



53rd Plenary Session
Minutes
December 9-10, 2010

I. December 9, 2010:

a. Introduction and Opening Remarks By Chairman Paul Verkuil

The first day of the 53rd Plenary Session of the Administrative Conference of the United States (“the Conference”) commenced on December 9, 2010 at 2:38 p.m. at the McGowan Theater located in the National Archives, 700 Pennsylvania Avenue, N.W., Washington, D.C. The 53rd Plenary Session was the first gathering of the full Assembly of the Conference since the Conference’s reauthorization after an absence of fifteen years.

The Conference’s Executive Director, Michael T. McCarthy, opened the session with administrative announcements, which included noting that because the Conference is a Federal Advisory Committee, its proceedings are open to the public and on the record. Mr. McCarthy informed attendees that audio and video of the meeting were being streamed live over the Internet. Mr. McCarthy then introduced Chairman Paul R. Verkuil.

Chairman Verkuil welcomed the Plenary Session’s attendees and thanked them for their presence. He noted that this was an exciting day for the Conference, which he referred to as “ACUS 2.0.” Chairman Verkuil introduced Associate Justice of the United States Supreme Court and former Conference Chairman Antonin Scalia. Chairman Verkuil thanked Justice Scalia for his instrumental role in the revival of the Conference through his numerous testimonies before Congress.

b. Remarks By Supreme Court Justice Antonin Scalia

Justice Scalia said that he took particular joy in this occasion as it marked the reauthorization and reestablishment of the Conference. He observed that the Conference was of particular personal significance to him given that his position as a former Chairman of the Conference was one of the three jobs he held in the executive branch of the federal government. Justice Scalia provided historical perspective on the Conference in its prior incarnation. He highlighted the significant academic writing in the field of administrative law that originated as Conference-sponsored studies. He stated that the Assembly of the Conference was, among many other things, a quasi-government think tank tasked with improving the administrative process throughout the government. Justice Scalia noted that the Conference was also a great networking medium for those interested in the administrative process and stated that he made lasting friendships with outstanding lawyers, academics and agency members through his past work as a chairman of the Conference. Then, after providing some historical background and



perspective on the oath of office, Justice Scalia administered the oath of office to the Conference's Council and Members and congratulated them.

c. Additional Remarks By Chairman Paul Verkuil

Chairman Verkuil thanked Justice Scalia. He recognized the Conference's Senior Fellows who were in attendance and gave special recognition to Malcolm Mason, a Senior Fellow of the Conference who recently celebrated his 100th birthday.

Chairman Verkuil made additional remarks about the Conference's mission and role. He noted that in appointing the Council in August 2010, President Barack Obama said that the Conference was a "public-private partnership designed to make government work better." Chairman Verkuil read aloud the message that the President sent to the attendees of the Conference's 53rd Plenary Session. Chairman Verkuil noted that the Conference is a "remarkable public-private gathering" of individuals from different sectors. He noted that having been reestablished, the Conference was like a "Rip Van Winkle" reawaking after 15 years to a very different world with changes that include, among other things, the Internet. Chairman Verkuil noted changes at the Conference that reflected the new age. Those changes include the newly created Conference website and the new Committee on Collaborative Governance. Chairman Verkuil thanked attendees for sharing their time and talents with the Conference. He acknowledged that if attendees were to bill the Conference at the hourly rates that lawyers of their caliber and experience currently charge, the Conference could not possibly afford it.

Chairman Verkuil recognized Conference Member Carl Malamud for his service of helping to digitize the Conference's documents. He also recognized the Conference staff by asking them all to stand. Chairman Verkuil specifically recognized the efforts of David Pritzker, the Conference's Deputy General Counsel, who was the sole Conference staff member for some time before additional staff members were hired. Chairman Verkuil also recognized the Conference's Council for their efforts in helping him to reestablish the Conference.

d. Adoption of the Resolution Governing the Order of Business and the Conference Bylaws

Chairman Verkuil invited a motion to adopt the following Resolution Governing the Order of Business:

The time initially allotted to each item of business is separately stated in the agenda. Individual comments from the floor shall not exceed five minutes (unless further time is authorized by unanimous consent). A majority of the members present and voting may extend debate on any item for up to 30 additional minutes. At any time after the expiration of the time initially allotted to



an item, the Chair shall have discretion to move the item to a later position in the agenda.

Amendments and substitutes that have been submitted in writing to the General Counsel before the meeting will receive priority in the discussion of any proposed item of business. Other amendments and substitutes will be entertained only to the extent that time permits. Notwithstanding Robert's Rules of Order, the Chair may allow up to five minutes for debate on any motion to lay on the table.

A motion to adopt the resolution was made and seconded. After opportunity for discussion, the Assembly adopted the resolution by voice vote.

Chairman Verkuil then invited a motion to approve the proposed Bylaws, as included in the packets distributed to members of the Assembly. (See the Appendix to these Minutes for the proposed Bylaws.) Such a motion was made and seconded. After opportunity for discussion, the Assembly approved the proposed Bylaws by voice vote.

e. Division of the Public Members into Two Classes

Chairman Verkuil explained that since the Conference Bylaws provided that Public Members should serve staggered two-year terms, the initial set of Public Members had to be divided into two classes, so that the one class would serve a two-year term and the other class would serve a one-year term. Prior to the meeting, two classes of public members had been selected alphabetically, as follows:

Class A: Fred W. Alvarez, Lisa S. Bressman, John F. Cooney, Susan E. Dudley, Cynthia R. Farina, David C. Frederick, Patti Goldman, Philip J. Harter, James E. Johnson, Simon Lazarus, Ronald Levin, Randolph J. May, Nina Mendelson, David W. Ogden, John A. Payton, Richard J. Pierce, Jr., Richard L. Revesz, Teresa Wynn Roseborough, Larry D. Thompson, Judge John Vittone.

Class B: Jodie Z. Bernstein, James Ming Chen, Walter Dellinger, Christopher Edley, Jr., Jody Freeman, H. Russell Frisby, Jr., Michael E. Herz, John M. Kamensky, Peter D. Keisler, Carl Malamud, Jerry Mashaw, Doris Meissner, Gillian E. Metzger, Michael K. Powell, Saikrishna B. Prakash, Alasdair S. Roberts, Max Stier, James J. Tozzi, Helgi C. Walker, Allison M. Zieve.

Chairman Verkuil announced that the division would be modeled on the division of the first United States Senators into three classes to serve staggered terms, which occurred on May 15, 1789. Conference Director of Research and Policy Jonathan R. Siegel rolled up two pieces



of paper of equal size, numbered “1” and “2”, and placed them in a box. The Chairman called on Fred Alvarez from Class A and Jodie Bernstein from Class B to draw papers from the box on behalf of their classes. Mr. Alvarez drew the paper numbered “2” and Ms. Bernstein drew the paper numbered “1.” Accordingly, the Chairman announced, members of Class A will serve an initial 2-year term and members of Class B will serve an initial 1-year term.

f. Presentation on Proposed Recommendation 2010-1

Chairman Verkuil moved to the business of the Conference’s proposed recommendation on agency procedures for considering the preemption of state law (“Proposed Recommendation 2010-1”). Proposed Recommendation 2010-1 came from the Conference’s Committee on Regulation. Chairman Verkuil called upon Jonathan Siegel, the Conference’s Research and Policy Director, to introduce the proposed recommendation.

Mr. Siegel thanked those who had worked on the proposed recommendation, including the consultant, Professor Catherine Sharkey of NYU Law School; Russell H. Frisby, Chair of the Committee on Regulation; and Emily Schleicher, the Conference’s Staff Counsel to the Committee. Mr. Siegel explained that Proposed Recommendation 2010-1 is about the procedures that federal agencies should follow as they consider regulations that might have the effect of preempting state law. Mr. Siegel explained the process by which the proposed recommendation was created, the process it went through before it was presented to the full Assembly of the Conference at the 53rd Plenary Session, and the Conference Members’ role in voting on the proposed recommendation.

Mr. Siegel introduced Professor Sharkey, who gave a short presentation about her research and report on the procedures that federal agencies should follow when they consider regulations that may have the effect of preempting state law. Professor Sharkey provided background on the issue of federal agency preemption of state law and gave a brief overview of the recommendations contained in Proposed Recommendation 2010-1, which included: urging agencies to have internal written guidance about their procedures in preemptive rulemaking and to make those guidelines publicly available; improving consultation with the relevant groups that represent state interests and urging consultation earlier in the rulemaking process; an attorney general notification procedure to reach out to state attorneys general; an internal oversight procedure within an agency whereby that agency would evaluate the basis for its assertions of preemption and provide a reasoned basis and evidence for its conclusions on preemption; and suggestions directed toward the Office of Information and Regulatory Affairs within OMB to encourage a more thorough review of preemption in the regulatory review process.

Mr. Frisby then explained the goals of the recommendation as a whole as well as the ideas and concerns that came out during the Committee on Regulation’s process of drafting the proposed recommendation. Mr. Frisby also took attendees through each section of Proposed



Recommendation 2010-1 and provided a summary of each section as well as the goals and objectives for each section.

g. Debate and Approval of Proposed Recommendation 2010-1

Chairman Verkuil opened the floor for discussion and informed attendees that all Conference Members, including Senior Fellows and Liaison Members were entitled to speak. A discussion period followed in which Conference Members provided comments regarding the various sections of proposed Recommendation 2010-1 and asked Professor Sharkey, Mr. Frisby and Mr. Siegel questions about the proposed recommendation's substance and form. During the course of the discussion period, one Conference Member proposed an amendment to the text of Proposed Recommendation 2010-1. This proposed amendment was to change the text of paragraph 2(a) of the Proposed Recommendation 2010-1 from "How the agency determines the need for any preemption" to "How the agency determines whether it has the statutory authority to preempt and whether it should preempt state or local law." Following a discussion of this proposed amendment, the Assembly voted by voice vote and did not approve the amendment. Another Conference Member proposed an amendment to insert the words "authority and" in paragraph 4 of Proposed Recommendation 2010-1, before the word "basis" in the second sentence. Following a discussion, the Assembly voted by voice vote and approved the amendment. In addition, the discussion at the Plenary Session concluded that some minor stylistic details and suggested changes to the recommendation would be delegated to the "committee on style." At the close of the discussion period, Chairman Verkuil called for a vote to adopt Proposed Recommendation 2010-1 as amended. By voice vote of the voting Conference Members in attendance, the motion to adopt Recommendation 2010-1 as amended was approved. Conference Staff was directed to work with Professor Sharkey and the Committee on Regulation to finalize the text of Proposed Recommendation 2010-1 as it was amended by the Conference Members and to make the final version of the recommendation publicly available.

h. Remarks by U.S. Senator Sheldon Whitehouse

Chairman Verkuil introduced United States Senator Sheldon Whitehouse of Rhode Island. Chairman Verkuil noted Senator Whitehouse's instrumental role in authorizing the work of the Conference through his work as Chair of the U.S. Senate Judiciary Subcommittee. Senator Whitehouse noted the Conference's energy in diving into the issue of regulatory preemption of state laws and the Conference's efforts to increase public participation. Senator Whitehouse stated that the focus on public participation would help the Conference play a vital role in maximizing the efficiency, effectiveness and integrity of agencies that face constant political, legal and economic pressures. Senator Whitehouse discussed the threat of agency capture, a familiar concept in regulatory and economic theory. Senator Whitehouse stated that he believed agency capture poses a threat to our regulatory state, and that he thought it was remarkable how little attention has been paid to the subject by Congress over the years. He



noted that making government work was a common cause that we all should share. He noted that a study of the issue of agency capture is not only warranted but also extremely productive and invited the Conference to join in this effort by either studying agency capture as a broad and general concept, exploring its particular ramifications within specific agencies or investigating ways to ensure that the public retains its faith in the integrity of their regulatory institutions. Senator Whitehouse asked the Conference to not limit itself to finding regulatory solutions to regulatory problems but to also look to Congress as a possible partner in the continuing task of improving and protecting regulatory agencies. Senator Whitehouse concluded by thanking the Plenary Session attendees for the opportunity to speak with them.

i. Closing Remarks By Chairman Paul Verkuil

Chairman Verkuil thanked Senator Whitehouse for his remarks and noted that agency capture is an important issue that reflects the Conference's concerns about good government. Chairman Verkuil recognized the Conference's Special Counsel, Professor Jeffrey Lubbers of American University's Washington College of Law. Chairman Verkuil again thanked Justice Scalia and Senator Whitehouse for taking the time to address the Plenary Session attendees during the first day of the 53rd Plenary Session. He invited all Conference Members to visit the Conference's new offices and invited all Plenary Session attendees to attend the Plenary Session's evening reception which would be held at 6:00 pm in the Rotunda of the National Archives. The December 9, 2010 meeting of the Conference's 53rd Plenary Session adjourned at 5:11 p.m.

II. Minutes from December 10, 2010:

a. Introduction and Opening Remarks By Chairman Paul Verkuil

The second day of the 53rd Plenary Session of the Conference commenced on December 10, 2010 at 9:12 a.m. in the McGowan Theater at the National Archives. Chairman Verkuil welcomed attendees back to the Plenary Session. He stated that it should be an enjoyable day that would give the attendees an opportunity to get to know each other better and come up with ideas for the Conference to work on going forward.

b. Remarks By Archivist David Ferreiro

Chairman Verkuil introduced David Ferreiro, the tenth Archivist of the United States. Mr. Ferreiro thanked Chairman Verkuil and welcomed all attendees of the Plenary Session to the National Archives. He noted that the National Archives has been the nation's record-keeper since 1934 and that the Archives is charged with making the vast volumes of records, dating back to the beginning of the nation, available to the public. After providing some background on the National Archives and its work in preserving national records, Mr. Ferreiro noted the partnership between the Conference and the Office of Government Information Services, most



recently through a workshop co-hosted by the two agencies. The workshop brought together individuals from different agencies to discuss the use of technology in the management of high volume caseloads. Mr. Ferreiro stated that the workshop was an excellent example of the Conference's mission of what President Obama has described as "making government work better." Mr. Ferreiro also highlighted Conference Member Miriam Nisbet for her role as the first holder of the title of Federal Freedom of Information Act ombudsman. Mr. Ferreiro then showed the Plenary Session attendees some historical documents that demonstrated the context of the Conference's work. Mr. Ferreiro closed his address by again welcoming attendees and encouraging them to come back and visit the National Archives.

c. Remarks by Conference Executive Director Mike McCarthy

Chairman Verkuil thanked Mr. Ferreiro for his address and for hosting the Conference at the National Archives. Chairman Verkuil introduced Michael McCarthy, the Conference's Executive Director, to talk about the mission and goals of the Conference. Mr. McCarthy noted that one of the main goals of the 53rd Plenary Session was to think about the future direction of the Conference and that this goal would be a major point of discussion during the upcoming breakout sessions where Conference Members would get a chance to participate in small group discussions. Mr. McCarthy noted the sources of the Conference's mission and goals, including its statutory mandates, and presented the Conference's mission statement. He noted that the Conference Staff came up with a strategic plan and performance goals to guide its selection of projects and support its budget requests. Mr. McCarthy then presented the themes that the Staff identified to assist the Conference in tracking its statutory mandate and provided some examples of current work the Conference was doing which exemplified those themes. He noted that the goal was for the Conference Members to provide feedback through the upcoming breakout sessions about whether the themes presented by the Staff were appropriate and whether any goals or priorities should be added or changed. Mr. McCarthy encouraged all Conference Members to give the themes he highlighted some thought and to plan to discuss them in the upcoming breakout sessions.

d. Remarks by Conference Communications Director Kathy Kyle

Mr. McCarthy introduced the Conference's Communication's Director, Kathy Kyle. Ms. Kyle first provided an overview of the Conference's web presence and its use of technology. She presented the website and noted specific features. She stated that the current website has links to social media sites such as Facebook and Twitter. She also stated that the Conference considers itself a gateway to information and noted that the Conference plans to use GoogleApps for Government as a collaborative workspace. Ms. Kyle closed by noting Chairman Verkuil's deep commitment to social media and technology and his desire that the Conference serve as an incubator for Web 2.0 technology. She informed the attendees that their feedback was welcomed and invited them to explore the website.



e. Introduction to the Breakout Sessions By Chairman Paul Verkuil

Chairman Verkuil announced that attendees would go to their breakout sessions. He informed attendees that two Conference Staff members and two Council members had been assigned to each breakout session. Chairman Verkuil noted that in each breakout session, a Conference Staff member would take notes while the two Council members would facilitate a discussion among the group in that session. Chairman Verkuil noted that attendees in each breakout session should discuss Mr. McCarthy's presentation on the Conference's mission as well as what projects the Conference should undertake and what problems in government the Conference should address. The Assembly temporarily adjourned. Attendees went to their assigned rooms for the breakout sessions where they discussed the Conference's mission, ideas for future projects and government problems which the Conference should learn about and potentially study.

f. Remarks Following the Breakout Sessions

The Assembly reconvened at 11:00 a.m. following the breakout sessions. Chairman Verkuil welcomed all attendees to back to the full Assembly. Chairman Verkuil and Council Member Thomasina Rogers then reported the ideas of their breakout session. They were followed by Council Members Preeta Bansal, Michael Fitzpatrick, Ronald Cass, and Thomas Perez, who each presented the ideas from their respective breakout sessions. Once all representatives from each breakout session reported their ideas to the full Assembly, Chairman Verkuil returned to the podium. He noted that only an organization like the Conference could pull together all of the talent in the room. Chairman Verkuil noted that the Conference would preserve all the ideas generated in the breakout sessions and continue to communicate to Conference Members the work of the Conference through various mediums, including the use of new media technology. Chairman Verkuil entertained questions from the attendees and there was a short discussion among attendees.

g. Closing Remarks By Conference Chairman Paul Verkuil

Following a short discussion period, Chairman Verkuil returned to the podium to adjourn the Plenary Session. He announced that the 54th Plenary Session would take place on June 16 and 17, 2011 in Washington D.C. Chairman Verkuil thanked all attendees of this Plenary Session. Chairman Verkuil adjourned the 53rd Plenary Session of the Administrative Conference of the United States at 11:54 a.m.