

“IF IT DIDN’T EXIST, IT WOULD HAVE TO BE INVENTED”—REVIVING THE ADMINISTRATIVE CONFERENCE

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With the demise of the Administrative Conference of the United States (“ACUS”) in October 1995, the federal government, for the first time in nearly thirty years, lacks a center for advice, research, consensus-building, and information dissemination concerning administrative agency practices and procedures.

The concept of an “administrative conference” goes back before the 1964 Administrative Conference Act,¹ to the “temporary” administrative conferences (of two years’ duration) in the Eisenhower² and Kennedy³ Administrations. In each case the temporary conference recommended the establishment of a permanent conference.⁴ The Congress in 1964 heeded the

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1. Pub. L. No. 88-479, 78 Stat. 615 (codified at 5 U.S.C. §§ 591-596 (1994)).

2. The President’s Conference on Administrative Procedure, created by Presidential Memorandum on April 29, 1953. See Report of the Conference on Administrative Procedure Called by the President of the United States on April 29, 1953 (undated but presumably 1955 because it contains President Eisenhower’s reply, dated March 3, 1955) (on file with author).

3. See Exec. Order No. 10,934, 26 Fed. Reg. 3233 (1961), “Establishing the Administrative Conference of the United States,” April 13, 1961, reprinted in S. DOC. NO. 24, *Selected Reports of the Administrative Conference of the United States, Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary* (1963) [hereinafter *Selected Reports*].

4. The final action of the 1953-54 Eisenhower Conference was to adopt a resolution recommending that a similar conference be established on a permanent basis. This history is recounted in 1961-62 KENNEDY CONFERENCE, REPORT ON THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 6. Similarly, in 1962 the Chairman and Counsel Members of the Kennedy Conference wrote a letter to the President recommending “the creation on a permanent footing of

recommendation and enacted the Administrative Conference Act. With the appointment of its first Chairman in late 1967, ACUS began its activities as the government's central repository of advice and recommendations on administrative law. After 27 years and over 200 recommendations, the Conference's activities were cut short by the decision of the Appropriations Committees of the 104th Congress to eliminate the agency's funding.⁵

ACUS' structure was designed to produce a public/private partnership by maximizing the joint participation of agency and outside experts in administrative procedure. This "Conference" met together to develop recommendations to the President, Congress, agencies, and the courts with the help of a small permanent professional and support staff. Its statutory charter provided for a maximum of 101 members (including a presidentially-appointed Chairman and ten-member Council).⁶ Every major federal agency appointed at least one member, and the Conference Chairman appointed distinguished private sector members who served without compensation. The staff and budget remained small over the years.⁷ In 1995, it had 19 employees and a budget of under \$2 million—a minuscule budget for a federal entity.⁸ By comparison, its counterpart in the judicial branch, the Federal Judicial Center—created in the same year as ACUS with only a slightly larger budget—had grown to have a budget ten times larger.⁹

the Administrative Conference of the United States, to be composed of a counsel and an assembly." Letter from E. Barrett Prettyman, Chairman to the President (Dec. 19, 1962) (on file with author).

5. The story of the Conference's demise—including some earlier, but non-fatal, appropriations difficulties with Congress—is well told in Gary J. Edles, *Lessons from the Administrative Conference of the United States*, 2 EUR. PUB. L. 571 (1996), to be reprinted in revised form as *The Continuing Need For an Administrative Conference*, 50 ADMIN. L. REV. 101 (forthcoming 1998). For other recent discussions of the Administrative Conference, see *Testimony Before the Subcomm. on the Judiciary on Admin. Law and Gov'tl Relations of the House Comm. on the Judiciary in Support of the Reauthorization of the Administrative Conference of the United States* [hereinafter Statement of Katzen et al.], reprinted in 8 ADMIN. L.J. AM. U. 649 (1994); Marshall J. Breger, *The Administrative Conference of the United States: A Quarter Century Perspective*, 53 U. PITT. L. REV. 813 (1992); ABA Section of Administrative Law & Regulatory Practice Program: *The Administrative Conference of the U.S.—Where Do We Go From Here?*, 8 COOLEY L. REV. 147 (1991); Charles Pou, Jr., *The Administrative Conference: An "Auxiliary Precaution" of the American System*, 4 CAN. J. ADMIN. L. & PRAC. 57 (1990).

6. See 5 U.S.C. § 593 (1994).

7. There were proposals in the Carter Administration to transform ACUS into a much larger operation, housing the Federal Register and all of the government's administrative law judges. See, e.g., Larry Kramer, *New 'Superagency' Proposed To Oversee Federal Regulation*, WASH. POST, Mar. 3, 1979, at A8.

8. I cannot resist pointing out that ACUS' budget was about .0008 of the cost of one new submarine. See John Mintz, *Navy Floats \$2.4 Billion Attack Sub; Without an Enemy, Seawolf Draws Fire*, WASH. POST, July 19, 1997, at A1.

9. Congress appropriated \$40,000 for the initial operations of the Federal Judicial Center ("FJC") in fiscal year 1968, and \$300,000 for fiscal year 1969. See 1968 ANN. REP. DIRECTOR OF

ACUS sponsored considerable research in administrative law,¹⁰ leveraging a small research budget to hire academic consultants who sacrificed market-based fees for the sake of enhanced peer review, access to government decision makers, and a chance to affect agency activities. Their research reports became the basis for formal recommendations, drafted in the open with substantial public participation by committees of members. Semi-annual plenary sessions considered committee recommendations for adoption. Adopted recommendations were published in the *Federal Register* and *Code of Federal Regulations*,¹¹ widely disseminated around the government, and actively promoted by the Conference's staff. Due to the consensus-based process used by ACUS, it managed to achieve a high rate of implementation for its (non-binding) recommendations.¹² ACUS also sponsored basic research (e.g., on agency caseload statistics), and published numerous guides, sourcebooks, and manuals¹³ for agency (and public) use. Its Chairman and professional staff regularly presented testimony and advice on pending legislation.¹⁴

THE ADMIN. OFFICE U.S. CTS. 41. The original appropriation ceiling for ACUS was \$250,000 in 1968. See Administrative Conference Appropriations Ceiling Act, Pub. L. No. 88-499, 78 Stat. 615 (1964). In 1969, the ceiling was raised to \$450,000. See Administrative Conference Appropriations Ceiling Act, Pub. L. No. 91-164, 83 Stat. 446 (1969); 1969 ACUS ANN. REP. 1 & n.2 (1970). In 1994 ACUS' budget authority was \$1.8 million and the FJC's was \$18,828,000. See EXECUTIVE OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1996 app. at 939, 950.

10. See, e.g., *Reauthorization of the Administrative Conference of the United States: Hearings Before the Subcomm. on Commercial and Admin. Law, Comm. on the Judiciary*, 104th Cong. 38 (1995) (statement of Peter M. Shane, Dean of the University of Pittsburgh School of Law) [hereinafter Statement of Shane] ("Since its inception, ACUS has produced a steady stream of law reform analysis of the very highest quality. Under distinguished leaders of both parties . . . ACUS has maintained an unblemished reputation for sound, independent, evenhanded judgment in the interests of administrative fairness, efficiency, and effectiveness.").

11. The latest full compilation was in 1 C.F.R. § 305 (1993). This set is now available online at <<http://www.law.fsu.edu/library/admin/acus/acustoc.html>>. See also 60 Fed. Reg. 56,312 (1995) for a notice that lists all of the ACUS recommendations and statements, together with citations for the *Federal Register* documents in which they were published. Many depository libraries also have copies of ACUS' annual volumes of *Reports and Recommendations*.

12. ACUS estimated that about three-fourths of its recommendations were adopted at least in part. See Statement of Katzen et al., *supra* note 5, at 665.

13. See, e.g., THE MANUAL FOR ADMINISTRATIVE LAW JUDGES (3d ed. 1993); A GUIDE TO FEDERAL AGENCY RULEMAKING (2d ed. 1991); AN INTERPRETIVE GUIDE TO THE GOVERNMENT IN THE SUNSHINE ACT (1978); FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK (2d ed. 1992); NEGOTIATED RULEMAKING SOURCEBOOK (2d ed. 1995); SOURCEBOOK: FEDERAL AGENCY USE OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION (1987). All of these books were published and sold by the U.S. Government Printing Office.

14. See, e.g., *Comprehensive Regulatory Reform Act of 1995: Hearings on S. 343 Before the Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary*, 104th Cong. (1995) (statement of Thomasina V. Rogers, ACUS Chair); *Regulatory Flexibility Amendments Act of*

In recent years, ACUS had been in the forefront of evaluating regulatory reform initiatives and in encouraging agency use of alternative dispute resolution ("ADR"). The Administrative Conference's work in promoting ADR in the government included applied research, giving policy advice to agencies, educating agency personnel, offering legislative drafting and technical aid to Congress, and providing individual agencies with systems design and other implementation help. In the 1980s, ACUS developed theoretical underpinnings—helping agencies begin to think in terms of adapting unfamiliar ADR concepts to their various activities, or even creating new ones, such as negotiated rulemaking.¹⁵ ACUS then took a lead role in drafting, and getting introduced, the Administrative Dispute Resolution Act¹⁶ and Negotiated Rulemaking Act,¹⁷ and then working (with others, notably the American Bar Association) to obtain passage of these laws in 1990. The laws encouraged ADR use, mandated appointment of dispute resolution specialists in each agency, and named the Administrative Conference as the lead agency for implementation. After enactment of the Acts, ACUS worked to build agencies' capacity to implement them—it organized and maintained a roster of neutrals; helped newly appointed agency dispute resolution specialists develop policies and start new ADR programs; and brought them together in interagency working groups, staffed by the Administrative Conference, to present materials, seminars, and training that no single agency would have done on its own.¹⁸

Despite a great deal of support from the bar,¹⁹ members of Congress

1993: *Hearings on the House Comm. on the Judiciary*, 102d Cong. (1993) (statement of Jeffrey S. Lubbers, ACUS Research Director); Letter from Gary J. Edles, ACUS Gen. Counsel to Staff Dir., Sen. Comm. on Banking, Housing and Urban Affairs (June 2, 1992), reprinted in 138 CONG. REC. S9353 (July 1, 1992).

15. See generally Charles E. Grassley & Charles Pou, Jr., *Congress, the Executive Branch, and the Dispute Resolution Process*, 1 J. DISP. RESOL. 1 (1992).

16. Pub. L. No. 101-552, 104 Stat. 2736 (codified at 5 U.S.C. §§ 571-583). The Act was permanently reauthorized and amended by the Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870 (1996).

17. Pub. L. No. 101-648, 104 Stat. 4969 (codified at 5 U.S.C. §§ 561-70). The Act was permanently reauthorized by the Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 11, 110 Stat. 3870, 3873 (codified at 5 U.S.C. § 569 (1996)).

18. See OFFICE OF THE CHAIRMAN, ACUS, TOWARD IMPROVED AGENCY DISPUTE RESOLUTION: IMPLEMENTING THE ADR ACT (February 1995) (Report to Congress); OFFICE OF THE CHAIRMAN, ACUS, BUILDING CONSENSUS IN AGENCY RULEMAKING: IMPLEMENTING THE NEGOTIATED RULEMAKING ACT (October 1995) (Report to Congress).

19. The ABA, and especially its Section of Administrative Law and Regulatory Practice, was historically a strong supporter of ACUS. It supported ACUS' creation in the 1960s and it was always solicitous of its role within the government. In 1989, the House of Delegates adopted a resolution supporting "the reauthorization of [ACUS] and the provision of funds sufficient to permit

from both parties,²⁰ the academic community,²¹ and unusual letters of support from Justices Breyer and Scalia,²² ACUS ran afoul of budget cutters in the appropriations subcommittees and rather suddenly, after an appropriations conference committee failed to follow the Senate's earlier floor vote to restore its budget,²³ had to close down in one month (October

ACUS to continue its role as the government's in-house advisor and coordinator of administrative procedural reform." ABA, 1989 MIDYEAR MEETING, SUMMARY OF ACTION OF THE HOUSE OF DELEGATES 35.

20. See examples cited in Edles, *supra* note 5, at 604 n.144. One of the more remarkable testimonials came after-the-fact by Representative Steny H. Hoyer (D. Md.) who was Chair of the Appropriations Subcommittee on Treasury, Postal Service and General Government in the 103rd Congress and ranking minority member in the 104th:

As you know, initially I was not a proponent of the Conference and felt that its work could be done either in the agencies themselves or in the private sector. However, I became convinced that the Conference did, in fact, perform a very valuable and important service. . . .

Unfortunately, as you are well aware, the Republican Leadership was very desirous of having notches on its gun barrel of agencies that it had eliminated. . . . As a result, for a very small savings we have given up a very valuable agency supported by a broad bi-partisan coalition of individuals who know of the quality of its work.

Letter from Rep. Steny H. Hoyer to Thomasina V. Rogers, last Chair of ACUS (Nov. 1, 1995).

21. See, e.g., Statement of Shane, *supra* note 10, at 4 ("I can tell you that universities, think tanks, and even Congressional staffs could not hope to fulfill ACUS's current role."). See also Statement of Katzen, et al., *supra* note 5, at 687 (statement of Professor Thomas O. Sargentich). In 1993, a letter in support of ACUS was signed by 97 law school deans and professors of administrative law. See Letter from Professor Ronald M. Levin, Washington University in St. Louis School of Law to Rep. Steny H. Hoyer (Sept. 10, 1993) (on file with author).

22. See Edles, *supra* note 5, at 603 n.143. Justice Scalia had served as ACUS Chairman from 1972-74. For a description of Justice (then-Judge) Breyer's activities as a member of ACUS, see Jeffrey S. Lubbers, *Justice Stephen Breyer: Purveyor of Common Sense in Many Forums*, 8 ADMIN. L.J. AM. U. 775 (1995).

23. See Amendment No. 2249, 141 CONG. REC. S11,547 (daily ed. Aug. 5, 1995); see also Letter from Sens. William S. Cohen, John Glenn, Charles E. Grassley, Orrin Hatch, Howell Heflin, Herb Kohl, Carl Levin, and William V. Roth, Jr. to Sen. Richard Shelby, Chairman, Treasury, Postal Serv. and Gen. Gov't Subcomm. of the Senate Comm. on Appropriations (Sept. 8, 1995) (reiterating "strong support for the Senate position providing [full] funding" for ACUS). Notwithstanding this letter, Senator Shelby did not support the Senate's position in the conference committee.

The Senate's overall support for ACUS was also reflected in the fact that the three major regulatory reform bills pending in the Senate at that time (S. 291, S. 343, and S. 1001) mandated studies by ACUS of the implementation of the legislation. The Governmental Affairs Committee, in reporting out S. 343, wrote:

Because ACUS is comprised of respected experts and practitioners representing a wide range of perspectives and interests, and has a record of developing unbiased, practical solutions to regulatory problems, the Committee believes that this agency is well suited to producing the studies and recommendations needed to fulfill the intent . . . [of the bill].

REGULATORY REFORM ACT OF 1995, REPORT OF THE SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS, S. REP. NO. 104-88, at 57 (1995). Indeed, two years after ACUS' closing, proposed

1995).²⁴ Its resources and archives were distributed rather hurriedly, its members left hanging, and its staff unceremoniously “riffed.”²⁵ Its functions went unassigned by the Congress—not surprisingly leaving a fragmented approach to administrative law reform and resource sharing.²⁶

To be sure, a few aspects of ACUS’ functions have been picked up by other agencies. The Federal Mediation and Conciliation Service has stepped up its involvement in agency ADR efforts.²⁷ It, along with the Department of Justice and the General Services Administration, has each hired a former ACUS staff attorney to help with administrative-law-related issues. With the backing of Presidential Executive Orders, OMB’s Office of Information and Regulatory Affairs (“OIRA”) has served as a coordinating body on regulatory issues (albeit with an “Administration” point of view).²⁸ A rather unstructured Regulatory Working Group, also chaired by the OIRA Administrator,²⁹ has undertaken occasional efforts to coordinate agency regulatory activities. The National Performance Review, working for the Vice President, and once thought to be a temporary management review effort, has also continued to look at “reinvention” initiatives and management reforms.³⁰

legislation still contains assignments to ACUS. See Health Care Liability Reform and Quality Assurance Act of 1997, S. 886, 105th Cong. § 111(b) (requiring the Attorney General to consult with ACUS in developing guidelines for state-based alternative dispute resolution mechanisms); Equal Access to Justice Reform Amendments of 1998, S. 1613, 105th Cong. § 1(g) (mandating that ACUS report to Congress on fee awards in administrative proceedings).

24. Because of the historical importance of these unusual letters, I have reproduced them in the Appendix.

25. I.e., subject to removal via a “reduction in force.”

26. For example, when Congress reauthorized the Administrative Dispute Resolution Act in 1996, the Conference’s key role of promotion of ADR under the 1990 Act was assigned to an unnamed “agency designated by, or the interagency committee designated or established by the President.” Pub. L. No. 104-320, § 4, 110 Stat. 3870 (1996). The provision that also reauthorized the Negotiated Rulemaking Act also contained a similar provision. See *id.* § 11.

27. Among other things, the FMCS now maintains the “ADR Reading Room” created and maintained by ACUS, and has taken over sponsorship of the ACUS Interagency ADR Working Groups, now called the Federal ADR Network. See Deborah Schick Laufer, *Whither Federal ADR? Here To Stay!*, NIDR NEWS (Nov./Dec. 1996), at 11.

28. For a report on OIRA’s recent activities, see OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET, MORE BENEFITS FEWER BURDENS—CREATING A REGULATORY SYSTEM THAT WORKS FOR THE AMERICAN PEOPLE, A REPORT TO THE PRESIDENT ON THE THIRD ANNIVERSARY OF EXECUTIVE ORDER 12,866 (1996).

29. See Exec. Order No. 12,866, 3 C.F.R. § 638 (1993). The membership of the RWG does not include representatives of independent regulatory agencies, although representatives have been allowed to attend upon request. The members are listed in OFFICE OF MANAGEMENT AND BUDGET, REPORT TO THE PRESIDENT ON EXECUTIVE ORDER 12866, REGULATORY PLANNING AND REVIEW, app. B, reprinted in 59 Fed. Reg. 24,293 (1994).

30. As Vice President Gore recently wrote, “[E]ven before the second inauguration, President Clinton and I called the new Cabinet to Blair House to give them their reinvention marching

In the private sector there are also organizations that at least partially share ACUS' interest in administrative law reform. Most obvious, of course, is the ABA's Section of Administrative Law and Regulatory Practice. The Federal Bar Association and D.C. Bar have similar but smaller committees. In the academic world, American University's Washington College of Law ("WCL") has helped preserve the ACUS legacy in an accessible place, by agreeing to maintain the ACUS archive (i.e., that portion not mandated for inclusion into the National Archives) in its new law library.³¹ The WCL also has a Law and Government Program and has recruited two former senior ACUS officials to affiliate with it. Other private sector organizations, foundations, and think tanks in Washington also have an interest in government procedures, ranging from the National Academy of Public Administration, Urban Institute, Brookings Institution, American Enterprise Institute, and Heritage Foundation.

Obviously, none of these agencies or private organizations is, or could be, clones of ACUS. They all lack one or more of the following attributes of ACUS: (1) the public/private membership structure, (2) direct ties to both the President and the Congress (including the ability to accept special assignments with or without budget augmentation),³² (3) a determination to maintain a non-partisan, unbiased approach to issues, (4) a permanent career staff that could organize research and implement activities and serve as a central repository for administrative law and related expertise, (5) the ability to attract the participation of federal judges, or (6) an exclusive focus on administrative procedure.

orders." Al Gore, Introduction to "Blair House Papers," National Performance Review, Jan. 1997, at viii. The National Performance Review did, however, work closely with ACUS on administrative law matters and its leadership wrote in support of ACUS' continued funding. See Letter from Elaine Kamarck, Senior Policy Advisor to the Vice President to Rep. Steny H. Hoyer (Mar. 7, 1994) ("Among the agencies I encountered for the first time was ACUS, and I was much impressed with its work. . . . We look forward to continuing to use the unique expertise and consensus-building capabilities of ACUS in bringing about the management efficiencies and administrative improvements of the NPR.").

31. For information contact: Law Library, Washington College of Law, American University, 4801 Massachusetts Ave., NW, Washington, D.C. 20016; (202) 274-4330.

32. See *supra* note 26 for examples. In addition, Congress specifically asked ACUS to study and make recommendations for reform of the Federal Aviation Administration civil penalty program in Pub. L. No. 101-370, 104 Stat. 451 (1990). The ultimate ACUS recommendations were incorporated into Pub. L. No. 102-345, 106 Stat. 923 (1992). See Edles, *supra* note 5, at 593-94. Congress also, in 1978, mandated an ACUS study of the FTC's Trade Regulation Rulemaking provisions in Pub. L. No. 93-637 (1974). See Statement of Katzen et al., *supra* note 5, at 671 n.87. Also, the Equal Access to Justice Act, 5 U.S.C. § 504(c)(1) (1994), and the Government in the Sunshine Act, 5 U.S.C. § 552b(g) (1976), required agencies to consult with ACUS before issuing regulations. See Statement of Katzen et al., *supra* note 5, at 671 n.88.

But ACUS also had some drawbacks: a somewhat unwieldy structure, inflexible bureaucratic responsibilities (personnel and procurement restrictions, annual budget/appropriation cycles, and a myriad of reporting requirements) that come with being a federal agency (and are especially burdensome for small agencies), and the buffeting that inevitably goes on with changes in the control of Congress and the White House.

Still, as the title of this piece indicates, many of ACUS' supporters argued that ACUS was needed "now more than ever"³³ and would be needed again.³⁴ So it may be appropriate to consider several different options for recreating an ACUS-like entity to resume the coordination of the federal administrative law and its reform.

OPTION 1: RESUSCITATE ACUS

The Administrative Conference Act, 5 U.S.C. §§ 591-96, was not repealed. If Congress wished, it could simply reauthorize ACUS and appropriate funds. The President would presumably have to nominate a new Chairman and appoint a new Council, and the agency would have to start over.

But as a former ACUS General Counsel has observed, "In a climate of government retrenchment, ACUS is not likely simply to be re-established. Rather, to employ the jargon of the day, it would have to be 'reinvented.'"³⁵ He went on to sketch a possible vision of an acceptable "reinvented" Conference, using the extant Administrative Conference Act as the foundation:

There is no reason why employees from other agencies (or even the private sector) could not augment a small ACUS staff on a temporary basis, with their salaries paid by their employing entities. The existing statute already permits this type of arrangement and, for a number of years, ACUS had an active 'visiting executive' program that allowed a number of talented government employees to join the ACUS staff for temporary

33. Statement of Katzen, et al., *supra* note 5, at 677 (statement of Thomas M. Susman entitled "Now More Than Ever: Reauthorizing the Administrative Conference, Reforming Regulation and Reinventing Government").

34. As former Counsel to Vice President Bush and President Reagan put it, avoiding the cliché, "My guess is that if Congress terminates ACUS now, it will have to recreate it some time in the future, at considerable extra expense." *Reauthorization of the Administrative Conference of the United States: Hearing Before the Subcomm. on Commercial and Admin. Laws of the Comm. of the Judiciary*, 104th Cong. 33 (May 11, 1995) (statement of C. Boyden Gray, Council Member, ACUS).

35. Edles, *supra* note 5, at 609.

periods. ACUS might even be authorized to have a formal affiliation with a law school, whose students and faculty could assist in conducting research and drafting recommendations. If need be, a law school, or consortium of law schools and schools of public administration, might even provide financial or logistical support for ACUS's operations.³⁶

Given the passage of enough time, it is still quite possible that a future Congress will recognize the error of the 104th and breathe new life into the Administrative Conference Act. Until that time it is advisable to think of other options for reviving its needed activities in another form.

OPTION 2: CREATE AN ADVISORY COMMITTEE ON ADMINISTRATIVE PROCEDURE IN THE DEPARTMENT OF JUSTICE

If the functions of the Administrative Conference were to be revived in an existing department or agency, the leading contender would be the Department of Justice. The Department, of course, is the legal affairs center of the government and the Office of the Associate Attorney General already contains the Office of Information and Privacy, charged with overseeing agency implementation of the Freedom of Information Act and Privacy Act, and a small Office of Alternative Dispute Resolution. In addition, the Legal Education Institute, which trains federal lawyers in, among other things, administrative law, is housed within the Department.³⁷

There also is some precedent for lodging the responsibility in the Department. Pursuant to the terms of the Executive Order creating it, the Kennedy Temporary Conference received research and staff support from the Department's Office of Administrative Procedure.³⁸ After the temporary conference ended its operations in 1963, that small office continued to perform some research and statistics-gathering activities on administrative proceedings until ACUS was activated in 1968.

Proposed structure: Probably the most efficient and effective means would be an "Advisory Committee on Administrative Procedure" established

36. *Id.*

37. ACUS lawyers regularly participated in LEI's administrative law courses as instructors.

38. See Exec. Order No. 10,934, *supra* note 3, § 5. The Office of Administrative Procedure was created as a unit within the Office of Legal Counsel, Department of Justice, in 1957. See Att'y Gen. Order 142-57, 22 Fed. Reg. 998 (1957), reprinted in 1957 ANNUAL REPORT OF THE OFFICE OF ADMINISTRATIVE PROCEDURE at v. Its creation had been recommended by the Eisenhower Temporary Conference. See *supra* note 2. Its primary activity was to collect and publish statistics on agency proceedings. See 1957 and 1958 ANNUAL REPORTS OF THE OFFICE OF ADMINISTRATIVE PROCEDURE at v.

by the Attorney General. Recommendations from the Committee would be made to the Attorney General, who would determine whether to forward them to Congress or other agencies as appropriate. Alternatively, recommendations could also be made directly to the agencies and/or Congress, without AG approval. My suggested model would reduce the size of the Committee from the ACUS model to forty-five³⁹ with three subcommittees: Adjudication and Dispute Resolution, Rulemaking and Regulation, and Governmental Processes and Oversight (which would include judicial review issues).

Membership: I would begin with a ratio of twenty-five government members to twenty non-government members.⁴⁰ The Attorney General would select the non-government members with the government members selected by agencies in the same way as was done with ACUS. The Attorney General would select the agencies to be represented—with some requirement of rotation among agencies and with some requirement that independent agencies be represented. She would also appoint the Committee Chair from among the government members and the chairs of the three subcommittees. The Chair would preside over plenary meetings. The Attorney General would receive recommendations on membership issues from a full-time Executive Director. For continuity's sake, she would select the Executive Director who would be a career SES member within the Department of Justice.⁴¹

Staff: The permanent staff would be minimal. I would suggest the following: Executive Director (SES Level), Deputy Director (GS-15 level), Staff Attorney (GS-12-14 level), Staff Assistant (GS-8-9). This skeletal staff housed within DOJ, could be supplemented by Visiting Executives (like ACUS was able to attract for 1-2 year stints) and detailees (for shorter stints). The staff would support Committee activities, provide clearinghouse assistance on administrative procedure issues, and promote implementation of Committee recommendations.

39. ACUS' statute allows up to 101 members. See 5 U.S.C. § 593 (1994). The 1962 Temporary Conference had 88 members. See *Selected Reports, supra* note 3, at 2. In my experience, the large membership was not particularly costly but it did require more staff attention and created an unwieldy appearance. If the Committee were placed in an existing agency, its size should probably be reduced.

40. This follows the example of the ACUS model which also created a slight predominance of government members, partly I believe because it was thought that the non-government members, individually, would be able to devote a bit more energy and intellectual capital to the enterprise. See 5 U.S.C. § 593(b)(6).

41. This would guarantee the Executive Director some degree of tenure in the SES, but would allow the Attorney General to transfer him to other positions in the Department.

Budget: The proposed budget could be limited to about \$650,000. (E.g., \$325,000 for staff salaries and benefits, \$100,000 for overhead; \$60,000 for membership support [travel and committee meeting expenses]; \$100,000 for research contracts, and \$65,000 for publications.) Some of the funds could likely be attracted from other agencies.

Status within DOJ: A crucial attribute to making the Advisory Committee model work is providing for independent preparation of recommendations to the Attorney General. The Executive Director should report directly to either the Deputy AG or Associate AG. Some sort of clearance/approval process would be developed to approve new projects recommended by the Executive Director, but after that the Committee, subcommittees and consultants should be allowed leeway to develop recommendations as ACUS did.⁴² As with ACUS, there would presumably be considerable self-generated incentives to come up with a defensible, persuasive product at that point. Of course, the Advisory Committee would be subject to the openness requirements of the Federal Advisory Committee Act.⁴³

OPTION 3: SIMILAR TO OPTION 2, EXCEPT PLACED IN GENERAL SERVICES ADMINISTRATION

There would be several advantages to situating the Advisory Committee on Administrative Procedure in the General Services Administration ("GSA"). First, GSA, although an executive branch agency, has a much lower level of involvement with policy matters (with less of an Administration perspective) than the Department of Justice. Second, GSA already has numerous government-wide, apolitical oversight responsibilities and already has two related administrative law functions: it has responsibility for Federal Advisory Committee Act oversight⁴⁴ and also houses the Regulatory Information Service Center which, among other things, organizes and publishes the semi-annual Unified Agenda of Federal

42. For a good description of the process used by ACUS to develop its recommendations, see Breger, *supra* note 5, at 825-28. See also Edles, *supra* note 5, at 583 ("ACUS never attempted to dictate the results of consultant research but consultant products were subjected to an interactive peer review process . . .").

43. 5 U.S.C. app. §§ 1-15 (1982). ACUS was also subject to FACA and had few problems operating within its strictures.

44. The Act vests the coordination function to the President and the OMB Director, but the function was transferred to GSA by Exec. Order No. 12,024, 42 Fed. Reg. 61,445 (1977). The function is now performed by the GSA Office of Administration, Committee Management Secretariat.

Regulatory and Deregulatory Actions.⁴⁵ Third, placement in GSA would be more likely to allow participation by federal judges who might feel it inappropriate to advise the Department of Justice because of its role as the government's litigator. Offsetting these advantages, however, is a very big disadvantage: GSA clearly lacks the clout the Justice Department enjoys. It would probably be more difficult to attract high-level participation in Committee activities or sufficient attention to Committee recommendations without the Attorney General's imprimatur. Moreover the GSA Administrator is normally chosen for managerial acumen and has historically not been involved or interested in administrative law reform or regulatory procedure issues.

OPTION 4: PRIVATIZATION IN AN EXISTING WELL-FINANCED ENTITY

As an alternative to reviving ACUS *within* the government, an existing private entity (American Bar Association, National Academy of Public Administration, The Brookings Institution, Urban Institute or American Enterprise Institute) could be approached with a plan to recreate the "Conference" aspect of ACUS—modeled perhaps on the smaller "Advisory Committee" described in Option 2. A part-time Conference Chair and full-time Executive Director could be appointed to direct the activities of the Conference, which would operate loosely within the organization. Recommendations might be made to a Board of Directors or equivalent (e.g., the ABA's Board of Governors). Funding would come from the organization's budget, foundations, federal research grants, book sales, and training fees. Corporate funding might also be considered, although the risks of actual or perceived bias would obviously counsel caution in that area.

The overriding weakness of this option is that the non-government nature of the entity would inevitably reduce the stature and official nature of the recommendations. A related worry is that this privatized Conference might also inevitably be viewed as reflecting the political or policy orientation of the parent entity. The real strength of ACUS was that it was not only *in* the government, it *was* the government. A recommendation emanating from ACUS was inevitably referred to by headline writers as

45. For more information, see Introduction to the Unified Agenda of Federal Regulatory and Deregulatory Actions, 62 Fed. Reg. 21,406 (1997).

"Federal Panel recommends X."⁴⁶ This not only added the *gravitas* with which all participants approached the issues, it made its recommendations more influential, especially with "member" agencies. Moreover, the participation of the government members was *intragovernmental*. It was clearly official business for the assistant general counsel of the Department of Agriculture to grab a cab and spend several hours participating as an ACUS Committee member. On the other hand, the ability of such officials to take time to travel to and participate in bar activities, for example, is clouded.⁴⁷

Nevertheless there is some precedent for such an effort within the bar association. In the 1970s, the ABA's Section of Administrative Law (as it was then named) did organize the Center for Administrative Justice. According to the original proposal for the Center made in 1972, although the Center was not intended to duplicate the sort of applied research recommendations that ACUS specialized in,⁴⁸ it was supposed to maintain an administrative law library and "provide training opportunities for those engaged or interested in the administrative decision-making process in the federal and local governments, assemble and disseminate information in this area, conduct and support research projects, both theoretical and empirical,

46. See, e.g., *Tort Claims Exception Repeal Tabled By Blue Ribbon Panel*, 36 FOOD CHEM. NEWS, Apr. 4, 1994; Cass Peterson, *Agency Calls for Harmonizing Laws on Protection of Whistle-Blowers*, WASH. POST, June 11, 1987, at A21.

47. See, e.g., Memorandum from the Deputy Attorney General, Subject: Participation in Bar Activities by Justice Department Employees, to Department of Justice Attorneys, Mar. 27, 1997, at 2 ("Ordinarily bar activities should not be conducted at the expense of the government in terms of time or money. . . . Occasionally, when the work of a bar committee is closely related to a employee's official responsibilities, the Department may determine that an employee may serve on that committee in his or her official capacity as the representative of the Department."). See generally Lisa G. Lerman, *Symposium on Mandatory Pro Bono: Public Service by Public Servants*, 19 HOFSTRA L. REV. 1141, 1192-1208 (1991) (describing criminal statutes and agency regulations governing "outside activities" of employees).

48. As the first ACUS Chairman, Professor Jerre Williams, stated, in lauding the creation of this Center in the ABA:

Certain limitations in [ACUS] and its functions should be noted. The most important is that its activities relate solely to the federal government. A second limitation is that a majority of the members of the Conference must be government officials. While this is a valuable and proper limitation for this organization, because it means that the government itself is undertaking reform, the Conference nevertheless for this reason remains a government agency and this limitation must be frankly recognized. A third possible limitation upon the Conference is that, to maintain congressional and Presidential backing it must be specific and precise in much of its activities. This means that there is less room for general scholarship or "radical" inquiry.

Jerre S. Williams, *A National Institute of Justice and the Administrative Process*, NAT'L CENTER FOR ST. CTS 114, 120-21 (undated).

in order to illuminate the dark areas of the subject, and to provide consulting and drafting services to governmental units of agencies."⁴⁹ The Center was established and did some worthwhile work⁵⁰ before going out of business due to funding difficulties in the early 1980s.

OPTION 5: CREATE A NEW PRIVATE ACUS

If adequate start-up funds and a prestigious Chair could be attracted, a private Conference on Administrative Procedure might be viable. Of course without an adequate "endowment" from a respected foundation, funding problems would likely be more acute in a start-up organization, and the lure of corporate sponsorship correspondingly greater.

It should be noted here that the *Washington Post* recently reported that staff members from the Office of Technology Assessment (a larger congressional agency that also lost its funding about the same time as did ACUS) have succeeded ("after six months of often frustrating efforts") in obtaining donated office space and a \$50,000 grant from an anonymous donor as seed money for an Institute for Technology Assessment.⁵¹

OPTION 6: TRY A ONE YEAR REVIVAL

As a short term experimental step, given the difficulty of a true revival—at least while the appropriators who failed to appreciate ACUS' value are still in charge—it might be advisable to try a low-budget temporary ACUS in an academic setting. One way to try this would be for a law school to sponsor an "Administrative Law Plenary Session" in 1998 or 1999. As a foundation for such a setting, the Dean could appoint a group of volunteers, some perhaps drawn from ACUS' most recent membership, to identify the most pressing administrative law issues in today's government. For instance, many new laws were passed in 1995-96 affecting the administrative process.⁵² Committees such as the ones suggested above in

49. Proposal for Center for Administrative Justice, Apr. 24, 1972, at 5, *quoted in* Williams, *supra* note 48, at 121.

50. For example, see the Center's influential empirical study of the social security appeals process, JERRY L. MASHAW ET AL., *SOCIAL SECURITY HEARINGS AND APPEALS* (1978).

51. *An Agency's Private Return*, WASH. POST, May 6, 1996, at F19. No listing for the Institute was found in the Washington phone directory, however.

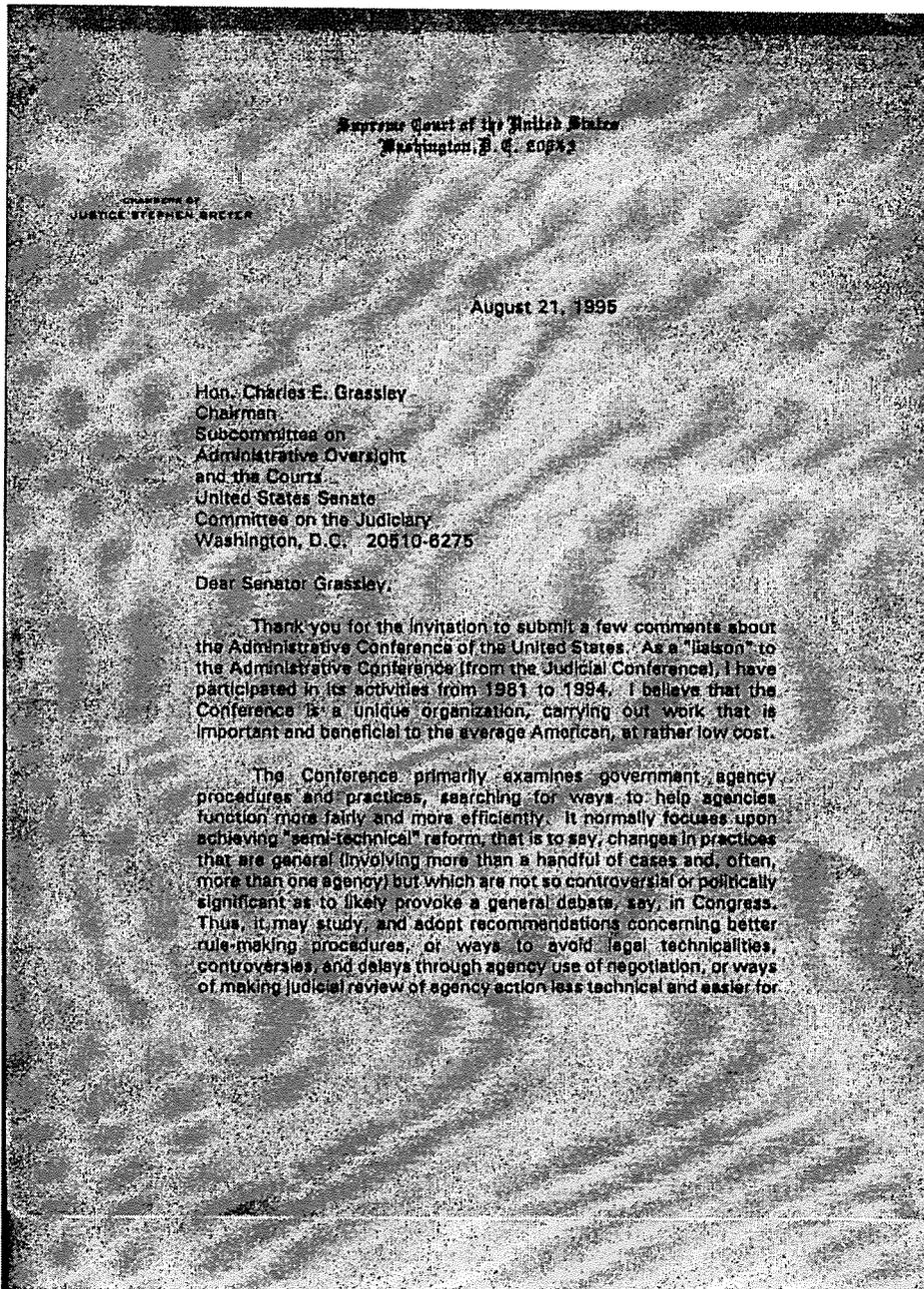
52. See, e.g., *Recent Developments: Regulatory Reform & the 104th Congress*, 49 ADMIN. L. REV. 95 (1997) (discussing congressional review of agency regulations, the Paperwork Reduction Act of 1995, the Small Business Regulatory Enforcement Fairness Act, and the Unfunded Mandates Reform Act of 1995).

Option 1 could be formed to discuss these issues, develop reports, and draft and circulate recommendations to ready them for a Plenary Session. If properly organized and staffed with faculty and student assistance, such a Conference would at least continue the chain (unbroken from 1968 to 1995) of ACUS recommendations to Congress and the agencies on administrative law reform.

CONCLUSION

I believe it is only a matter of time before Congress and the President recognize this country's need for objective, non-partisan expertise on the crucial, but not always politically "sexy," issues of administrative procedure implementation and reform. I also, not surprisingly, believe an "administrative conference," as reflected in the Eisenhower and Kennedy "temporary conferences" and as enacted by the Administrative Conference Act, is basically sound. The three main attributes of this model—a public/private partnership, an entity that is a part of the government, and one with at least a small staff to follow up and encourage real-world implementation of recommended reforms—are of great importance to its practical success. I have tried to present alternatives to the stand-alone, independent agency model that proved to be too precarious to withstand a politicized appropriations cycle. I have also suggested possible streamlining changes. Finally, if the in-house approach proves to be unrealistic for a while, I suggest ways of keeping the idea (and the momentum built up by ACUS for almost thirty years) alive in the private sector. However it may happen, having an independent, expert entity to conduct research, provide consensus-based recommendations, and assist Congress and agencies on matters of administrative process is an idea whose time will come again.

APPENDIX

Justice Breyer Letter

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ordinary citizens to obtain. While these subjects themselves, and the recommendations about them, often sound technical, in practice they may make it easier for citizens to understand what government agencies are doing to prevent arbitrary government actions that may harm them.

The Administrative Conference is unique in that it develops its recommendations by bringing together at least four important groups of people: top-level agency administrators; professional agency staff; private (including "public interest") practitioners; and academicians. The Conference will typically commission a study by an academician, say, a law professor, who often has the time to conduct the study thoughtfully, but may lack first-hand practical experience. The professor will spend time with agency staff, which often has otherwise unavallable facts and experience, but may lack the time for general reflection and comparisons with other agencies. The professor's draft will be reviewed and discussed by private practitioners, who bring to it a critically important practical perspective; and by top-level administrators such as agency heads, who can make inter-agency comparisons and may add special public perspectives. The upshot is likely to be a work-product that draws upon many different points of view, that is practically helpful and that commands general acceptance.

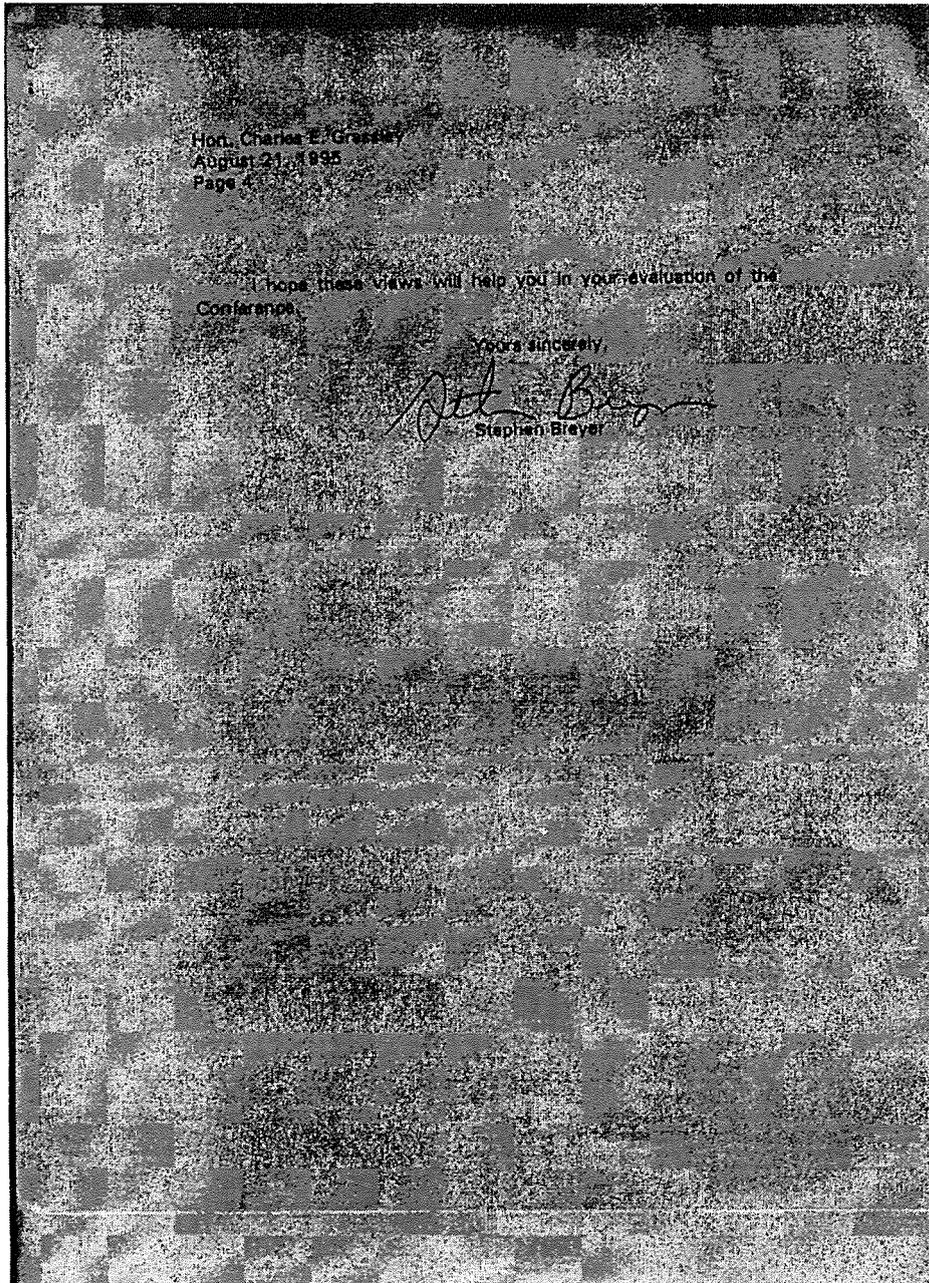
In seeking to answer the question, "Who will control the regulators?" most governments have found it necessary to develop institutions that continuously review, and recommend changes in, technical agency practices. In some countries, ombudsmen, in dealing with citizen complaints, will also recommend changes in practices and procedures. Sometimes, as in France and Canada, expert tribunals will review decisions of other agencies and help them improve their procedures. Sometimes, as in Australia and the United Kingdom, special councils will advise ministries about needed procedural reforms. Our own Nation has developed this rather special approach

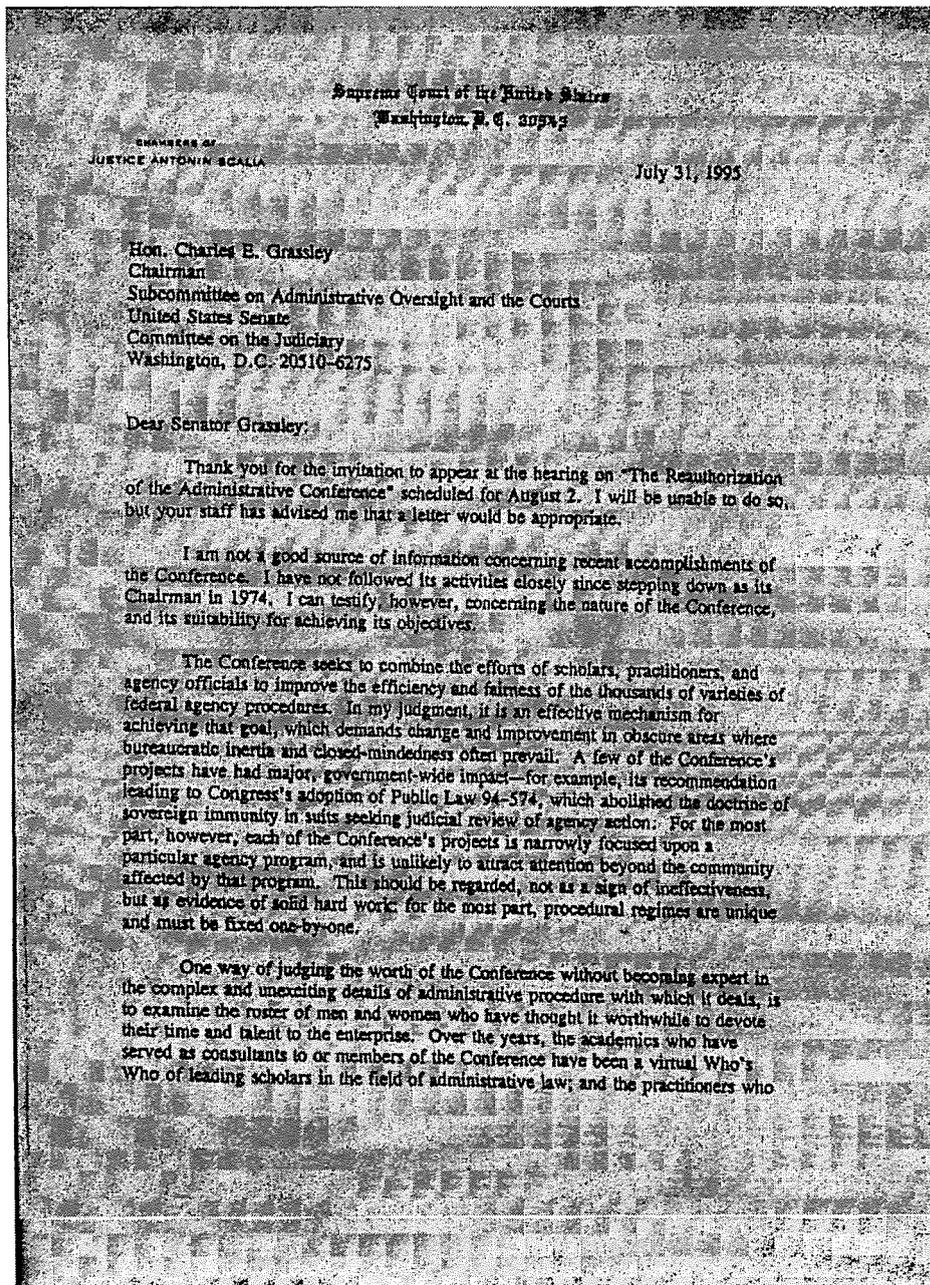
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(drawing together scholars, practitioners, and agency officials) to bringing about reform of a sort that is more general than the investigation of individual complaints yet less dramatic than that normally needed to invoke Congressional processes. Given the Conference's rather low cost (a small central staff, commissioning academic papers, endless amounts of volunteered private time, and two general meetings a year), it would be a pity to weaken or to lose our federal government's ability to respond effectively, in this general way, to the problems of its citizens.

I do not see any other institution readily available to perform this same task. Individual agencies, while trying to reform themselves, sometimes lack the ability to make cross-agency comparisons. The American Bar Association's Administrative Law Section, while a fine institution, cannot call upon the time and resources of agency staff members and agency heads as readily as can the Administrative Conference. Congressional staffs cannot as easily conduct the technical research necessary to develop many of the Conference's more technical proposals. The Office of Management and Budget does not normally concern itself with general procedural proposals.

All this is to explain why I believe the Administrative Conference performs a necessary function, which, in light of the cost, is worth maintaining. I recognize that the Conference is not the most well known of government agencies; indeed, it is widely known only within a fairly small (administrative practice oriented) community. But, that, in my view, simply reflects the fact that it does its job, developing consensus about change in fairly technical areas. That is a job that the public, whether or not it knows the name "Administrative Conference," needs to have done. And, for the reasons I have given, I believe the Administrative Conference well suited to do it.



Justice Scalia Letter

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have served as members have been, by and large, prominent and widely respected lawyers in the various areas of administrative practice.

I was the third Chairman of the Administrative Conference. Like the first two (Prof. Jerry Williams of the University of Texas Law School, and Prof. Roger Cramton of the University of Michigan Law School), and like my successor (Prof. Robert Anthony of Cornell Law School) I was an academic--on leave from the University of Virginia Law School. The Conference was then, and I believe remains, a unique combination of scholarship and practicality, of private-sector insights and career-government expertise.

I would not presume to provide the Subcommittee advice on the ultimate question of whether, in a time of budget constraints, the benefits provided by the Administrative Conference are within our Nation's means. But I can say that in my view those benefits are substantial: the Conference has been an effective means of opening up the process of government to needed improvement.

Sincerely,

