



57th Plenary Session
Minutes
December 6-7, 2012

I. December 6, 2012

a. Introduction and Opening Remarks by Chairman Paul Verkuil

The first day of the 57th Plenary Session of the Administrative Conference of the United States (“Conference”) commenced on December 6, 2012 at 2:00 p.m., at the Main Conference Room of the Commodity Futures Trading Commission (CFTC), at Three Lafayette Centre, 1155 21st Street, NW, Washington, D.C.

i. Introductory Remarks

Chairman Paul Verkuil called the meeting to order. He welcomed all the Conference members and attendees, and thanked the CFTC for providing the meeting space.

ii. Changes at the Conference

Chairman Verkuil introduced the members of the Council of the Administrative Conference, and thanked them for their advice and guidance. He noted that Amber Williams, a Conference Attorney Advisor, had passed the Virginia Bar. He then introduced the new members of the Conference since the last Plenary Session held in June.

Chairman Verkuil remarked that on the first day of the last Plenary Session, the Conference failed to achieve a quorum of voting members. The Chairman reviewed the proposed solutions to the quorum issue, and stated that the Conference had decided to permit remote voting through video conference software. He emphasized that such remote participation was not a substitute for in-person participation, and that advance approval of remote participation would be required.

iii. Further Introductory Remarks

Chairman Verkuil highlighted the Conference’s major activities since the last Plenary Session. He noted that the Conference had sponsored workshops to improve the use of science in the regulatory process, and mentioned other activities which included the implementation of past recommendations, as well as collaboration between the Conference and the Chinese



administrative law community. Chairman Verkuil also described the reemergence of the Council of Independent Regulatory Agencies as a forum for discussion among independent agencies.

iv. Presentation of the Sourcebook of United States Executive Agencies

Chairman Verkuil introduced David Lewis, a professor of Political Science at Vanderbilt University, and Jennifer Selin, a Vanderbilt University graduate student. He praised Mr. Lewis for his work in creating *The Sourcebook of the United States Executive Agencies* (“Sourcebook”). Mr. Lewis then described the *Sourcebook*’s contents and purpose, noting that the report gives both a big picture look at agencies, as well as details about different agencies. Ms. Selin described the report’s data collection process, noting the difficulty in defining a federal agency. Mr. Lewis then highlighted the report’s findings, and noted several specific trends among these findings based on the structural characteristics of agencies, types of agencies, and personnel within agencies.

Chairman Verkuil then closed the introductory remarks by stating that the Plenary Session was the culmination of considerable work by members, researchers, staff, and others. He also reviewed the rules of debate and voting at the plenary session.

b. Initial Business

The Assembly adopted the minutes of the 56th Plenary Session by voice vote.

The Assembly approved the proposed Resolution Governing the Order of Business by voice vote.

c. Introduction to Recommendations

The Conference’s Research Director, Gretchen Jacobs, introduced herself, noting that she had come to the Conference from the Department of Justice (“DOJ”). She stated that the recommendations came to the Plenary Session with the approval of the Conference’s Council. She closed by describing the procedures for debate and amendment of recommendations.

d. Consideration of Proposed Recommendation on The Need to Reform 28 U.S.C. § 1500

Ms. Jacobs summarized of the history of the proposed recommendation concerning 28 U.S.C. § 1500, and introduced the co-researchers on the recommendation— Jonathan Siegel, professor of law at The George Washington University Law School and former Director of Research & Policy at the Conference, and Attorney Advisor Emily Bremer—and the Chairman



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of the Committee on Judicial Review, Ronald Levin. Mr. Siegel discussed the motivation behind the recommendation and gave a brief overview of the project. Mr. Levin described the considerations and concerns that influenced the drafting of the proposed recommendation.

Chairman Verkuil proceeded to open up the floor for debate. General comments in support of the recommendation were offered by Senior Fellow Judges Loren Smith and S. Jay Plager, Public Member Allison Zieve, and member of the public Bill Austin.

Since Conference member Elana Tyrangiel was newly appointed by the Justice Department, the Assembly approved Mr. Lamar Baker, also with DOJ, to speak on her behalf. Mr. Lamar Baker asserted that the recommendation went too far. Mr. Baker then moved on behalf of DOJ to postpone consideration of the recommendation for one year, and went on to explain that the Conference should take time to reassess their position in light of new litigation. After debate, the Assembly defeated the motion by voice vote.

Mr. Baker then proposed an amendment on behalf of DOJ. He described the amendment, which would serve as a substitute for the proposed recommendation text, as limiting the applicability of the recommendation by inserting the phrase “except as otherwise provided by law” at the beginning of subsection (a), and also providing safeguards to ensure that plaintiffs would not lose their claims. After several Conference members spoke in opposition to the amendment, Government Member Bob Schiff noted that some of the DOJ’s proposed amendments were worth considering. The amendment was defeated by a voice vote.

After further discussion the entire recommendation was adopted by voice vote.

The Assembly took a short recess.

e. Consideration of Proposed Recommendation on Third-Party Programs to Assess Regulatory Compliance

Ms. Jacobs introduced the recommendation concerning the use of third-party programs to assess regulatory compliance. She noted that the goal of the project was to identify key issues and practice areas for agencies when deciding whether and how to establish third-party programs. Ms. Jacobs then introduced Professor Lesley McAllister, who served as the consultant for the project, and Miriam Nisbet, the Chairman of the Committee on Collaborative Governance.

Ms. McAllister provided a brief overview of her report and thanked Chairman Verkuil, David Pritzker, Attorney Advisor and Staff Counsel to the Committee on Collaborative Governance, and Ms. Nisbet, for their help on the project. She explained that the aim of her



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research was to identify and survey existing federal programs that used third-party inspections funded by non-federal sources and to identify possible recommendations for best practices. Ms. McAllister noted that through her research, she studied eight major programs within six different federal agencies that relied on private parties to conduct significant aspects of regulatory compliance assessment.

Ms. Nisbet summarized the Committee's work and thanked Ms. McAllister for her report. Ms. Nisbet then briefly discussed the recommendation and acknowledged that some agency action is inherently governmental and is not appropriate for third-party program consideration. She then urged consideration and adoption of the recommendation on third-party programs by the Assembly.

Chairman Verkuil offered a manager's amendment and it was adopted without objection by voice vote.

Public Member Phillip Harter, who serves on the Committee on Collaborative Governance, questioned what the term "regulatory standard" meant in the recommendation and Ms. McAllister responded that the phrase was intended to be broadly applicable to both mandatory and voluntary regulatory programs. Chairman Verkuil suggested clarification of the language in a footnote.

Senior Fellow Alan Morrison offered two amendments. Mr. Morrison's first amendment was withdrawn following a discussion on cost-shifting from agencies to third parties.

Mr. Morrison's second amendment proposed that health and safety concerns should be given more rigorous consideration during agency deliberations about whether to adopt third-party programs. Public Member James Tozzi, Mr. Harter, Ms. McAllister, Council Member Ronald Cass, and Ms. Nisbet expressed concern about the amendment and contended that the amendment was unnecessary. The Morrison Amendment was not adopted.

Senior Fellow Paul Kamenar questioned why the Committee chose the word "might" over "shall" or "should" when drafting the language of the recommendation and expressed concern that the wording "watered down" the effects of the recommendation. Ms. Nisbet asserted that the Committee backed the wording of "might."

Council Member Jane Sherburne discussed Mr. Morrison's first amendment concerning the costs of third-party programs and asked for clarity. Chairman Verkuil stated that the Committee on Style could more explicitly clarify how agencies should consider the costs of paying third parties to perform conformity assessment activities.



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Mr. Harter proposed the deletion of wording in paragraph B of the recommendation concerning the proportionality of risk. The motion to delete text in Paragraph B did not pass.

Mr. Tozzi expressed concern about the use of “may” and the phrase “to the extent possible.” Government Member David Michaels expressed concern with the removal of “to the extent possible” and asked that it be replaced with “generally.” Ms. Nisbet also asked that the wording of line 210 be changed to state “for example it may.” Dave Rostker, representing the Small Business Administration’s Office of Advocacy and a member of the public, asked that the word “should” in the previous sentence be changed to “must.” Ms. Nisbet asked that the phrase be changed to “has a duty to.”

The recommendation, including the stylistic modifications and wording changes discussed, was adopted by voice vote.

f. Presentation of the Walter Gellhorn Award

Shawne McGibbon, the Conference’s General Counsel, briefly discussed the model agency award selection process and presented the second annual Walter Gellhorn Innovation Award. She noted that the award is given to the agency that developed innovative best practices that can be shared government-wide.

Ms. McGibbon recognized two agencies that were awarded special recognition by the judges. First, the Census Bureau at the Department of Commerce was recognized for their work on the mobile application “America’s Economy.” Stephen Buckner, Director of the Center for New Media and Promotions, accepted the award on behalf of the Census Bureau.

Additionally, the Consumer Financial Protection Bureau was recognized for their consumer complaint database. Scott Pluta, Assistant Director of the Consumer Response Program, accepted the award on behalf of the Consumer Financial Protection Bureau.

Finally, Ms. McGibbon presented the Walter Gellhorn Innovation Award to the National Archives and Records Administration for their Citizen Archivist Initiative. Ms. McGibbon explained that the initiative encourages substantive contributes like tags, transcripts, and digital images that increase public access to the records of the federal government. David Ferriero, the Archivist of the United States, accepted the award on behalf of National Archives and Record Administration.

The Assembly then recessed until the following morning.



II. December 7, 2012

The second day of the 57th Plenary Session of the Administrative Conference of the United States commenced on December 7, 2012 at 9:00 a.m., at the Main Conference Room of the Commodity Futures Trading Commission (CFTC), at Three Lafayette Centre, 1155 21st Street, NW, Washington, D.C.

a. Introduction and Opening Remarks by Chairman Paul Verkuil

Chairman Paul Verkuil opened the day's meeting by welcoming Conference members, guests, and other attendees back to the Plenary Session and calling the session to order.

b. ACUS Website Update

Megan Kindelan, the Conference's Communication Director, presented a preliminary model of the Conference's forthcoming new website redesign. She discussed the revised navigation menu, inter-connectedness of different webpages, enhanced search functions, and the capability of providing updates via e-mail. She thanked her working group. She also asked members for updated photographs and biography information for the "Contact" section of the website.

c. Continued Consideration of 28 U.S.C. § 1500

Mr. Levin proposed a manager's amendment to the Section 1500 recommendation in response to earlier comments made by Mr. Baker (DOJ). Chairman Verkuil asked for any objections. Without objection, the manager's amendments were adopted by voice vote.

d. Consideration of Proposed Recommendation on Inflation Adjustment for Civil Penalties

Ms. Jacobs introduced the proposed recommendation on inflation adjustment of monetary penalties under the Inflation Adjustment Act. She thanked Conference members for all their hard work on the project. Public Member James Chen, who served as the Consultant on the project, discussed the details of his research and summarized his report.

John Cooney, Chairman of the Committee on Administration and Management, discussed the legislative history of the Inflation Adjustment Act and the "modest" nature of the recommendation.



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Chairman Verkuil asked if there were any objections to adopting the manager's amendments. Without objection, the manager's amendments were adopted by voice vote. Chairman Verkuil then opened the floor to debate on the recommendation.

Mr. Tozzi, who serves on the Committee on Administration and Management, expressed his hope that Congress considers all alternative metrics for measuring inflation. Mr. Cass, Mr. Levin, and Mr. Cooney debated the wording of the recommendation and the precise message being sent to Congress.

Public Member Richard Pierce made a motion based on Mr. Levin's suggestion that the recommendation be more assertive. Senior Fellow Neil Eisner and Mr. Siegel voiced their support. Mr. Chen clarified his view on the solutions he thinks Congress should adopt.

Public Member Michael Herz suggested a wording change consistent with the more assertive approach, which Mr. Pierce accepted as part of his motion. However, Council Member Mariano-Florentino Cuéllar asked to vote on them separately, which was agreed to by Chairman Verkuil. Mr. Levin voiced support for both motions. Mr. Cass and Mr. Cooney opposed both motions and sought to retain the more modest approach.

Chairman Verkuil called for a vote. Mr. Pierce's motion was adopted with 25 votes in favor and 13 opposed. Mr. Herz's motion was adopted with 22 votes in favor and 15 opposed.

Chairman Verkuil then opened to the floor to general debate on the recommendation. Public Members Gary Bass and Nina Mendelson asked questions about the reasoning behind and economic implications of particular aspects of the recommendation. Mr. Cooney and Mr. Chen answered these questions. Liaison Representative Toby Dorsey suggested a conforming change, which was accepted.

Chairman Verkuil called for a vote on the recommendation. The recommendation was adopted by voice vote. The Conference then took a short recess.

a. ACUS Project Updates

Chairman Paul Verkuil called the meeting back to order, and stated that Ms. Jacobs would be presenting updates on Conference projects.

Ms. Jacobs discussed the status and timelines of the following projects: Science in the Administrative Process; Social Security Disability Adjudication; Administrative Record in Informal Rulemaking and Judicial Review; Social Media in Rulemaking; Cost-Benefit Analysis at Independent Agencies; Remand Without Vacatur; and Government in the Sunshine Act. Ms.



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Jacobs also mentioned two projects regarding video hearings in immigration proceedings and Medicare adjudications at the Department of Health and Human Services. Finally, she mentioned the Field Guide to Federal Rulemaking. Ms. Jacobs concluded with an announcement of upcoming events, a reminder of the Conference's strategic goals, and finally an explanation of the brainstorming session to follow.

b. Project Discussion and Brainstorming Session

Chairman Verkuil opened the brainstorming session and encouraged conversation regarding new as well as potential topics identified on PowerPoint slides.

Mr. Tozzi proposed an administrative process project regarding regulations.gov to address the difficulty agencies face while attempting to access and use the website. After asking for further suggestions, Chairman Verkuil added the suggestion to the list.

After explaining the origin of the project list, Ms. Jacobs discussed ideas regarding the SES Reform. Mr. Eisner and Government Member Will Gunn suggested that the Conference potentially study other topics, including: merger of agencies; new programs within agencies; e-discovery requirements; and the compliance with the Federal Records Act. Additional comments were offered by Public Member Gary Bass.

Mr. Cuéllar further recommended research regarding how to handle high-volume complaints, especially in government entities that have contact with the general public. Chairman Verkuil acknowledged the previous award given to CFPB and suggested best practices might be extracted from that model.

Senior Fellow Betty Jo Christian voiced concern regarding the high volume of pending retirements by federal employees over the next ten years, and suggested that the Conference research how to encourage a smoother transition process similar to large law firms.

After further Assembly discussion, Chairman Verkuil asked Matthew Wiener, the Conference's Executive Director, to discuss potential study of issues related to whistleblower protection. Mr. Wiener discussed the Whistleblower Protection Enhancement Act of 2012 and suggested it might be a good area for Conference study and evaluation. Public Member John Kamensky and Government Member Edward Keable voiced implementation concerns and noted other potential research areas for the Conference. Speaking with respect to whistleblower protection, Judge Plager noted tensions between the agencies and Congress, strains within agencies themselves, and complications of applying statutory formulas.



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Mr. Neil Eisner suggested that consensus approaches to developing international regulator cooperation initiatives as a potential Conference project. Public Member Michael Fitzpatrick echoed the need for study on this topic, adding that new mechanisms were needed on a domestic level as well.

Government Member Christy Walsh suggested the topic of a boot camp for new appointees, as had been discussed in a previous CIRA meeting. Government Member David Shonka offered additional comments regarding the Privacy Act for the Modern Era. Mr. Morrison raised concerns regarding application, noting the tension between substance and procedure. Public Member Russell Frisby raised the need for uniformity in ex parte contacts.

Chairman Verkuil responded to these comments, first highlighting the importance of both large and smaller approaches depending on the issue presented. He then highlighted the broad government prospective needed at the Conference.

Ms. Christian voiced concern regarding how the courts have interpreted the APA, making it more difficult, complicated, and time-consuming for the government to function. She stated that this was a timely topic and encouraged the Conference to study it. Chairman Verkuil explained that the Conference reaches past the boundaries of the APA.

Senior Fellow Paul Kamenar suggested the Conference evaluate how agencies are using or abusing guidance documents in regard to rulemaking. He also made suggestions for clarity on government websites. Mr. Cuéllar voiced his support for the social media and rulemaking project.

Public Member David Rostker voiced a desire for a Conference study on ways to improve the effectiveness of retrospective review and raised the issue of unified agenda and its potential barrier to government transparency. He suggested the agenda needs more real-time evaluation.

Mr. Dorsey referred to a previously discussed mechanism offered by Senior Fellow Judge Katzmann, and Mr. Wiener discussed progress regarding the project. Mr. Dorsey voiced further concerns regarding the uneven nature of legislative drafting and suggested further assessment.

Chairman Verkuil then asked for any general principles extracted from the proposed topics for discussion.

Judge Plager offered comments on the numbers and usage of administrative law judges and discussed issues regarding structural reform as addressed in his article in the *University of Pennsylvania Law Review* on when and why federal judges leave the bench. He emphasized the



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amount of information he uncovered during his research regarding why employees serve in the government. He responded to the retrospective review component of rulemaking and regulation and stressed the importance of the ex parte contacts as a potential research topic. Finally, he highlighted the need for APA reform. After Mr. Wiener acknowledged the importance Judge Plager's article regarding federal judges, Chairman Verkuil voiced his desire to make it accessible via the Conference's website.

Mr. Schiff, Mr. Bass, and Chairman Verkuil discussed the value of leveraging technology on rulemaking and evaluation practices.

Chairman Verkuil then moved on to the subject of judicial review. Ms. Zieve voiced her concerns regarding the "Judgment Bar" and suggested it might be a fruitful area for Conference research, and Mr. Morrison raised the need for close examination in relation to the Privacy Act. Chairman Verkuil responded with an explanation of the various roles of the Conference.

Government Member Bridget Dooling offered thoughts on the notion of best practices implementation plans when an agency handles complex statutes.

Closing Remarks and Adjournment

Chairman Verkuil and Ms. Jacobs thanked the membership, staff, and guests for their attendance and reiterated the open discussion model of the Conference. Chairman Verkuil then announced future 2013 plenary dates: June 13th and 14th, as well as December 5th and 6th. Chairman Verkuil officially adjourned the 57th Plenary Session of the Administrative Conference at 11:43 a.m.