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Statement

of

Antonin Scalia  
Associate Justice  
Supreme Court of the United States

before the

Subcommittee on Commercial and Administrative Law  
Committee on the Judiciary  
United States House of Representatives

Hearing on the Reauthorization of the Administrative  
Conference of the United States

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Mr. Chairman and Members of the Subcommittee:

I am happy to accept your invitation to provide information concerning the Administrative Conference of the United States. I was the third Chairman of the Conference, and served in that capacity from September 1972 to August 1974. Like the first two Chairmen (Professor Jerre Williams of the University of Texas Law School, and Professor Roger Crampton of the University of Michigan Law School), and like my successor (Professor Robert Anthony of Cornell Law School), I was an academic—at that time on leave from the University of Virginia Law School. The Conference was then, and I believe continued to be, a unique combination of scholarship and practical know-how, of private-sector insights and career-government expertise. My testimony will generally pertain to the time period in which I served as Chairman, since I did not follow the Conference's activities closely after moving on.

At the outset, let me describe why the Conference was instituted and how it was organized. The Administrative Conference of the United States was established as a permanent independent federal agency by the Administrative Conference Act, signed by President Lyndon Johnson in 1964; and it was activated by the appointment of its first Chairman in January 1968. Its purpose was to identify the causes of inefficiency, delay, and unfairness in administrative proceedings affecting public rights, and to recommend improvements to the President, the agencies, the Congress, and the Courts.

The Conference was composed of three parts: a Chairman, a Council, and an Assembly. The Chairman was appointed by the President, with the advice and consent of the Senate, for a term of five years. He was the Chief Executive of the Conference. He presided at plenary sessions of the Assembly and at Council meetings, and was the official spokesman for the Conference in relations with the President, the Congress, the Judiciary, the agencies, and the

public. His most important responsibility, however, was to identify subjects appropriate for study by the Conference, and—if the relevant Committee of the Assembly was willing to pursue a particular subject—to line up an academic consultant qualified to assist in the research. It was also the Chairman's responsibility to seek implementation of Conference recommendations—a task that required some diplomacy and charm, since needless to say the Conference had no enforcement powers over the agencies, much less over the President and Congress if the recommendations were directed to those quarters. The Chairman was served by a small permanent staff whose principal duties were to furnish administrative and research support to the Assembly of the Conference and its Committees, to follow and assist in the work of consultants, and to help the Chairman in securing implementation of recommendations.

The Council of the Conference consisted of the Chairman and 10 other members who were appointed by the President for three-year terms, of whom not more than one-half could be drawn from Federal agencies. Its functions were similar to those of a corporate board of directors. It had the authority to call plenary sessions of the Conference and to fix their agenda, to recommend subjects for study, to receive and consider reports and recommendations before the Assembly considered them, and to exercise general budgetary and policy supervision.

The Assembly of the Conference was composed of the entire membership, which by statute could not be less than 75 members nor more than 91. The Chairman and the other members of the Council accounted for 11 of this number; the remaining members fell into the following groups: First, the Act conferred membership upon the Chairman of each independent regulatory board or commission, or an individual designated by the board or commission. Second, the Act granted membership to the head of each Executive Department or other administrative agency (or his designee) named by the President. The final group consisted of the

public members, appointed by the Chairman with the approval of the Council for two-year terms. These members, who had to comprise not less than one-third nor more than two-fifths of the total membership, were selected in such a manner as to provide broad representation of the views of private citizens of diverse experience. They were chosen from among members of the practicing bar, prominent scholars in the field of administrative law, and others specially qualified by knowledge and experience to deal with matters of federal administrative procedure.

The Assembly, which had ultimate authority over all activities of the Conference, operated much like a legislative body. It adopted By-laws establishing nine standing committees: (1) Agency Organization and Personnel, (2) Claims Adjudications, (3) Compliance and Enforcement Proceedings, (4) Grant and Benefit Programs, (5) Informal Action, (6) Judicial Review, (7) Licenses and Authorizations, (8) Ratemaking and Economic Regulation, and (9) Rulemaking and Public Information. These committees were the real work-horses of the Conference. They met periodically to direct and supervise research by academic consultants and by the Conference's professional staff. On the basis of that research they framed proposals for consideration by the Assembly at its annual meeting. When a study or tentative recommendation had been prepared, it was circulated to the affected agencies for comment and reexamined by the committee in light of the replies. After final committee approval, a proposed recommendation would be transmitted to the Council and then to the Assembly for final action in plenary session. The Assembly could adopt the recommendation in the form proposed, amend it, refer it back to the committee, or reject it entirely.

The purpose of the Conference was to apply the talents of its diverse group of agency officials, practitioners, and academic members to improving the efficiency and fairness of the thousands of varieties of federal agency procedures. In my judgment, it was an effective

mechanism for achieving that goal—usually through voluntary acceptance of its recommendations by the affected agencies. Inefficiency and unfairness in agency procedures often exist simply by reason of bureaucratic inertia, and a well reasoned study and recommendation, prepared with the cooperation of the affected agency, can often produce desirable change. A few of the Conference's projects have had major, government-wide impact—for example, its recommendation leading to Congress's adoption of Public Law 94-574, which abolished the doctrine of sovereign immunity in suits seeking judicial review of agency action. For the most part, however, each of the Conference's projects was narrowly focused upon a particular agency problem, and was unlikely to attract attention beyond the affected community. This should be regarded, not as a sign of ineffectiveness, but as evidence of solid hard work. Administrative procedure is not a one-size-fits-all operation; most procedural regimes are unique, and have to be fixed one-by-one.

The Administrative Conference made several important strides in the area of implementation and saw some of its earlier recommendations bear fruit. Some examples that come to mind are the Justice Department's almost verbatim adoption of the Conference's guidelines for implementation of the Freedom of Information Act; the Civil Service Commission's publication of proposals substantially applying the Conference's recommendation concerning adverse actions against Federal employees; the Board of Parole's indication of its readiness to adopt the Conference proposals concerning parole procedures; and the Department of Labor's adoption of a field memorandum that substantially implemented the Conference's proposals regarding labor certification of immigrant aliens. Agencies that engaged in publicity as a regulatory tool adopted procedures conforming to the Conference's recommendations for protecting against unfair publicity that could harm a private party. The Conference's

recommendations regarding procedures for resolution of environmental issues in licensing proceedings were embodied in regulations adopted by five of the six affected agencies.

Some of the Conference's work also bore fruit at the legislative level. The Parole Commission and Reorganization Act of 1976, P.L. 94-233, implemented Recommendation 72-3's call for a right to counsel in parole proceedings, and other procedural guarantees recommended by the Conference. The 1974 Freedom of Information Act Amendments, Pub. L. No. 93-502, adopted many of the Conference's recommended improvements to FOIA. The Conference's encouragement of granting agencies authority to impose civil money penalties has had a major, and I think beneficial, impact. Many separate statutes implemented the Conference's recommendation regarding the appropriate standard of pre-enforcement judicial review of rules of general applicability. (That recommendation was also cited by court opinions that looked to it for guidance. See *Ass'n of Data Processing Service Organizations, Inc. v. Board of Governors of Federal Reserve System*, 745 F. 2d 677, 684 (CA DC 1984); *Home Box Office, Inc. v. F. C. C.*, 567 F. 2d 9, 57 n.130 (CA DC 1977).) Some recommendations were effectively implemented through a combination of congressional and agency action. For example, the Department of Treasury agreed to carry out most of the provisions of Recommendation 73-4, which called for increased access to customs representatives, greater disclosure, and written findings; and 1974 legislation implemented the suggested improvements in coordination between Customs and other relevant agencies. Of course some recommendations were framed not in terms of what to do, but rather in terms of what to avoid—for example, the recommendation cautioning against Congress's imposition of complex rulemaking procedures, which has been followed with few exceptions.

The Conference made itself useful in ways beyond specific proposals for legislation, or

executive or judicial action. As Chairman, I gave testimony before Congress on legislation pertaining to the Freedom of Information Act, the procedures of the U. S. Board of Parole, the establishment of a Consumer Protection Agency, possible amendments to the Federal Food, Drug, and Cosmetics Act and the Fair Packaging and Labeling Act, and the opening of the administrative process to the public. The Conference responded to numerous informal requests for advice from congressional committees and committee staffs on a wide variety of procedural matters.

Agencies also sought the Conference's informal advice and assistance, particularly in connection with their initiation of new programs or procedures. I regarded this sort of pre-implementation advice as a particularly beneficial activity, since it is obviously preferable to get things started on the right foot than to criticize the deficiencies of a program already in operation. During my first year alone, the staff and consultant resources of the Conference were called upon for advice with respect to several programs under development—for example, the Department of Transportation's program to facilitate public participation in their rulemaking process, and the Justice Department's congressionally mandated study into the feasibility of a special court for environmental matters. Especially noteworthy was the study which the Chairman's Office prepared, at the request of the Office of Management and Budget, covering the procedural provisions of what was then the most significant piece of regulatory legislation that had been adopted in years, the Consumer Product Safety Act. This study was completed before the members of the new Consumer Product Safety Commission had yet been named, and was therefore a prime example of applying the Conference's expertise at the point where it is most useful—before procedures have been adopted and institutional commitments made. The Conference also conducted seminars for agency attorneys, emphasizing those aspects of

administrative procedure that had special relevance to the attorneys' agency, but also refreshing the attorneys' recollection of basic administrative law principles to which they had had no systematic exposure since law school.

The Conference also conducted studies that, while not producing recommendations in and of themselves, were useful in enabling particular administrative functions to be understood and evaluated. An example of this is the study completed during the first year of my chairmanship by the Committee on Informal Action, systematically examining, for the first time, the agencies' practices in providing advice to the public. Or the study by the Chairman's Office concerning the various means by which agencies handle citizen complaints.

One way of judging the worth of the Conference without becoming expert in the complex and unexciting details of administrative procedures with which it deals, is to examine the roster of men and women who have thought it worthwhile to devote their time and talent to the enterprise. Over the years, the academics who have served as consultants to or members of the Conference have been a virtual Who's Who of leading scholars in the field of administrative law; and the practitioners who have served as members have been, by and large, prominent and widely respected lawyers in the various areas of administrative practice.

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 was a proved and effective means of opening up the process of government to needed improvement.