

STATEMENT IN SUPPORT OF THE ACADEMY FOR THE ADMINISTRATIVE PROCESS

The processes government agencies use to make decisions are complex, difficult, and continually evolving. The flexible, scant procedures outlined in the Administrative Procedure Act have been supplemented by numerous Executive Orders, judicial decisions, and ad hoc statutory requirements. Moreover, since the APA was enacted in 1946 significant changes have taken place in the management structure of the Federal government, and there are new forms of public-private interaction, new developments in the relationship between Federal and State governments, and new perceptions as to how the government should function when making important decisions. Officials in each agency must confront all of these demands each time they take action. As a result, similar choices must be made over and over again in the halls of Washington about **how** to make decisions.

Oftentimes officials have little information as to how well a program implemented by another agency worked or little guidance as to how the duties could be successfully discharged or major pitfalls avoided. Many who deal regularly with multiple agencies have witnessed the dire need for some means by which agencies can share insights and experiences and to gain expert advice as to the best ways to go about the public's business. Without it, agencies necessarily incur high transaction costs by repeatedly reinventing similar procedures; the lack also means the best ideas are not recognized, strengthened, and used more widely nor the worst improved or discarded.

Further, advice would be helpful both to Congress and the agencies as to the potential structure of new ways to achieve public goals and to respond to public inquiries and criticisms about how individual agencies have functioned. And, Congress and the agencies alike could benefit from the insights and advice of those who are directly affected by the administrative process and from those who study it from a variety of perspectives.

We currently lack the means to refine how we do the public's business: no office or organization regularly convenes a broadly representative group of experts to deliberate about how to improve the quality of the administrative process. A permanent entity is needed that can be devoted to solving the problems of excess costs, delays, and burdens that are imposed upon the agencies and upon the public by inadequate, inefficient, and duplicative government processes.

Individual agencies, while they have the ability to review their own performance, lack the capacity to make cross-cutting agency reforms and comparisons. Furthermore, agencies acting alone cannot make the necessary procedural reforms for the improvement of administrative process as a whole. A forum for collegial self-critique and development of effective administrative practices is eminently desirable. Moreover, a forum is needed that can bring a sense of unity to administrative agencies and promote an appropriate degree of uniformity in their procedures. Congress should, therefore, establish such an institution that will systematically seek to promote improvements in the administrative process.

The primary purpose of such a new entity would be to care for the improvement of the administrative process. In doing so, it would examine government procedures and practices, with the goal being to search for new ways of helping governmental agencies function more fairly, efficiently, and effectively. The organization could play a leading role in the development of domestic administrative law doctrines. One of its foremost functions would be to review and evaluate whether the basic law governing administrative procedure, the Administrative Procedure Act (“APA”), as well as other procedural requirements should be revised and updated. It could also be charged with arranging for the interchange among administrative agencies of information potentially useful in improving administrative procedures. Another role it could discharge would be the preparation of resource documents, bibliographies, and advice and recommendations on various topics confronted by agencies.

Such an organization could also focus on the more minute details of the administrative process as well. Specifically, it could study and adopt recommendations concerning better rule-making procedures, or ways to avoid legal technicalities, controversies, and delays through agency use of alternative means of dispute resolution. For example, the exploding use of the internet and other forms of electronic communication present wonderful opportunities for increasing the information available to our citizens and their participation in our affairs. But, tapping these resources and making sure they work effectively and efficiently is itself a daunting task. The entity could collect information and statistics from administrative agencies and publish reports that could be useful

for evaluating and improving administrative procedure. It could also evaluate the judicial review of agency actions and make recommendations for its improvement. A major issue confronting the administrative process that has emerged forcibly in the past few years is the delicate balance of open government in a time of concern over national security and the means by which requirements are imposed on our citizens and businesses to protect our homeland.

Another purpose for establishing the new body could be to serve as a regulatory ombuds. It could in appropriate circumstances investigate and respond to individual complaints and undertake a systematic performance review of various government agencies, especially of those agencies with serious operational and programmatic problems. Individual agencies themselves often resist any critical self-evaluation in response to public complaints due to burdensome workloads, inertia, or a failure to admit the flaws in one's own prior decisions. An independent, objective entity, unfettered by internal agency politics and its own inertia, can offer meaningful recommendations to improve the operational structure of administrative agencies.

The entity could also be a repository on administrative processes that the various state governments could call upon for high quality administrative procedural advice. It could consider ways to improve federal, state, and local relations in different areas, including those in which state and local agencies administer federal programs. The organization could attempt to promote cooperation and coordination on interstate administrative procedural matters to foster a responsible and efficient administrative process among the several

states. The entity would be equipped to advise state agencies and their staffs of significant legal developments and emerging trends occurring in the area of administrative procedure.

Another major issue in administrative procedure comes from the international harmonization of laws and regulations. As a result of harmonization, many domestic regulations will need to be changed to bring them into conformity with the international requirements. Just how that is to be done is a complex, controversial issue that needs to be addressed.

The entity should be structured to give objective, non-partisan analysis and advice. If the new organization is afforded sufficient independence from particular policy-based responsibilities, its recommendations will be given credence and can be seen as a detached analysis. The structural makeup would be unique in that it would bring together an inter-disciplinary collection of experts in the administrative process. Membership would preferably include: committed senior management agency officials, professional agency staff, representatives of diverse perspectives the private sector who deal frequently with agencies, leaders of public interest organizations, highly regarded scholars from a variety of disciplines, and respected jurists. The problems that the organization will address will include management as well as legal issues. Thus, the panel of the organization's experts should be comprised of members with both legal backgrounds and those who may not have legal training, such as management, public administration, political science, dispute resolution, and law and economics. State interests should also be included in the entity's

membership by sending representatives from certain state agencies or state organizations.

After having studied the matter, we believe that it is appropriate to create such an entity in the private sector based on the highly successful model of the National Academy of Sciences. Being in the private sector, it can achieve a detached, independent expertise that would be difficult to achieve if it were a part of the government itself. But, it must also be structured in such a way that the government agencies, officials, and employees, as well as the Administration, feel confident in the integrity of its work and are comfortable participating in its affairs. Considerable thought has gone into that structure to accomplish these ends.

We therefore propose that Congress establish "The Academy for the Administrative Process." While the Academy will be in the private sector, like the National Academy of Sciences, having it chartered by Congress will demonstrate a Congressional imprimatur for its activities. The Academy will consist of individuals who are experts in administrative law and the administrative process, with the actual number of members to be established in the Academy's Bylaws. That expertise may come via government position, practicing before agencies, or scholarship. It may be in law, public administration, management, economics, or political affairs. It will be governed by a Board of Directors. The Board will consist of ten members appointed by the President of the United States, half of whom shall be officers or employees of the Federal Government and the others should reflect a diverse mix of interests and

expertise. The Chief Executive Office of the Academy, who will also be its public persona, will be its Chair who will be appointed by the President of the United States for a 5 year term. The Chair of the Academy will appoint the members of the Academy with the approval of the Board.

The Board will be responsible for adopting bylaws that would govern the affairs of the Academy. The Academy would meet in plenary session at least once per year unless the Board explicitly decided otherwise. The Academy would be authorized to receive bequests, donations, and grants, and to enter into contracts to perform functions within its charter. It would also be authorized to receive appropriated funds to discharge its responsibilities.

The Academy for the Administrative Process will help significantly in ensuring that our public decisions are made effectively, efficiently, and fairly. That is clearly a major undertaking, but one the Academy is structured to discharge for the benefit of us all.