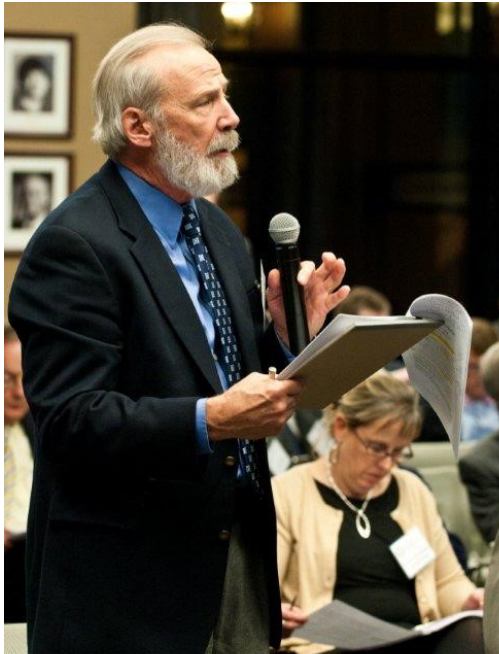




ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

STATEMENT ON THE PASSING OF PHILIP J. HARTER

August 31, 2023



The Administrative Conference of the United States (ACUS) joins the whole administrative law community in mourning the passing of our colleague Phil Harter on August 12, 2023. During his long and distinguished career, Phil was a valued contributor to the work of the Administrative Conference. ACUS Chair Andrew Fois said about Phil, “Everyone at ACUS feels the loss of Phil Harter. Phil was a long-time supporter of ACUS as a staffer during the mid-1970s, a consultant, and a member. Many of Phil’s accomplishments were achieved while working in concert with his colleagues at ACUS. Our condolences go to his wife Nancy, daughter Alexa, and the rest of his family.”

Phil had a profound understanding and respect for administrative law, both theory and practice. He was a skilled administrative law professor who served as the Chair of the American Bar Association (ABA) Section of Administrative Law & Regulatory Practice in 1995–1996, during the 50th Anniversary of the Administrative Procedure Act (APA). Phil was also the father of negotiated rulemaking, having written the articles that set out the framework for it, and he led the effort to enact the Negotiated Rulemaking Act of 1990. Phil was also a leading expert in mediation and alternative dispute resolution. He will be missed.

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Statements by ACUS Members and Other Individuals on the Passing of Professor Philip J. Harter

From Andrew Emery, ACUS Special Counsel

I first met Phil Harter when I was a child, and his family came to our house to visit. Phil and my father were good friends. When I was applying to college Phil wrote a recommendation for me to attend his alma mater, Kenyon College. When I started in rulemaking, one of the first regulatory projects I worked on was a negotiated rulemaking for the Federal Aviation Administration on

overflights of national parks. Phil Harter was the professional mediator leading the project. My father and Phil had become very close friends from their work in the ABA's Section of Administrative Law & Regulatory Practice (Phil was a former Chair) and in ACUS. My father taught classes on the regulatory process, and Phil would teach the section on negotiated rulemaking. My father would introduce Phil Harter as the father of negotiated rulemaking due to Phil's work laying out the framework for regulatory negotiation in articles and then spearheading the enactment of the Negotiated Rulemaking Act of 1990. As Phil and my father aged, my father's moniker for Phil also aged, and my father started referring to Phil as the grandfather of negotiated rulemaking. My father's entire career was administrative law and the regulatory process. After my father passed away, I was appointed special counsel to ACUS. I called Phil to let him know. Later, when I was nominated to be Chair of the Section of Administrative Law & Regulatory Practice, I called Phil to let him know. Phil was a dedicated scholar and practitioner of administrative law. Phil was a very dear friend and colleague to my father. Phil was a wonderful friend and mentor to me. I am grateful for having known Phil Harter.

From Jeffrey Lubbers, ACUS Special Counsel and Former Research Director

I was saddened to hear of Phil's passing. On a personal level, he was a mentor to me when I was a young attorney at ACUS, and he was the Senior Staff Attorney. When he went into private practice and then teaching, he continued to write important articles on government reform, and he became an ABA leader. He also served as the consultant on three projects that led to ACUS recommendations. He was always a strong and effective voice in support of ACUS.

More than anything, Phil was an innovator. He recognized, before most people did, that there was a pressing need for more collaborative governance, and he wrote the groundbreaking article that later provided the foundation for the Negotiated Rulemaking Act. But he did more than theorize about collaboration, he practiced it—successfully mediating numerous contentious rulemakings and other public policy disputes. He made the world a better place, and while he did so, he was a lot of fun to be with.

From Peter Strauss, ACUS Senior Fellow

It's hard to add to what Andrew and Jeff have already said. I first met Phil in around 1980 when we were both consultants for the ABA's coordinating group on regulatory reform under the leadership of Richard B. Smith. Richard, a Republican, had been a commissioner of the SEC, and he very much represented business interests in the coordinating group. Phil and I were more on the side of regulators and regulation. This began a friendship that lasted over the years, with many biking excursions for conversations about administrative law issues of the day. Negotiated rulemaking was at the heart of what Phil was about as a scholar, as a lawyer, and as a mediator. Phil served as Chair of the ABA's Section of Administrative Law and Regulatory Practice in the year of the 50th anniversary of the APA, and he was a particularly forceful voice for a restoring ACUS. Once it had

been restored, he was often heard at its meetings. He knew how well negotiated rulemaking could work and put a lot of energy into contesting the skeptics who wondered about its worth. That voice will be sorely missed.

From Allan Strasser

Phil Harter was a transformative leader and gifted mediator. After meeting him as a professor at Vermont Law School, for five years I worked with Phil on negotiated rulemakings at the Mediation Institute, and he taught me how Washington really works. A brilliant trailblazer, his scholarship and practical insights into administrative law allowed him to develop laws and forge practices that resulted in numerous consensus-based agreements for him and other practitioners. Where some saw a brick wall, Phil saw possibilities that could benefit the government, numerous industries, and the public. And he was a friend and mentor. Through many car rides in Vermont or D.C. we got to know each other well, and we stayed in touch over the years. He was kind and generous. And he made me see what was possible when the government worked hard to broker consensus; it could not only create smart policy but change industry behavior and the lives of those negotiators who participated. In short, Phil helped me believe there was hope for mankind. In our last conversation this summer, he was glum at the hyper-polarized nature of politics. But he also spoke fondly of his wife, Nancy, and his daughter, Alexa.

From Neil Eisner, ACUS Senior Fellow

Phil was a great lawyer and a wonderful friend. He will be missed by many. His recommendations to ACUS and the ABA were quite valuable to many. His work on regulatory negotiations is a great example; after a recommendation was adopted, he spent many hours working with government agencies and others who were interested in how they could apply it. Another example is that he did not just get young lawyers to join the ABA, he got them involved in the workings of the ABA.

From David Pritzker, ACUS Special Counsel

Phil Harter was among my earliest colleagues when I joined the ACUS staff in 1976. We had neighboring offices and quickly discovered that we shared an extensive mathematical background, which often led to a common approach to the logic of issues before us. Phil was the key person who encouraged ACUS to undertake its initial study of the possibilities of negotiating proposed regulations in appropriate circumstances. He was ACUS's consultant for its 1982 recommendation on "reg neg," working closely with me in my role as the staff lead on the project. After formal adoption of the recommendation, Phil set out to recruit a handful of agencies to try this highly innovative approach. In the following few years, ACUS gradually expanded its overall approach to the full toolkit of alternative approaches to dispute resolution, and Phil was always a central member of our team, as consultant, adviser, practitioner, and theoretician. Phil and I, along with some other

ACUS colleagues, put together the first draft of the Administrative Dispute Resolution Act of 1990. With the passage of that legislation and the contemporaneous Negotiated Rulemaking Act of 1990, again Phil was always available to work closely with ACUS staff to educate and assist a wide spectrum of federal agencies in implementing ADR procedures in their programs. Phil's wisdom and enthusiasm will be sorely missed.

From Adam White, ACUS Senior Fellow and Chair of the ABA Section of Administrative Law & Regulatory Practice

Reflecting on negotiated rulemaking in 2006, Philip Harter observed that when government pursues genuine consensus deliberation, the process “recognizes the legitimate views and actual participation of those affected in making the actual decision.” And, he added, “doing so frequently results in considerable benefits.”

So it does—and not just in government. The ABA's Administrative Law Section joins ACUS in mourning Philip's passing and celebrating his legacy. He was our section's chairman from 1995 to 1996. He dedicated his career to seeking consensus, and not just in government. Indeed, he exemplified it in his own efforts at ACUS, in the Administrative Law Section, at Vermont Law and Missouri Law, and everywhere else. His work on negotiated rulemaking, particularly in his ACUS report, inspired Congress's legislation. His collegiality and commitment to thoughtful research and discussion will continue to inspire the friends and colleagues who were lucky enough to know him.

From Howard Bellman, Gerald Cormick, and Alana Knaster

Phil Harter was first and foremost a scholar and an expert in Administrative Law who was passionate about the protection of the public interest. He will be best remembered as a visionary who invented a practical, participatory approach to rulemaking- Negotiated Rulemaking, commonly known as Reg Neg. Reg Neg is designed to enhance the principles of democracy. It gives a “seat at the table” to all stakeholder interests on a particular public policy issue, gaining their expertise and consent by emphasizing participation in creating solutions, rather than finding reasons to litigate differences. Phil worked tirelessly with the members of ACUS to draft and then secure the passage of the Negotiated Rulemaking Act of 1990 and subsequently continued to serve as an advocate for the process, collaborating with his colleagues to ensure its successful implementation.

We had the honor and privilege of collaborating with Phil in the first Reg Negs. We know how seriously he viewed his responsibility as the neutral/mediator and how tirelessly he worked to turn heated debates into civil conversations with positive results. It is our responsibility to ensure the continuation of his legacy.