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# ADMINISTRATIVE LAW, PROCESS AND PROCEDURE PROJECT

## HEARING

BEFORE THE

SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

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# ADMINISTRATIVE LAW, PROCESS AND PROCEDURE PROJECT

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**TUESDAY, NOVEMBER 1, 2005**

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCIAL
AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
*Washington, DC.*

The Subcommittee met, pursuant to notice, at 10 a.m., in Room 2141, Rayburn House Office Building, the Honorable Chris Cannon (Chair of the Subcommittee) presiding.

Mr. CANNON. If you would all like to take your seats. Thank you all for coming this morning.

I don't have a gavel. We are now in order. Don't worry about it. It is not life or death here.

The current Federal regulatory process faces many significant challenges. Earlier this year the head of OMB's Office of Information and Regulatory Affairs testified that "no one has ever tabulated the sheer number of Federal regulations that have been adopted since passage of the Administrative Procedure Act," which I might add parenthetically was in 1946. He further acknowledged, "Sad as it is to say, most of these existing Federal rules have never been evaluated to determine whether they have worked as intended and what their actual benefits and costs have been." A rather depressing statement.

In September 2005, the SBA's Office of Advocacy reported that the annual cost to comply with Federal regulations in the United States in 2004 exceeded $1.1 trillion, about 10 percent of our whole economy, which means that if every household received a bill for its equal share, each would have owed $10,172, an amount that exceeds what the average American household spent on health care in 2004, which is just under $9,000.

Other problematic trends include the absence of transparency in certain stages of the rulemaking process, the increasing incidence of agencies publishing final rules without having them first promulgated on a proposal basis, the stultification of certain aspects of the rulemaking process, and the need for more consistent enforcement by agencies.

Given the fact that the EPA was enacted nearly 60 years ago, a fundamental question that arises is whether the act is still able to facilitate effective rulemaking in the 21st century.

In an attempt to answer that question, House Judiciary Chairman Sensenbrenner earlier this year requested that our Sub-

committee spearhead the Administrative Law, Process and Procedure Project.

The object of the project is to conduct a nonpartisan, academically credible analysis of Federal rulemaking that will focus on process, not policy concerns. Some of the areas that will be studied include the role of public participation in the rulemaking process, judicial review of rulemaking, and the utility of regulatory analysis and the accountability requirements.

For the purpose of soliciting scholarly papers and promoting a robust dialogue, the Subcommittee intends to facilitate colloquia at various academic institutions and organizations that analyze Federal rulemaking.

In addition, the Congressional Research Service has been asked to make some of its leading administrative law experts available to guide the project, one of whom is testifying today. Under the auspices of CRS, several independent empirical studies of various issues conducted by some of the most respected members of academia are already underway as part of the project, and we will hear about one of those ongoing studies as part of today's hearing.

The project will also benefit from the wealth of expertise that the Government Accountability Office provides. To date, GAO has produced more than 60 reports on various aspects of the Federal regulatory process, and one of our witnesses will explain the work of GAO in this critical area.

The project will culminate with the preparation of a detailed report with recommendations for legislative proposals and suggested areas for further research and analysis to be considered by the Administrative Conference of the United States.

As you may recall legislation reauthorizing ACUS was signed into law last fall. ACUS was a nonpartisan, private-public think tank that proposed many valuable recommendations which improved administrative aspects of regulatory law and practice. Over its 28-year existence ACUS has served as an independent agency charged with studying the efficiency, adequacy and fairness of the administrative procedure used by Federal agencies. Most of its approximately 200 recommendations were implemented. They in turn helped save taxpayers millions of dollars.

In a rare expression of unanimity, the Supreme Court Justices Scalia and Breyer jointly testified before our Subcommittee last year in support of ACUS. In complete unison they extolled the Conference's virtues. Justice Breyer in particular cited the value of the Conference's recommendations, noting that they resulted in "huge" savings to the public. Likewise Judge Scalia stated the Conference was "an enormous bargain." Accordingly, it is critical that ACUS be appropriated its funding if not before, at least by the time the project report is completed.

This is truly an exciting undertaking. I look forward—can you imagine an exciting undertaking in administrative procedures? It actually really is, and I look forward to the testimony from our witnesses as we get this project going.

I now turn to my colleague, Mr. Watt, the distinguished Ranking Member of my Subcommittee, and ask him if he has any opening remarks.

[The prepared statement of Mr. Cannon follows:]

PREPARED STATEMENT OF THE HONORABLE CHRIS CANNON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH, AND CHAIRMAN, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

The current federal regulatory process faces many significant challenges. Earlier this year, the head of OMB's Office of Information and Regulatory Affairs testified that "no one has ever tabulated the sheer number of federal regulations that have been adopted since passage of the Administrative Procedure Act," which I might add parenthetically was in 1946. He further acknowledged, "Sad as it is to say, most of these existing federal rules have never been evaluated to determine whether they have worked as intended and what their actual benefits and costs have been." A rather depressing statement.

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Given the fact that the APA was enacted nearly 60 years ago, a fundamental question that arises is whether the Act is still able to facilitate effective rulemaking in the 21st Century?

To help us answer that question, House Judiciary Committee Chairman Sensenbrenner earlier this year requested our Subcommittee to spearhead the Administrative Law, Process and Procedure Project. The objective of the Project is to conduct a nonpartisan, academically credible analysis of federal rulemaking that will focus on process, not policy concerns.

Some of the areas that will be studied include the role of public participation in the rulemaking process, judicial review of rulemaking, and the utility of regulatory analysis and accountability requirements.

For the purpose of soliciting scholarly papers and promoting a robust dialogue, the Subcommittee intends to facilitate colloquia at various academic institutions and organizations that analyze federal rulemaking. In addition, the Congressional Research Service has been asked to make some of its leading administrative law experts available to guide the Project, one of whom is testifying today. Under the auspices of CRS, several independent empirical studies of various issues conducted by some of the most respected members of academia are already underway as part of the Project, and we'll hear about one of those ongoing studies as part of today's hearing. The Project will also benefit from the wealth of expertise that the Government Accountability Office provides. To date, GAO has produced more than 60 reports on various aspects of the federal regulatory process. And, one of our witnesses will explain the work of the GAO in this critical area.

The Project will culminate with the preparation of a detailed report with recommendations for legislative proposals and suggested areas for further research and analysis to be considered by the Administrative Conference of the United States. As you may recall, legislation reauthorizing ACUS was signed into law last fall. ACUS was a nonpartisan "private-public think tank" that proposed many valuable recommendations which improved administrative aspects of regulatory law and practice. Over its 28-year existence, ACUS served as an independent agency charged with studying the efficiency, adequacy, and fairness of the administrative procedure used by federal agencies. Most of its approximately 200 recommendations were implemented, and they, in turn, helped save taxpayers many millions of dollars.

In a rare expression of unanimity, Supreme Court Justices Scalia and Breyer jointly testified before our Subcommittee last year in support of ACUS. In complete unison, they extolled the Conference's virtues. Justice Breyer, in particular, cited the value of the Conference's recommendations, noting that they resulted in "huge" savings to the public. Likewise, Justice Scalia stated that the Conference was "an enormous bargain." Accordingly, it is critical that ACUS be appropriated its funding, if not before, at least by the time the Project report is completed.

This is a truly exciting undertaking and I look forward to the testimony from our witnesses.

Mr. WATT. Thank you, Mr. Chairman, and thank you for convening this hearing, and thank Chairman Sensenbrenner and Ranking Member Conyers for enlisting the able assistance of the

Congressional Research Service to provide guidance, supervision and a structural framework for this important, massive, bipartisan undertaking.

As I indicated last year in our hearing in which Justices Scalia and Breyer offered their insights on the role that the defunct Administrative Conference of the United States had played prior to its demise, I found it somewhat ironic that the agency that had actively worked to make Government smaller, more efficient and more accountable was itself a victim of the end of the era of big Government mantra of the 90's by reauthorizing the Administrative Conference last term. Congress has now taken the first steps toward restoring an invaluable mechanism created to improve the content, implementation and processes of Federal administrative law.

Now, if we could get funding appropriated to fund the Administrative Conference, this project will serve as a useful device to sort through and prioritize those systematic issues in the administrative law arena that cry out for examination and possible reform.

There is no greater example, as noted by several of our witnesses in their written testimony, of the need for review of the effectiveness of administrative law and procedures before us today than the bureaucratic morass that seemingly and tragically undermined efforts to save and provide prompt relief to the countless families and individuals caught in the path of Hurricane Katrina.

While there will be probing investigations into what went wrong in the aftermath of Katrina, bureaucratic flexibility in the face of national disasters or emergencies together with the interoperability and coordination of efforts at all levels of Government are vitally important to be considered in this examination of the current state of administrative process and procedure.

In addition to disaster-related areas of inquiry, there are other areas that are deserving of the in-depth review the project seeks to provide. I believe that overall review not only of our administrative agencies themselves but also of the judicial, presidential and congressional roles in the administrative process, will provide us with a thorough understanding of how each branch of Government contributes to furthering or impeding the goals of that process.

As the project progresses to evaluate e-Government and e-rulemaking, I believe the questions of security, privacy and access must be considered. While technological advances have broadened the possibilities of delivering and managing some governmental services quicker with greater efficiency, these advances have also broadened the potential for abuse, misuse, and exclusion.

For example, transparency may invite security concerns, assembly of vast amounts of personal data may invite privacy concerns, and the mere use of advanced technology to administer governmental programs and policies might invite access concerns for small, disadvantaged or minority stakeholders who have yet to cross the digital divide.

There are many other issues, privatization, attorneys fees, judicial comity and the role of executive orders to name a few, that are important aspects of our system of administrative law and procedure.

I look forward to continuing to work with you, Mr. Chairman, on this comprehensive and balanced bipartisan examination of the state of our administrative law system, and I thank the witnesses for the insights they will provide to us today and yield back the balance of my time.

Mr. CANNON. Thank you, Mr. Watt. I have often said that the most interesting questions of our day are not partisan questions. This is certainly, I believe, one of them. When we consider a tenth of the economy is involved in the Federal regulatory process it is amazing.

Without objection, all Members may place their statements in the record at this point. Without objection, so ordered.

Without objection, the Chair will be authorized to declare recesses at any point in this hearing. Hearing none, so ordered.

I ask unanimous consent that Members have 5 legislative days to submit written statements for inclusions in today's hearing record. Without objection, so ordered.

I am now pleased and honored to introduce our witnesses for today's hearing. Our first witness is Mort Rosenberg, Specialist in American Public Law in the American Law Division of the Congressional Research Service. In all matters dealing with administrative law, Mort has been the Judiciary Committee's right hand. For more than 25 years, he has been associated with CRS. Prior to his service with that office he was Chief Counsel for the House Select Committee on Professional Sports, among other public servant positions he has held.

In addition to these endeavors, Mort has written extensively on the subject of administrative law. We are proud that he will later this month receive the American Bar Association's Mary C. Lawton Award for Outstanding Government Service. Mort obtained his undergraduate degree from New York University and his law degree from Harvard Law School. Thank you for being here with us.

Our second witness is Chris Mihm, who is the Managing Director of GAO's Strategic Issues team, which focuses on government-wide issues with the goal of promoting more results-oriented and accountable Federal Government. The strategic issues team has examined such matters as Federal agency transformation, budgetary aspects of the Nation's long-term fiscal outlook and civil service reform. Sort of the easy things, right? Government reform?

Mr. Mihm is a Fellow of the National Academy of Public Administration, and he received his undergraduate degree from Georgetown University.

Professor Jeffrey Lubbers is our third witness. A Fellow in Law and Government at American University Washington College of Law, Professor Lubbers brings a unique perspective to today's hearing with respect to ACUS. As many of you know, Professor Lubbers worked at ACUS for 20 years, including 13 years as the Conference's Research Director. A prolific writer on the subject of administrative law, Professor Lubbers obtained his undergraduate degree from Cornell University and his law degree from University of Chicago Law School.

I would also like to mention that about 3 years ago, Professor Lubbers testified before this Subcommittee at an oversight hearing regarding the administrative law and privacy ramifications in-

volved in establishing the Department of Homeland Security. As a result of this hearing, our Subcommittee spearheaded the creation of the first statutorily mandated privacy officer as part of DHS's enabling legislation.

Welcome back, Professor Lubbers. We appreciate that. That actually has worked out awfully well, we think.

Our fourth witness is Professor Jody Freeman. Professor Freeman teaches administrative law and environmental law at Harvard Law School, where she is the Director of the Environmental Law Program. Prior to joining Harvard Law School, Professor Freeman taught at UCLA for 10 years. I appreciate some good Western perspective here. Currently, she serves as Vice Chair of the ABA Administrative Law Section Subcommittee on both Dispute Resolution and Environmental Law and Natural Resources. She also chairs the AALS Executive Committee on Administrative Law.

Professor Freeman received her undergraduate degree from Stanford University and her law degree from the University of Toronto, where I have a son living now. She thereafter received her master's and doctorate of law from the Harvard Law School.

I extend to each of you my warm regards and appreciation for your willingness to participate in today's hearing. In light of the fact that your written statement is being included in the record, I request that you limit your remarks to 5 minutes. Accordingly, please feel free to summarize or highlight the salient points of your testimony.

You will note that we have a lighting system that starts with a green light. After 4 minutes, it turns to a yellow light and then 5 minutes it turns to a red light. It is my habit, interestingly it is actually captured here in my notes, to tap the gavel at 5 minutes. We would appreciate it if you would finish up your thoughts within that time frame. We don't want to cut people off in the middle of their thinking, but it works better if everybody has that rule. It is not a hard rule, just so you know recognizing 5 minutes has gone by. We are actually quite interested in what you have to say and if it goes beyond that, I don't think today anybody is doing to be very exercised.

We would appreciate that, and I if really start tapping hard then you know I am bored or Mel is nudging me or something. After you have presented your remarks, Subcommittee Members, in the order they arrive, will be permitted to ask questions of the witnesses subject to the 5-minute limit and possibly subject to more than one round.

Pursuant to the direction of the Chairman of the Judiciary Committee, I ask that the witnesses please stand and raise your right hand to take the oath.

[Witnesses sworn.]

Thank you. You may be seated. The record should reflect that the witnesses answered in the affirmative.

And Mr. Rosenberg, we would be pleased if you proceed with your testimony.

**TESTIMONY OF MORTON ROSENBERG, ESQUIRE, SPECIALIST IN AMERICAN PUBLIC LAW, AMERICAN LAW DIVISION OF THE CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS**

Mr. ROSENBERG. Thank you, Mr. Chairman. Mr. Chairman, Mr. Watt, I am very pleased to be here today. I have enjoyed for many, many years working with your Subcommittee and Raymond Smietanka and Susan Jensen and with other parts of your full Committee. I am a wonk in administrative law. I get off on these kind of things and I have for over 30 years in CRS.

You have asked me here today to discuss and describe the background, development and goals of your Committee's Administrative Law, Process and Procedure Project, CRS's role in that project, what we've done so far, and what we hope to accomplish in the future.

In my prepared remarks, I have detailed the genesis of your project, from the coincidence of the briefing that T.J. Halstead, one of the CRS team, and I gave a full Committee staff briefing on emerging issues in law and ad process and your first hearing in the attempt to revive ACUS with Justices Scalia and Thomas [sic].

My sense at that time was that there was a close nexus between the demise of ACUS in 1995 and the growing number of seemingly insoluble process and practice issues over the last decade, a sense that I tried to convey to the Committee. I was perhaps influenced by an unknowing dependence upon ACUS. I do not exaggerate when I say that I have always had within arm's reach in my 33 years at CRS a full and, until 1995, complete growing set of ACUS reports and recommendations, which were often my first resource in responding to clients such as your Committee.

I was fortunate in the 80's and 90's, when I was deeply involved in issues involving Executive Order 12291, presidential review of rulemaking, and some of the first major efforts at regulatory reform that were going on in those days, and I was fortunate to call upon for assistance and occasionally work with Jeff Lubbers when he was Research Director at ACUS. In any event, I was excited—and I am excited—at the prospect of working with your Subcommittee, with the CRS team that includes T.J. Halstead of the American Law Division and Curtis Copeland, of our Government and Finance Division, in which to assist in the two-track effort that you have started. That is, by providing it with background materials and information to inform the bipartisan effort to reauthorize ACUS and identifying the issues that might be the subject of either further study by a revived ACUS and/or legislative action by the Committee during the 109th Congress.

As you mentioned, success was achieved with regard to the first effort with the enactment of the Federal Regulatory Improvement Act of 2004 in October of 2004. But as of this date, funding legislation has not been passed.

The Subcommittee, however, anticipated the possibility of an extended delay in the operational startup of ACUS after passage of the reauthorization legislation and directed its staff to consider, with the assistance of the CRS team, the options that would be available to it to accumulate the information and the data necessary to determine whether action on a particular issue required

immediate legislative attention or was best referred to ACUS for further in-depth studies and recommendations.

And after extended discussions, such traditional approaches that have been used in the past, such as a series of informative hearings by the Committee, possible establishment of a study commission, or the creation by the Committee of a study group, were rejected in favor of seeking and utilizing the assistance of resources outside of Congress and the Committee, such as academic institutions, think tanks, CRS, the Government Accountability Office, among others, and the potentiality of utilizing forums for the airing of issues outside of Washington were deemed important.

The staff proposed and the Committee adopted a unique course of action. And I underline that what you're doing here is pretty unique. It is novel in the way it is reaching out beyond the Beltway to try to get a diversity of opinions and compile a record outside which might be more reflective of what is really going on and what real practical thoughts are out there.

What you did was pursuant to the House rule requiring Committee adoption of an oversight plan for the 109th Congress. The full Committee made a study of emergent administrative law and process issues a priority oversight agenda item for the Subcommittee. Among the benefits of so identifying the study as a Subcommittee priority was to give it the imprimatur of official legislative legitimacy and importance which might, in turn, be useful in enlisting the voluntary assistance and services of individuals and institutions throughout the Nation.

The oversight plan identified seven general areas for study: public participation in the rulemaking process, congressional review of rules, presidential review of agency rulemaking, judicial review of rulemaking, the adjudicatory process, the utility of regulatory analyses and accountability requirements, and the role of science in the regulatory process.

The CRS team was designated by the Chairman and Ranking Minority Member to coordinate this project. Its first task was to take these seven broad study areas and identify or define potential questions or issues for research. The thought was not to limit research to those matters within the combined experience and expertise of the team members, but to develop theme packages in order to sell a package or a particular issue to a law school or university graduate school, a public agency or a consortium of those institutions for systematic, in-depth studies by means of empirical studies and papers conducted and prepared by leading experts in the particular areas which might be followed by public presentations and findings of symposia that would reflect these competing views.

Hopefully, the end product of that exercise is to be a compilation of the papers and the transcripts of the various public symposia similar to the two-volume working papers of the National Commission on Reform of Federal Criminal Laws published by your Committee in 1970, which contains 59 studies covering all aspects of the then current issues in criminal law reform. Those studies actually informed Congress' subsequent successful reform efforts.

As of this date, two major empirical studies are underway, and one forum is scheduled for this room on December 5th.

One, being conducted under the direction of Professor Jody Freeman of Harvard Law School, is looking at the nature and impact of judicial review of agency rulemaking over what appears to be now a 13-year period in the 11 Federal Circuit Courts of Appeals. Professor Freeman is a fellow panelist today and will describe her plan for this very daunting and important undertaking.

The second study is being led by Professor William West of the Bush School of Government and Public Service at Texas A&M and will be looking into the influences on the initiation, design and development of new rules at 20 agencies during the period prior to the publication of notices of proposed rulemaking for public comment in the Federal Register. Professor West will be assisted by eight graduate students, and the study is in part funded by CRS's Capstone Program grant.

Both studies are expected to provide at least preliminary results by the spring of 2006. The third thing is the forum that is going to be lead by Professor Cary Coglianese here on e-rulemaking. There will be two panels of experts from the private sector, from the public sector, from Government, and they will be speaking with regard to the problems and potentialities of e-rulemaking as a way of fostering public participation.

Some other projects that we hope to place include a mega-project dealing with the problems that appear to be arising with presidential rulemaking, through executive orders, and the Congressional Review Act. That is the mechanism by which in 1996 Congress hoped to have a more effective oversight role and to balance what was going on under the executive order system.

It appears apparent that there are problems. In the last few years under the leadership of OMB Administrator John Graham, it appears the balance between Congress' review efforts and the control and direction of, and influence on agency rulemaking has extended to the extent that one could say that perhaps there is a constitutional imbalance that needs to be redressed. But again, as Professor Freeman notes in her statement, empirical study is really necessary to understand just exactly how effective and perhaps untoward the presidential review mechanisms are.

Let me stop here and allow others to talk. There are a few other projects that we want to institute, but we can talk about those from your questions. I thank you.

[The prepared statement of Mr. Rosenberg follows:]

PREPARED STATEMENT OF MORTON ROSENBERG

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STATEMENT

OF

MORTON ROSENBERG
SPECIALIST IN AMERICAN PUBLIC LAW
CONGRESSIONAL RESEARCH SERVICE

BEFORE THE

HOUSE SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY

CONCERNING

THE ADMINISTRATIVE LAW, PROCESS AND PROCEDURE PROJECT

PRESENTED ON

NOVEMBER 1, 2005

Mr. Chairman and Members of the Subcommittee

My name is Morton Rosenberg. I am a Specialist in American Public Law in the American Law Division of the Congressional Research Service. Among my areas of professional concern at CRS are issues relating to the efficiency, effectiveness, fairness and accountability of the administrative processes, procedures and practices established under congressional authority to implement the laws mandating agency missions and programs. Over the years I have had occasion to advise Committees and Members about matters involving the Administrative Procedure Act's (APA) provisions regarding public participation and its exceptions, and judicial review of final agency actions, among others, presidential and congressional review of agency rulemaking, proposals for regulatory and adjudicatory reform, and questions relating to reorganization, appointments and removal of executive officers and employees, and structural organizations.

You have asked me here today to discuss and describe the background, development, and goals of your Committee's Administrative Law, Process and Procedure Project (Project), CRS' role in that Project, what we have done so far, and what we hope will be accomplished in the future.

The genesis of the Project may be traced to the preparations by myself and my ALD colleague, T.J. Halstead, for a briefing of the full Committee staff on emerging issues in administrative law and process in May 2004. Shortly before the briefing we were advised by the Committee's Chief Counsel that coincident with our session a hearing would be held by your Subcommittee on the reauthorization of the Administrative Conference of the United States (ACUS) at which Supreme Court Justices Scalia and Breyer would be the principal witnesses. T.J. and I thought it would be appropriate and useful to alter the focus of our presentation from a simple review of significant current administrative law and process issues to one that we believed highlighted the fact that many of the issues we were identifying were of the type that ACUS had addressed with success during its 28 year history, and that in the now decade-long hiatus since its demise no institution or consortium of public and private resources had emerged with a comparable blend of expertise, non-partisanship and presumptive professional authority that ACUS had represented. The disparate, though excellent, work of individual academics, public interest groups, bar associations, and the episodic inquiries of jurisdictional committees appeared to us not to have been a sufficient substitute for the focus, comprehensiveness and inherent authority and respect that ACUS's studies and recommendations carried. While we did not suggest that an ACUS revival would lead us out of the desert, it did appear to us that a new ACUS held some promise of again becoming a focal point and resource for federal agency and legislative advice and guidance for significant emerging administrative law and process issues.

Our remarks apparently resonated with the Committee, and working with your Subcommittee staff, a CRS team, which now includes Curtis Copeland of our Government and Finance Division, assisted in a two-track effort: providing it with background materials and information to inform the bi-partisan effort to reauthorize ACUS; and identifying the issues that might be the subject of either future study by a revived ACUS and/or legislative action by the Committee during the 109th Congress. Success was achieved by the Subcommittee with respect to the first effort with the enactment of the Federal Regulatory Improvement Act of 2004, P.L. 108-401, on October 30, 2004. But, as of this date, funding legislation has not been passed.

The Subcommittee anticipated the possibility of an extended delay in the operational start-up of ACUS after passage of the reauthorization legislation and directed its staff to consider, with the assistance of the CRS team, the options available to it to accumulate the information and data necessary to determine whether action on a particular issue required immediate legislative attention or was best referred to ACUS for further in-depth studies and recommendations. One option was to hold a series of informational hearings over the course of the 109th Congress on particular topics and themes (public participation in rulemaking, judicial review of rulemaking, presidential review of rulemaking, "midnight rules," consent decrees, etc.) to which academics, judges, executive branch officials, think tank experts, and industry spokespersons, among others, would be invited to present their views and suggestions for reform. This traditional approach to such a broad-ranging inquiry was seen as putting an unreasonable burden on Subcommittee Members and staff, as well as the commitment of substantial Subcommittee time and resources over a lengthy period during which it was likely that unforeseen legislative issues would arise which could distract and divert from the project.

Another past model considered is reflected in the legislative creation of the two Hoover Commissions (1947-49, 1953-55) and the National Commission on Reform of Federal Criminal Laws (1966) whose findings and recommendations led to a major congressional restructuring of administrative departments and agencies and the reformation of federal criminal laws, respectively. The reauthorization of ACUS, however, appeared to render the establishment of a study commission, with its attendant costs, superfluous.

A third option was the model of the comprehensive study of federal regulation directed by Senate Resolution 71 (1975) to the Senate Committee on Government Operations to assess the impact of regulatory programs and the need for change. The ultimate product, a six volume study, entitled "Study on Federal Regulation," was completed in 1978 and was conducted by a staff of 14 operating separate and apart from the Senate committee permanent staff, and was overseen by an outside advisory board. The effort therefore entailed authorization by the Senate and required a significant expenditure of funds for salaries and support.

Ultimately, it was determined that the Committee should not be bound by such past models, although they are suggestive of techniques and approaches. The discussion indicated that consideration of cost, the possible availability of resources outside of Congress and the Committee, such as academic institutions, think tanks, CRS, and the Government Accountability Office (GAO), among others, and the potentiality of utilizing forums for the airing of issues outside of Washington, were important. In light of these considerations, and breadth of the issue areas, staff proposed and the Committee adopted the following course of action.

Pursuant to House Rule X, 2(d)(1), requiring Committee adoption of an oversight plan for the 109th Congress, the Committee made a study of emergent administrative law and process issues a priority oversight agenda item for the Subcommittee on Commercial and Administrative Law. Among the benefits of so identifying the study as a Subcommittee priority was to give it the imprimatur of official legislative legitimacy and importance which might, in turn, be useful in enlisting the voluntary assistance and services of individuals and institutions throughout the nation. The oversight plan identified seven general areas for study: "(1) public participation in the rulemaking process; (2) Congressional review of rules; (3) Presidential review of agency rulemaking; (4) judicial review of rulemaking; (5) the agency adjudicatory process; (6) the utility regulatory analyses and accountability requirements; and (7) the role of science in the regulatory process."

The CRS team was designated by the Chairman and Ranking Minority Member to coordinate the Project. Its first task was to take these seven broad study areas and identify and define potential questions or issues for research. The thought was not to limit research to those matters within the combined experience and expertise of the team members, but to develop theme packages in order to "sell" a package or a particular issue to a law school, a university graduate school, a public agency, or a consortium of such institutions that would arrange for systematic, in-depth studies by means of empirical studies and papers conducted and prepared by leading experts in the particular areas, which might be followed with public presentations of findings in symposia that would reflect competing views. The location of the participating entities and institutions could be scattered throughout the country to insure diversity of thoughts, and broad themes could be addressed at more than one location. Members of the Committee could participate as keynoters at the public forums. Federal agencies could be encouraged to cooperate with the researchers. Based on the ACUS experience, that is likely to occur in any event since the agencies will perceive if they are to be either the beneficiaries or targets of any adopted recommendations with respect to any administrative law or process change in which they would want to have an input.

The end product of the exercise is hoped be a compilation of the papers and transcripts of the various public symposia similar to the two volume "Working Papers of the National Commission on Reform of Federal Criminal Laws" published by the House Judiciary Committee in 1970 which contained 59 studies covering all aspects of the then current issues in criminal law reform. Those studies informed Congress' subsequent reform actions.

No study is likely to be conducted the same way. For example, an important aspect of the current state of judicial review of agency rulemaking is the purported high rate of successful challenges of agency rulemakings in the federal appellate courts. Anecdotal evidence reported by commentators since the 1980's is that over 50% of rule challenges have been upheld by appeals courts. Some limited studies (e.g., EPA cases in the District of Columbia Circuit over a 8 year period in the 1990's) appear to support the proposition. A limited, unsophisticated CRS study of a number of circuits over a six year period in the 1990's appeared to confirm the 50% overturning rate. If the appellate failure rate is accurate, there are important implications of, and perhaps a confirmation of the contentions of the so-called "ossificationists" who argue that a major reason agencies have been attempting to evade notice and comment rulemaking through "non-rule rules" is because of the high incidence of appellate rejection of agency rules on review. Among the many questions raised by such statistics is whether it is because the agencies simply aren't doing their job or are the appellate courts in fact substituting (improperly) their own policy judgments for those of the agencies, using the vehicle of the rather subjective "reasoned decisionmaking" standard of review. Or is there some other explanation? Some commentators have raised the question whether judicial review of rulemaking is necessary at all.

The first task of a study of judicial review, then, would be the conduct of a sophisticated study of appellate rulemaking rulings in all circuits over an extended period (at least 10 years), which would answer certain basic questions such as: How many overrulings were there? Were the overrulings of an entire rule or part of a rule? Which agencies had the least amount of success; which the best success? Is there any correlation in the overruling between political affiliation of the judges and particular issues or subject matter? The results of the study would then be considered by a panel of experts who would evaluate the results and data and present analyses, conclusions and recommendations to the Committee. It is likely that a number of the "theme" areas may require basic empirical studies to provide a basis for issue assessment.

The CRS team's tentative compilation of research topics within the Committee's review is as follows:

**1. Public Participation in the Rulemaking Process**

- Should efforts to include the public in the rulemaking process before publication of a proposed rule (e.g., negotiated rulemaking, SBREFA panels) be expanded? How much do these processes currently add in terms of public participation?

- How effective is the *Unified Agenda of Federal Regulatory and Deregulatory Actions* in identifying future rulemaking (thereby giving the public advance warning of forthcoming regulatory actions)? What changes could make this *Agenda* a more effective means of notification?

- What has been the impact of agencies' use of "nonrulemaking" approaches (e.g., guidance documents, notices, etc.) and attenuated rulemaking approaches (e.g., use of the APA's "good cause exception to skip notices of proposed rulemaking) on the public's opportunities for participation? Should the public be able to comment on those approaches before they become final?

- Should all agencies be required to make comments received immediately available to the public (to allow comments on the comments)? Or, alternatively, should agencies provide "reply comment periods" (to discourage waiting to the end of the comment period)?

- What effect has "e-rulemaking" (including the use of e-mail comments and "comments on comments," on-line dialogues, the new Regulations.gov web site, agency-specific and the new governmentwide electronic dockets) had on the amount and nature of public participation in the rulemaking process, and how do agencies view those comments? Specifically:
  - How should agencies deal with the sometimes hundreds-of-thousands of e-mail comments generated by special interest groups?
  - Should all agencies be required to offer "list serves" that allow members of the public to be notified of certain rules being available for comment?
  - Has e-rulemaking allowed more people to participate in the rulemaking process, or simply facilitated access to traditional commenters?

- The APA does not specify how long public comment periods should be (although EO 12866 suggests 60 days). Should there be a minimum comment period specified in the statute? If so, what should it be? Also, under what circumstances can/should agencies extend comment periods?

- Are agencies always required to respond to public comments, even if they take no further action on the proposed rule for years? How soon should they respond, and in what form? Is there a point when public comments

become too "stale" to permit issuance of a rule based on those comments (without further public comments)?

- Currently, there are no governmentwide standards for what should be in the rulemaking record (e.g., a copy of the proposed rule, public comments, etc.) or a standard order of presentation of the documents? Should there be such standards? If so, who should establish them (OMB, NARA, other)?

- Under what circumstances is it appropriate for agencies to allow commenters to file confidential comments? How should this procedure be regularized?

- Currently, the Administrative Procedure Act prohibits *ex parte* contacts in formal rulemaking, but is silent about such contacts in the much more common informal "notice and comment" rulemaking. Should Congress extend those prohibitions, and clearly establish when and what types of contacts are prohibited?

- Currently, the Administrative Procedure Act does not mention two relatively common forms of rulemaking that avoid traditional notice and comment requirements — interim final rulemaking and direct final rulemaking. Should Congress codify these forms of rulemaking and how they should (and should not) be used? More generally, should Congress revisit agencies' use of all forms of the "good cause" exception?

- Currently, some of the statutory analytical requirements in rulemaking (e.g., the Regulatory Flexibility Act and the Unfunded Mandates Reform Act) do not apply to rules for which there is no notice of proposed rulemaking. Should these incentives for agencies to avoid NPRMs be eliminated? At a minimum, should the exemptions for interim final and direct final rules be eliminated?

- OMB's new peer review bulletin allows agencies to decide whether to permit public comment on their peer review processes. Should agencies have that discretion, should agencies be required to permit public comments, or should public comments on what is supposed to be an "expert" process not be permitted (because, among other things, it could slow down rulemaking)?

- To what extent does public participation in its various forms (e.g., comment periods, public meetings, SBREFA panels, etc.) have an effect on agency decisionmaking during the rulemaking process? What empirical evidence is there of that effect?

- What is the proper role of consultants in the development stage of a rulemaking? Should there be a balance of views of competing stakeholders in the pre-NPRM period? Should agencies be required to invite competing views to ensure "balance"?

**2. Congressional Review of Rules**

- How effective has the Congressional Review Act been in improving congressional oversight of the rulemaking process? Does the Act need to be amended/replaced? For example:
  - Should agencies still be required to send all rules to the House, Senate, and GAO?
  - Should more rules be exempt from this process?
  - How are GAO's reports handled by Congress? Do they need refinement?
  - Should there be an expedited procedure for House consideration of rules?
  - Should Congress clarify how not to run afoul of the "substantially the same" prohibition in the CRA?
  - Should the "legislative day" measure be clarified since it is so unpredictable in terms of calendar days?
  - Should Congress adopt the changes in the CRA process that were contemplated by H.R. 3356 in the 108th Congress, including the proposal to establish a joint congressional committee to screen and recommend proposed rules for disapproval?

- Other than the Congressional Review Act, what other options does Congress have to prevent the implementation of an agency rule (e.g., appropriations riders)? How common are such approaches? Are they effective?

- Should Congress establish a "Congressional Office of Regulatory Analysis" to help it oversee the agencies' compliance with various rulemaking requirements? If so, should it follow the format envisioned in the Truth in Regulation Act (e.g., be established within the Government Accountability Office, require assessment of all rulemaking requirements, etc.)? If so, should Congress simply reauthorize and fund TIRA?

- Should Congress affirmatively approve all major rules (e.g., those with a $100 million annual impact on the economy) before they take effect?

**3. <u>Presidential Review of Rules</u>**

- To remove any question of its legitimacy, should Congress codify presidential review of agency rulemaking? If so, how detailed should that codification be? For example, should it simply authorize the President to issue an executive order on this issue (thereby giving future Presidents the flexibility to change its provisions), with certain other requirements for transparency and limits on delay? Or should the codification spell out in detail the process by which Presidents should review rules before they are published?

- Should independent regulatory agencies' rules be subject to presidential review (as they are now under the Paperwork Reduction Act)? Or would presidential review adversely affect the independence intended for these agencies?

- What role should OMB play in the presidential rule review process? Should OMB be a "counselor" to the agencies (as during the Clinton Administration), suggesting improvements to the agencies but generally deferring to agencies' statutory expertise? Or should it be more of a "gatekeeper" (as during the current Bush Administration) establishing strict standards and ensuring that regulations meet certain standards before publication?

- What rules should govern OMB's contacts with outside parties during the presidential review process? For example, should OMB be allowed to meet with regulated entities outside of the period when agencies are not permitted to do so (because of restrictions on *ex parte* communications)? Should OMB be required to disclose to the public not only that such a meeting occurred, but also a summary of what was said (as some agencies are required to do) to provide an administrative record for any subsequent changes?

- How transparent should the presidential review process be to the public? Are improvements in review transparency currently needed (either administratively or by statute)? Specifically:
  - Should OMB clearly define what types of "substantive" changes to rules need to be disclosed?
  - Should agencies or OMB be required to disclose substantive changes made to rules during "informal" reviews (when OMB says it can have its greatest effect)?
  - Should OMB clearly indicate in its database which rules were changed at its suggestion?

- A number of actions by OMB during the Bush Administration have had the effect of centralizing rulemaking authority in the Executive Office of the President. For example, within the past four years OMB has revitalized the regulatory review function under EO 12866 (emphasizing cost-benefit analysis, returning rules to the agencies); and issued governmentwide guidelines on data quality and peer review (with OMB able to determine when agencies' rules should be peer reviewed and at what level). Have these executive actions taken too much authority away from the agencies in whom Congress vested rulemaking authority, thereby upsetting the balance of power between Congress and the President in this area?

- How has the OIRA "prompt letter" process worked in the past four years?

- How is the OIRA logging provision in EO 12866 working?

- Should a new President be authorized to stay the effectiveness of "midnight rules" that are promulgated shortly before a new administration takes office? If so, should there be limits on the amount of time rules can be delayed?

**4. <u>Judicial Review of Rules</u>**

- Should Congress clarify whether the Information Quality Act permits judicial review?

- In light of the Supreme Court's 2001 ruling in *U.S. v. Meade*, is it time for Congress to establish rules of "deference" when a court finds a statutory delegation "ambiguous?"

- If studies showing that appellate courts are overturning more than 50% of challenged agency rules prove accurate, should Congress statutorily modify the "reasonable decisionmaking" standard, or limit judicial review in some other way?

- Should the APA be amended to make more clear when the courts can remand a rule without vacating it?

- The Chief Counsel for Advocacy of the Small Business Administration has been given unique power under SBREFA to file amicus briefs in cases challenging agency action. How effective/problematic has this been?

- Should Congress address the increasing use of consent decrees that modify or alter the substantive content of agency rules?

**5. <u>The Agency Adjudicatory Process</u>**

- Is there a need to reassess the role of ALJs and how they are selected and evaluated? Should regulatory ALJs be treated differently from benefits ALJs?

- Should the notion of a centralized ALJ corps be revisited?

- Is there a need to examine and review the role of non-ALJ hearing officers?

- Should the split-enforcement model of agency adjudication (e.g., OSHA-OSHRC) be used more often?

- Should the APA contain a provision regarding informal adjudication?

- Should the APA's adjudication provisions be extended to all evidentiary hearings required by statute?

**6. <u>The Utility of Regulatory Analysis and Accountability Requirements</u>**

- Should Congress reassess statutory requirements that prohibit agencies' considerations of cost in setting health and safety standards?

- Is cost-benefit analysis inherently biased in that the benefits of health and safety rules are often difficult or impossible to monetize?

- Executive Order 12866 requires agencies to assess the costs and benefits of all significant rules, and requires a full cost-benefit analysis of all "economically significant" rules. Does OMB apply these requirements and use cost-benefit information in a balanced way? For example, does OMB require all rules to have a cost-benefit analysis, or are certain rules exempt (e.g., Homeland Security rules)? Does OMB use cost-benefit analysis to prompt rulemaking or to increase regulatory requirements, or only to stop or limit rulemaking?

- How effective have been the regulatory requirements designed to protect small businesses and other small entities (e.g., the Regulatory Flexibility Act (RFA) and the Small Business Regulatory Enforcement Fairness Act)? Do they give federal agencies too much discretion in their application? Should SBA or some other entity be required to define key terms (e.g., "significant economic impact on a substantial number of small entities")? Or should there even be special protections for small businesses and other small entities?

- How effective have been the regulatory requirements designed to protect federalism (e.g., Executive Order 13132)? Do they give federal agencies too much discretion in their application? Should OMB or some other entity be required to define key terms (e.g., "significant federalism implications")? Or should there even be special protections for federalism?

- Should agencies be required to reexamine their rules periodically to ensure that they are still needed or impose the least burden? (Currently, agencies are only required to do so for rules that had/have a "significant economic impact on a substantial number of small entities.") Or, should Congress take on that reexamination responsibility (perhaps as contemplated in H.R. 3356 in the 108th Congress)? Relatedly, should agencies' final rules include a "sunset" provision that requires them to be reexamined and republished?

- Should the myriad of analytical and accountability requirements in various statutes and executive orders be rationalized and codified in one place?

- To what extent have the analytical and accountability requirements contributed to what is called by some the "ossification" of the rulemaking process?

- How accurate are agencies' pre-promulgation cost and benefit estimates?

- How much does it cost for agencies to conduct cost-benefit analyses, risk assessments, regulatory flexibility analyses, federalism assessments, etc.?

7. **<u>The Role of Science in the Regulatory Process</u>**

- How should scientific advisory panels be constructed to ensure that they are unbiased?

- Under what circumstances should agencies' regulatory policies deviate from the recommendations of their scientific staff and advisory bodies?

- In February 2002, OMB published governmentwide standards for information quality (as required by the Information Quality Act). Do agencies have too much discretion to deny correction requests? Should agencies' correction denials be subject to judicial review? What effect has the act had on the length of time it takes agencies to issue rules? Do the Shelby Amendment and the Information Quality Act, in tandem, potentially restrict the release of research findings that would have significant social impact?

- What is the appropriate role of the courts in reviewing science-based agency regulatory decisions?

- In December 2004, OMB published governmentwide standards for peer review of scientific information. Are governmentwide standards for peer review needed? Does OMB have the authority to issue such standards? What effect will these requirements have on the length of time it takes agencies to issue rules?

- What has been the effect of the Supreme Court's ruling in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (regarding the acceptance and understanding of scientific evidence to be used in the legal system) on regulatory policymaking?

As of this date two major empirical studies are underway. One, conducted under the direction of Professor Jody Freeman of the Harvard Law School, is looking at the nature and impact of judicial review of agency rulemaking over a 10 year period in the 11 federal circuit courts of appeal. Professor Freeman is a fellow panelist today and will describe her plan for this daunting and important undertaking. The second study is being led by Professor William West of the Bush School of Government and Public Service, Texas A&M University at College Station, Texas, and will be looking into influence on the initiation, design, and development of new rules at 20 agencies during the period prior to the publication of a notice of proposed rulemaking for public comment in the Federal Register. Professor West will be assisted by eight graduate students. The study will be in part funded by a Capstone Program Grant from the Congressional Research Service. Both studies are expected to provide at least preliminary results by Spring 2006. Exploratory contacts for the conduct of several other studies are under way. It is hoped that this hearing will spur independent proposals for studies to be considered by the CRS team.

Finally, I have previously suggested that ACUS being in operation was not essential, at least initially, to the success of the Committee's Project. It is anticipated that many of the results of the studies will be directly useful in supplying the basis for possible legislative action. Other results should be available to affected agencies and may inform or influence action to remedy administrative process shortcomings. In the view of many, however, the value in the long term of an operational ACUS for a fairer, more effective, and more efficient administrative process is inestimable , but sure, and is evidenced by the strongly supported congressional reauthorization in 2004. As you are aware, CRS does not take a position on any legislative options, and it is not my intent to espouse such a position on behalf of CRS. It may be useful, however, for this public record to re-state the rationale that appears to have been successful in supporting the passage of the ACUS reauthorization measure.

ACUS' past accomplishments in providing non-partisan, non-biased, comprehensive, and practical assessments and guidance with respect to a wide range of agency processes,

procedures, and practices is well documented.[1] During the hearings considering ACUS' reauthorization, C. Boyden Gray, a former White House Counsel in the George H.W. Bush Administration, testified before the House Judiciary Committee's Subcommittee on Commercial and Administrative Law in support of the reauthorization of ACUS, stating: "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." [2] Further evidence of the widespread respect of, and support for, ACUS' continued work at the hearings was presented by Supreme Court Justices Antonin Scalia and Stephen Breyer. Justice Scalia stated that ACUS "was a proved and effective means of opening up the process of government to needed improvement," and Justice Breyer characterized ACUS as "a unique organization, carrying out work that is important and beneficial to the average American, at a low cost."[3] Examples of the accomplishments for which ACUS has been credited range from the simple and practical, such as the publication of time saving resource material, to analyses of complex issues of administrative process and the spurring of legislative reform in those areas.[4]

During the period of its existence Congress gave ACUS facilitative statutory responsibilities for implementing, among others, the Civil Penalty Assessment Demonstration Program; the Equal Access to Justice Act; the Congressional Accountability Act; the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act; provision of administrative law assistance to foreign countries; the Government in the Sunshine Act of 1976; the Railroad Revitalization and Regulatory Reform Act of 1976; the Administrative Dispute Resolution Act; and the Negotiated Rulemaking Act.

In addition, ACUS produced numerous reports and recommendations that may be seen as directly or indirectly related to issues pertinent to current national security, civil liberties, information security, organizational, personnel, and contracting issues that often had government-wide scope and significance. A listing and brief description of 28 such products may be found in Appendix A of this submission.

ACUS evolved a structure to develop objective, non-partisan analyses and advice, and a meticulous vetting process, which gave its recommendations credence. Membership included senior (often career) management agency officials, professional agency staff, representatives of diverse perspectives of the private sector who dealt frequently with agencies, leaders of public interest organizations, highly regarded scholars from a variety of

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[1] See *e.g.*, Gary J. Edles, The Continuing Need for An Administrative Conference, 50 Adm. L. Rev. 101 (1998); Toni M. Fine, A Legislative Analysis of the Demise of ACUS, 30 Ariz. St. L.J. 19 (1998); Jeffrey Lubbers, "If It Didn't Exist, It Would Have to Be Invented."–Reviving the Administrative Conference, 30 Ariz. St. L.J. 147 (1998); Paul R. Verkuil, Speculating About the Next Administrative Conference: Connecting Public Management to the Legal Process, 30 Ariz. St. L.J. 187 (1998).

[2] C. Boyden Gray, Testimony Before the U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, Hearing on the Reauthorization of the Administrative Conference of the United States, 108th Cong., 2d Sess. (June 24, 2004).

[3] Reauthorization Hearings, *supra* note 5 (May 20, 2004).

[4] Fine, *supra,* note 1 at 46. See also Gary J. Edles, The Continuing Need for an Administrative Conference, 50 Admin. L. Rev. 101, 117 (1998); Jeffrey Lubbers, Reviving the Administrative Conference of the United States, 51 Dec. Fed. Law 26 (2004).

disciplines, and respected jurists. Although in the past the Conference's predominant focus was on legal issues in the administrative process, which was reflected in the high number of administrative law practitioners and scholars, membership qualification has never been static and need not be. Hearing witnesses and commentators on the revival of ACUS have strongly suggested that the contemporary problems facing a new ACUS will include management as well as legal issues. The Committee can assure that ACUS's roster of experts will include members with both legal backgrounds and those with management, public administration, political science, dispute resolution, and law and economics backgrounds. It could also encourage that state interests be included in the entity's membership.

All observers, both before and after the demise of ACUS in 1995, have acknowledged that the Conference was a cost-effective operation. In its last year, it received an appropriation of $1.8 million. But all have agreed that it was an entity that throughout its existence paid for itself many times over through cost-saving recommended administrative innovations, legislation and publications. At the heart of this cost saving success was the ability of ACUS to attract outside experts in the private sector to provide hundreds of hours of volunteer work without cost and the most prestigious academics for the most modest stipends. The Conference was able to "leverage" its small appropriation to attract considerable in-kind contributions for its projects. In turn, the resulting recommendations from those studies and staff studies often resulted in huge monetary savings for agencies, private parties, and practitioners. Some examples include: In 1994, the FDIC estimated that its pilot mediation program, modeled after an ACUS recommendation, had already saved it $9 million. In 1996, the Labor Department, using mediation techniques suggested by the Conference to resolve labor and workplace standard disputes, estimated a reduction in time spent resolving cases of 7 to 11 percent. The President of the American Arbitration Association testified that ACUS's encouragement of administrative dispute resolution had saved "millions of dollars" that would otherwise have been spent for litigation costs. ACUS's reputation for the effectiveness and the quality of its work product resulted in contributions in excess of $320,000 from private foundations, corporations, law firms, and law schools over the four-year period prior to its defunding. Finally, in his testimony before the Subcommittee Justice Scalia commented, when asked about the cost-effectiveness of the Conference, that it was difficult to quantify in monetary terms the benefits of providing fair, effective, and efficient administrative justice processes and procedures.

According to this view, prompt funding to make ACUS operational would come at an opportune time. The Departments of Homeland Security's (DHS) response to Hurricane Katrina and its continuing efforts to stabilize and adjust its organizational units to achieve optimum efficiency and responsiveness in planning for and successfully dealing with terrorist or natural disaster incidents are receiving considerable congressional attention and criticism. Both these issues, and the role ACUS might play in resolving them, are closely related.

The Katrina catastrophe has raised a number of questions as to the organization, authority and decisionmaking capability of DHS' Federal Emergency Management Agency (FEMA). Previously an independent, cabinet-level agency reporting directly to the President, FEMA was made a subordinate agency in the creation of DHS and saw some of its authority withdrawn and placed elsewhere and its funding reduced. Suggestions have been made that these and other administrative operating deficiencies contributed to ineffective planning and responses that included communications break-downs among Federal, State and local officials, available resources not being used, and official actions

taken too late or not taken at all, among others.[5] It has also been suggested that FEMA revert to its previous independent status outside of DHS.

Moreover, it is not clear at present, for example, which laws provide authority to grant regulatory waivers or extensions of time for reports or applications to assist victims of a catastrophic terrorist or natural disaster incident or to ease the economic effects of such incidents. There appears to be no central coordinating authority for such situations or even a complete catalogue of such waiver or extension authorities that can serve as a guide.[6]

A reactivated and operational ACUS could be tasked with reviewing, assessing and making recommendations with respect to FEMA's role, where it should play that role, and the authorities it needs to fulfill that role, as well as assessing the need for a comprehensive waiver and extension authority for such emergency situations.

The terrorist attacks of September 11, 2001, have had and will continue to have a profound effect on governmental processes. One of the initial responses to the 9/11 attacks was the creation in November 2002 of the Department of Homeland Security (DHS), a consolidation of all or parts of 22 existing agencies. Each of the agencies transferred to DHS had its own special organizational rules and rules of practice and procedure. Additionally, many of the agencies transferred have a number of different types of adjudicative responsibilities. These include such diverse entities as the Coast Guard and APHIS which conduct formal-on-the record adjudications and have need for ALJs; and formal rules of practice; the Transportation Security Administration and the Customs Service, which have a large number of adjudications but do not use ALJs; and the transferred Immigration and Naturalization Service units which also perform discrete adjudicatory functions. The statute is silent as to whether, and to what extent, these adjudicatory programs should be combined and careful decisions about staffing and procedures are still required. Similarly, all the agencies transferred have their own statutory and administrative requirements for rulemaking that likely will have to be integrated. Also, the legislation gives broad authority to establish flexible personnel policies. Further, provisions of the DHS Act eliminated the public's right of access under the Freedom of Information Act and other information access laws to "critical infrastructure information" voluntarily submitted to DHS. The process of integration and implementation of the various parts of the legislation goes on and is likely to need administrative fine tuning for some time to come. An operational ACUS has a clear role to play here.

The recommendations of the 9/11 Commission with respect to reforms and restructuring of the intelligence community were recognized by the Commission as having the potential of profoundly affecting government openness and accountability. It noted:

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[5] See, *e.g.*, Susan B. Glassner and Michael Grunwald, Hurricane Katrina- What Went Wrong, Wash. Post., Sept. 11, 2005, A1, A6-A8.

[6] CRS has produced at least seven reports directly or indirectly addressing the issue: "Regulatory Waivers and Extensions Pursuant to Hurricane Katrina," RS22253, Sept. 19, 2005; "Emergency Waiver of EPA Regulations: Authorities and Legislative Proposals in the Aftermath of Hurricane Katrina," RL33107, Sept. 29, 2005; "Hurricane Katrina: The Response by the Internal Revenue Service," RS22261, Sept. 14, 2005; "Hurricane Katrina: Medicaid Issues," RL33083, Oct. 11, 2005; "Katrina Relief: U.S. Labor Department Exemption of Contractors from Written Affirmative Action Requirements," RS22282, Sept. 27, 2005; "Hurricane Katrina: Education and Training Issues," RL33089, Sept. 22, 2005; "Natural Emergency Powers," 98-505 GOV, Sept. 15, 2005. One bill has been introduced to "clarify" EPA's authority. See S. 1711.

> Many of our recommendations call for the government to increase its presence in our lives– for example, by creating standards for the issuance of forms of identification, by better securing our borders, by sharing information gathered by many different agencies. We also recommend the consolidation of authority over the now far-flung entities constituting the intelligence community. The Patriot Act vests substantial powers in our federal government. We have seen the government use the immigration laws as a tool in its counter-terrorism effort. Even without changes we recommend, the American public has vested enormous authority in the U.S. government.
>
> At our first public hearing on March 31, 2003, we noted the need for balance as our government responds to the real and ongoing threat of terrorist attacks. The terrorists have used our open society against us. In wartime, government calls for greater powers, and then the need for those powers recedes after the war ends. This struggle will go on. Therefore, while protecting our homeland, Americans should be mindful of threats to vital personal and civil liberties. This balancing is no easy task, but we must constantly strive to keep it right. This shift of power and authority to the government calls for an enhanced system of checks and balances to protect the precious liberties that are vital to our way of life.

A reactivated ACUS could be utilized to facilitate the process of implementation of the restructuring and reorganization of the bureaucracy for national security purposes. ACUS could serve to identify measures that might slow down the administrative decisional process, thereby rendering the agency less efficient in securing national security goals, and also to assist in carefully evaluating and designing security mechanisms and procedures that can minimize the number and degree of necessary limitations on public access to information and public participation in decisionmaking activities that affect the public, and minimize infringement on civil liberties and the functioning of a free market. At present DHS is engaged in effecting its first agency-wide reorganization effort since its establishment in 2002. Its proposal, announced in July 2005, was scheduled to become effective on October 1, 2005, and is not subject to formal congressional review and approval or disapproval.[7]

Finally, in addition to the impact of 9/11, the decade-long period since ACUS's demise has seen significant changes in governmental policy focus and emphasis in social and economic regulatory matters, as well as innovations in technology and science, that appear to require a fresh look at old process issues. For example, the exploding use of the Internet and other forms of electronic communications presents extraordinary opportunities for increasing government information available to citizens and, in turn, citizen participation in governmental decisionmaking through e-rulemaking. A number of recent studies have suggested that if the procedures used for e-rulemaking are not carefully developed, the public at large could be effectively disenfranchised rather than having the effect of enhancing public participation. The issue would appear ripe for ACUS-like guidance. Among other public participation issues that may need study include the peer review

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[7] The DHS reorganization is discussed in CRS Report No. RL 33042, "Department of Homeland Security Reorganization: The 2SR Initiative," and deals with issues concerning the means for realizing the proposed 2 SR reorganizations; the efficiencies and effectiveness that will result with the proposed flatter, but more sprawling, restructuring and how new leadership positions will be established, filed, compensated, and situated in the DHS hierachy.

process; early challenges to special provisions for rules that are promulgated after a November presidential election in which an incumbent administration is turned out and a new one will take office on January 20 (the so-called "Midnight Rules" problem); and the continued problem of avoidance by the agencies of notice and comment rulemaking by means of "non-rule rules." Control of agency rulemaking by Congress and the President continues to present important process and legal issues. Questions that might be presented for ACUS study could include: Should the Congress establish government-wide regulatory analyses and regulatory accountability requirements? Should the Congressional Review Act be revisited to make it more effective? Is there an effective way to review, assess and modify or rescind "old" rules? Is the time ripe for codification of the process of presidential review of rulemaking that is now guided by executive order. Finally, recent studies have raised questions as to the efficacy of judicial review of agency rulemaking. Statistical evidence has shown that appellate courts are overturning challenged agency rules at rates in excess of 50%. Is it appropriate for Congress to consider statutorily modifying the "reasonable decisionmaking standard" now prevailing, or to limit judicial preview of rulemaking by, for example, having all "major" rules come to Congress and be subject to joint resolutions of approval? These are among a myriad of process, procedure, and practices issues that could be addressed by a revived ACUS.

**Appendix A***

## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES: A SELECTED BIBLIOGRAPHY OF RECOMMENDATIONS PERTINENT TO NATIONAL SECURITY, CIVIL LIBERTIES, INFORMATION SECURITY, AGENCY ORGANIZATION AND REORGANIZATION, PERSONNEL AND CONTRACTING ISSUES

This bibliography identifies ACUS Recommendations that either directly or indirectly focus on issues pertinent to national security and related civil liberties issues, and issues related to information security, agency organization and reorganization, personnel and contracts issues. The bibliography is broken down into categories, with a brief statement explaining the relevancy of each entry.

### National Security/Civil Liberties Issues

1. **Anderson, David R., and Diane M. Stockton.** Ombudsmen in Federal agencies: the theory and the practice. 1990 ACUS 105. *Also:* Federal ombudsmen: an underused resource. 5 ADMIN. L.J. AM. U. 275 (1991).
   Recommendation 90-2: "The Ombudsman in Federal Agencies." 1 C.F.R. § 305.90-2 (1993), and 55 FED. REG. 34,211 (Aug. 22, 1990). Reason for inclusion: Ombudsman mechanisms might be useful at DHS to deal with other tensions arising from national security/protection of civil liberties issues.

2. **Bonfield, Arthur E.** "Military and foreign affairs function" rulemaking under the APA. 3 ACUS 226 (1975), and 71 MICH. L. REV. 221 (1972).
   Recommendation 73-5: "Elimination of the `Military or Foreign Affairs Function' Exemption From APA Rulemaking Requirements." 1 C.F.R. § 305.73-5 (1993), and 39 FED. REG. 4,847 (Feb. 7, 1974). Reason for inclusion: Early recommendations concerning how to accommodate public participation with military and foreign affairs needs.

3. **Fenton, Howard N., III.** Recommendations for injecting needed openness and due process reforms into the U.S. export control procedures. 1991 ACUS 173. *Also:* Reforming the procedures of the Export Administration Act: a call for openness and administrative due process. 27 TEX. INT'L L.J. 1 (1992).
   Recommendation 91-2: "Fair Administrative Procedure and Judicial Review in Commerce Department Export Control Proceedings." 1 C.F.R. § 305.91-2 (1993), and 56 FED. REG. 33,44 (July 24, 1991). Reason for inclusion: The need to review export control procedures is arguably greater than ever.

4. **Kress, Jack M., and Carole D. Iannelli.** Administrative search and seizure: whither the warrant? 31 VILL. L. REV. 705 (1986). Reason for inclusion: Touches upon issues that are of particular importance in the national security and civil liberties contexts.

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* The information in this Appendix was supplied by Professor Jeffrey S. Lubbers, Fellow in Administrative Law, American University, Washington College of Law. Professor Lubbers was Research Director of ACUS from 1982 to 1995.

5. **Legomsky, Stephen H.** Forum choices for the review of agency adjudication: a study of the immigration process. 1985 ACUS 505, and 71 IOWA L. REV. 1297 (1986). Recommendation 85-4: "Administrative Review in Immigration Proceedings." 1 C.F.R. § 305.85-4 (1993) and 50 FED. REG. 52,894 (Dec. 27, 1985). Reason for inclusion: With the substantial changes that have occurred at INS, the need to rationalize the appeals process is arguably greater than ever.

6. **Nafziger, James A. R.** Report on reviewability of visa denials by consular officers. 1989 ACUS 587. *Also:* Review of visa denials by consular officers. 66 WASH. L. REV. 1 (1991).
Recommendation 89-9: "Processing and Review of Visa Denials." 1 C.F.R. § 305.89-9 (1993), and 54 FED. REG. 53,496 (Dec. 29, 1989). Reason for inclusion: While focused primarily on due process issues, this study is pertinent to the extent that Visa processes have become increasingly controversial.

7. **Perritt, Henry H., Jr.** Electronic acquisition and release of Federal agency information. 1988 ACUS 601, and 141 ADMIN. L. REV. 253 (1989). *Also:* Federal electronic information policy. 63 TEMPLE L. REV. 201 (1990). *Also:* Electronic records management and archives. 53 U. PITT. L. REV. 961 (1992). *Partially reprinted:* At Appendix 7H *in:* Stein, Jacob A., Glenn A. Mitchell, and Basil J. Mezines. Administrative law. New York: Matthew Bender. Recommendation 88-10: "Federal Agency Use of Computers in Acquiring and Releasing Information." 1 C.F.R. § 305.88-10 (1993), and 54 FED. REG. 5,209 (Feb. 2, 1989). Reason for inclusion: this study considers electronic FOIA and privacy concerns, an issue of particular importance in the national security and civil liberties contexts.

8. **Perritt, Henry H., Jr.** Federal agency electronic records management and archives. 1990 ACUS 389. *Also:* Electronic records management and archives. 53 U. PITT. L. REV. 963 (1992).
Recommendation 90-5: "Federal Agency Electronic Records Management and Archives." 1 C.F.R. § 305.90-5 (1993) and 55 FED. REG. 53,270 (Dec. 28, 1990). Reason for inclusion: As with the previous recommendation, this study considers FOIA and privacy issues of particular importance in the national security and civil liberties contexts.

9. **Shane, Peter F.** Negotiating for knowledge: administrative responses to Congressional demands for information. 1990 ACUS 611. *Also:* Administrative responses to Congressional demands for information. 44 ADMIN. L. REV. 197 (1992). Recommendation 90-7: "Administrative Responses to Congressional Demands for Sensitive Information." 1 C.F.R. § 305.90-7 (1993), and 55 FED. REG. 53,272 (Dec. 28, 1990). Reason for inclusion: The need for better ways to resolve executive/legislative disputes over access to information is a pressing issue in the national security context.

10. **Stevenson, Russell B., Jr.** Protecting business secrets under the Freedom of Information Act: managing Exemption 4. 1982 ACUS 81 (Vol. 1), and 34 ADMIN. L. REV. 207 (1982).
Recommendation 82-1: "Exemption (b)(4) of the Freedom of Information Act." 1 C.F.R. § 305.82-1 (1988), and 47 FED. REG. 30,702 (July 15, 1982), as amended at 54 FED. REG. 6,862 (Feb. 15, 1989). [Note: The President in 1987 issued Executive Order 12600, which requires agencies to follow procedures similar to those

recommended by ACUS]. Reason for inclusion: This Recommendation precipitated an Executive Order on the issue by President Reagan, but the protection of such information remains an important issue.

11. **Verkuil, Paul R., Daniel Gifford, Charles Koch, Richard Pierce, and Jeffrey S. Lubbers**. The Federal administrative judiciary. 1992 ACUS 773. *Also:* Verkuil, Paul R. Reflections upon the Federal administrative judiciary. 39 UCLA L. REV. 1341 (1992). *An extract of this report also published as:* Lubbers, Jeffrey S. The Federal administrative judiciary: establishing an appropriate system of performance evaluation for ALJs. 7 ADMIN. L.J. AM. U. 589 (1994). *Supra* no. 234.
Recommendation 92-7: "The Federal Administrative Judiciary." 1 C.F.R. § 305.92-7 (1993), and 57 FED. REG. 61,760 (Dec. 29, 1992). Reason for inclusion: This recommendation was the result of a major study by ACUS on ALJs and AJs, and included information on the need for performance evaluation. Similar issues adhere in the national security and civil liberties contexts given the expanded authority of certain agencies in this regard.

12. **Wright, Ronald F.** The right to counsel during agency investigations. 1993 ACUS 509.
Statement 16: "Right to Consult with Agency Counsel in Agency Investigations." 59 FED. REG. 4,677 (Feb. 1, 1994). Reason for inclusion: Agency investigative procedures are relevant to both national security and civil liberties concerns.

**Health/Safety Issues**

13. **Aman, Alfred C., Jr.** Institutionalizing the energy crisis: some structural and procedural lessons. 1980 ACUS 205, and 65 CORNELL L. REV. 491 (1980).
Recommendation 80-2: "Enforcement of Petroleum Price Regulations." 1 C.F.R. § 305.80-2 (1982), and 45 FED. REG. 46,774 (July 11, 1980). Reason for inclusion: Responsive to the energy crisis of the 1970's.

14. **Baram, Michael S.** Risk communication by regulatory agencies in protecting health, safety, and the environment. 1990 ACUS 207.
Recommendation 90-3: "Use of Risk Communication by Regulatory Agencies in Protecting Health, Safety, and the Environment." 1 C.F.R. § 305.90-3 (1993), and 55 FED. REG. 34,212 (Aug. 22, 1990). Reason for inclusion: Risk communication has taken on new urgency.

15. **Hamilton, Robert W.** Role of nongovernmental standards in the development of mandatory Federal standards affecting safety or health. 1978 ACUS 247, and 56 TEX. L. REV. 1329 (1978).
Recommendation 78-4: "Federal Agency Interaction with Private Standard-Setting Organizations in Health and Safety Regulation." 1 C.F.R. § 305.78-4 (1993), and 44 FED. REG. 1,357 (Jan. 5, 1979). Reason for inclusion: The use of outside standard setting organizations is especially important in the national security arena.

16. **Shapiro, Sidney A**. Biotechnology and the design of regulation. 1989 ACUS 475, and 17 ECOLOGY L.Q. 1 (1990).

Recommendation 89-7: "Biotechnology and the Design of Regulation." 1 C.F.R. § 305.89-7. Reason for inclusion: Biotechnology has become particularly relevant as a national security issue.

17. **Shaw, William R.** The procedures to ensure compliance by Federal facilities with environmental quality standards. 4 ACUS 283 (1979), and 5 ENVTL. L. REP. 50,211 (1975).
Recommendation 75-4: "Procedures to Ensure Compliance by Federal Facilities with Environmental Quality Standards." 1 C.F.R. § 305.75-4 (1993), and 40 FED. REG. 27,928 (July 2, 1975). Reason for inclusion: The tension between the conduct of military activities and training an environmental protection goals is arguably greater than ever.

**Personnel and Contracting Issues**

18. **Fidell, Eugene R.** Federal protection of private sector health and safety whistleblowers. 1987 ACUS 219, and 2 ADMIN. L.J. AM. U. 1 (1988), and 134 CONG. REC. S1447 (Daily ed., Feb. 23, 1988).
Recommendation 87-2: "Federal Protection of Private Sector Health and Safety Whistleblowers," 1 C.F.R. § 305.87-2 (1993), and 52 FED. REG. 2363 (June 24, 1987). Reason for inclusion: Whistleblowers serve an effective and valuable function in providing the government with information regarding security breakdowns, etc.

19. **Grad, Frank P.** Contractual indemnification of government contractors. 1988 ACUS 103, and 4 ADMIN. L.J. AM. U. 433 (1991).
Recommendation 88-2: "Federal Government Indemnification of Government Contractors." 1 C.F.R. § 305.88-2 (1993), and 53 FED. REG. 26,027 (July 11, 1988), and 53 FED. REG. 39,588 (Oct. 11, 1988). Reason for inclusion: The need to provide for optimum protection of government contractors is arguably greater than ever.

20. **Luneburg, William V.** The Federal personnel complaint, appeal and grievance system: a structural overview and proposed revisions. 1989 ACUS 895, and 78 KEN. L.J. 1 (1989-90).
Statement 15: "Procedures for Resolving Federal Personnel Disputes." 1 C.F.R. § 310.15 (1993)and 54 FED. REG. 53,498 (Dec. 29, 1988). Reason for inclusion: The need to upgrade civil service appeal and grievance procedures is arguably greater than ever.

21. **Michael, Douglas C.** Federal agency use of audited self-regulation as a regulatory technique. 1994-1995 ACUS 65, and 47 ADMIN. L. REV. 171 (1995).
Recommendation 94-1: "The Use of Audited Self-Regulation as a Regulatory Technique." 59 FED. REG. 44,701 (Aug. 30, 1994). Reason for inclusion: Provides an overview of issues pertaining to self-regulating organizations.

**Organizational/Regulatory Issues**

22. **Asimow, Michael.** When the curtain falls: separation of functions in Federal administrative agencies. 1981 ACUS 141, and 81 COLUM. L. REV. 759 (1981). Reason

for inclusion: With the creation of DHS, special problems of separating investigatory and adjudicative functions might arise.

23. **Bermann, George A.** Regulatory cooperation with counterpart agencies abroad: the FAA's aircraft certification experience. 1991 ACUS 63, and 24 LAW & POL'Y INT'L BUS. 669 (1993).
Recommendation 91-1: "Federal Agency Cooperation with Foreign Government Regulators." 1 C.F.R. § 305.91-1 (1993), and 56 FED. REG. 33,842 (July 24, 1991). Reason for inclusion: The need for international cooperation in regulatory activities is arguably greater than ever, and this study was one of the first to focus on the issue.

24. **Fallon, Richard H., Jr.** Imposing civil money for violations of Federal aviation regulations: implementing a fair and effective system. 1990 ACUS 43. *Also:* Enforcing aviation safety regulations: a case for the split-enforcement model of agency adjudication. 4 ADMIN. L.J. AM. U. 389 (1991).
Recommendation 90-1: "Civil Money Penalties for Federal Aviation Violations." 1 C.F.R. § 305.90-1 (1993), and 55 FED. REG. 34,209 (Aug. 22, 1990). Reason for inclusion: This study recommended a fair, restructured process for dealing with FAA/NTSB enforcement of aviation penalties and could thus serve as a model for DHS related activities.

25. **Gellhorn, Ernest.** Public participation in administrative proceedings. 2 ACUS 376 (1973), and 81 YALE L.J. 359 (1972).
Recommendation 71-6: "Public Participation in Administrative Hearings." 1 C.F.R. § 305.71-6. Reason for inclusion: An early study touching upon public participation issues.

26. **Kovacic, William E.** The choice of forum in bid protest disputes. 1994-1995 ACUS 507. *Also:* Procurement reform and the choice of forum in bid protest disputes. Forthcoming ADMIN. L.J. AM. U., Vol. 9, no. 3 (1995).
Recommendation 95-6. "Government Contract Bid Protests." 60 FED. REG. 43,113 (Aug. 18, 1995). Reason for inclusion: The importance of fair and efficient bid protest procedures is especially important in wartime.

27. **Szanton, Peter L.**, ed. Federal reorganization: what have we learned? Chatham, N.J.: Chatham House, 1981. Reason for inclusion: This publication, sponsored by ACUS, provides information on how to carry out effective executive reorganizations.

28. **Weaver, Russell L.** Organization of adjudicative offices in executive departments and agencies. 1993 ACUS 547. *Also:* Management of ALJ offices in executive departments and agencies. 47 ADMIN. L. REV. 303 (1995). Reason for inclusion: Provides information relating to the organization of departments and agencies.

Mr. CANNON. Thank you, Mort. The gentleman from North Carolina and Ranking Member of the Subcommittee is also the Chairman of the Congressional Black Caucus and has been extraordinarily busy with the passing of Rosa Parks, and so he has been concerned about his time. I leaned over and asked him if he thought I should tap, and his response was more or less no, this is great because we don't have to read it. And so I suggest that is exactly my view, by the way. And so we are going to be a little bit liberal, in fact, forget the clock. Just be interesting and, if you see one of us nodding off, then you know you have probably gone on too long.

Mr. ROSENBERG. I have one or two——

Mr. CANNON. We would like to hear that. Before you do so, let me suggest that we may be a little bit loose on the questioning too. As you were going through what were saying, Mort, it had occurred to me, are you familiar with WIKIsikis or Wikipedia, any of the panel? This is like a way for people to get online and work together. And you should look up Wikipedia, W-i-k-i-p-e-d-i-a, not the word spelling with the extra 'a,' and it is actually remarkable. It is a great encyclopedia that is created by people all over the world. And I suspect that, while we don't have this broad a base for the Administrative Procedure Act as we do have for an encyclopedia, there are many people that are interested and so a public forum, it might be interesting as part of the process you're considering. There are other tools. My office uses a tool called Net Documents, which most large law firms use, and it is a way to work collaboratively online. You may want to think about some of these tools in the process because if some wonk somewhere can take 5 minutes and review the latest activity and says, "Wow, you're wrong, you have missed an idea," it is a great way to really get a collaborative process. In the end, what we need here is not just a bipartisan process, we need a process the American people buy into because we are talking about 10 percent of our economy here. And that 10 percent does many things.

We were joking earlier about whether it does good things or not and it probably does, but it also limits the output of our economy in a dramatic way. So to the degree that we can remove obstacles that are not helpful, maybe create new obstacles that would be more helpful to what we don't have right now, and be more rational, we would do well. And that I think means that you might have a very, very large group of people that get engaged in that process.

Thanks, Mr. Mihm. You're recognized for 5 minutes or whatever.

## TESTIMONY OF J. CHRISTOPHER MIHM, MANAGING DIRECTOR OF STRATEGIC ISSUES, UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE

Mr. MIHM. Thank you, Mr. Chairman and Mr. Watt. It is an honor to be here. And Mr. Chairman, I will try and take your challenge of being interesting. That is a high bar but I am very pleased to be here and to contribute to your overview of Federal rulemaking and obviously we look forward to supporting this Subcommittee in its comprehensive and bipartisan review as you move forward.

As you mentioned in your opening statement, sir, over the last decade or so, at the request of Congress, we have prepared over 60 reports and testimonies reviewing cross-cutting aspects of rulemaking procedures and practices. Overall that work has found that—has identified important benefits of the efforts to enhance Federal rulemaking. At the same time, we have also pointed out some potential weaknesses and impediments to realizing those expected improvements. We have also identified some trends and challenges in the rulemaking environment that have emerged over the years that in our view merit closer congressional attention and consideration.

I will touch on each of these points in turn. In terms of the benefits then, as detailed in my written statement, our review has identified at least four overall benefits associated with existing regulatory analysis and accountability requirements. First, encouraging and facilitating greater public participation in rulemaking that clearly gives opportunities for the public to communicate with agencies by electronic means have expanded and requirements imposed by some of the regulatory reform initiatives have encouraged additional consultation with affected parties.

Second, improving the transparency of the rulemaking process. Initiatives implemented over the past 25 years have helped to make the rulemaking process more open by facilitating public access to information, providing more information about the potential effects of rules and available alternatives, and requiring more documentation and justification of agency decisions.

Third, increasing the attention directed to rules and rulemaking. Our reports have pointed out that the oversight of agencies' rulemaking can and has resulted in useful changes to those rules and furthermore that agencies' awareness of this added scrutiny may provide an important and direct effect, potentially leading to less costly, more effective rules.

And finally, increasing expectations regarding the analytic support for proposed rules. The requirements that have been added over the years have raised the bar regarding information and analysis needed to support regulations. Such requirements have also prompted agencies to provide more data on the expected benefits and costs of their rules, and encouraged the identification and consideration of available alternatives.

On the other hand, as I mentioned, we have also identified at least four recurring reasons why reform initiatives have not been as effective. I think these are certainly consistent with the research agenda that the Subcommittee is putting forward.

First, there has been a lack of clarity and other weaknesses in key terms and definitions. For example RFA's analytical requirements, which were intended to help address concerns about the impact of rules on small entities, do not apply if an agency head certifies that the rule will not have, "a significant economic impact on a substantial number of small entities." However, RFA neither defines this key phrase nor, importantly, places responsibility on any party to define it consistently across the Government, which not surprisingly has led to quite a bit of variance.

Second, the limited scope and coverage of various requirements. For example, we pointed out last year that the relatively small

number of rules identified as containing mandates under the unfunded mandates legislation could be attributed in part to the 14 different exemptions, exclusions and other restrictions on the identification of regulatory mandates under the act.

Third, the uneven implementation of the initiatives' requirements. For example, our reviews of economic assessments that analyze regulations prospectively has found that those assessments are not always useful for comparisons across Government, because they are often based on different assumptions of the same key economic variables.

And finally, a predominant focus on just one part of the regulatory process, and Mr. Chairman, in your opening statement this is certainly a point you were making. We have placed more analytic and procedural requirements on agencies' development of rules than on other phases of the regulatory process, from the underlying statutory authorization, through effective implementation and monitoring of compliance with rules, to an evaluation of existing rules. What are we actually getting in terms of benefits and costs associated with rules?

Thus, while rulemaking is clearly an important point in the regulatory process, other phases can also help determine the effectiveness of Federal regulation.

The findings and emerging issues reported in our body of work on Federal rulemaking suggest a few areas in which Congress might consider legislative action or further study, which are of course certainly consistent with those issues that are laid out in the Subcommittee's oversight plan and also as Mort was touching on in his written statement.

We believe that first there is a need to reexamine rulemaking structures and processes, including APA, again a point, Mr. Chairman, you made in your opening statement.

Second, there is a need to address previously identified weaknesses of existing statutory requirements.

Third, we should promote additional improvements in the transparency of agencies' rulemaking actions.

And fourth, a point, Mr. Watt, that you were making in regards to information technology, we need to open a broader examination of how developments in information technology might effect the notice in common under rulemaking process. And as you pointed out, sir, there are key issues of security, transparency and access that all need to be carefully weighed and balanced off against one another.

Mr. Cannon, Mr. Watt, this concludes my statement. I will be happy to answer any questions you may have.

[The prepared statement of Mr. Mihm follows:]

PREPARED STATEMENT OF J. CHRISTOPHER MIHM

United States Government Accountability Office

GAO

Testimony

Before the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, House of Representatives

For Release on Delivery
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# FEDERAL RULEMAKING

# Past Reviews and Emerging Trends Suggest Issues That Merit Congressional Attention

Statement of J. Christopher Mihm
Managing Director, Strategic Issues

GAO-06-228T

November 1, 2005

GAO
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Highlights

Highlights of GAO-06-228T, a testimony before the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, House of Representatives

# FEDERAL RULEMAKING

## Past Reviews and Emerging Trends Suggest Issues That Merit Congressional Attention

### Why GAO Did This Study

Federal regulation is one of the basic tools of government used to implement public policy. Agencies publish thousands of regulations each year to achieve goals such as ensuring that workplaces, air travel, and food are safe; that the nation's air, water, and land are not polluted; and that the appropriate amount of taxes are collected. Because regulations affect so many aspects of citizens' lives, it is crucial that rulemaking procedures and practices be effective and transparent.

GAO, at the request of Congress, has prepared over 60 reports and testimonies during the past decade that review aspects of federal rulemaking procedures and practices. This testimony summarizes some of the general findings and themes that have emerged from GAO's body of work on federal regulatory processes and procedures, including areas on which Congress might consider taking legislative action or sponsoring further study. GAO's prior reports and testimonies contain a variety of recommendations to improve various aspects of rulemaking procedures and practices.

www.gao.gov/cgi-bin/getrpt?GAO-06-228T.

To view the full product, including the scope and methodology, click on the link above. For more information, contact J. Christopher Mihm at (202) 512-6806 or mihmj@gao.gov.

### What GAO Found

GAO's prior evaluations highlighted both benefits and weaknesses of rulemaking procedures and practices in areas such as (1) regulatory analysis and accountability requirements, (2) presidential and congressional oversight of agency rulemaking, and (3) notice and comment rulemaking procedures under the Administrative Procedure Act (APA).

GAO's reviews identified at least four overall benefits associated with existing regulatory analysis and accountability requirements: encouraging and facilitating greater public participation in rulemaking; improving the transparency of the rulemaking process; increasing the attention directed to rules; and increasing expectations regarding the analytical support for proposed rules. On the other hand, GAO identified at least four recurring reasons why such requirements have not been more effective: unclear key terms and definitions; limited scope and coverage; uneven implementation by agencies; and a predominant focus on just one part of the regulatory process.

With regard to executive branch and congressional oversight of agencies' rulemaking, GAO has noted that efforts to increase presidential influence and authority over the regulatory process, through mechanisms such as the Office of Management and Budget's reviews of agencies' rulemaking, have become more significant over the years. However, mechanisms intended to increase congressional influence, such as procedures for disapproval of regulations under the Congressional Review Act, appear to have been less able to influence changes in agencies' rules to date.

GAO's reviews of agencies' compliance with rulemaking requirements under APA pointed out that agencies often did not published notices of proposed rulemaking (to solicit public comments) before issuing final rules, including some major rules with an impact of $100 million or more on the economy. APA provides exceptions to notice and comment requirements for "good cause" and other reasons, but GAO noted that agencies' explanations for use of such exceptions were sometimes unclear. Also, several analytical requirements for proposed rules do not apply if an agency does not publish a proposed rule. However, some of the growth in final rules without proposed rules appeared to reflect increased use of "direct final" and "interim final" procedures intended for noncontroversial and expedited rulemaking.

The findings and emerging issues reported in GAO's body of regulatory work suggested four areas on which Congress might consider taking action or studying further: (1) generally reexamining rulemaking structures and processes, (2) addressing previously identified weaknesses of existing statutory requirements, (3) promoting additional improvements in the transparency of agencies' rulemaking actions, and (4) opening a broader examination of how developments in information technology might affect the notice and comment rulemaking process.

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to contribute to your overview of administrative law, process, and procedure, including issues associated with federal rulemaking. In my statement today, I will summarize some of the general findings and themes that have emerged from our body of work on federal regulatory processes and procedures, including areas on which the subcommittee might consider taking legislative action or sponsoring further study.

In brief, our prior work identified important benefits of laws and executive orders designed to enhance federal rulemaking, such as enhanced transparency of the process. But we have also pointed out potential weaknesses and impediments to realizing expected improvements in the process, such as a lack of clarity in key terms and definitions associated with some regulatory analysis and accountability requirements. In addition, some trends and changes in the rulemaking environment that have emerged over the years might merit closer congressional attention and consideration of whether adjustments in federal rulemaking procedures and practices are needed to keep pace.

## Prior GAO Work Identified Benefits and Weaknesses of Rulemaking Procedures and Practices

Federal regulation, like taxing and spending, is one of the basic tools of government used to implement public policy. Agencies publish thousands of regulations each year to achieve goals such as ensuring that workplaces, air travel, and food are safe; that the nation's air, water, and land are not polluted; and that the appropriate amounts of taxes are collected. Because regulations affect so many aspects of citizens' lives, it is crucial that rulemaking procedures and practices be effective and transparent. Over the last decade, at the request of Congress, we have prepared over 60 reports and testimonies reviewing crosscutting aspects of those rulemaking procedures and practices.[1]

I would like to focus my remarks on topics or themes emerging from this work that are most relevant to this subcommittee's oversight agenda. These include: (1) regulatory analysis and accountability requirements, (2) presidential and congressional oversight of agency rulemaking, and

[1]Attached to this statement are the highlights pages from some of those reports and testimonies. We have also included a more extensive list of related GAO products at the end of this statement.

(3) notice and comment rulemaking procedures under the Administrative Procedure Act (APA).[2]

## Regulatory Analysis and Accountability Requirements

Congress has frequently asked us to evaluate the effectiveness of requirements that were initiated over the past 25 years to improve the federal regulatory process. Among the goals of these requirements are reducing regulatory burdens, requiring more rigorous regulatory analysis, and enhancing oversight of agencies' rulemaking. We have paid repeated attention to agencies' compliance with some of these requirements, such as ones in the Paperwork Reduction Act (PRA),[3] Regulatory Flexibility Act (RFA),[4] Unfunded Mandates Reform Act (UMRA),[5] Congressional Review Act (CRA),[6] and Executive Order 12866 on regulatory planning and review.[7]

Our reviews identified at least four overall benefits associated with existing regulatory analysis and accountability requirements:

- *Encouraging and facilitating greater public participation in rulemaking*—Some initiatives have encouraged and facilitated greater public participation and consultation in rulemaking. Opportunities for the public to communicate with agencies by electronic means have expanded and requirements imposed by some regulatory reform initiatives encouraged additional consultation with the parties that might be affected by rules under development by federal agencies.

- *Improving the transparency of the rulemaking process*—The initiatives implemented over the past 25 years have helped to make the rulemaking process more open by facilitating public access to information, providing more information about the potential effects of rules and

[2]Pub. L. No. 404, 60 Stat. 237 (1946), codified in 1966 in scattered sections of title 5, United States Code.

[3]44 U.S.C. §§ 3501-3520.

[4]5 U.S.C. §§ 601-612.

[5]Pub. L. No. 104-4, 109 Stat. 48 (1995), codified as amended in scattered sections of title 2, United States Code.

[6]5 U.S.C. §§ 801-808.

[7]Exec. Order No. 12866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

available alternatives, and requiring more documentation and justification of agencies' decisions. Although we have often recommended that more could be done to increase transparency, we have also highlighted the valuable contribution made when agencies had particularly clear and complete documentation supporting their rulemaking.

- *Increasing the attention directed to rules and rulemaking*—Our reports have pointed out that oversight of agencies' rulemaking from various sources—including Congress, the administration, and GAO, among others—can result in useful changes to rules. Furthermore, we noted that agencies' awareness of this added scrutiny may provide an important indirect effect, potentially leading to less costly, more effective rules.

- *Increasing expectations regarding the analytical support for proposed rules*—The analytical requirements that have been added over the years have raised the bar regarding the information and analysis needed to support policy decisions underlying regulations. Such requirements have also prompted agencies to provide more data on the expected benefits and costs of their rules and encouraged the identification and consideration of available alternatives.

On the other hand, we also identified at least four recurring reasons why the requirements imposed by such initiatives have not been more effective:

- *Lack of clarity and other weaknesses in key terms and definitions*—Unclear terms and definitions can affect the applicability and effectiveness of certain requirements. For example, we have frequently cited the need to clarify key terms in RFA. RFA's analytical requirements, which are intended to help address concerns about the impact of rules on small entities, do not apply if an agency head certifies that a rule will not have a "significant economic impact on a substantial number of small entities." However, RFA neither defines this key phrase nor places clear responsibility on any party to define it consistently across the government. Not surprisingly, we found that agencies' compliance with RFA varied widely from one agency to another and agencies had different interpretations of RFA's requirements. In another example, our review of agencies' compliance with a requirement to adjust civil monetary penalties for inflation under the Federal Civil

Penalties Inflation Adjustment Act (Inflation Adjustment Act),[8] indicated that both a lack of clarity and apparent shortcomings in some of the Act's provisions appeared to have prevented agencies from keeping their penalties in pace with inflation.[9] Although we recommended changes to address these shortcomings, to date Congress has not acted on our recommendations.

- *Limited scope and coverage of various requirements*—Simply put, some rulemaking requirements apply to few rules or require little new analysis for the rules to which they apply. For example, we pointed out last year that the relatively small number of rules identified as containing mandates under UMRA could be attributed in part to the 14 different exemptions, exclusions, and other restrictions on the identification of regulatory mandates under the Act. We also observed unintended "domino" effects of making certain requirements contingent on other requirements. For example, some requirements only apply to rules for which an agency published a notice of proposed rulemaking, but, as I will discuss later, we found that agencies issue many final rules without associated proposed rules. In addition, the requirement for "look back" reviews of existing regulations under section 610 of RFA only applies if the agency determined that its rule would have a significant economic impact on a substantial number of small entities. When RFA was amended in 1996 by the Small Business Regulatory Enforcement Fairness Act (SBREFA)[10] to require additional actions, such as preparing compliance guides and convening advocacy review panels for certain rules, this appeared to prompt a reduction in the number of rules that the Environmental Protection Agency identified as affecting small entities (and would therefore trigger the new requirements).

- *Uneven implementation of the initiatives' requirements*—Sometimes, agencies' implementation of various requirements serves to limit their effectiveness. For example, a recurring message in our reports over the

[8]28 U.S.C. § 2461 note.

[9]GAO, *Civil Penalties: Agencies Unable to Fully Adjust Penalties for Inflation Under Current Law*, GAO-03-409 (Washington, D.C.: Mar. 14, 2003). We also addressed issues regarding civil penalties in GAO, *Tax Administration: Systematic Information Sharing Would Help IRS Determine the Deductibility of Civil Settlement Payments*, GAO-05-747 (Washington, D.C.: Sept. 15, 2005).

[10]5 U.S.C. § 601 note.

years is that some agencies' economic analyses need improvement. Our reviews have found that economic assessments that analyze regulations prospectively are often incomplete and inconsistent with general economic principles.[11] Moreover, the assessments are not always useful for comparisons across the government, because they are often based on different assumptions for the same key economic variables.[12] In our recent report on UMRA, we noted that parties from various sectors expressed concerns about the accuracy and completeness of agencies' cost estimates, and some also emphasized that more needed to be done to address the benefits side of the equation.[13] Our reviews have found that not all benefits are quantified and monetized by agencies, partly because of the difficulty in estimation. In our recent report on the Paperwork Reduction Act, we noted that the Act requires chief information officers (CIO) to review and certify information collections to help minimize collection burdens, but our analysis of case studies showed that CIOs provided these certifications despite often missing or inadequate support from the program offices sponsoring the collections.[14]

- *A predominant focus on just one part of the regulatory process*—More analytical and procedural requirements have focused on agencies' development of rules than on other phases of the regulatory process, from the underlying statutory authorization, through effective implementation and monitoring of compliance with regulations, to the evaluation and revision of existing rules. While rulemaking is clearly an important point in the regulatory process, these other phases also help determine the effectiveness of federal regulation.

[11]See GAO, *Regulatory Reform: Agencies Could Improve Development, Documentation, and Clarity of Regulatory Economic Analyses*, GAO/RCED-98-142 (Washington, D.C.: May 26, 1998), and *Clean Air Act: Observations on EPA's Cost-Benefit Analysis of Its Mercury Control Options*, GAO-05-252 (Washington, D.C.: Feb. 28, 2005).

[12]See also GAO, *Economic Performance: Highlights of a Workshop on Economic Performance Measures*, GAO-05-796SP (Washington, D.C.: July 2005).

[13]GAO, *Unfunded Mandates: Views Vary About Reform Act's Strengths, Weaknesses, and Options for Improvement*, GAO-05-454 (Washington, D.C.: Mar. 31, 2005).

[14]GAO, *Paperwork Reduction Act: New Approach May Be Needed to Reduce Government Burden on Public*, GAO-05-424 (Washington, D.C.: May 20, 2005).

## Oversight of Agency Rulemaking

Closely related to regulatory analysis and accountability requirements are efforts to enhance the oversight of agencies' rulemaking by Congress, the President, and the judiciary. In general, efforts to increase presidential influence and authority over the regulatory process, primarily through the mechanism of Office of Management and Budget (OMB) review of agencies' rulemaking, have become more significant and widely used over the years. However, our reviews suggest that mechanisms to increase congressional influence, such as procedures for Congress to disapprove proposed rules, appear to have been less able to influence changes in agencies' rules to date. We have not done work that directly addresses issues regarding judicial review of agencies' rulemaking.

In our September 2003 report on OMB's role in reviews of agencies' rules, we recounted the history of centralized review of agencies' regulations within the Executive Office of the President.[15] We noted the expansion of OMB's role in the rulemaking process over the past 30 years under various executive orders. Although not without controversy, this expansion of a centralized regulatory review function has become well established. OMB's role in the rulemaking process has been further enhanced by provisions in various statutes (such as the Information Quality Act,[16] PRA, and UMRA) that placed additional oversight responsibilities on OMB. The formal process by which OMB currently reviews agencies' proposed and final rules has essentially remained unchanged since Executive Order 12866 was issued in 1993, but we reported on several changes in OMB policies in recent years that affected the process, such as increased emphasis on economic analysis, stricter adherence to the 90-day time limit for reviews of agencies' draft rules, and improvements in the transparency of the OMB review process (although some elements of the transparency of that process are still unclear). Based on our review of OMB and agency dockets on 85 rules reviewed by OMB during a 1-year period, we also showed that OMB's reviews sometimes result in significant changes to agencies' draft rules.

[15]GAO, *Rulemaking: OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews*, GAO-03-929 (Washington, D.C.: Sept. 22, 2003).

[16]The Information Quality Act is also known as the Data Quality Act. Consolidated Appropriations—Fiscal Year 2001, Pub. L. No. 106-554, § 515, 114 Stat. 2763A to 2763A-154 (2001).

The Congressional Review Act was enacted as part of SBREFA in 1996 to better ensure that Congress has an opportunity to review, and possibly reject, rules before they become effective. CRA established expedited procedures by which members of Congress may disapprove agencies' rules by introducing a resolution of disapproval that, if adopted by both Houses of Congress and signed by the President, can nullify an agency's rule. However, this disapproval process has only been used once, in 2001, when Congress disapproved the Department of Labor's rule on ergonomics.[17] CRA also requires agencies to file final rules with both Congress and GAO before the rules can become effective. Our role under CRA is to provide Congress with a report on each major rule (for example, those with a $100 million impact on the economy) that includes GAO's assessment of the issuing agency's compliance with the procedural steps required by various acts and executive orders governing the rulemaking process. Although we reported that agencies' compliance with CRA requirements was inconsistent during the first years after its enactment, compliance improved.[18]

Congress also passed the Truth in Regulating Act[19] (TIRA) in 2000 to provide a mechanism for it to obtain more information about certain rules. TIRA contemplated a 3-year pilot project during which GAO would perform independent evaluations of "economically significant" agency rules when requested by a chairman or ranking member of a committee of jurisdiction of either House of Congress. However, during the 3-year period contemplated for the pilot project, Congress did not enact any specific appropriation to cover TIRA evaluations, as called for in the Act, and the authority for the 3-year pilot project expired on January 15, 2004. Therefore, we have no information on the potential effectiveness of this mechanism.

[17]Pub. L. No. 107-5, 115 Stat. 7 (Mar. 20, 2001).

[18]As noted in GAO-04-837, our Office of General Counsel also takes several steps to assure the completeness of the list of major rules identified in GAO's compilation of reports on major rules. GAO's Federal Rules Database is publicly available at www.gao.gov under Legal Products.

[19]Pub. L. No. 106-312, 114 Stat. 1248 (Oct. 17, 2000), 5 U.S.C. § 801 note.

## Rulemaking Procedures under the Administrative Procedure Act

Some of our reviews have touched on agencies' compliance with APA. APA established the most long-standing and broadly applicable federal requirements for informal rulemaking, also known as notice and comment rulemaking.[20] Among other things, APA generally requires that agencies publish a notice of proposed rulemaking (NPRM) in the *Federal Register*.[21] After giving interested persons an opportunity to comment on the proposed rule, and after considering the public comments, the agency may then publish the final rule. However, APA provides exceptions to these requirements, including cases when, for "good cause," an agency finds that notice and comment procedures are "impracticable, unnecessary, or contrary to the public interest," and interpretive rules.[22] When agencies use the "good cause" exception, APA requires that they explicitly say so and provide a rationale for the exception's use when the rule is published in the *Federal Register*. An agency's claim of an exception to notice and comment procedures is subject to judicial review. The legislative history of APA, and associated case law, generally reinforce the view that the "good cause" exception should be narrowly construed. In addition, the Administrative Conference of the United States (ACUS) encouraged agencies to use notice and comment procedures where not strictly required by APA and recommended that Congress eliminate or narrow several of the exceptions in APA.

In various reports over the years, we noted that agencies had not issued NPRMs before publishing certain final rules.[23] When we reported on this issue in 1998, we estimated that about half of all final actions published in 1997 had been issued without an associated NPRM.[24] Although many of those final actions without proposed rules were minor actions, 11 of the 61

[20]5 U.S.C. § 553.

[21]APA includes exceptions to notice and comment procedures for categories of rules such as those dealing with military or foreign affairs and also agency management and personnel. 5 U.S.C. § 553(a).

[22]5 U.S.C. § 553(b).

[23]An earlier study concluded that NPRMs were not published for about one-third of final regulatory actions published in the *Federal Register*. See Juan J. Lavilla, *The Good Cause Exemption to Notice and Comment Rulemaking Requirements Under the Administrative Procedure Act*, 3 Admin. L. J. 317 (1989).

[24]GAO, *Federal Rulemaking: Agencies Often Published Final Actions Without Proposed Rules*, GAO/GGD-98-126 (Washington, D.C.: Aug. 31, 1998).

major rules (for example, those with an impact of $100 million or more) did not have NPRMs.[25] While we have not studied this issue in depth since 1998, we continued to find the prevalence of final rules without proposed rules during our reviews. For example, during our review of the identification of federal mandates under UMRA in 2001 and 2002, we found that 28 of the 65 major rules that imposed new requirements on nonfederal parties did not have NPRMs.[26]

We have also reported that agencies' explanations for use of APA's "good cause" exception were sometimes unclear, for example, simply stating that notice and comment would delay rules that were, in some general way, in the public interest. We noted that, when agencies publish final rules without NPRMs, the public's ability to participate in the rulemaking process is limited. Also, several regulatory reform requirements that Congress has enacted during the past 25 years—such as RFA's and UMRA's analytical requirements—use as their trigger the publication of an NPRM. Therefore, it is important that agencies clearly explain why notice and comment procedures are not followed.

At the same time, the number of final rules without proposed rules appears to reflect, at least in part, agencies' acceptance of procedures for noncontroversial and expedited rulemaking actions known as "direct final" and "interim final" rulemaking that were previously recommended by ACUS.[27] Although we observed some differences in how agencies implement direct final rulemaking, it generally involves publication of a rule with a statement that the rule will be effective on a particular date unless an adverse comment is received within a specified period of time (such as 30 days). For example, the Federal Aviation Administration (FAA) has used direct final rulemaking procedures nearly 40 times this year to modify the legal descriptions of controlled airspace at various airports across the country. FAA issued these modifications as direct final rules

[25]Of the 122 major rules submitted to GAO during the first 2 years of the Congressional Review Act (April 1996 through March 1998), 23 were issued without a previous NPRM. See GAO, *Regulatory Reform: Major Rules Submitted for Congressional Review During the First 2 Years*, GAO/GGD-98-102R (Washington, D.C.: Apr. 21, 1998).

[26]GAO, *Unfunded Mandates: Analysis of Reform Act Coverage*, GAO-04-637 (Washington, D.C.: May 12, 2004).

[27]See recommendation 95-4, 60 Fed. Reg. 43108 (Aug. 18, 1995). In 1993, the National Performance Review also encouraged agencies to use direct final rulemaking for noncontroversial rules.

because it anticipated no adverse or negative comments. FAA also noted that these regulations only involve an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. If an adverse comment is received on a direct final rule, the agency withdraws the direct final rule and may publish the rule as a proposed rule under normal notice and comment procedures. For interim rulemaking, an agency issues a final rule without an NPRM that is generally effective immediately, but with a postpromulgation opportunity for the public to comment. Public comments may persuade the agency to later revise the interim rule. Although neither direct nor interim final rulemaking are specifically mentioned in APA, both may be viewed as an application of the "good cause" exception in APA.

Direct and interim final rules appear to account for hundreds of the final regulatory actions published each year. In our report on final rules without proposed rules, we identified 718 interim and direct final regulatory actions published by agencies during 1997. A quick search of recent *Federal Register* notices showed that agencies published over 550 notices in 2004 for which the subject rulemaking action was identified as a direct final, interim final, or interim rule. Through October 21 of this year, agencies had published nearly 400 such notices. Direct final rules accounted for almost 60 percent of these notices.

## Some Issues and Emerging Trends Merit Attention

The findings and emerging issues reported in our body of work on federal rulemaking suggest a few areas on which the subcommittee might consider taking legislative action or sponsor further study:

- generally reexamine rulemaking structures and processes, including the APA;
- address previously identified weaknesses of existing statutory requirements;
- promote additional improvements in the transparency of agencies' rulemaking actions; and
- open a broader examination of how developments in information technology might affect the notice and comment rulemaking process.

## Generally Reexamine Rulemaking Structures and Processes, Including the APA

As we have noted in several products this year, we believe that it is appropriate and necessary to begin taking a broad reexamination of what the federal government does and how it does it, especially given the fiscal challenges facing the country.[28] Although the federal rulemaking process does not have much direct impact on the federal budget—given that most costs of regulation fall on regulated parties and their customers or clients—we have testified that it nevertheless should be part of that reexamination. We recognize that a successful reexamination of the base of the federal government will entail multiple approaches over a period of years. No single approach or reform can address all of the questions and program areas that need to be revisited. However, as we have previously stated, federal regulation is a critical tool of government, and regulatory programs play a key part in how the federal government addresses many of the country's needs. This subcommittee has already begun such a reexamination through its current oversight agenda, and ACUS, if funded, might well play a valuable role in carrying out the detailed research that will be needed.

One emerging trend that any such reexamination should take into account is the evolution of the markets and industries that federal agencies regulate. Changes in the regulatory environment, especially the growing influence of the global economy, have implications for federal rulemaking procedures and practices. For example, agency officials pointed out to us in 1999 the growing importance of international standards and standard-setting bodies, alongside the role of international agreements, in producing certification standards of interest and importance to American businesses. More recently, international developments regarding global harmonization of regulatory standards, chemical risk-assessment requirements, Internet governance issues, and compliance with capital standards and requirements for financial institutions have attracted attention in the regulatory arena.

More specifically, Congress might want to revisit APA in view of changes in agencies' practices over time, such as greater use of interim and direct final

[28]See GAO, *21st Century Challenges: Reexamining the Base of the Federal Government*, GAO-05-325SP (Washington, D.C.: Feb. 2005); *21st Century Challenges: Transforming Government to Meet Current and Emerging Challenges*, GAO-05-830T (Washington, D.C.: July 13, 2005); and *Regulatory Reform: Prior Reviews of Federal Regulatory Process Initiatives Reveal Opportunities for Improvements*, GAO-05-939T (Washington, D.C.: July 27, 2005).

rulemaking for certain regulations. For example, we observed that some agencies differed in their policies and practices regarding direct final rulemaking. Whether there should be one standard approach to such rulemaking by federal agencies is an open question. In addition, although direct final rulemaking had been viewed by ACUS as permissible under the APA, ACUS nevertheless suggested that Congress may wish to expressly authorize the process to alleviate any uncertainty and reduce the potential for litigation. With regard to interim final rulemaking, ACUS had similarly recommended that, when APA is reviewed, Congress amend the Act to mandate use of postpromulgation comment procedures for rules issued under the "good cause" exception.

## Address Previously Identified Weaknesses of Existing Statutory Requirements

Our prior reviews have identified many opportunities to revisit and refine existing regulatory requirements. Although progress has been made to implement recommendations we raised in past reports, there are still unresolved issues. We still believe, for example, that the promise of RFA may never be realized until key terms and definitions, such as "substantial number of small entities," are clarified and/or an entity with the authority and responsibility to do so is established. Similarly, we believe that civil penalties are an important element of regulatory enforcement and deterrence, but we found that agencies are unable to fully adjust their penalties for inflation under the provisions of current law. Congressional action is needed to address these issues.

## Promote Additional Improvements in the Transparency of Agencies' Rulemaking Actions

As pointed out earlier, we have identified many positive developments regarding the transparency of the regulatory process, but more could be done. For example, additional attention could be paid to agencies' explanations for statements or certifications that certain requirements do not apply. This is another area that might merit additional study of available options. Some uses of exemptions, such as agencies' claims that a rule does not contain a federal mandate as defined by UMRA or that a proposed rule has no federalism impacts, do not require the agency to provide any more support than the certification itself. Other uses, such as claims of "good cause" to publish final rules without proposed rules, require agencies to provide a clear statement and explanation (although even here we noted that sometimes agencies' explanations were vague). This raises the question of whether there should be a more demanding requirement for agencies to essentially "show their work" behind such certifications, and, if so, what form such requirements might take.

## Open a Broader Examination of How Developments in Information Technology Might Affect the Rulemaking Process

One emerging trend we have observed in our work is the expanded role of technology-based innovations in enhancing the regulatory process. Agencies' use of the Internet and other technologies to enhance the regulatory process has rapidly increased in importance. In about 5 years, we have gone from reporting on and encouraging the early development of some innovative technologies in support of rulemaking to reporting on the implementation of governmentwide e-government initiatives, such as Regulations.gov and the centralized electronic docket for executive branch agencies.[29] The increased use of technology-based innovations may provide opportunities to transform the rulemaking process, not simply to replace "paper" processes with electronic versions. Continued study is therefore warranted of how such initiatives can open additional opportunities for public participation in and access to information about federal rulemaking, as well as how information technology can be used to improve the federal government's ability to analyze public comments.

Mr. Chairman, this concludes my prepared statement. Once again, I appreciate the opportunity to testify on these important issues. I would be pleased to address any questions you or other members of the committee might have at this time.

If additional information is needed regarding this testimony, please contact J. Christopher Mihm, Managing Director, Strategic Issues, at (202) 512-6806 or mihmj@gao.gov.

[29]See GAO, *Federal Rulemaking: Agencies' Use of Information Technology to Facilitate Public Participation*, GAO/GGD-00-135R (Washington, D.C.: June 30, 2000); *Electronic Government: Government Paperwork Elimination Act Presents Challenges for Agencies*, GAO/AIMD-00-282 (Washington, D.C.: Sept. 15, 2000); *Regulatory Management: Communication About Technology-Based Innovations Can Be Improved*, GAO-01-232 (Washington, D.C.: Feb. 12, 2001); *Electronic Rulemaking: Efforts to Facilitate Public Participation Can Be Improved*, GAO-03-901 (Washington, D.C.: Sept. 17, 2003); and *Electronic Rulemaking: Progress Made in Developing Centralized E-Rulemaking System*, GAO-05-777 (Washington, D.C.: Sept. 9, 2005).

# Related GAO Products

*Electronic Rulemaking: Progress Made in Developing Centralized E-Rulemaking System.* GAO-05-777. Washington, D.C.: September 9, 2005.

*Regulatory Reform: Prior Reviews of Federal Regulatory Process Initiatives Reveal Opportunities for Improvements.* GAO-05-939T. Washington, D.C.: July 27, 2005.

*Economic Performance: Highlights of a Workshop on Economic Performance Measures.* GAO-05-796SP. Washington, D.C.: July 2005.

*Paperwork Reduction Act: New Approach May Be Needed to Reduce Government Burden on Public.* GAO-05-424. Washington, D.C.: May 20, 2005.

*Unfunded Mandates: Views Vary About Reform Act's Strengths, Weaknesses, and Options for Improvement.* GAO-05-454. Washington, D.C.: March 31, 2005.

*21st Century Challenges: Reexamining the Base of the Federal Government.* GAO-05-325SP. Washington, D.C.: February 2005.

*Electronic Government: Federal Agencies Have Made Progress Implementing the E-Government Act of 2002.* GAO-05-12. Washington, D.C.: December 10, 2004.

*Unfunded Mandates: Analysis of Reform Act Coverage.* GAO-04-637. Washington, D.C.: May 12, 2004.

*Paperwork Reduction Act: Agencies' Paperwork Burden Estimates Due to Federal Actions Continue to Increase.* GAO-04-676T. Washington, D.C.: April 20, 2004.

*Rulemaking: OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews.* GAO-03-929. Washington, D.C.: September 22, 2003.

*Electronic Rulemaking: Efforts to Facilitate Public Participation Can Be Improved.* GAO-03-901. Washington, D.C.: September 17, 2003.

*Civil Penalties: Agencies Unable to Fully Adjust Penalties for Inflation Under Current Law.* GAO-03-409. Washington, D.C.: March 14, 2003.

*Regulatory Flexibility Act: Clarification of Key Terms Still Needed.* GAO-02-491T. Washington, D.C.: March 6, 2002.

*Regulatory Reform: Compliance Guide Requirement Has Had Little Effect on Agency Practices.* GAO-02-172. Washington, D.C.: December 28, 2001.

*Federal Rulemaking: Procedural and Analytical Requirements at OSHA and Other Agencies.* GAO-01-852T. Washington, D.C.: June 14, 2001.

*Regulatory Flexibility Act: Key Terms Still Need to Be Clarified.* GAO-01-669T. Washington, D.C.: April 24, 2001.

*Regulatory Reform: Implementation of Selected Agencies' Civil Penalties Relief Policies for Small Entities.* GAO-01-280. Washington, D.C.: February 20, 2001.

*Regulatory Management: Communication About Technology-Based Innovations Can Be Improved.* GAO-01-232. Washington, D.C.: February 12, 2001.

*Regulatory Flexibility Act: Implementation in EPA Program Offices and Proposed Lead Rule.* GAO/GGD-00-193. Washington, D.C.: September 20, 2000.

*Electronic Government: Government Paperwork Elimination Act Presents Challenges for Agencies.* GAO/AIMD-00-282. Washington, D.C.: September 15, 2000.

*Regulatory Reform: Procedural and Analytical Requirements in Federal Rulemaking.* GAO/T-GGD/OGC-00-157. Washington, D.C.: June 8, 2000.

*Certification Requirements: New Guidance Should Encourage Transparency in Agency Decisionmaking.* GAO/GGD-99-170. Washington, D.C.: September 24, 1999.

*Federalism: Previous Initiatives Have Little Effect on Agency Rulemaking.* GAO/T-GGD-99-131. Washington, D.C.: June 30, 1999.

*Regulatory Accounting: Analysis of OMB's Reports on the Costs and Benefits of Federal Regulation.* GAO/GGD-99-59. Washington, D.C.: April 20, 1999.

*Regulatory Flexibility Act: Agencies' Interpretations of Review Requirements Vary.* GAO/GGD-99-55. Washington, D.C.: April 2, 1999.

*Regulatory Burden: Some Agencies' Claims Regarding Lack of Rulemaking Discretion Have Merit.* GAO/GGD-99-20. Washington, D.C.: January 8, 1999.

*Federal Rulemaking: Agencies Often Published Final Actions Without Proposed Rules.* GAO/GGD-98-126. Washington, D.C.: August 31, 1998.

*Regulatory Management: Implementation of Selected OMB Responsibilities Under the Paperwork Reduction Act.* GAO/GGD-98-120. Washington, D.C.: July 9, 1998.

*Regulatory Reform: Agencies Could Improve Development, Documentation, and Clarity of Regulatory Economic Analyses.* GAO/RCED-98-142. Washington, D.C.: May 26, 1998.

*Regulatory Reform: Implementation of Small Business Advocacy Review Panel Requirements.* GAO/GGD-98-36. Washington, D.C.: March 18, 1998.

*Congressional Review Act: Implementation and Coordination.* GAO-T-OGC-98-38. Washington, D.C.: March 10, 1998.

*Regulatory Reform: Agencies' Section 610 Review Notices Often Did Not Meet Statutory Requirements.* GAO/T-GGD-98-64. Washington, D.C.: February 12, 1998.

*Unfunded Mandates: Reform Act Has Had Little Effect on Agencies' Rulemaking Actions.* GAO/GGD-98-30. Washington, D.C.: February 4, 1998.

*Regulatory Reform: Changes Made to Agencies' Rules Are Not Always Clearly Documented.* GAO/GGD-98-31. Washington, D.C.: January 8, 1998.

*Regulatory Reform: Agencies' Efforts to Eliminate and Revise Rules Yield Mixed Results.* GAO/GGD-98-3. Washington, D.C.: October 2, 1997.

*Regulatory Reform: Implementation of the Regulatory Review Executive Order.* GAO-T-GGD-96-185. Washington, D.C.: September 25, 1996.

*Regulatory Flexibility Act: Status of Agencies' Compliance.* GAO/GGD-94-105. Washington, D.C.: April 27, 1994.

# Appendix I

GAO
Accountability*Integrity*Reliability

## Highlights

Highlights of GAO-05-777, a report to the Chairman and Ranking Minority Member, Committee on Homeland Security and Governmental Affairs, U.S. Senate

September 2005

ELECTRONIC RULEMAKING

## Progress Made in Developing Centralized E-Rulemaking System

### Why GAO Did This Study

The E-Government Act of 2002 requires regulatory agencies, to the extent practicable, to ensure there is a Web site the public can use to comment on the numerous proposed regulations that affect them. To accomplish this, the Office of Management and Budget named the Environmental Protection Agency (EPA) as the managing partner for developing a governmentwide e-Rulemaking system that the public can use for these purposes. Issues GAO was asked to address include:

- EPA's basis for selecting a centralized system,
- how EPA collaborated with other agencies and agency views of that collaboration, and
- whether EPA used key management practices when developing the system.

### What GAO Recommends

GAO recommends that, to build on the success of this initiative, the Administrator of EPA, as managing partner of the initiative, take steps to ensure there are written agreements between EPA and participating agencies that include performance measures that address issues such as system performance, maintenance, and cost savings. These measures are necessary to provide criteria for evaluating the effectiveness of the initiative. E-Rulemaking Initiative officials said they agree with GAO's recommendation and they plan to implement it.

www.gao.gov/cgi-bin/getrpt?GAO-05-777.

To view the full product, including the scope and methodology, click on the link above. For more information, contact Orice Williams (202) 512-8837 or williamso@gao.gov.

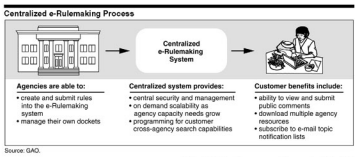
### What GAO Found

E-Rulemaking officials and the e-Rulemaking Initiative Executive Committee considered three alternative designs and chose to implement a centralized e-Rulemaking system based on cost savings, risks, and security. Officials relied on an analysis of the three alternatives using two cost and risk assessment models and a comparison of the alternatives to industry best practices. Prior to completing this analysis, officials estimated the centralized approach would save about $94 million over 3 years. They said when they developed this estimate, there was a lack of published information about costs related to paper or electronic rulemaking systems. They used their professional judgment and information about costs for developing and operating EPA's paper and electronic systems, among other things, to develop the estimate.

E-Rulemaking officials extensively collaborated with rulemaking agencies and most officials at the agencies we contacted thought the collaboration was effective. E-Rulemaking officials created a governance structure that included an executive committee, advisory board, and individual work groups that discussed how to develop the e-Rulemaking system. We contacted 14 of the 27 agencies serving on the advisory board and most felt their suggestions affected the system development process. Agency officials offered several examples to support their views, such as how their recommendations for changes to the system's design were incorporated.

While managing the development of the centralized system, e-Rulemaking officials followed all but a few of the key practices for successfully managing an initiative. For example, officials did not have written agreements with participating agencies that included system performance measures. The first agencies began migrating to the centralized system in May 2005 with the public scheduled to have access in September 2005. Eventually, all rulemaking agencies will migrate to the centralized system; however, the schedule is tentative due in part to funding issues. As agencies migrate, e-Rulemaking officials are planning changes to the system including adding capabilities that exist in electronic systems operated by some agencies.

**Centralized e-Rulemaking Process**




Source: GAO.

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# Highlights

Highlights of GAO-05-830T, a testimony before the Subcommittee on the Federal Workforce and Agency Organization, Committee on Government Reform, House of Representatives

July 13, 2005

## 21ST CENTURY CHALLENGES

## Transforming Government to Meet Current and Emerging Challenges

### Why GAO Did This Study

The daunting challenges that face the nation in the 21st century establish the need for the transformation of government and demand fundamental changes in how federal agencies should meet these challenges by becoming flatter, more results-oriented, externally focused, partnership-oriented, and employee-enabling organizations.

This testimony addresses how the long-term fiscal imbalance facing the United States, along with other significant trends and challenges, establish the case for change and the need to reexamine the base of the federal government; how federal agencies can transform into high-performing organizations; and how multiple approaches and selected initiatives can support the reexamination and transformation of the government and federal agencies to meet these 21st century challenges.

www.gao.gov/cgi-bin/getrpt?GAO-05-830T.

To view the full product, including the scope and methodology, click on the link above. For more information, contact J. Christopher Mihm at (202) 512-6806 or mihmj@gao.gov.

### What GAO Found

Long-term fiscal challenges and other significant trends and challenges facing the United States provide the impetus for reexamining the base of the federal government. Our nation is on an imprudent and unsustainable fiscal path driven by known demographic trends and rising health care costs, and relatively low revenues as a percentage of the economy. Unless we take effective and timely action, we will face large and growing structural deficit shortfalls, eroding our ability to address the current and emerging needs competing for a share of a shrinking budget pie. At the same time, policymakers will need to confront a host of emerging forces and trends, such as changing security threats, increasing global interconnectedness, and a changing economy. To effectively address these challenges and trends, government cannot accept all of its existing programs, policies, functions, and activities as "givens." Reexamining the base of all major existing federal spending and tax programs, policies, functions, and activities offers compelling opportunities to redress our current and projected fiscal imbalances while better positioning government to meet the new challenges and opportunities of this new century.

In response, agencies need to change their cultures and create the capacity to become high-performing organizations, by implementing a more results-oriented and performance-based approach to how they do business. To successfully transform, agencies must fundamentally reexamine their business processes, outmoded organizational structures, management approaches, and, in some cases, missions. GAO has hosted several forums to explore the change management practices that federal agencies can adopt to create high-performing organizations. For example, participants at a GAO forum broadly agreed on the key characteristics and capabilities of high-performing organizations, which can be grouped into four themes:

- a clear, well-articulated, and compelling mission;
- focus on needs of clients and customers;
- strategic management of people; and
- strategic use of partnerships.

A successful reexamination of the base of the federal government will entail multiple approaches over a period of years. The reauthorization, appropriations, oversight, and budget processes should be used to review existing programs and policies. However, no single approach or institutional reform can address the myriad of questions and program areas that need to be revisited. GAO has recommended certain other initiatives to assist in the needed transformations. These include (1) development of a governmentwide strategic plan and key national indicators to assess the government's performance, position, and progress; (2) implementing a framework for federal human capital reform; and (3) proposing specific transformational leadership models, such as creating a Chief Operating Officer/Chief Management Official with a term appointment at select agencies.

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# Highlights

Highlights of GAO-05-424, a report to congressional requesters

May 2005

## PAPERWORK REDUCTION ACT

## New Approach May Be Needed to Reduce Government Burden on Public

### Why GAO Did This Study

Americans spend billions of hours each year providing information to federal agencies by filling out information collections (forms, surveys, or questionnaires). A major aim of the Paperwork Reduction Act (PRA) is to balance the burden of these collections with their public benefit. Under the act, agencies' Chief Information Officers (CIO) are responsible for reviewing information collections before they are submitted to the Office of Management and Budget (OMB) for approval. As part of this review, CIOs must certify that the collections meet 10 standards set forth in the act (see table).

GAO was asked to assess, among other things, this review and certification process, including agencies' efforts to consult with the public. To do this, GAO reviewed a governmentwide sample of collections, reviewed processes and collections at four agencies that account for a large proportion of burden, and performed case studies of 12 approved collections.

### What GAO Recommends

GAO recommends that OMB and the agencies take steps to improve review processes and compliance with the act. Also, the Congress may wish to consider mandating pilot projects to target some collections for rigorous analysis that includes public outreach. In commenting on a draft of this report, OMB and the agencies agreed with parts of the report and disagreed with others.

www.gao.gov/cgi-bin/getrpt?GAO-05-424.

To view the full product, including the scope and methodology, click on the link above. For more information, contact Linda Koontz at (202) 512-6240 or koontzl@gao.gov.

### What GAO Found

Governmentwide, agency CIOs generally reviewed information collections and certified that they met the standards in the act. However, GAO's analysis of 12 case studies at the Internal Revenue Service (IRS) and the Departments of Veterans Affairs, Housing and Urban Development, and Labor showed that CIOs certified collections even though support was often missing or partial (see table). For example, in nine of the case studies, agencies did not provide support, as the law requires, for the standard that the collection was developed by an office with a plan and resources to use the information effectively. Because OMB instructions do not ask explicitly for this support, agencies generally did not address it. Further, although the law requires agencies both to publish notices in the *Federal Register* and to otherwise consult with the public, agencies governmentwide generally limited consultation to the publication of notices, which generated little public comment. Without appropriate support and public consultation, agencies have reduced assurance that collections satisfy the standards in the act.

Processes outside the PRA review process, which are more rigorous and involve greater public outreach, have been set up by IRS and the Environmental Protection Agency (EPA), whose missions involve numerous information collections and whose management is focused on minimizing burden. For example, each year, IRS subjects a few forms to highly detailed, in-depth analyses, including extensive outreach to the public affected and the information users. IRS reports that this process—performed on forms that have undergone CIO review and received OMB approval—has reduced burden by over 200 million hours since 2002. In contrast, for the 12 case studies, the CIO review process did not reduce burden. Without rigorous evaluative processes, agencies are unlikely to achieve the PRA goal of minimizing burden while maximizing utility.

**Support Provided by Agencies for Paperwork Reduction Act Standards in 12 Case Studies**

| | | Support provided | | |
|---|---|---|---|---|
| **Standards: The information collection—** | **Total[a]** | **Yes** | **Partial** | **No** |
| Is necessary for the proper performance of agency functions. | **12** | 6 | 6 | 0 |
| Avoids unnecessary duplication. | **11** | 2 | 2 | 7 |
| Reduces burden on the public, including small entities. | **12** | 5 | 7 | 0 |
| Uses language that is understandable to respondents. | **12** | 1 | 0 | 11 |
| Will be compatible with respondents' recordkeeping practices. | **12** | 3 | 0 | 9 |
| Indicates period for which records must be retained. | **6** | 3 | 3 | 0 |
| Gives required information (e.g., whether response is mandatory). | **12** | 4 | 8 | 0 |
| Was developed by an office with necessary plan and resources. | **11** | 2 | 0 | 9 |
| Uses appropriate statistical survey methodology (if applicable). | **1** | 1 | 0 | 0 |
| Makes appropriate use of information technology. | **12** | 8 | 4 | 0 |
| **Total** | **101** | **35** | **30** | **36** |

Source: Paperwork Reduction Act, Pub. L. 104-13, 109 Stat. 173-4, sec. 3506(c)(3).

[a]The total is not always 12 because not all certifications applied to all collections.

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# Highlights

Highlights of GAO-05-454, a report to the Chairman, Subcommittee on Oversight of Government Management, the Federal Workforce and the District of Columbia, Committee on Homeland Security and Governmental Affairs, U.S. Senate

## Why GAO Did This Study

The Unfunded Mandates Reform Act of 1995 (UMRA) was enacted to address concerns about federal statutes and regulations that require nonfederal parties to expend resources to achieve legislative goals without being provided federal funding to cover the costs. UMRA generates information about the nature and size of potential federal mandates on nonfederal entities to assist Congress and agency decision makers in their consideration of proposed legislation and regulations. However, it does not preclude the implementation of such mandates.

At various times in its 10-year history, Congress has considered legislation to amend various aspects of the act to address ongoing questions about its effectiveness. Most recently, GAO was asked to consult with a diverse group of parties familiar with the act and to report their views on (1) the significant strengths and weaknesses of UMRA as the framework for addressing mandate issues and (2) potential options for reinforcing the strengths or addressing the weaknesses. To address these objectives, we obtained information from 52 organizations and individuals reflecting a diverse range of viewpoints. GAO analyzed the information acquired and organized it into broad themes for analytical and reporting purposes.

GAO makes no recommendations in this report.

www.gao.gov/cgi-bin/getrpt?GAO-05-454.

To view the full product, including the scope and methodology, click on the link above. For more information, contact Orice M. Williams at (202) 512-5837, or williamso@gao.gov.

March 2005

UNFUNDED MANDATES

## Views Vary About Reform Act's Strengths, Weaknesses, and Options for Improvement

## What GAO Found

The parties GAO contacted provided a significant number of comments about UMRA, specifically, and federal mandates, generally. Their views often varied across and within the five sectors we identified (academic/think tank, public interest advocacy, business, federal agencies, and state and local governments). Overall, the numerous strengths, weaknesses and options for improvement identified during the review fell into several broad themes, including UMRA-specific issues such as coverage and enforcement, among others, and more general issues about the design, funding, and evaluation of federal mandates. First, UMRA coverage was, by far, the most frequently cited issue by parties from the various sectors. Parties across most sectors that provided comments said UMRA's numerous definitions, exclusions, and exceptions leave out many federal actions that may significantly impact nonfederal entities and should be revisited. Among the most commonly suggested options were to expand UMRA's coverage to include a broader set of actions by limiting the various exclusions and exceptions and lowering the cost thresholds, which would make more federal actions mandates under UMRA. However, a few parties, primarily from the public interest advocacy sector, viewed UMRA's narrow coverage as a strength that should be maintained.

Second, parties from various sectors also raised a number of issues about federal mandates in general. In particular, they had strong views about the need for better evaluation and research of federal mandates and more complete estimates of both the direct and indirect costs of mandates on nonfederal entities. The most frequently suggested option to address these issues was more post-implementation evaluation of existing mandates or "look backs." Such evaluations of the actual performance of mandates could enable policymakers to better understand mandates' benefits, impacts and costs among other issues. In turn, developing such evaluation information could lead to the adjustment of existing mandate programs in terms of design and/or funding , perhaps resulting in more effective or efficient programs.

Going forward, the issue of unfunded mandates raises broader questions about assigning fiscal responsibilities within our federal system. Federal and state governments face serious fiscal challenges both in the short and longer term. As GAO reported in its February 2005 report entitled *21st Century Challenges: Reexamining the Base of the Federal Government* (GAO-05-325SP), the long-term fiscal challenges facing the federal budget and numerous other geopolitical changes challenging the continued relevance of existing programs and priorities warrant a national debate to review what the government does, how it does business and how it finances its priorities. Such a reexamination includes considering how responsibilities for financing public services are allocated and shared across the many nonfederal entities in the U.S. system as well.

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# Highlights

Highlights of GAO-03-409, a report to the Senate Committee on Governmental Affairs and the House Committee on Government Reform

March 2003

## CIVIL PENALTIES

## Agencies Unable to Fully Adjust Penalties for Inflation Under Current Law

### Why GAO Did This Study

Civil penalties are an important element of regulatory enforcement, allowing agencies to punish violators appropriately and to serve as a deterrent to future violations. In 1996, Congress enacted the Inflation Adjustment Act to require agencies to adjust certain penalties for inflation. GAO assessed federal agencies' compliance with the act and whether provisions in the act have prevented agencies from keeping their penalties in pace with inflation.

### What GAO Recommends

Congress may wish to consider amending the act to (1) require or permit agencies to adjust their penalties for lost inflation; (2) make the calculation and rounding procedures more consistent with changes in inflation; (3) permit agencies with exempt penalties to adjust them for inflation; and (4) give some agency the responsibility to monitor compliance and provide guidance.

The Department of Justice, the Department of the Treasury, and the Office of Management and Budget did not comment on the first three matters for congressional consideration. The agencies suggested changes to the fourth matter, but we did not make those changes.

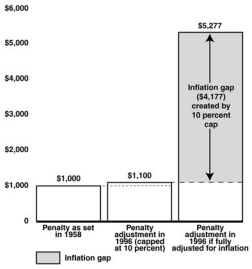
www.gao.gov/cgi-bin/getrpt?GAO-03-409.

To view the full report, including the scope and methodology, click on the link above. For more information, contact Victor Rezendes (202) 512-6806 or rezendesv@gao.gov.

### What GAO Found

As of June 2002, 16 of 80 federal agencies with civil penalties covered by the Inflation Adjustment Act had not made the required initial adjustments to their penalties. Nineteen other agencies had not made required subsequent adjustments, and several other agencies had made incorrect adjustments. The act does not give any agency the authority to monitor compliance or to provide guidance to agencies. More important, several provisions of the act have prevented some agencies from fully adjusting their penalties for inflation. One provision limited the agencies' first adjustments to 10 percent of the penalty amounts, even if the penalties were decades old and hundreds of percent behind inflation. The resultant "inflation gap" can never be corrected under the statute and grows with each subsequent adjustment. (The figure below illustrates the effect of the cap on one agency's $1,000 penalty set in 1958.) Also, the act's calculation and rounding procedures require agencies to lose a year of inflation each time they adjust their penalties, and can prevent some agencies from making adjustments until inflation increases by 45 percent or more (i.e., 15 years or more at recent rates of inflation). Finally, the act exempts penalties under certain statutes from its requirements entirely. Consequently, more than 100 exempted penalties have declined in value by 50 percent or more since Congress last set them.

Ten Percent Cap on Initial Penalty Adjustments Resulted in Large Inflation Gaps

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Mr. CANNON. I thank you very much. You know you talk about a high bar. For APA wonks, the bar appears substantially lower. Like a heartbeat probably works.

Mr. Lubbers, we appreciate your testimony now.

**TESTIMONY OF PROFESSOR JEFFREY S. LUBBERS, FELLOW IN LAW AND GOVERNMENT PROGRAM, WASHINGTON COLLEGE OF LAW, AMERICAN UNIVERSITY**

Mr. LUBBERS. Thank you, Mr. Chairman, Mr. Watt. It's great to be here with my distinguished panel members today, and I guess I do qualify as an administrative procedure wonk having worked in the area for so long.

I found much to agree with in my fellow panelists' statements and very little to disagree with.

I first want to applaud you and your Committee for leading the successful effort to reauthorize the Administrative Conference, which had to close its doors—exactly 10 years ago yesterday, by the way.

I truly believe it was one of the Federal Government's most cost effective institutions and it has been sorely missed.

I view this hearing as an opportunity to suggest a research agenda for ACUS that would help convince the appropriators that the relatively small investment in ACUS would be repaid many times over.

I also applaud the Committee for sponsoring a series of empirical research projects that would provide reliable data for a reconstituted ACUS to use in making recommendations to use in improvements in the administrative process. I think it is a great idea and the two projects already underway to be carried out by Professor West and by Professor Freeman should be invaluable to all of us.

Let me say that I think there is one analog that I can recall the Senate Governmental Affairs Committee back in the late 70's, maybe early 80's, late 70's, did a series of empirical studies that provided a very good basis for regulatory reform proposals in the 80's.

I have provided the Committee with a lengthy menu of topics that I believe might form the research agenda of a revived ACUS. I group these topics into several major areas.

First, the rulemaking process. The notice-and-comment rulemaking process is the preferred way for most agencies to make policy. However, this process has become much more complicated in the last 35 years due to additional procedural and analytical requirements, to the point where many commentators are worried that the process has become too difficult—or ossified, to use the two-dollar word. And agencies seem to be increasingly trying to avoid these requirements by making policy through less visible types of nonrule rules, such as guidance documents that are not subject to notice and comment.

Therefore, I believe that one area researchers should pursue is the increasing complexity of the rulemaking process. For example, agencies are required to prepare about a dozen separate analyses in rulemaking. A study of the costs and benefits of these impact analyses and how they could at least be consolidated would be useful.

I also agree with Mort Rosenberg that the systems for both White House and congressional review of agency rules should be examined to see what kinds of changes agencies have made in proposed rules, and how the length of the rulemaking process has been affected.

There is also a renewed emphasis on the need for sound science in rulemaking. Last January OMB issued a bulletin that requires administrative agencies to conduct a peer review of, "scientific information disseminations." This followed enactment in year 2000 of the Information Quality Act, which was inserted as an undebated amendment into an omnibus appropriations bill.

The IQA requires every agency to issue guidelines to ensure the quality, objectivity, utility and integrity of information disseminated by the agency.

These two OMB-overseen initiatives require significant agency implementation activities, but it is unclear at this point how they have affected the rulemaking process or whether they have provided any improvements in regulatory science.

Another study I recommend is to find out what is holding back negotiated rulemaking. Since the mid-90's its use has plateaued or even fallen despite its great promise. It would be useful to mount a major study of why it is faltering and what should be done to revive it.

The other major change, as others have mentioned, to the rulemaking process has been the impact of the Internet, leading to what is called e-rulemaking. Since ACUS's defunding, there have been enormous developments in this area especially in the technology. But the legal developments are moving more slowly. I have tried to catalog the legal issues that provide challenges to the twin goals of better information dissemination and increased public participation in the rulemaking process.

These legal issues include such things as how to best integrate the data, docketing questions, archiving, copyright protection, security, and privacy just to name a few.

Beyond the rulemaking process itself, there are a lot of broader regulatory issues that need study: regulatory prioritization, retrospective reviews of agency rulemakings to see how the actual costs and benefits match the predicted costs and benefits, alternative approaches to regulation and enforcement—something that my colleague Jody Freeman has written very excellent articles about. Use of waivers and exceptions—something we have heard a lot about after the Katrina hurricane—federalism issues, and agency structural issues, such as how should departments and commissions be structured.

There are also some pressing issues of administrative adjudication. The ALJ program, Administrative Law Judge program, is still having problems with agencies seeking to use other types of hearing officers too often. Agency appeal boards are coming under scrutiny in the immigration, Social Security and patent and trademark areas. And mass adjudication programs like the Social Security Disability program are facing huge backlogs and caseload pressures.

And finally, there are recurrent issues concerning judicial review. The agency-court partnership is of obvious concern to all three

branches of Government as exemplified by the Chevron case, in which the Supreme Court basically told the judiciary to defer to reasonable interpretations of statutes made by executive agencies. This simple dictum has spawned many cases concerning what this deference should consist of and to what types of interpretations it should be applied.

There is no shortage of scholarly commentary on these cases. But there is an absence of consensus-building around this issue. The courts are struggling with these issues, and a renewed ACUS could help provide some focus for the courts.

One other judiciary issue I will mention, which relates to attorneys' fee issues. This is something that ACUS had a role in, in overseeing the rules under the Equal Access to Justice Act. But a recent Supreme Court decision has limited what is meant by the term "prevailing party", which allows parties to get attorneys' fees. The impact of this decision should be of great interest to Congress, which could of course make its intent clear if it so wished.

In conclusion, let me say that this is a short summary of a lengthy list. But even the full list is hardly a comprehensive menu of projects that could be tackled by a revived ACUS. It is a collection of issues that have accumulated in the past decade. The new ACUS chairperson and his or her counsel would obviously have their own priorities. But I hope that this listing does show the need for a revised and continuing focus on the administrative procedural issues that often get short shrift but can make or break the success of governmental programs.

For 28 years ACUS provided a low cost center of research scholarship and consensus-building on administrative law within the Federal Government and I believe that now, through the efforts of you and your Committee, that ACUS has been reauthorized, it should be funded as soon as possible. Thank you, and I look forward to your questions.

[The prepared statement of Mr. Lubbers follows:]

PREPARED STATEMENT OF JEFFREY S. LUBBERS

**STATEMENT OF JEFFREY S. LUBBERS***

**HEARINGS BEFORE THE**
**SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW**
**COMMITTEE ON THE JUDICIARY,**
**U.S. HOUSE OF REPRESENTATIVES**
**ON**
**THE ADMINISTRATIVE LAW, PROCESS AND PROCEDURE PROJECT**
**NOVEMBER 1, 2005**

Mr. Chairman and Members of the Committee:

I am pleased to be here today to discuss with you the Committee's Administrative Law, Process and Procedure Project. I first want to applaud the Committee's leadership, especially that of Chairman Cannon, in leading the successful effort last year to reauthorize the Administrative Conference of the United States (ACUS).[1] I spent 20 years of my professional career working at ACUS from 1975 until it lost its funding in 1995—exactly ten years ago. I truly believe it was one of the federal government's most cost-effective institutions, and it has been sorely missed.[2]

Unfortunately the first year of the three-year reauthorization has now occurred without the necessary appropriations to actually re-start ACUS, and I view this hearing as an opportunity to suggest a research agenda for ACUS that would help convince the appropriators that the relatively small investment in ACUS would be repaid many times over. I do this with the perspective of having served as ACUS's Research Director from 1982-1995 and from having taught Administrative Law at American University's Washington College of Law since 1996.[3]

I also applaud the Committee for sponsoring a series of empirical research projects that would provide reliable data for a reconstituted ACUS to use in making recommendations for improvements in the administrative process. The two projects already under way—research to

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* Fellow in Law and Government, Washington College of Law, American University. Research Director, Administrative Conference of the United States (1982-1995).

[1] The Federal Regulatory Improvement Act of 2004, Pub. L. 108-401.

[2] *See* Jeffrey S. Lubbers, *Reviving the Administrative Conference of the United States: The Time Has Come*, 51 FED. LAWYER 26 (Nov./Dec. 2004); Jeffrey S. Lubbers, *Consensus-Building in Administrative Law: The Revival of the Administrative Conference of the U.S.*, 30 ADMIN. & REG. L. NEWS 3 (Winter 2005).

[3] When I first joined American University I was asked to undertake a similar effort for a Symposium on "The Future of the American Administrative Process." My resulting article, *The Administrative Law Agenda for the Next Decade*, 49 ADMIN. L. REV. 159 (1997), contained a list of proposed future research topics—many of which are still in need of attention today.

be carried out by Professor William West at Texas A &M on the early-stage development of proposed rules and by Professor Jody Freeman at Harvard on the judicial review of rulemaking—should be invaluable to those of us who wish to make the U.S. regulatory process a more efficient, fair and effective process.

The recent bureaucratic problems we have seen in the aftermath of the Gulf Coast hurricanes are symptomatic of the need to think about administrative problems before crises occur, not after. For example, did federal, state, and local officials lack (or think that they lacked) the ability to make emergency rules or waivers of existing statutes or rules? What sorts of procedures are appropriate for granting (or denying) such waiver requests? Were there recordkeeping or liability concerns that impeded the overall relief efforts? Are there intra-departmental or inter-governmental coordination problems that need to be solved? These matters obviously bear on homeland security in its various meanings.

With that preface, let me suggest a menu of topics that I believe might form the research agenda of a revived ACUS.

I would group the topics into several broad areas:

I. The Rulemaking Process.

The Committee's own proposed projects focus primarily on rulemaking, and I think with good reason. The federal rulemaking process is the preferred way for most agencies to make policies under their delegated authority from Congress. Over three decades ago, my own Administrative Law Professor, Kenneth Culp Davis, one of the drafters of the Administrative Procedure Act (APA), characterized notice-and-comment rulemaking as "one of the greatest procedural inventions of modern government."[4] However, this process has become much more complicated in the last 35 years, due to additional procedural and analytical requirements—to the point where some commentators are worried that the process has become too difficult ("ossified"),[5] and agencies seem to be increasingly trying to avoid these requirements by making binding policy through less visible types of issuances such as guidance documents that are not subject to public notice and comment.[6] To some extent these additional requirements are a by-product of "regulatory reform" initiatives—some of which have had some unintended consequences.[7]

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[4] 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 6.15 (Supp. 1970).

[5] *See, e.g.*, Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 Duke L.J. 1385 (1992); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995). One example of how rulemaking is taking longer is illustrated by a recent report by the Inspector General of the Department of Transportation, which found that the time taken to complete a rule increased from an average of 1.8 years and a median of 10 months in 1993, to an average of 3.8 years and a median of 2.8 years in 1999. Moreover the number of significant rules issued fell from 54 in 1993 to 20 in 1999. DOT, OIG AUDIT REPORT: THE DEPARTMENT OF TRANSPORTATION'S RULEMAKING PROCESS 7, Report No. MH-2000-109 (July 20, 2000).

[6] *See, e.g.*, Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and Courts?*, 7 YALE J. ON REG. 1 (1990).

[7] *See* U.S. GEN ACCOUNTING OFFICE, PRIOR REVIEWS OF FEDERAL REGULATORY PROCESS INITIATIVES REVEAL OPPORTUNITIES FOR IMPROVEMENT, Testimony of J. Christopher Mihm, before the House Subcomm. of Regulatory Affairs, Comm. on Govt. Reform (GAO-05-939T) (JULY 27, 2005).

A. The Increasing Complexity of the Rulemaking Process. Therefore I believe that one area researchers should pursue is the increasing complexity of the rulemaking process. The following projects might be considered:

*1. Analysis of Impact Analyses.* Agencies are required to prepare about a dozen separate analyses in rulemaking. These include analyses concerning cost and benefits, paperwork, regulatory flexibility (small business impacts), unfunded mandates, federalism (state and local government impacts), tribal impacts, "takings" of private property, litigation impacts, environmental justice, impacts on families, environmental health impacts on children, energy impacts, and the granddaddy of all impact analyses, environmental impact statements—all at a time when many agencies' budgets in real dollar terms are being reduced.[8] A study of the costs and benefits of these impact analyses and how they could at least be consolidated would be useful.

*2. White House Review of Agency Rules.* Executive Order 12,866, issued at the beginning of the Clinton Administration, seems to have achieved bipartisan support, as witness the willingness of the current Bush Administration to continue to use it with only a minor amendment.[9] The current Administrator of the Office of Information and Regulatory Affairs (OIRA), in OMB, Dr. John Graham, has brought some of his own emphases and strategies in implementation of the Order and is generally credited with improving the Office's website and information dissemination. But there has not been an extensive study of what the overall impact of OIRA review has been on agency rulemaking—for example, what kinds of changes have agencies made in proposed rules at the behest of OIRA, how has the length of the rulemaking process been affected, etc.

*3. Congressional Review.* Similar questions could be asked about the congressional-review-of-rules provisions enacted in 1996.[10] The law requires agencies to submit all final rules to Congress before they become effective—a constitutional form of the "legislative veto." While tens of thousands of rules have been transmitted to Congress and GAO for review,[11] only one has been disapproved under the procedures and relatively few resolutions of disapproval have been introduced.[12] "Major" rules are subject to a delayed effective date—normally for at least 60 days—under these provisions. And there is a special problem that can develop at the end of each

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[8] The ABA has urged that Congress and the President show restraint in establishing analytical requirements. ABA House of Delegates recommendation on Rulemaking Impact Analyses, (Feb. 1992). *See also* U.S. GEN. ACCOUNTING OFFICE, FEDERAL RULEMAKING: PROCEDURAL AND ANALYTICAL REQUIREMENTS AT OSHA AND OTHER AGENCIES (GAO-01-852T) (June 14, 2001) (testimony of Victor Rezendes, Managing Director, Strategic Issues Team, before the House Comm. on Education and the Workforce) (describing the many requirements and their impact on OSHA rulemaking).

[9] President Bush did amend the Order to remove the Vice President from the process. Executive Order 13,258 (Feb. 26, 2002), 67 Fed. Reg. 9384 (Feb. 28, 2002).

[10] 5 U.S.C. §§ 801—(part of the Small Business and Regulatory Enforcement Fairness Act).

[11] As of February 2001, the Comptroller General had submitted reports on 336 major rules under section 801(a)(2)(A) and GAO had cataloged the submission of 21,249 non-major rules as required by Section 801(a)(1)(A). Morton Rosenberg, *Congressional Review of Agency Rulemaking: A Brief Overview and Assessment After Five Years, CRS Report for Congress*, American Law Division (Mar. 6, 2001).

[12] *See* Pub L. 107-5, overturning the controversial OSHA ergonomics rule issued at the end of the Clinton Administration.

Congress because any final rule promulgated in the last sixty "legislative" days of a congressional term must be considered, for the purpose of this new law, as being introduced fifteen days into the subsequent Congress. But since this is a rather indeterminate deadline, agencies might feel the need to manipulate their rulemaking schedule to issue rules before this time limit goes into effect. What have been the costs and benefits of this law?

*4. The Nexus of Science and Rulemaking.* Major rulemakings often depend on a sound scientific foundation. Some agencies have recognized this by convening scientific advisory boards, or outside advisory committees to assist them. OMB has recognized this by issuing (after notice and comment) a Peer Review Bulletin that requires administrative agencies to conduct a peer review of "scientific information disseminations that contain findings or conclusions that represent the official position of one or more agencies of the federal government."[13] This followed enactment of the Information Quality Act (IQA), enacted in 2000 as an undebated amendment of the Paperwork Reduction Act inserted into an omnibus appropriations bill.[14] The IQA requires every agency, to issue guidelines, with OMB oversight, to ensure and maximize the quality, objectivity, utility, and integrity of information disseminated by the agency. Agencies must also establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency.

These two OMB-overseen initiatives require significant agency implementation activities, but it is unclear at this point how they have affected the rulemaking process or whether they have provided any improvements in regulatory science.

*5. What's Holding Back Negotiated Rulemaking?* One of ACUS's proudest achievements was the development of a more participatory and consensus-based form of rulemaking known as negotiated rulemaking.[15] With the passage of the Negotiated Rulemaking Act of 1990[16] and its permanent reauthorization in 1996,[17] negotiated rulemaking seemed on the verge of taking off. Congress still requires it from time to time in specific statutes,[18] but since the mid-90's its use has plateaued or even fallen, despite its great promise. One reason, of course, may be the absence of ACUS's support and assistance to the agencies in undertaking these proceedings.[19] But there are cost, timing, and effectiveness questions as well. Perhaps the advent of electronic rulemaking (discussed below) will help breathe new life into the idea, but it would be useful to mount a major study of why it is faltering and what should be done to revive it.

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[13] EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MGMT. & BUDGET, FINAL INFORMATION QUALITY BULLETIN FOR PEER REVIEW, published in the Federal Register at 70 Fed. Reg. 2664 (Jan 14, 2005).

[14] Consolidated Appropriations Act of 2001, Pub. L. No. 106-554, § 515, 114 Stat. 2763, 2763A154 (2000) (codified at 44 U.S.C.A. § 3516 Note).

[15] ACUS Recommendation 82-4, *Procedures for Negotiating Proposed Regulations*, 47 Fed. Reg. 30,708 (1982); ACUS Recommendation 85-5, *Procedures for Negotiating Proposed Regulations*, 50 Fed. Reg. 52, 895 (1985).

[16] Pub. L. No. 101-648, 104 Stat. 4969 (codified at 5 U.S.C. §§ 561-570).

[17] *See* the Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320 § 11, 110 Stat. 2870, 3873.

[18] *See, e.g.*, Pub. Law No. 108-458 § 7212 (requiring the Secretary of Transportation to convene a negotiated rulemaking concerning driver's licenses and personal identification cards).

[19] *See, e.g.*, Administrative Conference of the United States, NEGOTIATED RULE-MAKING SOURCEBOOK (2D ED. 1995).

*6. "Midnight" Rules.* Outgoing presidential administrations have characteristically issued a large number of important rules at the very end of their administrations. In some circumstances, (where the new President is from a different party), the incoming administration attempts to freeze, delay, or withdraw these "midnight rules." This can create some practical and legal difficulties for the agencies and the courts.[20] It would be good to have a set of standards for how both outgoing and incoming administrations (and organs like the Office of Federal Register) should behave in these situations.

*7. "Lookback" at Existing Regulations.* In recent years there has been a new emphasis on agency review and reevaluation of their *existing* regulations. The Regulatory Flexibility Act requires agencies to undertake periodic reviews of regulations that have "a significant economic impact upon a substantial number of small entities."[21] President Bush I mandated a "top to bottom review" of existing regulations in 1992 when he ordered a 90-day moratorium on new regulations.[22] President Clinton institutionalized that mandate in Executive Order 12,866, which required agencies to review existing regulations to ensure that they are still timely, compatible, effective, and do not impose unnecessary burdens.[23] In the Bush II Administration, OIRA has regularly solicited nominations of rules that should be reviewed for ineffectiveness or inefficiency.[24] These efforts should be evaluated.

B. E-Rulemaking. The other major change to the rulemaking process has been the impact of the Internet—leading to what is called "e-rulemaking."[25]

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[20] *See, e.g.*, William M. Jack, *Taking Care That Presidential Oversight of the Regulatory Process is Faithfully Executed: A Review of Rule Withdrawals and Rule Suspensions under the Bush Administration's Card Memorandum*, 54 ADMIN. L. REV. 1479 (2002).

[21] 5 U.S.C. § 610.

[22] *State of the Union Address* (Jan. 28, 1992), 1 PUB. PAPERS 156, 159 (1992-1993). *See also Letter to Congressional Leaders Transmitting a Report on Federal Regulatory Policy* (Jan. 15, 1993), 1 PUB. PAPERS 2258 (1992-1993).

[23] *See* Exec. Order 12,866 § 5. The Order requires agencies to "submit to OIRA a program" to undertake such a review. *Id.* Agencies are also directed to "identify any legislative mandates that require the agency to promulgate or continue to impose regulations that the agency believes are unnecessary or outdated by reason of changed circumstances." *Id.*

[24] *See* OFFICE OF MGMT. & BUDGET, DRAFT 2004 REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS, Notice of availability and request for comments, 69 Fed. Reg. 7987 (Feb. 20, 2004). *See also* Cindy Skrzycki, *Charting Progress of Rule Reviews Proves Difficult*, WASH. POST, (Dec. 7, 2004) E-1 (reporting that OIRA received 71 nominations in 2001, 316 in 2002, and 189 in 2004; it did not solicit in 2003); OIRA, REGULATORY REFORM OF THE U.S. MANUFACTURING SECTOR: A SUMMARY OF AGENCY RESPONSES TO PUBLIC REFORM NOMINATIONS (Mar. 9, 2005), *available at* http://www.whitehouse.gov/omb/inforeg/reports/manufacturing_initiative.pdf; *Regulatory Reform, Hearing before the House Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs* 108th Cong. (Nov. 17, 2004) (statement of John D. Graham, Administrator of OIRA), *available at* http://www.whitehouse.gov/omb/legislative/testimony/graham/111704_graham_reg_reform.html.

[25] The following discussion is derived from Jeffrey S. Lubbers, *The Future of Electronic Rulemaking: A Research Agenda*, Regulatory Policy Program Paper RPP-2002-04, (Mar. 2002), Kennedy School of Government, Harvard University, *available at* http://www.ksg.harvard.edu/cbg/research/rpp/RPP-2002-04.pdf; *reprinted in* 27 ADMIN. & REG. L. NEWS 6 (Summer 2002).

Since ACUS's defunding in 1995, there have been enormous developments in the e-rulemaking area. Government websites have become enormously useful. The online *Federal Register*, *Code of Federal Regulations* (C.F.R.), and *Unified Agenda of Federal Regulatory and Deregulatory Actions* have eclipsed the paper versions in a few short years. And the Electronic Freedom of Information Act Amendments of 1996 geometrically increased the amount of information provided proactively by agencies.

Technology is moving at its usual rapid clip. But legal developments are moving more slowly, and there are many e-rulemaking issues for administrative law scholars, with the help of their technologically adept colleagues to study. In trying to catalog and perhaps order these issues for future researchers, I believe the main goal should be nothing less than how to design a transformation of the rulemaking process as a whole.

This transformation has two main goals in my opinion. The first is an *informational* one of providing a seamless view of each rulemaking. This would include a chronological window to every meaningful step in the generation of a rule, from the statute enacted by Congress that authorizes the rule, to the earliest agency action (perhaps an "advance notice of proposed rulemaking"), to the last step in the process—whether it be the final rule, a decision in a court challenge, or later agency amendments, interpretations, guidelines, or enforcement actions. It would also allow for a "drilling down" into the rulemaking so that one can see the meaningful agency and outside studies and analyses that are now found in the docket, along with the public comments, and the links to secondary studies and analyses referenced in the primary studies.

The second goal of the transformation of rulemaking is a *participatory* one—making it possible for the general public to participate in agency rulemaking from their computers—via electronic comments that can be addressed to a government-wide rulemaking portal. We are well on the way to achieving that with *www.regulations.gov*. But the next step is to make it possible for participants to participate in real time with other stakeholders in a rulemaking process (a glorified "chatroom"), that will allow a more rational, interactive, and less adversarial path to an optimum final rule.

The flip side of increased public participation, of course, is increased responsibilities on agencies to digest and react to a higher volume of comments. Blizzards of comments have already become increasingly common in controversial traditional rulemakings, and e-rulemaking will only further this trend. On the other hand, technology may also make it possible for agencies to efficiently sort and categorize voluminous comments.

Both the informational and the participatory goals raise issues which require further research and experimentation.

*1. Issues Concerning the Informational Goal.*

*a. How should we best integrate existing sources of information?* The Office of Federal Register now is able to constantly update the electronic C.F.R.—which in itself is a great boon to anyone who needs to know what government regulations are in effect at the moment. As *www.regulations.gov* evolves, it should be a one-stop shop for all agency rules and related documents. This should include related guidance documents as well—a sort of "*C.F.R. Annotated*."

*b. Docketing issues.* The planned new integrated federal rulemaking docket needs to incorporate (i) consistent data fields, both across agencies and over time, (ii) flexibility of search, and (iii) ease of downloading.[26] Other docketing issues include:

- *Scanning issues.* Optimally, written (paper) comments should be scanned immediately so that a complete online docket is available. Apparently agencies will soon have the assistance of the Government Printing Office in some of these issues, "including scanning, high-level scanning, OCR processing, long-term docket storage for paper and microform, and other tangible items, and the ability to establish contracts for retrospective and supplemental scanning services."[27] In any event, agencies are faced with the need to develop a strategy for handling a combination of electronic and paper comments.
- *Archiving issues.* Do (redundant) paper copies need to be kept, due to federal archiving requirements? How about cover e-mails? As part of its implementation of the E-Government Act, the National Archives and Records Administration has an "Electronic Records Archives" project underway to "efficiently and effectively address the challenges presented by the increasing volume and complexity of records (in particular, electronic records) which it must manage, preserve, and make available."[28]
- *Attachments.* How should exhibits, forms, photographs, etc., be dealt with? Attachments can pose a risk of viruses and of overloading systems, and electronic technology makes it all too easy for commenters to "dump" huge files or links within their electronic comments. What should the agency's responsibility be to sift through everything that is "sent over the transom"?
- *Copyright concerns.* As public comments have been transformed from easily controlled physical files in Washington DC to internet-accessible digitized documents, copyright issues have emerged—both where the submitter asserts a copyright in his or her own comments, and where the submitter includes copyrighted work without permission. The submission of others' materials raises difficult issues. Various technological fixes have been suggested such as software controls that would code such documents so that downloading and copying can be regulated.[29]
- *Different levels of user classifications.* In some circumstances might it be appropriate for one type of participants (like agency staff) to see everything, while others have more limited access? Should agencies be allowed to ask viewers to register?
- *Authentication issues.* Agencies now have some benchmarks on the subject of electronic signatures because, as required by the Government Paperwork Elimination Act, in 2003,

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[26] These recommendations were included in a letter to OMB signed by 55 academics (myself included), reprinted in Cary Coglianese, Stuart Shapiro & Steven J. Balla, *Unifying Rulemaking Information: Recommendations for the New Federal Docket Management System*, 57 ADMIN. L. REV. 621, 634-645 (2005).

[27] Statement of Oscar Morales, director of the interagency e-rulemaking team, American University E-Rulemaking Conference (Jan. 2004), at 11, *available at* http://www.american.edu/rulemaking/panel4_05.pdf.

[28] *See* National Archives & Records Administration, FY 2004 Implementation of the E-Government Act (Dec. 6, 2004), available at http://www.archives.gov/about/plans-reports/e-gov.

[29] *See* Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433, 487 (2004).

the General Services Administration, in cooperation with OMB, issued a policy directive concerning authentication issues, including digital signatures, presented by electronic communications to the government.[30]

- *Security issues.* In a post 9/11 world, security issues have become of heightened concern—both in terms of preventing unauthorized tampering, and in making sure that sensitive information is not made available to potential terrorists.
- *Privacy issues.* Should anonymous comments be permitted? Ought commenters be identified, or searchable by name?
- *Mandating e-comments.* What legal impediments prevent agencies from *requiring* e-comments to the exclusion of paper comments? The "digital divide" continues to exist—not everyone owns or is comfortable using a computer, so agencies will have to continue to accept mailed, messengered, or hand-delivered comments. On the other hand, problems with the mail, especially in Washington after 9/11 and the anthrax scare, have made e-mail even effective by comparison.

*2. Issues Concerning the Participatory Goal.*

*a. How can we best reach the goal of better, more targeted notices?* Agencies are increasingly offering an opportunity to join listservs. How well has this worked?

*b. Can we also provide easier, more convenient comment opportunities?* Can agencies efficiently segment a proposed rule to allow for comment on a specific part as well as on the whole? Should they use numbered questions or numbered issues to help organize the comments?[31]

*c. What rules should govern rulemaking "chatrooms"?* First Amendment issues are tricky in this area. What rules should pertain to archiving of chats? To be consistent with the above informational goals, this should be done, but how much flexibility should there be, opportunity for correction, disclaimers, etc.? Should participants should be permitted to send attachments to their e-mails in such chat rooms. Do the Paperwork Reduction Act and the Privacy Act prevent agencies from collecting demographic and interest group affiliation data on participants? Finally, what about electronic "negotiated rulemaking"? Would this just become a more formalized, more highly moderated, version of "regular" electronic rulemaking? Or would it add value by liberating negotiated rulemaking from the up-front cost concerns (of convening meetings) that seem to be holding it back now.[32]

II. Broader Regulatory Issues.

A. Regulatory Prioritization. Many regulatory agencies have limited budgets and broad jurisdictions, and thus must devote much more attention to prioritization. They will have to

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[30] General Services Administration, *E-Authentication Policy for Federal Agencies*, Request for Comments, 68 Fed. Reg. 41,370 (July 11, 2003) (issued in cooperation with OMB).

[31] *See* Fred Emery & Andrew Emery, *A Modest Proposal: Improve E-Rulemaking by Improving Comments*, 31, ADMIN. & REG. L. NEWS, ____ (2005) (forthcoming).

[32] *See, e.g.*, Matthew J. McKinney, *Negotiated Rulemaking: Involving Citizens In Public Decisions*, 60 MONT. L. REV. 499, 511 (1999) (citing as a reason for not using negotiated rulemaking, "the costs to an agency, in both time and money").

develop better ways to decide on the best targets for regulation, for standard setting, and for enforcement. Some pioneering work was done by the EPA Science Advisory Board in trying to set priorities among all the environmental hazards that EPA might choose.[33] Such efforts need to be expanded.

B. Retrospective Reviews of Agency Rulemakings. A related topic is the need for studies comparing the projected cost-benefit impacts of agency rules (when issued) with the actual cost-benefit impact or rules after they have been in effect for a period of time. The conventional wisdom is that agencies overestimate the benefits and regulated industries overestimate the costs. OMB has discussed this growing body of literature in its 2005 Report to Congress,[34] and signaled its intention to release a report on this issue soon.[35]

C. Alternative Approaches to Regulation. Agencies must develop regulations that are more effective, yet less burdensome and more acceptable to the regulated community. This need fueled ACUS's work in the area of negotiated rulemaking.[36] ACUS also looked at the need to take advantage of voluntary industry consensus standards[37] and the need to achieve international harmonization of regulations.[38] A lot more research is needed in all those areas.

D. New Approaches to Enforcement. At the time of its shutdown, ACUS had just begun to look at ways that agencies could leverage their enforcement resources through the use of audited self-regulation.[39] For example, the Securities and Exchange Commission (SEC) relies on intermediaries such as the stock exchanges to do the front-line regulating, while the SEC serves as a backstop and overseer of the way the stock exchanges do the regulating. ACUS also began to look at what was called cooperative enforcement—reliance on the employees of the regulated

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[33] *See* ENVIRONMENTAL PROTECTION AGENCY, UNFINISHED BUSINESS: A COMPARATIVE RISK ASSESSMENT OF ENVIRONMENTAL PROBLEMS (1987); ENVIRONMENTAL PROTECTION AGENCY, REDUCING RISKS: SETTING PRIORITIES AND STRATEGIES FOR ENVIRONMENTAL PROTECTION (1990).

[34] OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, *Draft 2005 Report to Congress on the Costs and Benefits of Federal Regulations* 39-44, *available at* http://www.whitehouse.gov/omb/inforeg/regpol-reports_congress.html.

[35] *Id.* at 39 ("OMB is in the process of reviewing this body of literature to determine whether overall inferences or lessons can be drawn for analysts and/or regulators."); and at 40 ("OMB intends to explore regulatory reforms that would promote rigorous validation studies."). See also GAO Report, *supra* note 7, at 10 (suggesting the need for more retrospective analysis).

[36] *See* note 15, *supra*.

[37] *See* ACUS Recommendation 78-4, *Federal Agency Interaction with Private Standard-Setting Organizations in Health and Safety Regulation*, 44 Fed. Reg. 1357 (Jan. 5, 1979).

[38] *See* ACUS Recommendation 91-1, *Federal Agency Cooperation with Foreign Government Regulators*, 56 Fed. Reg. 33,842 (July 24, 1991). *See also* George A. Bermann, *Regulatory Cooperation Between the European Commission and the U. S. Administrative Agencies*, 9 ADMIN. L.J. AM. U. 933, 954-83 (1996) (examining European Commission practices and policies concerning regulatory dialogue with United States and concluding with prescriptions for more effective regulatory cooperation).

[39] *See* ACUS Recommendation 94-1, *The Use of Audited Self-Regulation as a Regulatory Technique*, 59 Fed. Reg. 44,701 (1994) (suggesting that agencies delegate power to private self-regulatory organizations, provided conditions promote effectiveness and organization operates fairly). *See also* Douglas C. Michael, *Federal Agency Use of Audited Self-Regulation as a Regulatory Technique*, 47 ADMIN. L. REV. 171, 181 (1995) (listing advantages of audited self-regulation).

entity itself rather than a third-party intermediary. The best known example of this is the method that is now used in food safety regulation, called Hazard Analysis and Critical Control Point (HACCP) in which the agency approves the company's plan, reviews operating records, and verifies that the program is working.[40] EPA and OSHA also undertook experiments in cooperative regulation as well, and subsequent research, led by Professor Freeman, has shed new light on the pros and cons of this.[41]

There is a lot more that needs to be done in this area of alternative enforcement. What about qui tam actions under the False Claims Act,[42] often referred to as the "bounty hunter" provisions? What about insurance-based regulation or contract-based regulation, or the continued development of systems for trading of pollution credits and other marketable rights?[43]

E. Waivers and Exceptions. The Gulf Coast disaster has focused attention on agency authorities and procedures for issuing waivers from existing statutes and regulations. What process is required for waivers? How should third-party beneficiaries of existing laws and regulations be heard in such proceedings? Is it rulemaking or adjudication? This is a neglected area.

F. Alternative Dispute Resolution. Another area of heavy ACUS involvement was in the encouragement of agency use of alternative dispute resolution (ADR). With increasing budget stringency, ADR is one way of avoiding costly enforcement adjudication. Every enforcement case that is mediated saves the government many times the cost of the mediation. Thus ACUS should pick up where it left off in terms of its concentrated studies of ADR use in the government.[44] A major issue is the need for confidentiality in such proceedings—an issue that must of course be balanced by the needs for open government.

G. Cooperative Federalism. Another major issue bearing on regulation and the provision of government services is federalism. The aftermath of Katrina showed just how important it is to have cooperative linkage between federal, state, and local governments.

Moreover, many important regulatory programs involve state implementation of federal environmental and safety standards—the Clean Air Act, Clean Water Act, Surface Mining Control Act, and the Occupational Health and Safety Act, just to name a few. Under these Acts,

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[40] *See* Dept. of Agriculture, Food Safety & Inspection Service, Hazard Analysis and Critical Control Point (HACCP) Systems, 9 C.F.R. pt. 417.

[41] *See, e.g.*, Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997); Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155 (2000).

[42] 31 U.S.C. §§ 3729-3733.

[43] *See, e.g.*, Clean Air Act Amendments of 1990, 42 U.S.C. §§ 7651-7651 (establishing allowance trading system for sulfur dioxide emissions from utilities).

[44] *See* ADMINISTRATIVE CONFERENCE OF THE U.S., TOWARD IMPROVED AGENCY DISPUTE RESOLUTION: IMPLEMENTING THE ADR ACT (Feb. 1995) (documenting savings). *See also* Testimony of former Acting ACUS Chair Sally Katzen, quoting from the President of the American Arbitration Association, as pointing to "the importance of the Administrative Conference of the United States in our national effort to encourage the use of alternative dispute resolution by Federal government agencies, thereby saving millions of dollars that would otherwise be frittered away in litigation costs." Sally Katzen, *Testimony Before the House Committee on the Judiciary Subcommittee on Administrative Law and Governmental Relations in Support of the Reauthorization of the Administrative Conference of the United States* (Apr. 21, 1994), 8 ADMIN. L.J. AM. U. 649 (citing Letter from Robert Coulson, President, American Arbitration Association, to Rep. Steny Hoyer (Sept. 3, 1993)).

states retain the ability to leave enforcement to the feds, but most states prefer to administer these programs themselves. This approach of "cooperative federalism"[45] is seen as an alternative to direct federal enforcement. But, inevitably, tensions arise as the federal agency retains the ultimate authority to oversee and even veto state implementation activities. Because this model is so prevalent, it deserves a close study—with all the stakeholders represented in the study.

Finally, the movement over the last few decades to devolve more responsibility onto state and local governments in federally funded assistance programs such as Medicaid, Medicare, public housing, supplemental security income, food stamps, and welfare has required the states, with their fifty different administrative procedure acts, to deal with an influx of rulemaking and adjudication responsibilities. In part, the Unfunded Mandates Reform Act of 1995 was an attempt to address this.[46]

During ACUS's time it had a sister agency, the Advisory Commission on Intergovernmental Relations (ACIR), which worked on these issues from 1959 1996, when it too was abolished.[47] A revived ACUS could focus on these issues.

H. Requirements for Agency "Planning" in Natural Resource Regulation. In 1998, the Supreme Court in *Ohio Forestry v. Sierra Club*,[48] made it difficult to challenge the sort of agency planning documents that are required under many natural resources statutes.[49] The case concerned the ripeness for immediate review of a Forest Plan adopted by the Forest Service authorizing the cutting of timber in a national forest in Ohio. The Court denied review on ripeness grounds, saying that many steps had to take place under the plan before trees were actually cut, including the approval by the Forest Service of permits for particular logging projects. The upshot of this decision is that the Forest Service can insulate itself from judicial review of its plans by keeping them as general as possible—a tack that undercuts the value of the planning process. The Forest Service, citing this decision, subsequently crafted a forest planning process that was designed to produce the most general of plans, exempted from NEPA,[50] and with the important decisions made at the site-specific level by the Forest Supervisor.[51] While perhaps an understandable

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[45] *See, e.g.*, Connecticut v. EPA., 696 F.2d 147, 151 (2d Cir. 1982) (referring to the Clean Air Act's State Implementation Plan approach as a "bold experiment in cooperative federalism").

[46] Pub. L. No. 104-4, 109 Stat. 48 (1995) (codified at 2 U.S.C. Chs. 17A, 25).

[47] For more on the ACIR, see its preserved website at http://www.library.unt.edu/gpo/acir/default.html.

[48] 523 U.S. 726 (1998).

[49] The statute involved in this case, the National Forest Management Act of 1976 requires the Secretary of Agriculture to "develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System." 90 Stat. 2949, as renumbered and amended. 16 U.S.C. § 1604(a). *See also* "habitat conservation plans" approved by the Secretary of the Interior under the Endangered Species Act, § 10, 16 U.S.C. § 1539(a)(2); state "coastal zone management programs" subject to the approval of the Secretary of Commerce under the Coastal Zone Management Act, § 306, 16 U.S.C. § 1455(d).

[50] This exemption is important because the courts have held that NEPA challenges and Regulatory Flexibility challenges are ripe for review immediately.

[51] *See* Department of Agriculture, Forest Service, Final Rule, National Forest System Land Management Planning, 70 Fed. Reg. 1023, 1024 (Jan. 5, 2005) codified at 36 CFR Part 219. (preamble describes the final rule as "a paradigm shift," designed to make forest planning "more strategic and less prescriptive in nature").

reaction to the decision, this new approach—which could easily be applied to all the other natural resource conservation statutes requiring formal agency planning—deserves examination.

I. Agency Structure. Is the multi-member board or commission an expensive anachronism? Is there such a thing as an independent agency, or should there be? Why does Congress create three-member agencies like the Occupational Safety Review Commission (OSHRC), or even worse, six-member commissions, like the Federal Election Commission and the International Trade Commission, with too many opportunities for paralysis? Does it really make any difference if the EPA becomes a Cabinet department? How well does the "holding company" model of a Department, like the Department of Transportation or the Department of Homeland Security, function? What about all the hybrids, such as government-sponsored enterprises,[52] government corporations,[53] and administrative quasi-courts, like OSHRC and the National Transportation Safety Board, that are split off from their rulemaking agencies? And what about all the independent power centers developing within agencies: presidentially appointed general counsels, division heads, inspectors general,[54] chief financial officers,[55] and so on?

III. Administrative Adjudication

A. The Administrative Law Judge Program. I mentioned expensive anachronisms. Sometimes I think that agencies believe that administrative law judges (ALJs) fit that description. I believe the state of administrative adjudication is something that also needs to be addressed again. It was in 1979 that then-Professor Antonin Scalia began an article by saying "the subject of administrative hearing officers is once again on the agenda of federal regulatory reform."[56] Today Congress seems little concerned about the state of administrative adjudication even though agencies seem to be using all sorts of non-ALJ adjudicators instead of ALJs. In fact, other than the over 1100 ALJs in the Social Security Administration, the numbers at the other agencies have fallen from 410 in 1978 to 209 in March 2002.[57] Meanwhile, agencies are using thousands of other administrative hearing officers, administrative judges, immigration judges, asylum officers, etc.[58]

In my opinion, many agencies have come to see ALJs as too expensive, too difficult to appoint, and too hard to manage; therefore, they seek to avoid using them.[59] I think this is a shame

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[52] *See, e.g.*, Richard Scott Carnell, *Handling the Failure of a Government-Sponsored Enterprise*, 80 WASH. L. REV. 565 (2005); Thomas H. Stanton, *Federal Supervision of Safety and Soundness of Government-Sponsored Enterprises*, 5 ADMIN. L.J. AM. U. 395 (1986).

[53] *See, e.g.*, A. Michael Froomkin, *Reinventing the Government Corporation*, 1995 U. ILL. L. REV. 543.

[54] *See* Inspector General Act of 1978, 5 U.S.C. app. (1994). *See also* PAUL C. LIGHT, MONITORING GOVERNMENT: INSPECTOR GENERALS AND THE SEARCH FOR ACCOUNTABILITY (1993).

[55] *See* 31 U.S.C. §§ 901, 903 (creating position of chief financial officer in all departments and other enumerated agencies).

[56] Antonin Scalia, *The ALJ Fiasco—A Reprise*, 47 U. CHI. L. REV. 57 (1979).

[57] Chart supplied to the author by the Office of Personnel Management in 2002.

[58] *See* John H. Frye III, *Survey of Non-ALJ Hearing Programs in the Federal Government*, 44 ADMIN. L. REV. 261 (1992) (detailing use of non-ALJ presiding officers by agencies).

[59] *See* Jeffrey S. Lubbers, *APA-Adjudication: Is the Quest for Uniformity Faltering?*, 10 ADMIN. L.J. AM. U. 65, 72-74 (1996) (describing the reasons agencies are moving away from using ALJs).

because it undermines the consistency, uniformity, and independent adjudicative values that are at the heart of the APA.

Finally the Office of Personnel Management, which has the statutory responsibility for administering the ALJ program, has abolished its separate Office of ALJs, and has seen its register of eligible candidates for the ALJ position frozen during a lengthy period of litigation over the agency's implementation of the veterans' preference laws within the ALJ hiring program.[60]

B. Administrative Appeal Boards. The APA does not prescribe how agencies must organize their internal appeal procedures for review of ALJ initial decisions. This has resulted in many different variations, ranging from a single "Judicial Officer" at the Department of Agriculture, to an Appeals Council at the Social Security Administration, to appeal boards at EPA and the Department of Labor.[61] In other large-volume non-APA adjudication programs involving patent and trademark appeals and immigration appeals, agencies have also set up appeal boards. Most of these boards lack the independence and stature of the judges whose decisions are being reviewed. In some agencies the agency head controls the make-up and assignments of these boards. This seems to undercut the adjudicative model, but it also recognizes the policymaking accountability of the agency head. This is a neglected area that needs some rethinking.

C. Mass Adjudication Programs. How should we handle high-volume benefits programs such as the Social Security Disability Program, which now has upwards of 500,000 hearings a year with no sign of slowing down,[62] or immigration adjudication, which is burgeoning at a very fast rate? The Black Lung Benefits program is another high caseload program, and a new Medicare appeals adjudication program[63] shows signs of becoming the next big program. Which cases are best assigned to agencies and which are best assigned to Article III courts or the more specialized Article I courts? Can administrative tribunals handle mass tort cases?[64] These are all questions that I think should be on the research agenda in coming years.

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[60] The litigation began in 1997 and was not resolved until 2003, see Meeker v. MSPB, 319 F.3d 1368 (Fed. Cir. 2003).

[61] *See* Russell L. Weaver, *Appellate Review in Executive Departments and Agencies*, 48 ADMIN. L. REV. 251 (1996).

[62] The Social Security Administration has recently proposed a complete overhaul of the disability adjudication process, see Notice of Proposed Rulemaking, "Administrative Review Process for Adjudicating Initial Disability Claims," 70 Fed. Reg. 43,590 (July 27, 2005). *See also* Frank S. Bloch, Jeffrey S. Lubbers and Paul R. Verkuil, *Developing a Full and Fair Evidentiary Record in a Nonadversarial Setting: Two Proposals for Improving Social Security Disability Adjudications*, 25 CARDOZO L. REV. 1 (2003); also *available at* http://www.ssab.gov/documents/Bloch-Lubbers-Verkuil.pdf.

[63] See the Medicare Prescription Drug, Improvement and Modernization Act of 2003, § 931, Pub. L. No. 108-173, 117 Stat. 2066 (2003) (directing SSA and DHHS to submit a Plan for the Transfer of Responsibilities for Medicare Appeals).

[64] Such as victim compensation process created for the victims of the September 11 attacks, or the ongoing debate over compensation for asbestos-related illnesses. For an early ACUS examination of this issue, see Wendy K. Mariner, *Innovation and Challenge: The First Year of the National Vaccine Injury Compensation Program*, 1991 ACUS 409 (examining effectiveness of administrative tribunal in handling tort cases arising from vaccinations required by state law).

IV. Judicial Review of Administrative Agency Action

A. *Chevron*-Related Issues. The APA essentially creates an agency-court partnership. Agencies make rules and decide cases, and the Article III courts review these actions with a careful but deferential scope of review. This relationship is of obvious concern to all three branches of government, as exemplified by the *Chevron* case, in which the Supreme Court basically told the judiciary to defer to reasonable interpretations of legislative statutes made by executive agencies.[65] This simple dictum has spawned a plethora of cases concerning what this deference should consist of and to what types of interpretations it should be applied. There is no shortage of scholarly commentary on these cases, but there is an absence of consensus-building around this issue. The courts are struggling with these issues, and a renewed ACUS could help provide some focus for the courts.

B. Access to the Courts. Just as the *Chevron* doctrine has become prohibitively complex, so have the courts' decisions on private rights of action, standing, ripeness, finality, and exhaustion of remedies—the key doctrines governing the ability of people to challenge administrative agency action. Moreover, some of these doctrines seem to be asymmetric—tending to favor challenges by regulated interests and to disfavor challenges by plaintiffs seeking stronger regulation.

C. Attorney Fees. One of ACUS's key responsibilities was to review agency rules implementing the Equal Access to Justice Act's attorney fee provisions concerning administrative adjudication.[66] This function has not been picked up anywhere else. Another key attorney fee issue concerns what is meant by the term "prevailing party." The Supreme Court ruled in 2001 that to meet that test—which is crucial in many statutes' attorney fee provision—a party must have prevailed on the merits through a judgment or a consent decree, thus precluding an award of fees for favorable settlements and other favorable changes in the defendant's conduct.[67] The impact of this decision should be of great interest to Congress, which could, of course, make its intent clear if it so wished.

In conclusion, let me first say that this is hardly a complete list of projects that could be tackled by a revived ACUS. It is a collection of issues that have accumulated in the past decade. The new ACUS Chairperson and his or her Council would obviously have their own priorities. But I hope that this listing does show the need for a revived and continuing focus on the administrative procedural issues that often get short shrift in the day-to-day needs of legislating and administration of programs, but can make or break the success of these programs. For 27 years ACUS provided a low-cost center of research, scholarship, and consensus-building on administrative law within the federal government. And I believe that now that ACUS has been reauthorized, it should be funded as soon as possible.

Thank you Mr. Chairman, and I look forward to your questions.

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[65] Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984).

[66] When Congress enacted the EAJA in 1980, it directed agencies to consult with the Chairman of ACUS and then to establish uniform procedures for the submission and consideration of fee applications in their administrative proceedings. *See* Pub. L. No. 96-481, Title II, § 203, 94 Stat. 2326 (Oct. 21, 1980). ACUS developed Model EAJA Rules to guide the individual agencies in drafting their own EAJA rules. *See* 46 Fed. Reg. 32,900 (June 25, 1981).

[67] Buckhannon Bd. & Care Homes, Inc., v. West Virginia Dep't of Health & Human Servs., 532 U.S. 598 (2001).

Mr. CANNON. My sentiment about funding exactly. I have been sitting here trying to figure out how we in an era of reducing programs by number as opposed to improving Government through a process is more important. We are working on that. Thank you, and appreciate your comments.

Professor Freeman.

**TESTIMONY OF PROFESSOR JODY FREEMAN, HARVARD LAW SCHOOL**

Ms. FREEMAN. Mr. Chairman, Mr. Watt, members of the staff, I am delighted to be here today. As you know, I specialize in administrative law and I want to line up on your side in terms of being excited all the time about administrative law issues. If anybody wants to keep talking about it after the end of the hearing I will stay as long as anyone likes. It is hard to find friends. Administrative law and administrative process issues have a PR problem in this regard, and I think that is part of the reason.

I have spent a lot of time trying to think about how to rename the field. Things like "Government, power and you" come to mind. But I want to focus on two points of my testimony. I have gone on at length in my written testimony, and I won't repeat all of it.

First, I want to express the absolute clarity of the need for empirical research on what Government agencies do and how well they do it. We know precious little. We don't know much at all about the very important process of generating rules which, as you all well know, reach every corner of our economy and every aspect of social life. The high volume of rules coming out of agencies like DHS and EPA and HHS and DOT, these rules have the power, the effect of legislation. And yet we know almost nothing about how well we are doing this and how we might improve it. And there is a clear need, as this Committee well knows, for an informed approach to congressional law reform efforts.

As you know, Congress passes a few hundred laws every year. The Supreme Court issues maybe between 70 and 100 cases every year. And yet we have thousands of rules coming from the Federal Government every year, and we have almost no—I feel safe in saying—only almost no careful empirical analysis of what agencies are doing.

And this is a really serious, I think, problem because we can't answer some essential questions. We can't answer the question yet, how well is congressional review of agency rulemaking going? We can't answer whether OMB oversight is effective and whether it is effective for some agencies or not. Some agencies may perform cost-benefit analysis particularly well, some agencies maybe fairly poorly. We can't answer the question, have we heaped on too many of these analytic burdens so that we are actually undermining the ability of agencies to promulgate rational, defensible, smart rules?

Intuitively you would expect more oversight, more analysis, more information to help the rulemaking process. But the problem is that we don't know how well we are actually performing.

So we have only scratched the surface in starting to explore these issues, and I think a coherent, comprehensive empirical research project would be enormously helpful to your efforts in Congress to either avoid law reform that is wasteful and distracting

and just a bad idea, and to target your law reform efforts and your money and your time on things, on measures that will be beneficial. There will be short term measures, longer term measures, but what you want I believe is a list of priorities and a sense of where you will get the most bang for your proverbial buck. And I think that is something that a revived ACUS that is appropriately funded can really contribute to.

There are many myths about the administrative process. There is a figure that we all know about which circulated for years which was a figure that claimed that 80 percent of EPA's rules got challenged, and administrators of EPA cited this and people cited it in congressional testimony. And the truth is there was absolutely no empirical basis for the figure. People just thought it was 80 percent.

This is not the way one ought to go about law reform and planning for administrative decision making.

There is a similar figure floating around, and I believe there is a preliminary study that CRS did—I may be wrong about that—but there is a figure floating around that 50 percent of rules that get challenged upon judicial review get struck down.

Some people believe it is as high as 50 percent. This is something the study I am doing is looking at, and the truth of the matter is we just don't know. We don't know how well rules fair when they get challenged.

So I will be happy to talk a little bit about the study and give you a sense of it. We are at the preliminary stage, but this is the kind of thing we want to know about. Because it would be a big mistake and a waste of resources to conclude that so many rules are being challenged and so many rules have been struck down that the process isn't working and Congress ought to intervene to fix it if in fact that is not the case.

So we really need to know the answers to these questions.

Just briefly, the study that I am conducting I think can help shed some light on at least how one project is going about looking at the judicial review of rulemaking and also I think shed a little bit of light on the cost involved.

This study grew out of conversations between me and staff at the Congressional Research Service, in particular, Curtis Copeland, which of course stem from this Committee's interest in sponsoring empirical work. And we focused on the fate of agency rules upon judicial review. This study is the most comprehensive study I am aware of. We look at a database initially of 10,000 cases but culled to 3,000 cases, of which we think there are about 20 percent involving rulemaking, challenges to rules. So we think we are going to end up with about 600 cases, which is a very big database of cases, and every one of them is being coded in the most deliberate manner so that what we can pull out of this data would be preliminary inferences, preliminary answers to questions like how many rules do get struck down across all of the 11 circuit courts? How often do interest groups of a particular type succeed in challenging rules? Does it make a difference what agency promulgated the rules? Do some agencies always win, do some agencies always have their rules struck down?

We don't know the answers to these questions, and we are coding the data for even more than that. So if we want to ask even more detailed questions; for example, how do you do across the circuits? How does the Fifth Circuit compare to the First Circuit? Does it matter which panel of judges you come before in terms of the rate at which they strike rules down?

All of these questions we are asking and we should be able we hope to infer something here as well about how closely judges are really reviewing rules because we are going to code the reasons why the rules are struck down, the basis for challenging why they are struck down when they are struck down. So we should be able to tell something about whether the courts are reviewing rules with a very serious, rigorous kind of approach which we would call "hard look review" or whether they are giving these rules rather a soft glance and not being particularly rigorous in reviewing them.

So I am happy to talk more about that study. I will tell you something about what it costs, and this leads to this problem of incentives to do this kind of research. I will be very honest with you, law professors really don't want to do this. And the reason is not because we are not interested but you don't get tenure for it. These kind of empirical studies give us very few rewards. Luckily I have tenure. I can just be interested in it. But without incentivizing this kind of work that means without a body like ACUS that can draw on academic expertise and tempt academics by saying—guess what, you can interact with some of the best minds in practice, some of the best minds in agencies, you will have lots of access to this collaborative, cooperative exercise, without incentives—it is going to be very hard to generate this kind of work, the work that you need to inform your efforts.

The other thing I want to mention about empirical work is it takes time and money. It is slower going than we would like. It is hard to do. My project involved an empirical expert who directs empirical research at UCLA School of Law where I formerly was a professor before I joined Harvard. You need someone with that kind of statistical expertise to do this work so it's reliable and credible for your purposes. I have a team of four research assistants. These people are very underpaid, and I need even more of them to do this properly. The project is probably easily costing $10,000 for the first cut through the data, and I imagine it will get easily to $20,000, and the generosity of the Dean of the Harvard Law School is making this possible. There is no other source of funding to do it.

As you well know, Mr. Chairman, it is very hard to go out to foundations or anybody and say I am doing a fascinating project on the administrative process, even though it is about the way the American Government works and how well it works.

Finally, my second big point and my most important point I think here for your purposes may be to reinforce the need to invest in ACUS. A small investment is going to go a very long way. This is a body that is going to be able to make recommendations in a way that no other body can. The American Bar Association doesn't have the legislative clout and the credibility with agencies that ACUS will have. There is a Center for Rulemaking that Professor Kerwin has initiated at the American University. It is a very inter-

esting center, but it doesn't have the resources. It doesn't have the ability to do the kinds of things that ACUS can do. And as Justice Scalia noted very clearly, there is a big difference when ACUS comes to agencies and says we want to study you. They perceive that as potentially helpful, and not as something that will potentially be an obstacle that will get in their way.

I really believe that ACUS is a bargain for Congress. And as you mentioned, Mr. Chairman, as other panelists have mentioned, it is clear that funding ACUS to a tune of the several million dollars should not be seen as in competition with other efforts that are very pressing in the Federal Government. ACUS can help to improve our efforts, as you mentioned, in terms of disaster relief response and also in terms of security, national security concerns. If you make Government work better and you figure out ways to improve it, you're going to assist in all those endeavors. It is well worth the investment.

I just want to add to Professor Lubbers' long list a few ideas for what I believe is really the next generation of ACUS. Ten years is a long time. Things have changed since ACUS was around, and there is, as Professor Lubbers has mentioned, a backlog of work to do. But in particular a few things have developed that I think are very worthy of ACUS's time. One has been mentioned here today, privatization and contracting out. We really do not have administrative procedures adequate to guide privatization and contracting out. Private service providers are increasingly performing functions we have traditionally thought of as public, including functions associated with the military functions, prisons, national security. And the truth of the matter is most of these actions typically fall outside of the administrative law process and protections. And we need to think carefully about that. ACUS can spearhead in a bipartisan way a project to think about that.

Second, I do want to mention it is the 10th anniversary of the Small Business Regulatory Enforcement Fairness Act and there have been concerns that small businesses are not the ones benefiting from getting an early look at these rules, but rather that, potentially, big business is driving the small business agenda. It is something that Congress may be interested in, something certainly that ACUS could look at.

And finally, where ACUS could direct further research, as again has been mentioned here today and I want to reinforce it, is the reconciliation of the administrative law principles of fairness and openness and transparency and effectiveness with the clear imperatives of national security. This was not on the radar screen 10 years ago, and it is front and center on the radar screen right now.

There are agencies in the Federal Government that are not subject at the moment to the kind of rigorous cost-benefit analysis and the kind of other requirements that we impose on—that we normally impose on the process. And how are we going to reconcile the need to protect our national security while at the same time not abandon the norms and principles that inform administrative law? I think that's a huge challenge. I don't know the answer.

But we are operating with a 60-year-old document, the Administrative Procedure Act, and we need to think very carefully about

where and how to engage in reform. And I think ACUS will be well worth a small investment of Congress' time and money. Thank you.

[The prepared statement of Ms. Freeman follows:]

PREPARED STATEMENT OF JODY FREEMAN

Mr. Chairman and Members of the Subcommittee:

Thank you for the invitation to testify at the Oversight Hearing on the Administrative Law, Process and Procedure Project.

I am a Professor of Law at Harvard Law School. I specialize in administrative law and environmental law. My scholarship focuses on congressional delegation of authority to agencies, inter-agency coordination, public-private collaboration, dispute resolution, regulatory innovation, and privatization. I am the Vice-Chair of the American Bar Association Administrative Law Section Sub-Committee on Dispute Resolution as well as the Vice Chair of the Sub-Committee on Environmental Law and Natural Resources. I am the current Chair of the American Association of Law Schools (AALS) Executive Committee on Administrative Law.

My testimony focuses on two points: (1) the need for empirical research to support congressional law reform efforts in administrative law; and (2) the benefits to be gained by funding the Administrative Conference of the United States (ACUS) to produce and sponsor such empirical research. I will also describe the empirical project on agency rulemaking that I have undertaken in consultation with the Congressional Research Service (CRS), a project that I hope will further this Subcommittee's Oversight Plan and which might help to inform other empirical studies sponsored by ACUS, should it be funded. Although I will confine most of my remarks to the topic of rulemaking, the scope of what ACUS can and should undertake to study is broader. I will briefly touch upon some other matters ACUS might examine if it is funded, but a more developed proposal for the agency's agenda will be offered by my co-panelist, Jeffrey S. Lubbers.

I. THE NEED FOR EMPIRICAL RESEARCH TO ASSIST CONGRESSIONAL LAW REFORM

As this Subcommittee has noted, Congress needs more information on rulemaking and other aspects of the administrative process in order to focus its law reform efforts. We know precious little about the administrative process. Consider: Each year, Congress enacts a few hundred laws, the Supreme Court hands down fewer than a hundred decisions, and regulatory agencies promulgate several thousand rules. Yet while the legislative and judicial processes are the object of very close scrutiny and rigorous empirical analysis, the rulemaking process attracts strikingly little scholarly attention. Are rules effective? Are they produced in a timely manner? Are they produced with sufficient public input? Are they cost-effective? Do congressional and executive oversight mechanisms improve rules? Are rules challenged frequently? Do most challenged rules survive judicial review? We simply cannot answer these questions. The dearth of empirical research on rules is especially problematic given the importance of rulemaking as a vehicle for social and economic policy. Many rules have very significant social and economic effects. The agencies that produce a high volume of rules, including the Department of Transportation, the Environmental Protection Agency, the Department of Homeland Security, and Health and Human Services affect virtually every corner of the U.S. economy and every aspect of social life. Yet our empirical knowledge of the effectiveness of their rulemaking processes remains woefully thin.

Without the benefit of reliable empirical research, Congress might waste both time and money on law reform efforts that are neither necessary nor effective. It would be a mistake, for example, to add more oversight mechanisms to rulemaking if the existing measures, such as cost-benefit analysis and peer review, work well. Intuitively, one would expect these additional steps to improve the quality of rulemaking, yet we cannot say with confidence whether or not this is true. Among the questions to be investigated are: How well do agencies perform these analyses? Do these oversight mechanisms improve the quality of rules? Do they slow down the rulemaking process unnecessarily? Are they a net benefit or a net cost? While we have some preliminary evidence on these questions, scholarly work to date has only scratched the surface.

Moreover, to the extent that scholars do study the rulemaking process, the majority of attention focuses on *ex ante* processes in rulemaking (such as cost-benefit analysis). There is virtually no *ex post* empirical study of the rules themselves. To put a finer point on it, we do not know how well rules are implemented and whether they achieve their goals, and we lack mechanisms for feeding such *ex post* evaluation back into the rulemaking process.

Indeed, we have not even agreed upon what measurement tools we would use to answer the most basic questions. For example, how would we answer the question, *Are regulatory agencies getting better at rulemaking?* Would we look to see if the agency is doing a better job of setting its priorities? Whether it is issuing rules faster than it used to? Doing a superior job of analyzing scientific data? Obtaining more feedback about the effect of its rules, and integrating it into decision making? Congress might be interested in knowing the answer to these questions before it undertakes reform. Perhaps agencies that are less successful at one or more of these steps might be encouraged to adopt the "best practices" of the more successful agencies. Congress might wish in some instances to require the adoption of certain practices across the board. With only anecdotal and impressionistic evidence, however, Congress would simply be guessing at what works.

There are many myths about the administrative process that persist for years, despite their dubious origins. For example, scholars and practitioners of administrative law long subscribed to the widely-held belief that the vast majority—80 *per cent*—of regulations issued each year by the Environmental Protection Agency (EPA) were challenged in court. This statistic was relied upon by academics, legislators, and journalists, quoted by successive administrators of EPA, and cited before congressional committees as truth. The only problem was that the statistic had no factual basis. Indeed, one empirical study investigating its accuracy determined that no more than 35 *per cent* of the EPA's rules were challenged. This rate of challenge is still significant, and might justify law reform efforts aimed at reducing legal challenges to rules. Yet the example ought to make us cautious. Some concerns about the administrative process might be overstated, and some understated. There may be similar mistaken assumptions about how many rules are invalidated upon judicial review. Some believe the figure is as high as 50 *per cent*, but we don't really know. It would be a mistake to conclude, without knowing the real rate, that Congress needs to intervene to address this perceived problem. Only with good data can Congress choose wisely where to invest its resources, and prioritize which law reform efforts are most needed now, and which might be longer-term efforts.

In its Oversight Report, this Subcommittee has already identified issues that require further study, including (1) public participation in the rulemaking process; (2) Congressional review of rules; (3) Presidential review of agency rulemaking; (4) judicial review of agency rulemaking, (5) the agency adjudicatory process; (6) and the utility of regulatory analysis and accountability requirements; and (7) the role of science in the regulatory process. I agree that these are important areas for examination and, after discussions with the CRS, I agreed to undertake an empirical study of one of these issues: the judicial review of rulemaking. I describe the study below.

## II. DESCRIPTION OF FREEMAN/DOHERTY EMPIRICAL STUDY: JUDICIAL REVIEW OF RULEMAKING

### *Origin of the Study*

This study grew out of conversations with the CRS about this Subcommittee's interest in empirical work on the administrative process. Among the important subjects CRS identified for scrutiny at the behest of this Subcommittee is the fate of agency rules upon judicial review. I agreed to do an empirical study on this topic together with Joseph Doherty, Associate Director for Research in the Empirical Research Group at the UCLA School of Law, and with the help of a team of research assistants at Harvard Law School. We expect to have preliminary results in January 2006 and a final report by the end of August 2006.

### *Purpose of the Study*

The goal of the study is to investigate what happens to rules upon judicial review, including the rate at which they are struck down; the reasons why they are struck down or upheld; and any trends in the cases that might be attributable to differences in (1) the agencies generating the rules; (2) the litigants challenging them; or (3) the Circuits hearing the cases. While this study is only a beginning, we expect it to yield useful data on what is actually happening to agency rules after they are promulgated and once they are challenged.

### *Database*

We are using a comprehensive database consisting of all federal appellate cases involving administrative agencies (not just challenges to agency rules) from 1991 to 2003. The database consists of 3,075 cases that were decided in the Circuit courts during this thirteen-year period. The database was culled from an initial database of 10,000 cases, which was collected and partially coded by the Administrative Office of the Courts. We obtained the original database with the assistance of the CRS.

To my knowledge, this database is unique in its breadth and in the time span it covers.

*Preliminary Report*

We are in the process of identifying those cases in which an agency's conduct in promulgating a rule was challenged. This includes both formal and informal rulemaking. Preliminary analysis suggests that approximately 20 *per cent* of the cases will be identified as rulemaking cases. Thus, we expect to analyze approximately 600 cases of rulemaking, a significant number and far in excess of the number of cases that have been examined to date. We will read every case in this group, and collect highly detailed information about who challenged the rule, the basis for the challenge, and the reasoning behind the court's decision to uphold or overturn the agency's action. This information will be collected and entered into a database. Analysis of the data will permit us to make inferences about general characteristics and trends in the courts' reasoning.

*Relevance*

Why does this research matter? Right now, we simply do not know whether agency rules are generally upheld or not, or whether some agencies are more likely to have their rules struck down compared to others. Nor do we know whether challenges brought by certain types of groups are more successful than those brought by others. Moreover, we lack comparative knowledge about different Circuits i.e., whether outcomes vary across the Circuits, or indeed across specific panels of particular judges. In addition to shedding light on these matters, the study should enable us to say something about the extent to which courts are taking a "hard look" at agency rules (meaning that courts closely examine the rulemaking process), *versus* a more cursory "soft glance" kind of review (in which review is less exacting). Without answers to these questions, we cannot begin to answer the broader question of whether the rulemaking process is producing effective rules (or at least rules resistant to judicial invalidation), and whether judicial review is performing its intended function.

## III. THE BENEFITS OF FUNDING THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Funding ACUS requires a relatively small investment but has the promise of big returns. I echo what this Subcommittee heard in the 108th Congress from Justices Scalia and Breyer, among others, about the unique role that ACUS has played in the past by serving as a remarkably productive and bipartisan "think tank" for administrative law reform. I agree with the consensus view that at past funding levels, and at funding levels being considered by the 109th Congress, ACUS was and will continue to be a bargain. Its key strength is in bringing together academics, experienced practitioners, and agency officials—people of great distinction from both the public and private sectors—to think carefully and systematically about sensible good government reform. As Justice Scalia only half-jokingly pointed out, many of these people charge very high billable rates; Congress gets their help for free.

As I argued above, and as this Subcommittee well knows, there is an obvious need for empirical study of the administrative process, and ACUS is the institution best situated to generate and sponsor high quality research. The need for empirical research, particularly in the area of administrative law, is increasingly being recognized. In July 2004, the American University launched the Center for the Study of Rulemaking, which has as its mission examining and improving the processes used by government agencies to develop regulations. The Center has organized two conferences: one on e-rulemaking and another on the state of rulemaking in the federal government. While not devoted solely to empirical research, the Center has encouraged such study. Likewise, the American Association of Law Schools (AALS), a nonprofit association of 166 law schools, has set "empirical scholarship" as the theme of its annual meeting in 2006. I am Chairing the Administrative Law Section meeting this year at the AALS and, in line with the overall theme, we are focusing on empirical study of administrative law. But this will be a one-time event.

The shift toward empirical study—what Roscoe Pound described as "law in action"—may be ascendant, but it is neither coordinated nor coherent. While they can partner with ACUS, neither the Center for rulemaking, the AALS, the Administrative Law Section of the American Bar Association (ABA) nor any other body can by itself organize and direct a program of empirical study of administrative law issues. Moreover, as Justice Scalia testified before this Subcommittee last year, agencies view any review by these non-governmental bodies with suspicion. ACUS, on the other hand, is a "government insider," with legislative clout. Justice Scalia described the difference as follows:

> I was Chairman of the Ad. Law Section for a year, and there's a big difference between showing up at an agency and saying, "I'm from the American Bar Association, I want to know this, that, and the other," and coming there from the Administrative Conference which has a statute that says agencies shall cooperate and provide information. It makes all the difference in the world.

Only ACUS is positioned to sustain these studies over the longer-term, and to shape a coherent research agenda in coordination with Congress.

IV. THE ADMINISTRATIVE CONFERENCE'S AGENDA

This Subcommittee has already identified research questions that it would like to see ACUS pursue, and other witnesses on today's panel will have more to say on that topic. While I would not characterize the administrative state as being in crisis, it is operating with a sixty year old manual—the Administrative Procedure Act—and there are critical areas in need of closer examination and reform. Jeffrey S. Lubbers, in his submissions, has provided a list of issues that require further study, and I am in full agreement with him. I wish only to underscore that I believe that ACUS could be the incubator for the next generation of administrative law research and I would suggest three other research areas on which it might focus.

The first is privatization and contracting out. Private entities increasingly perform what we traditionally view as government functions, including some functions associated with the military, prisons and national security. Private service providers have contractual obligations vis-à-vis the government, but their actions typically fall outside of administrative law protections, process and regulation. How, if at all, should we conceive of these actors in administrative law? Is there a need for administrative law reform to address the issues raised by contracting out? This is a topic of considerable relevance at the moment, and it will only become more important over time.

The second area of research relates to the impact of the Small Business Regulatory Enforcement Fairness Act (SBREFA). In 1980, Congress enacted the Regulatory Flexibility Act (RFA), mandating that federal agencies consider the impact of regulatory proposals on small entities. The RFA was strengthened in 1996 by the enactment of the SBREFA. In the context of rulemaking, SBREFA grants small businesses the opportunity to see rules at a very early stage, before they are even proposed. While this seems to be a fair accommodation in principle, there is at least some anecdotal evidence that the process may not be working well and may even be abused. While small businesses may ostensibly be fronting the early review of rules, big business may in fact be driving the process behind the scenes. Next year is the tenth anniversary of SBREFA and it is an appropriate time to examine its effectiveness. ACUS could inquire into SBREFA's implementation and determine whether Congress' intended purpose of assisting smaller entities is, in fact, being met.

Finally, the third area where ACUS could direct further research is the reconciliation of the principles of administrative law with the imperatives of national security. Like other agencies, the various agencies within the Department of Homeland Security (DHS) undertake administrative processes and promulgate rules. However, unlike the other agencies, the DHS has not, perhaps understandably, been subject to commensurate scrutiny or cost-benefit analysis. How are the administrative law principles of transparency and accountability, fairness and effectiveness, to be reconciled with national security interests? Can the Administrative Procedure Act, which is now 60 years old, deal with contemporary matters of national security? These are not easy questions to answer but ACUS could provide a forum for their consideration.

These are among the next generation of issues that ACUS might profitably explore, along with coordinating empirical study of how well the administrative state currently performs its functions. A small financial investment in ACUS could lead to significant cost savings down the road by directing Congress to high priority issues that are most in need of reform, illuminating opportunities where Congress can get the biggest bang for its proverbial buck, and directing Congress away from reform measures that may be unnecessary.

This concludes my remarks. I would be happy to take any questions that you might have.

Mr. CANNON. Thank you. I just want you all to know that I've made all these arguments about funding ACUS, and I think we're making progress there. We'll be submitting written questions that I think will take the bulk of what I would otherwise do. I'd like to

take just a few moments and talk about where I'd like to see us go.

You know, the reason we—the reason the only program, or the only program that was actually defunded was ACUS is because people didn't understand it. They didn't share our heartbeat over what it does. And so we are spending some time trying to raise the level of interest in that.

And it was a bipartisan elimination. I mean, nobody knew much about what it did except those people who really understood, and they were not persuasive enough.

And so one of the things that I hope, as we proceed in this project, as I mentioned earlier, that we have, is we try and reach out to other interest groups. And there are a lot of people out there who care a lot about it if they thought there was a way to make some progress. And so I think it's our duty, as part of the project, to help look at those groups out there and draw them in. You do that by contacting them and by sending them an e-mail with a link and having them pop the link and then having a large corporation task a staff attorney or someone to follow the progress.

And most corporations are spending a great deal of money on these issues. And as you tap into them and tap into the interest groups like the small business groups and the Chamber of Commerce and others, you end up with the ability to reach out and actually get people engaged in the process. And that means the process will be better, but it also means that we may actually be able to get something done.

And so, I would, since we are all going to be working together on this over a long period of time, if I might suggest, you have WIKIs and blogs, you have Web sites and e-mails, and we need to be using sort of these tools that are out there to promote what we are doing. And, in fact, we need to do something, as you said, Ms. Freeman, about changing the name, because APA puts you to sleep if you could remember what it stands for. But something like, "The Government power and you"—that does touch people and it especially touches people who have deep pockets and who care about this stuff, but who have grown inured to the enormity of what's happening to them partly because the issues have been partisan.

If you're talking about environmental issues, you have people who are pro and con before the issue is on the table. And so you can't say what is the process that leads us to an appropriate conclusion. And there are some people who will actually say that they specifically view the world that way. They don't want it to be touched because walking on public lands or stopping categorical exclusions for drilling, those things are good, regardless of the cost and the outcome in a world where technology has changed.

We just had over the weekend a news report that the local gas company has been awarded a 20 percent increase in its costs and what people pay. And they met with me the day before that happened and said it was going to be 30 percent. So you—now you have a bunch of guys say 20 percent, how do we do it on 20 percent? And what they have to do is come up with more oil and gas.

They have several oil wells that have been completed, but not ready to produce because they are waiting for a signature by a bureaucrat in a system. And at the same time they believe they

should get categorical exclusions which will allow them to drill enough wells between now and next November that prices could come down by 30 percent in November. And we are doing that in a context of people arguing at a level that is absolutely unrelated to either the production of more gas and, therefore, the lowering of costs or to the effectiveness of drilling when the technology is so radically different that we are not regulating the same thing that we produce the rules for.

So this is a remarkably important time, and we are going to produce more oil and gas. The question is, do we do it thoughtfully? And what we do as a group here is likely to be a significant portion of that.

So I am going to turn the time over to my Ranking Member in a moment, but I just want to thank you all for being here and tell you that this, I think, is about as important a thing as can be done in Government because we can regulate much more efficiently. We can accomplish our objectives without the kind of costs that we are imposing, and human beings and other species that share our world can enjoy it to a much better degree if we are faithful and articulate about what our goals are and how we achieve them than if we just live with an old structure that is in many ways probably not serving us very well.

So I yield back my time. And Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman. I couldn't help but have my mind wonder at one point during this exciting testimony and your exciting response to the testimony, that a new stenographer came in the middle and she's probably wondering what in the world is a WIKI. You ought to at least try to explain that to her so she can get it in the record. I mean, there was a different reporter here.

Mr. CANNON. W-I-K-I. And Google it, G-O-O-G-L-E. I am sure you know what that is.

Mr. WATT. Don't make it worse.

Mr. CANNON. It'll be great.

Mr. WATT. She was having enough trouble following your Utah accent without all these extraneous words.

Let me start by asking a global question, and then I want to just go down and ask each one of you a question or two that got sparked by your exciting testimony.

Global question: I take it that all of you would agree that this project in which you all are engaged is not a satisfactory substitute for ACUS.

Ms. FREEMAN. As somebody conducting one of the few studies ongoing, let me say, absolutely not. As much as I appreciate the enormous help of the Congressional Research Service and their tremendous ability to help me do this, the truth is, it is very ad hoc. It depends on what a few people are interested in. This is not a comprehensive, well-thought-out exercise by those of us who are picking it up on the go. We need a body to say, here are the priorities.

Mr. WATT. I thought that would be the—I guess that's kind of the uniform response of all of the witnesses.

Mr. LUBBERS. I think the results of the project could provide some good raw data and empirical information that an ACUS could use.

Mr. WATT. I have got a question, a specific question, about that that I'll come back to in a little bit. In light of your response, I think I will take a more frontal assault on the Contract with America that I took——

Mr. CANNON. It preceded me.

Mr. WATT. That, I took a gentle swipe at in my opening statement.

I think, actually, doing away with ACUS is probably the most dramatic demonstration that the Contract was political, rather than practical. I mean, I just can't think of a more dramatic example of it, so I'll let that go.

All right, I'm going on to my list of questions, and I'll just go down the questions, and maybe if you've got a thought or two about these questions that you want to do quickly, for each one of you—but it might be helpful to have you be more thoughtful and address these questions maybe as a follow-up to today's hearing because some of them are kind of more long term.

Mr. Rosenberg, the question I had of you is, how systematic is the outreach in the project? Has the project itself become more of an inside game for inside players?

In my role as Chair of the Congressional Black Caucus, one of the things I'm always concerned about is whether there is systematic or any effort to reach out to historically black colleges and universities, for example, to do any of these research projects. It is refreshing to see one female here on the panel, but I'm always wondering whether there is any diversity going on in any of this research or whether it is all an inside game. That was my question to Mr. Rosenberg.

Mr. Mihm, you listed a series of things that you refer to as areas in which congressional action may be required—weaknesses, transparency, technology, impact. I might suggest that some more specific examples of that, of those areas, might be worthwhile to give us a context.

Maybe that's included in your testimony, your written testimony; maybe it's not. As the Chairman said, one of the reasons you all went on and on and on beyond the 5 minutes was because probably neither one of us has read, had the opportunity to read your testimony.

Mr. Lubbers, a more concise statement of how ACUS has been missed and in what areas. You got to that issue, kind of indirectly by listing a bunch of things that the new ACUS might want to focus on, but there are probably some very dramatic examples that could be pointed to within the last 10 years of mistakes or things that would not have happened had ACUS been in existence, or possibly would not have happened had ACUS not been—it seems to me that that would be a good laundry list of things.

I'm trying to build a case for ACUS. I forgot to give you my mantra at the outset, ACUS ASAP. What about that? You like that?

Mr. CANNON. We're going to have to act like Senators and then figure out something that has meaning for that acronym.

Mr. WATT. ACUS ASAP. That was kind of my overall mantra. I forgot to give it to you at the beginning. Okay, I'm almost through.

I absolutely agree with Professor Freeman that we don't have a clue of whether our Federal Government agencies and/or the rules and regulations they promulgate are being effective or not, or how they could be improved. And I want to second that emotion.

I am especially interested in some of the things that you mentioned about the next generation of ACUS privatization, and contracting out is a major, major concern of ours when we start contracting out fighting a war. And there is some excellent research out there about how much of the Iraq war is being contracted out to private contractors, security providers, the whole effort in Iraq which—none of which is subject or little of which—is subject to any kind of governmental oversight or administrative oversight or rules or regulations. And then when some of these private contractors get captured or taken as prisoners, we don't even know whether we have the responsibility to send the military in to rescue them or whether that is a private obligation.

Even down to that level, when we start contracting out the interrogation of prisoners—this has been a major issue of ours domestically for years. When it comes to privatization of prisons, whether the private contractors are subject to the same set of responsibilities that the Government was subject to is a major issue, and I hope you'll elaborate on that.

And then, of course, the issue that I raised in my opening statement, of reconciling these imperatives of privacy and transparency with national security is a major issue that I think we're just missing the boat on without ACUS doing systematic research. Not that the episodic research that you all are doing under the project is not good, but this needs to be systematic; and I want to join the Chairman of the Subcommittee in saying, it may not be exciting, but it is absolutely critically necessary.

Might not be politically something that people want to spend money on, but when we start—what is it my mama used to say about saving, spending a little bit now to save more, penny wise and pound foolish, I think was the phrase she used. It is a dramatic demonstration that a lot of these suggestions that were implemented in the aftermath of the Contract with America have been just penny wise and pound foolish, in my opinion.

So I won't get off on that. I didn't mean to politicize it.

Mr. CANNON. Would the gentleman yield?

Mr. WATT. I'm going to yield back.

Mr. CANNON. Well, don't yield back.

Mr. WATT. Sure, I yield.

Mr. CANNON. You've asked several questions of the individuals. Can I just add another question to that? And probably, Professor Lubbers, you are best equipped, but others may want to comment.

Is it possible for ACUS to operate with private funding? I am just thinking, due to the legislation, it's a Government agency almost, or it's a sort of private thing. I don't think it's a not-for-profit, but there are many agency groups out there, I think, who would like to see it operate, and I don't know that we're going to be able to do much this year.

Mr. WATT. I've got an idea for you.

Mr. CANNON. Yield back.

Mr. WATT. I've got an idea for you. It'll cut down on regulations if you just have each agency's budget assessed when they do a regulation or a rule to fund ACUS.

Mr. CANNON. As a Republican, I agree with that.

Mr. WATT. Get the money out of the various agencies.

Mr. CANNON. I get the sense you're trying to revive a new Contract with America from the Republican point of view. I got elected during the period of reaction to the Contract with America. I was only one of two Republicans who beat incumbent Democrats, whereas I think we lost eight or——

Mr. WATT. Not enough.

Mr. CANNON. Thank heavens.

Anyway, I yield back to you; and I think you have asked your questions.

Mr. WATT. If there are any quick responses to any of the things I have raised, but I, I mean, maybe some more thoughtful, longer-term written responses would be just as well. So go right ahead if you all want to comment.

Mr. ROSENBERG. My wife last night asked me what in the world I was doing working so late, and I explained to her, you know, what we were doing, and about ACUS and its reauthorization with no funds. She looked at me and said why didn't they do the Lance Armstrong solution. There must be enough wonks out there who will buy a bracelet, red, white and blue, you know, for a buck each. Maybe there are three million of them out there, we can get it going into next term.

With regard to your question——

Mr. WATT. Is this a policy wonks bracelet? Is that what you're advocating for?

Mr. ROSENBERG. Yes. A policy wonks bracelet. There should be three million of them out there for at least 1 year's work.

These are just preliminary thoughts. What is the selection process? It isn't systematic. We are on the team and are familiar with various administrative law issues, administrative practice issues; and the way we know them is reading other—what people have done, things that have been published by people wherever they are.

One of the things that I was hoping is that this hearing would get some notice out there in the industry, where the wonks would say, I have an idea, I'm willing to do that, I have the resources, or whatever it may be, and would come to us. We're trying to find people in various areas and encourage them.

The difficulty, as Professor Freeman has noted, is that whatever the university, graduate school, law school, whatever it is, unless there is some funding, they're not going to be able to do it. It takes time to do some of these things.

Not all these projects that we're looking at by the way, are mega studies; some of them are mini studies. One of them involves consent decrees. Your Committee is dealing with a big, broad issue on consent decrees. But one thing it doesn't deal with is a problem that—or at least it's an anecdotal thing that I have come across—is that there's been a trend in the last 5 to 7 years of agencies whose rules are being challenged, are entering into consent decrees about those rules and changing the substantive thrusts of those rules. And under the law today, the only way those rules can then

be changed is by Congress passing a law. It's set in stone, and it is undermining public participation.

Now, that is a mini study. We want to—what I'm trying to do is get people who have written about consent decrees in this area to look at them very carefully and say, is this a real problem, is this a trend in the way the administrative agencies are evading public participation and being able to change the rules themselves? And once that is done, maybe there can be a solution with regard to—well, H.R. 1229, the Federal Consent Decree Fairness Act, tries to do it by limiting the duration of any consent decree. I don't think that will particularly work with this, but that would be one part of the solution.

So they have a mini thing. And what you do is, you try to find somebody out there who has written about consent decrees and knows about this process and gets it, wherever they are, you know, whatever it is. We will try to make this as diverse as possible, but we have—it's difficult enough finding people like Jody Freeman, you know, to do this kind of thing.

Mr. WATT. Are you all funding—who's funding even the basic part of this? Are there grants?

Ms. FREEMAN. Harvard Law School.

Mr. WATT. Harvard Law School has taken your project completely. So you've got to go ask somebody to do something for free.

Mr. ROSENBERG. Yes. But there is a partial funding of this public participation study at Texas A&M. It's coming from CRS, which has links with about four or five graduate schools, universities, where they have, where—this is a unique funding thing. Most of them are to help CRS do various studies. This is the first one in which we are aiding a Committee and funding, you know, the eight graduate students, you know, to do this massive study of——

Mr. WATT. But think about what we're saying here. That's almost guaranteeing a lack of diversity because the people who are less—the institutions that are least likely to be able to pick up that kind of economic burden are the ones that are just not going to. I mean, an HBCU is not going to be able to do that. Harvard can; a small university can't. A big university may be able to, if, you know, so you're almost guaranteeing a lack of diversity through this project, I think.

Anyway——

Ms. FREEMAN. And, Mr. Watt, the problem's even worse because it is very unstable and unreliable, so even if you can pick up some funding for a little while, it gets cut off when you're mid-project.

Mr. MIHM. Mr. Watt, in the question that you directed to me, I'm going to take you up on your kind offer to provide a more complete and perhaps thoughtful answer for the record. But at least three things right off the top in terms of statutory changes that Congress may want to consider.

One, as I mentioned earlier, was revisiting the "significant economic impact on a substantial number of small entities" and providing—this isn't a regulatory flexibility act, providing either some additional guidance to agencies on what that means, or more likely, I would think, requiring some consistent guidance that be provided on that so that we can get comparability across agencies; or when

it's not comparable, make sure that it's done for known reasons, rather than just kind of idiosyncratic reasons.

The second is that I think that we've published in the past that we think that Congress ought to revisit the Inflation Adjustment Act which allows agencies to increase their civil penalties to capture inflation. There've been problems with that both in kind of the technical aspects, some technical aspects of that, as well again as the need for some cross-cutting guidance across Government. We found that as a result of that lack of guidance that there was some inconsistency in how agencies work.

Mr. WATT. Are they required to increase them? Or some of them are doing it and some of them are not?

Mr. MIHM. They are required, and some are doing it and some are not.

Mr. WATT. But not consistently in the way they do it, is what you are saying?

Mr. MIHM. Right. Yes, sir.

And then the third and perhaps this is actually building on an ACUS recommendation to go back and look at APA, and in particular with, you know—APA, as you know, allows for good cause an agency not to have a notice of proposed rulemaking. That good-cause definition has been expanded and stretched and is perhaps at the screaming point in some places.

Some clarified guidance on that or expectations from Congress, I think would also be helpful. But again, we will provide a more complete list for you.

Mr. LUBBERS. Mr. Watt, it is a little hard to come up with dramatic examples of things that might not have happened if ACUS were there. It's a little bit like proving a negative. And ACUS did not have any power, per se. It was a recommendatory agency. But let me try to give you a few thoughts that occurred to me.

For example, the Department of Homeland Security, when that was created, a lot of agencies were brought together and there were some organizational issues that I think could have benefited from ACUS's consideration. Don't forget, ACUS was a large body of experts who were serving as volunteers, and it brought together people from all sides of the political spectrum. So I think one benefit of ACUS was that it reduced the partisanship that we see in Washington these days. So you had public interest groups from the left and the right talking to each other and Government people talking to private lawyers about some of these problems.

Another issue that was sort of partisan was the midnight regulation issue. When the Clinton administration went out and the Bush administration came in, there were lots of crises about regulations that were issued at the end of the Administration and then withdrawn or delayed by the Bush administration. I think that is an issue that the Administrative Conference could have worked on.

All of the issues regarding electronic rulemaking that I have mentioned I think would have benefited from scholarship and a coordinated set of studies. The Administrative Law Judge hiring program was frozen for 6 years at the Office of Personnel Management. Agencies could not hire new ALJs from the register of ALJs because of litigation over controversy concerning the Veterans Pref-

erence Act, and I think the Administrative Conference could have helped to solve that problem a lot earlier than 6 years.

The asbestos compensation issue, which I know Chairman Cannon is very concerned about and this Committee is concerned about, is something that I think could have benefited from Administrative Conference review. Maybe an administrative forum could have been developed to help resolve that issue.

Sarbanes-Oxley is another issue that receives a lot of concern. And I think that law was necessary because of some failings of self-regulatory organizations in the securities and accounting area. So that is another thing I think we could have worked on.

Waivers and exceptions, we have seen that with respect to Katrina. People didn't know whether or how waivers and exceptions should be granted. I think that was on our list back in 1995, and I think we would have gotten around to that before 2005. So those are some issues.

Now, I just—I want to also respond to Chairman Cannon's question about private funding. The Administrative Conference statute, of course, is very broad and it does permit the agency to accept private gifts, private donations, volunteer services, dollar-a-year people, and anybody who wants to work, agency transfers of funds.

ACUS has a very flexible statute, and it would permit all these sorts of funding—sources of funding to be used at ACUS. Whether you could come up with a completely private analog of ACUS that would be as effective, I have some doubts.

And let me just mention one other thing while I have the microphone which is, I'm working on an advisory committee, National Academy of Sciences official advisory committee now, which is concerning one slice of the Social Security program. And this is the part of the program that has to do with beneficiaries who cannot handle the benefits. Because of their disability, or they're drug addicts or something like that, they have to have a representative payee to get these checks. And not surprisingly, there are some abuses in this area.

So Congress has funded the Social Security Administration to then fund the National Academy of Sciences to study this issue. And this study, alone, I think, was funded at an $8 million level. And our Committee just received bids from Beltway organizations to do a nationwide survey of about 4,000 representatives and beneficiaries; and that's going to be, I think, about a $5 million study. So that's just one slice of one obviously important program that's being funded for $8 million. And we're talking about a $3 million budget for the Administrative Conference.

Ms. FREEMAN. I just have a couple of brief remarks in response to the questions and concerns.

First, these very potentially politically contentious issues around contracting out, privatization, and harmonizing national security and administrative law procedures, the great value ACUS can aid here is obviously not solving this problem, not making the hard choices. That's for Congress to make, but steering a course through it by at least beginning to explain what kinds of contracting are not so problematic, what kinds of contracting are more problematic, what issues get raised, what rules apply.

You know, procurement law. There is an elaborate set of rules and regulations because of procurement.

But then there is an entirely different arena of contracting where almost nothing governs. And it's that kind of explaining what's going on, dissecting what the issues are, proposing potential solutions that can be so useful when delivered to Congress, and you can decide what you wish to do. But that function is being lost here.

And I think, too, with the—the same thing with the contentious dimensions of the national security administrative law conflict here, the question is, what are the options and what are the perceived benefits, what are the perceived costs, and how ought we to think about it? That's a very important function that you want to put in the hands of a body that has this great reputation for being quite bipartisan and quite professional.

And the final thing I want to mention that goes back to the mention of consent decrees and the problems of what I would call backdoor rulemaking, whenever you tighten up discretion in one area, the funny thing with administrative agencies is it pops out somewhere else. And there is a relationship between additional oversight mechanisms from both Congress and the executive and the great search within agencies for areas where they can operate more freely.

So it's something ACUS might look at; that is, the relationship between adding more analytic requirements and agencies feeling the need to go elsewhere, that is, operate through consent decrees, use exceptions that they can drive a truck through. These are related. And ACUS can look at that in a more comprehensive way than somebody who does a piecemeal study, part by part.

And the very last thing, the problem, the PR problem with administrative law, this is a failure—I hate to admit this—of law schools. It's a failure of policy schools, it's a failure of public administration schools, because we have not developed a robust capacity to talk about how Government's working.

We talk about Congress plenty and we talk about judges a lot. But we do not focus on the heart and soul of the Federal Government, and that is the rulemaking and adjudicatory processes. And ACUS can be a spark to reignite interest in this important topic.

Mr. WATT. Mr. Chairman, I've gone way over my time. I'll just close by saying, ACUS ASAP. Yield back.

Mr. CANNON. And that "P" probably needs to stand for private funding or some other source of funding, because we need to talk about it. Thank you very much, Mr. Watt.

And we want to thank the panel. It is very insightful. We've, I think, learned a lot here today. I have. And we look forward to working with you over a long term on this, and maybe we can come up with some ways of actually getting people to realize that 10 percent of the economy is a lot more than whatever judges do or that these elections for Congress aren't really very important in that context either.

Thank you a lot. We appreciate it. And see you soon.

[Whereupon, at 11:32 a.m., the Subcommittee was adjourned.]

# APPENDIX

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## Material Submitted for the Hearing Record

RESPONSES TO ADDITIONAL QUESTIONS FROM MORTON ROSENBERG, ESQUIRE, SPECIALIST IN AMERICAN PUBLIC LAW, AMERICAN LAW DIVISION OF THE CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS

## Responses to Questions from Chairman Cannon

1. **If you could personally address the Congressional appropriators who have jurisdiction over the Administrative Conference of the United States (ACUS), what would be your principal and most persuasive arguments for funding ACUS?**

Funding to make ACUS operational in the near future would be opportune and beneficial. Current congressional scrutiny of the Department of Homeland Security is (DHS) preparation for and response to Hurricane Katrina has revealed fundamental flaws and deficiencies in the organizational structure and decisional mechanisms of the Department with respect to emergency management. The initial hasty mingling of 22 existing, often disparate agencies with overlapping missions and conflicting administrative decisional processes and cultures assumed that a lengthy period of adjustment, integration and stabilization would be required before an efficient and reliably functioning bureaucratic mechanism became a reality. The Katrina catastrophe and growing national security concerns flowing from the exposed Katrina failures have inspired calls for immediate remedial action. Quick legislative fixes can be anticipated, but long-term examination of the bureaucratic structural and decisional problems of DHS are required.

ACUS' 28 history of pragmatic, cost-effective and successful recommendation commends it revival. A reactivated of operational ACUS could be tasked, for example, with reviewing, assessing and making recommendations with respect to FEMA's role, where and how it should play that role, and the authorities it needs to fulfill that role. It could also study and help rationalize the administrative process of the 22 agencies transferred to DHS. Each of those agencies had its own special organizational rules and rules of practice and procedure. Additionally, many of the agencies transferred have a number of different types of adjudicative responsibilities. These include such

diverse entities as the Coast Guard and APHIS which conduct formal-on-the record adjudications and have need for ALJ'S, and formal rules of practice; the Transportation Security Administration and the Customs Service, which have a large number of adjudications but do not use ALJs, and the Immigration and Naturalization Service units transferred, which also perform discrete adjudicatory functions. The statute is silent as to whether, and to what extent, these adjudicatory programs should be combined and careful decisions about staffing and procedures are still required. Similarly, all the agencies transferred have their own statutory and administrative requirements for rulemaking that likely will have to be integrated. Also, the legislation gives broad authority to establish flexible personnel policies. Further, provisions of the DHS Act eliminated the public's right of access under the Freedom of Information Act and other information access laws to "critical infrastructure information" voluntarily submitted to DHS. The process of integration and implementation of the various parts of the legislation goes on and is likely to need administrative fine tuning for some time to come. ACUS has a clear role to play here.

A reactivated ACUS could be utilized to facilitate the process of implementation of the restructuring and reorganization of the bureaucracy for national security purposes. ACUS could serve to identify measures that might slow down the administrative decisional process, thereby rendering the agency less efficient in securing national security goals, and also to assist in carefully evaluating and designing security mechanisms and procedures that can minimize the number and degree of necessary limitations on public access to information and public participation in decisionmaking activities that affect the public, and minimize infringement on civil liberties and the functioning of a free market.

Finally, in addition to the impact of 9/11, the decade long period since ACUS's demise has seen significant changes in governmental policy focus and emphasis in social and economic regulatory matters, as well as innovations in technology and science, that appear to require a fresh look at old process issues. For example, the exploding use of the Internet and other forms of electronic

communications presents extraordinary opportunities for increasing government information available to citizens and, in turn, citizen participation in governmental decisionmaking through e-rulemaking. A number of recent studies have suggested that if the procedures used for e-rulemaking are not carefully developed, the public at large could be effectively disenfranchised rather than having the effect of enhancing public participation. The issue would appear ripe for ACUS-like guidance. Among other public participation issues that may need study include the peer review process; early challenges to special provisions for rules that are promulgated after a November presidential election in which an incumbent administration is turned out and a new one will take office on January 20 (the so-called "Midnight Rules" problem); and the continued problem of avoidance by the agencies of notice and comment rulemaking by means of "non-rule rules." Control of agency rulemaking by Congress and the President continues to present important process and legal issues. Questions that might be presented for ACUS study could include: Should the Congress establish government-wide regulatory analyses and regulatory accountability requirements? Should the Congressional Review Act be revisited to make it more effective? Is there an effective way to review, assess and modify or rescind "old" rules? Is the time ripe for codification of the process of presidential review of rulemaking that is now guided by executive order. Finally, recent studies have raised questions as to the efficacy of judicial review of agency rulemaking. Statistical evidence has shown that appellate courts are overturning challenged agency rules at rates in excess of 50%. Is it appropriate for Congress to consider statutorily modifying the "reasonable decisionmaking standard" now prevailing, or to limit judicial preview of rulemaking by, for example, having all "major" rules come to Congress and be subject to joint resolutions of approval? These are among a myriad of process, procedure, and practices issues that could be addressed by a revived ACUS.

ACUS' past accomplishments in providing non-partisan, non-biased, comprehensive, and practical assessments and guidance with respect to a wide range of agency processes, procedures, and practices is well documented. During the hearings considering ACUS' reauthorization, C.

Boyden Gray, a former White House Counsel in the George H.W. Bush Administration, testified before the House Judiciary Committee's Subcommittee on Commercial and Administrative Law in support of the reauthorization of ACUS, stating: "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." Further evidence of the widespread respect of, and support for, ACUS' continued work at the hearings was presented by Supreme Court Justices Antonin Scalia and Stephen Breyer. Justice Scalia stated that ACUS "was a proved and effective means of opening up the process of government to needed improvement," and Justice Breyer characterized ACUS as "a unique organization, carrying out work that is important and beneficial to the average American, at a low cost." Examples of the accomplishments for which ACUS has been credited range from the simple and practical, such as the publication of time saving resource material, to analyses of complex issues of administrative process and the spurring of legislative reform in those areas.

During the period of its existence Congress gave ACUS facilitative statutory responsibilities for implementing, among others, the Civil Penalty Assessment Demonstration Program; the Equal Access to Justice Act; the Congressional Accountability Act; the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act; provision of administrative law assistance to foreign countries; the Government in the Sunshine Act of 1976; the Railroad Revitalization and Regulatory Reform Act of 1976; the Administrative Dispute Resolution Act; and the Negotiated Rulemaking Act.

In addition, ACUS produced numerous reports and recommendations that may be seen as directly or indirectly related on issues pertinent to current national security, civil liberties, information security, organizational, personnel, and contracting issues that often had government-wide scope and significance.

ACUS evolved a structure to develop objective, non-partisan analyses and advice, and a meticulous vetting process, which gave its recommendations credence. Membership included senior (often career) management agency officials, professional agency staff, representatives of diverse perspectives of the private sector who dealt frequently with agencies, leaders of public interest organizations, highly regarded scholars from a variety of disciplines, and respected jurists. Although in the past the Conference's predominant focus was on legal issues in the administrative process, which was reflected in the high number of administrative law practitioners and scholars, membership qualification has never been static and need not be. Hearing witnesses and commentators on the revival of ACUS have strongly suggested that the contemporary problems facing a new ACUS will include management as well as legal issues. The Committee can assure that ACUS's roster of experts will include members with both legal backgrounds and those with management, public administration, political science, dispute resolution, and law and economics backgrounds. It could also encourage that state interests be included in the entity's membership.

All observers, both before and after the demise of ACUS in 1995, have acknowledged that the Conference was a cost-effective operation. In its last year, it received an appropriation of $1.8 million. But all have agreed that it was an entity that throughout its existence paid for itself many times over through cost-saving recommended administrative innovations, legislation and publications. At the heart of this cost saving success was the ability of ACUS to attract outside experts in the private sector to provide hundreds of hours of volunteer work without cost and the most prestigious academics for the most modest stipends. The Conference was able to "leverage" its small appropriation to attract considerable in-kind contributions for its projects. In turn, the resulting recommendations from those studies and staff studies often resulted in huge monetary savings for agencies, private parties, and practitioners. Some examples include: In 1994, the FDIC estimated that its pilot mediation program, modeled after an ACUS recommendation, had already saved it $9 million. In 1996, the Labor Department, using mediation techniques suggested by the

Conference to resolve labor and workplace standard disputes, estimated a reduction in time spent resolving cases of 7 to 11 percent. The President of the American Arbitration Association testified that ACUS's encouragement of administrative dispute resolution had saved "millions of dollars" that would otherwise have been spent for litigation costs. ACUS's reputation for the effectiveness and the quality of its work product resulted in contributions in excess of $320,000 from private foundations, corporations, law firms, and law schools over the four-year period prior to its defunding. Finally, in his testimony before the Subcommittee Justice Scalia commented, when asked about the cost-effectiveness of the Conference, that it was difficult to quantify in monetary terms the benefits of providing fair, effective, and efficient administrative justice processes and procedures

**2. Why do we need an entity like ACUS as opposed to a commission?**

ACUS was, and is contemplated to be, an ongoing, independent governmental study entity whose purpose is to provide a resource for all departments and agencies to assist them in finding pragmatic and cost-effective solutions to administrative process and procedure problems. It is not intended to address one grand problem and fold its tent, such as the Warren or 9/11 Commissions. As indicated in our response to question 1, the decade since ACUS demise in 1995 has seen a dramatic change in the nature and complexity of administrative process issues simply because of changes in technology and the government's changes in focus on agency missions, among other factors. Administrative process is not static, it needs to be flexible and have the ability to evolve to meet new challenges. The purpose of establishing an entity like ACUS is to develop and maintain an administrative expertise for the long run that allows it address both agency specific problems and government-wide issues.

**3. In your testimony, you discuss the informal study that CRS conducted with regard to judicial review of agency rulemaking, which estimated a 50% reversal rate. Why should we in Congress care about this?**

Judicial review of agency rulemaking provides a vital democratic check on administrative lawmaking. Of necessity, Congress delegates such lawmaking authority to administrative agencies to implement its less then specific policy goals. In the absence of an effective congressional review mechanism, Congress has placed reliance on the courts to assure that agency exercises at this delegated lawmaking authority is being carried in the manner it intended. A high rate of successful challenges of rules in the courts would be an important signal that something may be going awry. It may be that agencies are not doing their jobs in developing and supporting the rules and the courts are calling them to task. Or it could be that, as some commentators have charged, that reviewing courts are substituting their own judgement as to what is good or wise policy for that of the agency decisionmakers. Or perhaps the fault lies, as some entities content, with Congress in either the lack of clarity of its legislative directions in its inagility to effectively oversee the agency rulemaking process. A comprehensive study of judicial decisionmaking is this area can clarify if there really is such a problem and, if so, where the "fault" lies. In the end, if there is a problem, the solution is likely to lie in Congress' hands, either to establish a more confined standard of review, establish a more effective congressional or presidential review mechanism, provide more clarity in its legislative decisions, or some combination of the foregoing solutions.

**4. Earlier this year, we heard assertions that OMB and/or OIRA essentially perform the same tasks as ACUS. What are your views about the validity of such statements?**

A close examination of the historic roles and missions of ACUS and the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) makes it quite clear that their tasks and functions are totally dissimilar.

While ACUS and OIRA could be viewed as operating within the same sphere to the extent that they are both concerned with regulatory matters, it would appear that there are substantial, concrete differences between their respective structures and missions that in turn give rise to a fundamental difference between the nature and manner of their respective assessments of agency performance in the administrative process.

Most importantly, ACUS is an independent entity, whereas OIRA is responsible for effectuating a given administration's regulatory agenda. As touched upon above, ACUS was widely regarded as an independent, objective entity that was tasked with the unique role of assessing all facets of administrative law and practice with the single goal of improving the regulatory process. As stated by one commentator, "[t]his level of bipartisanship contributed greatly to the ability of the Administrative Conference to reach consensus on issues for their merits rather than because of any particular ideology or party agenda; this in turn contributed to the credibility of the Conference's work and the willingness of academics and private attorneys to volunteer their time to the Administrative Conference." Conversely, OIRA has none of the indicia of independence or objectivity that characterized ACUS, nor does it claim such a character. As an arm of OMB, situated within the Executive Office of the President, OIRA is quintessentially executive in nature, with a predominant mission to advance the policy goals of the President. As such while OIRA might be characterized as serving a coordinating function in the administrative context, it naturally follows

that this function is exercised under the influence of the President. Indeed, the activities of OIRA during the Reagan, Clinton, and George W. Bush Administrations, as touched upon above, would appear to establish that this coordinating function has been employed to further the regulatory agenda of those administrations.

The distinction between ACUS as an independent entity and OIRA as an executive agency may also be seen as having practical effects that give further credence to the ability of ACUS to serve uniquely in the consideration of agency specific issues. For instance, Loren A. Smith, currently serving as a Senior Judge on the United States Court of Federal Claims and a former Chairman of ACUS, has stated:

> [T]he very fact of ACUS' smallness and its lack of investigative powers and budget sanctions, made agencies willing to come to ACUS and listen to ACUS. OMB or the General Accounting Office were threatening. The General Services Administration and the Office of Personnel Management were often perceived as the enemy. ACUS on the other hand, was seen as the kind counselor, one who gave useful, and generally palatable remedies. It thus had the confidence of most of the Executive branch and the Congress. And a place like this is not to be valued lightly.

Apart from concerns regarding independence and objectivity, it has been suggested that while the staff of OIRA possess a significant degree of expertise with regard to administrative issues, there are nonetheless fundamental structural issues that would inhibit OIRA's efficacy in this context, such as the "multitude of issues flowing through agencies daily, the severely limited resources of executive oversight, and the variety of control relationships that exist in the administrative system." Justice Breyer echoed this sentiment

in his testimony discussing the mission of ACUS, stating "I have not found other institutions readily available to perform this task. Individual agencies, while trying to reform themselves, sometimes lack the ability to make cross-agency comparisons....The Office of Management and Budget does not normally concern itself with general procedural proposals."

Also, the broad scope of ACUS' mission, coupled with its independence and expertise could be seen as making it the appropriate entity to analyze the efficacy of the functions of OMB itself. In his testimony before the Subcommittee, C. Boyden Gray identified OMB activities as being ripe for study by ACUS, suggesting "empirical research on the innovation of the OMB 'prompt' letter, matters relating to data quality and peer review issues," as particularly suitable topics for inquiry.

These issues of independence and objectivity, the widely recognized expertise and bipartisan nature of ACUS, and the broad scope of the work it conducted in all facets of the administrative process could thus be taken to belie the notion that the activities of a reconstituted ACUS would be duplicative of the functions of OMB or its Office of Information and Regulatory Affairs.

It may be noted that the former Administrator of OIRA, John Graham, has publically agreed that the nature of the tasks and functions of ACUS and OIRA are totally dissimilar.

**5. What safeguards will be in place to ensure that the studies performed as part of the Administrative Law, Process and Procedure Project (Administrative Law Project), which you and your colleagues at the Congressional Research Service are overseeing, will be objective analyses supported by empirical evidence?**

The quality and reliability of the research products we will be getting will, in the first instance, depend on the researcher we engage for the particular study. It is our intention to

select researchers with an expertise in the subject area as well as prior empirical research experience. In addition, since we intend to hold discussion forums on the findings of the research papers produced, an effective vetting mechanism is built into our program.

**6. For the Administrative Law Project to be deemed a valuable or meaningful endeavor, what would it need to accomplish?**

One ultimate judgement of the success of this endeavor will rest on the number of administrative process issues or problems identified and whether they are successfully addressed legislatively or resolved voluntarily by affected agencies through further analyses and recommendations of ACUS.

**7. Please explain how ACUS, if it was in existence, could have ameliorated some of the problematic aspects of the response to Hurricane Katrina by the Department of Homeland Security.**

A response to this query is entirely speculative. However, when the legislation passed, FEMA was not brought over as a "distinct entity" whose function and responsibilities could not be changed, such as the Coast Guard and the Transportation Safety Administration. As we understand it, its emergency preparation and much of its grant funding authority was placed elsewhere in DHS and it was left with its response functions. ACUS could have been asked whether the severance of its preparation and funding functions from its response functions weakened its potential operational effectiveness; whether lines of authority and communication within DHS and with state and local responders allowed for effective

responses; and whether maintaining FEMA's independent outside of DHS would have better maintained its prior level of effectiveness.

**8. Please expound upon the role that ACUS could play in facilitating the implementation and restructuring of the Office of the National Intelligence Director.**

See response to question 1.

**9. Please provide a brief overview of the Congressional Review Act and an explanation of how it has worked since its enactment.**

**10. Approximately, how many regulations are promulgated each year that are subject to the Congressional Review Act?**

**11. How often has Congress, pursuant to the Congressional Review Act, overturned a regulation since the Act's enactment?**

**12. Why is the Congressional Review Act so rarely used by Congress?**

The Congressional Review Act (CRA), codified at 5 U.S.C. 801-808, establishes a mechanism by which Congress, for the first time, can review and disapprove, by means of a partially expedited legislative process, virtually all federal agency rules. The CRA was enacted as part of Title II of the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. 104-121, 110 Stat. 857-874. The framers of the congressional review provision adopted broadest possible understanding of the term "rule" by incorporating the definition found in Section 551 (4) of the Administrative Procedure Act (APA). The legislative history of the CRA emphasizes that by adoption of the Section 551 (4) definition of rule, the review

process would not be limited only to coverage of rules required to comply with the notice and comment provisions of the APA or any other statutorily required variation of notice and comment procedures, but would rather encompass a wider spectrum of agency activities characterized by their effect on the regulated public: "The committee's intent in these subsections is... to include matters that substantially affect the rights or obligations of outside parties. The essential focus of his inquiry is not on the type of rule but on its effect on the rights and obligations of non-agency parties." The framers of the legislation indicated their awareness of the now widespread practice of agencies avoiding the notification and public participation requirements of APA notice-and-comment rulemaking by utilizing the issuance of other, non-legislative documents as a means of binding the public, either legally or practically, and noted that it was the intent of the legislation to subject such documents to congressional scrutiny:

> ... The committees are concerned that some agencies have attempted to circumvent notice-and-comment requirements by trying to give legal effect to general statements of policy, "guidelines," and agency policy and procedure manuals. The committees admonish the agencies that the APA's broad definition of "rule" was adopted by the authors of this legislation to discourage circumvention of the requirements of chapter 8.

See joint Explanatory Statement of House and Senate Sponsors, 142 Cong.Rec. E571, E578 (daily ed. April 19, 1996); 142 Cong. Rec. S 3686, 3687 (daily ed. April 18, 1996).

All covered ruled rules, in order to become effective, must be reported to Congress and the Controller General (CG), in order to become effective. If a rule is designated as "major" by the Administrator of the Office of Information and Regulatory Affairs (OIRA), the CG must prepare a report within 15 calendar days of the submission of the agency report. A major

rule may go into effect no earlier that 60 days after its submission. All covered rules are subject to disapproval even if they have go into effect. Congress has reserved to itself a review period of at least 60 session or legislative days during a session, which is extended to the next session of the Congress if the full 60 days is not available. If a joint resolution of disapproval is enacted into law, the rule is deemed not to have any effect at any time. A rule that does not take effect, or is not continued because of a passage of disapproval resolution, may not be reissued in substantially same form unless it is specifically authorized by a law enacted subsequent to the disapproval of the original rule. The law spells out in detail an expedited conduction procedure for the Senate, but no special procedure for expedited conduction and processing of joint resolution in the House.

Since the effective date of the CRA in April 1996, the Controller General has submitted reports to Congress on some 600 major rules and has cataloged the submission of almost 40,000 non-major rules. Virtually all the 40,000 non-major rules thus far reported to the CG have been either notice and comment rules or agency documents required to be published in the Federal Register. This likely means that perhaps thousands of covered rules have not been submitted for review. Pinning down a concrete number is difficult since such covered documents are rarely if ever published in the Federal Register and thus will come to the attention of committees or Members only serendipitously. As of July 2005, 37 joint resolutions of disapproval had been introduced relating to 28 rules. Only one rule, OSHA's ergonomics standard in March 2001, has been disapproved, an action that may prove to be unique to the circumstances of its passage. Two other rules, the FCC's 2003 rule relating to broadcast media ownership, and a 2005 Department of Agriculture relating to the establishment of minimal risk zones for introduction of bovine spongiform encephalography (Mad Cow Disease), were disapproved by the Senate, but no action was taken in the House.

In its current form, the efficacy of the CRA review scheme as a vehicle to control agency rulemaking through the exercise of legislative oversight appears to some observers to be problematic despite the nullification of OSHA's controversial ergonomics standard in March 2001. In retrospect, it appears that that action was the result of unique confluence of circumstances not likely to soon recur: the White House and both Houses of Congress in the hands of the same political party, a contentious rule promulgated in the waning days of an outgoing administration; longstanding opposition to the rule in Congress and by broad coalition of business interests; and encouragement of repeal by the President. On the other hand, several rules have been affected by the presence of the review mechanism, suggesting that the review scheme has had some influence.

Among potential impediments to the law's use, the scheme provides no expedited consideration procedure in the House of Representatives; there is no screening mechanism to identify rules that may require special congressional attention; and a disapproval resolution of a significant or politically sensitive rules is likely to need a supermajority to be successful if control of the White House and the Congress are in different political hands, as was the case between April 1966 and January 2001. Moreover, a number of critical interpretive issues remain to be resolved, including the scope of the provisions' coverage of rules; whether an agency failure to report a covered rule is subject to court review and sanction; whether a joint resolution of disapproval may be utilized to veto parts of a rule or only may be directed at the rule in its entirety; and what is the scope of the limitation that precludes an agency from promulgating a "substantially similar" rule after disapproval of a rule. It is persuasively arguable that these potential impediments and uncertainties have contributed to the negligible number of actions taken under the authority of the CRA over the years since its passage.

For a comprehensive overview and discussion of how the review scheme was expected to operate, how it has in fact been utilized, an assessment of the reasons for its limited use, and a review of congressional remedial proposals, see CRS Report No. 30116, "Congressional Review of Agency Rulemaking: An Update and Assessment after Nullification OSHA's Ergonomics Standard."

**13. Some have suggested that ACUS be privately funded. What is your response?**

ACUS was and will be a governmental entity performing governmental functions. While it would not be inappropriate for it to be authorized to accept gifts and donations many agencies have such authority total private funding would raise potential conflict of interest questions. The legitimacy and acceptability of its reports and recommendations rested upon its reputation for non-partisanship and unbiased work. Private funding is likely to require a perpetual search for future resources that would require the diversion of time and effort and run the risk of appearing to compromise objectivity if the donees have an arguable interest in pending studies.

**14. During the hearing, Ranking Member Watt and I discussed the possibility that each agency's budget be assessed each time it issues a regulation and that such assessment be earmarked to fund ACUS. What is your reaction to this suggestion?**

Agency decisionmaking is not solely concerned with rulemaking and ACUS' work in the past was not exclusively concerned with rulemaking. Adjudication, informal decisional

processes and other agency decisional processes occupied much of ACUS' efforts. It therefore could be argued to be unfair to a few high volume rulemaking agencies to bear the entire ACUS funding burden. Fairer, and arguably more realistic, would be to "tax" all agency's annual budget at the same rate so that1717 ACUS receives its statutorily authorized appropriation. Such a scheme not only would be a fair allocation of financial burden but might encourage more agencies to come to ACUS for assistance.

## Response to Questions from Ranking Member Mel Watt

### 1. Is the Administrative Law Project a satisfactory substitute for ACUS?

The Administrative Law Project is no substitute for ACUS. It hopefully provide evidence of a need for immediate legislative action by the Committee, or, more likely, the need for further review by a reactivated ACUS.

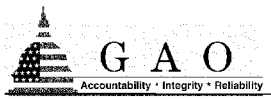
### 2. How systematic is outreach of the Administrative Law Project?

Our plan is to find the most qualified, available researchers with expertise in the issue and a track record for empirical studies. The issue areas the Committee has identified are relatively arcane. Moreover time, availability and funding constraints narrow the choices. We have been, and continue to reach out to academics with specialities that reach the issues we seek to cover.Our outreach has included announcements at major academic functions. We intend to ensure diversity by contacting by letters academic institutions that our informal announcements and personal contacts are not likely to reach.

**3. Has the Administrative Law Project become more of an inside game for inside players?**

This is not our intention nor is it our expectation.

RESPONSES TO ADDITIONAL QUESTIONS FROM J. CHRISTOPHER MIHM, MANAGING DIRECTOR OF STRATEGIC ISSUES, UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE




**United States Government Accountability Office**
**Washington, DC 20548**

December 12, 2005

The Honorable Christopher B. Cannon
Chairman
The Honorable Melvin L. Watt
Ranking Minority Member
Subcommittee on Commercial and Administrative Law
Committee on the Judiciary
House of Representatives

On November 21, 2005, you requested that we respond to questions for the official record regarding your Subcommittee's November 1, 2005, hearing on the Administrative Law, Process, and Procedure Project. Our responses are included in this correspondence.

**Responses to Questions from Chairman Chris Cannon**

1. Please describe the benefits that a reauthorized Administrative Conference of the United States (ACUS) would provide.

We have not done specific work on the subject, but concur with the general consensus expressed by other witnesses before the subcommittee on this issue. The record of its past work shows that ACUS provided a valuable forum to advise the federal government on administrative procedural reform. As others have testified, ACUS was able to draw together legal experts from across the spectrum to study problems affecting federal administrative procedures and to provide expert, nonpartisan advice and recommendations on how to improve the efficiency, adequacy, and fairness of those procedures. We would expect a reconstituted ACUS to provide the same benefits.

2. How would a reconstituted ACUS interface with the Government Accountability Office (GAO)?

Our primary client is the Congress, and our work is intended to help Congress make effective policy, funding, and oversight decisions. In doing so, we must maintain our independence from the entities that might be the subject of our work, including ACUS. However, we are committed to maintaining constructive working relationships and continuing communication with other agencies and organizations. Such working relationships and communications may take several forms, as facts and

circumstances warrant, including periodic meetings with other agencies' leadership and executives and specific communications pertaining to planned and ongoing work.[1]

Cooperation between ACUS and GAO would also be in accordance with the specific purposes outlined in the legislative reauthorization of ACUS, which include providing suitable arrangements through which federal agencies, assisted by outside experts, may cooperatively study mutual problems, exchange information, and develop recommendations for action.[2] Given our shared focus on studying problems affecting government operations and processes, we expect that ACUS and GAO would identify ways to complement each other's work in seeking to improve the efficiency of federal administrative procedures, including rulemaking.

3. With respect to the weaknesses of federal rulemaking procedures described in your written testimony, what role would ACUS be able to play in response to those problems?

As we noted in our testimony, ACUS, if funded, could play a valuable role in carrying out the detailed research needed for a reexamination of the federal rulemaking structure and processes. In particular, ACUS could plan and direct empirical research by experts to identify the most significant issues underlying weaknesses in federal rulemaking procedures and generate a range of practical options for addressing those weaknesses. Research by ACUS might also help to identify options regarding the other three major challenges we identified—addressing weaknesses in existing statutory requirements, improving the transparency of the rulemaking process, and adapting to changes associated with increased use of information technology.

4. Based on the four emerging issues cited in your testimony, does it appear that the Administrative Procedure Act may need to be amended in order to better deal with these matters?

Amending the Administrative Procedure Act (APA) could be among the options available to address some of the issues we identified, particularly regarding a reexamination of federal rulemaking structures and processes. For example, in our testimony, we noted that ACUS had recommended potential amendments to APA regarding interim final and direct final rulemaking. Whether other specific amendments to APA might address emerging issues requires further study. In some cases, Congress might need to amend other statutes—for example, to address weaknesses we previously identified in various regulatory reform statutes.

5. Earlier this year, we heard assertions that OMB and/or OIRA essentially perform the same tasks as ACUS. What are your views about the validity of such statements?

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[1]See, for example, the policies and practices on how GAO interacts with executive branch agencies in GAO, *GAO's Agency Protocols*, GAO-05-35G (Oct. 2004). Also, under the Inspector General Act of 1978, 5 U.S.C. App. 3 §4(c), GAO works with Inspectors General with a view toward avoiding duplication and insuring effective coordination and cooperation.
[2]Pub. L. 108-401, § 2.

From our perspective, OMB/OIRA generally performs a very different role than ACUS, although OMB/OIRA and ACUS both can contribute to improving federal rulemaking. Though OMB and OIRA sometimes provide general guidance to agencies (as discussed in our response to the next question), they primarily have a transactional focus on reviewing and overseeing individual draft rules and proposed information collections. Further, as we have pointed out in prior reports, OIRA is a relatively small office with responsibility for handling a large volume of such regulatory and paperwork reviews. As such, OIRA is unlikely to be able to spare resources to devote to extensive empirical research on administrative procedure issues. Also, with regard to its oversight of rulemaking, OIRA generally does not cover the independent regulatory agencies. Finally, OMB and OIRA are part of the Executive Office of the President, and the President is their chief client. In contrast, ACUS' role is to focus on empirical research and evaluation regarding administrative procedures, in general, and to provide expert, nonpartisan advice on that topic to all three branches of government. One of the perceived values of ACUS, according to witnesses before this subcommittee, is that its evaluations and recommendations were viewed as independent and nonpartisan, and not reflecting just the view of the current administration.

6. Can OMB or OIRA provide the guidance or direction to federal agencies in order to address these four emerging issues?

OMB or OIRA sometimes provide guidance or direction to federal agencies regarding specific rulemaking issues. For example, as directed by Congress, OMB issued information quality guidelines for agencies.[3] OMB also recently released a proposed bulletin for agencies outlining "good guidance practices."[4] Further, as we have noted in prior products, OMB and OIRA have a responsibility under Executive Order 12866 to instruct agencies on such matters.[5] However, with regard to administrative rulemaking processes and procedures, it has been our experience that OMB and OIRA also have sometimes declined to issue guidance to agencies. For example, OIRA deferred to the rulemaking agencies in response to our recommendations that OIRA issue guidance regarding use of the "good cause" exception under APA and that OIRA encourage agencies to use "best practices" in disclosing changes made to their draft rules.[6]

7. What role can GAO play with respect to the Administrative Law, Process and Procedure Project (Administrative Law Project)?

As in the case of any other work we perform for Congress, we can conduct specific research on request to address issues and questions that are part of the

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[3]For the updated final version of the guidelines see 67 *Fed. Reg.* 8452 (Feb. 22, 2003).
[4]See 70 *Fed. Reg.* 71,866 (Nov. 30, 2005).
[5]Section 2(b) of the Executive Order states "to the extent permitted by law, OMB shall provide guidance to agencies" and that OIRA "is the repository of expertise concerning regulatory issues, including methodologies and procedures that affect more than one agency."
[6]See GAO, *Federal Rulemaking: Agencies Often Published Final Actions Without Proposed Rules*, GAO/GGD-98-126 (Washington, D.C.: Aug. 31, 1998), and *Rulemaking: OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews*, GAO-03-929 (Washington, D.C.: Sept. 22, 2003).

Administrative Law Project agenda. In the course of our work for Congress, we can examine the use of federal funds, evaluate federal programs and activities, conduct investigations, and provide information, analyses, options, recommendations, and other assistance. Similar to the work that some academic scholars are currently doing for the project, our contribution would be focused on specific requests and research engagements, rather than a broad, systematic effort.

8. Some have suggested that ACUS be privately funded. What is your response?

and

9. During the hearing, Ranking Member Watt and I discussed the possibility that each agency's budget be assessed each time it issues a regulation and that such assessment be earmarked to fund ACUS. What is your reaction to this suggestion?

Both questions 8 and 9 deal with alternative funding mechanisms for a reconstituted ACUS. We have not done work directly on this question. In general, however, there are a number of issues to consider when deciding on use of a funding mechanism other than appropriations. For example the funding mechanism suggested in question 9 implies that funds would be appropriated to executive branch agencies and then transferred by them to ACUS. Would these funds then be available for use by ACUS without further Congressional action? If ACUS was to be funded privately—as raised in question 8—how would that funding be obtained? What would be the source of the private funding? Would this be like a user fee? On whom would it be imposed? At what level? How would they be determined? Would these funds then be available for obligation by ACUS without further Congressional action? How would the funding mechanism affect Congressional oversight?

The funding structure suggested in question 9 is not identical to but is somewhat similar to the funding structure used for the General Services Administration's Federal Buildings Fund—an assessment imposed on other agencies which are expected to pay it out of their appropriations. The committee might wish to look at that experience as well as consult the Appropriations Committee about how this might work in a time of tight spending constraints.

**Responses to Questions from Ranking Member Mel Watt**

1. In your testimony, you listed a series of areas where Congressional action may be required, dealing with weaknesses, transparency, technology, and impact. Please suggest some specific examples of these areas.

We identified four general areas on which the subcommittee might consider taking legislative action or sponsor further study. Some specific examples in each of the four areas follow.

Reexamine rulemaking structures and processes—The subcommittee has begun such a reexamination through its current oversight agenda and, specifically, the Administrative Law Project. In addition to the topics already included in that project, our prior work suggests at least two other subjects for reexamination and potential congressional action. First is the effect of changes in the markets and industries

regulated by federal agencies. For example, we stated in our report on 21st century challenges that increased global interdependence and rapid technological advancement in the financial services industry pose significant challenges to U.S. regulatory institutions. Such changes raise questions about whether it is time to modernize the regulatory system and whether the current regulatory framework is appropriately structured.[7] The second subject is the effect of changes in agency practices on the rulemaking processes established by the APA. In particular, we mentioned in our testimony that agencies appeared to be making increased use of procedures that by-pass notices of proposed rulemaking. Other witnesses at the hearing also commented that the increasing complexity of the rulemaking process (due to additional procedural and analytical requirements) might encourage agencies to avoid public notice and comment procedures by, for example, issuing guidance rather than rules. Such guidance and policy statements have been the subject of judicial challenges as having the effect of rules, and OMB recently issued a proposed "good guidance practices" bulletin to address some concerns about agencies' documents that might have the effect of rules.

Previously identified weaknesses of existing statutory requirements—Two main examples from our prior work concern weaknesses in the Regulatory Flexibility Act (RFA) and the Federal Civil Penalties Inflation Adjustment Act (Inflation Adjustment Act). With regard to RFA, we previously identified the need for Congress to clarify key terms and definitions, such as "significant economic impact" and "substantial number of small entities," and/or explicitly charge an entity with the authority and responsibility to do so, if RFA's promise is to be realized.[8] With regard to the Inflation Adjustment Act, we found that agencies are unable to fully adjust their civil monetary penalties for inflation under current law.[9] We suggested that Congress may wish to consider amending the act to (1) require or permit agencies to adjust their penalties for lost inflation; (2) make the calculation and rounding procedures more consistent with changes in inflation; (3) permit agencies with exempt penalties to adjust them for inflation; and (4) give some agency the responsibility to monitor compliance and provide guidance.

Transparency—To prompt further improvements in the transparency of federal rulemaking processes, we noted in our testimony that additional attention could be paid to agencies' explanations for certifications that certain analytical or procedural requirements do not apply. We have sometimes found it difficult to determine the underlying support or rationale for such certifications and statements.[10] Furthermore, agencies need to provide clear statements and explanations for only some of the requirements, such as when claiming the "good cause" exception from notice and comment requirements under APA. Therefore, we raised the question of whether there should be more demanding requirements for agencies to show the

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[7]See GAO, *21st Century Challenges: Reexamining the Base of the Federal Government*, GAO-05-325SP (Washington, D.C.: Feb. 2005).
[8] See GAO, *Regulatory Flexibility Act: Clarification of Key Terms Still Needed*, GAO-02-491T (Washington, D.C.: Mar. 6, 2002).
[9]See GAO, *Civil Penalties: Agencies Unable to Fully Adjust Penalties for Inflation Under Current Law*, GAO-03-409 (Washington, D.C.: Mar. 14, 2003).
[10]See, for example, GAO, *OCC Preemption Rulemaking: Opportunities Existed to Enhance the Consultative Efforts and Better Document the Rulemaking Process*, GAO-06-8 (Washington, D.C.: Oct. 17, 2005).

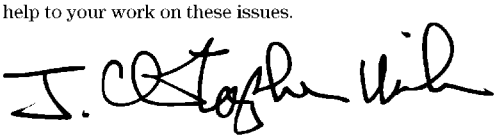
analyses or more fully explain the rationale behind such certifications and, if so, what form such requirements might take.

Information technology—Along with other witnesses at the November 1 hearing, we pointed out the rapid pace of developments regarding information technology and e-rulemaking. The two examples of specific issues that we highlighted in our testimony as meriting additional study were how information technology could (1) impact public participation in the rulemaking process and (2) be used to improve agencies' ability to analyze public comments. As discussed at the hearing, consideration of the first issue should include both questions of how technology can facilitate and expand opportunities for public participation and also questions of how to ensure participation of all interested parties when some do not have ready electronic access to rulemaking proposals and their supporting materials.

2. Is the Administrative Law Project a satisfactory substitute for ACUS?

We have not studied this issue, but in general it does not appear that the Administrative Law Project can substitute for the long-term, systematic investigation and monitoring of the administrative process that a reconstituted ACUS could provide. Nor was it ever intended to do so. As Morton Rosenberg of the Congressional Research Service pointed out in his testimony, in anticipation of a delay in the operational start-up of ACUS after passage of the reauthorization legislation, the project was intended to accumulate information to help determine whether action on particular issues required immediate legislative action or was best referred to ACUS for further in-depth studies and recommendations. Also, because its current research is dependent on the availability, interest, and resources of individual researchers and institutions, the Administrative Law Project is likely to be more limited in the number and types of research projects that it can carry out, compared to the body of work that ACUS had been able to sponsor in the past and, presumably, would continue to conduct in the future, if funded.

Please contact me at (202) 512-6806 or mihmj@gao.gov if you, other Subcommittee members, or your staffs have additional questions or if we can provide additional help to your work on these issues.



J. Christopher Mihm
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(450463)

RESPONSES TO ADDITIONAL QUESTIONS FROM JEFFREY S. LUBBERS, FELLOW IN LAW AND GOVERNMENT PROGRAM, WASHINGTON COLLEGE OF LAW, AMERICAN UNIVERSITY

**QUESTIONS FOR PROFESSOR JEFFREY LUBBERS**
**FROM CHAIRMAN CHRIS CANNON**

1. Based on your long-experience with the Administrative Conference of the United States (ACUS), could you estimate the savings in taxpayer dollars that the Conference produced over the course of its existence?

Answer:

Although there are no hard data on this point, my own educated guess is that ACUS probably saved, directly or indirectly, hundreds of millions of dollars during its 28 year existence—certainly far more than the $30-40 million dollars of cumulative appropriations it received over those years.

One reason I say this is that ACUS saved Congress from having to earmark numerous special appropriations for expensive contract research studies in the area of government procedure. Experience has shown that such special individual studies themselves often cost millions of dollars each. The ability of ACUS to undertake studies inexpensively due to its volunteer membership and its ability to attract low-cost academic consultants provided a cost-effective alternative to such earmarks. ACUS also provided no-cost training to agency lawyers and commissioners, and a continuous stream of informal consultations to agency lawyers on procedural matters of concern to their agencies.

Second, there were some ACUS recommendations that directly saved the government millions of dollars. One for example was Recommendation 80-5, *Eliminating or Simplifying the "Race to the Courthouse" in Appeals from Agency Action.* Enactment of Public Law 100-236 in 1988 was directly based on this recommendation, and it has ever since prevented large number of expensive and costly court battles over which court should hear an appeal.

Other ACUS recommendations have stimulated reforms that have saved the government a great deal of money. The most notable such reform was in the area of "alternative means of dispute resolution," or ADR. ACUS issued over a dozen recommendations in the 1980's and early 1990's that encouraged and facilitated agency use of ADR. While it is hard to quantify these savings, former Acting Chair Sally Katzen's April 21, 1994 testimony before this subcommittee quoted from the President of the American Arbitration Association, who cited "the importance of the Administrative Conference of the United States in our national effort to encourage the use of alternative dispute resolution by Federal government agencies, thereby saving millions of dollars that would otherwise be frittered away in litigation costs." Another set of recommendations, ACUS Recommendations 72-6, and 79-3, concerning the procedures in agency enforcement actions, led to congressional enactment of numerous streamlined civil money penalty adjudication laws that ultimately resulted in a huge increase of penalty collections into the federal treasury.

2. Why should anyone care about the early stage development of proposed rules, which as you know is the subject of Professor West's study?

Answer:

Rulemakings vary significantly in their manner and pace of development, and the events or external interests that "trigger" a rulemaking may be a major factor influencing the way the rulemaking is conducted. Congress, the courts, OMB, the public, and other entities may be instrumental in causing an agency to undertake a rulemaking. Also, because this early "pre-rulemaking" stage of federal agency rulemaking is not regulated by the APA, there are no legal restrictions concerning outside participation in this process.

A recent critical report on an EPA rulemaking that was influenced at an early stage by industry ex parte comments illustrates some of the issues that can arise. See EPA, Office of Inspector General, *Rulemaking on Solvent-Contaminated Industrial Wipes*, Evaluation Report No. 2006-P-00001 (Oct. 4, 2005) at 13, *available at* www.epa.gov/oig/reports/2006/20051004-2006-P-00001.pdf (finding that the "'reusable wipes industry' influenced the EPA rulemaking but this is allowable," although "appearances of favoritism contributed to perceptions of impropriety").

3. Why has the rulemaking process, at least in certain respects, become "ossified"?

Answer:

The term "ossified" has been applied to the effects caused by the increasing procedural complexity of rulemaking. Beginning around 1970, Congress enacted a variety of specific regulatory statutes that mandated additional rulemaking procedures to supplement or supersede the APA's provisions. In addition, many administrative agencies significantly modified their rulemaking procedures in response to court-mandated refinements and the increasing complexity and controversial nature of many rulemakings. Succeeding Presidents, beginning with Nixon, have, by executive order, imposed procedural and analytical requirements on rulemaking by executive branch agencies that went beyond procedures required by the APA. Additional "regulatory reform" initiatives enacted during the 104th Congress have also prescribed procedural requirements for rulemaking. The combination of these add-ons to the rulemaking process, without much thinking about how they all fit together, has led numerous commentators to fret over the "ossification" of rulemaking.

4. If you could personally address the Congressional appropriators who have jurisdiction over ACUS, what would be your principal and most persuasive arguments for funding ACUS?

Answer:

(A) ACUS actually produces real cost savings for the federal government, as explained in Answer #1;

(B) ACUS provides a proven consensus-building mechanism (public-private partnership) to address administrative and regulatory controversies in a way that that diminishes, rather than exacerbates, partisanship in Washington;

(C) ACUS provides a continuing monitoring and implementation role for successful government-wide reform initiatives such as ADR, negotiated rulemaking, open government, whistleblower protection, audited self-regulation, agency ombudsmen, the ALJ program, and adjudicatory case management;

(D) ACUS provides a low-cost way to provide "procedural audits" of particular agency programs, such as environmental, health and safety, and other regulatory programs as well as mass adjudication programs such as social security, Medicare, immigration and customs; and

(E) ACUS provides a way to maintain and carry out a cutting-edge research agenda that can benefit all three branches of the federal government.

All this and more for $3 million a year!

5. In your testimony, you discuss the administrative issues presented by mass adjudication programs. Do you see any role that ACUS could play with respect to asbestos litigation?

Answer:

In 1991, ACUS studied the National Vaccine Compensation program (ACUS Recommendation 91-4), which provided reform suggestions for this type of mass tort program. The federal government has also set up apparently successful compensation programs for other mass tort situations, such as those victimized by the 9/11 disaster and victims of radiation poisoning from atomic testing in the mountain states. The Black Lung Benefits program is a larger-scale mass compensation program that is modeled on workers compensation programs. My thought was that such examples could be studied by ACUS and their lessons applied to other mass tort situations such as the asbestos problem.

6. Earlier this year, we heard assertions that OMB and/or OIRA essentially perform the same tasks as ACUS. What are your views about the validity of such statements?

Answer:

As you know, OMB/OIRA is one of the most powerful and highly influential actors in Washington. OIRA serves as the President's team in coordinating regulatory policy, and in implementing presidential executive orders and directives. For the most part OIRA acts as a regulator—of the executive branch regulatory agencies themselves.

ACUS had and would have a very different role. Unlike OIRA, an ACUS has no power, other than the power to persuade. Its recommendations are consensus-based. Its research agenda is forward looking and extends to all aspects of government procedures—beyond the regulatory area that OIRA itself regulates. And its ability to follow up on its recommendations is a continuing one.

ACUS also provides a degree of independence from the Administration, and a degree of closeness to Congress that distinguishes it from OIRA. Although the ACUS Chair and Council are appointed by the President, it is not a White House entity; its membership is finely balanced with members from all the key agencies in the government as well as different interest groups. It also, unlike OIRA, can have close affiliations with independent regulatory agencies.

This is not to say that ACUS and OIRA cannot work together. Executive Order 12,866, for example promotes agency use of negotiated rulemaking, and the just-issued OIRA draft bulletin on Good Guidance Principles cites two ACUS recommendations on that subject. And to some extent, OIRA can be a clearinghouse for best practices in the regulatory area.

Of course OIRA can also play an influential role in ACUS projects and debates, and ACUS can review and study the impact of OIRA initiatives.

7. Some have suggested that ACUS be privately funded. What is your response?

Answer:

As I suggested in my testimony, ACUS's statute is a flexible one that allows the agency to accept intergovernmental transfers, outside donations or grants, and voluntary services. These augmentations can be quite useful. But ACUS would not be ACUS in my opinion if it were not an agency of the federal government with an annual appropriations.

I say this for two main reasons. First, if ACUS were entirely dependent on outside funders, there would be at least a perception of undue influence by the outside funder. Even foundations these days are often identified as aligned with narrow or partisan interests. Second, agency members of ACUS would have a harder time attending meetings, participating in studies, and cooperating with research consultants, if ACUS were not a federal agency.

8. During the hearing, Ranking Member Watt and I discussed the possibility that each agency's budget be assessed each time it issues a regulation and that such assessment be earmarked to fund ACUS. What is your reaction to this suggestion?

Answer:

It was an interesting suggestion, but my suspicion is that if ACUS's funding were derived from an assessment tied to agency activity, this would create such resentment among the paying agencies, that soon ACUS would have some real bureaucratic enemies. (It would also be hard to define what a "regulation" is for this purpose.)

If any sort of a widely-shared assessment were to be established, it would probably be better for Congress to specify that it should be some sort of an across-the-board tiny percentage (or rounding off amount) transferred from the appropriation of each member agency.

I note for example that a number of the current Administration's E-Government initiatives are funded by participating agencies. The E-rulemaking initiative is one of those. As the GAO has described the funding arrangements:

> A common strategy used in fiscal years 2003 and 2004 was to reach agreement among the participating agencies on monetary contributions to be made by each—10 of the 25 initiatives used this strategy. Initiatives used different approaches in determining how much an agency should contribute. For example, some adopted complex allocation formulas based on agency size and expected use of the initiative's resources, while others decided to have each agency contribute an equal share. In most cases, the funding strategy and allocation formula adopted for an initiative was determined by its governing board, with input from partner agencies and OMB. To further reinforce the strategy of having partner agencies make financial contributions, OMB generally reflected planned agency allocations in its annual budget guidance to partner agencies, known as passback instructions. GAO report at 7.

The GAO report also pointed out noted that there were some shortfalls in funding. For example: "The e-Rulemaking initiative, managed by EPA, received only $5,850,208 (51 percent) of its planned fiscal year 2004 budget of $11,505,000 in partner agency contributions." GAO report at 10. But the amounts of these contributions, when compared to ACUS's authorized budget, are still quite large.

**QUESTIONS FOR PROFESSOR JEFFREY LUBBERS**
**FROM RANKING MEMBER MEL WATT**

1. Could you provide a concise statement of how ACUS has been missed and in what areas? For example, there are probably some very dramatic examples that could be pointed to within the past ten years involving mistakes or things that would not have happened had ACUS been in existence.

Answer:

I can think of several areas where ACUS's involvement could have improved government activities or helped to avoid mistakes. The first area is the application of electronic technology to the administrative process. The Internet was just becoming a reality in government offices when ACUS was shut down. In fact ACUS sponsored one of the very first series of studies of electronic information collection and docketing, by Professor Henry Perritt [Henry H. Perritt, *Electronic acquisition and release of Federal agency information*. 1988 ACUS 601, and 141 ADMIN. L. REV. 253 (1989); *Federal Electronic Information Policy* 63 TEMPLE L. REV. 201 (1990); *Electronic Records Management and Archives*, 53 U. PITT. L. REV. 961 (1992)]. Since that time the government has been playing catch-up in adapting electronic technology to its adjudicative and regulatory activities. ACUS sponsored several of the first studies concerning electronic dockets and electronic FOIA, and I believe we could have hastened a more orderly adoption of a government-wide electronic docket and helped to solve some of the nagging legal problems still apparent in the area of e-rulemaking.

A second area has to do with the creation of the Department of Homeland Security. Besides the difficult consolidation issues, there were numerous privacy and openness-vs.-security issues presented. Chairman Cannon thanked me for my testimony on your committee's hearing on these matters, which I appreciated, but I have to admit that I was speaking off the cuff and without the benefit of any underlying studies. If ACUS had existed after 9/11, I believe it would have been able to help achieve consensus and some careful solutions pertaining to some of these issues.

A third area is administrative adjudication. As I said in my statement, agencies are finding numerous ways to circumvent the Administrative Law Judge (ALJ) program. I think this is a shame because it undermines the consistency, uniformity, and independent adjudicative values that are at the heart of the APA. The Office of Personnel Management, which has the statutory responsibility for administering the ALJ program, has largely abandoned its statutorily-mandated role of overseeing the ALJ program. It abolished its separate Office of ALJs, and became embroiled in a long-lasting lawsuit that saw its register of eligible candidates for the ALJ position frozen for many years. See Meeker v. MSPB, 319 F.3d 1368 (Fed. Cir. 2003). I believe that ACUS could have played a role in highlighting these problems and helping to fix them expeditiously.

And finally, ACUS has definitely been missed in the area of promotion of ADR and negotiated rulemaking. Although the Department of Justice did create an interagency working group on ADR, which has done some good work, the concentrated attention and expertise that had grown up among ACUS members and staff was dispersed in October 1995. I don't think it is coincidental that negotiated rulemaking has faltered since.

2. What are some of the areas that the next generation of ACUS could focus upon?

Answer:

In my testimony I attempted to lay out a research agenda for ACUS. If I had to choose the areas that seem most pressing, I would suggest: electronic rulemaking, negotiated rulemaking's faltering, alternative approaches to agency regulation and enforcement, cooperative federalism, and bringing more rationality and predictability to judicial review of agency action.

3. Is the Administrative Law, Process, and Procedures Project a satisfactory substitute for ACUS?

Answer:

In my opinion the ALPP Project is an excellent idea, but should not be seen as a substitute for ACUS. I think if your Committee asked itself whether it wanted to take on the responsibility of designing and overseeing pro bono administrative law research on an ad hoc basis for the foreseeable future, it would probably realize that such a task would not be sustainable for long.

Moreover, there needs to be a process for digesting the results of the studies and turning them into recommendations for reform. This is a job for a permanent dedicated group of expert members and staff in the executive branch.

RESPONSES TO ADDITIONAL QUESTIONS FROM JODY FREEMAN, HARVARD LAW SCHOOL

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**QUESTIONS FOR PROFESSOR JODY FREEMAN FROM CHAIRMAN CHRIS CANNON**

**Question 1:** *Why should anyone care about the percent of rules invalidated upon judicial review?*

**Answer:** Congress, the President, the judiciary and the general public should care about the percentage of rules invalidated or remanded (and why they are invalidated or remanded) because if the rate of reversal is high, it is a fair inference that the rulemaking process is not working well. Ideally, we want rules to be of sufficient quality to survive legal challenge. This has real consequences for congressional efforts to reform agency process. Policymakers and scholars often assert that a high percentage of rules are struck down or remanded, and claim that this proves the regulatory process is flawed. Yet these assertions are based on almost no data. We do not really know the truth about the rate of reversal or remand. If critics are right, and federal agencies are spending significant resources producing rules that do not pass judicial muster, we need to know that, and we need to know why. The first step is to calculate the rate at which rules successfully survive legal challenge in the first place.

The next step is to look for trends in the data that could explain why rules are struck down. From there, we can look for opportunities to improve the rulemaking process. For example, perhaps we will discover that the invalidated rules tend to have undergone less rigorous cost-benefit analysis than the rules that are upheld. If that were the case, Congress might wish to change how agencies conduct such analyses. Maybe the invalidated rules share other features that suggest relatively easy opportunities for improvement. For example, perhaps the invalidated rules tend to lack the public participation necessary to ventilate all of the important policy considerations. To remedy this, Congress could reform how agencies conduct public participation. Perhaps the invalidated rules disproportionately come from a few agencies with relatively weak rulemaking practices. In such a case, Congress could require these agencies to adopt the "best practices" of the more effective agencies.

On the other hand, if it turns out that most challenged rules are upheld, then perhaps we can infer that most agencies are performing their rulemaking responsibilities relatively well. If this were the case, Congress could avoid unnecessary and expensive intervention in the rulemaking process.

However, we cannot do anything to improve the regulatory process without basic research about how many rules get challenged, how many get reversed, and why they get reversed.

- **Question 2:** *What are some of the key possible findings from your study that you think could be helpful to us in Congress?*

  **Answer:** We might find that relatively few challenged rules are struck down, and that agencies do not really face significant legal obstacles implementing their rules. We might find on the other hand that a relatively high percentage of rules are struck down, suggesting the need for some reform of the rulemaking process. These reforms might include any or all of the following: requiring agencies to develop improved records to support rules; requiring agencies to change how they perform cost-benefit analysis or peer review; requiring increased congressional review of rulemaking; requiring agencies to take additional procedural steps prior to rule promulgation; alternatively, where warranted, reducing the number of procedural steps for certain kinds of rules; requiring more or different kinds of consultation with the public and interested parties; requiring greater use of alternative dispute resolution; require greater use of technology in rulemaking.

  In addition, we might find that some interest groups prevail much more than others in challenging rules, something that Congress might wish to remedy or recalibrate. We might find great variation in how rigorously courts use generic standards of review (such as the arbitrary and capricious test), something Congress could adjust by statute.

  This basic research should be seen as a down payment on future studies that will help Congress to make the rulemaking process both more effective and more efficient.

- **Question 3:** *If you could personally address the Congressional appropriators who have jurisdiction over the Administrative Conference of the United States (ACUS), what would be your principal and most persuasive arguments for funding ACUS?*

  **Answer:** I would emphasize to appropriators that ACUS provides great value for relatively little money. As I stated in my oral testimony, ACUS is a bargain. First, ACUS saves Congress from earmarking appropriations on a piecemeal basis to conduct individual studies of the administrative process. An ad hoc approach to funding research can be needlessly expensive, and too uncoordinated. ACUS can undertake and sponsor studies at low cost because it can rely on its volunteer membership to conduct them. Moreover, these studies can be linked together as part of a coherent research agenda that ACUS oversees. ACUS can set research priorities, oversee the research and develop reform proposals from the results. ACUS can also provide consistent oversight and monitoring of agencies, which would enable it to identify new issues that require Congress's attention. By playing this ongoing role, ACUS can help to ensure that important issues of government procedure do not fall through the cracks. By contrast, for Congress to try to conduct research on a piecemeal basis would be both more expensive and less effective.

Second, many of ACUS's recommendations have been focused on reforms that not only improve the administrative process but also save money. For example, the numerous ACUS recommendations on alternative dispute resolution during the 80s and early 90s were aimed at reducing costly litigation. These money-saving opportunities still exist—the federal government could use ADR more effectively and it could make better use of new technology like "e-rulemaking". ACUS could add value by proposing these kinds of reforms.

Third, funding ACUS is a low-cost way for Congress to obtain the benefit of a non-partisan "think tank" made up of experienced professionals from both the public and private sector. Because of the expertise of its membership, ACUS can perform a variety of functions: ACUS can monitor the performance of government agencies over time to identify and promote the adoption of "best practices;" ACUS can recommend procedural reforms tailored to the needs of particular agencies (i.e., DHS will confront different challenges in rulemaking than EPA); ACUS can recommend reforms that ought to be adopted government-wide; ACUS can anticipate problems that ought to be addressed early before they become acute. To take just one example, had ACUS still existed after the attacks of September 11, 2001, it might have proposed ways in which the new Department of Homeland Security could delicately balance the need for secrecy to protect national security with the need for openness in the regulatory process.

ACUS is unique. It has traditionally taken a holistic view of federal agency performance rather than looking only at narrow problems and individual agencies. Its membership has the combination of expertise necessary to generate thoughtful and sensible reforms. ACUS enjoys heightened credibility with both independent and executive agencies, which is necessary to ensure their cooperation in both generating and adopting reforms. The fact that ACUS has attracted the support of two individuals of such different perspectives as Justices Breyer and Scalia is testimony to the way in which it has managed to rise above the political fray and provide a much needed service.

**Question 4:** *Earlier this year, we heard assertions that OMB and/or OIRA essentially perform the same tasks as ACUS. What are your views about the validity of such statements?*

**Answer:** OMB/OIRA cannot perform the functions of ACUS because OMB/OIRA represents the interests and policy imperatives of the White House. By comparison, ACUS is more independent. Though the leadership of ACUS is appointed by the President, its membership is balanced and broadly representative. And unlike OMB/OIRA, ACUS can help all three branches in their efforts to oversee agency process.

In addition, although OIRA plays a very powerful role in overseeing executive agency rulemaking, and in enforcing executive orders and presidential directives, this encompasses only part of what federal agencies do. OIRA does not oversee agency adjudication, agency grants and contracts, and other important agency actions. And OIRA does not engage in programmatic research with an eye to more general reform of the administrative state. These are gaps that ACUS can fill.

Also, because of the oversight role OIRA plays for the Administration, OIRA can sometimes be placed in an adversarial posture toward the executive agencies it oversees.

ACUS operates differently. Its recommendations are based on consensus, and it works cooperatively with agency staff to develop and adopt reforms. ACUS has not traditionally represented a particular set of interests or a particular branch, which gives it special credibility with both independent and executive agencies.

- **Question 5:** *With respect to Small Business Regulatory Enforcement Fairness Act and in light of its upcoming tenth anniversary, what areas in particular would you recommend be studied with respect to the Act's effectiveness?*

**Answer:** I am not an expert on SBREFA, but I have heard anecdotal reports that perhaps it is not serving the interests of smaller business entities, as Congress intended. I would recommend research into the role that larger businesses might be playing behind the scenes in SBREFA's implementation. And more generally I would recommend conducting research into whether the benefits that Congress sought to confer on smaller businesses are being realized.

**Question 6**: *Some have suggested that ACUS be privately funded. What is your response?*

**Answer:** There is nothing wrong with allowing ACUS to accept funding from a variety of sources, and indeed ACUS's statute permits this. But I believe it would be a mistake to have private funding as the exclusive source of ACUS's support. First, private funding always raises suspicion about potential influence by the funder. ACUS's recommendations have been influential in the past because they are perceived to be non-partisan and unbiased. Private funding would likely change that perception. (Incidentally, this could also be the case if funding were to come exclusively from just one government agency, like the Department of Homeland Security). Finally, ACUS has special standing with both independent and executive agencies in large part because it too is a federal agency funded by annual appropriations. This gives ACUS clout and legitimacy, which it would lose if privately funded.

**Question 7:** *During the hearing, Ranking Member Watt and I discussed the possibility that each agency's budget be assessed each time it issues a regulation and that such assessment be earmarked to fund ACUS. What is your reaction to this suggestion?*

**Answer**: It is valuable to think creatively about how to fund ACUS but I think this would likely create animosity between the "taxed" agencies and ACUS. This could poison what has traditionally been a cooperative relationship. Moreover, this proposal appears to penalize regulation and could create an incentive for agencies not to regulate, even where regulation might be warranted. However, an across-the-board assessment from agency budgets could be an alternative idea. And perhaps those agencies that stand to benefit most from a particular ACUS research project might pay a disproportionate share of its cost. This could be done on a project-by-project basis.

**QUESTION TO PROFESSOR JODY FREEMAN FROM RANKING MEMBER MEL WATT**

**Question :** Is the Administrative Law, Process, and Procedures Project a satisfactory

substitute for ACUS?

**Answer:** No, it is not. Though the Administrative Law, Process and Procedures Project is valuable, it is too limited in scope and too ad hoc in its approach to substitute for a federal agency like ACUS. The Congressional Research Service has, to its credit, tried to enlist scholars in conducting research for the Project, but only a small number of administrative law experts have agreed to study a few limited questions. Empirical work is time consuming and requires an investment of resources. The Project does not appear to have significant financial support or a long-term research plan.

A funded ACUS offers significant advantages over the Project. First, scholars may be more likely to respond to an invitation or request for research from ACUS, a body that has historically been a professional association with a strong record of bipartisanship. Second, a funded ACUS would have the financial support to sustain a coordinated long-term research program. Third, a funded ACUS would have the advantage of the broad expertise of its large membership. Finally, a funded ACUS would be able to take the results of empirical research and develop those results into recommendations, something that the Project does not seem equipped to do.

Although the Project is a laudable effort to obtain some preliminary information about how agencies are performing, it is a stop-gap measure. By contrast, ACUS will be able to undertake both short and long term studies in a coordinated and comprehensive way. Its leadership will be able to prioritize among the most important questions and establish a research agenda. ACUS's independence and reputation for professionalism will afford it real credibility with the agencies it is studying.

This concludes my responses. Thank you for the opportunity to respond to your questions.

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