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May 20, 2004

The Honorable Chris Cannon  
Chairman  
Subcommittee on Commercial and Administrative Law  
Committee on the Judiciary  
U.S. House of Representatives  
Washington, D.C. 20515

Re: Subcommittee Hearing on the Reauthorization of the Administrative  
Conference of the United States, Scheduled for May 20, 2004

Dear Mr. Chairman:

On behalf of the American Bar Association ("ABA") and its more than 400,000 members nationwide, I write to express our support for the reauthorization and refunding of the Administrative Conference of the United States, the subject of today's Subcommittee hearing. As Chair of the ABA Section of Administrative Law and Regulatory Practice, I have been authorized to express the ABA's views on this important matter. We ask that this letter be included in the official record of today's hearing.

As you know, the Administrative Conference was established in 1964 as a permanent body to serve as the federal government's in-house advisor on, and coordinator of, administrative procedural reform. It enjoyed bipartisan support for over 25 years and advised all three branches of government before being terminated in 1996.

Through the years, the Conference was a valuable resource providing information on the efficiency, adequacy and fairness of the administrative procedures used by administrative agencies in carrying out their programs. This was a continuing responsibility and a continuing need, a need that has not ceased to exist.

The Conference's work in some cases resulted in bipartisan legislation to improve the administrative process. For example, both the Negotiated Rulemaking Act of 1990 and the Administrative Dispute Resolution Act were the product of the Conference's work, both in terms of the studies and reports that underlay the justification for these two laws and also in terms of the interested persons and agencies brought together to support the law.

In other cases, the Conference's work made legislation unnecessary. For example, early studies indicated that the exemption from notice and comment in the original Administrative Procedure Act for rulemakings involving public property, grants, contracts, loans, and benefits was no longer necessary or desirable. As a result of the Conference's work, virtually every agency voluntarily subjected itself to notice-and-comment rulemaking when dealing with these subjects, improving the transparency and acceptability of government rules without the need for legislative amendment.

The hallmark of the Conference's work was its ability to provide expert and non-partisan advice to the three branches of government. Drawing on the large number of volunteer public members of the Conference, as well as representatives from a wide spectrum of agencies, the Conference fostered a conversation among all interested persons and agencies. Utilizing academics for empirical research, which was reviewed first by subject matter committees staffed by members of the Conference and then by the full Conference, the Conference was able to provide a factual predicate for improvements in the administrative process that were not identified as ideologically or partisan-based proposals.

I stress the fact that over a quarter century the Administrative Conference of the United States maintained a reputation for non-partisan, expert evaluation of administrative processes and recommendations for improvements to those processes. It had no power but the power to persuade, and no political constituency other than those interested in improving administrative government. The lack of a particular constituency was its undoing when a political need for visible symbols of budget cutting and a special interest attack on the Conference combined in a perfect storm of politics. The error of that penny-wise, pound foolish decision to sacrifice the Conference stands out today, when a divisive and corrosive partisanship on issues of national concern cry out for the kind of independent, respected expert view that the Conference exemplified.

Not only was the Conference a source of expert and nonpartisan advice, the Conference played an important facilitative role for agencies in implementing changes or carrying out recommendations. Thus, a number of statutes, including the Government in the Sunshine Act and the Equal Access to Justice Act, specified that the Conference work with agencies in adopting the agencies' initial regulations. More recently, the Conference worked tirelessly to help agencies understand and utilize the Negotiated Rulemaking Act and the Administrative Dispute Resolution Act. Today, adapting administrative processes to make best use of the internet is a hot topic, but one for which there is no central organization to study different techniques, assess them, and then facilitate the implementation of those that are best.

It is a testament to the Conference's unique position that today persons of such differing judicial philosophies as Justices Scalia and Breyer can rally behind the re-creation of the Conference. Nor is it hard to find many others from across the political spectrum who will similarly commend the re-creation of the Conference to your subcommittee. Past chairs of the Conference, such as Professors Marshall Breger and Robert Anthony and Judge Loren Smith from one side of the aisle, can join hands with lawyer Sally Katzen and administrative judge Thomasina Rogers on the other side.

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The Conference proved itself effective at promoting efficiency in government for over 25 years. The American Bar Association has long supported the Conference and the role it played in advancing administrative procedural reform. We urge you to support legislation that would reauthorize the Conference and provide it with funds that are sufficient to permit it to continue its important mission.

Thank you for considering the views of the ABA on this important issue. If you would like to discuss the ABA's views in greater detail, please feel free to contact me at 503/768-6606 or the ABA's legislative counsel for administrative law issues, Larson Frisby, at 202/662-1098.

Sincerely,

A handwritten signature in cursive script, appearing to read "William Funk", with a long horizontal flourish extending to the right.

William Funk

cc: All members of the Subcommittee on Commercial and Administrative Law