Transforming E-rulemaking to Promote Public Participation and Efficiency

A joint public forum of the Administrative Conference and the Brookings Institution

Paul R. Verkuil
Chairman, Administrative Conference of the United States
November 30, 2010
The Administrative Conference “is a public–private partnership designed to make government work better.”

President Barack Obama
July 8, 2010
Live Tweet: #erulemaking

acusgov

brookingsgs

americaspeaks
Our Mandate

Arrange for federal agencies, assisted by outside experts, cooperatively [to] study mutual problems, exchange information, and develop recommendations for action [so that] private rights may be fully protected and federal responsibilities may be carried out expeditiously in the public interest (1964).

Added in 2004

• Promote public participation and efficiency in rulemaking
  and with regard to rulemaking, adjudication, licensing, and investigation:
  • Reduce unnecessary litigation
  • Improve the use of science
  • Improve the effectiveness of applicable laws

See 5 U.S.C. 591
Our Council

Preeta D. Bansal  
(Vice Chair)  
General Counsel, OMB

Ronald A. Cass  
(Member)  
Chair, Center for the Rule of Law

Michael A. Fitzpatrick  
(Member)  
Associate Administrator, OIRA

Mariano-Florentino Cuellar  
(Member)  
Professor, Stanford Law

Julius Genachowski  
(Member)  
Chairman, FCC

Patricia McGowan Wald  
(Member)  
D.C. Circuit Judge (ret.)

Theodore B. Olson  
(Member)  
Former Solicitor General

Thomas E. Perez  
(Member)  
Assistant Attorney General, Civil Rights DOJ

Thomasina V. Rogers  
(Member)  
Chair, OSHRC

Jane C. Sherburne  
(Member)  
General Counsel BNY Mellon

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
Our Conference

The membership of the Conference, also known as the Assembly, includes the Chairman, the Council, members from approximately 50 federal executive departments and agencies and independent regulatory boards and commissions, and 40 members of the public representing diverse views and backgrounds.
<table>
<thead>
<tr>
<th>Name</th>
<th>Title and Affiliation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fred W. Alvarez</td>
<td>Partner, Wilson Sonsini Goodrich &amp; Rosati</td>
</tr>
<tr>
<td></td>
<td>San Francisco, CA</td>
</tr>
<tr>
<td></td>
<td>Assistant Secretary of Labor (1987-89)</td>
</tr>
<tr>
<td></td>
<td>EEOC Commissioner (1984-87)</td>
</tr>
<tr>
<td>Walter Dellinger</td>
<td>Partner, O’Melveny &amp; Myers LLP</td>
</tr>
<tr>
<td></td>
<td>Acting Solicitor General (1996-97); Assistant Attorneys General, Office of Legal Counsel (1993-96)</td>
</tr>
<tr>
<td>Jody Freeman</td>
<td>Archibald Cox Professor of Law</td>
</tr>
<tr>
<td></td>
<td>Harvard Law School</td>
</tr>
<tr>
<td></td>
<td>White House Counselor for Energy and Climate Change (2009-10)</td>
</tr>
<tr>
<td>H. Russell Frisby, Jr.</td>
<td>Partner, Stinson Morrison Hecker LLP</td>
</tr>
<tr>
<td></td>
<td>Washington, DC</td>
</tr>
<tr>
<td></td>
<td>Former Chair, ABA Section of Administrative Law and Regulatory Practice</td>
</tr>
<tr>
<td>Jodie Z. Bernstein</td>
<td>Of Counsel, Kelley Drye &amp; Warren LLP</td>
</tr>
<tr>
<td></td>
<td>Washington, DC</td>
</tr>
<tr>
<td></td>
<td>Director, FTC Bureau of Consumer Protection (1995-2001)</td>
</tr>
<tr>
<td></td>
<td>General Counsel, EPA (1977-79) and Department of Health and Human Services (1979-80)</td>
</tr>
<tr>
<td>Lisa Schultz Bressman</td>
<td>Associate Dean for Academic Affairs and Professor of Law</td>
</tr>
<tr>
<td></td>
<td>Vanderbilt University Law School</td>
</tr>
<tr>
<td>Christopher Edley, Jr.</td>
<td>William H. Orrick Jr. Distinguished Chair and Dean, UC Berkeley School of Law</td>
</tr>
<tr>
<td></td>
<td>Associate Director</td>
</tr>
<tr>
<td></td>
<td>Office of Management and Budget (1993-95)</td>
</tr>
<tr>
<td>Susan E. Dudley</td>
<td>Research Professor, Trachtenberg School of Public Policy and Public Administration</td>
</tr>
<tr>
<td></td>
<td>The George Washington University Administrator, OMB Office of Information and Regulatory Affairs (2007-09)</td>
</tr>
<tr>
<td>Patti Goldman</td>
<td>Vice President for Litigation, Earthjustice</td>
</tr>
<tr>
<td>James Ming Chen</td>
<td>Dean and Professor of Law, Louis D. Brandeis School</td>
</tr>
<tr>
<td></td>
<td>University of Louisville</td>
</tr>
<tr>
<td>Cynthia R. Farina</td>
<td>Professor, Cornell Law School</td>
</tr>
<tr>
<td></td>
<td>Principal Researcher, e-Rulemaking Initiative</td>
</tr>
<tr>
<td>Philip J. Harter</td>
<td>Professor of Law, University of Missouri</td>
</tr>
<tr>
<td></td>
<td>Former Chair, ABA Section of Administrative Law and Regulatory Practice</td>
</tr>
<tr>
<td></td>
<td>Senior Staff Attorney, Administrative Conference of the United States (1975-77)</td>
</tr>
<tr>
<td>John F. Cooney</td>
<td>Partner, Venable LLP, Washington, DC</td>
</tr>
<tr>
<td></td>
<td>Assistant and Deputy General Counsel for Litigation and Regulatory Affairs, OMB (1982-87)</td>
</tr>
<tr>
<td>David C. Frederick</td>
<td>Partner, Kellogg, Huber, Hansen, Todd, Evans &amp; Figel</td>
</tr>
<tr>
<td></td>
<td>Washington, DC</td>
</tr>
<tr>
<td></td>
<td>Assistant to the Solicitor General (1996-2001)</td>
</tr>
<tr>
<td>Michael E. Herz</td>
<td>Professor of Law</td>
</tr>
<tr>
<td></td>
<td>Benjamin N. Cardozo School of Law</td>
</tr>
<tr>
<td></td>
<td>Chair Elect, ABA Section of Administrative Law and Regulatory Practice</td>
</tr>
<tr>
<td>Ronald M. Levin</td>
<td>Henry Hitchcock Professor of Law</td>
</tr>
<tr>
<td></td>
<td>Washington University School of Law</td>
</tr>
<tr>
<td></td>
<td>Former Chair, ABA Section of Administrative Law and Regulatory Practice</td>
</tr>
</tbody>
</table>
Public Members

Carl Malamud
President and Founder, Public.Resource.Org

Gillian E. Metzger
Professor of Law, Columbia Law School

Saikrishna B. Prakash
Sullivan & Cromwell Professor of Law
University of Virginia Law School

Larry D. Thompson
Senior Vice President and General Counsel, Pepsico
Deputy Attorney General (2001-03)

Jerry L. Mashaw
Sterling Professor of Law, Yale Law School

David W. Ogden
Partner, Wilmer Cutler Pickering Hale and Dorr
Deputy Attorney General (2009-10); Assistant
Attorney General, Civil Division (1999-2001)

Richard L. Revesz
Dean and Lawrence King Professor of Law
New York University School of Law

James J. Tozzi
Member, Board of Directors
Center for Regulatory Effectiveness
Assistant Director, Office of Management and
Budget (1977-80)
Deputy Administrator, OMB Office of Information
and Regulatory Affairs (1980-83)

Randolph J. May
President, Free State Foundation
Former Chair
ABA Section of Administrative Law and Regulatory
Practice

John A. Payton
President and Director-Counsel, NAACP Legal
Defense and Educational Fund, Inc.
Former President, D.C. Bar

Alasdair S. Roberts
Rappaport Professor of Law and Public Policy,
Suffolk University Law School
Fellow, National Academy of Public Administration

John Vittone
Chief Administrative Law Judge
Department of Labor (Retired)
Administrative Law Section Delegate, ABA Board of
Governors

Doris Meissner
Senior Fellow and Director, US Immigration Policy
Program, Migration Policy Institute
Commissioner, Immigration and Naturalization
Service (1993-2000)

Richard J. Pierce, Jr.
Lyle T. Alverson Professor of Law, The George
Washington University Law School

Teresa Wynn Roseborough
Deputy General Counsel
Metropolitan Life Insurance Company
Deputy Assistant Attorney General, Office of Legal
Counsel (1994-96)

Helgi C. Walker
Partner, Wiley Rein
Washington, DC
Associate Counsel to the President (2001-03)

Nina Mendelson
Professor of Law
University of Michigan Law School

Michael K. Powell
Senior Advisor, Providence Equity Partners
Commissioner and Chairman, Federal
Communications Commission (1997-2005)

Max Stier
President and CEO, Partnership for Public Service
Deputy General Counsel, Department of Housing
and Urban Development (1999-2001)
Fellow, National Academy of Public Administration

Allison M. Zieve
Director, Public Citizen Litigation Group

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
# Senior Fellows

<table>
<thead>
<tr>
<th>Name</th>
<th>Title and Affiliation</th>
</tr>
</thead>
<tbody>
<tr>
<td>William H. Allen</td>
<td>Retired Partner, Covington &amp; Burling LLP Senior Fellow (1982-95)</td>
</tr>
<tr>
<td>Betty Jo Christian</td>
<td>Partner, Steptoe &amp; Johnson LLP Senior Fellow (1989-95)</td>
</tr>
<tr>
<td>Sally Katzen</td>
<td>Consultant and Visiting Professor New York University School of Law Public Member (1988-93), Vice Chairman (1993), Acting Chairman (1993-94)</td>
</tr>
<tr>
<td>Sallyanne Payton</td>
<td>William W. Cook Professor of Law University of Michigan Law School Senior Fellow (1988-95)</td>
</tr>
<tr>
<td>Robert A. Anthony</td>
<td>George Mason University Foundation Professor Emeritus, George Mason University School of Law Chairman (1974-79), Senior Fellow (1982-95)</td>
</tr>
<tr>
<td>Neil R. Eisner</td>
<td>Assistant General Counsel, United States Department of Transportation Government Member (1982-95)</td>
</tr>
<tr>
<td>Richard J. Leighton</td>
<td>Partner, Keller and Heckman LLP Senior Fellow (1991-95)</td>
</tr>
<tr>
<td>The Honorable Antonin G. Scalia</td>
<td>Associate Justice, United States Supreme Court Chairman (1972-74), Public Member (1978-82), Senior Fellow (1982-95)</td>
</tr>
<tr>
<td>Richard E. Wiley</td>
<td>Partner, Wiley Rein LLP Senior Fellow (1984-95)</td>
</tr>
<tr>
<td>Warren Belmar</td>
<td>Chairman of the Board, Clean Economy Network Education Fund Public Member (1986-95), Senior Fellow (1995)</td>
</tr>
<tr>
<td>Brian C. Griffin</td>
<td>Chairman of the Board, Clean Energy Systems Inc. Chairman (1992-93), Senior Fellow (1993-95)</td>
</tr>
<tr>
<td>Malcolm S. Mason</td>
<td>Senior Fellow (1984-95)</td>
</tr>
<tr>
<td>The Honorable Loren A. Smith</td>
<td>Senior Judge, United States Court of Federal Claims Chairman (1981-85), Senior Fellow (1985-95)</td>
</tr>
<tr>
<td>Marshall J. Breger</td>
<td>Professor of Law, Catholic University Columbus School of Law Chairman (1985-91), Senior Fellow (1991-95)</td>
</tr>
<tr>
<td>Paul D. Kamenar</td>
<td>Senior Fellow (1990-95)</td>
</tr>
<tr>
<td>Alan B. Morrison</td>
<td>Lerner Family Associate Dean for Public Interest &amp; Public Service Law The George Washington University Law School Senior Fellow (1989-95)</td>
</tr>
<tr>
<td>Peter L. Strauss</td>
<td>Betts Professor of Law, Columbia Law School Senior Fellow (1991-95)</td>
</tr>
</tbody>
</table>
Council of Independent Regulatory Agencies

- Commodity Futures Trading Commission
- Consumer Product Safety Commission
- Federal Communications Commission
- Federal Election Commission
- Federal Energy Regulatory Commission
- Federal Maritime Commission
- Federal Mine and Safety & Health Review Commission
- Federal Reserve Board
- Federal Trade Commission
- National Labor Relations Board
- Nuclear Regulatory Commission
- Occupational Safety & Health Review Commission
- Postal Regulatory Commission
- Securities and Exchange Commission
- Surface Transportation Board
- U.S. International Trade Commission
Pending Projects

In progress -
• Federal Agency Preemption of State Law
• Ethics for Government Contractor Employees

Approved -
• e-Rulemaking
• FACA in the 21st Century
• Government in the Sunshine Act
• Immigration Adjudication
• Methods of Collaborative Governance
• Rulemaking Comments
• Science in the Administrative Process
• Midnight Regulations
Next Steps

53rd Plenary of the Administrative Conference of the United States December 9-10, 2010

Direct inquiries to ACUS Plenary Designated Federal Official, Scott Rafferty, at srafferty@acus.gov.

For media inquiries, contact Kathy Kyle at 202.480.2091 or kkyle@acus.gov.
E-Rulemaking and the Courts

- Ossification issues

- What will record on review look like (74-4 redux)

- Consequences of online collaboration for rulemaking review—will there be a duty to participate (logical outgrowth test, etc.)

- How are the values of transparency, collaboration, efficiency and public participation to be measured
Connect with us…
Join our Mailing List at info@acus.gov

ONLINE

www.acus.gov
info@acus.gov
www.facebook.com/ACUSgov
www.twitter.com/ACUSgov
www.youtube.com/ACUSgov
www.dipity.com/ACUSgov
www.flickr.com/ACUSgov
www.livestream.com/administrativeconferenceoftheus

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES