



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

### 54<sup>th</sup> Plenary Session

#### Minutes

June 16-17, 2011

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#### I. **June 16, 2011:**

##### a. **Introduction and Opening Remarks by Chairman Paul Verkuil**

The first day of the 54<sup>th</sup> Plenary Session of the Administrative Conference of the United States (“the Conference”) commenced on June 16, 2011 at 2:00 p.m., at the Pew Charitable Trusts located at 901 E Street N.W., Washington D.C.

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, that progress of the meeting could also be followed on Twitter, and that throughout the session amendments to the recommendations would be tracked in real time thanks to technological advancements. Mr. McCarthy then introduced Chairman Paul R. Verkuil.

Chairman Verkuil welcomed the Plenary Session’s attendees, and noted that the Conference had come a long way since it had last convened. Chairman Verkuil provided a brief overview of the Conference’s activity since the last plenary, emphasizing the number of recommendations, workshops, and other projects that had quickly come into fruition. Chairman Verkuil articulated how the four priorities of the Conference – promotion of participation, collaboration, innovation, and education in the administrative process – have been incorporated into its mission, and how the caliber of the Conference membership is what has made its comeback such a success. Chairman Verkuil reiterated the Conference’s commitment to transparency, and concluded his remarks with some procedural announcements.

##### b. **Consideration of Proposed Recommendation on Legal Considerations in e-Rulemaking**

###### i. **Presentation on Proposed Recommendation 2011-1**

Chairman Verkuil moved to the business of the Conference’s proposed recommendation on legal considerations in e-rulemaking (“Proposed Recommendation 2011-1”). Proposed Recommendation 2011-1 came from the Conference’s Committee on Rulemaking. Chairman Verkuil called upon Jonathan Siegel, the Conference’s Research and Policy Director, to introduce the proposed recommendation.

Mr. Siegel began by commending all of the Conference’s committee members for the diligence and energy that they bring to the discussion of administrative law topics. Mr. Siegel



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made clear the high level of consideration that is displayed through the Conference's recommendation process, and in particular the roles played by the committees and Council. Mr. Siegel explained that manager's amendments to the recommendations had been previously submitted, and he explained the process through which new amendments could be adopted. Mr. Siegel noted that e-rulemaking is one of the biggest and most important trends in rulemaking, and that the Conference hoped to add value by investigating these issues.

Mr. Siegel introduced Bridget Dooling, who served as the researcher on Proposed Recommendation 2011-1 while on detail to the Conference from OMB, who gave a short presentation about her research and report on the legal issues that present themselves when agencies engage in e-rulemaking. Ms. Dooling defined e-rulemaking as the use of web technology in informal rulemaking to improve the rulemaking process, and cited online public comments as an example of a legal issue that is presented by e-rulemaking. Ms. Dooling explained that the report was fueled through the creation of an exploratory survey to shape discussion topics for an informal workshop, at which approximately a dozen federal agencies provided insight into the creative ways agency staff work to address legal issues that arise along the way in e-rulemaking. Ms. Dooling concluded by noting that the final report will be published in the Administrative Law Review at the end of the year and that any feedback would be welcome.

Neil Eisner, filling in for Committee on Rulemaking Chair Bob Rivkin, explained the problems presented by e-rulemaking and noted that one of the primary purposes of the recommendation is to address some of those concerns and to dispel some of the legal uncertainty. Mr. Eisner detailed each of the nine proposals within Proposed Recommendation 2011-1, which included: procedures to be taken when an agency receives a large number of duplicative comments; methods to allow the public to notify the agency when they see something inappropriate or protected; methods for the commenter to indicate when he or she has confidential information; confirmation that the agencies have procedures for handling confidential or trade secret information; determining whether the docket system used by the executive branch has sufficient Privacy Act Compliance; determining to what extent electronic records should eliminate paper records; figuring out with how to deal with a three-dimensional object; how courts should encourage agencies to submit electronic copies of their docket to the court; and the suggestion that records generated during e-rulemaking should be shared and up-to-date.

### **ii. Debate and Approval of Proposed Recommendation 2011-1**

Chairman Verkuil opened the floor for general comments, followed by manager's and individual amendments. A discussion period followed in which Conference Members provided comments regarding various issues presented by proposed Recommendation 2011-1 and asked Mr. Eisner, Ms. Dooling and Mr. Siegel questions about the proposed recommendation's substance. Chairman Verkuil then turned to the manager's amendments on the recommendation, which were approved without discussion by a voice vote.



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A Conference Member proposed an amendment to the text of Proposed Recommendation 2011-1. The amendment suggested replacing the term “confidential” in the text of paragraphs (c) and (d) with the phrase “confidential business information. Following a discussion of this proposed amendment, the Assembly voted by voice vote and did not approve the amendment. Another Conference Member, in a pre-submitted amendment, proposed an amendment to the text of Proposed Recommendation 2011-1. The first part of the proposed amendment suggested deleting “comment” on the heading on page 5, “Maintaining Rulemaking Dockets in Electronic Form”. The second part of the proposed amendment inserted a paragraph on page 6 beginning with the words “To facilitate” and ending with the words “a publicly available electronic docket”. During the discussion period of this proposed amendment a friendly amendment to replace “as soon as they are known to the agency” with “as soon as practicable during or after the close of the comment period” was suggested. Following more discussion of this proposed amendment, the Assembly voted by voice vote and approved the amendment. Conference Staff were directed to work with the “committee on style” to address some minor stylistic details and suggested changes to the recommendation.

A member of the Council proposed an amendment to the text of Proposed Recommendation 2011-1. The proposed amendment would replace “to the greatest extent permitted” with “as appropriate”. Following a discussion, the Conference Members voted by a show of hands to adopt the amendment. Another Council member proposed an amendment to replace in paragraph (b) the phrase “possible removal” with “appropriate action”. By voice vote, the proposed amendment was adopted without any discussion. Another Conference Member proposed an amendment to take out the language “for members of the public” and replace it with “a method for flagging”. A friendly amendment to the amendment by a different Conference Member proposed changing the language at issue to “Providing a method, including for members of the public, for flagging inappropriate or protected content, and for taking inappropriate action thereon”. The friendly amendment to the proposed amendment to the text of Proposed Amendment 2011-1 was adopted following a voice vote.

At the close of the discussion period, Chairman Verkuil called for a vote to adopt Proposed Recommendation 2011-1 as amended. By voice vote of the voting Conference Members in attendance, the motion to adopt Recommendation 2011-1 as amended was approved. Chairman Verkuil then adjoined the Plenary Session for a fifteen minute recess.

### **c. Consideration of Proposed Recommendation on Rulemaking Comments**

#### **i. Presentation on Proposed Recommendation 2011-2**

Chairman Verkuil reconvened the 54<sup>th</sup> Plenary Session to discuss the Conference’s proposed recommendation on rulemaking comments (“Proposed Recommendation 2011-2”). Proposed Recommendation 2011-2 came from the Conference’s Committee on Regulation. Chairman Verkuil again called upon Mr. Siegel to introduce the proposed recommendation.



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Mr. Siegel explained that Proposed Recommendation 2011-2 was designed to try to improve the comment part of notice and comment rulemaking. The project grew out of a request from the House Judiciary Committee's Subcommittee on Commercial and Administrative Law which specifically suggested that the Conference investigate certain questions that it posed about the comment process. Mr. Siegel introduced the researcher, Professor Steven Balla of George Washington University; and Russell H. Frisby, Chair of the Committee on Regulation.

Professor Balla gave a presentation detailing the five specific areas of public commenting that the House report suggested the reconstituted Conference investigate: whether there should be a recommended, minimum length for a comment period; whether agencies should immediately make comments publicly available and allow reply comment periods; whether agencies must reply to all comments; under what circumstances agencies should be permitted to keep comments confidential and/or anonymous; and what effects comments actually have on agency rules. To examine those issues, Professor Balla did independent research to fill in the gaps after reviewing germane published research by both lawyers and social scientists, and interviewed experts on rulemaking comments both inside and outside of government to bring their insights to bear on the issues addressed in the report. The report draws conclusions about the state of practice and understanding of those areas, and proposes benchmarks to assess the impacts of the recommendations if carried out by agencies.

Mr. Frisby thanked the Committee on Regulation and Professor Balla, and explained how the recommendations incorporated yet at the same time differed slightly from the substance Professor Balla's report. Mr. Frisby took attendees through each section of Proposed Recommendation 2011-2, and provided a summary of each section as well as the objectives sought by each recommendation.

### **ii. Debate and Approval of Proposed Recommendation 2011-2**

Chairman Verkuil suggested that a general discussion of Proposed Recommendation 2011-2 be bypassed, and asked for a motion to accept the manager's amendments. Following discussion on the manager's amendments, a friendly amendment was made to strike the word "consider" on the proposed amendment to item 7 addressing the question of a stale record. The Assembly voted by voice vote and the manager's amendments were accepted.

Chairman Verkuil proceeded to address an amendment to paragraph two of Proposed Recommendation 2011-2 as proposed by a Conference Member. The amendment proposed to conform the comment period with Executive Order 13563 by removing the distinction between significant regulatory actions and other actions and instituting a comment period that should generally be at least 60 days. Following discussion of the Executive Order and the proposed amendment, the Assembly voted by voice vote and did not approve the amendment. Another Conference Member proposed the text of paragraph four of Proposed Recommendation 2011-2 be deleted, as it appeared to be a non-recommendation. Following a discussion, the Assembly voted by a voice vote to not adopt the amendment. A different Conference Member proposed an amendment to add the phrase "or the number of commenters" to paragraph eight of Proposed



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Recommendation 2011-2. During discussion of the amendment it was further proposed that the entire paragraph be deleted from Proposed Recommendation 2011-2. By a show of hands, the Assembly voted to remove paragraph eight from Proposed Recommendation 2011-2. At the close of the discussion period, Chairman Verkuil called for a vote to adopt Proposed Recommendation 2011-2 as amended. By voice vote of the voting Conference members in attendance, the motion to adopt Recommendation 2011-2 as amended was approved.

**d. Staff Presentation by the Conference's General Counsel Shawne McGibbon and Communications Director Kathy Kyle**

Shawne McGibbon, General Counsel, and Kathy Kyle, Communications Director, presented the Conference's Model Agency project. Ms. McGibbon explained that the project's goal is to identify all of the practices and procedures that make up a model 21<sup>st</sup> Century agency and to share those practices government-wide. Ms. Kyle revealed the Conference's new website for the project, which embodies good ideas, technology, and collaboration. The website will contain agency best practices and success stories, resources and events, a "know-how" blog where agencies can share their expertise, and case studies highlighting newly established or reorganized agencies. Ms. McGibbon announced that at each December plenary the Conference plans to give an award to the agency with the best "best practice", and that the award is named in honor of the father of administrative law and founding Council member, Walter Gellhorn.

**e. Keynote Remarks by the Honorable Stephen Breyer, Associate Justice, Supreme Court of the United States**

Chairman Verkuil introduced the Honorable Stephen Breyer, and credited him along with Justice Antonin Scalia for the revival of the Conference. Justice Breyer stated that it was wonderful to see so many old and new friends, who now compose a special group of people passionate about administrative law. He went on to discuss why everyone in the room loved administrative law, and gave anecdotal evidence of how it affects the lives of many. Justice Breyer noted that the true basic question that those in attendance sought to answer is who will regulate the regulators. He articulated that it is the Administrative Conference of the United States who does this regulating – the agency that provides sound advice and tries to see that other agencies follow fair procedures. Justice Breyer stated that a principle of administrative law is that rules and laws should be public, and that the Conference works to promote such transparency. Justice Breyer concluded by stating that he was delighted the Conference had arisen from the ashes. He then took questions from those in attendance.

**f. Closing Remarks by Chairman Paul Verkuil**

Chairman Verkuil thanked Justice Breyer for taking the time to address the Plenary Session attendees. He invited the Members to attend the Plenary Session's evening reception at 6:00 p.m., which would include a receiving line for himself, Justice Breyer and Conference Vice-Chair Preeta Bansal. The June 16, 2011 meeting of the Conference's 54<sup>th</sup> Plenary Session adjourned at 5:56 p.m.



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### II. June 17, 2011:

#### a. Introduction and Opening Remarks by Chairman Paul Verkuil

The second day of the 54<sup>th</sup> Plenary Session of the Conference commenced on June 17, 2011 at 9:04 a.m., at the Pew Charitable Trusts. Chairman Verkuil opened the session by thanking the Assembly for its hard work the day before, and informed them that two major recommendations would be considered that day. Chairman Verkuil called upon Mr. Siegel to introduce the first proposed recommendation.

#### b. Consideration of Proposed Recommendation on Compliance Standards for Government Contractor Employees – Personal Conflicts of Interest and Use of Certain Non-Public Information

##### i. Presentation on Proposed Recommendation 2011-3

Mr. Siegel began by thanking all who made the four recommendations possible, including all in attendance who worked diligently on the committees, with emphasis on the hard work of all of the committee chairs and researchers. Mr. Siegel described the first recommendation of the day to be considered, a recommendation on government contractor ethics (“Proposed Recommendation 2011-3”). Proposed Recommendation 2011-3 came from the Conference’s Committee on Administration and Management chaired by John Cooney. Mr. Siegel explained the heightened need for a cohesive contractor ethics regime, and the process the recommendation went through before it was presented to the full Assembly of the Conference at the 54<sup>th</sup> Plenary Session.

Mr. Siegel introduced the consultant, Professor Kathleen Clark of Washington University Law School, who gave a short presentation about her research and report on the problem of the lack of regulation of contractor personnel ethics. Professor Clark gave an overview of the report, which looks at whether there is a need for statutes and regulations to protect the public trust when contractors are doing the government’s work. Professor Clark’s research was fueled through traditional research as well as interviews with over 90 government employees and procurement and ethics officials.

Mr. Cooney then described the need for the recommendation due to the lack of a systemic approach to regulate contractor ethics. Mr. Cooney identified the two most important aspects of the problem that should be addressed as personal conflicts of interest by a contractor employee and the contractor employee’s access to certain kinds of nonpublic information that could be of great financial value if they were purloined and used inappropriately by the worker. Mr. Cooney explained that the committee identified the proper tools and processes to deal with the problem, and that the benefits of the solution recommended outweigh the costs. Mr. Cooney took the attendees through the type of program recommended by Proposed Recommendation 2011-3: a program run by the agencies themselves, a risk-based program, and a program run at the contracting officer level. Mr. Cooney concluded by stating that this problem is one that Congress



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must have had in mind when it reauthorized the Conference, as there is a gap in agency efforts to address a real problem that can be remedied by a common sense solution without new statutory authority.

### **ii. Debate and Approval of Proposed Recommendation 2011-3**

Chairman Verkuil opened the floor for discussion, and began by prompting a vote on the manager's amendments to Proposed Recommendation 2011-3. By a voice vote, the Assembly voted to approve the manager's amendments to Proposed Recommendation 2011-3. Chairman Verkuil invited Mr. Dan Gordon, the administrator of the Office of Federal Procurement Policy and head of the Federal Acquisition Regulatory Council, to speak on the issue of federal procurement spending and government contracting. Mr. Verkuil then called upon Mr. Don Fox, acting director of the United States Office of Government Ethics, to speak on the subject. A discussion period followed in which Conference Members provided comments regarding Proposed Recommendation 2011-3 and asked Mr. Cooney, Professor Clark, Mr. Siegel, Mr. Gordon and Mr. Fox questions about the proposed recommendation's substance.

During the discussion, a Conference Member proposed an amendment to the text of Proposed Recommendation 2011-3. The amendment proposed replacing "may", the seventh word in recommendation six, with the word "should". Mr. Siegel suggested using the phrase "should consider using" instead of the word "should". Another Conference Member suggested deleting "as a resource" in recommendation six if the phrase "should consider using" was inserted. Yet another Conference Member proposed a friendly amendment to the amendment, which would use the phrase "also should consider using or modifying" in order to make the language in recommendation six parallel to that of recommendation three. The Conference Member also proposed changing the final sentence of paragraph six from "they should consider employing or, if necessary, customizing" to "they should also consider employing or, if necessary, modifying" in order to keep the language consistent. Following this series of friendly amendments to the proposed amendment, the Assembly voted by a voice vote to approve the amendment to the text of recommendation six of Proposed Recommendation 2011-3.

A Conference Member made a suggestion for the "committee on style", and several Conference Members commended the committee and Professor Clark for the thoroughness of the study and that it should be seen as a basis for further recommendations. After further discussion a Conference Member proposed an amendment to the heading of recommendation three of Proposed Recommendation 2011-3. This proposed amendment was to change the current heading from "Agencies should have the discretion whether to use or modify the model FAR provisions or clauses" to "Agencies should have the discretion whether to use or modify the model FAR provisions or clauses unless otherwise required by statute or regulation". Following further discussion, the Assembly voted by a voice vote and did not approve the amendment. Mr. Siegel suggested that a Conference Member move to have the language of the first sentence of recommendation four be changed to conform to that of recommendation five. The proposed amendment would remove the word "consider" from recommendation four, so that the text of both recommendations would read "should encourage agencies to include". The Assembly voted



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by voice vote and approved the amendment. Chairman Verkuil then called for a vote to adopt Proposed Recommendation 2011-3 as amended. By voice vote of the voting Conference Members in attendance, the motion to adopt Recommendation 2011-3 as amended was approved.

**c. Consideration of Proposed Recommendation on Agency Use of Video Hearings: Best Practices and Possibilities for Expansion**

**i. Presentation on Proposed Recommendation 2011-4**

Chairman Verkuil turned the floor over to Mr. Siegel, who introduced the final proposed recommendation on agency use of video hearings (“Proposed Recommendation 2011-4”). Mr. Siegel noted that this final recommendation was different from the others, as it advocated the continued use of a best practice as opposed to identifying a problem and recommending a solution. Proposed Recommendation 2011-4 came from the Committee on Adjudication, chaired by John Vittone, and researched by Funmi Olorunnipa, an attorney advisor for the Conference.

Ms. Olorunnipa gave a short presentation about her research and report on how video teleconferencing technology (VTC) has been used by agencies to solve problems and how that use may be expanded to other agencies that could benefit from VTC. Ms. Olorunnipa explained that interviews were conducted with a number of senior officials at three agencies with high-volume caseloads who have been using VTC to conduct administrative hearings since the 1990s: the Social Security Administration’s Office of Disability Adjudication and Review, the Department of Veterans Affairs’ Board of Veterans Appeals, and the Department of Justice’s Executive Office for Immigration Review. Ms. Olorunnipa provided a summary of findings from each agency, what types of criteria agencies that conduct video hearings should consider prior to adopting their use, and what advice those agencies who have used video hearings can give to other agencies in terms of best practices and lessons learned. The report concluded that the use of video hearings has the potential to improve efficiency and/or reduce costs while also preserving fairness and participant satisfaction in proceedings.

Mr. Vittone thanked the Conference staff and the members of the Committee on Adjudication for their service and advice throughout the recommendation process, and commended Ms. Olorunnipa on the quality of the recommendation. Mr. Vittone then explained what is advocated by Proposed Recommendation 2011-4, and described the criteria agencies should consider when deciding whether to use video conferencing to conduct administrative hearings. Mr. Vittone also illuminated certain best practices that agencies should follow if implementation is chosen.

**ii. Debate and Approval of Proposed Recommendation 2011-4**

Chairman Verkuil opened the floor discussion by stating how exciting it is to be entering into this new area. He emphasized that when this idea is pursued it is done with procedural due process interests in mind. Chairman Verkuil called for a vote on the manger’s amendment to



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Proposed Recommendation 2011-4, and by a voice vote the manager's amendment was approved.

A Conference Member proposed an amendment to Proposed Recommendation 2011-4. The proposed amendment suggested that the phrase "legally permissible" be applied to each criterion in recommendation two. A discussion period followed in which Mr. Vittone and Mr. Siegel answered questions concerning the proposed recommendation's substance and form. The Assembly voted by voice vote and did not approve the proposed amendment. Mr. Verkuil then opened the floor for general discussion on Proposed Recommendation 2011-4, and asked Jim Borland, alternate for Glenn Sklar, Deputy Commissioner of the SSA's Office of Disability Adjudication and Review, to speak to how the agency uses video conferencing to deal with its increasing caseload. A discussion period followed in which Conference Members provided comments and asked questions of Mr. Borland. Mr. Verkuil then asked Edward Kelly from the DOJ's Executive Office of Immigration Review to comment on the use of video hearings in immigration adjudication. Following further conversation, a Conference Member made a proposed amendment to drop the word "consider" from paragraph 3(a) and keep the word "use" at the beginning of the sentence. By a voice vote, the Assembly voted to accept this amendment to Proposed Recommendation 2011-4. After a few final comments, Chairman Verkuil called for a vote to adopt Proposed Recommendation 2011-4 as amended. The voting Conference Members in attendance voted by a voice vote to adopt Recommendation 2011-4.

### **d. Remarks by Conference Director of Research and Policy Jonathan Siegel**

Chairman Verkuil turned to Mr. Siegel to give a review of the Conference's pending projects. Mr. Siegel began by noting that the Conference has come a long way since its reauthorization, with thirteen active research projects and numerous other projects in various planning stages. Mr. Siegel also underscored the forums, workshops and other educational activities that the Conference promotes as proof that the agency is no longer in start-up mode. Mr. Siegel then highlighted a few of the projects that would likely come before the full Conference as recommendations within the next year. Mr. Siegel concluded by asking the government members to notify the Conference Staff of what they have done to implement Recommendation 2010-1 since its passage in December.

### **e. Remarks by Conference Deputy Director of Research and Policy Scott Rafferty**

Scott Rafferty, Deputy Director of Research and Policy, then described the project he has spearheaded to digitize and post materials from the agency's previous existence from 1968 to 1995. Mr. Rafferty thanked HeinOnline for offering to scan these documents which will allow the Conference to make an archival website of past administrative materials. He noted that the Conference is proud of this project and of being able to make these materials accessible. Mr. Rafferty closed by mentioning that he aspires the Conference website to be the "go-to website" for law students, public servants, historians and members of the public who want government to work better.



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### f. **Closing Remarks by Chairman Paul Verkuil**

Before concluding to 54<sup>th</sup> Plenary Session, Chairman Verkuil informed those in attendance that pending legislation has named the Conference to be the collector of information about Equal Access to Justice Act payments for both administrative and judicial opinions. He asked the twenty public members whose terms expired on June 30<sup>th</sup> to be aware that they had all been appointed to new terms, and that they would need to accept their reappointments if so desired. Chairman Verkuil closed by announcing that the 55<sup>th</sup> Plenary Session would take place on December 8 and 9, 2011 in Washington D.C.