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ADMINISTRATIVE LAW, PROCESS AND PROCEDURE PROJECT FOR THE 21ST CENTURY

HEARING

BEFORE THE

SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

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ADMINISTRATIVE LAW, PROCESS AND PROCEDURE PROJECT FOR THE 21ST CENTURY

TUESDAY, NOVEMBER 14, 2006

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

The Subcommittee met, pursuant to notice, at 3:27 p.m., in Room 2141, Rayburn House Office Building, the Honorable Chris Cannon (Chairman of the Subcommittee) presiding.

Mr. CANNON. I would like to apologize to the witnesses for the late start. The votes, and people chatting in the halls, make the gauntlet from the Capitol here virtually impassable. So I apologize to you, and I appreciate your patience and look forward to your testimony.

Today's hearing is a fitting way to bring to a close the 109th Congress. The Committee on the Judiciary, as one of its very first items of business for this Congress, authorized the Subcommittee on Commercial and Administrative Law to undertake a comprehensive study of administrative law, process and procedure on January 26, 2005, as part of the Committee's oversight plan for the 109th Congress.

This hearing represents the culmination of that 2-year study known as the Administrative Law, Process and Procedure Project for the 21st Century. Over the course of this project, the Subcommittee conducted six hearings, participated in three symposia, and sponsored several empirical studies.

Topics examined as part of this project included the adjudicatory process of agencies; the role of public participation in rulemaking; the process by which agency rulemaking is reviewed by the Congress, the President, and the Judiciary; and the role of science in the regulatory process.

From its very inception, this project has been a thoroughly bipartisan and nonpartisan undertaking. To that end, I want to thank the Subcommittee Ranking Member, Mr. Watt for his active and unwavering support throughout this undertaking, and point out that I look forward to working with him in whichever chairmanship he assumes in the next Congress.

It is also important to remember that this project was inspired and initiated by the House Judiciary Chairman, Jim Sensenbrenner. The project is a testament to the Chairman's deep and long-standing commitment to improving the law and procedure in general, and, in particular, to improving the administrative and

rulemaking process. Accordingly, we thank the Chairman for his insight and leadership in allowing the Subcommittee to spearhead this endeavor.

It is also appropriate at this time to extend our sincere thanks to the Congressional Research Service and its director, Dan Mulhollan, for devoting so many critical resources—physical, financial, and human—to this project.

The three witnesses who appear today on behalf of CRS, namely, Mort Rosenberg, Curtis Copeland and T.J. Halstead, deserve much of the credit for playing such a major role in guiding the project and ensuring its success.

It is my sincere hope that the findings and recommendations of the project's report, which will be issued later this month, will not just sit on the proverbial shelf to gather dust. Rather, it should become a valuable legacy for the next Congress.

Let me cite just one example. One of the most important legacies of the project is that it underscored the absolute and urgent need to have a permanent, neutral, nonpartisan think tank that can dispassionately examine administrative law and process and that can make credible recommendations for reform. Clearly, I am referring to the need to reactivate the Administrative Conference of the United States. Although reauthorized in the 108th Congress with overwhelming bipartisan support, the Conference remains to be funded.

The extremely nominal investment to fund ACUS would redound in billions of savings in taxpayer dollars. Accordingly, I encourage our Subcommittee Members on both sides of the aisle to continue to pursue this very worthy cause in the waning days of this Congress, and, if that fails, in the next Congress.

[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

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T.J. Halstead deserve much of the credit for playing such a major role in guiding the Project and ensuring its success.

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

Mr. WATT. Thank you, Mr. Chairman. I assure you that being a Chair or a Ranking Member is not, by definition, more distinguishing or less distinguishing.

Mr. CANNON. I agree with the gentleman. I hope that I don't lose much stature in the process. It would be hard for you to gain more stature because you're a person of great accomplishments and distinction already.

Mr. WATT. It does feel good.

Mr. CANNON. Now let's not rub it in, okay?

Mr. WATT. I will just, if it is all right, Mr. Chairman, ask unanimous consent to revise and extend my remarks and submit a statement for the record, and will make a very brief comment about this hearing because I think it is important for us to do the follow-up. And hopefully whoever is in charge of this Subcommittee and Committee next term of Congress will not allow this to go unnoticed, and the package of recommendations will be implemented.

We are in thorough need of reform in Government agencies and the administrative procedures since we haven't had a major reform in over a decade, when we had the National Performance Review and the second Clinton/Gore term began to focus on some of these issues, so I think this is important. The Chair has put it at the top of his agenda, and I hope some Chair will put it at the top of their agenda in the next term of Congress if nothing is done this year.

That having been said, Mr. Chairman, I would ordinarily yield back, but if this is to be the last meeting of our Subcommittee in this term of Congress, I think I would be remiss not to express my gratitude to you and my high admiration for the manner in which you have conducted this Subcommittee and consulted with me as the Ranking Member. It's the kind of consultation that I think is important, and that the American people are saying they desire to have Republicans and Democrats have. And from my part, you can be assured wherever I am, as a Chair, it will be my intention to exercise the same kind of consultation as we go forward, either on this Subcommittee or on whatever Subcommittee I'm on, on Judiciary or Financial Services, which I may also be eligible for a Subcommittee on.

So you've set a good model for us and set a high standard for bipartisanship and consultation and respect and friendship, and I just publicly want to express my thanks to you for that.

And with that, I'll yield back the balance of my time.

Mr. CANNON. I want to thank the gentleman for those kind remarks. I can't imagine any kinder thing being said about me, except possibly that I'm a good father, but you don't know my family, so that's beyond your purview. But thank you very much for those kind comments.

And I would just point out that America has evolved, it's grown in the last 10 or 12 or 15 years, and I think the next Congress is going to be an opportunity to focus on what America needs and not in a partisan fashion. There are many, many issues that are truly nonpartisan that are important, and I look forward to working with the gentleman on many of those issues.

Without objection, the gentleman's entire statement will be placed in the record. Hearing no objection, so ordered.

[The information referred to was not available.]

Mr. CANNON. I ask unanimous consent to include a letter from the American Bar Association in the prehearing record. Hearing no objection, so ordered.

[The information referred to can be found in the Appendix.]

Mr. CANNON. Without objection, all Members may place their opening statements in the record at this point. Hearing no objection, so ordered.

Without objection, the Chair will be authorized to declare recesses of the hearing at any point. Hearing no objection, so ordered.

I ask unanimous consent that the Members have 5 legislative days to submit written statements from the conclusion of today's hearing record. Hearing no objection, so ordered.

I am now pleased to introduce today's witnesses for today's hearing.

Our first witness is Mort Rosenberg, a specialist in American public law in the American Law Division at the CRS. In all matters dealing with administrative law, Mort has been the Judiciary Committee's right hand. For more than 25 years he's been associated with CRS. Prior to his service at that office, he was chief counsel at the House Select Committee on Professional Sports, among other public service positions he's held. In addition to these endeavors, Mort has written extensively on the subject of administrative law. He obtained his undergraduate degree from New York University and his law degree from Harvard Law School, and he has been a remarkable help us to through this process, and I want to thank you for that, Mr. Rosenberg.

Our second witness is Dr. Curtis Copeland, a specialist in American Government at CRS. Dr. Copeland's expertise, appropriately relevant to today's hearing, is Federal rulemaking and regulatory policy. In addition to this area of expertise, Dr. Copeland also heads the Government and Finance Divisions, Executive and Judiciary Section at CRS, which covers issues ranging from Federal financial management to the appointment of Supreme Court Justices. Prior to joining CRS, he held a variety of positions at the Government Accountability Office over a 23-year period. Dr. Copeland received his Ph.D. From the University of North Texas.

Our final witness is T.J. Halstead, a legislative attorney in the American Law Division of CRS, and in this capacity is one of CRS's primary analysts on administrative law and separation of powers issues. Before joining CRS in 1998, Mr. Halstead received both his undergraduate and law degrees from the University of Kansas.

We understand and appreciate that as CRS staff, your testimony will be confined to technical, professional and nonadvocative aspects of the hearing subject matter pursuant to congressional guidelines on objectivity and nonpartisanship.

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 statements will be included in the hearing record, I request that you limit your oral 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 at 5 minutes it turns to a red light. It is my habit to tap the gavel or a pencil 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, and certainly not in the middle of your thinking, so it's not a hard red light or a hard termination.

After you've presented your remarks, the Subcommittee Members, in the order they arrive, will be permitted to ask questions of the witnesses subject to the 5-minute limit. I suspect that won't be a real long event.

Let me just say we welcome Mr. Chabot, who has joined us here on this end.

I would ask the witnesses to rise and raise your hand to take the oath.

[Witnesses sworn.]

Mr. CANNON. The record should reflect that all the witnesses answered in the affirmative.

Mr. Rosenberg, would you now proceed with your testimony.

TESTIMONY OF MORTON ROSENBERG, ESQ., SPECIALIST IN AMERICAN PUBLIC LAW, CONGRESSIONAL RESEARCH SERVICE, WASHINGTON, DC

Mr. ROSENBERG. Thank you, Mr. Chairman. Thank you, Mr. Watt. I just want to reiterate that I am honored not only to appear before you again, but also for giving me the opportunity to do the kind of work we've been doing for the last 2 years. It's been an education for me, and it's been a fruitful endeavor to put together, you know, symposia, be at these hearings, and to generally support the work of this Committee in identifying emerging issues.

Today, my CRS colleagues Curtis Copeland and T.J. Halstead and I will try to brief you on the status of the Process and Procedure Project and what might be done in the future. My testimony will focus on the potential significance of the reactivation of ACUS, and one of the seven elements of the project, the Congressional Review Act. Curtis and T.J. Will discuss the other six elements of the study.

With respect to ACUS, I've always thought that in this part of the project there was, you know—of course it's important for it to

be the reactivation that occurred in 2000—the reauthorization that occurred in 2004 was important, and that the funding and ultimate reactivation of ACUS was not important at that moment. But at some particular point—and our experience with our studies underlines the fact that there is a need for an organization like ACUS, which provided nonpartisan, nonbiased, comprehensive, practical and cost-effective assessments and guidance on a wide range of agency processes, procedures and practices, a history that has been well documented before this Committee.

What struck me as important was one of the study projects that we commissioned, the one which Professor West conducted with regard to participation in the—public participation in the prenotice and comment period. His excellent study was, you know, hindered a great deal by the fact that, as his testimony before this Committee revealed, that his entree to the Committee, to the agencies that he was attempting to get information and to do his assessments was met with recalcitrance and suspicion. Generally, the best information that he got was through informal interviews that were in, you know, deep, you know, background from knowledgeable officials of these agencies.

That was not true during the heyday of the Administrative Conference. Its reputation of credibility, of nonpartisanship, and expertise opened doors when an ACUS-sponsored researcher came to the door because there was a certain amount of self-interest involved. The reputation of ACUS as an entity that would provide expert guidance redounded, and the kinds of studies and suggestions for the agencies to—you know, to change their practices or to undertake new ways of decisionmaking redounded to their benefit so that there was a self-interest involved in having an ACUS study that could help that agency. So that reactivation, you know, that could be looked to as an extraordinarily important aspect to it.

I also enjoyed very much the empirical—the symposia that we conducted, as well as the—one of the more symposia—at least, and most interesting was the science and rulemaking symposium, from which, after questioning some of the members of the panel on advisory bodies, we discovered that nobody knew how many science advisory bodies were out there. Nobody knew what the selection process was—these were among experts in this field—and as a result of that revelation in itself—and the panels at that science symposia were quite excellent—we commissioned a study to develop a taxonomy of science advisory committees in the Federal Government, a study that will be completed sometime next June, and we'll present it to this Committee, which will tell us, you know, how many there are, how they're selected, how they're vetted, how they deal with conflicts of interest and various important information about these advisory committees that will allow Congress to decide whether any kinds of legislative actions needs more regulating.

The symposium we held on September 11 on Presidential, Congressional and Judicial Control of Rulemaking was also one that I would recommend to scholars, Congresspeople, everybody to read the transcript. One of the themes and one of the things that came across very well was the constitutional dimension of the study, or parts of the study, that you are engaged in. And I will talk about that, you know, in a few moments.

I chaired the panel on the Congressional Review Act, and of course I've spoken about the Congressional Review Act with you at one of your hearings. The panel was interesting, revealing, and I'd like to say a few words about the Congressional Review Act and where we could go from here.

Congress' stated objective of setting in place an effective mechanism to keep it informed about the rulemaking activities of Federal agencies which would allow for expeditious congressional review and possible nullification of particular rules may not have been met. That was the clear result of the testimony there and the discussion. Statistically, to date, over 43,000 rules have been reported to Congress, including over 630 major rules, and only one, the Department of Labor's ergonomics standard, was disapproved in 2001. Many analysts believe that the negation of the ergonomics rule was a singular event, not likely to be repeated.

Witnesses at your hearing pointed to structural defects in the mechanism, most commonly the lack of a screening mechanism to identify rules that warranted review by jurisdictional Committees, and then expedited consideration process in the House—the lack of an expedited consideration process in the House that complemented the Senate's procedures, as well as numerous interpretive difficulties of key statutory provisions that seemed to deter use of the mechanism.

One witness at the hearing, Todd Gaziano of the Heritage Foundation, while agreeing with the structural critique, suggested that the law's presence and the threat of a filing of a joint resolution of disapproval had had a degree of influence that could not be ignored. He agreed, however, that the framers of the legislation anticipated that the mechanism would provide an incentive for legislators to insist on institutional accountability as a response to criticisms of Congress that it had been delegating vast amounts of lawmaking authority to executive agencies without maintaining countervailing checks on the exercise of that authority.

There was also recognition among the witnesses that the establishment of a joint Committee that would screen rules, recommend action to jurisdictional Committees in both Houses could provide the coordination and information that were necessary to inform the bodies sufficiently and in a timely manner and nature of such to take appropriate legislative actions.

The balanced nature of such a joint Committee and its lack of substantive authority appeared to provide a way to allay political concerns over turf intrusions. The House Parliamentarian, John B. Sullivan, agreed that such a joint Committee was a viable construct.

A further question raised at the March hearing, and again at the panel discussion of the Congressional Review Act in the September 11th symposium, was whether it was necessary to have all the rules reported and reviewed. It was suggested that only major rules need be reported, which would save legislative time, and also money; and that the many rules, the thousands that have come before Congress, simply aren't of a stature that needs to be addressed by a jurisdictional Committee.

There was no consensus, however, among the panelists as to who or how a major rule would be defined. There was an agreement

among the panelists that the nonsubstantive advisory joint Committee would be a politically viable screening mechanism, but not the same unanimity with respect to an expedited House consideration procedure. Former House Parliamentarian, Charles Johnson, explained that it was likely that the lack of a parallel House expedited procedure in the CRA was purposeful. He explained that the House leadership believes that the House is a majoritarian institution, and that expedited procedures undermines majority rule.

One panelist, Professor Jack Beermann, expressed a view that making it easier for Congress to overturn an agency rule may come at a very high political cost. He asks the question, "does Congress really want to be in the position where it is perceived that everything an agency does is their responsibility, since they've taken it on and reviewed it under this mechanism? Do they want to have that perception?" He concluded, "I think that this may just increase the blaming opportunities for Congress."

Professor Beermann also stated the belief that—similar to that expressed by Todd Gaziano, that the current CRA has the effect of forcing the executive to negotiate, which is a satisfactory result, in his view. I don't think there is a lot of empirical evidence to support those comments, but it is a view that's prevalent out there.

Proponents of the CRA concept, however, argue that it reflects a congressional recognition of the need to enhance its own political accountability, and thereby strengthening the perception of legitimacy and competence of the administrative rulemaking process.

It is also said to rest on an understanding that broad delegations of rulemaking authority to agencies are necessary and appropriate, and will continue for the indefinite future. The Supreme Court's most recent rejection in 2001 in the Whitman case of an impending revival of the so-called nondelegation doctrine is impetus for Congress to consider several facets and ambiguities of the current mechanism.

Absent congressional review, it is argued, current instances of avoidance in notice and comment, rulemaking, lack of full reporting of covered rules to be submitted under the CRA, and increasing Presidential control over the rulemaking process will likely continue. Professor Paul Verkuil, who was on the CRA panel, was a particularly strong voice for this view at the symposium.

Let me conclude by observing that much of the Administrative Law Project has an important constitutional dimension, raising the crucial question of where ultimate control of agency decisionmaking authority lies in our constitutional scheme of separated, but balanced powers. The tension and conflicts of this scheme were well brought forth and voiced in CRS's symposium on Presidential, Congressional and Judicial Control of Rulemaking.

There can be little doubt as to Congress' authority to make the determinative decisions with respect to the wisdom of any particular agency rulemaking, and to prescribe the manner in which congressional review will be conducted. Whether or not to do so is a political decision, a hard one with many practical consequences.

I thank you, and I'll welcome questions.

Mr. CANNON. Thank you, Mr. Rosenberg.

[The prepared statement of Mr. Rosenberg follows:]

PREPARED STATEMENT OF MORTON ROSENBERG

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 14, 2006

Mr. Chairman and Members of the Subcommittee

I am honored to appear before you again to present another progress report on CRS's efforts with respect to the unique and important study project initiated by the leadership of the House Judiciary Committee and your Subcommittee. You were concerned that in the last decade, a period coincident with the absence of the Administrative Conference of the United States, many new issues of administrative law, process, and procedure had emerged that had not been properly addressed or perhaps even identified. Today my CRS colleagues, Curtis Copeland and T.J. Halstead, and I will brief you on the status of the study project and what might be done in the future. My testimony will focus on the potential significance of the reactivation of ACUS and on one of the seven elements of the project, the Congressional Review Act. Curtis and T.J. will briefly discuss the other six elements of the study. Let me start with some background.

The Administrative Law, Process, and Procedure Project (Project) has been a bi-partisan undertaking of the House Judiciary Committee, overseen and conducted by its Subcommittee on Commercial and Administrative Law. It has had two principal goals: to reauthorize and to substantiate the need to reactivate the Administrative Conference of the United States (ACUS), and, simultaneously, to set in motion a study process that would identify the important issues of administrative law, process, and procedure that have emerged in the eleven year hiatus since its demise that would serve as a basis for either immediate legislative consideration and action by the Committee or as the initial agenda for further studies by a reactivated ACUS.

Initial success was achieved by the Committee with respect to the first effort with the enactment of the Federal Regulatory Improvement Act of 2004, Pub. L. 108-401, on October 4, 2004, reauthorizing ACUS. But, as of this date, funding legislation has not been passed.

Action to accomplish the second goal was initiated by the Committee's adoption of an oversight plan for the 109th Congress which made a study of emergent administrative law an process issues a priority oversight agenda item for the Subcommittee on Commercial and Administrative Law. The oversight plan identified seven general areas for study: (1) public participation in the rulemaking process; (2) congressional review of agency rulemaking; (3) presidential review of agency rulemaking; (4) judicial review of agency rulemaking; (5) the agency adjudicatory process; (6) the utility of regulatory analyses and accountability requirements; and (7) the role of science in the regulatory process. The Subcommittee, in turn, tasked the Congressional Research Service (CRS) with coordinating the research effort.

ACUS

In previous testimony I have 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 and symposia will be directly useful in supplying the basis for necessary 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 your Subcommittee 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.

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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] Hearing on the Reauthorization of the Administrative Conference of the United States, 108th Cong., 2d Sess. (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).

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 help 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.

I would note that ACUS' established credibility and non-partisan reputation opened doors at federal agencies and allowed access to ACUS-sponsored research to internal operational information that normally would not have been been available otherwise. Professor William West testified before this Subcommittee of the reluctance of most agencies to provide him with information vital to his study on public participation at the development stage of a rulemaking proceeding. His requests for information were often met with reluctance and suspicion and his most valuable contacts with knowledgeable officials were on deep background. This was not the usual ACUS experience where agency cooperation was generally the rule.ACUS researchers were often welcomed because the results of their studies redounded to the benefit of the agency.

Reactivation of ACUS to make it operational would come at an opportune time. Let me provide some examples that respond to the Committee's interests. As I have indicated to you in past testimony and written memoranda, 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 have been and are continuing to receive considerable congressional attention and criticism. Both these issues, and the role ACUS might play in resolving them, appear closely related.

The Katrina catastrophe, for example, 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 were 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 was also suggested that FEMA revert to its previous independent status outside of DHS. In October 2006 Congress acted by "reassembling" FEMA as a "distinct" entity within DHS. A reactivated and operational ACUS could be tasked with reviewing, assessing and making recommendations with respect to FEMA's new role, how it should play that role, and the authorities it needs to fulfill that role, as well as assessing the need for more comprehensive 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. Again, a reactivated ACUS could have a clear role to play here.

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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.

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:

> 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.

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. Anecdotal statistical evidence has shown that appellate courts are overturning challenged agency rules at rates in excess of 50%. As will be discussed below, CRS has commissioned a study to determine the accuracy of such claims. Whatever the result of the study, important questions may be raised: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.

Hearings

Since 2004, the Subcommittee has held a series of hearings in anticipation of and as part of the Project. Following its May 20, 2004 oversight hearing on the proposed reauthorization of ACUS, at which Justices Scalia and Breyer testified, the Subcommittee conducted a second hearing on ACUS that examined further reasons why there is a need to reactivate ACUS. On November 1, 2005, the Subcommittee held a hearing on the status of the Project. In 2006, the Subcommittee held three hearings. The first, in March, 2006, focused on the Congressional Review Act in light of the Act's tenth anniversary. The second dealt with how the Regulatory Flexibility Act (RFA) has been implemented since its enactment in 1980 and whether proposed legislation, such as H.R. 682, the Regulatory Flexibility Improvement Act, would adequately address certain perceived weaknesses in the RFA. Finally, on July 14, 2006, the Subcommittee held a hearing on the 60th Anniversary of the passage of the Administrative Procedure Act (APA), addressing the question of whether the APA is still effective in the 21st century.

Symposia

In addition to conducting hearings, the Subcommittee to date has sponsored three symposia as part of the project. The first symposium, held on December 5, 2005, "E-Rulemaking in the 21st Century," dealt with Federal E-Government initiatives. This program, chaired by Professor Cary Coglianese, examined the Executive Branch's efforts to implement e-rulemaking across the federal government. A particular focus of this program was the ongoing development of a government-wide Federal Docket Management System (FDMS). Presentations at the symposium were given by government managers involved in the development of the FDMS as well as by academic researchers studying e-rulemaking. Representatives from various agencies, including the Office of Management and Budget (OMB), the U.S. Environmental Protection Agency, and the GAO, discussed the current progress of e-rulemaking. In addition, academics reported on current and prospective research endeavors dealing with certain aspects of e-rulemaking. The program offered a structured dialogue that addressed the challenges and opportunities for implementing e-rulemaking, the outcomes achieved by e-rulemaking to date, and strategies that could be used in the future to improve the rulemaking process through application of information technology.

On May 9, 2006, the Center for the Study of Rulemaking at American University hosted a day-long conference for the Subcommittee entitled "The Role of Science in the

Rulemaking." The four panels – "The Office of Management and Budget's Recent Initiatives on Regulatory Science," "Science and Judicial Review of Rulemaking," "Science Advisory Panels and Rulemaking," and "Government Agencies' Science Capabilities" – reflected the current debate over whether "sound science" has been given sufficient weight in the development of regulatory standards. As part of that debate, questions have been raised about the quality of the data that are used in developing proposed and final rules, the use of peer review panels as part of the process to ensure quality, and the role that risk assessment can or should play in deciding what to regulate and at what levels.

On September 11, 2006, the Congressional Research Service, on behalf of the Subcommittee, sponsored a day-long seminar entitled "Presidential, Congressional, and Judicial Control of Agency Rulemaking," consisting of four panels of academics, government officials and private sector public interest groups that addressed "Conflicting Claims of Congressional and Executive Branch Legal Authority Over Rulemaking," "Judicial Review of Rulemaking," "Congressional Review of Rulemaking," and "Presidential Review of Rulemaking: Reagan to Bush II."

Empirical Studies

Three empirical studies were initiated by CRS. The first, conducted by Professor William West of the Bush School of Government and Public Service at Texas A&M University, studied how agencies develop proposed rules, with a particular emphasis on how rulemaking initiatives are placed on regulatory agendas; how the rulemaking process is managed at inter and intra-agency levels; and how public participation and transparency factor in the pre-notice and comment phase of rule formulation. Professor West presented his findings and conclusions at your March 30, 2006 hearing.

A second study commissioned by CRS sought to fill the void created by the absence of an authoritative, systematic empirical analysis of the effects of judicial review of agency rulemaking by federal appellate courts. Professor Jody Freeman of the Harvard Law School agreed to conduct the study which will analyze the pertinent rulings of all federal circuit courts of appeal from 1995 to 2004 to determine the rate at which rules are invalidated in whole or in part, and the reasons for those invalidations. Professor Freeman's study is still on-going.

A third study arose out of a discussion during the panel on the role of science advisory bodies in agencies at the Science and Rulemaking symposiumwhen it became apparent that there was no authoritative compilation of how many science advisory committees currently exist in the agencies, how they were selected, how issues of neutrality and conflicts of interest were handled, how issues are selected for review, and the impact of advisory body recommendations on agency decisionmaking. CRS commissioned such a study to be conducted by Professor Stuart Brettschneider of the Maxwell School of Public Administration of the Syracuse University. The study is expected to be completed by June, 2007.

The Congressional Review Act (CRA)

As I detailed in my testimony before this Subcommittee in its March 30, 2006, hearing on the tenth anniversary of the passage of the CRA, Congress's objective of setting in place an effective mechanism to keep it informed about the rulemaking activities of federal agencies and to allow for expeditious congressional review, and possible nullification of particular rules, apparently has not been met. Statistically, to date, over 43,000 rules have

been reported to Congress, including over 630 major rules, and only one, the Department of Labor's ergonomics standard, was disapproved in March, 2001. Many analysts believe that the negation of the ergonomics rule was a singular event, not likely soon to be repeated. Witness at the hearing pointed to structural defects in the mechanism, most prominently the lack of a screening mechanism to identify rules that warranted review and an expedited consideration process in the House that complemented the Senate's procedures, as well as numerous interpretive uncertainties of key statutory provisions, that served to deter use of the mechanism.

One witness, Todd Gaziano of the Heritage Foundation, while agreeing with the structural critique, suggested that the law's presence, and the threat of the filing of a joint resolution of disapproval, has had a degree of influence that should not be ignored. He argeed, however, that the framers of the legislation anticipated that the mechanism would provide an incentive for legislators to insist on institutional accountability as a response to criticisms that Congress had been delegating vast amounts of lawmaking authority to executive agencies without maintaining countervailing checks on the exercise of that authority. There was agreement among the witnesses that the establishment of a joint congressional committee that would screen rules and recommend action to jurisdictional committees in both Houses would provide the coordination and information necessary to inform the bodies sufficiently and in a timely manner to take appropriate legislative actions. The balanced nature of such a joint committee and its lack of substantial authority appeared to provide a way to allay political concerns regarding "turf" intrusions. The House Parliamentarian, John v. Sullivan agreed that such a joint committee was a viable construct.

A further question raised at the March hearing, and again at the panel discussion on the CRA at the September 11, 2006, symposium, was whether it was necessary to have all rules reported and reviewed. It was suggested that only "major" rules need be reported, which would save legislative time and money. There was no consensus among the panelists as to who and or how, "major rule" would be defined. There was agreement among the panelists that a non-substantive advisory joint committee would be a valuable screening mechanism, but not the same unanimity with respect to an expedited House consideration procedure. Former House Parliamentarian Charles Johnson explained that it was likely that the lack of a parallel House expedited procedure in the CRA was purposeful. He explained that the House leadership believes that the House is a majoritarian institution and that expedited procedures undermines majority.

One panelist, Professor Jack Beermann, expressed the view that making it easier for Congress to overturn an agency rule may come at a high political cost. He asked "Does Congress want to be in the position where [it is perceived that] everything an agency does is their responsibility since they've taken it on and reviewed it under this mechanism?... Do they want to have that perception? He concluded that "I think that this may just increase the blaming opportunities for Congress." Professor Beermann also stated the belief, similar to that expressed by Todd Gaziano, that the current CRA has the effect forcing the executive to negotiate, which is a satisfactory result.

Proponents of the CRA concept argue that it reflects a congressional recognition of the need to enhance its own political accountability and thereby strengthen the perception of legitimacy and competence of the administrative rulemaking process. It is also said to rest on understanding that broad delegations of rulemaking authority to agencies are necessary and appropriate and will continue for the indefinite future. The Supreme Court's most recent rejection in 2001 in the *Whitman* case of an impending revival of the non-delegation doctrine adds impetus for Congress to consider several facets and ambiguities of the current

mechanism. Absent effective congressional review, it is argued, current instances of avoidance of notice and comment rulemaking, lack of full reporting of covered rules under the CRA, and increasing presidential control over the rulemaking process will likely continue.

Let me conclude by observing that much of the Administrative Law Project has an important constitutional dimension, raising the crucial question of where ultimate control of agency decisionmaking authority lies in our constitutional scheme of separated but balanced powers. The tensions and conflicts in this scheme were well brought forth in CRS' symposium on presidential, congressional and judicial control of agency rulemaking. There can be little doubt as to Congress' authority to make the determinative decisions with respect to the wisdom of any particular agency rulemaking and to prescribe the manner in which the review shall be conducted. Whether or not to do so is a political decision, a hard one with many practical consequences.

Mr. CANNON. The Chair would like to recognize Mr. Coble, the gentleman from North Carolina, who has joined us, and also the gentleman from Massachusetts Mr. Delahunt.

In deference to your experience, we went beyond the 5-minute rule. When we made that decision, we had only a couple of us here, but if I could remind the other two questions—we will probably have time for questioning, but I would like to have the panel to have the opportunity to question, so I will probably tap at 5 minutes.

Thank you, Mr. Rosenberg.

And Dr. Copeland, you are now recognized.

TESTIMONY OF CURTIS COPELAND, PH.D., SPECIALIST IN AMERICAN NATIONAL GOVERNMENT, CONGRESSIONAL RESEARCH SERVICE, WASHINGTON, DC

Mr. COPELAND. Thank you very much.

Mr. Chairman, Members of the Subcommittee, thank you for inviting me here today to discuss the Administrative Law Project. My testimony will focus on three elements of that project, the Presidential review of rulemaking, the utility of regulatory analysis requirements and the role of science in the regulatory process.

During the past 25 years, the epicenter of Presidential review has been a small office within OMB, the Office of Information and Regulatory Affairs, or OIRA. OIRA's role in reviewing agency rules has changed with the changes in the Presidency. The current Bush administration has reasserted OIRA's gatekeeper role that was prominent during the Reagan administration.

Although OIRA's reviews have become somewhat more transparent in recent years, it is still far from a transparent process. For example, OIRA has said that it has its greatest impact before rules are formally submitted to it for review, but has instructed agencies not to disclose those changes to the public.

OIRA also remains highly controversial. Some public interests groups assert that OIRA review has been a one-way rachet that only weakens and delays rules, while business groups contend that OIRA has not been assertive enough in reining in agencies.

A number of very interesting studies have recently examined the impact that OIRA has on rulemaking, but many issues remain that either Congress or ACUS may want to address. Those issues include whether Congress should codify Presidential review, whether independent regulatory agencies' rules should be subject to review, and what rules should govern OIRA's contacts with outside parties during the review process.

OIRA also has been a key player in implementing regulatory analysis requirements established by Congress and the President. Many of those requirements were developed in the 1980's and '90's in an effort to ensure that the benefits of regulation were worth the compliance cost. For example, before publishing any proposed or final rule, the Regulatory Flexibility Act of 1980 requires agencies to prepare an analysis describing the rule's effects on small businesses and what efforts the agency took to avoid those effects.

The Unfunded Mandates Reform Act of 1995 has similar requirements to protect the interests of State and local governments. Executive Order 12866 requires covered agencies to prepare a cost/

benefit analysis for any rule having a $100 million impact on the economy. However, numerous studies indicate that these requirements have often been less effective than their advocates have hoped. For example, agencies can avoid a reg flex analysis if they certify that the rule in question does not have a "significant economic impact" on a "substantial number of small entities." And agencies have certified rules, even when they cost businesses thousands of dollars each year in compliance costs.

In other cases, new requirements have been linked to old ones that have been viewed as ineffective. For example, the requirements that agencies develop compliance guides to help businesses and others comply with the regulations and that agencies reexamine their rules every 10 years are not triggered if the agency certifies those rules don't have a significant impact on small entities.

After more than 25 years of experience with these analytic requirements, we know surprisingly little about their effectiveness or how they can be improved. Issues that Congress or ACUS could explore include the extent to which the requirements contribute to what is called the "ossification" of the rulemaking process; the accuracy of agency's prerule estimates of cost and benefits; and whether the myriad of requirements should be made consistent and codified in one place.

The role of science in rulemaking has become highly controversial in recent years, with observers from both the left and the right suggesting that "sound science" has been given insufficient weight in the development of regulatory standards. The May 2006 symposium that Mort mentioned on this topic featured panelists discussing such issues as the role of science advisory panels, science and judicial review, and Government agencies' capabilities. A panel that I moderated focused on OIRA's recent science-related initiatives, including recent bulletins on peer review and risk assessment.

While OIRA's peer review bulletin was initially very controversial, with some science groups and others asserting that it could make peer review vulnerable to political manipulation or controlled by regulated entities. As a result of those concerns, OIRA later published a substantially revised version of the bulletin that gave agencies more discretion, while reserving some for itself.

OIRA's January 2006 proposed bulletin on risk assessment is currently undergoing peer review by the National Academy of Sciences. In May 2006, nine Federal agencies testified at a public meeting on that bulletin. Some agencies said that the scope of this risk assessment bulletin is so broad that doctors and the public may not receive timely warnings about potential health risks posed by medical devices and drugs like Vioxx. Other agencies were more supportive of the risk bulletin, but still proposed certain changes.

Possible areas for further research in this area include whether the Information Quality Act should be amended to provide for judicial review, how advisory panels can be constructed to ensure that they're unbiased, and whether governmentwide standards for peer review and risk assessment are needed and working as intended. Objective and rigorous examinations of all of these administrative law issues by Congress or ACUS could prove to be a wise investment in the long term.

Mr. Chairman, that concludes my prepared statement. I'd be happy to answer any questions.

Mr. CANNON. Thank you, Dr. Copeland.

[The prepared statement of Mr. Copeland follows:]

PREPARED STATEMENT OF CURTIS W. COPELAND

Statement of Curtis W. Copeland
Specialist in American National Government
Congressional Research Service

Before

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

November 14, 2006

on
"The Administrative Law, Process, and Procedure Project"

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to discuss this Subcommittee's bipartisan "Administrative Law, Process, and Procedure Project" and our work during the past two years related to that project. As my colleague Mort Rosenberg mentioned, an underlying theme in many of the comments and recommendations received related to those projects has been that the newly reauthorized Administrative Conference of the United States (ACUS) should be funded and tasked with addressing many of these kinds of topics. The projects also yielded numerous issues that Congress may want to address. My testimony today will focus on three elements of the administrative law project — presidential review of agency rulemaking, the utility of regulatory analysis and accountability requirements, and the role of science in the regulatory process — and will highlight some of the issues identified for ACUS or for Congress.

Presidential Review of Agency Rulemaking

At the September 11, 2006, symposium on "Presidential, Congressional, and Judicial Control of Rulemaking" that CRS sponsored for this Subcommittee, there was a great deal of discussion about whether Congress or the courts or the President actually controls agency rulemaking behavior.[1] At the conclusion of the day, the consensus seemed to be that, on a

[1] The transcripts of this symposium are available online at the website for the Center for the Study (continued...)

day-to-day basis, the President has far more control than either of the other branches. During the past 25 years, the epicenter of presidential control has been the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget. Although created by the Paperwork Reduction Act of 1980 and periodically tasked by Congress with other statutory responsibilities, OIRA is located within the Executive Office of the President and reviews hundreds of agency regulations each year before they are published to ensure that the President's policies are implemented. In a sense, therefore, OIRA embodies the tension between presidential and congressional control.

I moderated a panel at the September 11 symposium on "Presidential Review of Rulemaking: Reagan to Bush II." One of the participants on that panel was Sally Katzen, currently a professor of law at George Mason University who was administrator of OIRA from 1993 to 1998 during the Clinton Administration. As Professor Katzen pointed out, all presidents since President Nixon have called for some form of centralized review in order to, as she put it, "get their hands around agency rulemaking." The genesis of the current form of centralized presidential review is traceable to President Reagan's Executive Order 12291 in 1981, which tasked the newly-created OIRA with reviewing all agency rules except those from independent regulatory commissions — several thousand per year.[2] In 1985, President Reagan extended OIRA's influence over rulemaking even further by issuing Executive Order 12498, which required covered agencies to submit a "regulatory program" to OMB each year listing all of their significant regulatory actions underway or planned.[3] As a result, any rule submitted to OIRA for review that had not been previously identified could be returned to the agency for "reconsideration."

The expansion of OIRA's authority in the rulemaking process via these executive orders was highly controversial. Some voiced concerns that OIRA's role violated the constitutional separation of powers and could affect public participation and the timeliness of agencies' rules.[4] Some believed that OIRA's new authority displaced the discretionary authority of agency decision makers in violation of congressional delegations of rulemaking authority, and that the President exceeded his authority in issuing the executive orders. Others indicated that OIRA did not have the technical expertise needed to instruct agencies about the content of their rules. Still other concerns focused what was viewed as a lack of transparency of the review process. Professor Katzen said that during the Reagan era and, to a certain extent, during the Bush I era, OIRA was "a big black hole" where regulations went in and the public didn't know what happened. She also said OIRA was generally known as a group of "lean, mean junkyard dogs" who required agencies to make the changes that it wanted, and emphasized reducing regulatory costs over all other goals.

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[1] (...continued)
of Rulemaking at American University [http://www.american.edu/rulemaking/news/index.htm].

[2] Executive Order 12291, "Federal Regulation," 46 *Federal Register* 13193, Feb. 19, 1981.

[3] Executive Order 12498, "Regulatory Planning Process," 50 *Federal Register* 1036, Jan. 8, 1985.

[4] U.S. Congress, House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, *Role of OMB in Regulation*, 97th Cong., 1st sess., June 18, 1981 (Washington: GPO, 1981). See also Morton Rosenberg, "Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12291," *Michigan Law Review*, vol. 80 (Dec. 1981), pp. 193-247.

When President Clinton took office and Sally Katzen became head of OIRA in 1993, she said they wrote Executive Order 12866 to make several basic changes in the presidential review process.[5] For example, under this executive order, OIRA only reviews "significant" rules from the covered agencies, reducing the number of rules reviewed from several thousand to about 600 per year. The new executive order also improved the transparency of OIRA's reviews by, for example, requiring agencies to disclose the changes made as a result of OIRA's review. Other changes included reaffirming the "primacy" of the agencies in the rulemaking process (since, she argued, they possess the subject matter expertise and experience) and recognizing that non-quantifiable costs and benefits are essential to consider. In essence, Professor Katzen said, OIRA adopted a more cooperative and friendly approach to the agencies than had been the case during the Reagan and first Bush Administrations.

When the current President Bush took office in 2001, and particularly after John Graham became OIRA administrator in July of that year, OIRA's role in presidential review changed again — even though the pertinent executive order stayed the same. OIRA's role as "gatekeeper" or watchdog returned, and with it came an increased emphasis on economic analysis and an increase in letters from OIRA returning rules to the agencies for their "reconsideration." OIRA also ventured into several new areas, publishing bulletins in the last three years on peer review practices, agencies' use of guidance documents, and risk assessment procedures. OIRA became somewhat more transparent during John Graham's nearly five-year tenure, disclosing meetings with outside parties about rules whenever they occurred and publishing on the Office's website the status of all rules under review. However, OIRA still contends that the changes that it recommends to agencies before the formal review process begins (when OIRA says it has its greatest impact) should not be disclosed to the public. Also, although OIRA reveals its meetings with outside parties, the lists provided sometimes make it difficult to know what rule is being discussed or who the outside parties actually represent.

In the last several years, several scholars have attempted to assess the actual impact that OIRA has on rules.[6] While some of these studies are interesting and quite good, to really understand OIRA's effects, researchers must go rule-by-rule and examine the evidence provided in rulemaking dockets. One such study that the General Accounting Office (GAO, now Government Accountability Office) completed three years ago revealed that OIRA frequently suggested only minor changes to rules, but had a much more significant impact on certain types of rules — most notably rules submitted to OIRA from the Environmental Protection Agency's (EPA) air and water programs and the Federal Aviation Administration.[7] For example, at OIRA's recommendation, EPA removed manganese from a list of hazardous wastes, deleted certain types of engines from coverage of a rule setting emissions standards, and delayed the compliance dates for two other types of emissions.

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[5] Executive Order 12866, "Regulatory Planning and Review," *58 Federal Register* 51735, Oct. 4, 1993. To view a copy of this order, see [http://www.whitehouse.gov/omb/inforeg/eo12866.pdf].

[6] See, for example, Steven Croley, "White House Review of Agency Rulemaking: An Empirical Investigation," *University of Chicago Law Review*, vol. 70 (Summer 2003), pp. 821-885; Scott Farrow, *Improving Regulatory Performance: Does Executive Office Oversight Matter?* (Pittsburgh: Carnegie Mellon University, July 26, 2000).

[7] U.S. General Accounting Office, *Rulemaking: OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews*, GAO-03-929, Sept.2003.

GAO also reported that, in several of these cases, OIRA recommended what business interest groups had suggested during their previous meetings with OIRA.

Although the nature of OIRA's review has clearly changed substantially during the past 25 years, there is little if any continued questioning of the legality of centralized presidential review. Many rulemaking agencies recognize that OIRA review can add value because it brings a different perspective to the rulemaking process and can, by its very presence, prevent bad ideas from becoming rules. However, many public interest groups do question whether centralized review is a good idea, arguing that OIRA review has usually been a "one-way rachet" that weakens, not strengthens, rules; that it is still highly secretive and delays the issuance of rules; and that OIRA reviewers have caused agencies to issue rules that are inconsistent with their statutory mandates. Business groups, on the other hand, have argued that OIRA has not been assertive enough, and that agencies still control the rulemaking process to an unwarranted degree.

Unresolved Issues. Several issues regarding presidential review remain unresolved. For example:

- Should Congress codify presidential review of agency rulemaking? If so, how detailed should that codification be? For example, it might 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 a codification spell out in detail the process by which Presidents should review rules before they are published? What are the policy implications of codification?

- Should independent regulatory agencies' rules be subject to presidential review? Or would presidential review adversely affect the independence intended for these agencies?

- 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? 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) in order to provide an administrative record for any subsequent changes?

- Are improvements in review transparency currently needed (either administratively or by statute)? For example, should agencies or OIRA be required to disclose substantive changes made to rules during "informal" reviews (when OMB says it can have its greatest effect)?

- Does OIRA have the legal authority to promulgate requirements or even guidelines regarding agencies' use of peer reviews, risk assessments, or guidance documents?

- Is presidential review of rules cost effective? Is there any way to objectively measure the benefits that OIRA review provides?

- Should OIRA's funding and staffing be increased, decreased, or stay the same? If increased, is there evidence that doing so would yield substantial returns on investment?

Regulatory Analysis and Accountability Requirements

Regulatory analysis and accountability requirements vary considerably with regard to their sources, their content, and their effectiveness. Some of these requirements are traceable to the presidential reviews that I just discussed, while others have their roots in statute. The "grandfather" of these requirements, and the foundation for most of them, is the Administrative Procedure Act (APA) of 1946 (5 U.S.C. 551 *et seq.*) which generally requires that agencies publish their proposed rules in the *Federal Register*, receive and consider comments on the proposed rules, and then publish a final rule stating its basis and purpose. Because my colleague T.J. Halstead is covering the APA and public participation issues in his testimony, I will only note that the word "generally" in my previous sentence is important here. A 1998 GAO study indicated that about half of all final rules were published without an opportunity for prior public comment, with agencies often invoking the "good cause" exception that allows them to avoid publishing a proposed rule for comment if the agency concludes it is "impracticable, unnecessary, or not in the public interest."[8] While many of these final rules were on relatively minor issues, some were "significant" rules under Executive Order 12866, and some had at least a $100 million impact on the economy.

Between 1946 and 1980, Congress established dozens of federal agencies and programs designed to improve the environment, make workplaces safer, and protect consumers. Subsequently, an array of federal economic, environmental, and social regulations were put in place that affected many of the decisions made by American businesses. Strong concerns then began to be raised about whether the benefits that these regulations and regulatory agencies were attempting to achieve were worth the costs associated with compliance. Concerns were also being raised about the cumulative effects of all federal regulations on individual businesses, and the effects that federal rules were having on particular segments of the economy (e.g., small businesses), and on other levels of government.

Congressional Initiatives. Since 1980, Congress has reacted to these concerns by establishing analytical and/or accountability requirements as part of the rulemaking process. These requirements have a variety of purposes, including the protection of certain interests from unnecessary regulatory burden, increased control over rulemaking agencies, and ensuring that the rules issued focus on issues of real public concern in as efficient and effective manner possible. Statutory initiatives imposing these requirements include the (1) the Regulatory Flexibility Act (RFA) of 1980 (5 U.S.C. 601-612), (2) the Paperwork Reduction Act (PRA) of 1980 (44 U.S.C. 3501-3520), (3) the Unfunded Mandates Reform Act (UMRA) of 1995 (2 U.S.C. 1532-1538), and the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). Although these regulatory requirements clearly have had an effect on agency actions, many of them do not appear to have been as effective as their advocates had hoped.

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[8] U.S. General Accounting Office, *Federal Rulemaking: Agencies Often Issued Final Actions Without Proposed Rules*, GAO/GGD-98-126, Aug. 31, 1998.

For example, the Regulatory Flexibility Act requires federal agencies to assess the impact of their forthcoming regulations on "small entities" (e.g., small businesses and small governments), and requires that analysis to describe, among other things, (1) the reasons why the regulatory action is being considered; (2) the small entities to which the proposed rule will apply and, where feasible, an estimate of their number; (3) the projected reporting, recordkeeping, and other compliance requirements of the proposed rule; and (4) any significant alternatives to the rule that would accomplish the statutory objectives while minimizing the impact on small entities. However, the RFA's analytical requirements are not triggered if the head of the issuing agency certifies that the proposed rule would not have a "significant economic impact on a substantial number of small entities." The RFA does not define "significant economic impact" or "substantial number of small entities," thereby giving federal agencies substantial discretion regarding when the act's analytical requirements are triggered. A 2000 GAO study determined that EPA certified virtually all of its rules as not needing an RFA analysis, even rules that impose thousands of dollars of compliance cost on thousands of small entities.[9] Also, the RFA's analytical requirements do not apply to final rules for which the agency does not publish a proposed rule, and agencies do not have to consider the cumulative impact of their rules in making analytical determinations under the act. Finally, the courts have said that the act does not require the analysis with regard to indirect effects on small entities.[10] GAO has examined the implementation of the RFA several times within the past 10 to 15 years, and a recurring theme in GAO's reports is the varying interpretation of the RFA's requirements by federal agencies.[11]

Other statutory requirements also appear to have fallen short of proponents' expectations. For example, section 202 of the Unfunded Mandates Reform Act requires agencies to prepare "written statements" containing, among other things, estimates of future compliance costs and any disproportionate budgetary effects "if and to the extent that the agency in its sole discretion determines that accurate estimates are reasonably feasible and that such effect is relevant and material." The statute gives agencies the same discretion regarding estimates of the effects of their rules on the national economy. Therefore, an agency can avoid these estimates if, in its sole discretion, it considers them inaccurate, unfeasible, irrelevant, or immaterial. Likewise, section 203 of UMRA requires agencies to develop plans to involve small governments in the development of regulatory proposals that have a "significant or unique" effect on those entities. Therefore, an agency that concludes that a rule's effect on small governments will not be "significant" or "unique" can avoid this requirement. When GAO examined the implementation of UMRA in 1998, it concluded that the act had little effect on agency rulemaking, due largely to statutory exemptions.[12] The act did not cover most of the rules that GAO examined with a $100 million impact on the economy, and when a rule was covered, UMRA did not require the agency to do much more

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[9] U.S. General Accounting Office, *Regulatory Flexibility Act: Implementation in EPA Program Offices and Proposed Lead Rule*, GAO/GGD-00-193, Sept. 20, 2000.

[10] See *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001).

[11] See, for example, U.S. General Accounting Office, *Regulatory Flexibility Act: Agencies' Interpretations of Review Requirements Vary*, GAO/GGD-99-55, April 2, 1999; U.S. General Accounting Office, *Regulatory Flexibility Act: Implementation in EPA Program Offices and Proposed Lead Rule*, GAO/GGD-00-193, Sept. 20, 2000.

[12] U.S. General Accounting Office, *Unfunded Mandates: Reform Act Has Had Little Effect on Agencies' Rulemaking Actions*, GAO/GGD-98-30, Feb. 4, 1998.

than it was already required to do under other statutes and executive orders. GAO reached a similar conclusion in its 2004 examination of UMRA's implementation.[13] While critics deride this situation as regulatory reform ineffectiveness, others contend that Congress had good reason to entrust this amount of discretion to the agencies.

Some reforms have been related to or built on other reforms with some of the above-mentioned issues. For example, the "look back" requirements in section 610 of the RFA (mandating that agencies review certain rules within 10 years of their issuance) are triggered when the rulemaking agency determines that a rule has a "significant economic impact on a substantial number of small entities." As mentioned previously, some agencies certify almost all of their rules as not having that level of impact, so they can avoid section 610's requirements (as well as the analytic requirements in the RFA). For this and other reasons (e.g., a lack of clarity regarding key terms), studies of agencies' implementation of section 610 have consistently indicated that few of the required look-back reviews appear to be conducted.[14]

Section 212 of SBREFA requires agencies to publish one or more compliance guides for each rule or group of related rules for which the agency is required to prepare a final regulatory flexibility analysis under the RFA. Therefore, if the agency concludes that the final rule would not have a "significant" impact on a "substantial" number of small entities, the agency is not required to prepare a compliance guide. Agencies are given "sole discretion" in the use of plain language in the guides, and the statute does not indicate when the guides must be developed or how they must be published. Therefore, under section 212, an agency might develop a compliance guide years after a final rule is published with no input from small entities. In 2001, GAO reviewed agencies' implementation of section 212 and concluded that the requirement did not appear to have had much of an impact on agencies' rulemaking actions.[15]

Presidential Initiatives. In addition to these and other congressionally-established requirements, each President within the past 35 years has required some form of regulatory analysis before rules are published in the *Federal Register*. In addition to establishing OIRA review of rules, President Reagan's Executive Order 12291 generally required covered agencies to prepare a "regulatory impact analysis" for each "major" rule, which was defined as any regulation likely to result in (among other things) an annual effect on the economy of $100 million. Those analyses were required to contain a description of the potential benefits and costs of the rule, a description of alternative approaches that could achieve the regulatory goal at lower cost (and why they weren't selected), and a determination of the net benefits of the rule.

These analytical requirements remained in place until September 1993, when President Clinton issued Executive Order 12866. This executive order, which is still in effect,

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[13] U.S. General Accounting Office, *Unfunded Mandates: Analysis of Reform Act Coverage*, GAO-04-637, May 12, 2004.

[14] CRS Report RL32801, *Reexamining Rules: Section 610 of the Regulatory Flexibility Act*, by Curtis W. Copeland; General Accounting Office, *Regulatory Flexibility Act: Agencies Interpretations of Review Requirements Vary*, GAO/GGD-99-55, April 2, 1999.

[15] U.S. General Accounting Office, *Regulatory Reform: Compliance Guide Requirement Has Had Little Effect on Agency Practices*, GAO-02-172, Dec. 28, 2001.

established analytical requirements that are similar (although not identical) to those it replaced. For example, the order requires a cost-benefit analysis for all "economically significant" rules (essentially the same as "major" rules under Executive Order 12291) containing an assessment of the anticipated costs and benefits of the regulatory action and an assessment of the costs and benefits of alternatives to the regulatory action (with an explanation of why the planned action is preferable).

Researchers have examined agencies' economic analyses of rules under Executive Order 12866 and related guidance documents, and several of those studies indicated that the agencies' analyses are not always consistent with the requirements in the order or the guidance.[16] For example, in 1998 GAO reported that some of the 20 economic analyses that it examined did not discuss alternatives to the proposed regulatory action and, in many cases, it was not clear why the agencies used certain assumptions.[17] Five of the analyses did not discuss uncertainty associated with the agencies' estimates of benefits or costs or document the agencies' reasons for not doing so. GAO has also examined the cost-benefit analyses for particular rules, and often found them lacking in some of the same ways.[18] Other studies have criticized agencies for not providing quantitative information on net benefits in their analyses.[19] Still other studies have examined the accuracy of agencies' regulatory cost estimates, often concluding that costs are overestimated.[20] OMB reviewed the literature on *ex ante* cost and benefit estimates, and concluded that federal agencies tend to overestimate both benefits and costs.[21]

In addition to studies examining the implementation of cost-benefit and other rulemaking requirements, a large body of literature has developed debating the very notion of subjecting agencies' rules to these analytical requirements. Those supporting the use of these analytical methods view cost-benefit analysis as a helpful and neutral tool in regulatory

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[16] See, for example, Richard D. Morgenstern,ed., *Economic Analyses at EPA: Assessing Regulatory Impact* (Washington: Resources for the Future, 1997); and Robert W. Hahn, ed., *Risks, Costs, and Lives Saved: Getting Better Results from Regulation* (Washington: AEI Press, 1996).

[17] U.S. General Accounting Office, *Regulatory Reform: Agencies Could Improve Development, Documentation, and Clarity of Regulatory Economic Analyses*, GAO/RCED-98-142, May 26, 1998.

[18] U.S. Government Accountability Office, *Clean Air Act: Observations on EPA's Cost-Benefit Analysis of Its Mercury Control Options*, GAO-05-252, Feb. 28, 2005. GAO concluded that EPA did not, among other things, consistently analyze available options or provide estimates of the costs and benefits of each option.

[19] See, for example, Robert W. Hahn and Patrick Dudley, *How Well Does the Government Do Cost-Benefit Analysis?*, Working Paper 04-01 (Washington: AEI-Brookings Joint Center for Regulatory Studies, Jan. 2004).

[20] For a summary of this literature, see Winston Harrington, Richard D. Morgenstern, and Peter Nelson, "On the Accuracy of Regulatory Cost Estimates," *Journal of Policy Analysis and Management, vol. 19 (2000), pp. 297-322.* See also (former EPA Administrator) William K. Reilly, "The EPA's Cost Underruns, *Washington Post*, Oct. 14, 2003, p. A-23, which said "a review of some of the major regulatory initiatives overseen by the EPA since its creation in 1970 reveals a pattern of consistent, often substantial overestimates of their economic costs."

[21] U.S. Office of Management and Budget, Office of Information and Regulatory Affairs, *Validating Regulatory Analysis: 2005 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, pp. 41-52, available at [http://www.whitehouse.gov/omb/inforeg/2005_cb/final_2005_cb_report.pdf].

decisionmaking.[22] They contend that some type of cost-benefit balancing takes place during the rulemaking process anyway, and that the formal analysis simply makes that balancing (with the associated data and assumptions) more explicit, systematic, and rigorous. Furthermore, they argue that putting as accurate a dollar value on costs and benefits as possible makes decisions regarding whether and how to regulate easier and more rational. As one author stated, "[m]onetizing risk and environmental benefit does not devalue these outcomes, but rather gives them real economic value when the effects might otherwise be ignored."[23]

Others, however, assert that cost-benefit analysis is inherently flawed and biased against regulation.[24] For example, they assert that because regulatory benefits are generally more difficult to measure in dollar terms than regulatory costs, cost-benefit analysis is not carried out on a level playing field. Measurement of the benefits associated with health, safety, and environmental rules often requires an assessment of risk (e.g., how many people would get sick or die in the absence of the regulatory intervention) and a monetization of the associated benefits (i.e., placing a dollar value on the lives saved or illnesses prevented). These steps frequently involve significant methodological and ethical difficulties. Data are frequently not available to measure regulatory risks precisely, and using "willingness to pay" models to determine the values to assign to health effects is highly controversial. Critics of cost-benefit analysis also contend that regulatory cost data are often provided by regulated entities, who have an incentive to inflate those costs in order to influence agencies not to issue the rules. Other criticisms focus on the use of "discount rates" that reduce the value of future benefits to current dollars, and the "distributional" effects that are not often considered in such analyses. Finally, these critics suggest that although executive orders and statutes often indicate that non-monetized benefits must be considered as part of the rule development process, there is a natural tendency to discount or disregard non-monetized benefits. Still other critics assert that regardless of whether cost benefit analysis is neutral in concept, it is not neutral in effect, tending to result in the promulgation of fewer and weaker rules.[25]

Areas for Possible Further Research. In addition to the analytical requirements discussed above, a variety of other efforts have been made by Congress or Presidents to constrain agency rulemaking, including moratoriums on new rulemaking at the start of new presidential administrations, efforts to establish regulatory "accounting" mechanisms (which could pave the way to the establishment of a "regulatory budget"), the establishment of "advocacy review panels" at the start of certain EPA and OSHA rules, and attempts to limit the impact of rules on federalism and on individual privacy. After more than 25 years of experience with these various requirements, we know surprisingly little about their effectiveness or, where effectiveness is suspect, how they can be improved. Issues that Congress, ACUS, or both might explore in this area include the following:

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[22] See, for example, Cass R. Sunstein, *The Cost-Benefit State: The Future of Regulatory Protection* (Chicago: American Bar Association, 2002).

[23] W. Kip Viscusi, "Monetizing the Benefits of Risk and Environmental Regulation," *Fordham Urban Law Journal*, vol. 33 (May 2006, p. 1003.

[24] See, for example, Lisa Heinzerling and Frank Ackerman, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection* (Washington: Georgetown University, 2002).

[25] David M. Driesen, "Is Cost-Benefit Analysis Neutral?," *University of Colorado Law Review*, vol. 77 (Spring 2006), pp. 335-404.

- Is cost-benefit analysis inherently biased in that the benefits of health and safety rules are often difficult or impossible to monetize? If not, can steps be taken to ensure that regulatory costs and benefits are fairly and accurately measured?

- Does OMB apply the cost-benefit analysis requirements in Executive Order 12866 and use cost-benefit information in a consistent way? For example, does OMB require all rules to have a cost-benefit analysis, or are certain types of rules or rules from certain agencies (e.g., Homeland Security rules) essentially exempt from these requirements?

- How accurate are agencies' pre-promulgation estimates of regulatory costs and benefits? How much do cost-benefit studies cost? Do cost-benefit requirements pass a cost-benefit test?

- Should Congress or the Administration define key terms in the Regulatory Flexibility Act (e.g., "significant economic impact on a substantial number of small entities")?

- Should agency rules be reexamined periodically to ensure that they are still needed or impose the least burden? If so, who should have that reexamination responsibility?

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

- Have the analytical and accountability requirements contributed to what is called the "ossification" of the rulemaking process?

Role of Science in Rulemaking

On May 9, 2006, the Center for the Study of Rulemaking at American University hosted an all-day conference for this Subcommittee entitled "The Role of Science in Rulemaking." As Neil Kerwin, interim president of American University and director of the Center for the Study of Rulemaking, said in his opening remarks, "rulemaking is the transformation of information into legal obligations and rights. That information takes many forms, but the type of information that contributes most profoundly to a vast swath of rulemaking can be broadly categorized as scientific."

The role of science in rulemaking has become highly controversial in recent years, with observers from both the left and the right of the political spectrum suggesting that "sound science" has been given insufficient weight in the development of regulatory standards. Some assert that closer adherence to science would lessen the burden of unnecessary regulation, thereby lowering regulatory costs. Others argue that science is often trumped by political considerations, and as a result regulatory standards that science suggests are needed do not get developed. As part of that debate, questions have been raised about the quality of data that are used in developing proposed and final rules, the use of peer review panels as part of the process to ensure quality, and the role that risk assessment can/should play in deciding what to regulate and at what levels.

Information Quality Act. The May 2006 symposium featured panels discussing such topics as the role of science advisory panels in the rulemaking process, science and the judicial review of rulemaking, and government agencies' science capabilities. The issues discussed by those panels were too numerous and varied to detail here, but included how advisory panels can be structured to ensure neutral competence and how the courts should treat agencies' science determinations. Another panel focused on OIRA's recent science-related initiatives, and those initiatives were a consistent theme in each of the panel discussions.

The starting point of those OIRA initiatives was an act of Congress — a two-paragraph provision added to the 700-page Treasury and General Government Appropriations Act for Fiscal Year 2001 (P.L. 106-554) that is more commonly known as the "Data Quality Act" or the "Information Quality Act" (IQA) (codified at 44 U.S.C. 3504(d)(1) and 3516). Although little noticed at the time, the IQA has subsequently been the subject of intense debate and controversy. The act required OMB to issue guidance to federal agencies designed to ensure the "quality, objectivity, utility, and integrity" of information disseminated to the public. It also required agencies to issue their own information quality guidelines, and to establish administrative mechanisms that allow affected persons to seek correction of information maintained and disseminated by the agencies that does not comply with the OMB guidance.

Supporters of the IQA contended that it and the resultant OMB and agency guidelines would improve the quality of agency science and regulation and force agencies to regulate based on the best science available. Critics, on the other hand, said that the law was a tool by which regulated parties can slow and possibly stop new health, safety, and environmental standards, and that could lead to the revision or elimination of existing standards. They also contended that the act could have a chilling effect on agency distribution and use of scientific information.

In retrospect, it appears that both of these positions were overstated. OMB has reported that the expected flood of IQA correction requests did not occur (only 85 in the first two years of implementation), and that the correction request process had been used by virtually all sectors of society (albeit primarily by business groups). OMB said "to our knowledge, the (act) has not affected the pace or length of rulemakings," but neither it nor the agencies presented any data on this issue. Finally, OMB noted that most non-frivolous requests were denied because "a reasonable scientist could interpret the available information the way the agency had."[26]

Recent court decisions indicate that agency denials of information correction requests are not judicially reviewable. For example, on June 21, 2004, a U.S. district court ruled that such terms as "quality," "objectivity," "utility," and "integrity" are not defined in the IQA, and the history of the legislation does not provide any indication as to the scope of these terms. Therefore, absent any "'meaningful standard' against which to evaluate the agency's discretion, the Court finds that Congress did not intend the IQA to provide a private cause

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[26] Office of Management and Budget, *Draft Report to Congress on the Costs and Benefits of Federal Regulations*, p. 50, available at
[http://www.whitehouse.gov/omb/inforeg/2005_cb/draft_2005_cb_report.pdf].

of action."[27] On November 15, 2004, the U.S. District Court for the Eastern District of Virginia (Alexandria Division) ruled that the Salt Institute and the Chamber of Commerce lacked standing to sue (e.g., they had suffered no "injury in fact"), and that judicial review of the agency's decisionmaking was not available. On March 6, 2006, the U.S. Court of Appeals for the Fourth Circuit dismissed the appeal by the Salt Institute and the Chamber of Commerce, agreeing with the district court that the appellants lacked standing because they did not suffer an injury from the published data.[28] The Fourth Circuit concluded that the IQA "creates no legal rights in any third parties," including any right to "information or to correctness." Therefore, the court argued, "appellants cannot establish injury in fact and, therefore, lack Article III standing to pursue their case in the federal courts."

At the May 2006 panel discussion on OMB's science-related initiatives, Bill Kovacs from the U.S. Chamber of Commerce said that, because of these recent court decisions, the IQA is "little more than a nice academic exercise," and that his organization planned to go back to Congress "to get judicial review provisions put into the law." In contrast, Rena Steinzor of the University of Maryland School of Law said that the IQA represented the "corpuscularization of science; that is, looking at each piece of scientific evidence very critically, deconstructing every study, questioning each individual piece as opposed to viewing all the scientific evidence together and making a scientific judgment on what the weight of the evidence tells us." Don Arbuckle, then acting administrator of OIRA, said that OMB believes that the act was "working quite well," and characterized the IQA and related guidelines as "more of an internal government quality control exercise than a regulation or a law that is challengeable through the judicial branch." He also said that the guidance places a "hefty data burden of proof on the petitioner," and was not intended to "give people an easy avenue to criticize government work."

Peer Review. Another science-related OIRA initiative has been the development of governmentwide standards for peer review of scientific information used in developing agency regulations. OIRA indicated that the bulletin was needed because agencies' peer review practices were inconsistent, and government-wide standards would make regulatory science more competent and credible. The initial proposed bulletin, published in September 2003, aroused substantial controversy, with some observers expressing concern that it could create a centralized peer review system within OMB that would be vulnerable to political manipulation or control by regulated entities.[29] OMB received nearly 200 comments on the proposal, including comments from Members of Congress, trade associations, public interest groups, and recognized experts in the field of peer review and scientific research. At our May 2006 symposium, Al Teich of the American Association for the Advancement of Science said that many scientists concluded that the initial bulletin appeared to be "a means of attacking regulation by attacking the science behind it."

As a result of these comments, OMB later published a "substantially revised" version of the bulletin that gave agencies more discretion to determine when information required a peer review, and when the more detailed review requirements for "highly influential"

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[27] *In re: Operation of the Missouri River Sys. Litig.*, No. 03-MD-1555 at 49 (D. Minn. June 21, 2004) (order granting motions for summary judgment).

[28] *Salt Institute; Chamber of Commerce of the United States of America v. Michael O. Leavitt, Secretary of Health and Human Services*, No. 05-1097, Mar. 6, 2006.

[29] Office of Management and Budget, Executive Office of the President, "Proposed Bulletin on Peer Review and Information Quality," 68 *Federal Register* 54023 (Sept. 15, 2003).

information were applicable. Also, unlike the proposed bulletin, the revised bulletin did not exclude individuals from being peer reviewers if they had received research grants from the agency disseminating the information being peer reviewed. The bulletin essentially requires agencies to (1) have a peer review conducted on all "influential scientific information" that the agency intends to disseminate, (2) have all "highly influential scientific assessments" peer reviewed according to more specific and demanding standards, and (3) indicate what "influential" and "highly influential" information the agency plans to peer review in the future. Although these revisions were generally embraced by the scientific community and others, business groups believed the changes had weakened the bulletin to such an extent that they withdrew their initial support. Still others believed the changes had not gone far enough, asserting that the bulletin was unnecessary and did not appropriately guard against appointment of reviewers with conflicts of interest.

On December 15, 2004, OMB published a final version of the peer review bulletin on its web site.[30] OMB said this version reflected "minor revisions" made in response the public comments on the revised bulletin. For example, the final bulletin requires agencies to disclose the names of peer reviewers to the public and adds an annual reporting requirement to allow OMB to track how agencies are using the bulletin. Agencies are still afforded substantial discretion to determine when and what type of peer review is required. The amount of discretion that agencies actually have in carrying out their peer review programs (or, conversely, the amount of control that OMB retains) will be apparent only through the bulletin's implementation, and therefore could vary substantially from one administration to another. Certain provisions of the peer review bulletin took effect in June 2005, with other provisions taking effect six months later.

To date, I am unaware of any empirical studies of how this peer review bulletin has been implemented. Nevertheless, the bulletin is likely to have a significant effect on federal rulemaking and other forms of information dissemination and public policy, both directly and indirectly through references to the bulletin by others. For example, section 402 of the "Specialty Crops Competitiveness Act of 2004" (Pub. Law 108-465, signed by the President on Dec. 21, 2004) indicated that a required peer review of the procedures and standards governing the consideration of certain import and export requests "shall be consistent with the guidance by the Office of Management and Budget pertaining to peer review and information quality."

Risk Assessment. On January 9, 2006, OIRA released a proposed bulletin on risk assessment for comment by the public and for peer review by the National Academy of Sciences (NAS).[31] The proposed bulletin would, if made final, establish general risk assessment and reporting standards, and establish special standards for "influential" risk assessments by all agencies. Risk assessment is defined in the bulletin as a document that "assembles and synthesizes scientific information to determine whether a potential hazard exists and/or the extent of possible risk to human health, safety, or the environment." In a regulatory context, risk assessment helps agencies identify issues of potential concern (e.g.,

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[30] Office of Management and Budget, *Final Information Quality Bulletin for Peer Review*, Dec. 15, 2004, available at [http://www.whitehouse.gov/omb/inforeg/peer2004/peer_bulletin.pdf].

[31] Office of Management and Budget, "Proposed Risk Assessment Bulletin," Jan. 9, 2006, available at [http://www.whitehouse.gov/omb/inforeg/proposed_risk_assessment_bulletin_010906.pdf].

whether exposure to a given risk agent causes effects such as cancer, reproductive and genetic abnormalities, or ecosystem damage); select regulatory options; and estimate a forthcoming regulation's benefits. OMB said that "there is general agreement that the risk assessment process can be improved, and said the purpose of the bulletin is "to enhance the technical quality and objectivity of risk assessments prepared by federal agencies by establishing uniform, minimum standards."

Although characterized as "guidance" in the document's summary, the narrative text mentions the "requirements" of the bulletin, and the language in the bulletin prior to the standards lists the standards with which "[e]ach agency shall" comply. However, OMB also says that the bulletin applies to all agency risk assessments "to the extent appropriate." Agency heads are authorized to waive or defer some or all of the requirements in the bulletin "where warranted by a compelling rationale." Public comments on the bulletin were requested by June 15, 2006, and on June 22, 2006, OMB posted the comments it had received on its web site.[32] Those comments varied significantly, with some suggesting ways to make the document stronger and more inclusive, while others suggested that OMB abandon the bulletin altogether.

On March 22, 2006, a committee of the Board on Environmental Issues and Toxicology within the National Academies' Division of Earth and Life Sciences began what is expected to be an 11-month peer review of OMB's proposed bulletin. On May 22, 2006, the committee held a public meeting on OMB's proposed risk assessment bulletin. According to press accounts, the nine federal agency officials who testified at the meeting voiced a variety of opinions about the bulletin.[33] For example, the Director of FDA's Center for Drug Evaluation and Research reportedly said that if the bulletin was made final in its current form, doctors and the public might not receive timely warnings about potential health risks posed by drugs and medical devices (e.g., warnings related to the use of the anti-inflammatory drug Vioxx). He and two other agency officials (from the National Institute of Environmental Health Sciences and the National Institute for Occupational Safety and Health's Risk Evaluation Branch) reportedly said that the bulletin's definition of risk assessment is so broad that many types of federal analyses could be inappropriately covered by its requirements. On the other hand, EPA's science advisor was quoted as saying that the agency was in "pretty good shape" in terms of meeting the requirements in the proposed bulletin, but nevertheless suggested that the guidance be revised to explain how much flexibility agencies have regarding its requirements (e.g., how agencies can get waivers from the bulletin's requirements).

Like the peer review bulletin, the manner in which OMB implements the risk assessment bulletin will determine its effectiveness. For example, it is unclear the extent to which agencies will be allowed to waive or defer the bulletin's requirements when they believe it is "warranted by a compelling rationale." Similarly, it is unclear whether OMB will allow agencies to decide when a risk assessment is "influential" (thereby triggering additional standards in the bulletin) and whether OMB will treat the bulletin's provisions as "guidance" or as "requirements."

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[32] See [http://www.whitehouse.gov/omb/inforeg/comments_rab/list_rab2006.html].

[33] Pat Phibbs, "Definition of Risk Assessment Deemed Too Broad by Several Health Agency Officials," *BNA Daily Report for Executives*, May 23, 2006, p. A-15.

Possible Issues for Congressional or ACUS Consideration. As the above discussion suggests, a number of issues remain for possible congressional consideration, or for further study by a re-funded ACUS or some other body. In some cases, Congress could weigh in and resolve the issue. For example, in light of recent court decisions, if Congress wanted agencies' decisions under the Information Quality Act to be judicially reviewed, it could resolve any lingering questions by amending the statutes and permitting judicial review. Likewise, if Congress objected to using risk standards for one statute and applying them to other statutes, it could act through legislation or through oversight of OMB's risk assessment bulletin.

Among the questions that may merit further study are the following:

- How can 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?
- What were Congress's intentions in passing the IQA? Has it served those purposes?
- Do agencies have too much discretion to deny correction requests under the IQA? What effect has the act had on the length of time it takes agencies to issue rules? What if anything should be done to ensure that the act is consistently implemented?
- Should OMB take a more active role in reviewing agencies' decisions under the IQA? Should Congress or OMB initiate the collection of data regarding the IQA's effect on rulemaking or agencies' resources?
- What is the appropriate role of the courts in reviewing science-based agency regulatory decisions?
- Are governmentwide standards for peer review and risk assessment needed? Does OMB have the authority to issue such standards? What effect have these requirements had on the length of time it takes agencies to issue rules?
- Are agencies complying with the peer review and risk assessment bulletins? For example, are agencies posting agendas listing their upcoming peer reviews? Are agencies peer reviewing all "influential" information? Are some agencies complying better than others? Should Congress refer to these bulletins in legislation as models for particular peer reviews or risk assessments?
- What constitutes the "weight of the evidence" in making risk-based regulatory decisions? Should Congress define the term, or should it be left up to the agencies within a specific regulatory context?

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Mr. Chairman, that concludes my prepared statement. I would be happy to answer any questions that you or other Members of the Subcommittee might have.

Mr. CANNON. Mr. Halstead.

TESTIMONY OF T.J. HALSTEAD, ESQ., LEGISLATIVE ATTORNEY, AMERICAN LAW DIVISION, CONGRESSIONAL RESEARCH SERVICE, WASHINGTON, DC

Mr. HALSTEAD. Mr. Chairman, Members of the Subcommittee, I am pleased to be here today to discuss the Subcommittee's Administrative Law Process and Procedure Project.

I've been particularly involved in the consideration of four issues that have arisen in the various symposia, hearings and studies conducted under the project's banner, namely, public participation in the rulemaking process, agency adjudication, judicial review of agency rulemaking, and the utility of a reconstituted ACUS in light of the regulatory clearance and review functions of the Office of Management and Budget. I have addressed those issues in detail in my prepared statement, and I would like to focus today on efforts that have been made to study court participation and judicial review over the course of the project. I think they illustrate both the time and effort that has gone into the project, as well as factors that could be viewed as supporting the continuing need for an entity such as ACUS.

The staff of your Subcommittee has spent a great deal of time focusing on public participation issues ranging from the impact of non-rule rules on public participation, to whether e-rulemaking initiatives have, in fact, facilitated an increase in public participation.

Professor Cary Coglianese convened a congressional symposium for the Committee on the e-rulemaking issue last December, and I think that type of collaborative effort has been essential to furthering our understanding of these issues. One interesting aspect of that symposium was the general consensus that e-rulemaking initiatives have not, in fact, generated the significant increase in participation that was largely expected in light of the strides that have been made in electronic technology and accessibility. The participants of that symposium recommended further studies on the issue, and, in particular, recommended expanding and institutionalizing opportunities for collaboration, which is a role that ACUS has served in the past and could arguably fulfill again.

Another significant study that Mort mentioned in his testimony has been conducted by Professor William West at Texas A&M, focusing on how agencies develop proposed rules, with a particular emphasis on public participation and transparency in the prenotice and comment phase of rule formulation. The study relied in large part on an electronic questionnaire sent to agency staff involved in the development of a large sample of individual rules and on interviews with high-level agency personnel with extensive experience in the rulemaking process. One of the hopes of that study was that the questionnaire would generate data that would enable a systematic comparison of variations in agency practice during this phase of rulemaking, but, as Mort mentioned, a low response rate to the survey prevented that from happening.

The interview and survey data did enable Professor West and his team to make some very interesting and important observations relating to the outside participation of individuals in the development of rules, but I think the low response rate to that survey, again,

could be taken to support the position that there is an important role for ACUS. Professor West himself has related his view that the survey was hobbled by a general reluctance on the part of agencies to share information, with apparently two agencies explicitly ordering their staff not to respond to the survey.

Given the factors that Mort mentioned earlier regarding ACUS's nonpartisan nature and organizational independence, it's quite possible that a reconstituted ACUS would be able to secure a greater response for these types of studies, which in turn would further Congress' knowledge of such issues.

Another key study in the project is being conducted by Professor Jody Freeman at Harvard Law School, focusing on empirical analysis of judicial review of agency rulemaking. The goal of the study is to find out what happens to agency rules during review in the circuit courts, essentially to determine how often rules are invalidated in whole or in part, and the reasons why they are invalidated. Professor Freeman's study is ongoing, but she discussed the methodology of the study and presented her preliminary findings at our September 11, 2006, symposium on Presidential, Congressional and Judicial Control of Agency Rulemaking.

The study is ultimately expected to yield significant and useful empirical data on the success of challenges to agency rules in the appellate courts, but the limitations on this type of study might be seen as providing further evidence of the futility of a reconstituted ACUS. Professor Freeman herself noted in her comments at that symposium that stand-alone studies of this type do not give rise to a coherent and comprehensive empirical strategy that fosters optimal analysis of administrative process for the long term. Rather, it could be argued that only an entity such as a reconstituted ACUS will have the ability to assemble a group of experts with the aim of formulating a cohesive methodology that will be supported by ongoing and systematic analysis.

I hope my testimony has given you an idea of the scope of work that's been done in these areas, as well as the potential for a reconstituted ACUS to further improve our knowledge and understanding of administrative law and process, and I look forward to answering any questions that you might have. Thank you.

Mr. CANNON. Thank you, Mr. Halstead.

[The prepared statement of Mr. Halstead follows:]

PREPARED STATEMENT OF T.J. HALSTEAD

Statement of T.J. Halstead
Legislative Attorney, American Law Division
Congressional Research Service

Before

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

November 14, 2006

on
"The Administrative Law, Process, and Procedure Project"

Mr. Chairman and Members of the Subcommittee:

My name is T.J. Halstead. I am a Legislative Attorney with the American Law Division of the Congressional Research Service at the Library of Congress, and I thank you for inviting me to testify today regarding the Committee's ongoing and bipartisan "Administrative Law, Process and Procedure Project."

My testimony today will address three issues that have been studied over the course of the project: public participation in the rulemaking process, agency adjudication, and judicial review of agency rulemaking, with a focus on how the various symposia and academic studies sponsored by the Committee have contributed to our understanding of the significant and complex issues that adhere in these contexts, as well as to illustrate the potential ability of a reconstituted Administrative Conference of the United States to further aid our appreciation of such issues. My testimony will additionally discuss the issue of whether a reconstituted ACUS would be duplicative of activities that are currently performed by the Office of Management and Budget.

Public Participation

Effective public participation in agency rulemaking is a fundamental principle of the Administrative Procedure Act, and the staff of your Committee has been particularly active in considering factors impacting such participation. Working with your staff, we have identified a wide range of issues that have arisen in this context, ranging from the effect of "non-rulemaking approaches," such as the issuance of interpretive rules and policy

statements on public participation, to the effect of e-rulemaking initiatives.

On December 5, 2005, Professor Cary Coglianese of the University of Pennsylvania Law School convened a symposium on "E-Rulemaking in the 21st Century" that was sponsored by the Committee. This symposium brought together legislative and executive branch personnel, academic researchers, and non-governmental representatives for an in-depth discussion on e-rulemaking and the manner in which advances in information technology may impact the future of administrative rulemaking. In testimony presented before the Committee on July 26, 2006, Professor Coglianese commented on the status of empirical research on e-rulemaking, noting that empirical data that has been obtained to date does not appear to support the initial expectation that advances in this context would facilitate a significant increase in public participation. Nonetheless, technological improvements may ultimately provide substantial benefits in this regard. Professor Coglianese also noted that ancillary benefits of e-rulemaking, such as increased transparency, enhanced ability for executive or congressional oversight, administrative cost reduction, and greater ease of compliance provide additional justifications for continued efforts to improve agency utilization of electronic technology in rulemaking.

Another key issue in the public participation context has been whether efforts to include the public in the rulemaking process prior to the publication of a proposed rule should be expanded. Professor William West of the Bush School of Government and Public Services at Texas A&M University undertook an effort to study a specific aspect of this issue at the behest of the Committee, with the support of the Congressional Research Service.

Professor West formulated and conducted a project to analyze how agencies develop proposed rules, with a particular emphasis on how rulemaking initiatives are placed on agency regulatory agendas; how the rulemaking process is managed at inter and intra agency levels; and how public participation and transparency factor in the pre-notice and comment phase of rule formulation. Professor West has stated that the issue of public participation at this stage of agency rule formulation "may be especially relevant to the Congress as it considers possible amendments to the APA." The study relied in large part on an electronic questionnaire sent to agency staff involved in the development of a large sample of individual rules and on interviews with high level agency personnel with extensive experience in the rulemaking process. One of the hopes for the study was that the questionnaire would generate data that would enable a systematic comparison of variations in agency practice regarding the scope, transparency, and inclusiveness of outside participation during this phase of rulemaking. However, a low response rate to the electronic questionnaire prevented such a comparison. Nonetheless, the interview and survey data did enable Professor West and his team to make some very interesting and important observations relating to outside participation in proposal development: that agency officials noted that the submission of information by public interest groups, industry representatives, other affected interests, and other agencies was "frequently indispensable to intelligent decision making"; that the character of such participation is variable, based on a number of factors; and, finally, that such participation does not generally occur as the result of an inclusive agency approach, instead occurring by virtue of agency invitation or participant initiative.

While the West study has contributed significantly to congressional and academic understanding of the complex issues surrounding public participation in the pre-notice and comment rulemaking context, the low response rate to the survey could be viewed as

supporting the position that a reconstituted ACUS could serve an important role in facilitating research of this type. Professor West has related his view that the survey was hobbled by a general reluctance of agencies to share information, as illustrated by the fact that two agencies went so far as to explicitly order their staff not to respond to the survey. It is arguable that a similar study, if conducted by a reconstituted ACUS, would have greater success in generating the information necessary to enable the systematic comparisons envisioned by the West study by virtue of its non-partisan nature and organizational independence.

Agency Adjudication

Another matter of significant importance and interest to the project has been the issue of agency adjudication. In addition to rulemaking, it is a fundamental maxim of administrative law that agencies may control regulated activities and entities through adjudicatory processes. Regarding the basic issue of an agency's discretion to choose between rulemaking and adjudication, the Supreme Court established in *SEC v. Chenery Corporation* that "the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." This dichotomy effectively allows agency adjudicators to exert policy-making authority through a quasi-judicial proceeding, as opposed to the quasi-legislative nature of the procedures that govern notice and comment rulemaking. This dynamic has given rise to the question of whether it is appropriate for agencies to establish binding policy through adjudication when such action could be effected through notice and comment rulemaking. ACUS, as a reconstituted entity, would be in a unique position to analyze the impact of agency determinations to regulate through adjudication and rulemaking, with the aim of formulating a recommendation as to whether the Administrative Procedure Act should be amended to explicitly address issues adhering to agency adjudication.

The mechanics of agency adjudication are also an issue that might be ripe for review by a reconstituted ACUS. To this end, CRS has identified a series of issues in this context that have been of interest to administrative law scholars and practitioners, ranging from the question of whether there is a need to reevaluate the Administrative Law Judge program, with a focus on the selection of ALJ's and the issue of whether ALJ's dealing with regulatory matters should be treated differently than those handling benefits cases. Additionally, a comprehensive study of the issue of whether the APA's adjudicatory provisions should be extended to all evidentiary hearings required by statute, as has been suggested by the American Bar Association, would appear to be particularly suitable for examination by ACUS.

Judicial Review

Judicial review of agency rulemaking has emerged as an issue of great significance and interest in the years since the demise of ACUS, and the study of this issue has factored prominently in efforts undertaken in aid of the Administrative Law, Process, and Procedure Project.

Under the Administrative Procedure Act, courts are authorized to invalidate rules that are deemed to be arbitrary or capricious. This standard of review, is not clearly defined, and the judiciary's interpretation of the meaning of this phrase has changed substantially over the past thirty years. Until the 1970's, arbitrary or capricious review

was extremely deferential, essentially requiring only that a regulation fall within the scope of legally delegated authority. However, the Supreme Court's 1971decision in *Citizens to Protect Overton Park, Inc. v. Volpe* established a dynamic that has led to more stringent review of rules.

Overton Park addressed a challenge to the Secretary of Transportations' decision to approve the release of federal funds for the construction of a highway through a park, on the basis that the decision violated a prohibition on the use of federal highway funds for highway construction through public parks so long as another feasible and prudent route could be used. Applying the arbitrary or capricious standard to the Secretary's decision, the Court held that is was required to analyze whether the decision was based on "a consideration of the relevant factors and whether there had been a clear error in judgment...." The Court stated that while this inquiry must be "searching and careful," the standard of review was ultimately narrow. The Court then proceeded to remand the case so that the lower court could conduct a "thorough, probing, in-depth review of the administrative record underlying the Secretary's decision.

The language used by the Court in Overton Park is at once instructive yet ambiguous. The Court declares that judicial review under the arbitrary and capricious standard is to be "searching and careful," while simultaneously espousing a deferential approach to review of informal agency action by stating that the judiciary "is not empowered" to impose its judgment on an agency. It has been asserted that courts applying the precepts of Overton Park "tend to ignore all but the mandate to conduct a 'searching and careful' inquiry," slipping into a "a more active role than was intended for arbitrariness review." In turn, this increased level of scrutiny has been cited as facilitating the development of what has come to be referred to as the "hard look" doctrine of arbitrary and capricious review. This approach has been characterized as obliging a reviewing court "to examine carefully the administrative record and the agency's explanation, to determine whether the agency applied the correct analytical methodology, applied the right criteria, considered the relevant factors, chose from among the available range of regulatory options, relied upon appropriate policies, and pointed to adequate support in the record for material empirical conclusions."

The Supreme Court implicitly endorsed the hard look doctrine in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, while continuing to assert, as it had in *Overton Park,* that a reviewing court is not to substitute its judgment for that of the agency. This dichotomy between what, on the one hand, appears to be a very broad grant of discretion to a reviewing court and the much more restrictive notion that the courts are not to usurp agency judgment has been focused upon by both proponents and critics of the hard look standard. Some commentators have argued that the hard look doctrine is essential to allow for an appropriate level of judicial scrutiny of an agency's exercise of power, in that it ensures that agency decisions are not controlled by narrow private interests or an agency's own "idiosyncratic view of the public interest." Conversely, critics of hard look review maintain that it allows for so much judicial discretion "that a single unsympathetic or confused reviewing court can bring about a dramatic shift in focus or even the complete destruction of an entire regulatory program." It has been argued that the establishment of a more stringent review dynamic in *Overton Park,* coupled with the adoption of the hard look doctrine in *State Farm,* has caused the rulemaking process to become more rigid and burdensome upon agencies. In turn, this has lead to the assertion that rulemaking has become "ossified," with agencies either undertaking resource and time intensive steps to ensure that a rule will withstand increased scrutiny, or circumventing the

traditional notice and comment rulemaking process by issuing policy statements and interpretive rules to effectuate compliance with a regulatory agenda.

Various studies have been conducted attempting to evaluate the number of challenges to agency rulemaking efforts and the effect of judicial review thereon. However, it has been stated that "administrative law scholars have failed generally to produce systematic empirical analysis of the effects of judicial review."

In hopes of ameliorating this situation, the Committee recruited Professor Jody Freeman of the Harvard Law School to conduct a study aimed at providing just such an empirical analysis. With the aid of Curtis Copeland, one of my fellow CRS coordinators of this Project, Professor Freeman was able to obtain access to data on administrative agency appeals from the Administrative Office of the Courts (AOC) from 1995 to 2004. The data consists of 3,075 cases drawn from an initial database of over 10,000 cases involving administrative appeals from every circuit court over that time frame. The goal of the study is to ascertain what happens to agency rules upon appellate judicial review, with the aim of determining the rate at which rules are invalidated in whole or in part, and the reasons for that invalidation. Professor Freeman's study is ongoing, but she discussed the methodology of the study and presented the preliminary findings of the study at a September 11, 2006 symposium on "Presidential, Congressional, and Judicial Control of Agency Rulemaking," that was hosted by CRS as part of the Committee's project. While the study is ultimately expected to yield significant and useful empirical data on the success of challenges to agency rules in the appellate courts, the limitations of this type of study might be seen as providing further evidence of the utility of a reconstituted ACUS. As Professor Freeman noted in her comments at the September 11, 2006 symposium, these types of studies do not give rise to a coherent and comprehensive empirical strategy that will foster optimal analysis of the administrative process for the long term. Rather, it could be argued that only an entity such as a reconstituted ACUS will have the ability to assemble a group of experts with the aim of formulating a cohesive methodology that will be supported by ongoing and systematic analysis.

The Differing Roles of ACUS and OIRA

Regarding the reauthorization and refunding of ACUS, I have worked closely with the staff of your Committee over the past two years in analyzing assertions that a reconstituted ACUS would be duplicative of functions that are already performed by Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB). Before addressing the merits of this argument, I think it is useful to provide an overview of the statutory structures and missions of these two entities.

Legislation creating a permanent Administrative Conference of the United States was enacted in 1964,[1] with funds first appropriated in 1968.[2] In 1995, the activities of ACUS ceased when funding for its activities was terminated. ACUS was reauthorized in the 108th Congress,[3] but has yet to receive an appropriation. The statutory provisions governing ACUS were never repealed by Congress, and the reauthorization in the 108th Congress only slightly

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[1] *See* 5 U.S.C. §§ 591-96.

[2] P.L. 90-392 (1968).

[3] P.L. 108-401, 108th Cong. 2d Sess. (2004).

revised its original provisions, by authorizing appropriations and by making four additions to the "purposes" section of the Act.[4]

Pursuant to its statutory authorization, ACUS is tasked with (1) providing "suitable arrangements through which Federal agencies, assisted by outside experts, may cooperatively study mutual problems, exchange information, and develop recommendations for action by proper authorities to the end that private rights may be fully protected and regulatory activities and other federal responsibilities may be carried out expeditiously in the public interest"; (2) promoting "more effective public participation and efficiency in the rulemaking process"; (3) reducing "unnecessary litigation in the regulatory process"; (4) improving "the use of science in the regulatory process;" and (5) improving "the effectiveness of laws applicable to the regulatory process."[5]

The reauthorization leaves intact ACUS' original membership dynamic, which is structured, in effect, as a public/private partnership, in order to maximize "the joint participation of agency and outside experts in administrative procedure."[6] In the event of appropriation its membership will thus consist of a minimum of 75 and a maximum of 101 members, composed of a Chairman, council, and assembly. The Chairman would be appointed by the President, the council would be composed of the chair and ten other members, and the assembly, if comprised in accordance with prior practice, would consist of approximately 100 members, "consisting of representatives of federal agencies, boards, and commissions and private citizens, including lawyers, law professors, and others knowledgeable about administrative law and practice."[7]

During the course of its original existence, ACUS was widely viewed as an effective, independent and nonpartisan entity. For instance, Sally Katzen, a former Administrator of OIRA during the Clinton administration, stated in 1994 that ACUS "has a long-standing tradition of private-sector membership that crosses party and philosophical lines."[8] Likewise, 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."[9]

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[4] *Id.*

[5] 5 U.S.C. §591(1)-(5).

[6] Jeffrey Lubbers, *"If it Didn't Exist, it Would Have to be Invented" - Reviving the Administrative Conference*, 30 Ariz. St. L.J. 147, 148 (1998).

[7] Jeffrey Lubbers, *A Guide to Federal Agency Rulemaking*, Third Edition, American Bar Association, p. xvii (1998).

[8] Toni M. Fine, *A Legislative Analysis of the Administrative Conference of the United States*, 30 Ariz. St. L.J. 19, 55 (1998).

[9] 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).

As further evidence of the respect of, and support for, ACUS, it is interesting to note that Supreme Court Justices Scalia and Breyer testified before the Subcommittee in support of the reauthorization of ACUS. 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 it important and beneficial to the average American, at a low cost."[10] 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.[11]

The Office of Management and Budget traces its origin to the establishment of the original Bureau of the Budget within the Department of the Treasury by the Budget and Accounting Act of 1921.[12] The Bureau was transferred to the newly created Executive Office of the President by Reorganization Plan No. 1 of 1939,[13] and was subsequently designated as the Office of Management and Budget by Reorganization Plan No. 2. of 1970.[14] While OMB's primary function centers on budget formulation and execution, it has many other major functions, including regulatory analysis and review. The Paperwork Reduction Act of 1980, later recodified as the Paperwork Reduction Act of 1995, established the Office of Information and Regulatory Affairs within OMB. In addition to its statutory responsibilities, OIRA exerts significant influence on the scope and substance of agency regulations through a presidentially mandated review and planning process. Shortly after the creation of OIRA in 1980, President Reagan issued Executive Order 12291, which imposed cost-benefit analysis requirements on rule formulation and established a centralized review procedure for all agency regulations. Responsibility for this program was delegated to OIRA.

In practical effect, E.O. 12291 gave OIRA a substantial degree of control over agency rulemaking, enabling OMB to exert considerable influence over agency efforts in this context from the earliest stages of the process. The impact of E.O. 12291 on agency regulatory activity was immediate and substantial, with OIRA reviewing over 2000 regulations per year and returning multiple rules to agencies for reconsideration. As a result of this rigorous review process, agencies became sensitized to the regulatory agenda of the Reagan Administration, largely resulting in the enactment of regulations that reflected the goals of the Administration.[15] The issuance and implementation of the order generated controversy and criticism, with opponents asserting that the review process was distinctly anti-regulatory and constituted an unconstitutional transfer of authority to OIRA from the executive agencies. This review scheme was retained to similar effect and controversy in the George H.W. Bush Administration.

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[10] Jeffrey Lubbers, *Reviving the Administrative Conference of the United States: The Time Has Come*, 51 Dec. Fed. Law. 26 (2004).

[11] Fine, n. 8, *supra*, at 46. *See also*, Gary J. Edles, *The Continuing Need for an Administrative Conference*, 50 Admin. L. Rev. 101, 117 (1998).

[12] 42 Stat. 20 (1921).

[13] 53 Stat. 1423 (1939).

[14] 84 Stat. 2085 (1970).

[15] *See* T.J. Halstead, *Presidential Review of Agency Rulemaking*, Congressional Research Service, Rep. No. RL32855 at 3 (2005).

President Clinton supplanted the Reagan era review scheme with Executive Order 12866, entitled "Regulatory Planning and Review."[16] The Clinton order implemented a more selective and transparent review process, while generally retaining the centralized review dynamic established by E.O. 12291. Coupled with the comparatively pro-regulatory stance of OMB during the Clinton era, this review scheme resulted in a decrease in the rates of OIRA review of rules, from an average of 2080 regulations per year in fiscal years 1982-93 to an average of 498 in fiscal year 1996.[17] It is important to note that this decrease in the numbers of rules reviewed does not indicate a concession on the part of the Clinton Administration that there were limits on presidential control of the scope of OIRA review or on the agency rulemaking process specifically.[18] Rather, it would appear that the Clinton Administration employed the OIRA review process and general assertions of administrative control over agencies in order to implement its regulatory agenda.[19]

The George W. Bush Administration has retained E.O. 12866, utilizing it to implement a review regime that subjects rules to more stringent review than was the case during the Clinton Administration. It has been asserted that the current Administration has returned to the review dynamic that prevailed under E.O. 12291, with OIRA describing itself as the "gatekeeper for new rulemakings."[20] Under the current Administration, OIRA has increased the use of "return" letters to require agencies to reconsider rules, which, in turn, has led agencies to seek OIRA input "into earlier phases of regulatory development in order to prevent returns later in the rulemaking process."[21] This dynamic arguably buttresses executive control over agency rulemaking efforts by exerting influence over rulemaking activity at the earliest stages of rule formulation.[22] Additionally, OIRA has instituted the practice of issuing "prompt letters" to appropriate agencies to encourage rulemaking on issues it feels are ripe for regulation.[23] OIRA has acknowledged that prompt letters "do not have the mandatory implication of a Presidential directive," characterizing them instead as a device that "simply constitutes an OIRA request that an agency elevate a matter in priority."[24] As with the use of return letters, the use of prompt letters has arguably enabled OIRA to exert a substantial degree of influence on an agency's regulatory agenda.[25]

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.

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[16] *Id.* at 5.

[17] *Id.* at 7.

[18] *Id.* at 8.

[19] *Id.* at 8.

[20] *Id.* at 10.

[21] *Id.* at 10.

[22] *Id.* at 10.

[23] *Id.* at 10.

[24] *Id.* at 11.

[25] *Id.* at 11.

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."[26] Conversely, OIRA does not possess 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.[27] 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 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.[28]

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."[29] Justice Breyer echoed this sentiment

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[26] Fine, n. 8, *supra*, at 55.

[27] *See, e.g.*, Lubbers n. 6, *supra*, at 152.

[28] Loren A. Smith, *The Aging of Administrative Law: The Administrative Conference Reaches Early Retirement*, 30 Ariz. St. L.J. 175, 181 (1998).

[29] *See* Edles, n. 11, *supra*, at 135 (quoting Thomas O. Sargentich, *The Supreme Court's Administrative Law Jurisprudence*, 7 Admin. L.J. Am. U. 273, 280 (1993)). Professor Edles has further suggested that "[p]rocedure and process changes would rarely, if ever, rise to the level

(continued...)

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."[30]

Also, the broad scope of ACUS' mission, coupled with its independence and expertise is seen by many 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.[31]

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.

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Mr. Chairman, that concludes my prepared statement. I would be happy to answer any questions that you or other Members of the Subcommittee might have.

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[29] (...continued)
sufficient to attract OIRA's attention." *See* Edles, n. 11, *supra*, at 135-36 n. 212.

[30] Stephen G. Breyer, Associate Justice, Supreme Court of the United States, 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., pp. 2-3 (May 20, 2004). *See also*, n. 9, *supra*.

[31] *See* n. 9, *supra*.

Mr. CANNON. And again, thank you all for being here today.

Mr. Rosenberg, if I could just follow up on some of your comments. You talked at some length about the Congressional Review Act and about how it would work here in Congress. And you fell a little short of talking about what we actually talked about, I think, in this hearing, and that was if Congress were to review every rule. In other words, if you set aside the major rules as impractical to actually determine, then what the effect of that would be that noncontroversial rules would be viewed as minor, and if anybody had a problem with a rule, they could raise that problem in the course of a congressional oversight process.

That would mean that Congress would have to staff up somewhat. The Majority or the Minority would shift a little bit in how they would happen, but you would have an internal process whereby notice and comment could be had, and that way what was major would be determined not by the agency's action or by some other standard which would be difficult to implement, but rather by the reaction of the population. So that in the case of a small business and the effect of a regulation on a small business, small businesses could come forward and say, hey, this regulation would be more difficult, and you could do it in a more easier fashion.

I don't know if you recall that part of the conversation, but it seems to me actually that the panel is agreeing that if you give up the idea of making a distinction between major and minor regulations, that you pretty soon end up in a point where you just say maybe Congress should review all, and then those that are substantial would become the point of focus. Do you recall that? And what is your thinking on that today?

Mr. ROSENBERG. What I was talking about today was a relation of testimony at the March hearing. It has been my view that there is a way to deal with all rules; that if, let's say, a joint Committee was set up as a screening mechanism, or a quorum-type vehicle was set up as a screening mechanism, which then presented recommendations, an internal procedure could be set up to screen out those rules that might be deemed minor rather than major, and that a deeming process that we talked about at the last hearing, which was approved by current Parliamentarian Sullivan and former Parliamentarian Charlie Johnson, that these could be the mechanism for——

Mr. CANNON. Would you mind suspending for a moment here while we have people leave? Thank you.

Please proceed.

Mr. ROSENBERG. The difficulty with limiting congressional review to major rules is just what you're saying: You're going to be losing rules that have an impact. Right now a major rule is defined by the Office of Management and Budget, and I don't know that you want to continue to have the Office of Management and Budget deciding what is a major rule, and therefore, these are the only rules that will come before Congress. You could do it verbally, with a sense of a $100 million impact, or a catch-all kind of a thing where it has a major significance, impact on—I did a nice thing here.

One of the constitutional problems is Congress itself can't decide what to bring up, what would be a charter problem, demanding that an agency bring up a particular rule. So you may have a prob-

lem of all or nothing, and to have the kind of effective congressional oversight, it would seem to me that all rules, as they are now, should come before Congress. And you would set up a procedure whereby there would be a screening process that, let's say, after 30 days, if a particular rule is not acted upon or a joint resolution of approval is not followed against that particular rule, it then goes to a calendar Wednesday when all the rules are being passed at that particular point or approved.

Mr. CANNON. But the charter problem doesn't exist if all rules come through, but directing a rule—Congress is not good at directing, so you don't ultimately have a charter problem, do you?

Mr. ROSENBERG. Not when it's there, not with all the rules covered. Then there can be a selection process and a deeming of approval at that particular point. You could get rid of 99.98 percent of the rules every year, and you would be able to catch the 60 or so major rules that come forward, if they're necessary. Most of the major rules are not that controversial either. So that you would have a process whereby the meaningful threat is out there that Congress is looking, and that these rules will have to come up, you know, in a way that, you know, conforms with what they were supposed to be.

Mr. CANNON. Mr. Watt, would you allow me to do one more question?

Mr. WATT. Sure.

Mr. CANNON. Dr. Copeland, when you talked about the blaming process—I think you mentioned that, that was mentioned by one of the witnesses here—that is, does Congress want to be blamed for rules that it approves based upon agency action? It seems to me that that's actually our job.

But secondly, having a process whereby you have a political review means that if you don't have significant objection to a rule, that the blame really goes to the people who have the interest who didn't assert the interest at the time. So do you think that the blaming—concern about blaming is something that Members of Congress would want to avoid, or is it something that we can deal with if we did some kind of a review of all regulations and perhaps a vote on all regulations?

Mr. COPELAND. I don't recall getting into the blaming issue, but I can respond to your question a bit.

The issue of whether congressional accountability for agency rules—it really gets back to the question of that the agency rules are based on congressional action. But the problem is more alluded to if Congress got in the business of approving all rules. There is about 4,000 final rules issued every year, and that would take up a significant amount of Congress' time. So some process of weeding these things out is necessary in order to avoid that overwhelming task.

The question then becomes how do you pick. And if you let OMB and the agencies pick which ones are subject to congressional review and would come up here. But technically any rule, under the Congressional Review Act—and Mort, correct me if I'm wrong—any rule can be challenged right now; there can be a resolution of disapproval on any rule, and it doesn't have to be one that an agency does a major rule report on or that GAO does a major rule report

on. So Congress can pick which ones, and certainly the interest groups in Washington are adept at pointing things out to Congress which ones they have a problem with.

Mr. ROSENBERG. The difficulty is it goes through a normal process of legislation, and you know how difficult that is. That's why expedited procedures assist in focusing and taking action in a timely and effective way. I'm the one that brought up the blaming——

Mr. CANNON. Oh, I'm sorry. You were quoting someone else, but——

Mr. ROSENBERG. I was quoting one of the participants on my panel who was making a political point, you know, that you're never going to get this because it puts too much responsibility. It may be that Congress gets blamed for doing things, and most often for not doing things; and here you're adding a whole category of rules that they could have taken care of, and somebody will hammer then. So therefore, let's have a procedure that's less threatening to us, or to you guys.

Mr. CANNON. I would hope that you could do some sort of expedited procedure and pass all bills, and the American people actually want that, and they're beginning to see that. And the blame thing is an initiating thing that we look at as individuals. Institutionally I think that Congress ought to have a greater role in the vast amount of law that gets created under the direction of the law we pass, but at the behest of the Administration.

Mr. ROSENBERG. One of the ostensible reasons for the passage of the Congressional Review Act was to place responsibility and accountability on Congress in order to wipe out the criticism that they nearly delegated vast amounts of power out and never, you know——

Mr. CANNON. That lever hasn't worked as well—it might have worked a little bit, but we don't have the data, and it hasn't worked clearly as well as we had hoped. But you know that I'm a fan of the idea of passing all.

Thank you, all. And I would like to recognize Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman.

And let me also join you in thanking the witnesses who have devoted so much time to this project, and I think advanced it to a point where hopefully it can be picked up and moved forward.

Mr. Rosenberg, I just had one clarifying question because I wasn't sure I understood what you were saying about ACUS being reauthorized in the 108th Congress, but wasn't so critical that it be funded. What was that point?

Mr. ROSENBERG. Well, my meaning was simply that the process that we're going through, the study process, the projects, the symposia, were setting the groundwork. And we could set the groundwork over a 2-year period, which we have done, but at some point there would have to be an ACUS or something like ACUS. There has to be something like ACUS to provide the kind of objective, nonpartisan consideration and study of sophisticated——

Mr. WATT. Right. I just wanted to make sure that the record was clear that all three of the witnesses, I assume, would strongly advocate funding of ACUS, not just reauthorizing it; or is there any disagreement about that?

Mr. ROSENBERG. We don't advocate, but we would be pleased——

Mr. WATT. I mean, supportive and pleased, yes.

Mr. Rosenberg, let's just do it one by one so we'll have it in the record, and there won't be any equivocation about it.

Mr. ROSENBERG. I am supportive of a reactivated ACUS.

Mr. COPELAND. Certainly it makes sense for these issues to be explored further. I think the potential is there for significant savings as a result of this because the people will quibble about what the total dollar value is of all regulations, but it's clearly in the hundreds of millions of dollars. Just last year OMB approved 82, I believe it was, economically significant rules, each of which is $100 million; 1 percent of that total is $82 million.

Mr. HALSTEAD. It's very difficult to quantify how much money ACUS saved over its existence. There are anecdotal examples——

Mr. WATT. Let me be clear. I'm trying to get a straight answer into the record that you support or don't support appropriating money to fund ACUS.

Mr. HALSTEAD. I think over the course of the project we've identified several factors that could be looked at as very much supporting the notion that a reconstituted, refunded ACUS would have a beneficial effect for modern administrative government.

Mr. WATT. Having established that from all three of the witnesses, let me also be clear. If you have some concept of what the appropriate appropriation level would be to adequately fund ACUS. And I guess I would say that against—obviously not having ACUS or something similar to it has had substantial economic impacts on various parts of our economy, businesses, so forth and so on. I'm trying to kind of put in context for the next Congress or future Congresses or Members of this Committee or the Judiciary Committee what it would cost as opposed to what it would save, I guess. And so what kind of appropriation level would we be talking about to adequately fund ACUS? Got a clue?

Mr. HALSTEAD. Well, we——

Mr. WATT. Mr. Halstead.

Mr. HALSTEAD. Using the prior reauthorization, it authorized, if my memory serves correctly, a funding level for fiscal years 2005 through 2007 of roughly $3 million a year. I think it's 3.2 million for the 2007 authorization. And based on the work that the Subcommittee did for that initial reauthorization, the expectation is that that would be somewhere in the neighborhood of what you would need for ACUS to get up and running in an effective fashion.

When you look at the academic literature study in ACUS, it has always been regarded as a very cost-effective organization in relation to the return it provides. So somewhere around that $3 million figure is maybe——

Mr. WATT. Three million?

Mr. HALSTEAD. Three million, yes.

Mr. WATT. Okay. And that's the figure that you're projecting that would be to get it up and running. What is the annual figure, ballpark, that you would think it would be appropriate to sustain it once it is up and running on an annual basis?

Mr. HALSTEAD. I would think it would be somewhere in that neighborhood. Throughout the course of its existence, it was at somewhat roughly that proportional level.

Mr. WATT. Okay. I just wanted all that to be in the record because, I mean, you know, we're constantly doing cost/benefit analyses. It seems to me that this is one of those occasions that, while we're not being scientific about it, that it's important for us to make it very clear to future Committees and Congresses that we view ACUS as being a very cost-effective agency. And $3 million, if you're saving substantial cost in paperwork and administrative burden and getting substantial benefits out of what ACUS does, is a minuscule amount of money when juxtaposed against the benefit that we get out of it.

That's the point I'm trying to drive home, and I don't want this hearing to end without having that unequivocally in the record. If anybody wants to argue with it, I want that from the witnesses, but—nobody seems to be arguing with it, so I'm going to do like the Chairman does when he administers the oath: Let the record show that everybody is nodding in affirmative agreement with the statements that I just made.

And with that, I'm happy, and I'll yield back, Mr. Chairman.

Mr. CANNON. Thank you.

Let me just add my view that ACUS is a remarkably cost-effective tool for governing ourselves, and that while I suspect that neither of us will be back on this Committee or directing this Committee next cycle, we will both be advocates for ACUS and for change. I am certainly concerned about who does Chair this Committee, and I'm hoping that we get someone—we've talked to several people who might end up doing that—who would recognize the importance of what we would be doing with this study and how we can translate that into law.

I'd like to ask unanimous consent to introduce into the record this memorandum from the Congressional Research Service from Mr. Rosenberg and Mr. Halstead, which its subject is the comparison of the duties and objectives of the Office of Management and Budget and the Administrative Conference of the United States with respect to the assessments of executive agency performance in the administrative process. I think that that is a valuable addition, especially in conjunction with the questions Mr. Watt asked.

[The information referred can be found in the Appendix.]

Mr. CANNON. I want to, again, thank the witnesses for being here, and the hearing will now be adjourned.

[Whereupon, at 4:23 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

LETTER FROM THE AMERICAN BAR ASSOCIATION SUBMITTED BY THE HONORABLE CHRIS CANNON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH, AND CHAIRMAN, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

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Pursuing Justice

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November 14, 2006

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

The Honorable Melvin L. Watt
Ranking Member
Subcommittee on Commercial and Administrative Law
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Re: Hearing on "The Administrative Law, Process and Procedure Project for the 21st Century"

Dear Chairman Cannon and Ranking Member Watt:

On behalf of the American Bar Association ("ABA") and its more than 410,000 members, I write to advise your Subcommittee of the great interest that the ABA, particularly its Section of Administrative Law and Regulatory Practice (the "Section") and its Judicial Division's National Conference of the Administrative Law Judiciary ("NCALJ"), has in the subject of today's scheduled hearing on "The Administrative Law, Process and Procedure Project for the 21st Century". The Project is a very important and worthwhile endeavor and it is our hope that we can work with you and your Subcommittee on the various key administrative law and rulemaking reforms contemplated by the Project. In addition, if the Subcommittee holds additional hearings on the Project or any other administrative law reform issues in the future, the ABA and the Section would welcome the opportunity to testify. As the Chair of the Section, I have been authorized to express the ABA's views on this important subject and request that this letter be included in the official record of today's hearing.

The ABA, including the Section of Administrative Law and Regulatory Practice and NCALJ, has a longstanding interest in reforming and improving the overall administrative law and rulemaking process, including the seminal statute in this area, the Administrative Procedure Act (APA). Towards that end, the ABA has adopted policy on a host of issues regarding the APA over the years, including reforms in rulemaking, public information, and judicial review. In 2001, the Section completed a comprehensive review of the APA culminating in a restatement of administrative law.[1] The most recent ABA policy pertaining to the APA is a resolution proposing

[1] American Bar Association Section of Administrative Law and Regulatory Practice, *A Blackletter Statement of Federal Administrative Law*, 54 ADMIN. L. REV. 17 (2001).

amendments to some sections of the APA relating to adjudication. We request that your Subcommittee give due consideration to this proposed amendment as you continue work on your Project. Below we have highlighted some issues of pressing concern to the ABA with regard to administrative law and rulemaking. These include: amendment of the adjudication provisions of the APA, reauthorization and appropriation of funds for the Administrative Conference of the United States, and creation of the "Administrative Law Judge Conference of the United States."

1. Proposed Changes in APA Adjudication

The rulemaking, public information, and judicial review provisions of the APA apply to all federal agencies (with specific exceptions). However, this is *not* the case with the adjudication sections of the APA (primarily sections 554, 556 and 557). These sections presently apply only to a small subset of the subject matter of federal agency adjudications: Social Security Act disability, old-age and survivors benefits claims, Medicare claims, labor law cases, and certain hearings conducted by about 20 other independent regulatory agencies and other Executive Branch agencies. We call these Type A hearings.

These APA provisions guarantee basic, fundamental fairness. They provide for the right to: present evidence and confront the opponent's evidence; require an impartial decision-maker; prohibit ex parte contacts; require separation of adjudicatory from advocacy functions within the agency; and require a statement of findings and reasons. Unfortunately, however, the APA adjudication provisions do not apply under present law to a vast number of adjudications in which an evidentiary hearing is required by federal statutes. Some of the excluded hearings are cases involving immigration and asylum, veterans' benefits, government contract disputes, civil money penalties, security clearances, IRS collection disputes, and about 80 other hearing schemes. We call these Type B hearings. There is no logical reason for the distinction between Type A and Type B hearings. Yet the number of statutes calling for Type B hearings is steadily increasing while the number of statutes calling for Type A hearings remains relatively constant. The APA should apply to all adjudicatory hearings required by statute that are conducted by federal agencies.

In 2005, the ABA adopted a resolution urging Congress to apply the adjudication provisions of the APA to Type B adjudication for the first time. This ABA policy, attached as Appendix A, includes draft legislative language as well as a detailed explanatory report. The ABA strongly urges the Subcommittee to support the APA reforms outlined in this resolution.

Although the ABA's proposal would subject Type B hearings to the adjudication provisions of the APA, one important part of the existing APA would *not* be applied to Type B hearings under our proposal. Specifically, these hearings would not be conducted by administrative law judges ("ALJs"). In an ideal world, ALJs would preside in all hearings required by federal statutes, but this does not appear to be feasible at this time. Nonetheless, these proposed reforms would offer vastly more protection to persons litigating against federal agencies than is provided by existing law.

In addition to expanding the APA adjudication provisions to Type B hearings, the ABA's policy proposal calls for a number of other significant changes in these provisions. In particular, it: (1) mandates the adoption of a code of ethics for all administrative presiding officers, whether they serve in Type A or Type B hearings; (2) provides protection for full-time Type B presiding officers

against dismissal without good cause; (3) expands the opportunity to seek a declaratory order; and (4) clarifies various definitions in the existing Act that have caused confusion – in particular, the definition of a "rule."

The drafters of the APA wanted to achieve uniformity of procedure in federal administrative law. They achieved that goal with respect to rulemaking, judicial review, and freedom of information, but they did not achieve it with respect to adjudication. Since 1946, a vast number of Type B hearing schemes have emerged that fall outside the APA's protective umbrella. The ABA's recommended reforms would bring Type B hearings under the APA umbrella, which in turn would assure fair administrative procedures to generations of future litigants who find themselves in disputes with federal agencies.

2. Administrative Conference of the United States

In the Federal Regulatory Improvement Act of 2004, P. L. 108–401, Congress reauthorized the Administrative Conference of the United States ("ACUS") for fiscal years 2005, 2006, and 2007. This reauthorization comports with long-standing ABA policy supporting ACUS and its reauthorization. Specifically, the ABA adopted policy in February 1989 that calls for reauthorization of ACUS with funding sufficient to permit the agency to continue its role as the government's coordinator of administrative procedural reform. A copy of this ABA policy statement is attached as Appendix B. In our view, a revitalized ACUS could play a crucial role in the future development of the federal APA as well as the other areas of reform contemplated by your Project. Indeed, ACUS would be an ideal forum for exploring just the sort of comprehensive reevaluation of the APA and other reforms that the Subcommittee has been addressing in its Project. It could provide a vital, inclusive and prestigious adjunct to the Subcommittee's work.

ACUS was originally established in 1964 as a permanent body to serve as the federal government's in-house advisor on, and coordinator of, administrative procedural reform. It enjoyed bipartisan support for over 25 years and advised all three branches of government before being terminated in 1995. Through the years, ACUS was a valuable resource providing information on the efficiency, adequacy, and fairness of the administrative procedures used by administrative agencies in carrying out their programs. This was a continuing responsibility and a continuing need, a need that has not ceased to exist.

The ABA and its Section of Administrative Law and Regulatory Practice strongly supported the reauthorization of ACUS in 2004 and we applaud your strong leadership in both sponsoring and facilitating the passage of the legislation that made this possible. Since ACUS was reauthorized in 2004, the ABA has been honored to work with you and your staff in an effort to secure adequate funding for the reconstituted agency from Congress. As part of that effort, the ABA sent a letter to the Senate Appropriations Committee on July 18, 2006, urging them to provide funding for ACUS for fiscal year 2007 at the fully authorized level of $3.2 million. A copy of that letter is attached as Appendix C.

As the ABA explained in its correspondence to the Senate Appropriations Committee, now that Congress has enacted bipartisan legislation reauthorizing ACUS, the agency should be provided with the very modest resources that it needs to restart its operations without unnecessary delay. Unfortunately, neither the Senate nor the House Appropriations Committees have approved the

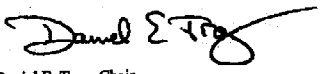
funding that ACUS needs to reconstitute its staff, secure office space and supplies, and resume its critical work. Therefore, the ABA urges you and the Subcommittee to continue your efforts to secure funding for ACUS for fiscal year 2007. In addition, whether or not ACUS receives this critical funding this year, we urge you to support legislation in the new 110th Congress that would reauthorize ACUS for fiscal year 2008 and beyond so that it can continue its vital mission.

3. Administrative Law Judge Conference of the United States

The ABA also encourages Congress to establish the proposed Administrative Law Judge Conference of the United States as an independent agency to assume the responsibility of the United States Office of Personnel Management ("OPM") with respect to Administrative Law Judges ("ALJs"), including their testing, selection, and appointment. The ABA's proposal—adopted by the ABA House of Delegates in August 2005 and attached as Appendix D—would maximize administrative efficiency by consolidating services, promoting professionalism, promoting public confidence in administrative decision-making, ensuring high ethical standards for administrative law judges, and providing necessary Congressional oversight. Therefore, the ABA strongly urges the Subcommittee to support this proposal by approving legislation that would formally establish the ALJ Conference of the United States.

Thank you for considering the views of the ABA, the Section of Administrative Law and Regulatory Practice, and NCALJ on these critical issues. We stand ready to assist you and the Subcommittee in a reexamination of the APA and with regard to the many other important reforms contemplated by the Project. We will be contacting your staff shortly to consider next steps. In the meantime, if you would like to discuss the ABA's views in greater detail, please feel free to contact me at 301/736-8000 or the ABA's senior legislative counsel for administrative law issues, Larson Frisby, at 202/662-1098.

Sincerely,



Daniel E. Troy, Chair
ABA Section of Administrative Law and Regulatory Practice

cc: Members of the Subcommittee on Commercial and Administrative Law
The Honorable Tela L. Gatewood, NCALJ
The Honorable Jodi B. Levine, ABA Judicial Division

Appendix A

RECOMMENDATION 114

ADOPTED BY THE

HOUSE OF DELEGATES

OF THE

AMERICAN BAR ASSOCIATION

February 14, 2005*

RESOLVED, That the American Bar Association urges Congress to amend and modernize the adjudication provisions of the Administrative Procedure Act and to expand certain fundamental fair hearings provisions of that Act by enacting legislation consistent with the attached draft bill entitled "Federal Administrative Adjudication in the 21st Century," dated February 2005, recognizing the administrative law judge adjudication as the preferred type of adjudication for evidentiary proceedings conducted under the Administrative Procedure Act.

*Note: The "Recommendation," but not the attached "Report," constitutes official ABA policy.

FEDERAL ADMINISTRATIVE ADJUDICATION IN THE 21ST CENTURY ACT

A BILL

To amend title 5, United States Code, to modernize the adjudication provisions of the Administrative Procedure Act and to extend certain fundamental fair hearing provisions to additional hearings required by statute.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Federal Administrative Adjudication in the 21st Century Act".

SEC. 2. DEFINITIONS.

(a) Section 551 of title 5, United States Code, is amended--

(1) by striking "and" at the end of paragraph (13);

(2) by striking the period at the end of paragraph (14) and inserting "; and"; and

(3) by adding the following at the end:

"(15) 'Type A adjudication' means adjudication required by statute to be—

"(A) determined on the record after opportunity for an agency hearing; or

"(B) conducted in accordance with sections 556 and 557 of this title;

"(16) 'Type B adjudication' means an agency evidentiary proceeding required by statute, other than a Type A adjudication;

"(17) 'agency evidentiary proceeding' means an agency proceeding that affords an opportunity for a decision based on evidence submitted by the parties orally or in writing; and

"(18) 'presiding officer' means the initial decisionmaker in a Type B adjudication.".

(b) Section 551(4) of title 5, United States Code, is amended to read as follows:

"(4) 'rule' means the whole or a part of an agency statement of general applicability designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of an agency;".

SEC. 3. TYPE A AND B ADJUDICATIONS.

Section 554 of title 5, United States Code, is amended—

(1) in subsection (a),

(A) by striking "adjudication required by statute to be determined on the record after opportunity for an agency hearing" in the matter preceding paragraph (1) and inserting "Type A adjudication and Type B adjudication";

(B) by inserting "or in a Type A or Type B adjudication" at the end of paragraph (1); and

(C) by striking paragraph (2) and redesignating paragraphs (3), (4), (5), and (6) as paragraphs (2), (3), (4), and (5), respectively;

(2) in subsection (b), by inserting "in a Type A or Type B adjudication" after "an agency hearing" in the matter preceding paragraph (1);

(3) in subsection (c),

(A) by inserting "In a Type A or Type B adjudication," at the beginning of the subsection; and

(B) by striking "on notice and in accordance with sections 556 and 557 of this title" and inserting "in accordance with the procedures for Type A adjudication specified in subsection (d) or Type B adjudication specified in subsection (e)";

(4) in subsection (d),

(A) by designating the first sentence as paragraph (2) and by striking "he" in that sentence and inserting "he or she";

(B) by designating the second sentence as paragraph (3) and redesignating the existing paragraphs (1) and (2) in that sentence as subparagraphs (A) and (B), respectively;

(C) by designating the third and fourth sentences as paragraph (4) and, in the first sentence as so redesignated, by striking all after " agency in a" and inserting "Type A adjudication may not, in that or a factually related adjudication, participate or advise in the initial or recommended decision or any review of such decision except as witness or counsel in public proceedings"; and

(D) by inserting the following at the beginning of the subsection:

"(1) A Type A adjudication shall be conducted in accordance with sections 556 and 557 of this title."; and

(5) by striking subsection (e) and inserting the following:

"(e)(1) A Type B adjudication shall be conducted in accordance with the procedures specified in this subsection.

"(2) A party may present its case or defense by oral or documentary evidence and conduct such cross-examination as may be required for a full and true disclosure of the facts. An agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

"(3) The functions of a presiding officer or an officer who reviews the decision of a presiding officer shall be conducted in an impartial manner.

"(4)(A) A presiding officer shall make the recommended or initial decision in the adjudication unless he or she becomes unavailable to the agency.

"(B) Except to the extent required for the disposition of ex parte matters as authorized by law, the presiding officer shall not consult with any person or party on a fact in issue, unless on notice and with an opportunity for all parties to participate.

"(C) A full-time presiding officer shall not be responsible to or subject to the supervision or direction of an agency employee engaged in the performance of investigative or prosecuting functions. A part-time presiding officer in an adjudication shall not be subject to the supervision or direction of an agency employee engaged in the performance of investigative or prosecuting functions in the same adjudication.

"(D) An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in an adjudication may not, in that or a factually related adjudication, participate or advise in an initial or recommended decision or any review of such decision, except as witness or counsel in public proceedings.

"(E) The requirements of this paragraph do not apply—

"(i) in determining applications for initial licenses;

"(ii) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

"(iii) to the agency or a member or members of the body comprising the agency.

"(5) The requirements of sections 556(e) and 557(d) shall apply to the proceeding and, in particular, the requirements that apply to an administrative law judge under section 557(d) shall apply to the presiding officer in the proceeding.

"(6) The decision of a presiding officer shall include a statement of findings, conclusions, and reasons, on material issues of fact, law, and discretion presented on the record. The decision may be delivered orally or in writing in the discretion of the presiding officer. In the event the decision is reviewed at a higher agency level, the parties shall have an opportunity to submit comments on the decision before the review process is completed.

"(7) An agency engaged in Type B adjudications may adopt rules that provide greater procedural protections than are provided in this section.

"(f) Unless otherwise specified, after the date of enactment of this subsection, the establishment of an opportunity for hearing in an adjudication subject to the requirements of this section shall be deemed to provide for a Type A adjudication.".

(g) Nothing in this section shall affect the requirements relating to agency or judicial review that are presently provided by statute.

SEC. 4. SUNSHINE ACT EXCEPTION.

Section 552b(c)(10) of title 5, United States Code, is amended by striking "formal agency adjudication pursuant to the procedures in section 554 of this title" and inserting "an agency evidentiary proceeding under section 554 of this title."

SEC. 5. DECLARATORY ORDERS.

Section 555 of title 5, United States Code, is amended by adding the following at the end:

"(f) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.".

SEC. 6. ISSUES RELATING TO EVIDENCE.

Section 556(d) of title 5, United States Code, is amended--

(1) by inserting "and may be entirely based on evidence that would be inadmissible in a civil trial" at the end of the third sentence; and

(2) by adding the following after the second sentence: "Evidence may be excluded, although relevant, if its probative value is substantially outweighed by the danger of confusion of the issues, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.".

SEC. 7. ALJ AND PO ETHICAL STANDARDS; REMOVAL AND DISCIPLINE OF PRESIDING OFFICERS.

(a) Title 5, United States Code, is amended by inserting after section 559 the following:

"§ 559a. Ethics and independence of Presiding Officers and Administrative Law Judges

"(a) The Office of Government Ethics shall prescribe regulations providing for appropriate ethical standards for administrative law judges and presiding officers who conduct adjudications under section 554 of this title.

"(b) The regulations shall be prescribed in accordance with section 553(b) and (c) of this title.

"§ 559b. Removal and discipline of presiding officers

"(a) A presiding officer, as defined in section 551 of this title and who is full-time, may be disciplined or removed from his or her position as presiding officer only for good cause and only after a hearing before the Merit Systems Protection Board, subject to judicial review. The hearing shall be a Type A adjudication.

"(b) The exceptions applicable to administrative law judges, relating to national security or reductions in force, shall be applicable to the discipline or removal of a presiding officer.".

(b) The analysis for chapter 5 of title 5, United States Code, is amended by inserting the following after the item relating to section 559:

"560a. Ethics and independence of Presiding Officers and Administrative Law Judges.
"560b. Removal and discipline of presiding officers."

SEC. 9. SUPERSEDING CONTRARY STATUTORY PROVISIONS.

The provisions of this act supersede existing contrary statutory provisions.

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REPORT

Introduction

The Administrative Procedure Act of 1946 (APA)[1] controls the procedures of almost all federal government administrative agencies and it has achieved nearly constitutional status. The APA is of immense importance to the governmental process and to uncounted millions of people who are impacted by federal agencies. The APA regulates *all* federal agency rulemaking and *all* judicial review of agency action (with narrowly drawn exceptions in each case). Under the Freedom of Information Act,[2] an amendment to the APA passed in 1966, *all* federal government information is covered (again with specific exceptions). The Negotiated Rulemaking Act and the Administrative Dispute Resolution Act[3] comprehensively regulate agency alternate dispute resolution.

As discussed in greater detail below, only a portion of agency adjudication is subject to the adjudication provisions of the APA. We call these "Type A adjudications." Type A adjudications are the cases in which administrative law judges (ALJs) ordinarily preside—primarily benefits cases involving Social Security, Medicare,[4] and Black Lung. In addition, Type A adjudication covers a wide array of regulatory adjudication, such as that conducted by the FTC, NLRB, SEC, and FERC. Type A adjudication also covers a variety of other programs involving civil penalties, labor, transportation, and communication. The APA provides significant protections to litigants in Type A adjudication. These include detailed provisions relating to the merit selection, independence, compensation, freedom from performance evaluation, and tenure of ALJs.

Numerous statutes that call for evidentiary hearings as part of regulatory or benefit programs are not governed by the APA's adjudication provisions. We refer to these as "Type B adjudications." Presiding officers (POs) rather than ALJs conduct these hearings. We believe it would be in the public interest to extend certain APA provisions that prescribe fundamental norms of fair adjudicatory procedure to Type B adjudication. Although all presiding officers should, of course, be selected based on merit, competence and experience, we do not propose that the APA's specific provisions relating to the selection, compensation and tenure of ALJs be extended to POs in Type B adjudication since it is not practical to do so.

This resolution attempts to modernize the adjudication provisions of the APA by accomplishing the following goals.

1. Extend certain APA procedural protections to Type B adjudication (Part I of this Report).

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[1] 5 U.S.C. §551 et. seq. The APA is cited herein without the prefatory 5 U.S.C.

[2] APA §552.

[3] 5 U.S.C. §§561 et.seq; 571 et.seq.

[4] The new prescription drug provision will undoubtedly increase the number of Medicare cases heard by ALJs. *See* Eleanor D. Kinney, *Changes in the Adjudication of Medicare Beneficiary Appeals in the New Medicare Prescription Drug Legislation: Reform or Retreat?* 29 Admin. & Regul. Law News 6 (Spring 2004) (transfer of ALJs deciding Medicare cases from Social Security to HHS).

2. Require adoption of ethical standards for ALJs and POs and protect full-time POs against removal or discipline without cause. (Part II).

3. Clarify the definitions of rule and adjudication under the APA (Part III).

4. Clarify the circumstances in which newly adopted adjudication schemes will be Type A as opposed to Type B adjudication (Part IV).

5. Clarify the APA provisions relating to evidence (Part V).

6. Clarify the ability of all adjudicating agencies to issue declaratory orders.

7. Clarify the right to obtain transcripts at agency's cost of duplication (Part VI).

8. Clarify that legislation adopted pursuant to these recommendations will supersede existing contrary statutory provisions (Part VII).

I. Extending APA procedural protections to Type B adjudication

II.

The existing APA adjudication provisions cover only Type A adjudication. *The proposal discussed in this section of the report would not change Type A adjudication or alter the various provisions in the APA that safeguard ALJ independence.*[5] We propose to *extend* certain procedural protections that are presently applicable to Type A adjudication to Type B adjudication.[6]

A. Type A adjudication under the APA

The term "Type A adjudication" covers all those hearing schemes to which the existing APA adjudicatory provisions apply.[7] These proceedings, often referred to "formal adjudication," are ordinarily conducted by ALJs.[8] They include hearings relating to Social Security, Medicare, and Black Lung benefits as well as to hearings provided by an array of regulatory agencies. There are approximately 1,350 federal ALJs.

In general, Type A adjudications are presently identified by statutes (outside the APA) that either i) explicitly require that sections 556-557 of APA apply or ii) call for adjudication "required by statute to be determined *on the record* after opportunity for an agency hearing."[9] As discussed in Part IV, the phrase "on the record" has acquired talismanic properties and most cases hold that those very words (or other clear evidence of Congressional intent) must be used

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[5] The proposals discussed in Parts II to VII apply to Type A adjudication but do not involve fundamental changes.

[6] These recommendations relate only to "adjudication" which, as discussed in part III below, means action of *particular* rather than *general* applicability. Thus, proceedings for ratemaking for an entire industry, like those in United States v. Florida East Coast Ry., 410 U.S. 224 (1973), would be treated as rulemaking, not adjudication, and would not treated as Type B adjudication.

[7] APA §§554, 556-58. See proposed §551(15) defining "Type A adjudication."

[8] Type A adjudication includes some relatively rare situations in which ALJs do not preside. First, a statute may provide that APA §§556-57 apply except that ALJs do not preside. APA §556(b). See Michael Asimow, editor, *A Guide to Federal Agency Adjudication* ¶10.03 (ABA Section of Administrative Law and Regulatory Practice, 2003) (hereinafter referred to as *Guidebook*). Second, the APA allows the agency head or heads to preside instead of ALJs, although this rarely if ever occurs. Third, in initial licensing or ratemaking cases, the APA allows the agency to designate staff members other than ALJs as presiding officers. §556(b). Type A adjudication covers hearings and procedures described in this footnote even though in fact ALJs do not preside.

[9] APA §554(a) (emphasis added). See *Guidebook* ¶3.01. Under the proposed default provision discussed in part IV below, adjudicatory hearings called for in future statutes will be Type A adjudication (even if the statute does not use the magic words "on the record") unless Congress provides the contrary.

before Type A adjudication provisions come into play. Other than the changes described in Parts II to VII of this Report, which are not fundamental in nature, we propose *no changes* in Type A adjudication since we view the system of Type A adjudication as working well.

B. Type B adjudication and informal adjudication

The recommendation proposes extension of certain fundamental procedural protections set forth in the existing APA to "Type B adjudication," meaning evidentiary proceedings required by statute other than Type A adjudication.[10] Type B adjudication covers a wide range of evidentiary proceedings that are conducted by presiding officers (POs) who are not ALJs.[11]

Although people sometimes refer to Type B adjudication as "informal adjudication," this usage is not proper. Many Type B hearings are as "formal" or even more "formal" than Type A hearings.[12] The term "informal adjudication" is properly used to describe the vast array of adjudications conducted by federal agencies with respect to which no statute requires a hearing.[13] There are literally millions of informal adjudications, ranging from economically important orders (such as refusal to grant a bank charter) to low-stakes decisions (such as allocation of campsites by federal forest rangers). Our proposals do not affect informal adjudication as defined in this paragraph.

C. Rationale

The provisions in Title V of the U. S. Code relating to rulemaking, judicial review, alternative dispute resolution, and government information apply across the board, but the APA's provisions for adjudication apply only to a portion of federal agency evidentiary proceedings.[14] This unfortunate balkanization of hearing procedures defeats the purpose of the drafters of the APA who wished to achieve greater uniformity and to provide basic fair-hearing norms in most agency adjudication.[15]

A 1992 study by ALJ John H. Frye III (based on 1989 data) identified about 83 case-types (involving about 343,000 cases annually) of Type B adjudication.[16] Frye identified 2,692

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[10] See proposed APA §§551(16) and (17).

[11] In practice, numerous titles are used to describe POs, but we used the generic term PO to include all such presiders. See proposed APA §551(18).

[12] Most Type A hearings are Social Security cases which are conducted in a non-adversarial, relatively informal fashion.

[13] The term "informal adjudication" is sometimes used to describe Type B proceedings that are conducted informally but we believe that the term "informal adjudication" should be reserved for the vast array of adjudicatory proceedings as to which no statute requires an evidentiary hearing.

[14] APA §§555 and 558 apply to all adjudications but provide protections that fall far short of those provided in Type A adjudication or the protections we propose should be applicable to Type B adjudication. See *Guidebook* ¶¶9.04, 9.06.

[15] Jeffrey S. Lubbers, *APA Adjudication: Is the Quest for Uniformity Faltering?* 10 Admin. L. J. 65 (1996); Cooley R. Howarth, *Restoring the Applicability of the APA's Adjudicatory Procedures*, 56 Admin. L. Rev. – (2004); Attorney General's Manual on the APA 9 (1947).

[16] John H. Frye III, *Survey of Non-ALJ Hearing Programs in the Federal Government*, 44 Admin. L. Rev. 261, 264 (1992). Frye eliminated 46 case types that showed a caseload of less than one case per year. See also Paul Verkuil et. al., *The Federal Administrative Judiciary*, Vol. 2 [1992] ACUS Rec. & Rep. 779, 788-90, 843-73. In

POs. Of the 83 case-types, 15 accounted for 98% of the total. The largest Type B category is deportation cases. There are a substantial number of law enforcement cases, including civil penalties administered by numerous agencies,[17] as well as passport denials or security clearance disputes. Type B adjudication includes many benefit cases such as veterans' benefits and Medicare Part B cases decided by employees of insurance carriers. A substantial number of cases deal with economic matters (farm credit, public contract disputes, bid protests, or debarment of contractors) and federal employment relationships (such as those administered by the Merit Systems Protection Board).

In 2002, Raymond Limon updated Frye's study.[18] Limon found 3,370 Type B POs, about a 25% increase from 1989 figures. In contrast, there are 1,351 ALJs in 29 different agencies (a 15% increase).[19] Frye reported 393,800 Type B proceedings each year; Limon reported 556,000 (a 41% increase).[20]

POs may be full-time decisionmakers or may be agency staff members who engage in part-time judging along with other tasks.[21] Frye found that full-time POs decide about 90% of the Type B cases (but part-time POs decided cases in 34 of the 83 case-types, mostly the less active ones).[22] Most of the full-time POs are lawyers but most of the part-time POs are not lawyers.[23]

Based on the criteria set forth in Part IV, it would be desirable to convert many of the existing systems of Type B adjudication to Type A adjudication. However, it is unlikely that Congress will be persuaded to do so in the foreseeable future. Thus, our proposal recognizes that

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comparison to the 343,000 Type B adjudications, the ACUS study estimated that there were about 300,000 Type A adjudications per year in the late 1980's.

[17] Under the Clean Water Act. EPA can impose a "class 1 civil penalty" ($10,000 per violation up to $25,000 maximum) or a "class 2 civil penalty" ($10,000 per violation with a maximum of $125,000). A class 2 penalty must follow "notice and opportunity for a hearing on the record in accordance with section 554 of Title 5." A class 1 penalty also requires notice and a hearing but "such hearing shall not be subject to section 554 and 556 of Title 5 but shall provide a reasonable opportunity to be heard and present evidence." 33 U.S.C.A. §1319(g)(2). Thus Class 2 penalties call for Type A adjudication but Class 1 penalties call for Type B adjudication. For a thorough treatment of civil penalties and Type B adjudication, see William F. Funk, *Close Enough for Government Work?—Using Informal Procedures for Imposing Civil Penalties*, 24 Seton Hall L. R. 1 (1993).

[18] Office of Administrative Law Judges, *The Federal Administrative Judiciary Then and Now—A Decade of Change 1992-2002* (Dec. 23, 2002).

[19] Limon stated that in 1992 there were 1167 ALJs; in 2002, there were 1351 ALJs. Limon 3, n.4. During much of the period between the Frye and Limon reports, the hiring of ALJs was frozen. But for the freeze, the number of ALJs would undoubtedly have expanded more rapidly.

[20] Numerous recent statutes call for Type B adjudication. For example, a recently enacted statute provides for "collection due process" (CDP) hearings by the IRS. IRC §§6320, 6330. The IRS now conducts about 30,000 CDP hearings annually and the number is rising steadily. CDP hearings appear to be Type B adjudication although numerous issues about the nature of CDP hearings and judicial review thereof are at present unresolved. See Bryan T. Camp, *Tax Administration as Inquisitorial Process and the Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998*, 56 Florida L. Rev. 1, 117-28 (2004); Leslie Book, *The Collection Due Process Rights: A Misstep or Step in the Right Direction*, 41 Houston L. Rev. – (2004).

[21] Some part-time POs are not agency staff members; they may be retired judges or academics who are called upon by the agency from time to time as their particular expertise is needed.

[22] Frye found that there were 601 full-time POs and 2130 part-time POs. However, full-time POs decided about 90% of the Type B cases. Frye 349-50.

[23] Frye 349. Limon found that of 3370 POs, only 1370 were lawyers. However, of the 601 full-time POs, 438 were lawyers.

second-best is better than nothing at all. It is intended to insure fundamental, baseline procedural protection in the large universe of Type B adjudication.[24] In practice, so far as we can determine, such protections are normally provided in existing Type B adjudication schemes. Nevertheless the public deserves to be guaranteed that such protections will always be provided through generally applicable and accessible APA provisions, instead of the existing maze of due process requirements and situation-specific statutes and procedural regulations.

D. Meaning of "evidentiary proceeding"

Our proposal recognizes and distinguishes three types of federal adjudication. Type A adjudication refers to the set of evidentiary hearings usually conducted by ALJs and is unaffected by our proposal.[25] Type B adjudication refers to evidentiary hearings required by statute that are conducted by POs. Our proposal would impose a set of procedural requirements on Type B adjudication. Informal adjudication entails decisions by federal agencies with respect to which no statute calls for a hearing. Our proposal does not affect informal adjudication (except to make clear that it is possible to issue a declaratory order through informal adjudication—see Part VI).

As discussed in Part IV, there is considerable case law that distinguishes Type A from Type B adjudication. Unfortunately, this case law is in conflict. Our proposal does not attempt to resolve this conflict but assumes that the line between Type A and Type B would continue to be drawn under existing law. (Part IV of our proposal would clarify the Type A/Type B distinction for statutes adopted in the future). We discuss here the problem of distinguishing Type B adjudication from informal adjudication.

Type B adjudication, as defined in proposed §551(16), means "an agency evidentiary proceeding required by statute, other than Type A adjudication."[26] Under proposed §551(17), the term "agency evidentiary proceeding" means "a proceeding that affords an opportunity for a decision based on evidence submitted by the parties orally or in writing." As provided in new §551(18), a "presiding officer" conducts Type B adjudication. Thus a Type B proceeding will

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[24] New provisions in California's APA that were enacted in 1995 call for a scheme similar to this proposal. The California statute preserved a system of Type A adjudication that relies on central panel ALJs. It then provides for an "administrative adjudication bill of rights" for Type B adjudication. See generally Michael Asimow, *The Influence of the Federal Administrative Procedure Act on California's New Administrative Procedure Act*, 32 Tulsa L. J. 287 (1996).

[25] *See* note 16 which observes that a few classes of Type A adjudication are not heard by ALJs.

[26] The definition excludes from Type B adjudication the types of cases already excepted from Type A adjudication by §554(a) with some modifications: (1) a matter subject to a subsequent trial of the law and the facts de novo in a court or in a Type A or Type B adjudication; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; or (6) the certification of worker representatives.

We strike out an existing exemption: "~~(2) the selection or tenure of an employee other than an ALJ.~~" Hearings required by statute that concern the tenure of government employees would normally be classified as Type B adjudication. If any statute provides for evidentiary hearings relating to selection of employees, these would generally be Type B hearings also. Hearings relating to the tenure of ALJs would continue to be Type A adjudication. We propose that disputes concerning the tenure of Type B POs should also be Type A adjudication. We propose to strike out the existing exemption because hearings relating to selection and tenure of federal employees should be included in the APA's provisions for Type A or B adjudication. See Part II.

always be identified by the presence of a federal statute (other than the APA) that calls for an evidentiary proceeding.

Federal statutes frequently call for evidentiary "hearings" that are not Type A adjudication. The definition of Type B adjudication captures these proceedings.[27] Some statutes use terms other than "hearing" to describe such proceedings but the intention of the statute is to call for an "evidentiary proceeding."[28] The term "evidentiary proceeding" covers hearings required by statute even if all of the evidence is submitted in writing rather than orally, so long as the decisionmaker is limited to considering only record evidence. The term includes non-adversarial, inquisitorial hearings in which the Government is not represented, such as the hearings conducted by the Board of Veterans' Appeals (just as Type A adjudication includes non-adversarial Social Security hearings).[29]

The term "evidentiary proceeding" does *not* include statutory provisions calling for notice and comment-type procedures (even if applicable to adjudication) where such procedures do not limit the decisionmaker to consideration only of the evidence in the record.[30] Nor does it include so-called "hearings" in which the public is invited to appear and make statements (such as often occurs with respect to various forms of land use decisions),[31] informal inquiries, or investigatory or settlement-oriented hearings (meaning hearings that can be followed by another de novo administrative review or de novo judicial review to finally resolve the matter).[32]

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[27] For example, in railroad unemployment insurance cases, an employee "shall be granted an opportunity for a hearing before a referee." 35 USC §355. A federal government employee claiming workers compensation "is entitled to a hearing on his claim before a representative of the Secretary." 5 USC §8124(b)(1). In Agriculture Department disputes, there is a "right to appeal an adverse decision for an evidentiary hearing of a hearing officer." 7 USC §6996(a). Persons who are subject to IRS collection activities have "a right to a hearing." IRC §6330(a)(1).

[28] In immigration cases, the statute states that an Immigration Judge (IJ) "shall conduct proceedings for deciding the inadmissibility or deportability of an alien." In context, it is clear that the IJ is to conduct an evidentiary proceeding. For example, an alien "shall have reasonable opportunity to present evidence and cross examine witnesses presented by the government." The IJ is authorized to administer oaths, receive evidence, and issue subpoenas; the IJ must rule on evidentiary objections and provide findings and reasons for decisions. 8 USC §1229a(1)(a)(1), (b)(1), (4)(B); 8 CFR §240.1(c). The Contract Disputes Act provides that a board of contract appeals shall "provide to the fullest extent practicable informal, expeditious, and inexpensive resolution of disputes and shall issue decisions in writing." A member may administer oaths, authorize depositions, and subpoena witnesses for taking of testimony. Again, the context makes clear that an evidentiary hearing is intended. 41 USC §§607(e), 610. We understand that the existing system of public contract dispute resolution already meets all requirements of Type B adjudication.

[29] 38 USC §§7104(a), 7107(b). BVA hearings are informal and non-adversarial. See 38 CFR §20.700(c).

[30] See 16 USC §1456(c)(3)(A) concerning licensing decisions for activities within the coastal zone. The Secretary of Commerce can override a state's objection to the issuance of a federal license or permit after finding the activity consistent with goals and objectives of the Coastal Zone Management Act or necessary in the interests of national security. The Secretary must first provide an opportunity for the state and permit applicant to submit detailed comments. Though the regulations implementing this provision establish detailed appellate-like procedures for the conduct of the Secretary's inquiry, the statute indicates no requirement for an evidentiary proceeding as the Secretary is not limited to considering only the data contained in the written comments submitted by the parties.

[31] See, e.g., Buttrey v. United States, 690 F.2d 1170, 1174-83 (5th Cir. 1982) ("opportunity for public hearing" does not trigger APA formal adjudication).

[32] Present section 554(a)(1) contains an exception for "a matter subject to a subsequent trial of the law and the facts de novo in a court." We propose to add the words "or in a type A or Type B adjudication." We intend thereby to make clear that the requirements for Type B adjudication will not apply where a "hearing" required by statute can be followed by another de novo trial of the law and facts, whether it takes place in an Article III court or before some administrative tribunal or Article I court. In short, a litigant gets only one Type B or Type A administrative proceeding, not two. (For this purpose, we do not consider the remote likelihood that the agency heads or other

It would be possible to extend Type B adjudication to evidentiary proceedings called for by the Due Process clause of the 5th Amendment. We do not propose this because it would be difficult to decide which due process cases call for evidentiary proceedings and which ones call for some sort of interaction that is less formal than an evidentiary proceeding.[33] Due process cases use an ad hoc balancing test to decide what procedures are applicable[34] and thus resist the sort of rigidity that the proposed statutory test would entail.

It would also be possible to extend the Type B adjudication concept to evidentiary proceedings called for by *agency procedural regulations* rather than by statutes.[35] We do not propose this, however, because it would create perverse incentives. It might discourage agencies from voluntarily adopting hearing procedures through their regulations when they are not required to do so. Also, it might encourage agencies to dispense with hearing procedures now called for by regulations. Agencies should not be discouraged from providing procedural protections that they are not required to provide.[36]

E. APA provisions applicable to Type B adjudication

Under proposed APA §554(e), certain provisions of the existing APA will apply to Type B adjudication:

- Timely notice and right to submit settlement offers;[37]
- The right to present a case by oral or documentary evidence and to conduct cross examination when required for a full and true disclosure of the facts;[38]

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reviewing authority can call for a de novo hearing after the decision of an ALJ or a PO as constituting a subsequent de novo trial).

[33] *See, e.g.*, Cleveland Bd. of Education v. Loudermill, 470 U.S. 532 (1985) (procedures required before public employee is discharged); Goss v. Lopez, 419 U.S. 565 (1975) (procedures required before suspending child from school for ten days or less).

[34] Mathews v. Eldridge, 424 U.S. 319 (1976).

[35] The VA regulations (but not a statute) provide for a hearing in connection with benefits disputes (so-called "regional office hearings"). 38 CFR §3.103(c). Such hearings are not Type B adjudication for two reasons: i) they are provided for in regulations rather than by statute, and ii) they are followed by a subsequent de novo administrative hearing provided by the Board of Veterans' Appeals. Similarly, the Equal Employment Opportunities Commission provides hearings for federal employees who allege prohibited discrimination but such hearings are authorized by regulation rather than by statute. See 42 U.S.C. §2000e-16(b); 29 CFR §1614.109(a) (2003).

[36] Of course, agencies might choose to incorporate the principles applicable to Type B adjudication in their procedural regulations calling for evidentiary proceedings. It seems likely that many would choose to do so (or have already done so).

[37] Proposed APA §554 (b) and (c) apply the existing APA provisions for notice and submission of settlement proposals to Type B proceedings. See *Guidebook* ¶4.02.

[38] Proposed APA §554(e)(2) adapts language from APA §556(d): "A party may present its case or defense by oral or documentary evidence and conduct such cross-examination as may be required for a full and true disclosure of the facts." See Guidebook ¶5.07, 5.08. As in Type A adjudication, a PO would have discretion as to whether evidence should be presented orally or in writing. Similarly, a PO would have discretion whether to allow cross-examination. A PO may decide that cross-examination is not needed for a "full and true disclosure of the facts" where the issue to be resolved is not a disputed factual question that turns on credibility. As in Type A adjudication, a PO may decide that evidence that has been received in written form need not be subject to cross-examination.

Under VA regulations, no cross-examination is allowed in BVA hearings. However, the parties (presumably including the PO) may ask "follow-up questions" of the witnesses. 38 CFR §20.700(c) ("Parties to the

- Decisionmaker impartiality;[39]
- Decisionmaker independence and separation of functions;[40]
- Prohibition on ex parte contacts with decisionmakers;[41]
- The exclusive record and official notice provisions;[42] and
- the requirement of a written or oral decision containing findings and reasons. In the event that the PO's decision is reviewed at a higher agency level, the PO's decision must be disclosed to the parties who have an opportunity to comment on it prior to the higher-level decision.[43]

It is intended that the provisions for notice and hearing, decisionmaker independence, and written or oral decisions, would apply only to the initial proceeding.[44] The requirements of impartiality, separation of functions, ex parte contact, and exclusive record would apply both to the initial decision stage and to the agency review stage. We also believe that the exception from the Government in the Sunshine Act that applies to the "initiation, conduct, or disposition" of Type A adjudication should be extended to include Type B adjudication.[45]

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hearing will be permitted to ask questions, including follow-up questions, of all witnesses but cross-examination will not be permitted"). Because of the non-adversarial format of BVA hearings (meaning that the VA is not represented), there may be little occasion for cross-examination. The provision for follow-up questions should be sufficient to meet the requirements of proposed §554(e)(1). Similarly, IRS collection due process (CDP) hearings do not include cross-examination. Reg. §301.6330-1(d)(1) A-D6 ("the taxpayer or the taxpayer's representative do not have the right to subpoena and examine witnesses at a CDP hearing"). The issues in a CDP hearing would not ordinarily involve credibility conflicts so cross-examination should not be necessary.

[39] Proposed APA §554(e)(3) adapts language drawn from §556(b): "The functions of a presiding officer or an officer who reviews the decisions of a presiding officer shall be conducted in an impartial manner." See *Guidebook* ¶7.02.

[40] Proposed §554(e)(4)(A) provides that a PO shall make the recommended or initial decision unless he or she becomes unavailable. This parallels existing §554(d). Proposed §554(e)(4)(B) provides that a PO shall not consult any person or party ex parte on a fact in issue. This parallels existing §554(d)(1). Proposed §554(e)(4)(C) prohibits command influence. It parallels existing §554(d)(2). The proposed command influence provision applies only to full-time POs. It would be impracticable to prohibit command influence in the case of part-time POs who engage in investigation or prosecution functions in other cases and are supervised by staff members who engage in such functions. Instead, we propose that a part-time PO not be supervised by a person serving as prosecutor or investigator in the same adjudication that the PO is deciding. We seek to avoid extra costs or disruption of existing structures, and we do not wish to compel agencies to reorganize themselves. Finally, §554(e)(4)(D) parallels the existing provision for separation of functions; it prohibits agency prosecutors or investigators in a case from participating or advising in the decision of that case. See *Guidebook* ¶7.06.

[41] Proposed APA §554(e)(5) incorporates the provisions of existing APA §557(d). See *Guidebook* ¶7.04.

[42] Proposed APA §554(e)(5) also incorporates APA §556(e): "The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision. . . . When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary." See *Guidebook* ¶7.08.

[43] Proposed APA §554(e)(6) requires a PO's decision to include
"a statement of findings, conclusions, and reasons, on material issues of fact, law, or discretion presented on the record. The decision may be delivered orally or in writing in the discretion of the" PO. This provision modifies language in existing APA §557(c). See *Guidebook* ¶6.02. We understand that some POs deliver oral decisions. We did not wish to compel a change in this practice by requiring written decisions. We also understand that in some Type B proceedings, POs write recommended decisions that are not disclosed to the parties until after the agency review phase is completed. Our proposal would change this practice.

[44] Normally the initial proceeding would be conducted by a PO but these requirements should also apply if the initial proceeding is conducted by the agency heads or other officials.

[45] 5 USC §552b(c)(10).

Numerous provisions of the existing APA will *not* apply to Type B adjudication unless required by statute (or by agency rule). These include:

- The various provisions relating to the hiring, compensation, rotation, evaluation and discharge applicable to ALJs.[46]
- Provisions relating to evidence and burden of proof.[47]
- Various provisions relating to review of initial decisions.[48]
- The right to an award of attorney's fees under the Equal Access to Justice Act.[49]

Judge Frye's report confirms that Type B adjudication is already conducted in accordance with the requirements of proposed section 554(e) in almost all cases. Therefore, the adoption of these baseline procedural protections should not significantly change the way that federal agencies conduct Type B adjudication. These provisions will not increase the costs of conducting Type B adjudication or cause delays or confusion or require costly agency reorganizations. Our intention is to assure that litigants will receive fundamental procedural protections in Type B adjudication without requiring restructuring of existing hearing schemes.

II. Ethical standards and protection against reprisal

Proposed §559a requires the Office of Government Ethics to adopt ethical standards for all federal ALJs and POs. This proposal implements Resolution 101B, adopted August 6, 2001, in which the ABA recommended that members of the administrative judiciary be held accountable under appropriate ethical standards adapted from the ABA's Model Code of Judicial Conduct in light of the unique characteristics of particular positions in the administrative judiciary.

The objective of Resolution 101B, and of proposed §559a, is to assure that both ALJs and POs be held accountable to appropriate ethical standards. These rules should be based on the ABA Model Code of Judicial Conduct as a starting point, taking account of the unique characteristics of particular positions of ALJs and POs. The rules should also consider the codes of ethics adopted by groups such as NCALJ and the 1989 Code of Conduct for Administrative Law Judges, and might include particular standards adapted to the unique characteristics of various positions held by ALJs and POs, for part-time and full-time POs, or for lawyers and non-lawyers.[50]

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[46] 5 U.S.C. §§3105, 7521, 5372, 3344, 1305. See *Guidebook* Chapter 10.

[47] §556(d). See *Guidebook* ¶5.03 to 5.05. In our view, it is not necessary to incorporate the APAs provisions relating to evidence and burden of proof in order to insure fair procedure in Type B adjudication. In particular, we did not wish to impose the *Greenwich Collieries* decision on agencies conducting Type B adjudication unless they choose to adopt it. Director, Office of Workers' Compensation Programs v. Greenwich Collieries, 512 U.S. 267 (1994); *Guidebook* ¶5.033.

[48] APA §§557(b), (c). See *Guidebook* ¶6.03. Again, we did not believe it necessary to incorporate these detailed provisions to achieve fair procedures in Type B adjudication.

[49] See *Guidebook*, chapter 11. We would not be opposed to extending EAJA to Type B adjudication but do not recommend it at this time in the interests of minimizing the budgetary impact of our proposal.

[50] The ABA's Model Code of Judicial Conduct stresses that "anyone, whether or not a lawyer, who is an officer of a judicial system and performs judicial functions...is a judge within the meaning of this Code."

Also in keeping with Resolution 101B, proposed section 559b provides that full-time POs shall be removed or disciplined only for good cause and only after a hearing to be provided by MSPB under the standards of Type A adjudication, subject to judicial review.[51] Section 559b is also based on ABA Resolution 101B.[52] POs should be protected from negative consequences for engaging in ethical and independent decisionmaking. Good cause should include violation of the ethical rules referred to in the preceding paragraph. POs should also be entitled to judicial review of such decisions.

III. Clarifying the definition of rule

At present, the APA's definition of "rule" is defective.[53] Rulemaking is the process for formulating a "rule." A "rule" is a "statement of *general or particular applicability and future effect* designed to implement, interpret or prescribe law or policy...and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefore or of valuations, costs, or accounting, or practices bearing on any of the foregoing." Adjudication is the process for formulating an "order" and an "order" means a "final disposition . . . in a matter *other than rule making* but including licensing."[54]

The statute should be amended so that agency action of *general applicability* is a rule and agency application of *particular applicability* is adjudication.[55] Under the existing definitions, for example, an FTC cease and desist order would be a rule (since it is agency action of particular applicability and future effect), but everyone treats case and desist orders as "orders" rather than as "rules" and agrees that they should be subject to adjudicatory procedure.[56] This

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[51] As provided in Recommendation IV, newly enacted hearing schemes should be Type A rather than Type B adjudication unless Congress specifically provides to the contrary. Consistent with the spirit of Recommendation IV, we recommend here that adjudication arising out of the discipline or discharge of POs should be Type A adjudication, meaning that such cases would be heard by the MSPB's ALJs rather than its POs. Of course, the same exceptions presently applicable to hearings to remove ALJs (relating to national security or to reductions in force) would also apply to removal of POs. 5 USC §7521(b)(A) and (B), referring to §7532 and §3502. A full-time PO would be treated as such even if the official had limited incidental duties in addition to judicial responsibilities in evidentiary hearings.

[52] The 2001 resolution made clear that, for this purpose, the administrative judiciary includes all individuals whose exclusive role in the administrative process is to preside and make decisions in a judicial capacity in evidentiary proceedings, but does not include agency heads, members of agency appellate boards, or other officials who perform the adjudicative functions of an agency head.

[53] See *Guidebook* ¶1.04; Ronald M. Levin, *The Case for (Finally) Fixing the APA's Definition of "Rule,"* 56 Admin. L. Rev. – (2004).

[54] APA §§551(4) to (7).

[55] The recommendation also deletes the words "and includes the approval or prescription for the future of rates, wages, corporate or financial structure or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing." The effect of the latter change is that ratemaking of general applicability would be rulemaking but ratemaking of particular applicability would be adjudication. See United States v. Florida East Coast Ry., 410 U.S. 224 (1973) (holding that setting of industry-wide railway rate should be treated as informal rulemaking under the APA).

[56] As under existing law, a rule that in practice would apply to only a single person is still a rule (rather than an adjudication) as long as it is stated in general terms and it is theoretically possible that it could apply to additional persons. An agency's grant of exemption from a rule to a particular person would be an adjudication.

proposal is already ABA policy. It was part of a set of recommendations approved in 1970 by the HOD.

A further clarifying amendment removes the words "and future effect" from the definition of "rule." This revision would make clear that the APA applies to retroactive rules. Under Supreme Court case law,[57] an agency may not adopt a retroactive rule that has the force of law unless Congress explicitly authorizes the agency to do so. When agencies do adopt retroactive rules with the force of law, they should be adopted with appropriate notice and comment procedures.[58] In addition, interpretive rules often have retroactive effect; the APA's definition of "rule" should also cover retroactive interpretive rules.

IV. Type A Adjudication: Guidelines for Congress and a Default Provision When Statute is Unclear

In June, 2000, the ABA House of Delegates adopted Resolution 113, a recommendation sponsored by the Judicial Division, that set forth criteria Congress should consider in deciding whether a new adjudicatory scheme should employ Type A adjudication. A second part of the resolution created a default provision that would sweep newly adopted adjudicatory schemes into Type A unless Congress provided otherwise. This 2000 resolution is germane to the present set of recommendations. If Congress takes up the issues of Type A and B adjudication, it would naturally consider this recommendation at the same time.[59]

A. Criteria for deciding whether new program should employ Type A adjudication

When Congress sets up a new program involving adjudications with opportunity for hearing, it should consider and explicitly determine whether the new program will be Type A adjudication.

Congress should consider the following factors (each of which points toward Type A rather than Type B adjudication):

a. Whether the adjudication is likely to involve a substantial impact on personal liberties or freedom, whether the orders carry with them a finding of criminal-like culpability or would have substantial economic effect, or whether the orders involve determinations of discrimination under civil rights or analogous laws.

b. Whether the adjudication would be similar to, or the functional equivalent of, a current type of Type A adjudication.

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[57] Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988). We do not propose to change the rule of the *Georgetown* case but only to provide that the APA's definition of rule applies when an agency is authorized to adopt a retroactive rule or when it adopts a retroactive interpretive rule.

[58] See ABA House of Delegations Resolution (Feb. 1992) stating that "retroactive rules are and should be subject to the notice and comment requirements of Section 553 of the Administrative Procedure Act."

[59] Because of the various changes in statutory nomenclature embodied in this recommendation and report (such as adoption of the terms Type A and B adjudication), we propose non-substantive changes in the 2000 recommendation.

c. Whether the adjudication would be one in which adjudicators ought to be lawyers.[60]

B. Default provision

Congress should amend the APA to provide prospectively that absent a statutory requirement to the contrary, in any future legislation that creates opportunity for an adjudicatory evidentiary hearing, such hearing shall be Type A adjudication.[61]

C. Rationale

Under the existing APA, Type A adjudication exists only when "adjudication [is] required by statute to be determined on the record after opportunity for an agency hearing…"[62] Where a statute calls for an evidentiary hearing but does not use the magic words "on the record," it has been difficult to decide whether the resulting adjudication is Type A or Type B. The case law is conflicting.[63] ABA Resolution 113, already adopted by the HOD, calls for Congress to carefully consider this issue when it adopts future legislation that creates opportunity for an adjudicatory evidentiary hearing. The Resolution provides a useful list of factors that Congress should consider when it makes that decision. The resolution also calls for a prospective-only default rule. Under that rule, future legislation that creates opportunity for an adjudicatory evidentiary hearing will require Type A adjudication unless Congress provides the contrary.

This default rule will nudge federal administrative law in the direction of greater use of ALJs and Type A adjudication. This will result in enhancement in the impartiality and skill of adjudicatory decisionmakers and an accompanying improvement in the fairness and quality of decisions. Generally, agencies are well aware of legislation that affects them and the burden should be on the agencies to inform Congress at the time it considers a new adjudicatory scheme if the agency believes that Type A is inappropriate.[64]

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[60] These factors are substantially the same as those in ACUS Recommendation 92-7, 57 Fed. Reg. 61760 (Dec. 29, 1992).

[61] Resolution 113 states that such hearings "shall be subject to 5 USC §§554, 556, and 557." The present Recommendation used the term Type A adjudication which embodies the sections of the APA referred to in Resolution 113. No change in meaning is intended.

[62] APA §554(a).

[63] See *Guidebook* ¶3.01; Gary Edles, "An APA-Default Presumption for Administrative Hearings: Some Thoughts on "Ossifying" the Adjudication Process," 55 Admin. L. Rev. 787, 796-804 (2003); Cooley R. Howarth, *Federal Licensing and the APA: When Must Formal Adjudicative Procedures Be Used?* 37 Admin. L. Rev. 317 (1985); Cooley R. Howarth, *Restoring the Applicability of the APA's Adjudicatory Procedures*, 56 Admin. L. Rev. – (2004). Three distinct lines of cases have emerged. Some cases conclude that Type A adjudication is intended despite absence of the words "on the record." Steadman v. SEC, 450 U.S. 91, 96 n.13 (1981); Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 875-78 (1st Cir. 1978); Lane v. USDA, 120 F.3d 106 (8th Cir. 1997). Other cases require the use of the words "on the record" or some other clear statement of Congressional intention. City of West Chicago v. NRC, 701 F.2d 632, 644-45 (7th Cir. 1983); RR Comm'n of Texas v. United States, 765 F.2d 221, 227-29 (D.C. Cir. 1985). And still others accord *Chevron* deference to the agency's determination that the statute does not call for Type A adjudication. Chemical Waste Mgmt., Inc. v. EPA, 873 F.2d 1477, 1480-83 (D.C. Cir. 1989).

[64] According to the Report accompanying Resolution 113, the default rule would apply to "any new adjudication that Congress creates with an opportunity for a hearing." See Edles, 812-14.

V. Issues relating to evidence

A. Residuum rule

The "residuum rule" (followed in some states) requires that a decision must be supported by at least some non-hearsay evidence. This rule creates many problems, such as requiring the judge to make constant hair-splitting rulings about hearsay and its many exceptions, and requiring the parties to object at some appropriate time that the residuum rule applies in order to preserve the issue on appeal. It is generally believed that *Richardson v. Perales*[65] rejected the residuum rule at the federal level but this should be made clear in the statute.

The proposed amendment to APA section 556(d) accomplishes this result by adding the italicized language: "A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party, *and may be entirely based on evidence that would be inadmissible in a civil trial.*"

B. Evidence—FRE 403

In general, the Federal Rules of Evidence are not applicable to administrative agencies. The existing APA provides that an agency "as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence."[66] An ACUS study indicated that this provision was inadequate because it did not give ALJs adequate case management tools. The consultant's survey of ALJs indicated that they believed they lacked power to exclude evidence that was patently unreliable or whose probative value was so low that it would not justify the amount of hearing time it would require.

The ACUS study declared: "This is a serious disadvantage. The delay and high cost of the administrative process poses a severe threat to the quality of justice available in our modern administrative state. Admission and cross-examination of a large volume of low quality evidence contributes significantly to the extraordinary length and attendant high cost of many agency adjudications."[67]

As a result, ACUS recommended that agencies adopt evidentiary rules allowing decisionmakers to exclude evidence under Federal Rule of Evidence 403.[68] That rule provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of . . . confusion of the issues . . . or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[69] We agree and recommend that section 556(d) of the APA be amended to specifically permit ALJs to exclude evidence based on the FRE 403 standard (as modified slightly to take account of the differences between administrative and judicial proceedings).

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[65] 402 U.S. 389 (1971).
[66] APA §556(d).
[67] Richard J. Pierce, Jr., *Use of the Federal Rules of Evidence in Federal Agency Adjudications*, 39 Admin. L. Rev. 1, 23 (1987).
[68] ACUS Recommendation 86-2, 51 Fed. Reg. 25642 (July 16, 1986).
[69] The elision in this quotation is for the words "or misleading the jury" and "danger of unfair prejudice," which seem inapplicable to the administrative process.

VI. Declaratory orders

Existing §554(e) empowers an agency to issue a declaratory order to terminate a controversy or remove uncertainty. The placement of this subsection in the existing statute implies that only an agency authorized to conduct Type A adjudication can issue a declaratory order. We believe that any agency, whether conducting Type A, Type B, or informal adjudication, should be authorized to issue a declaratory order. Therefore, we propose moving this provision to §555, which applies to agency proceedings generally.[70]

VII. Transcripts

The APA should provide that transcripts of agency proceedings (if they exist) should be available to private parties at cost of duplication. This is probably already required by §11 of the Federal Advisory Committee Act which provides: "Except where prohibited by contractual agreements entered into prior to the effective date of this act, agencies shall make available to any person, at actual cost of duplication, copies of transcripts of agency proceedings (as defined in §551(12)." It would be useful to incorporate this provision in the APA itself where it would not be overlooked. As a result, we recommend that section 556(e) be amended by adding the italicized language and deleting the stricken out language:

"The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title ~~and on payment of lawfully prescribed costs, shall be made available to the parties.~~ *Agencies shall make such transcripts available to the parties at the actual cost of duplication.* When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

VIII. Superseding contrary statutory provisions

Legislation adopted pursuant to these recommendations will supersede existing contrary statutory provisions.

Respectfully submitted,
Randolph J. May
Chair, Section of Administrative Law and
Regulatory Practice

February 2005

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[70] See Jeffrey S. Lubbers & Blake D. Morant, *A Reexamination of Federal Agency Use of Declaratory Orders*, 56 Admin. L. Rev. – (2004).

APPENDIX
(Ramseyer Rule)

I. Extending APA procedural protections to Type B adjudication

A. Definitions

Add to APA § 551 (definitions), 5 U.S.C. §551:[71]

(15) "Type A" adjudication means adjudication required by statute to be—
(A) determined on the record after opportunity for an agency hearing; or
(B) conducted in accordance with sections 556 and 557 of this title;
(16) "Type B adjudication" means an agency evidentiary proceeding required by statute, other than a Type A adjudication;[72]
(17) "agency evidentiary proceeding" means an agency proceeding that affords an opportunity for a decision based on evidence submitted by the parties orally or in writing; and
(18) "presiding officer" means the initial decisionmaker in a Type B adjudication.

B. Type B adjudication

Amend existing APA §554 so that it reads as follows:

Sec. 554. - Adjudications

(a) ***General principles.*** This section applies, according to the provisions thereof, in every case of *Type A adjudication and Type B adjudication* ~~adjudication required by statute to be determined on the record after opportunity for an agency hearing,~~ except to the extent that there is involved—

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court *or in a Type A or Type B adjudication;*[73]
(2) ~~the selection or tenure of an employee, except an administrative law judge appointed under section 3105 of this title.~~[74]
(2) proceedings in which decisions rest solely on inspections, tests, or elections;

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[71] Subsequent references to the APA will exclude the prefatory 5 U.S.C.
[72] The problem of distinguishing Type A, Type B, and informal adjudication is discussed in Parts I.A. and I.B. of the Report that follows these recommendations.
[73] In some agencies, the agency heads or a superior reviewing authority can, in theory, require a new de novo hearing of a case already heard by an ALJ or a PO to be conducted before the agency heads. We understand that this virtually never occurs in practice. The unlikely possibility of a de novo rehearing at the agency head level should not be taken into account in applying this subsection. Thus the rules relating to Type A and Type B adjudication apply to the hearing provided by an ALJ or a PO despite the remote possibility that the case could be heard anew at a higher level. For further discussion, see note 32 of the Report.
[74] This exception in the existing act becomes inappropriate in light of the adoption of the provisions relating to Type B adjudication. For further discussion, see note 26 of the Report.

(3) the conduct of military or foreign affairs functions;
(4) cases in which an agency is acting as an agent for a court; or
(5) the certification of worker representatives.

(b) *Notice.* Persons entitled to notice of an agency hearing in a *Type A or Type B adjudication* shall be timely informed of —
(1) the time, place, and nature of the hearing;
(2) the legal authority and jurisdiction under which the hearing is to be held; and
(3) the matters of fact and law asserted. ... [balance of subsection remains the same]

(c) *Settlement proposals. In a Type A or Type B adjudication,* the agency shall give all interested parties opportunity for—
(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and
(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision ~~on notice and in accordance with sections 556 and 557 of this title.~~ *in accordance with the procedures for Type A adjudication specified in subsection (d) or Type B adjudication specified in subsection (e).*

(d) *Procedures for Type A adjudication.*
(1) A Type A adjudication shall be conducted pursuant to sections 556 and 557 of this title.
(2) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he *or she* becomes unavailable to the agency.
(3) Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not —
(A) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or
(B) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.
(4) An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a ~~case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings.~~ *Type A adjudication may not, in that or a factually related adjudication, participate or advise in the initial or recommended decision or any review of such decision,* ~~decision, recommended decision, or agency review pursuant to section 557 of this title,~~ *except as witness or counsel in public proceedings.* This subsection does not apply —
(A) in determining applications for initial licenses;
(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or
(C) to the agency or a member or members of the body comprising the agency.

~~(c) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.~~ [75]

(e) ***Procedures for Type B adjudication.***

*(1) **General rule.** A Type B adjudication shall be conducted in accordance with the procedures specified in this subsection.*

*(2) **Presentation of evidence.** A party may present its case or defense by oral or documentary evidence and conduct such cross-examination as may be required for a full and true disclosure of the facts. An agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.*

*(3) **Impartiality of presiding officers and reviewing officers.** The functions of a presiding officer or an officer who reviews the decisions of a presiding officer shall be conducted in an impartial manner.*

*(4) **Agency decisional process***

(A) A presiding officer shall make the recommended or initial decision unless he or she becomes unavailable to the agency.

(B) Except to the extent required for the disposition of ex parte matters as authorized by law, the presiding officer shall not consult any person or party on a fact in issue, unless on notice and with an opportunity for all parties to participate.

(C) A full-time presiding officer shall not be responsible to or subject to the supervision or direction of an agency employee engaged in the performance of investigative or prosecuting functions. A part-time presiding officer in an adjudication shall not be subject to the supervision or direction of an agency employee engaged in the performance of investigative or prosecuting functions in the same adjudication.

(D) An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in an adjudication may not, in that or a factually related adjudication, participate or advise in an initial or recommended decision or any review of such decision, except as witness or counsel in public proceedings.

(E) The requirements of this paragraph do not apply—

(i) in determining applications for initial licenses;

(ii) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(iii) to the agency or a member or members of the body comprising the agency.

*(5) **Ex parte communications.** The requirements of sections 556(e) and 557(d) shall apply to the proceeding and, in particular, the requirements that apply to an administrative law judge under section 557(d) shall apply to the presiding officer in the proceeding.*

*(6) **Decision.** The decision of a presiding officer shall include a statement of findings, conclusions, and reasons, on material issues of fact, law, and discretion presented on the*

[75] The provision for declaratory orders is moved from §554 to §555. See VI. below.

record. The decision may be delivered orally or in writing in the discretion of the presiding officer. In the event the decision is reviewed at a higher agency level, the parties shall have an opportunity to submit comments on the decision before the review process is completed.

*(7) **Additional protections.** An agency engaged in Type B adjudications may adopt rules that provide greater procedural protections than are provided in this section.*

C. Sunshine Act exception.

Section 552b(c)(10) in the Government in the Sunshine Act provides an exception to the Sunshine Act requirements for the "initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of this title or otherwise involving a determination on the record after opportunity for a hearing." This section should be amended to make clear that the exception applies also to Type B adjudication.

II. Ethical standards and protection against reprisal

A. Ethical standards

Add new section 559a:

559a. Ethics and independence of presiding officers and administrative law judges

(a) The Office of Government Ethics shall prescribe regulations providing for appropriate ethical standards for administrative law judges and presiding officers who conduct adjudications under section 554 of this title.

(b) The regulations shall be prescribed in accordance with sections 553(b) and (c) of this title. .

B. Removal and discipline of presiding officers

Add a new section 559b:

559b. Removal and discipline of presiding officers

(a) A presiding officer, as defined in section 551 of this title and who is full-time, may be disciplined or removed from his or her position as presiding officer only for good cause and only after a hearing before the Merit Systems Protection Board, subject to judicial review. The hearing shall be a Type A adjudication.

(b) The exceptions applicable to administrative law judges, relating to national security or reductions in force, shall be applicable to discipline or removal of a presiding officer.

III. Clarification of the definition of rule

APA section 551(4) should be amended to read as follows:

(4) "rule" means the whole or a part of an agency statement of general applicability designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of an agency;

~~"rule means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefore or of valuations, costs, or accounting, or practices bearing on any of the foregoing;~~

IV. Type A adjudication: guidelines for Congress and a default provision when statute is unclear

A. Criteria for deciding whether new programs should be Type A adjudication.

When Congress creates a new program involving adjudication with opportunity for an evidentiary hearing, it should consider and explicitly determine whether the new program will be Type A or Type B adjudication.

Congress should consider the following factors (the presence of which would weigh in favor of the use of Type A rather than Type B adjudication):

a. Whether the adjudication is likely to involve a substantial impact on personal liberties or freedom, whether the orders carry with them a finding of criminal-like culpability or would have substantial economic effect, or whether the orders involve determinations of discrimination under civil rights or analogous laws.

b. Whether the adjudication would be similar to, or the functional equivalent of, a current type of Type A adjudication.

c. Whether the adjudication would be one in which adjudicators ought to be lawyers.

Please note that this provision relating to criteria for choosing between Type A and Type B adjudication is not included in the Bill language above since it is not intended to be a statutory provision.

B. Default provision.

Congress should amend the APA to provide prospectively that, absent a statutory requirement to the contrary, in any future legislation that creates an opportunity for hearing in an adjudication, such hearing shall be Type A adjudication.

V. Issues relating to evidence

Section 556(d) should be amended by adding the italicized language:

Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. *Evidence may be excluded, although relevant, if its probative value is substantially outweighed by the danger of confusion of the issues, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.* A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party *and may be entirely based on evidence that would be inadmissible in a civil trial.* [The remainder of §556(d) remains the same]

VI. Declaratory orders

Section 555 should be amended by adding thereto the following subsection:

(f) Declaratory orders. *The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.*

VII. Transcripts

Section 556(e) should be amended by adding the italicized language and striking the crossed-out language:

The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title. ~~and, on payment of lawfully prescribed costs, shall be made available to the parties.~~ *Agencies shall make such transcripts available to the parties at the actual cost of duplication.* When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

VIII. Superseding contrary statutory provisions

The provisions of this act supersede existing contrary statutory provisions.

Appendix B

RECOMMENDATION 126A

ADOPTED BY THE

HOUSE OF DELEGATES

OF THE

AMERICAN BAR ASSOCIATION

February 1989

BE IT RESOLVED, that the American Bar Association supports the reauthorization of the Administrative Conference of the United States (ACUS) and the provision of funds sufficient to permit ACUS to continue its role as the government's in-house advisor and coordinator of administrative procedural reform.

Appendix C.

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July 18, 2006

The Honorable Thad Cochran
Chairman
Committee on Appropriations
United States Senate
Washington, D.C. 20510

The Honorable Robert C. Byrd
Ranking Member
Committee on Appropriations
United States Senate
Washington, D.C. 20510

Re: Funding the Newly Reauthorized Administrative Conference of the United States for Fiscal Year 2007

Dear Chairman Cochran and Ranking Member Byrd:

On behalf of the American Bar Association ("ABA") and its more than 400,000 members nationwide, I write to express our strong support for funding the Administrative Conference of the United States ("ACUS") for fiscal year 2007 at the fully authorized level of $3.2 million. As your Committee prepares to mark up the Transportation, Treasury Appropriations Bill later this week, we urge you to provide full funding for ACUS, which was just reconstituted in the last Congress by the enactment of the "Federal Regulatory Improvement Act of 2004" (P.L. 108-401, formerly, H.R. 4917). Once it is provided with this modest funding, the agency will be able to restart its operations and then begin addressing the many important tasks that may be assigned to it by Congress, including, for example, assisting the Department of Homeland Security to consolidate the administrative processes from the more than 20 federal agencies that were included in the new Department.

ACUS was originally established in 1964 as a permanent body to serve as the federal government's in-house advisor on, and coordinator of, administrative procedural reform. It enjoyed bipartisan support for over 25 years and advised all three branches of government before being terminated in 1995. In 2004, Congress held several hearings on ACUS reauthorization, and during those hearings, all six witnesses, including Supreme Court Justices Antonin Scalia and Stephen Breyer, praised the work of the agency. The written testimony of Justices Scalia and Breyer is available on the ABA's website at http://www.abanet.org/poladv/ACUSreauthorization.html.

Following these hearings, H.R. 4917 was introduced by Rep. Chris Cannon (R-UT), Chairman of the House Judiciary Subcommittee on Commercial and Administrative Law, for the purpose of reauthorizing and resurrecting the agency. That bipartisan legislation ultimately garnered 34 cosponsors—including 18 Republicans and 16 Democrats—before being approved unanimously by the House and Senate at the end of the 108th Congress. President Bush then signed the measure into law on October 30, 2004.

At the request of Chairman Cannon, the Congressional Research Service ("CRS") prepared a short study describing the many benefits of ACUS, and a copy of the CRS Memorandum of October 7, 2004 is also available at http://www.abanet.org/poladv/ACUSreauthorization.html. As outlined by CRS, ACUS has many virtues, including the following:

•A newly-reconstituted ACUS would provide urgently needed resources and expertise to assist with difficult administrative process issues arising from the 9/11 terrorist attacks against the United States as well as other new administrative issues. The CRS Memorandum concludes that "[ACUS's] reactivation would fill the current urgent need for an expert independent entity to render relevant, cost-beneficial assistance with respect to complex and sensitive administrative process issues raised by 9/11 restructuring and reorganization efforts," including the creation of the Department of Homeland Security by consolidating parts of 22 existing agencies and the 9/11 Commission's recommendations to establish a new intelligence structure. In addition, CRS noted that ACUS could provide valuable analysis and guidance on a host of other administrative issues, including public participation in electronic rulemaking, early challenges to the quality of scientific data used by agencies in the rulemaking process, and possible refinements to the Congressional Review Act. A fully-funded ACUS could effectively address these and myriad other issues involving administrative process, procedure, and practice at a cost that is minimal when compared to the benefits that are likely to result.

•ACUS enjoys strong bipartisan support and all observers agree that it has been extremely cost-effective. As CRS also noted in its Memorandum, all six of the witnesses who testified before the House Judiciary Subcommittee on Commercial and Administrative Law agreed that during the more than 25 years of its existence, "...the Conference was a valuable resource providing information and guidance on the efficiency, adequacy and fairness of the administrative procedures used by agencies in carrying out their missions." ACUS was unique in that it brought together senior representatives of the federal government with leading practitioners and scholars of the private sector to work together to improve how our government functions. That collaboration has been sorely missed in many ways, as was so clearly brought out in the hearings. As CRS explained, ACUS produced over 180 recommendations for agency, judicial, and congressional actions over the years, and approximately three-quarters of these reforms were adopted in whole or in part. Because ACUS achieved these impressive reforms with a budget of just a few million dollars per year, CRS noted that "all observers, both before and after the demise of ACUS in 1995, have acknowledged that the Conference was a cost-effective operation."

•Before it was terminated in 1995, ACUS brought about many significant achievements. In addition to providing a valuable source of expert and nonpartisan advice to the federal government, ACUS also played an important facilitative role for agencies in implementing changes or carrying out recommendations. In particular, Congress gave ACUS facilitative statutory responsibilities for implementing a number of statutes, including, for example, the Equal Access to Justice Act, the

Congressional Accountability Act, the Government in the Sunshine Act, the Administrative Dispute Resolution Act, and the Negotiated Rulemaking Act. In addition, ACUS' recommendations often resulted in huge monetary savings for agencies, private parties, and practitioners. For example, CRS cited testimony from the President of the American Arbitration Association which stated that "ACUS's encouragement of administrative dispute resolution had saved 'millions of dollars' that would otherwise have been spent for litigation costs." CRS also noted that in 1994, the FDIC estimated that "its pilot mediation program, modeled after an ACUS recommendation, had already saved it $9 million." The CRS Memorandum provides numerous additional examples of ACUS' prior successes as well.

•ACUS' role in the regulatory process is totally separate and distinct from that of OIRA. In the past, some have suggested that ACUS' activities perhaps may duplicate some of the activities of OMB's Office of Information and Regulatory Affairs ("OIRA"). This reflects a misunderstanding of ACUS' fundamental role in the regulatory process. By virtue of its history and institutional design, ACUS is uniquely in a position to achieve bi-partisan consensus on administrative and regulatory improvements; to provide a forum for executive and independent agencies to exchange "best practices" ideas; and to bring private sector lawyers and academics together with political and career government officials to address ways to improve government operations.

OIRA is a very different type of entity that is neither inclined nor equipped to address many of the issues that ACUS has focused on. For example, there is no way that OIRA could have devoted so much time and attention to developing the ADR techniques that so many government agencies adopted. Nor does OIRA play any role in agency adjudication or judicial review issues. OIRA's principal role is to represent the President in making sure that the Administration's regulatory policy is followed. ACUS's role, on the other hand, is to be an independent catalyst for seeking to reform and improve administrative and procedural issues that necessarily tend to receive less attention in Congress or the White House in the face of what are deemed more pressing day-to-day matters.

In sum, now that Congress has enacted bipartisan legislation reauthorizing ACUS, the agency should be provided with the very modest resources that it needs to restart its operations without unnecessary delay. To accomplish this goal, we urge you to provide $3.2 million in funding for ACUS for fiscal year 2007 during your Committee's mark up of the Transportation Treasury Appropriations Bill later this week.

Thank you for considering the views of the ABA on this important issue. If you would like to discuss the ABA's views in greater detail, please feel free to contact the ABA's senior legislative counsel for administrative law issues, Larson Frisby, at 202/662-1098, or the Chair of the ACUS Task Force of the ABA Administrative Law Section, Warren Belmar, at 202/586-6758.

Sincerely,

Robert D. Evans

Robert D. Evans

cc: The Honorable Christopher S. Bond
The Honorable Patty Murray
All other members of the Senate Committee on Appropriations
The Honorable Arlen Specter
The Honorable Orrin G. Hatch
The Honorable Patrick J. Leahy
The Honorable Jeff Sessions
The Honorable Charles E. Schumer
The Honorable Jerry Lewis
The Honorable David R. Obey
The Honorable Joseph Knollenberg
The Honorable John W. Olver
The Honorable Chris Cannon

Appendix D

RECOMMENDATION 106A

ADOPTED BY THE

HOUSE OF DELEGATES

OF THE

AMERICAN BAR ASSOCIATION

August 9, 2005*

RESOLVED, that the American Bar Association encourages Congress to establish the Administrative Law Judge Conference of the United States as an independent agency to assume the responsibility of the United States Office of Personnel Management with respect to Administrative Law Judges including their testing, selection, and appointment.

*Note: The "Recommendation," but not the attached "Report," constitutes official ABA policy.

REPORT

Federal administrative law judges ("ALJ") have been members of the American Bar Association, Judicial Division, National Conference of the Administrative Law Judiciary, since 1971; this resolution renews and extends existing American Bar Association policy.[1]

The Office of Personnel Management ("OPM") is mandated to administer the ALJ program and to maintain a register of qualified applicants and test and evaluate prospective applicants.[2]. However, OPM recently closed its Office of Administrative Law Judges and has otherwise failed to adequately service the agencies and the judges under its mandate. In 2003, the functions were dispersed to other OPM divisions, without notice to the agencies or to ALJs regarding the terms of transfer. Thus, there is no central administrative office to administer the administrative law judge program at OPM, and there is no agency that provides suggestions to Congress to improve the administrative adjudication process.

The Administrative Law Judge Conference of the United States will perform those functions and enhance the independence of decision-making and the quality of adjudications of administrative law judge hearings under the Administrative Procedure Act ("APA"). The Administrative Law Judge Conference of the United States would be similar to the Judicial Conference of the United States, which provides administrative functions for Federal Article III judges, but its creation would effect no change in the current relationship between ALJs and the agencies where they serve. Rather the new Conference would assume the current responsibilities of OPM with respect to administrative law judges, including their testing, selection, and appointment.

Federal administrative law judges are appointed under 5 U.S.C.§ 3105.[3] Their powers emanate

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[1] The American Bar Association has adopted policy supporting the independence and integrity of the administrative judiciary in 1983, 1989, 1998, 2000 and 2001. Indeed, the Association's commitment to the independence of the administrative judiciary is reflected in the jurisdictional authority of the Standing Committee on Judicial Independence, which is authorized to promote this value.

[2] The classification of "administrative law judge" is reserved by OPM for the specific class of appointments made under 5 U.S.C. § 3105 and applies to all agencies:

> "The title 'administrative law judge' is the official class title for an administrative law judge position. Each agency will use only this official class title for personnel, budget, and fiscal purposes." 5 C.F.R. § 930.203b.

5 C.F.R. § 930.201 requires OPM to conduct competitive examinations for administrative law judge positions and defines an ALJ position as one in which any portion of the duties includes those which require the appointment of an administrative law judge under 5 U.S.C. 3105. ALJs can only be appointed after certification by OPM:

> An agency may make an appointment to an administrative law judge position only with the prior approval of OPM, except when it makes its appointment from a certificate of eligibles furnished by OPM. 5 C.F.R. § 930.203a. Id. § 930.203a; see also 5 U.S.C. § 5372 (2000) (providing for pay for administrative law judges, also subject to OPM approval).

[3] See also, 5 U.S.C. sec. 5372 (a) ("For the purposes of this section, the term 'administrative law judge' means an administrative law judge appointed under section 3105.")

from the Administrative Procedure Act.[4] Extensive legal experience is necessary for the position, because experience provides maturity, expertise in compiling a reliable record, first-hand knowledge with problems likely to be encountered as an administrative law judge, and intimacy with rules of evidence and procedure similar to those used in administrative hearings.[5] After reviewing the duties of the office, the Supreme Court has declared that federal administrative law judges are like other federal trial judges for tenure and compensation[6] and that ALJs are functionally equivalent to other Federal trial judges:[7]

> Cases heard and decided by ALJs involve billions of dollars and have considerable impact on the national economy. In fact, a single ALJ may handle a single case that may affect millions of people and involve billions of dollars. ALJs adjudicate cases involving a wide range of regulatory matters…

The Office of Personnel Management

The need for a separate agency to manage the ALJ program is prompted by longstanding problems with OPM's administration of the program. The APA contemplated that the Civil Service Commission (now OPM)[8] would oversee merit selection and appointment of ALJs and would also act as an ombudsman for the ALJ program but OPM has essentially abandoned that role. Section 1305 provides that for the purpose of sections 3105 (appointment), §3344 (loans), and §5372 (pay) OPM "may.. investigate, require reports by agencies, prescribe regulations, appoint advisory committees as necessary, recommend legislation, subpoena witnesses and records, and pay witness fees." Although the OPM Program Handbook, p. 4, affirms those responsibilities, OPM has seldom exercised them, except for regulations, including sometimes less-than-benign changes in selection and RIF regulations.[9]

On May 21, 1991, the National Conference of Administrative Law Judges (NCALJ)[10], in the Judicial Division of the American Bar Association, wrote to OPM, pointing out that:

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[4] See, A Guide to Federal Agency Adjudication, Michael Asimow, ed., 164 (*American Bar Association Administrative Law Section*, 2003). For example, subject to published rules of the agency, administrative law judges are empowered to administer oaths, issue subpoenas, receive relevant evidence, take depositions, and regulate the course of the hearing. These fundamental powers arise from the Administrative Procedures Act "without the necessity of express agency delegation" and "an agency is without the power to withhold such powers" from its administrative law judges. Id. The Administrative Procedure Act seeks to affirm and protect the role of the administrative law judge, whose "impartiality," in the words of the Supreme Court in *Marshall v. Jerrico*, 446 U.S. 238, 250 (1980), "serves as the ultimate guarantee of fair and meaningful proceedings in our constitutional regime."

[5] Amiel T. Sharon and Craig B. Pettibone, "Merit Selection of Federal Administrative Law Judges," 70 *Judicature* 216, 218 (1987).

[6] *Butz v. Economou*, 438 U.S. 478 (1978).

[7] *Federal Maritime Com'n v. South Carolina State Ports Authority*, 535 U.S. 743 (2002); *see* also, *Rhode Island Dept. of Environmental Management v. United States*, 304 F.3d 31(1st Cir. 2002) (finding that Department of Labor administrative law judges are functionally equivalent to Federal District Judges).

[8] Administration of the ALJ program was originally placed in the Civil Service Commission and was subsequently bifurcated to OPM and the Merit Systems Protection Board ("MSPB").

[9] See Appointment, Pay, and Removals of Administrative Law Judges, 63 Fed. Reg. 8,874 (proposed Feb.23, 1998).

[10] Now the National Conference of the Administrative Judiciary.

OPM has not taken a leadership role in the education of either ALJs or the agencies as to the nature of their relationship or the judge's function, or in the supervision or investigation of problems related to that relationship and function. OPM has not conducted or sponsored orientation programs for ALJs or their administrators, has not monitored the appointment of sufficient numbers of ALJs by agencies (although traditionally it has carefully monitored appointments to prevent the appointment of too many), has not adopted or proposed uniform rules for conduct, procedure, robes, support staff, office or hearing space, and has not investigated or made recommendations on any of these questions, or the long-standing strife between the SSA and its ALJs, or, most recently, the apparent due process breakdown at MSPB in connection with projected furlough of ALJs in fiscal 1991.

That letter suggested 10 items that OPM should undertake to improve relationships between ALJs and their agencies and the lot of ALJs generally, including education for ALJs and their reviewing authorities, administrative leave for education, guidelines for offices, staff support, robes and perks, model procedural rules, standards of conduct, appointment of sufficient judges by agencies, a mini-corps, and an investigation of the SSA and furlough situations and pay issues. In June 1991 OPM forwarded that letter to the Administrative Conference of the United States (ACUS) for consideration in connection with its study of the federal administrative judiciary. That study was completed in 1992 and recognized the importance of continuing and improving the position of ALJs and the ALJ program.[11] However, OPM neither referenced nor dealt with any of the NCALJ concerns, and OPM undertook no action on the report even though it sponsored it.

In August 1994 NCALJ again sought a response to its letter and was told by OPM in a September 8, 1994, letter that "several of your concerns appear to be more appropriately identified as agency matters" and that "other concerns appear to involve matters which conflict with this agency's evolving policy of returning greater responsibility for personnel management to the agencies." The letter did not address the fact that such a policy might conflict with OPM's responsibilities under the APA. In short, while OPM has responsibility to study and report to Congress concerning the ALJ program, it has not done so and has proclaimed an interest in returning its function to the agencies.

From 1998 to 2004, agencies were generally unable to hire new judges from the OPM register. While *Axdell*[12] was pending, OPM suspended the examination process for administrative law judges (ALJ). Therefore, the ALJ register became dated. With one exception,[13] agencies could not hire judges from the ALJ Register during this period. In ***Bush v. Office of Personnel Management***, 315 F.3d 1358 (Fed. Cir. 2003), after an applicant was rejected in his request to be be given part of the ALJ examination, the Federal Circuit determined that the suspension of testing was a reviewable employment practice.[14] On

[11] 1 C.F.R. § 305.92-7. [57 FR 61760, Dec. 29, 1992].

[12] ***Meeker v. Merit Systems Protection Board***, 319 F.3d 1368 (Fed. Cir. 2003).

[13] In August, SSA was granted a waiver by OPM to hire 126 judges who would have qualified under any scoring formula. See ***Hearing Before the Subcommittee on Social Security Of the Committee on Ways and Means House of Representatives***, One Hundred Seventh Congress, Second Session (MAY 2, 2002).

[14] Sunsetting American Bar Association policy establishes that with respect to the recruitment and selection of administrative law judges (ALJs) employed by federal agencies, OPM, and Congress, where necessary, are to develop strategies to increase the percentages of women and minority candidates, eliminate veterans' preferences from this process, allow selection by agencies from a broader range of candidates for ALJ positions, and enhance

February 27, 2004, the United States Supreme Court finally dismissed the requests for certiorari.

OPM has also failed to follow its own regulations concerning priority placement from the ALJ priority referral list (PRL),[15] resulting in irreparable harm to an ALJ on the PRL and a preliminary injunction against its continued improper administration of the PRL.[16]

Various other questions have arisen concerning the appropriate administration of the ALJ program, including the adoption of a Code of Judicial Conduct for ALJs, which OPM has refused to consider as part of its responsibility under present law. While OPM has met periodically with ALJ representatives, it has refused requests to establish an advisory committee or to meet with ALJ representatives on a regular basis to discuss these and other problems concerning the ALJ program.[17]

Administration of the ALJ program by OPM has been inadequate, and OPM has repeatedly indicated by words and deeds that it does not want to continue responsibility for the administration of operational programs such as the ALJ program. Indeed, until 1998 the OPM long-range plan did not recognize the ALJ program as one of its responsibilities. From 1994-95 the Office of Administrative Law Judges was upgraded by placing an administrative law judge in charge of the office, but since that time the office director has been a personnel specialist rather than a judge and the office has been subordinated under other testing functions. For many years OPM refused to maintain a continuously open examination for ALJ applicants, and when it finally opened the register continuously, it applied illegal criteria, as noted above, in examining and scoring applicants. As a result of OPM inaction, agencies have not been able to address hiring needs.

Maximize Administrative Efficiency

The Administrative Law Judge Conference of the United States will assume all duties with respect to administrative law judges currently mandated to OPM. The budget currently dedicated to administration of an administrative law judges' program by OPM will be transferred to the Administrative Law Judge Conference. Agencies will continue to select ALJs but the selection process and ALJ register will be managed by the Administrative Law Judge Conference of the United States.

It is also anticipated that the office of the Chief Judge will have the capacity to review rules of procedure, rules of evidence, peer review, and where appropriate, make suggestions ~~for~~ *to* promote administrative uniformity.

Ensure High Standards

The Administrative Law Judge Conference of the United States will assure high standards for

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OPM's Office of Administrative Law Judges. Although OPM facially adhered to these requests, it failed to administer the system during the period when it was involved in the *Azdell* litigation.

[15] Under 5 CFR §930.215, an ALJ who is separated from service because of a reduction in force (RIF) is entitled to priority referral for any ALJ vacancy ahead of others on the ALJ register of eligibles maintained by OPM.

[16] ***Rutberg v. United States***, No. 98-10752-JUT, Order dated December 10, 1998, 1998 U.S. Dist, LEXIS 19832 (D. Mass., 1998).

[17] In 1998 and 1999, OPM advised ALJs that they are required to maintain active bar status to retain their status as ALJs, although there is no provision in the OPM regulations granting authority to do so. Unlike attorneys, ALJs are barred from the practice of law by the Code of Judicial Conduct (Canon 5F)(ABA, 1990), which has been applied to ALJs by the Merit Systems Protection Board (*In re Chocallo*, 1 MSPBR 612, 651 (1978) and by some agency regulations. In some states, Federal ALJs like other judges, cannot be members of the state bar. E.g. Alabama.

Federal Administrative Law Judges. It will permit the chief judge to adopt and issue rules of judicial conduct for administrative law judges. This is consistent with ABA policy, which states in part, that members of the administrative judiciary should be held accountable under appropriate ethical standards adapted from the ABA Model Code of Judicial Conduct in light of the unique characteristics of particular positions in the administrative judiciary.[18]

Promote Professionalism

The Conference can be used as a resource for continuing judicial education, consistent with ABA policy.[19]ABA policy also encourages governmental entities at all levels to permit government lawyers, including those in judicial administrative positions, to serve in leadership capacities within professional associations and societies.[20]

Promote Public Confidence

Establishment of the Administrative Law Judge Conference of the United States will significantly increase public trust and confidence in the integrity and independence of decision making by administrative law judges throughout the Federal Government.

Congressional Oversight

Congress needs a new organization to assure independent review of agency compliance with the APA and reporting to Congress on these important public safeguards for fundamental due process and the fair hearing process before administrative agencies. The Administrative Law Judge Conference of the United States will provide regular reports to the Congress on agency compliance with the APA and the provisions relating to ALJ utilization, management and compensation. This process will assist the Congress in its oversight of agency compliance with the APA. This reform permits Congress to maintain oversight on constitutional safeguards such as the right to an impartial and independent decision maker, notice and opportunity to appear at a hearing, a written explanation for the decision and the issuance of a timely hearing decision. This is consistent with ABA policy that Congress provide a practical process for agency matters.[21]

Respectfully Submitted,

Louraine Arkfeld, Chair, Judicial Division
August, 2005

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[18] Policy 101B, 2001, ***ABA Policy/procedures Handbook***, 193 (2004).

[19] Standards for the Education of the Administrative Judiciary. Policy 99 A101, ***ABA Policy/Procedures Handbook***, 268 (2004).

[20] Policy 99-A-112. It also encourages governmental entities to adopt standards that would authorize government lawyers, including those in judicial administrative positions, to (1) make reasonable use of government law office and library resources and facilities for certain activities sponsored or conducted by bar associations and similar legal organizations, and (2) utilize reasonable amounts of official time for participation in such activities.

[21] See ABA Policy, August, 1997, ***ABA Policy/Procedures Handbook:*** *Policy on Legislative and National Issues, 233 (2004).*

MEMORANDUM FROM MORTON ROSENBERG, SPECIALIST IN AMERICAN PUBLIC LAW AND T.J. HALSTEAD, LEGISLATIVE ATTORNEY, AMERICAN LAW DIVISION, CONGRESSIONAL RESEARCH SERVICE, TO THE SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

Memorandum August 3, 2005

TO: House Subcommittee on Commercial and Administrative Law, Committee on the Judiciary
Attention: Susan Jensen

FROM: Morton Rosenberg
Specialist in American Public Law
American Law Division

T.J. Halstead
Legislative Attorney
American Law Division

SUBJECT: Comparison of the Duties and Objectives of the Office of Management and Budget and the Administrative Conference of the United States With Respect to the Assessments of Executive Agency Performance in the Administrative Process

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Pursuant to your request, this memorandum provides a brief overview of the duties and objectives of the Administrative Conference of the United States and the Office of Management and Budget, with a focus on whether the activities of a reconstituted Administrative Conference would be duplicative of functions already performed by OMB.

Structure and Functions of ACUS

Legislation creating a permanent Administrative Conference of the United States (ACUS), was enacted in 1964,[1] with funds first appropriated in 1968.[2] In 1995, the activities of ACUS ceased when funding for its activities was terminated. ACUS was reauthorized in the 108th Congress,[3] but has yet to receive an appropriation. The statutory provisions governing ACUS were never repealed by Congress, and the reauthorization in the 108th

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[1] *See* 5 U.S.C. §§ 591-96.

[2] P.L. 90-392 (1968).

[3] P.L. 108-401, 108th Cong. 2d Sess. (2004).

Congress only slightly revised its original provisions, by authorizing appropriations and by making four additions to the "purposes" section of the Act.[4]

Pursuant to its statutory authorization, ACUS is tasked with (1) providing "suitable arrangements through which Federal agencies, assisted by outside experts, may cooperatively study mutual problems, exchange information, and develop recommendations for action by proper authorities to the end that private rights may be fully protected and regulatory activities and other federal responsibilities may be carried out expeditiously in the public interest"; (2) promoting "more effective public participation and efficiency in the rulemaking process"; (3) reducing "unnecessary litigation in the regulatory process"; (4) improving "the use of science in the regulatory process;" and (5) improving "the effectiveness of laws applicable to the regulatory process."[5]

The reauthorization leaves intact ACUS' original membership dynamic, which is structured, in effect, as a public/private partnership, in order to maximize "the joint participation of agency and outside experts in administrative procedure."[6] In the event of appropriation its membership will thus consist of a minimum of 75 and a maximum of 101 members, composed of a Chairman, council, and assembly. The Chairman would be appointed by the President, the council would be composed of the chair and ten other members, and the assembly, if comprised in accordance with prior practice, would consist of approximately 100 members, "consisting of representatives of federal agencies, boards, and commissions and private citizens, including lawyers, law professors, and others knowledgeable about administrative law and practice."[7]

During the course of its original existence, ACUS was widely viewed as an effective, independent and nonpartisan entity. For instance, Sally Katzen, a former Administrator of OMB's Office of Information and Regulatory Affairs (OIRA) during the Clinton administration, stated in 1994 that ACUS "has a long-standing tradition of private-sector membership that crosses party and philosophical lines."[8] Likewise, 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."[9]

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[4] *Id.*

[5] 5 U.S.C. §591(1)-(5).

[6] Jeffrey Lubbers, *"If it Didn't Exist, it Would Have to be Invented" - Reviving the Administrative Conference*, 30 Ariz. St. L.J. 147, 148 (1998).

[7] Jeffrey Lubbers, *A Guide to Federal Agency Rulemaking*, Third Edition, American Bar Association, p. xvii (1998).

[8] Toni M. Fine, *A Legislative Analysis of the Administrative Conference of the United States*, 30 Ariz. St. L.J. 19, 55 (1998).

[9] 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).

As further evidence of the widespread respect of, and support for, ACUS, it is interesting to note that Supreme Court Justices Scalia and Breyer testified before the Subcommittee in support of the reauthorization of ACUS. 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 it important and beneficial to the average American, at a low cost."[10] 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.[11]

Structure and Functions of OMB

The Office of Management and Budget traces its origin to the establishment of the original Bureau of the Budget within the Department of the Treasury by the Budget and Accounting Act of 1921.[12] The Bureau was transferred to the newly created Executive Office of the President by Reorganization Plan No. 1 of 1939,[13] and was subsequently designated as the Office of Management and Budget by Reorganization Plan No. 2. of 1970.[14] While OMB's primary function centers on budget formulation and execution, it has many other major functions, including regulatory analysis and review. The Paperwork Reduction Act of 1980, later recodified as the Paperwork Reduction Act of 1995, established the Office of Information and Regulatory Affairs (OIRA) within OMB. In addition to its statutory responsibilities, OIRA exerts significant influence on the scope and substance of agency regulations through a presidentially mandated review and planning process. Shortly after the creation of OIRA in 1980, President Reagan issued Executive Order 12291, which imposed cost-benefit analysis requirements on rule formulation and established a centralized review procedure for all agency regulations. Responsibility for this program was delegated to OIRA.

In practical effect, E.O. 12291 gave OIRA a substantial degree of control over agency rulemaking, enabling OMB to exert considerable influence over agency efforts in this context from the earliest stages of the process. The impact of E.O. 12291 on agency regulatory activity was immediate and substantial, with OIRA reviewing over 2000 regulations per year and returning multiple rules to agencies for reconsideration. As a result of this rigorous review process, agencies became sensitized to the regulatory agenda of the Reagan Administration, largely resulting in the enactment of regulations that reflected the goals of the Administration.[15] The issuance and implementation of the order generated controversy and criticism, with opponents asserting that the review process was distinctly anti-regulatory and constituted an unconstitutional transfer of authority to OIRA from the executive

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[10] Jeffrey Lubbers, *Reviving the Administrative Conference of the United States: The Time Has Come*, 51 Dec. Fed. Law. 26 (2004).

[11] Fine, n. 8, *supra*, at 46. *See also*, Gary J. Edles, *The Continuing Need for an Administrative Conference*, 50 Admin. L. Rev. 101, 117 (1998).

[12] 42 Stat. 20 (1921).

[13] 53 Stat. 1423 (1939).

[14] 84 Stat. 2085 (1970).

[15] *See* T.J. Halstead, *Presidential Review of Agency Rulemaking*, Congressional Research Service, Rep. No. RL32855 at 3 (2005).

agencies. This review scheme was retained to similar effect and controversy in the George H.W. Bush Administration.

President Clinton supplanted the Reagan era review scheme with Executive Order 12866, entitled "Regulatory Planning and Review."[16] The Clinton order implemented a more selective and transparent review process, while generally retaining the centralized review dynamic established by E.O. 12291. Coupled with the comparatively pro-regulatory stance of OMB during the Clinton era, this review scheme resulted in a decrease in the rates of OIRA review of rules, from an average of 2080 regulations per year in fiscal years 1982-93 to an average of 498 in fiscal year 1996.[17] It is important to note that this decrease in the numbers of rules reviewed does not indicate a concession on the part of the Clinton Administration that there were limits on presidential control of the scope of OIRA review or on the agency rulemaking process specifically.[18] Rather, it would appear that the Clinton Administration employed the OIRA review process and general assertions of administrative control over agencies in order to implement its regulatory agenda.[19]

The George W. Bush Administration has retained E.O. 12866, utilizing it to implement a review regime that subjects rules to more stringent review than was the case during the Clinton Administration. It has been asserted that the current Administration has returned to the review dynamic that prevailed under E.O. 12291, with OIRA describing itself as the "gatekeeper for new rulemakings."[20] Under the current Administration, OIRA has increased the use of "return" letters to require agencies to reconsider rules, which, in turn, has led agencies to seek OIRA input "into earlier phases of regulatory development in order to prevent returns later in the rulemaking process."[21] This dynamic arguably buttresses executive control over agency rulemaking efforts by exerting influence over rulemaking activity at the earliest stages of rule formulation.[22] Additionally, OIRA has instituted the practice of issuing "prompt letters" to appropriate agencies to encourage rulemaking on issues it feels are ripe for regulation.[23] OIRA has acknowledged that prompt letters "do not have the mandatory implication of a Presidential directive," characterizing them instead as a device that "simply constitutes an OIRA request that an agency elevate a matter in priority."[24] As with the use of return letters, the use of prompt letters has arguably enabled OIRA to exert a substantial degree of influence on an agency's regulatory agenda.[25]

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[16] *Id.* at 5.

[17] *Id.* at 7.

[18] *Id.* at 8.

[19] *Id.* at 8.

[20] *Id.* at 10.

[21] *Id.* at 10.

[22] *Id.* at 10.

[23] *Id.* at 10.

[24] *Id.* at 11.

[25] *Id.* at 11.

Analysis

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."[26] 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.[27] 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.[28]

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

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[26] Fine, n. 8, *supra*, at 55.

[27] *See, e.g.*, Lubbers n. 6, *supra*, at 152.

[28] Loren A. Smith, *The Aging of Administrative Law: The Administrative Conference Reaches Early Retirement*, 30 Ariz. St. L.J. 175, 181 (1998).

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."[29] 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."[30]

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.[31]

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.

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[29] *See* Edles, n. 11, *supra*, at 135 (quoting Thomas O. Sargentich, *The Supreme Court's Administrative Law Jurisprudence*, 7 Admin. L.J. Am. U. 273, 280 (1993)). Professor Edles has further suggested that "[p]rocedure and process changes would rarely, if ever, rise to the level sufficient to attract OIRA's attention." *See* Edles, n. 11, *supra*, at 135-36 n. 212.

[30] Stephen G. Breyer, Associate Justice, Supreme Court of the United States, 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., pp. 2-3 (May 20, 2004). *See also*, n. 9, *supra*.

[31] *See* n. 9, *supra*.