliott.  
12 I think Bill Schultz has a good point,  
13 but I do actually think that the  
14 amendment language actually makes it  
15 stronger and says that the only  
16 situation in which the FAR Council  
17 should impose mandatory requirements  
18 is where they are otherwise required  
19 by statute or regulation.

20 I think this whole point here is  
21 a bit of a mistake. I think it's  
22 inconsistent with the philosophy which  
23 Bob Taylor and others pointed to,  
24 which I think makes a lot of sense, of  
25 letting the FAR Council really examine

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 the issues. And I don't think that we  
3 should prejudge on this particular  
4 point.

5 So at the risk of getting my  
6 friend, Phil Harter, upset again,  
7 maybe this is one where "consider" is  
8 appropriate. You know, maybe  
9 softening this to something along the  
10 lines that the FAR Council should  
11 consider the extent to which agencies  
12 should have discretion, or something  
13 like that.

14 But I don't think that we should  
15 take this one point and make a  
16 specific recommendation and, in a  
17 sense, take it out of the hands of the  
18 FAR -- FAR Council.

19 CHAIRMAN VERKUIL: Let's just  
20 vote on the Schultz proposal, which is  
21 to add this phrase "unless" -- what's  
22 the words?

23 MR. SCHULTZ: "Unless otherwise  
24 required by statute."

25 CHAIRMAN VERKUIL: "Unless

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 otherwise required."

3 Do we have any further comments  
4 on this? I mean, this can't be  
5 that -- need that much discussion,  
6 Ron. What could possibly be the  
7 question?

8 (Laughter.)

9 MR. LEVIN: It does seem to  
10 me -- this is Ron Levin -- that it's  
11 practically stating a truism, if you  
12 add Bill's language because, by  
13 definition, if the statutes and  
14 regulations don't constrain the --

15 CHAIRMAN VERKUIL: Right. How  
16 about the Constitution?

17 (Laughter.)

18 MR. LEVIN: Rather than a  
19 truism, I think the intent of the  
20 original committee was to make a  
21 policy position to say maybe agencies  
22 should have broad discretion whether  
23 to use or modify. So that -- we  
24 welcome the possibility that that  
25 discretion would be constrained, but

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2 nevertheless it takes a position that  
3 there should be flexibility, and  
4 that's which I understood John to be  
5 advocating.

6 CHAIRMAN VERKUIL: All right.  
7 Bill.

8 MR. SCHULTZ: It's not quite as  
9 trivial. I think the words of the  
10 recommendation have the Administrative  
11 Conference telling FAR that it should  
12 not issue binding regulations on the  
13 agencies in any circumstance, that the  
14 agencies should always have the  
15 discretion to modify the FAR model  
16 provisions.

17 And what I'm suggesting is there  
18 may be situations where it's good  
19 policy for FAR to do that. Of course,  
20 if it did it, you know, there's  
21 nothing the Administrative Conference  
22 should do. But I don't know that we  
23 want to be recommending to FAR that  
24 there is no situation where they would  
25 issue a regulation that was binding as

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 to contracts.

3 CHAIRMAN VERKUIL: Okay. Let's  
4 vote. All in favor of the Schultz  
5 amendment, say aye.

6 (Chorus of ayes.)

7 CHAIRMAN VERKUIL: All opposed,  
8 say nay.

9 (Chorus of nays.)

10 CHAIRMAN VERKUIL: Okay. The  
11 nays have it.

12 So, are we ready to vote on the  
13 whole -- Jon?

14 MR. SIEGEL: There has been some  
15 discussion, both yesterday and this  
16 morning, about the difference between  
17 recommending that an agency should do  
18 something and saying it should  
19 consider to do something. I think the  
20 committees are using that distinction,  
21 you know, deliberately, that the  
22 "should consider" is meant to be a  
23 little softer.

24 We did discover this week,  
25 though, one place where it occurs in

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2 this recommendation that I think is an  
3 error. If you look at the first  
4 sentence under heading 4 and then the  
5 corresponding first sentence under  
6 heading 5, you'll notice, in 4, it  
7 says "the FAR Council should encourage  
8 agencies to consider inclusion of  
9 these provisions." And then 5 says  
10 "the FAR Council should encourage  
11 agencies to include these provisions."

12 Given that already just  
13 encouraged, I think 5 is what the  
14 committee had intended, and 4 is just  
15 a mistake. So if a member wanted to  
16 move conforming 4 to 5, I think that  
17 would be closer to what the committee  
18 meant.

19 PARTICIPANT: Which way?

20 MR. SIEGEL: That it should be  
21 as 5 reads.

22 MR. CHEN: So moved.

23 CHAIRMAN VERKUIL: "Encourage"  
24 instead of "should consider"?

25 MR. SIEGEL: "Should encourage

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 to include."

3 CHAIRMAN VERKUIL: Okay.

4 Motion. Second?

5 PARTICIPANTS: Second.

6 CHAIRMAN VERKUIL: All in favor?

7 (Chorus of ayes.)

8 CHAIRMAN VERKUIL: Nay?

9 (No response.)

10 CHAIRMAN VERKUIL: Okay. Thank  
11 you, Jon. Good.

12 Can we do the whole thing?

13 The motion has -- because it  
14 comes from the committee, we just need  
15 a second. We have a second. All in  
16 favor?

17 (Chorus of ayes.)

18 CHAIRMAN VERKUIL: Opposed?

19 (No response.)

20 CHAIRMAN VERKUIL: Okay. Well,  
21 thank you. This is a very good step.

22 (Applause.)

23 CHAIRMAN VERKUIL: Just to refer  
24 back to Jody's point, I think there  
25 are so many -- the inherent government

1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2 function which is Dan is working on,  
3 and so many things that are out there,  
4 that we could be looking at...

5 So why don't we -- we've got  
6 fifteen minutes for a coffee break,  
7 and then we'll come back and do our  
8 next hearing.

9 (Recess.)

10 CHAIRMAN VERKUIL: We're down to  
11 the last one, which I think is a very  
12 interesting one, and I hope you will  
13 enjoy it. So -- video hearings  
14 project, and I don't think we have Jon  
15 Siegel yet, so we can't start.

16 PARTICIPANT: He's on his way.

17 CHAIRMAN VERKUIL: We now have  
18 our Research and Policy Director.  
19 Jon, do you want to start us off? Do  
20 you want to tell a joke first?

21 MR. SIEGEL: My father was a  
22 musician, so in this situation he  
23 would also say "vamp till ready."

24 (Laughter.)

25 MR. SIEGEL: As a little part of

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2 vamping, let me just say that, in  
3 thanking staff members who had worked  
4 on the previous recommendation, I  
5 neglected to mention my deputy, Scott  
6 Rafferty -- he's standing right over  
7 there -- who served as the Staff  
8 Counsel to Committee on Administration  
9 and Management, so he is also to be  
10 thanked for his work on that  
11 recommendation.

12 Our final recommendation for  
13 this plenary session is our  
14 recommendation on video hearings. And  
15 what I find interesting about this  
16 recommendation is -- you know, most of  
17 our recommendations, I would say, are  
18 focused on that we've identified a  
19 problem that we would now like to  
20 recommend a solution for. This one, I  
21 think, is a little different. This is  
22 more about promoting what we see as a  
23 success story.

24 In 2010, we held a workshop  
25 which Scott also organized. It was

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2 about technological approaches to  
3 managing high-volume caseloads, and we  
4 had a lot of interesting people in the  
5 room, including someone from PayPal  
6 who told some very interesting stories  
7 about their automated system for  
8 resolving literally tens of millions  
9 of disputes a year on PayPal. And one  
10 of the things we learned was --

11 PARTICIPANT: EBay.

12 MR. SIEGEL: I'm sorry, eBay --  
13 well, but they own PayPal, right?

14 One of the things we learned is  
15 the Social Security Administration  
16 uses video technology in its  
17 administrative hearings in a way  
18 that's saving tens of millions of  
19 dollars, reducing the waiting time for  
20 hearings, and having no statistically  
21 significant effect on the case  
22 outcomes.

23 And when we heard that, we  
24 though, well, wow, there is a best  
25 practice that other agencies should

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2 consider. So we turned it into a  
3 recommendation project, and the result  
4 is before you.

5 So this project comes from our  
6 Committee on Adjudication, chaired by  
7 John Cooney, and the researcher -- I  
8 beg your pardon. John Vittone, I'm  
9 sorry. John Cooney --

10 (Laughter.)

11 MR. SIEGEL: We will fix that in  
12 the transcript.

13 Anyway, and the research for the  
14 project is our own in-house Funmi  
15 Olorunnipa, and she's now going to  
16 tell us about it.

17 MS. OLORUNNIPA: Thank you, Jon.  
18 Let me first say that, because my name  
19 is Funmi, I don't have often people  
20 getting my last name confused, so  
21 that's one less problem that I have.

22 Thank you, Jon. I had the  
23 pleasure of serving as the  
24 conference's in-house researcher on  
25 the agency use of video hearings:

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2 best practices and possibility for  
3 expansion project.

4 I should start by providing the  
5 disclaimer that, although I prepared  
6 the report in my capacity as Attorney  
7 Advisor for the Conference, the views  
8 I will express are my own and not  
9 necessarily those of the conference.

10 With that, I wanted to begin by  
11 providing a bit of background about  
12 the research for this project. As you  
13 all know, we are certainly living in a  
14 technological age. For some people,  
15 the use of technology can cause  
16 problems. Indeed, yesterday, Anthony  
17 Weiner finally recognized that, for  
18 him, use of technology did cause  
19 problems.

20 (Laughter.)

21 MS. OLORUNNIPA: With that said,  
22 I think everyone here can agree that,  
23 when used appropriately, technology  
24 can --

25 (Laughter.)

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2 MS. OLORUNNIPA: Accordingly,  
3 this project was designed to examine  
4 how video teleconferencing technology,  
5 also known as VTC, has been used by  
6 agencies to solve problems and how  
7 that use may be expanded to other  
8 agencies that could benefit from VTC.

9 To conduct the research, I  
10 interviewed a number of senior  
11 officials, administrative law judges  
12 and court staff at three agencies with  
13 high-volume caseloads who have been  
14 using VTC to conduct administrative  
15 hearings since the 1990s. These  
16 agencies found that the use of VTC  
17 aids them in reducing caseload  
18 backlogs and reducing the cost of  
19 administrative hearings, particularly  
20 travel costs.

21 The three agencies examined were  
22 the Social Security Administration's  
23 Office of Disability Adjudication and  
24 Review, the Department of Veterans  
25 Affairs Board of Veteran Appeals, and

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2 the Department of Justice Executive  
3 Office for Immigration Review.

4 In addition, I gathered,  
5 reviewed and assessed available  
6 quantitative data about the cost and  
7 benefits of the use of video hearings  
8 at the three agencies. I also  
9 personally visited the agencies to  
10 view how video hearings were being  
11 conducted.

12 The findings from the interviews  
13 conducted and available quantitative  
14 data collected were compiled into a  
15 report which detailed the research  
16 areas looked at within the three  
17 agencies.

18 For each of these agencies, the  
19 report provided general background  
20 about the types of claims heard by  
21 video, a brief history about the use  
22 of video hearings at the agency, a  
23 description of the type of technology  
24 agencies use to conduct video  
25 hearings, and how agency staff has

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2 been trained on this technology.

3 The report also gave a summary  
4 of how video hearings are conducted, a  
5 summary of some of the costs and  
6 benefits of the use of video hearings,  
7 and a description of how the use of  
8 video hearings is evaluated by the  
9 three agencies.

10 The research findings showed  
11 that, for agencies, the use of the  
12 video hearing has the potential to  
13 improve efficiency and/or reduce costs  
14 while also preserving fairness and  
15 participation satisfaction of  
16 proceedings.

17 Indeed, senior officials at the  
18 agencies examined that -- they  
19 reported that the use of VTC has led  
20 to various types of improvements in  
21 efficiency, reductions in cost and  
22 preservations of fairness.

23 For example, in 2010, ODAR  
24 conducted a total of 120,624 video  
25 hearings and a cost-benefit analysis

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2 conducted for the agency by outside  
3 consultants found that the ODAR's  
4 current use of video hearings saves  
5 the agency a projected estimated  
6 amount of approximately \$59,000,000  
7 annually and \$596,000,000 over a  
8 ten-year period.

9 At ODAR, claimants who had their  
10 cases heard by video had significantly  
11 shorter waiting periods for a hearing  
12 than those who had their hearings  
13 heard in person.

14 A study by that agency also  
15 determined that the use of VTC has no  
16 effect on the outcome of the case.

17 A separate ODAR study recently  
18 reviewed by the Conference found that  
19 agencies who had their -- found that  
20 individuals, excuse me, who had their  
21 claims heard by video rated their  
22 overall experience slightly higher  
23 than individuals who had their claims  
24 heard in person.

25 The report ultimately shaped the

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2 recommendation because it provided  
3 information on how video hearings are  
4 used by certain agencies to reduce  
5 caseload backlog and save costs.

6 Also, during the course of the  
7 research, it became apparent that the  
8 use of VTC by agencies may have fiscal  
9 and non-fiscal costs and, accordingly,  
10 a one-size-fits-all approach for the  
11 use of VTC does not help agencies.

12 In that vein, the research  
13 delved into what types of criteria  
14 agencies who conduct video hearings  
15 should consider prior to adopting  
16 their use and what advice those  
17 agencies who have used video hearings  
18 can give to other agencies in terms of  
19 best practices and lessons learned.

20 Ultimately, these research areas  
21 were helpful in shaping the  
22 recommendation.

23 With that, let me close with a  
24 particular note of thanks to those  
25 three agencies and the individuals at

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2 them because they were instrumental to  
3 this project with their willingness to  
4 take the time to be interviewed and to  
5 share agency data and information with  
6 the Conference.

7 Let me also note that I'm happy  
8 to answer questions about the research  
9 when the floor is open to them. Thank  
10 you very much.

11 (Applause.)

12 MR. VITTON: Good morning my  
13 name is John Vittone, and I'm the  
14 Chair of the Adjudication Committee.  
15 First I would like to thank Paul for  
16 his support during the process that  
17 that the committee went through and  
18 especially thank Jon Siegel, Funmi  
19 Olorunnipa for her outstanding service  
20 and Jon's outstanding service and  
21 advice to us during the process.

22 We held several meetings, and  
23 the committee worked very hard and are  
24 very interested in this topic, and I  
25 thought it was a good topic for us to

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2 begin with in the adjudication.

3 Some of you know I'm a retired  
4 administrative law judge from the U.S.  
5 Department of Labor. I looked at  
6 video conferencing about fifteen years  
7 ago to be used at the Department of  
8 Labor but, at that point, the  
9 technology in a sense was so primitive  
10 compared to what we have today that it  
11 really wasn't feasible.

12 We looked at it again several  
13 years ago, following up on the  
14 experience of the Social Security  
15 Administration and several other  
16 agencies, and found that the  
17 technology had improved vastly and  
18 that -- we used it on an experimental  
19 basis in several instances and found  
20 that it worked well, not in all cases,  
21 but in certain cases that we had at  
22 the Department of Labor.

23 At Labor we had hearings that  
24 fell -- or arose under probably 80 to  
25 100 different statutes or regulations.

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2 Funmi did an outstanding job on  
3 the report, and I hope you have all  
4 had an opportunity to read it. I  
5 would just like to go -- take this  
6 time to go over just a little bit of  
7 the recommendation.

8 Our recommendation is really  
9 quite simple and straightforward. We  
10 recommend that all agencies,  
11 high-volume and agencies that even  
12 don't have high-volume caseloads,  
13 consider the use of video conferencing  
14 to conduct their administrative  
15 hearings.

16 We set out a number of criteria  
17 that the agencies should consider when  
18 they're making this decision. I won't  
19 go over all of them, but I would just  
20 like to touch on a few.

21 One, is it legally permissible  
22 under the organic legislation of the  
23 agency? Each agency is unique, and  
24 they have to consider different  
25 factors that apply to their particular

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2 area of the law, and an important one  
3 is, is it legally permissible to hold  
4 those kinds of video conference  
5 hearings under their legislation?

6 And also, is the nature and the  
7 type of the administrative hearing  
8 conducive to the use of video  
9 technology? Not all hearings, I  
10 think, can be conducted by video  
11 technology. The Social Security  
12 Administration has had a good  
13 experience in it, but maybe the  
14 Federal Energy Regulatory Commission  
15 may not be able to use that kind of  
16 technology.

17 And, most importantly -- and the  
18 criteria is that the technology does  
19 not affect the outcome of the case in  
20 one way or the other.

21 And we think that the users, the  
22 people who participate in the  
23 proceedings, should be satisfied that  
24 the technology is providing them with  
25 a fair hearing and that it is

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2 beneficial.

3 One of the things I always  
4 learned as an administrative law  
5 judge, particularly when you're  
6 dealing with a single individual,  
7 claimant in a proceeding, they want to  
8 feel that someone has listened to them  
9 and that they've actually been able to  
10 come there and talk to a disinterested  
11 person to tell them their story. And  
12 video technology should also provide  
13 that same experience to any claimant  
14 or individual or corporation that  
15 comes before an administrative law  
16 judge.

17 We think there are certain best  
18 practices that should be followed.  
19 Agencies that don't have video  
20 technology at the present time should  
21 try it on a voluntary basis. They  
22 should look to the agencies that are  
23 using video technology, that have  
24 experience in this area, and steal  
25 from them if it works.

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2 They should evaluate it on a  
3 periodic basis, and they should  
4 solicit feedback from the users, not  
5 only the judges and the attorneys,  
6 government attorneys, but also the  
7 attorneys from the outside agency and  
8 the claimants or the individuals who  
9 are the subject of a particular  
10 proceeding.

11 Training is very important,  
12 technology. I think it's probably  
13 going to be less important as younger  
14 judges come into the process because  
15 they'll be more used to it, but people  
16 of my generation may have a little bit  
17 more difficult time.

18 Finally, and certainly not the  
19 least, the agencies that do this, or  
20 try it, should also consult with the  
21 Administrative Conference of the  
22 United States on a regular basis.

23 Thank you.

24 (Applause.)

25 CHAIRMAN VERKUIL: I like that

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2 last bit of advice. I recommend it.

3 So -- and as Jon said, this is  
4 like an entry into a new area, and I  
5 think it's a very exciting -- has very  
6 exciting possibilities. We were very  
7 sensitive to the notion about not  
8 applying second class justice for a  
9 mass justice case. I mean, we know  
10 about Matthews versus Eldridge. We  
11 know we can do more things on the  
12 civil side in the administrative  
13 process perhaps than you might  
14 anticipate.

15 But we wanted to make sure that  
16 this -- when we pursue this idea, that  
17 we do so fully aware of the procedural  
18 due process interests. And I think  
19 John made -- John Vittone made a good  
20 explanation of that.

21 And just another preliminary  
22 point. It turns out that the  
23 courtroom for the 21st Century, as  
24 it's called -- it's run by Fred  
25 Lederer down at William & Mary, of all

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2 places. And so they -- what Fred has  
3 there -- maybe you've been to  
4 Williamsburg to see it, but he got all  
5 the best equipment and all the  
6 providers -- I mean, Cisco is always  
7 working with him because all the  
8 providers want him -- he serves as a  
9 laboratory. He doesn't sell  
10 equipment. He's working in a  
11 university setting. So all the best  
12 possible practices are contained in  
13 his equipment.

14 He's the one that actually did,  
15 I think, the ODAR structure for their  
16 video hearing location, so that we  
17 have an opportunity to participate and  
18 be part of -- and we've asked Fred and  
19 his people to come up and talk to  
20 us -- to learn about how to include  
21 this process and to be part of our  
22 ongoing basis and to push it, as  
23 appropriate, into other agencies. So  
24 that's the thought behind this.

25 But let's turn the -- firstly,

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2 there's a manager's amendment that we  
3 should maybe -- those are little  
4 things that -- if I could hear a  
5 motion to approve the manager's --

6 PARTICIPANT: So moved.

7 PARTICIPANT: Second.

8 CHAIRMAN VERKUIL: All in favor?

9 (Chorus of ayes.)

10 CHAIRMAN VERKUIL: Opposed?

11 (No response.)

12 CHAIRMAN VERKUIL: Thank you.

13 And then there is one other  
14 amendment, and -- let's take that, and  
15 then I'd like maybe Jim Borland to  
16 talk to us -- perhaps -- let's take  
17 Alan's motion.

18 MR. MORRISON: Since I can't  
19 make a motion --

20 CHAIRMAN VERKUIL: Well, we'll  
21 make it for you.

22 MR. MORRISON: It seemed to me,  
23 in looking over the various criteria  
24 in recommendation 2, that some of them  
25 are across the board and some of them

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2 appear to be applicable to a  
3 particular case, and I thought it was  
4 just worth pointing that out to  
5 agencies, that some of them -- that  
6 is, "legally permissible" is probably  
7 applicable to the -- under the organic  
8 statute in every case.

9 But whether the hearing is  
10 affecting the outcome may be different  
11 depending upon the nature of the case.  
12 And I just thought it was just worth  
13 including that phrase to remind  
14 agencies that they shouldn't make a  
15 one-size-fits-all determination. It  
16 may be implicit, but I thought it  
17 could be explicit.

18 CHAIRMAN VERKUIL: Who wants  
19 to...

20 MR. VITTON: I don't think we  
21 disagree with you, Alan, but we  
22 thought that since we are directing  
23 this at the agencies, the agencies  
24 would have the flexibility to take  
25 that into consideration in a

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2 particular case that would come before  
3 it, that video technology may not be  
4 the appropriate process to use in a  
5 particular case.

6 I don't think oppose the  
7 concept, but I'm not sure that this is  
8 the place to include that kind of  
9 language. Jon?

10 MR. SIEGEL: I think  
11 recommendation 2 is directed at  
12 suggesting that the agencies make a  
13 global determination -- these are  
14 criteria that the agencies should  
15 think about as it makes a -- what I  
16 think the committee conceived of as a  
17 global determination as to whether  
18 video technology would be appropriate  
19 for its hearing processes. So I think  
20 all the considerations listed under 2  
21 were intended to be thought about on a  
22 global basis.

23 Now, an agency certainly might  
24 choose to adopt a policy which leaves  
25 some flexibility to its adjudicators

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2 to decide whether to use video in a  
3 particular case, so that's certainly  
4 possible. I would be more inclined to  
5 characterize that as a best practice  
6 that might be listed under 3 if it  
7 were to be included.

8 CHAIRMAN VERKUIL: Warren.

9 MR. BELMAR: Warren Belmar,  
10 senior fellow. Just a question of  
11 clarification. Would the litigant  
12 before the regulatory body have the  
13 option to choosing whether to engage  
14 in a video teleconference, or is it  
15 only the agency that can make that  
16 decision?

17 MR. SIEGEL: Well,  
18 recommendation 3(a) is that agencies  
19 consider making it voluntary, which I  
20 believe is the practice, for example,  
21 at SSA. It is not universally true,  
22 though -- you should know it is not  
23 universally true that every agency is  
24 in the habit of giving the litigants  
25 the option, and particularly EOIR is

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2 making it mandatory. You know, they  
3 have special concerns. Many of the  
4 people that they're adjudicating about  
5 are incarcerated. There's, you know,  
6 security issues about getting them to  
7 a face-to-face hearing.

8 So in that case it is not  
9 optional, but recommendation 3(a) is  
10 that agencies consider making it  
11 optional as a best practice.

12 CHAIRMAN VERKUIL: Can we vote  
13 on this, the addition of Morrison's --  
14 well, whoever made it. I guess -- I  
15 did. I'm not going to vote.

16 (Laughter.)

17 CHAIRMAN VERKUIL: So let's -- I  
18 don't mean to affect the --

19 (Laughter.)

20 CHAIRMAN VERKUIL: But it's  
21 so -- I shouldn't -- all right. I'm  
22 going to abstain.

23 (Laughter.)

24 CHAIRMAN VERKUIL: The -- would  
25 all in favor of the motion, please say

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2 aye.

3 (Chorus of ayes.)

4 CHAIRMAN VERKUIL: All opposed,  
5 say nay.

6 (Chorus of nays.)

7 CHAIRMAN VERKUIL: The nays have  
8 it.

9 So now we are at the point where  
10 we can have some general discussion.

11 And I just would -- if I may, I would  
12 just like to call -- oh -- no, no.

13 That's been withdrawn. Carol Ann has  
14 withdrawn her amendment. I'm sorry.

15 I should have mentioned that. I  
16 suppose someone else could bring it  
17 up, but she's happy.

18 So it might be nice to hear just  
19 a few words -- yes, Betty.

20 MS. CHRISTIAN: Betty Jo  
21 Christian, Senior Conference Fellow.  
22 This is just a question to the  
23 committee. You mentioned that  
24 agencies would need to look to their  
25 organic statutes to determine whether

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2 or not they're authorized to use VTC.

3 Was any consideration given to  
4 recommending the enactment of a  
5 statute that would basically provide  
6 that agencies are authorized to use  
7 VTC unless Congress -- except when  
8 legislation specifically prohibits it?  
9 It seems to me that this is the wave  
10 of the future and that our role should  
11 be to encourage its use wherever it's  
12 appropriate.

13 MR. VITTON: The committee did  
14 not consider making that kind of  
15 proposal. We dealt with what is  
16 available at the time. So we did not  
17 talk about that. Nobody raised it,  
18 actually.

19 MR. SCHIFF: Bob Schiff. The  
20 report mentioned that agencies -- and  
21 maybe it's just the Social Security  
22 Administration now -- made a  
23 determination that these kind of  
24 hearings are not outcome-determinative  
25 or have no impact on the outcome.

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2 And I wonder if you could just  
3 explain how they went about  
4 determining that, how confident you  
5 are in that -- those results, whether  
6 other agencies have undertaken similar  
7 studies of their video  
8 teleconferencing. Because that seems  
9 to be kind of the key question about  
10 whether this really should be  
11 promoted.

12 CHAIRMAN VERKUIL: That's right.  
13 And we have Jim Borland here. Maybe  
14 we'll let Jim because -- rather than  
15 us speaking for Jim, let's -- now, I  
16 have to say Jim Borland is standing in  
17 for Glenn Sklar who is head of ODAR,  
18 so we need to give Jim -- he's an  
19 alternate -- unanimous consent to  
20 speak. And I'm assuming silence means  
21 yes. Jim.

22 MR. BORLAND: Good morning, and  
23 thank you. John and Funmi, I want to  
24 thank you for including us in this  
25 process and really for helping us to

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2 tell what John called this morning a  
3 good news story.

4 I believe he called this a  
5 success story, which is rare. Many of  
6 you know that our national  
7 headquarters is up in Baltimore. It's  
8 very rare for us to be called down to  
9 Washington to talk about a success  
10 story.

11 (Laughter.)

12 MR. BORLAND: I am very proud to  
13 work in an organization that this  
14 year -- our core of 1400  
15 administrative law judges will conduct  
16 almost 700,000 hearings to determine  
17 whether or not individuals who have  
18 applied for disability benefits get  
19 them.

20 The economy has created large  
21 and growing caseloads over the last  
22 three or four years. Video  
23 conferencing is one of the tools --  
24 one of many tools that we've used to  
25 deal with that increasing caseload.

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2           During that period, we've also  
3 grown our ALJ core by about a third,  
4 from fewer than 1100 to what stands at  
5 over 1400 today. That increased  
6 capacity certainly has allowed us to  
7 deal with -- with the growing  
8 caseload, so we have the capacity in  
9 our human resource. But video has  
10 really given us the flexibility to  
11 deal with that workload in new and  
12 different ways.

13           Specifically, it's allowed us to  
14 address both our national backlogs as  
15 well as, and perhaps as importantly,  
16 localized backlogs so that when one of  
17 our 150 hearing officers across the  
18 country -- for instance, in the upper  
19 midwest, in Michigan, in Ohio where  
20 the economy has had a particularly  
21 harsh effect -- we have seen a  
22 concurrent increase in our claims in  
23 those localized geographic areas. And  
24 video has allowed us to take and hold  
25 hearings with the claimant and their

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2 representative in those locations with  
3 administrative law judges who can be  
4 anywhere in the country.

5 And, in fact, over the last four  
6 years, we've established five national  
7 hearing centers where groups of ALJs  
8 come together in one single location  
9 and hold all of their hearings by  
10 video with claimants and  
11 representatives all across the  
12 country.

13 In fact, Funmi, I know that you  
14 have -- you sat in on several of our  
15 video hearings. And it's kind of  
16 interesting because they'll typically  
17 jump around the country from hour to  
18 hour. So they might do two, three  
19 hearings in Miami, and then they go to  
20 the upper midwest and they do a couple  
21 of hearings up there, and then they  
22 may finish out on the west coast.  
23 That kind of flexibility obviously is  
24 impossible when you're holding  
25 face-to-face hearings. So, as Funmi

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2 mentioned, last year we held over  
3 120,000 video hearings out of about  
4 660,000 hearings nationwide, about 20  
5 percent of our total.

6 Our video hearings are optional.  
7 Claimants and representative each  
8 individually have the option of opting  
9 out of a video hearing. So if we  
10 offer a video hearing, they can  
11 decline.

12 I also want to note that our  
13 administrative law judges have the  
14 ability to opt out with cause. In  
15 other words, if they identify an issue  
16 that may disadvantage a claimant that  
17 they feel cannot be fully considered  
18 using a video hearing, they can ask  
19 for the rescheduling of the hearing in  
20 a face-to-face way.

21 So we've really designed this  
22 program to be maximally flexible, but  
23 also to ensure that there is no  
24 disadvantage to the claimant.

25 As was mentioned, we -- our

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2 studies have shown that there is no  
3 significant difference in the outcome  
4 of a hearing that's held by video  
5 versus a face-to-face hearing, and  
6 that's whether you look at allowance  
7 rates or positive outcome for the  
8 claimant or whether you look at  
9 quality.

10 And we do have a rather robust  
11 quality review function. And when you  
12 look at the legally justifiable nature  
13 of a particular case, there are -- and  
14 we do literally thousands of times a  
15 year -- there is no statistically  
16 significant difference either in the  
17 outcome or in the legal sufficiency of  
18 cases that are held by video.

19 And we've talked about -- I  
20 think Funmi's report talks about the  
21 costs and benefits of video.  
22 Certainly a video infrastructure the  
23 size of ours requires a significant  
24 upfront investment. And it's not the  
25 kind of investment that every agency

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2 can make. We are high-volume  
3 adjudicative agency, and the  
4 investment was worth our while. But  
5 the costs and benefits are only one  
6 part of the equation. The other part  
7 of the equation is public service.

8 Having video available expands  
9 the reach of service that we can  
10 provide the American public in a very,  
11 very dramatic way.

12 For instance, earlier this year,  
13 due to budget constraints, the  
14 Commissioner of Social Security, Mike  
15 Astrue, announced that we would be  
16 closing over 160 of our temporary  
17 remote hearing sites. These are sites  
18 where judges travel to hold hearings  
19 that are typically in geographically  
20 remote hearings.

21 Because of the video  
22 infrastructure that we have, we're now  
23 in the process of replacing many of  
24 those temporary remote sites, the  
25 temporary remote hearing sites, with

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2 what we call permanent remote hearing  
3 sites. These are sites that are  
4 located in social security offices.  
5 Not every social security office  
6 across the country, and there are 1250  
7 of them, is collocated with an  
8 adjudicative -- with an ODAR office.

9 So we are looking at putting  
10 video into more remote areas, but  
11 within our own bricks and mortar  
12 infrastructure. Because we have the  
13 network, both of offices and the video  
14 network, we're able to do that and  
15 expand the reach of service to the  
16 American public, which is really one  
17 of the foundations of the Social  
18 Security Administration.

19 So -- thank you. I'll be happy  
20 to take questions now or later.

21 CHAIRMAN VERKUIL: Why don't we  
22 just take a few --

23 PARTICIPANT: Can you just talk  
24 a little more about the methodology of  
25 how you determine that that...

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2 MR. BORLAND: Sure. So we have  
3 a -- our office of quality and  
4 performance, they do multiple studies.  
5 They do routine studies and they do  
6 special studies. They routinely  
7 review a percentage of every case that  
8 goes through our system. They look at  
9 legal sufficiency of the decision, and  
10 they look at -- so they're principally  
11 looking at the legal sufficiency of  
12 the decision and whether there is  
13 evidence in the file to support the  
14 outcome.

15 They have then subsetted that  
16 review by video hearings and nonvideo  
17 hearings. I can't get into the  
18 statistical methodology because I am  
19 not a statistician, but I did sleep at  
20 a Holiday Inn Express last night --

21 (Laughter.)

22 MR. BORLAND: And we used to  
23 actually hold hearings at Holiday Inn  
24 Expresses.

25 But when we look at these

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2 cases -- again, routine studies,  
3 special studies -- and special studies  
4 I'll get to in a second -- we look at  
5 differences in characteristics of  
6 particular cases. We look at  
7 geographical -- we look at geography.  
8 We look at regional differences. And  
9 certainly we look at video versus  
10 nonvideo, looking for statistically  
11 significantly differences in outcomes,  
12 and we found none in video.

13 In terms of special studies,  
14 special studies really gets to how we  
15 know that claimants in these hearings  
16 are slightly more satisfied than those  
17 who have face-to-face hearings. We do  
18 a tremendous amount of customer  
19 feedback studies. Again, our office  
20 of quality and performance conducts  
21 those studies, typically with response  
22 cards that we literally hand to  
23 claimants as they leave their hearing,  
24 although we do also do follow-up  
25 telephone studies.

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2 So those are kinds of the  
3 quantity/quality types of studies we  
4 do. Funmi, I suspect your report  
5 talks a little bit more about the  
6 methodology, and I might point you to  
7 that.

8 CHAIRMAN VERKUIL: Sallyanne.

9 MS. PAYTON: Sallyanne Payton,  
10 Senior Fellow. Is there any bias in  
11 the selection of the people who choose  
12 to have the videos, either with  
13 respect to the characteristics of the  
14 claimants or the characteristics of  
15 the claim or the characteristics of  
16 the representative?

17 MR. BORLAND: Not generally. I  
18 mean -- I think that -- we look  
19 typically to a need for video. We  
20 have, obviously, many urban offices  
21 that don't use video at all because  
22 there is no need for it.

23 We have a rule that's set by  
24 regulation that no claimant should  
25 have -- it actually requires us to pay

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2 travel expenses for claimants outside  
3 of a 75-mile radius of our hearing  
4 offices or other locations. So for  
5 our video locations, it really expands  
6 that 75-mile reach pretty  
7 substantially.

8 So -- bias? I think  
9 statistically you would see  
10 differences from hearing office to  
11 hearing office because of the nature  
12 of their service areas.

13 But because of that, you know,  
14 you'll -- again, I don't think you'll  
15 see noticeable differences among  
16 offices that have similar kinds of  
17 geographical service areas.

18 CHAIRMAN VERKUIL: Judge?

19 JUDGE WALD: One of the general  
20 public comments raised a question of  
21 whether or not, if you opt for a  
22 regular hearing, it regularly would be  
23 delayed so that there is some kind of  
24 implicit pressure on many -- on many  
25 of the applicants to go for a video

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2 hearing because you'll get it pretty  
3 quickly and that your claim -- you  
4 know, if you're really after your  
5 claim, as opposed to maybe -- this  
6 isn't aimed at your agency, but as  
7 opposed to having to wait a period.  
8 How did you handle this in yours?

9 MR. BORLAND: So I think there's  
10 two facets to that question. One is  
11 that a postponement or a hearing is  
12 always going to add additional time.  
13 So if we offer you a video hearing and  
14 you opt out and you want a  
15 face-to-face hearing, we're going to  
16 have to reschedule that. So there is  
17 some inherent delays in that.

18 I am not sure we've ever studied  
19 the extent to which those  
20 postponements create differences in  
21 the average waiting time for a  
22 hearing. But we do know that the  
23 average waiting time for a video  
24 hearing is less than the average  
25 waiting time for --

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2 JUDGE WALD: Is that  
3 substantially --

4 MR. BORLAND: -- an in-person  
5 hearing.

6 JUDGE WALD: -- less?

7 MR. BORLAND: It's not  
8 substantially less. It's a matter of  
9 days or weeks -- probably fewer than  
10 two weeks.

11 MS. SHERBURNE: Jane Sherburne,  
12 Council Member. The video hearing is  
13 the presumption and -- or the default,  
14 so that if they opt out, then they get  
15 back in the queue. Is that --

16 MR. BORLAND: Well, there's only  
17 actually one place where the video  
18 hearing is a presumption, and that's  
19 at our five national hearing centers  
20 where they offer the claimants a video  
21 hearing, and if the claimant declines  
22 the video hearing, then that case will  
23 go back to the hearing office from  
24 which it came. And, again, it's a  
25 backlog reduction issue.

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2 And because those offices are  
3 severely backlogged where we wouldn't  
4 have offered the assistance of a  
5 national hearing center, it's likely  
6 that those cases are going to be heard  
7 much faster if the video hearing is  
8 accepted than if the case is returned  
9 to a hearing office that's already  
10 backlogged.

11 CHAIRMAN VERKUIL: Peter and  
12 then --

13 MR. STRAUSS: I think this is a  
14 question at a different level of video  
15 technology, but hearing Judge Wald  
16 reminded me that quite a while ago she  
17 decided a case of due process rights  
18 in which the court and your department  
19 eventually agreed -- what was then  
20 your department -- eventually agreed  
21 that, well, a telephone hearing would  
22 suffice to meet the demands of  
23 moralities for minor financial claims.

24 And so I wonder the extent to  
25 which the committee has considered

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2 Skype. I mean, it's not going to be  
3 too long before certainly every  
4 government officer and many people out  
5 in the community will have  
6 teleconferencing available to them  
7 immediately at their own desk; they  
8 won't have to go anywhere to get it.  
9 And there could be considerable  
10 advantages to the government and to  
11 public satisfaction of conducting,  
12 over Skype or an equivalent kind of  
13 service, what previously has only been  
14 possible to do over a telephone.

15 Possibly this is the subject for  
16 future inquiry, not this one, but it  
17 does seem to me that this  
18 recommendation is focused on a rather  
19 advanced level of video  
20 teleconferencing technology, and that  
21 there are others around that ought to  
22 be considered.

23 MR. VITTON: Fred Lederer, in  
24 his presentations, often talks about  
25 the use of the improved technology. I

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2 don't know if he specifically talks  
3 about Skype, but he talks about just  
4 using a laptop computer to be able to  
5 have those kinds of conferences.

6 The committee did not talk about  
7 specific technology -- technology like  
8 that, although I think there was some  
9 reference to it during the course of  
10 our discussions -- and, as we all  
11 know, the technology is improving so  
12 fast.

13 I think, in that kind of  
14 situation, Skype maybe not so much for  
15 an actual hearing of the claimant, but  
16 particularly that kind of technology  
17 would be very useful for pre-hearing  
18 conferences in agency proceedings or  
19 situations like that where you can  
20 move the case along.

21 CHAIRMAN VERKUIL: Judge?

22 JUDGE SOLOMON: Dan Solomon. I  
23 am a Liaison Member and I was on the  
24 committee, and I did bring up that we  
25 may have Funmi, but Cisco has Umi,

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2 which is a souped-up version of Skype.  
3 And I did bring it up to the  
4 committee. And I went back and  
5 researched it at my agency, and we do  
6 not have sufficient bandwidth at the  
7 present time to do this.

8 We've also tried to borrow down  
9 through the years the equipment at the  
10 United States district courts, circuit  
11 court, even Social Security  
12 Administration. And there doesn't  
13 seem to be a resolution to the  
14 bandwidth problem at the present time.  
15 But time marches on, and hopefully  
16 we'll be able to do so.

17 CHAIRMAN VERKUIL: Patrick?

18 MR. PATTERSON: Patrick  
19 Patterson, Government Member, EEOC.

20 The recommendation that's before  
21 us does not seem to address the  
22 question of whether a video recording  
23 is preserved or a written transcript  
24 is made for appellate purposes. Can  
25 you just say a few words about how you

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2 deal with that?

3 MR. BORLAND: Sure. So all of  
4 our -- we do not preserve the video  
5 portion of the hearing. We do make a  
6 digital audio recording of every  
7 hearing, whether it's a video hearing  
8 or it's a face-to-face hearing. And  
9 that digital reporting is used for  
10 appellate purposes until, when the  
11 case goes to the federal court, at  
12 which point a transcript is prepared.

13 CHAIRMAN VERKUIL: Judge Plager.

14 JUDGE PLAGER: Jay Plager,  
15 Senior Fellow. The question of effect  
16 of outcome of cases seems to me to be  
17 a very significant issue that concerns  
18 me, among others. In a number of the  
19 cases we hear coming up through  
20 administrative adjudicatory systems  
21 credibility becomes a major issue. I  
22 am not sure that's the case in  
23 disability cases because I'm not sure  
24 whether there is conflicting  
25 testimony. But in many of the

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2 personnel cases we hear the  
3 administrative judge's credibility  
4 determination is indeed  
5 outcome-determinative when we apply  
6 the APA standard review to the case.

7 I'm puzzling about whether  
8 credibility determinations can be made  
9 in the same way through this video  
10 adjudication system as it can when the  
11 administrative judge confronts the  
12 witnesses face-to-face and has an  
13 opportunity to see their behavior and  
14 listen to them and make those kinds of  
15 judgments.

16 Do you have any sense for how  
17 that works out in your  
18 outcome-determinative studies?

19 MR. BORLAND: So let me address  
20 that. I'm actually -- this is going  
21 to be strange. I am going to address  
22 the Skype question and the credibility  
23 question at the same time.

24 One of the reasons we can't use  
25 Skype or other Internet-based -- I'll

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2 say commercial off-the-shelf video  
3 conferencing software is because it  
4 does not give the judge the ability to  
5 control the camera on the far end, and  
6 that's something that's very, very  
7 important, getting to the credibility  
8 question.

9 Our judges have the ability to  
10 pan, tilt and zoom the camera on the  
11 other end, which means that they can  
12 pull back and they can look at things  
13 like posture, they can see the full  
14 movement -- and, again, the quality of  
15 our video is such that you're not  
16 getting jitter generally, you're not  
17 getting -- you're not getting delay,  
18 whether it's in the audio or the  
19 video. They have the ability to zoom,  
20 probably -- in fact, I know, closer  
21 than most judges would be comfortable  
22 getting --

23 (Laughter.)

24 MR. BORLAND: -- to them in a  
25 hearing. So we have -- we have tools

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2 that compensate for the lack of  
3 physical presence. And, again, that  
4 really gets to why we're using the  
5 video infrastructure that we are.

6 CHAIRMAN VERKUIL: I wonder if  
7 we could move along -- because I would  
8 like to hear from Neil just for a  
9 minute, if that's okay, and I don't  
10 want to keep us --

11 MR. BORLAND: And, John, I would  
12 be happy to stay afterwards and answer  
13 questions.

14 CHAIRMAN VERKUIL: So if there  
15 are any questions -- this would be  
16 good.

17 And what I'd just like to do --  
18 and this really is -- because we rely  
19 mostly on the Social Security example.  
20 The VA has also a project going that  
21 we would like that be part of and work  
22 with you on and -- so we can talk  
23 further about that.

24 But in the one area we haven't  
25 moved yet, which is the immigration

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2 area, but we have launched a major  
3 study of immigration practice and  
4 procedure. It's going to be worked on  
5 over the -- probably over this coming  
6 year, and it's looking at a lot of  
7 things, including probably --  
8 certainly, I think, the question of  
9 use of video.

10 And Ed Kelly from the executive  
11 office of immigration review at DOJ is  
12 here, and I just thought it would be a  
13 good idea for Ed to sort of comment  
14 on -- in the world of immigration, we  
15 have a mandatory program, and it's a  
16 lot different, but maybe you should  
17 just say a few words and how you think  
18 we can help because we're going to be  
19 working on this project further.

20 JUDGE KELLY: Do you want me to  
21 come up?

22 CHAIRMAN VERKUIL: Come on up,  
23 sure.

24 JUDGE KELLY: I'm Ed Kelly. I'm  
25 assistant chief immigration judge with

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2 the executive office for immigration  
3 review in the Justice Department. I  
4 think there are -- as far as video  
5 hearings in the immigration context,  
6 in our office, there are three major  
7 advantages of this.

8 First, it allows us to get our  
9 mission done. We could not do it  
10 without video teleconferencing. We  
11 have 59 immigration courts from  
12 Hartford to Saipan, and without the  
13 flexibility -- and we have 200 hearing  
14 locations, many of which are in  
15 detention facilities. And without the  
16 flexibility of being able to zoom our  
17 immigration judges into detention  
18 facilities, it would not be possible  
19 to hold timely hearings, and we would  
20 not be able to accomplish the mission  
21 of fair and efficient adjudication of  
22 immigration cases.

23 I think the two other great  
24 advantages, besides just being able to  
25 accomplish the mission in the first

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2 place, are the budget -- the sort of  
3 ancillary budget advantages, and those  
4 are sort are multiple in our context  
5 because you get, number one, a force  
6 multiplier on your judges; our most  
7 precious commodity is immigration  
8 judge hearing time, and this allows us  
9 not to fly immigration judges all over  
10 the country, as we used to do. I  
11 know, because I was in charge of that,  
12 and it was very -- you know, it was a  
13 problem.

14 And it allows us to -- for  
15 example -- let me give you a concrete  
16 example to see how it works.

17 In our Arlington court, we zoom  
18 into three different detention centers  
19 on the same morning, and you've got  
20 three different images. You've got a  
21 respondent in three different places.  
22 While the immigration judge is holding  
23 a hearing of the first respondent, the  
24 officers in the detention facility in  
25 the other two locations are setting up

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2 the next one. And the immigration  
3 judge at a master calendar hearing,  
4 which is pleadings, scheduling and so  
5 forth, is able to go from person to  
6 person in three different detention  
7 locations rather than having to fly  
8 down there and take care of it himself  
9 in person.

10 And this saves DHS money as well  
11 because they would otherwise need to  
12 get the detainees -- get them in some  
13 transportation vehicles, with all the  
14 security necessary, bring them to the  
15 courtroom and then hold hearings and  
16 then bring them back. So the degree  
17 of budget savings is very significant.

18 I wanted to just mention about  
19 the issue of whether or not the  
20 proceedings are legally sufficient in  
21 the credibility context. Most -- the  
22 circuit courts have been very -- the  
23 federal circuit courts of appeal have  
24 been very diligent with respect to  
25 striking down demeanor credibility

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2 findings. We have found, in the  
3 immigration context, that the worst  
4 thing you can do as a judge is to make  
5 your credibility determination based  
6 on the respondent's demeanor. There  
7 are lots of -- some circuit court  
8 judges have actually told us in our  
9 annual conference, look, we don't like  
10 those, you're not likely to get that  
11 approved, forget about it.

12 And so what the immigration  
13 judges do is use the other criteria  
14 for determining credibility, the  
15 consistency of the documentation, the  
16 consistency of the testimony and so  
17 forth, and we tend to shy away from  
18 those, even in in-person proceedings.  
19 Consequently, the impact of what you  
20 may be concerned about in that regard  
21 is diminished to that extent.

22 I think a lot of the other  
23 things that I would have said have  
24 already been said, so I'll stop there.

25 If there are any questions, I'll

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2 be happy to take them.

3 CHAIRMAN VERKUIL: Well --

4 MR. VITTONI: I would just like  
5 Ed to clarify. We have a variety of  
6 hearings. Not all of them are  
7 required to go by video conferencing,  
8 right?

9 JUDGE KELLY: That's correct.  
10 If the parties that are nondetained  
11 would like to have an in-person  
12 hearing, that's not a problem. That's  
13 on a voluntary basis.

14 And not only that, but we do  
15 have attorneys -- the flexibility  
16 aspect of this is really good because  
17 we have attorneys who do not want to  
18 travel, you know, 300 or 400 miles to  
19 represent their client in person  
20 before the judge, and they can step  
21 into a courtroom in a different city  
22 and project into court just as the  
23 judge does in other locations. So  
24 there is a flexibility advantage there  
25 for the private bar as well in some

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2 circumstances.

3 CHAIRMAN VERKUIL: Thanks very  
4 much. Thanks very much.

5 And I should say this -- the  
6 immigration issue is a big one. And  
7 what we've done is we've started the  
8 consulting. We've got EOIR in the  
9 room with us as part of the team.  
10 We've got ICE, DHS -- we have got all  
11 the right people there. We've got the  
12 public interest community.

13 And I've even called Judge  
14 Posner and had long conversations with  
15 him, who has -- as you might remember,  
16 reading some of his immigration  
17 decisions, has pretty strong views on  
18 the situation -- and Judge Katzmann in  
19 the Second Circuit who is very  
20 concerned about the lack of  
21 representation for people in  
22 detention. In fact, it is the case, I  
23 think, that almost up to 90 percent of  
24 people in detention do not have  
25 attorneys.

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2 And so I am -- I mean, this is  
3 kind of one of my thoughts, and we're  
4 going to pursue this, but I really  
5 wonder whether or not video isn't one  
6 way to get lawyers into these remote  
7 locations where there are no lawyers  
8 now available. And we would have to  
9 work through that, but that's one of  
10 our goals is to meet Judge Katzmann's  
11 goal which is that -- because lawyers  
12 cannot be compensated in immigration  
13 cases. There is not a real private  
14 bar, so it's up to public interest bar  
15 or the law schools and others to fill  
16 this gap. And we're wondering whether  
17 video becomes a really positive way to  
18 help the representation dimension.

19 So those are some of the  
20 questions that we have, but I think  
21 maybe we should just -- if you're  
22 ready, let's just vote on this  
23 recommendation since -- Michael,  
24 sorry?

25 MR. HERZ: May I have a few

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2 minutes?

3 CHAIRMAN VERKUIL: Of course.

4 MR. HERZ: Michael Herz, Public  
5 Member. This whole question of  
6 mandatory versus voluntary is a huge  
7 issue, I think. And I'm happy to  
8 concede the validity of the ODAR  
9 statistics saying this is completely  
10 outcome-neutral, but it's  
11 outcome-neutral as to the class of  
12 cases where the claimants, many of  
13 them represented, have decided that  
14 they're not putting themselves at risk  
15 by having the video hearing. It  
16 doesn't tell us about the outcomes of  
17 video hearings in 100 percent of ODAR  
18 cases.

19 The report -- the report cites a  
20 study that said in the mandatory  
21 asylum video hearings, the alien loses  
22 twice as often in video hearings as in  
23 in-person hearings. I don't know if  
24 that number is accurate or not, if it  
25 can be explained with representation

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2 and so on and so forth.

3 But seems to me that, from our  
4 point of view, the presumption is --  
5 has to be in favor of in-person  
6 hearings, and the case has to be made  
7 that video hearings are  
8 outcome-neutral. And I don't think it  
9 has been sufficiently made that we can  
10 take the position that there should be  
11 mandatory video hearings.

12 Now turning then to the  
13 specifics of the recommendation --  
14 it's 3(a); it's the language in 3(a),  
15 that I just find confusing. When you  
16 say consider using it on a voluntary  
17 basis, I can't tell whether that means  
18 consider using it and, if you're going  
19 to use it, it should be on a voluntary  
20 basis, or whether the baseline is it  
21 should be -- it's mandatory, but you  
22 should consider making it merely  
23 voluntary.

24 And maybe I'm the only one who  
25 has that confusion, but I think --

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2 from my point of view, it's important  
3 that the recommendation be  
4 consistently that agencies, you know,  
5 make this available. I'm uneasy  
6 endorsing a recommendation that says  
7 there should be mandatory video  
8 hearings in agencies.

9 PARTICIPANT: Take the word  
10 "consider" out.

11 MR. VITTON: I don't view the  
12 recommendation as saying hearings  
13 should -- that video conferencing  
14 should be mandatory. We say the  
15 agencies should consider using it if  
16 it's appropriate in the context of the  
17 kinds of cases that they have.

18 CHAIRMAN VERKUIL: On a  
19 voluntary basis. Let's -- just figure  
20 out if there's --

21 MR. HERZ: So Peter has a nice  
22 suggestion, which is in the heading  
23 of -- the bold language in 3, to  
24 change "federal agencies with  
25 high-volume caseloads that decide

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2 to" -- that helps, but change "use" in  
3 that first line to "offer." So "to  
4 offer video teleconferencing."

5 PARTICIPANT: This is another  
6 solution, which might work, which is,  
7 in 3(a), take the word "consider" out  
8 because, above it, you have  
9 "consider." So it would read 'federal  
10 agencies with high-volume caseloads  
11 that decide to" -- well, the  
12 original -- "should consider the  
13 following best practices," and then it  
14 starts with --

15 PARTICIPANT: Yeah, yeah, yeah.

16 PARTICIPANT: -- "using VTC on a  
17 voluntary basis."

18 CHAIRMAN VERKUIL: That sounds  
19 right. Is that okay? Can we accept  
20 those?

21 PARTICIPANT: The second --

22 PARTICIPANT: Take out  
23 "consider."

24 CHAIRMAN VERKUIL: Okay. So  
25 you -- I'm sorry. You like taking out

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2 "consider"?

3 MR. STRAUSS: Drop "consider,"  
4 but keep "use."

5 CHAIRMAN VERKUIL: Drop  
6 "consider" but keep "use."

7 PARTICIPANT: Right.

8 CHAIRMAN VERKUIL: Is that okay?  
9 All right. So would -- could we have  
10 a motion.

11 MR. STRAUSS: I'll make that as  
12 a motion.

13 CHAIRMAN VERKUIL: All right.  
14 So that's -- we have a motion. Drop  
15 "consider" and leave "use." Right?  
16 Any further discussion? Are we okay?  
17 Can we vote.

18 PARTICIPANT: Change to "use"  
19 instead of "using" -- I mean,  
20 parallel --

21 CHAIRMAN VERKUIL: Right.  
22 "Use."

23 PARTICIPANT: And "allow."

24 CHAIRMAN VERKUIL: We will take  
25 care of that. Let just make sure

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2 we're happy. All in favor of that  
3 change, aye.

4 (Chorus of ayes.) Aye?

5 CHAIRMAN VERKUIL: Opposed?

6 (No response.)

7 CHAIRMAN VERKUIL: Okay. We  
8 will make sure the grammar is correct.  
9 Anything else? Yes?

10 MR. CUELLAR: I just want to say  
11 one quick word about I agree with  
12 Michael that the complexity of this  
13 issue cannot be understated.  
14 Questions, empirically, for example,  
15 about trying to understand in what  
16 context these hearings might have an  
17 impact on the outcome are very, very  
18 difficult.

19 Nonetheless, I just want to  
20 underscore why I'm in favor of this,  
21 and it has a lot to do a lot with how  
22 carefully recommendation 2 has been  
23 drafted by the committee, and I'd  
24 particularly direct people to 2(d),  
25 2(i) and 2(j) which underscore the

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2 importance for agencies of taking into  
3 account some very critical factors  
4 that might work out quite differently  
5 in different kinds of hearings.

6 And I think that just really  
7 illustrates the extent to which this  
8 is meant to guide agencies, not only  
9 in understanding the potential  
10 benefits of video hearings generally,  
11 but the responsibility they're taking  
12 on if they use these hearings to do so  
13 in a very stable manner. Thank you.

14 CHAIRMAN VERKUIL: Any further  
15 comments? Can we vote on the  
16 recommendation? Thank you.

17 All in favor?

18 (Chorus of ayes.)

19 CHAIRMAN VERKUIL: Opposed?

20 (No response.)

21 CHAIRMAN VERKUIL: Okay.

22 Recommendation passes. Thanks very  
23 much.

24 (Applause.)

25 CHAIRMAN VERKUIL: Now, before

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2 we wrap up -- and thank the committee  
3 and their work and the Chairman.

4 Before we wrap up, we would like  
5 to just give you a review of the  
6 pending projects. It's important for  
7 you to have that. And Jon is going to  
8 do that. And then Scott Rafferty  
9 wants to talk in particular about our  
10 reclaiming our legacy documents  
11 project, which I think is very  
12 interesting for you to know about.  
13 We'll try and do that as briefly  
14 and -- I don't think we want a lot of  
15 discussion just because you always can  
16 always get in touch with us. We  
17 wanted to make you aware of the items.  
18 And maybe, Jon, you can even say when  
19 you think they might be maturing into  
20 recommendations offered before the  
21 Conference.

22 MR. SIEGEL: Thanks. So as Paul  
23 said, we wanted to give you a little  
24 preview of what's on the agenda for  
25 the Conference's Research and Policy

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2 projects.

3 The big news, first of all, I  
4 would say is that we've really come a  
5 long way since we last gathered in  
6 December. At that time, the  
7 Conference was still very much in  
8 start-up mode. We basically had two  
9 active research projects, one of which  
10 was the preemption project that led to  
11 the recommendation that the Conference  
12 adopted at the December plenary.

13 Today, things are very  
14 different. We have thirteen active  
15 research projects, we have three  
16 projects as to which research  
17 contracts are likely to be signed  
18 imminently, possibly next week, and we  
19 have between four and six other  
20 projects in various stages of  
21 precontractual planning. And those  
22 are just recommendation projects.  
23 Then, in addition, we have forums,  
24 workshops, educational activities,  
25 improvements to our website. So we're

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2 well along in our way -- from our  
3 transition from an agency that's in  
4 start-up mode to a mature, fully  
5 occupied agency.

6 So -- if we could see the next  
7 slide. This is just a preview of the  
8 projects that are likely to come  
9 before you as recommendations. These  
10 are just the recommendations projects  
11 that will probably come before you as  
12 recommendations either at this year's  
13 December plenary or at next year's  
14 June plenary. And I don't want to  
15 take time to go over all of them, but  
16 just to highlight some.

17 As Paul mentioned in his remarks  
18 yesterday, we have identified  
19 participation, collaboration,  
20 innovation and education as the key  
21 themes of the Administrative  
22 Conference, so I am going to highlight  
23 a couple of projects that I think  
24 particularly touch on these themes.

25 First of all, as we saw

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2 yesterday, e-rulemaking is a high  
3 priority for the Conference, and this  
4 year we actually started two projects  
5 on e-rulemaking, one being the legal  
6 issues project that you considered  
7 yesterday. The other is a study of  
8 e-rulemaking innovations and  
9 experiments.

10 The White House keeps a pretty  
11 close eye on what's going on on  
12 regulations.gov, but what we wanted to  
13 do was to conduct a broad survey of  
14 what's happening at individual  
15 agencies, what are agencies doing with  
16 their own websites to complement  
17 regulations.gov, to add value to  
18 regulations.gov.

19 So we hired Professor Cary  
20 Coglianesse of Penn to do this study  
21 for us, and he unleashed a team of  
22 researchers to seek out innovations,  
23 experiments, best practices, find out  
24 what's going on in individual agencies  
25 and e-rulemaking.

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2 And just earlier this month we  
3 received the first draft of Professor  
4 Coglianesi's report. It's going to be  
5 going to one of our committees this  
6 summer, so you could probably expect  
7 this to come before you as a  
8 recommendation at the December  
9 plenary. And, as you can imagine,  
10 that will promote our themes of  
11 participation, education and  
12 innovation.

13 Other project which touches on  
14 these same themes, and which I'm very  
15 excited about it is our FACA project.  
16 Remember those breakout sessions we  
17 held at the December plenary where you  
18 all made suggestions about what we  
19 should do. Those led to several  
20 suggestions that we've taken up as  
21 projects, and one of them was -- we  
22 heard from many people -- was do  
23 something about FACA.

24 So we have our Committee on  
25 Collaborative Governance, chaired by

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2 Professor Jody Freeman of Harvard --  
3 is working on that, trying to figure  
4 out what needs to be done about FACA.  
5 But the particular project I wanted to  
6 highlight is our proposal for  
7 continuous virtual meetings of FACA  
8 committees.

9 One of the challenges of FACA is  
10 that it's procedurally cumbersome to  
11 hold a meeting of a FACA committee.  
12 You have to give notice weeks in  
13 advance. It makes it difficult to get  
14 things done. And I saw this in our  
15 own committee operations, because  
16 we've been operating our six  
17 committees as FACA committees. And I  
18 thought, wouldn't it be simpler if a  
19 FACA committee could make one  
20 announcement saying it's going to hold  
21 a continuous meeting at a specified  
22 Internet address, and you just have a  
23 web forum at that address and let the  
24 public have access to it? So that  
25 would allow the committee to meet much

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2 more efficiently while preserving the  
3 openness goals of FACA.

4 So, after some discussions about  
5 this with GSA and some very fine staff  
6 work by Reeve Bull on the staff, we  
7 have determined that we think this  
8 proposal is actually already lawful  
9 under current law, and we're gearing  
10 up to give it a try.

11 Kathy Kyle and Charles Kersey  
12 are setting up the web page  
13 and hopefully sometime this fall some  
14 of our committees will actually use  
15 this method of operation so we'll have  
16 a practical experiment that will  
17 provide, we hope, some useful data for  
18 our ultimate recommendation in this  
19 area.

20 As you can see, we've got  
21 numerous other projects on the  
22 horizon. We have a project to improve  
23 the use of science in administrative  
24 decision-making. Wendy Wagner of the  
25 University of Texas is our consultant

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2 on that project.

3 Paul mentioned we have a grant  
4 study of immigration and adjudication.  
5 We have two researchers on that  
6 project, Lenni Benson at New York Law  
7 School and Russell Wheeler of the  
8 Brookings Institution. They are going  
9 to be looking to a variety of ways  
10 particularly to try to reduce the case  
11 queue in immigration cases.

12 Bernie Bell of Rutgers Newark is  
13 looking into the Government in the  
14 Sunshine Act for us. Those of you who  
15 represent independent agencies may  
16 find that project particularly  
17 interesting.

18 We have a project that examines  
19 a specific aspect of the jurisdiction  
20 of Court of Federal Claims. We're  
21 hoping to eliminate a bizarre  
22 procedural trap that one of the  
23 statutes in that area creates for  
24 litigants.

25 And we're just starting up a

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2 project to study and suggest  
3 improvements to the Congressional  
4 Review Act.

5 So we have a full program of  
6 ongoing studies. I have just  
7 highlighted some of them. If you  
8 would like to learn more, you can ask  
9 me afterwards, or you can go to the  
10 ACUS website and click on research.

11 We're also focusing on  
12 implementing recommendations that have  
13 already been issued. We have four new  
14 ones we're going to have to be  
15 focusing on now. Those of you who are  
16 Government Members recently received a  
17 letter from us asking, you know, if  
18 you could let us know what you've done  
19 to implement the December preemption  
20 recommendation, and we appreciate  
21 those of you who have responded. We  
22 look forward to hearing from those of  
23 you who will respond.

24 In addition, as I mentioned  
25 we're also engaging in forums,

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2 workshops, other educational  
3 activities. We have a workshop in  
4 mind in connection with the FACA  
5 project. And then later this year,  
6 we're teaming up with the Justice  
7 Department to do a workshop on  
8 enhancing access to agency actions for  
9 persons with limited English  
10 proficiency. So we're looking forward  
11 to that.

12 And finally, as Paul mentioned,  
13 I would like to call on my deputy,  
14 Scott Rafferty, to describe one more  
15 project for you.

16 When we restarted the agency  
17 after its 15-year hiatus, we  
18 discovered that there is a treasure  
19 trove of materials from the agency's  
20 previous existence, going back to  
21 1968. Well, as you can imagine, these  
22 materials are not readily available in  
23 digital form, so Scott has been  
24 spearheading a project to digitize and  
25 post these materials, and he's going

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2 to say a few words about that.

3 MR. RAFFERTY: Thank you, Jon.

4 As my boss, the Director of Research  
5 and Policy, John Siegel, just noted,  
6 the works that -- the research papers  
7 from 1968 to 1995 from this Conference  
8 are a true treasure. Over the past  
9 six months I've had the privilege of  
10 preparing these to put on a searchable  
11 online database.

12 And I know we've been taking a  
13 lot of -- being very humble about  
14 administrative law, but this is --  
15 it's exciting stuff. I mean, it  
16 really is wonderful to see just the  
17 quality of the debates that we had in  
18 the past and the whole body of  
19 Conference work that you've continued  
20 here over the last two days. It's  
21 something to be not only proud of, but  
22 something that we have an obligation  
23 to make available because it's just  
24 valuable.

25 And for the last fifteen years

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2 American University has been storing  
3 350,000 pages of our prior  
4 deliberations and research and  
5 publications.

6 Now, 1995 happens to be the year  
7 before GPO started composing  
8 publications electronically. So these  
9 exist only on paper. And I wanted to  
10 give another shout out to Carl Malamud  
11 who has scanned most of our GPO and  
12 other publications, including the  
13 annual volumes, the recommendations  
14 and statements and the consultant  
15 reports that led to the  
16 recommendations.

17 Now, as excitingly, HeinOnline  
18 has offered to scan all the remaining  
19 pages. And it's just -- we're very  
20 grateful for these contributions that  
21 both Carl and Hein are making because  
22 they're going to enable us to create a  
23 world-class archival website.

24 And this body of work really is  
25 the foundation of modern

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2 administrative law. As most of you  
3 know, between 1968 and '95 we issued  
4 208 recommendations and statements,  
5 and we're talking about publishing the  
6 debates and comments, public comments,  
7 that led to these proposals, but also  
8 documenting the real extraordinary  
9 success that the agency -- that the  
10 Conference had in engaging with  
11 agencies to implement the  
12 recommendations, including our work  
13 with the ABA to -- where appropriate,  
14 to have statutory changes moved  
15 through Congress.

16 It's just -- the quality is so  
17 extraordinary. It's a nonpartisan,  
18 consensus-driven process that has  
19 really changed government. It's  
20 something that we -- we have, I  
21 believe, a duty and should be very  
22 proud of making accessible. And you  
23 know, we do not stop with the  
24 recommendations.

25 Year after year the Conference

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2 was working with agencies to make them  
3 work. And that implementation work is  
4 just a real tribute to the importance  
5 of this Conference. If you take some  
6 of our more significant proposals,  
7 like increasing the use of civil money  
8 penalties, there are just binders of  
9 correspondence that goes up to the  
10 very last days before the lights were  
11 turned off, as Chairman Rogers will  
12 know. This was -- we were really  
13 working with agencies to make these  
14 things real.

15 And, you know, you could teach a  
16 course in administrative law straight  
17 out of these materials. It just -- it  
18 shows how, for 27 years, the  
19 Conference fulfilled the statutory  
20 mandate to increase fairness,  
21 efficiency, respect for private  
22 rights, rulemaking and adjudication and  
23 investigations and in the management  
24 and organization of government.

25 I mean, this is something that

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2 you don't have to be a lawyer to  
3 appreciate. If you believe your  
4 government should be more efficient --  
5 we want you to have a website that  
6 shows that for 27 years and counting  
7 there is a government agency that's  
8 been thinking and working in a  
9 public-private partnership, in a  
10 bipartisan scholarly but practical way  
11 to make these things happen.

12 And, you know, I also have to  
13 add that -- many of you know about the  
14 quality of work firsthand because more  
15 than 20 of the consultant reports that  
16 led to these recommendations were  
17 written by current members and  
18 fellows, and -- several of whom are in  
19 the room.

20 And for the first time these  
21 very important recommendations are  
22 going to be available online for free  
23 to the entire public, clearly  
24 organized by topic.

25 So this is not a small task, and

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2 we really sincerely -- we're seeking  
3 input from every person in this room  
4 about how we do this. I think we've  
5 made great progress. I've been aided  
6 by our intern, Andrea Green who has a  
7 real "let's get it right" approach,  
8 but this is an interactive process  
9 that the academics and practitioners  
10 should really feel -- should  
11 contribute to this: I'll give you my  
12 card, call back.

13 And it's really our aspiration  
14 to make the conference website the  
15 go-to website for law students and  
16 public servants and historians and  
17 just members of public who want  
18 government to work better.

19 Now, I also want to mention the  
20 project files. Now, these are past  
21 initiatives that didn't involve  
22 recommendations, so -- we had missions  
23 to China, to Eastern Europe. We had  
24 model adjudication rules. Now, some new  
25 agencies call us up and ask for these

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2 things. And they weren't in the form  
3 of a recommendation.

4 We have got a book which is  
5 surprisingly -- was timely -- about  
6 federal reorganization.

7 So -- they also include what  
8 John Cooney has coined the cold case  
9 files, sort of the unsolved mysteries  
10 of administrative law, those that  
11 really escaped the grasp of the  
12 conference at the time, and are still  
13 around to kind of perplex us.

14 So, again, many of you in this  
15 room know these works firsthand  
16 because you've written fifteen of  
17 them, and some people not in this  
18 room, including -- four of them were  
19 written by people who are currently on  
20 the Supreme Court. But, you know, for  
21 one reason or another, the Conference  
22 forewent or deferred or did something  
23 other than a recommendation.

24 And what's extraordinary about  
25 this is almost without exception --

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2 it's the scholarship of this work and  
3 the -- the support for it is just --  
4 it's overwhelming. I mean, many led  
5 to seminal law review articles, and  
6 more than one to a book, and there are  
7 a couple of kind of unpublished magnum  
8 opuses and other, you know, long-term  
9 initiatives were -- you know, Jerry  
10 Mashaw and other people, including  
11 Chairman Verkuil -- long works that  
12 bring consistency to mass  
13 adjudication.

14 Phil Harter's studies of  
15 deregulation and alternative dispute  
16 resolution, which really was invented  
17 here. And our government-wide work on  
18 the use of science in risk management  
19 in the '70s, long before the Congress  
20 added it as part of our formal  
21 mandate.

22 So none of this has been -- most  
23 of it has not been published in any  
24 form. And it shows the historical  
25 origins of these very important

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2 principles, many of which we take for  
3 granted. And -- you know, I want to  
4 give one example that maybe more  
5 timely now than it was then.

6 In 1973, Justice Breyer proposed  
7 that independent commissions create an  
8 office of chief economist, which I  
9 thought was a pretty good idea, and  
10 then he moved onto the impeachment  
11 committee before the conference had a  
12 chance to take it up. We actually  
13 paid him for that study, all \$3,000.

14 But his analysis of how agencies  
15 should use -- it's timely to the SEC,  
16 to the CFTC. It's something that they  
17 talk about now. So this is valuable  
18 stuff. It unites -- we did studies of  
19 land use of seven different agencies.  
20 My friends in the environmental  
21 community tell me there are all kinds  
22 of conflicts in missions and  
23 objectives. This is a timely topic.

24 In fact, it's so timely that in  
25 March of this year the environmental

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2 group decided to publish our work on  
3 the forest service in 2001 for \$100.  
4 It's been published and it's in  
5 reprint. And we have permission from  
6 the author to make this available for  
7 free on our website.

8 So, again, on topics that --  
9 agency structure, culture, performance  
10 metrics, transparency, resource  
11 management -- the public is going to  
12 be able to see 27 years of superb  
13 work, 27 years and counting. And I  
14 really look forward to working with  
15 all of you to make this happen.

16 Thank you very much.

17 (Applause.)

18 CHAIRMAN VERKUIL: Thanks,  
19 Scott.

20 As you can obviously tell, Scott  
21 has devoted himself to this project,  
22 and he's doing great work for us, and  
23 I think we'll all benefit.

24 Two quick things. One is that  
25 EAJA, Equal Access to Justice Act --

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2 we have been asked to -- it's  
3 interesting. In the old days, we  
4 reported all EAJA payments. And then  
5 we went out of business. They didn't  
6 get reported for fifteen years.

7 Now there has been interest in  
8 learning about EAJA payments. And  
9 David Pritzker is doing that. We're  
10 doing that -- we've been circulating  
11 to the agencies. We want to remind  
12 you that we're asking for that  
13 information.

14 There is great interest on the  
15 Hill. There is even legislation now  
16 that we've been named to be the  
17 collector of EAJA payments for both  
18 administrative and judicial opinions,  
19 so that's an important role for us to  
20 revive. So that's one point.

21 Now, let me add, in closing,  
22 there are 20 Public Members whose  
23 terms will be up on June 30th. Do you  
24 remember when you lost the flip the  
25 last -- in December? So -- you

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2 probably know who you are. I won't  
3 bother to read everybody's name, but  
4 there are 20 of you. You're going to  
5 be getting a letter from me because  
6 the Council has approved everyone to  
7 be reappointed, as of June 30th, who  
8 has a one-year term for another two  
9 years. And we, of course, would like  
10 you to accept that. The letter will  
11 say, of course, don't forget that, if  
12 you do accept it, make sure you come  
13 to your committee meetings and  
14 other -- you know, plenary sessions,  
15 but -- so that's one thing that's  
16 coming. Take look for it. We want to  
17 keep it going, and we want to make  
18 sure you're part of it and that you're  
19 also participating. So that's that.

20 And, finally, I would like to  
21 say to all my -- our staff, the  
22 Administrative Conference staff, all  
23 fifteen of us -- are we around? Would  
24 you please stand up?

25 (Applause.)

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2 CHAIRMAN VERKUIL: It is like  
3 Daniel Webster said, you know, it's a  
4 little college, but there are those  
5 who love it. It's a little agency,  
6 and we all work very hard, so thank  
7 you so much.

8 PARTICIPANT: Next meeting.

9 CHAIRMAN VERKUIL: Oh. Plenary  
10 session, don't forget, December 8,  
11 December 9.

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2 CERTIFICATE OF REPORTER

3 I, Kathy Savich, RPR, do hereby  
4 certify that the foregoing proceedings were  
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